



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

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**Committee against Torture**

**Decision adopted by the Committee under article 22 of the  
Convention, concerning communication No. 633/2014\*, \*\***

<i>Communication submitted by:</i>	Y.S. (represented by counsel, John Phillip Sweeney)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	10 October 2014 (initial submission)
<i>Date of adoption of decision:</i>	15 November 2016
<i>Subject matter:</i>	Deportation to Sri Lanka; risk of torture
<i>Procedural issues:</i>	Admissibility — manifestly unfounded
<i>Substantive issues:</i>	Non-refoulement
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is Y.S., a national of Sri Lanka of Tamil ethnicity, born on 18 January 1969. He is a failed asylum seeker in Australia and at the time of submission, his deportation was imminent. He claimed that if deported to Sri Lanka, he would face a risk of detention and torture, cruel and inhuman treatment, in violation of article 3 of the Convention. The complainant is represented by counsel, John Phillip Sweeney.

1.2 On 15 October 2014, the Committee, acting through its Rapporteur on new complaints and interim measures, asked the State party not to expel the author while the complaint was being considered. On 28 July 2016, following requests by the State party dated 31 March 2016 and 5 April 2016, the Committee, acting through the same Rapporteur, denied the request of the State party to lift interim measures.

\* Adopted by the Committee at its fifty-ninth session (7 November-7 December 2016).

\*\* The following members of the Committee took part in the consideration of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller-Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.

GE.17-00602(E)



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**Facts as presented by the complainant**

2.1 The complainant was born in Valaichenai, Batticaloa District in the Eastern Province of Sri Lanka. From 1975 onwards, militant groups in that area began recruiting young men with the aim of enrolling them in military training. In 1985, the complainant fled to Colombo for fear of being forcefully recruited by one of those groups. In 1987, he returned to Valaichenai, from where he was abducted by the Tamil Eelam Liberation Organization. He was detained at one of the organization's camps and forced to work as a cook in the camp kitchen. On an unspecified date, he escaped and again fled to Colombo.

2.2 The complainant remained in hiding in Colombo until 1991, when he returned to his village. While he was in hiding in Colombo, his father was detained at the camp, where he was subjected to questioning and tortured for two days in retaliation for the complainant's escape.

2.3 Later in 1991, the complainant obtained a passport and fled to Saudi Arabia where he remained, except for two short trips back to Sri Lanka, until 2006, when he went to Dubai. In 1999, the complainant's aunt, T.M., was arrested, accused of terrorism and detained.

2.4 While the complainant was in Dubai, the Tamil Makkal Viduthalai Pulikal threatened to kill his wife and children. The group's officers forced his wife out of the family home and began using it as an office. She complained to the local police, but in vain. In January 2007, the group sent her a letter demanding money, accompanied by a death threat.

2.5 On 25 September 2008, the complainant left Dubai and returned to Sri Lanka to join his wife. After returning to Sri Lanka, he worked as a rickshaw driver. In March 2012, the complainant picked up a man from the train station, who asked the complainant to take him to an office of the Eelam People's Democratic Party. Shortly after that, the complainant was stopped by the local police. The complainant and his passenger were interrogated and briefly detained. During the interrogation, the complainant was accused of transporting a member of the Liberation Tigers of Tamil Eelam.

2.6 After that incident, the Sri Lankan authorities subjected the complainant to ongoing monitoring, detention and delays at checkpoints. He was informed by other rickshaw drivers that the police were asking questions about his passengers and their destinations.

2.7 As a result of that ongoing harassment and fearing its escalation, the complainant decided to flee again, this time to Australia. He left Sri Lanka illegally by boat on 4 May 2012 and arrived in Australia on 11 June 2012.

2.8 After he arrived in Australia, his wife informed him that the Sri Lankan Criminal Investigation Department was making inquiries about the large number of men that had left the village and travelled to Australia and about his whereabouts, and had demanded money. She refused to pay and was subsequently arrested.

2.9 After arriving in Australia, on 24 August 2012 the complainant applied for a protection visa. His application was refused by a delegate of the Minister for Immigration and Border Protection on 22 October 2012. On an unspecified date, he applied to the Refugee Review Tribunal for review of that decision, but his application was dismissed on 20 August 2013. He then applied for leave for judicial review, but his application was rejected on 26 June 2014. On 18 July 2014, the complainant made an application to the Minister for Immigration and Border Protection for ministerial intervention under sections 417 and 48B of the Migration Act 1958, but the application was dismissed on 24 September 2014. The domestic immigration authorities found the complainant's statements and claims inconsistent, did not accept that his fear of persecution was well founded, and were not

satisfied that there was a real chance that he would be targeted should he return to Sri Lanka. The complainant maintains that he has exhausted all available domestic remedies.

### **The complaint**

3. The complainant submitted that, as he left Sri Lanka illegally, should he be returned to Sri Lanka, he would be detained upon arrival and interrogated, charged and held on remand for offences in relation to his illegal departure. He claimed that he was at real risk of being tortured and suffering cruel, inhuman and degrading treatment and punishment at the hands of the Sri Lankan authorities because he is an ethnic Tamil. Furthermore, he feared that his ethnicity would result in him being imputed to be a political supporter of the Liberation Tigers of Tamil Eelam. That fear was reinforced by the fact that his father and his aunt had been subjected to cruel treatment because of those suspicions. The complainant therefore maintained that his return to Sri Lanka, if implemented, would constitute a violation of article 3 of the Convention.

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

4.1 On 3 September 2015, the State party submitted that the complainant's allegations were inadmissible on the ground that they were manifestly unfounded pursuant to rule 113 (b) of the Committee's rules of procedure. The State party maintained that, should the Committee find the allegations admissible, they were without merit as they had not been supported by evidence that there were substantial grounds for believing that the complainant would be in danger of being tortured, as defined in article 1 of the Convention.

4.2 The State party submitted that the complainant, a Sri Lankan national of Tamil ethnicity, arrived in Australia by boat. The complainant did not possess a valid visa for entry into Australia and was detained upon arrival. He remained in immigration detention until 13 September 2012, when he was issued with a bridging (general) visa, which expired on 19 June 2015.

4.3 The State party submitted that the complainant alleged that it would be in violation of article 3 of the Convention if it removed the complainant to Sri Lanka, since he would be arbitrarily detained, imprisoned and interrogated by the Sri Lankan authorities about his illegal departure from Sri Lanka and his suspected links with the Liberation Tigers of Tamil Eelam. He also appeared to claim that there was a real risk that he would be subjected to ongoing harassment amounting to torture by the Tamil Makkal Viduthalai Pulikal and the Sri Lankan Criminal Investigation Department if he were to return to his native Batticaloa region.

4.4 The State party maintained that article 3 of the Convention provides that State parties have an obligation not to return a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.<sup>1</sup> The Committee's views in *G.R.B. v. Sweden* confirm that the obligation under article 3 must be interpreted by reference to the definition of torture set out in article 1 of the Convention.<sup>2</sup> Under that definition, several elements must exist in order for an act to constitute torture. Firstly, it must cause the person severe pain or suffering. The pain or suffering may be mental or physical. Secondly, it must be intentionally inflicted on the person for such purposes as obtaining information or a confession, punishment for an act the person or a third person has or is suspected of having committed, or intimidation or coercion of the person or a third party, or for any reason based on discrimination of any kind. Thirdly, the pain or suffering must be inflicted by or at the instigation of or with the consent or

<sup>1</sup> See communication No. 39/1996, *Tapia Paez v. Sweden*, Views adopted on 28 April 1997, para 14.5.

<sup>2</sup> See communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

acquiescence of a public official or other person acting in an official capacity.<sup>3</sup> Each case must be assessed on its own facts. Whether conduct amounts to torture will depend on the nature of the alleged act. The obligation of non-refoulement under article 3 of the Convention is confined to torture and does not extend to cruel, inhuman or degrading treatment or punishment.<sup>4</sup> If it is established that the alleged act would constitute torture, article 3 also requires that there exist “substantial grounds for believing” that the complainant would be in danger of being subjected to torture. That is, the complainant must be at a foreseeable, real and personal risk of being subjected to torture. The Committee has also stated that the danger must be “personal and present”.<sup>5</sup> In order to show that a State party would be in breach of its non-refoulement obligations under article 3, an individual must be found to be personally at risk of torture should he or she be returned. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country; specific grounds must exist that indicate that the individual concerned would be personally at risk.<sup>6</sup> Therefore, additional grounds must be adduced by the complainant to show that he would be personally at risk.<sup>7</sup> The onus of proving that there is a foreseeable, real and personal risk of being subjected to torture upon extradition or deportation rests on the complainant and the risk must be assessed on grounds that go beyond mere theory and suspicion.<sup>8</sup>

4.5 The State party submitted that the complainant’s claims were inadmissible pursuant to rule 113 (b) of the Committee’s rules of procedure on the grounds that the claims were manifestly unfounded. Under rule 113 (b), it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of his complaint.<sup>9</sup> The Government of Australia respectfully submitted that the complainant had failed to do so. If the Committee considered the complainant’s claims to be admissible, the Government of Australia submitted that they were also without merit.

4.6 The State party also submitted that the complainant’s claims had been thoroughly considered by a series of domestic decision makers, including the Department of Immigration and Border Protection during the determination of the complainant’s protection visa application, and the Refugee Review Tribunal (RRT). The RRT decision was subject to judicial review by the Federal Circuit Court of Australia and the Federal Court of Australia. The complainant’s claims had also been assessed during the ministerial intervention process.<sup>10</sup> Robust domestic processes had considered the complainant’s claims and determined that they were not credible and did not engage the non-refoulement obligations of the Government of Australia. In particular, the complainant’s claims had been assessed under the complementary protection provisions contained in subparagraph 36 (2) (aa) of the Migration Act 1958, which reflects the Government’s non-refoulement obligations under the Convention.

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<sup>3</sup> See general comment No. 1 (1997) on the implementation of article 3, para. 3.

<sup>4</sup> *Ibid.*, para. 1.

<sup>5</sup> *Ibid.*, para. 7.

<sup>6</sup> See *G.R.B. v. Sweden*, para. 6.3.

<sup>7</sup> See communication No. 177/2001, *H.M.H.I. v. Australia*, decision of 1 May 2002, para. 6.5.

<sup>8</sup> See communication No. 203/2002, *A.R. v. Netherlands*, decision of 14 November 2003, para. 7.3.

<sup>9</sup> See general comment No. 1, para. 4.

<sup>10</sup> Section 48B of the Migration Act 1958 provides the Minister with the power to allow applicants in Australia to lodge a fresh protection visa application if the Minister thinks it is in the public interest to do so, where they have had a previous protection visa application refused or cancelled while in Australia. Section 417 of the Act provides the Minister with the power to substitute an RRT decision with a more favourable decision if the Minister thinks it is in the public interest to do so.

4.7 The State party maintained that the evidence that the complainant had provided in his submissions had been considered through its comprehensive domestic administrative and judicial processes. It referred to the Committee's general comment No. 1 (1997) on the implementation of article 3, stating that, as the Committee is not an appellate or judicial body, it gives considerable weight to findings of fact that are made by organs of a State party.<sup>11</sup> The State party requested that the Committee accept that it had thoroughly assessed the complainant's claims through its domestic processes and had found that it did not owe the complainant protection under the Convention. The State party takes its obligations under the Convention seriously and has implemented them in good faith through its domestic migration processes.

4.8 The State party acknowledged that "complete accuracy is seldom to be expected by victims of torture".<sup>12</sup> Domestic decision makers had taken into account the need to make some allowance for flaws and inconsistencies in the complainant's testimony. For example, in assessing the complainant's protection visa application, the decision maker had acknowledged the need to be sensitive to the difficulties often faced by asylum seekers.

4.9 The State party submitted that the complainant's claims in the communication had been considered during the following domestic processes: the protection visa application; an independent merits review by RRT; judicial review by the Federal Circuit Court and the Federal Court of Australia; and a request for ministerial intervention.

4.10 The complainant lodged an application for a protection visa on 22 August 2012. He was granted a bridging (general) (subclass 050) visa on 13 September 2012, while his protection visa application was under consideration by the Department of Immigration and Border Protection. On 18 October 2012, his protection visa application was refused. The decision maker had, with the assistance of an interpreter, conducted an interview with the complainant and had considered other relevant material such as country information provided by the Department of Foreign Affairs and Trade. The decision maker considered the complainant's circumstances, including his two months of forced service in a Tamil Eelam Liberation Organization camp in 1987, his history of forced payments to the Liberation Tigers of Tamil Eelam, his occupation as a rickshaw driver, his Tamil ethnicity and his possible status as a failed asylum seeker.

4.11 The decision maker noted that the complainant had been able to obtain a Sri Lankan passport and to travel through government checkpoints, including at the national airport, multiple times, suggesting that he was not of interest to the Sri Lankan authorities. Having reviewed relevant country information, the decision maker did not consider that there was a real chance that the complainant would be persecuted if returned to Sri Lanka. The decision maker considered whether the complainant was owed protection under section 36 (2) (aa) of the Migration Act, which implements the non-refoulement obligations of the Government of Australia under the Convention. Those provisions apply where the decision maker is satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of a non-citizen's removal from Australia, there is a real risk that the non-citizen will suffer significant harm. One factor relevant to the complainant's complementary protection claims related to possible harassment by the Tamil Makkal Viduthalai Pulikal. The complainant's wife and children had allegedly been evicted by that group from the complainant's house in 2007, while the complainant was in Dubai. The complainant had returned in an attempt to repossess the property, but the group had refused to relinquish it. After some months, the complainant and his wife had regained the house, with the assistance of the village administrator. In his interview with the decision maker, the complainant stated that as a result of that incident, the group was constantly giving him

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<sup>11</sup> See general comment No. 1, para. 9 (a).

<sup>12</sup> See communication No. 21/1995, *Alan v. Switzerland*, Views adopted on 8 May 1996, para. 11.3.

trouble. However, the decision maker noted that the complainant was unable to point to any subsequent occurrences of harassment and was able to live in the house for a further four years without incident. The decision maker concluded that the complainant did not face a real risk of significant harm should he be returned to Sri Lanka. Having concluded that the complainant was not a refugee and was not owed complementary protection under section 36 (2) (aa) of the Migration Act, the decision maker refused the complainant's protection visa application.

4.12 The State party submitted that the complainant subsequently applied, on 24 October 2012, for an independent merits review to RRT, a specialist independent review body that provides full and independent review of decisions concerning protection visas. On 20 August 2013, RRT affirmed the decision of the Department of Immigration and Border Protection not to grant the complainant a protection visa. The complainant was physically present at the RRT hearing, and was able to make oral submissions with the assistance of an interpreter.

4.13 RRT found that aspects of the complainant's evidence lacked credibility, and that he had given unconvincing answers to questions about inconsistencies in his evidence. Ultimately RRT did not accept that the complainant had been questioned and assaulted by the police in connection with his work as a rickshaw driver, that the Tamil Makkal Viduthalai Pulikal had ever occupied his family home, or that his wife had been harassed by the authorities since the complainant's departure to Australia. RRT also concluded that the complainant had not been truthful about the reasons why he had left Sri Lanka and that he was not of interest to the Sri Lankan authorities at the time that he left Sri Lanka to travel to Australia. RRT did not consider that the complainant would be of interest to the Sri Lankan authorities or paramilitary groups operating in the Batticaloa area as a result of his perceived support of the Liberation Tigers of Tamil Eelam. RRT accepted that the complainant had been abducted by the Tamil Eelam Liberation Organization in 1987, but found that there was no evidence to indicate that he was of continued interest to the authorities for that reason. RRT stated that it did not accept the complainant's claims that he would face harm because of his experience in one of the organization's camps in 1987 or because of his payments to the Liberation Tigers of Tamil Eelam during the war. RRT did not consider that the complainant would be perceived as a supporter of the Liberation Tigers of Tamil Eelam or otherwise imputed with an adverse political opinion. The complainant's status as a failed asylum seeker did not, in the view of RRT, put him at a real risk of significant harm if returned to Sri Lanka. RRT accepted that the complainant would be charged with offences under the Immigrants and Emigrants Act of Sri Lanka and that he might be detained for a number of days before facing an ultimate penalty of a fine. Based on the available country information, RRT did not consider that he would be detained for a prolonged period or otherwise face significant harm, including torture, upon return to Sri Lanka. Having considered guidelines issued by the United Nations High Commissioner for Refugees and the available country information regarding the treatment of Tamil returnees, RRT did not accept that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia, there would be a real risk that the complainant would suffer significant harm, including torture, under section 36 (2) (aa) of the Migration Act.

4.14 On 26 June 2014, the Federal Circuit Court dismissed the complainant's application for judicial review of the RRT decision. The complainant was physically present at the Court hearing and made oral submissions. The Court concluded that there was no legal error with the RRT decision, and that the complainant had been accorded procedural fairness. As such, the complainant's application for judicial review was dismissed.

4.15 On 18 July 2014, the complainant made a request for ministerial intervention under sections 417 and 48B of the Migration Act. Under those provisions, the Minister for

Immigration and Border Protection can intervene in individual cases if he thinks it is in the public interest to do so. The claims made by the complainant were again assessed in full, with consideration given to the decisions reached by RRT and the Federal Circuit Court. The complainant claimed that his aunt, T.S., had been arrested, falsely accused of terrorism and detained for a period of several months from 1999 to 2000. The complainant attached a letter dated 29 January 2001 from the International Committee of the Red Cross delegation in Sri Lanka in support of that claim. The letter indicated that the delegation had visited T.S. at Katugastota Police Station, Kandy District on 17 June 1999 and at Welikada Prison, Colombo District and Batticaloa Prison, Batticaloa District on dates between 19 August 1999 and 13 June 2000. The letter indicated that T.S. had told a delegate that she had been arrested on 27 May 1999 and released on 29 January 2000. The complainant had not raised that claim previously, despite having had a number of opportunities to do so during the protection visa process. The decision maker noted that the complainant had not provided an explanation for that omission or provided any further information as to how those circumstances would affect his return to Sri Lanka. The decision maker considered that there was no credible new information provided in the complainant's request for ministerial intervention to indicate that the complainant had an enhanced chance of making a successful protection visa application. Therefore the complainant's request under section 48B of the Migration Act was not referred to the Minister. However, the complainant's case was referred to the Assistant Minister for Immigration and Border Protection under section 417 of the Migration Act. The Assistant Minister declined to exercise her power to intervene.

4.16 In addition, the Government of Australia responded to the following matters that were raised in the complainant's submissions: new evidence relating to the alleged harassment of the complainant's wife; new evidence relating to the alleged eviction of the complainant's family; claims regarding the alleged torture of the complainant's father; a new claim regarding comments reportedly made by the Defence Secretary of Sri Lanka; a new claim regarding the law on serious harm; and claims regarding the return of failed asylum seekers to Sri Lanka.

4.17 The State party noted that the complainant had claimed that, since his arrival in Australia, his wife has been harassed by Sri Lankan authorities and the Tamil Makkal Viduthalai Pulikal. The complainant claimed that the Criminal Investigation Department had made inquiries with the complainant's wife about his whereabouts, demanded money from her and arrested her when she refused to pay. He claimed that she was detained for three days, beaten and released on bail to return to court at a later date. She also allegedly received unknown visitors demanding money and threatening telephone calls. The complainant suspected that the telephone calls were from the Criminal Investigation Department, the Tamil Makkal Viduthalai Pulikal or a paramilitary group. The complainant's wife allegedly made a complaint to the police about the threats she had received. RRT did not find those claims to be credible because the information the complainant provided was vague and his explanation did not make sense and shifted over time. RRT did not accept that the complainant's wife was of any adverse interest to the Sri Lankan authorities. In support of those claims, the complainant annexed to his submissions evidence that was not provided to RRT. The complainant's submissions included two letters from a parish priest, from Saint Theresa's Church in Valaichenai. The letters were not provided to previous decision makers. One letter, dated 14 June 2012, attested to the complainant's positive personal qualities. The letter indicated that the priest had been "told by the complainant's wife ... that she and her husband had undergone many hardships during the war and post-war". The second, undated, letter referred without elaboration to "an unfortunate incident" that had taken place on 16 July 2012. It stated that the complainant's wife subsequently received threatening telephone calls for a period of more than two weeks, which had left her unable to work. The complainant's submissions also

included a summons dated 23 July 2013 to appear as a witness in proceedings against V.K. Mekan relating to death threats made during a telephone call between two specified telephone numbers. No further information was provided about the circumstances surrounding the incident, V.K. Mekan or the outcome of the court hearing. The Department of Immigration and Border Protection assessed those documents, which indicated that the complainant's wife was a witness in proceedings against a person accused of making a threatening telephone call and had told a parish priest that she was receiving threatening telephone calls. The Department of Immigration and Border Protection assessed that those documents did not substantiate the claims that the complainant's wife had been targeted and harassed by the Criminal Investigation Department or that the complainant or his family were of interest to the Sri Lankan authorities. They contained no evidence to support the claim that the complainant's wife had been arrested, detained and mistreated by the authorities. The Department of Immigration and Border Protection had also considered threatening letters from the Tamil Makkal Viduthalai Pulikal demanding money and the use of the complainant's home in 2007. The complainant had returned to the Batticaloa region on 25 September 2008 and remained there until 2012, suggesting he was able to do so without fear of harm from that group or paramilitary groups. The State party maintained that the documents provided by the complainant did not substantiate the claims that he would be subjected to torture upon return to Sri Lanka.

4.18 The State party noted that according to the complainant, his wife and children were allegedly evicted by the Tamil Makkal Viduthalai Pulikal from her and the complainant's house in 2007. Noting the lack of evidence to support that claim, RRT rejected it. In his submission to the Committee, the complainant annexed evidence that was not provided to RRT. The evidence included a letter, dated 15 January 2007, purportedly from the political wing of the Tamil Makkal Viduthalai Pulikal, referring to the cessation of monthly payments made by the complainant since 2005 and requesting that the complainant attend the organization's office to discuss the matter. The letter stated that if the complainant refused to meet with the organization, his life would not be guaranteed, he would not be able to live in that area and his house and belongings would be confiscated. Another undated letter, purportedly from the political wing of the Tamil Makkal Viduthalai Pulikal, informed the complainant's wife that she must hand over her house for use as an office. The complainant also attached a statement from a neighbour attesting to the eviction and a statement from the Justice of the Peace enlisted by the complainant to assist in reclaiming the house. The State party submitted that a considerable amount of time had passed since the temporary eviction of the complainant's family in 2007 and maintained that, given that passage of time, it did not consider that the complainant would be of continued interest to the Tamil Makkal Viduthalai Pulikal by reason of his having reclaimed his home.

4.19 The State party noted that in his submission to the Committee, the complainant claimed that his father had been questioned and tortured for two days, sometime between 1987 and 1991, in retaliation for the complainant's escape from the Tamil Eelam Liberation Organization camp. That appeared to be a more expansive version of the claim put to RRT, which stated that the complainant's father had been beaten after the complainant went to Colombo. The State party maintained that there was no evidence to suggest that the complainant was of continued interest to the Sri Lankan authorities. The claim regarding the treatment of the complainant's father had been assessed by the Department of Immigration and Border Protection. The family link did not prevent the complainant from obtaining a passport or travelling freely within Sri Lanka after the incident allegedly took place, indicating that he was not of continued interest to the Sri Lankan authorities.

4.20 The State party noted that the complainant had made reference to reported comments made by Gotabaya Rajapaksa in a public speech in 2012 in his capacity as Secretary of the Sri Lankan Ministry of Defence and Urban Development. The comments included references to the phenomenon of Liberation Tigers of Tamil Eelam cadres fleeing



Sri Lanka and encouraging Tamils to regroup militarily. The complainant claimed that if he was returned to Sri Lanka, he would be arbitrarily detained and interrogated on that very point, and that while being interrogated, he would be at risk of torture, cruel and inhuman and degrading treatment and punishment. The Department of Immigration and Border Protection considered that speech and the complainant's claim that he would be arbitrarily detained and interrogated. Country of origin information indicated that the risk of torture and mistreatment for returnees was higher for those who were suspected of committing serious crimes, including people smuggling or terrorism offences. The State party did not consider that the complainant was at risk of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment if returned to Sri Lanka as there was no evidence to indicate that the complainant was suspected of committing any serious crimes.

4.21 The State party noted the complainant's submissions that he was a failed asylum seeker and that he was fearful of being tortured if returned to Sri Lanka, taking into account the evidence of the human rights violations in the Batticaloa region where he was from in Sri Lanka. The State party acknowledged that article 3 (2) of the Convention requires all relevant considerations to be taken into account when determining whether article 3 (1) is engaged, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. However, it maintained that the existence of a general risk of violence does not constitute sufficient ground for determining that a particular person would be in danger of being subjected to torture upon return to that country; "additional grounds must exist to show the individual concerned would be personally at risk".<sup>13</sup> RRT specifically rejected the complainant's claim that he would be at risk of significant harm if returned to Sri Lanka as a failed asylum seeker. The complainant had not established the existence of additional grounds to show that he was at a foreseeable, real and personal risk of torture if returned to Sri Lanka. Furthermore, the issues raised by the complainant relating to the human rights violations in, and the return of asylum seekers to, Sri Lanka had been specifically and carefully considered by all domestic processes. Material that was before the decision makers and considered as part of the assessment of the complainant's protection visa application, as well as during the appeals to RRT and the Federal Circuit Court, included country information provided by the Department of Foreign Affairs and Trade, the Department of State of the United States of America, the Danish Immigration Service, the Immigration and Refugee Board of Canada, the United Kingdom Border Agency, the Asian Human Rights Commission, International Crisis Group, Amnesty International, Human Rights Watch, Tamils Against Genocide, Freedom from Torture and the United Nations High Commissioner for Refugees. That had been considered by the primary decision maker, RRT and during the ministerial intervention process. There had been no relevant change to the country information since those decisions were made. The State party therefore submitted that the complainant had not provided sufficient evidence to indicate that he would be personally at risk of torture, or that he would be subjected to treatment that would constitute torture under article 1 of the Convention.

4.22 On 31 March 2016, the State party reiterated its submission from 3 September 2015 and requested that the Committee lift its request for interim measures. If the Committee decided that the request should not be withdrawn after due consideration, the State party requested that the communication be fast-tracked for consideration by the Committee on the basis that it was not complex, the documentation was complete and all domestic processes had been finalized.

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<sup>13</sup> See *G.R.B. v. Sweden*, para. 6.3.

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

5.1 On 8 August 2016, the complainant submitted that he was a rickshaw driver with minimum education from Sri Lanka and that he had been at the mercy of the government-appointed migration agents under the Immigration Advice and Application Assistance Scheme (a scheme aimed at assisting applicants to prepare forms and statements in English through interpreters). He was held in immigration detention in remote locations and had attempted to instruct his counsel by telephone over different time zones. That had limited his ability to provide all the necessary information and details, as instructions usually had to be provided to meet short deadlines, and restricted his availability to receive instructions by telephone as opposed to in a face-to-face consultation in an office setting. He maintained that he had been subjected to numerous official interviews with the immigration authorities and RRT. All the interviews had been "inquisitorial in nature" in that the official asked the questions and the complainant answered through an interpreter. The complainant's migration agent had been present at immigration and RRT interviews. With each interview, the complainant had been able to provide more detail, as the migration agent or the officials asked for further information and the migration agent drafted more detailed written statements. The different stages of the refugee determination process had led to new claims and had resulted in the alleged inconsistencies in the complainant's statement, especially as the memory fades over time or owing to trauma, such as being held in immigration detention for a prolonged period. The complainant's representative, who was engaged for the ministerial intervention and the complaint submitted to the Committee, asked the complainant more probing questions and requested documentary evidence regarding the new information and claims. The fact that new documentation was produced and claims were made late in the refugee determination process, or to the Committee, did not mean that they were not true and would not require genuine and proper consideration.

5.2 The complainant also maintained that the ministerial intervention process lacked transparency as the decision maker did not provide any reasoning as to why the complainant's request did not meet ministerial guidelines or why he would not be able to make a successful protection visa application. The Minister appeared to be influenced adversely by any credibility finding that RRT made. The allegations of harassment of the complainant's wife, torture of his father and eviction from the family house during the civil war were all serious matters that required genuine and proper consideration. The complainant submitted that the Government of the State party was "compromised in its trade deals with the Sri Lankan government" by providing money and material, including monitoring and surveillance technology and hardware worth millions of dollars to the Sri Lankan police and security forces. The complainant submitted that the Edmund Rice Centre had documented torture of other failed asylum seekers after they had been returned to Sri Lanka.

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

#### *Consideration of admissibility*

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes the State party's submission that the present communication is manifestly unfounded and thus inadmissible pursuant to rule 113 (b) of the Committee's rules of procedure. The Committee, however, considers that the communication has been

substantiated for the purposes of admissibility, as the complainant has sufficiently detailed the facts and the basis of the claim for a decision by the Committee.

6.3 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not contested that the complainant has not exhausted all available domestic remedies. Accordingly, the Committee concludes that it is not precluded by article 22 (5) (b) of the Convention from examining the present case. As the Committee finds no further obstacles to admissibility, it declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

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

7.2 In the present case, 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 to return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.3 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 that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The Committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment perpetrated by State actors, both the military and the police, which have continued in many parts of the country since the conflict ended in May 2009 (see CAT/C/LKA/CO/3-4, para. 6). 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 be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.<sup>14</sup>

7.4 The Committee recalls its general comment No. 1, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable (para. 6), it must be personal and present. In that regard, in previous decisions, 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, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.5 The Committee notes the complainant's claims that he would be at a real and personal risk of torture if returned to Sri Lanka because: (a) he left Sri Lanka illegally and

<sup>14</sup> See communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

he will be charged and held on remand for offences in relation to his illegal departure; (b) he will suffer cruel, inhuman and degrading treatment and punishment at the hands of Sri Lankan authorities because he is an ethnic Tamil and his ethnicity will result in him being imputed to be a political supporter of the Liberation Tigers of Tamil Eelam; (c) his father and his aunt have been subjected to cruel treatment because of suspicions about his actions; (d) on unspecified dates around 2007, the Tamil Makkal Viduthalai Pulikal threatened to kill his wife and children; (e) Tamil Makkal Viduthalai Pulikal officers forced his wife out of the family home, began using the house as an office and tried to extort money from her; and (f) the local police failed to provide his wife with protection, even though she made a complaint. The complainant was also afraid of being detained and tortured because of suspicion that he had links with the Liberation Tigers of Tamil Eelam, after he was briefly detained by the police, questioned and accused of transporting a member of the Liberation Tigers of Tamil Eelam in his rickshaw. The complainant also feared returning to Sri Lanka because in 1987 he had been abducted by the Tamil Eelam Liberation Organization, detained at one of the organization's camps, forced to work as a cook in the camp kitchen and had escaped from that camp.

7.6 The Committee also notes the State party's assertions that, in the present case: (a) the complainant has not provided any credible evidence in his submissions to the Committee; (b) he has failed to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the Sri Lankan authorities if he were to be returned to his country of origin; (c) his claims have been thoroughly considered by a number of domestic decision makers, including RRT, and subject to judicial review by the Federal Court of Australia; and (d) each body specifically considered the claims and determined that they were not credible. With reference to the RRT decision and the complainant's ministerial intervention assessment, the State party argues that failed asylum seekers and Tamils are not specifically targeted for adverse attention from the Sri Lankan authorities at the time of entry and that there was no evidence to support a finding that the complainant had issues that would bring him additional scrutiny or attention on return, or delay his release after security checks on return to Sri Lanka.

7.7 In this context, the Committee refers to its consideration in 2016 of the fifth periodic report of Sri Lanka (see CAT/C/SR.1472), during which it reiterated serious concern about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the police, had continued in many parts of the country after the conflict with the Liberation Tigers of Tamil Eelam had ended in May 2009 (see CAT/C/LKA/CO/3-4, para. 6). The Committee was also concerned at reprisals against victims and witnesses of acts of torture, and at abductions and acts of torture in unacknowledged detention facilities, and enquired whether a prompt, impartial and effective investigation of any such acts had been undertaken (see CAT/C/SR.1472, paras. 36 and 42).

7.8 In the present case, the Committee notes, however, that the information submitted by the complainant regarding the events in Sri Lanka that led to his departure from the country were thoroughly evaluated by the State party's authorities, which found it insufficient to show that he was in need of protection. The Committee also notes that the complainant has not presented adequate credible evidence in support of his claims that the Sri Lankan authorities were interested in him before or after his departure from the country in relation to his past involvement with the Tamil Eelam Liberation Organization. Although the complainant disagrees with the assessment of his accounts by the State party's authorities, he has failed to demonstrate that the decision to refuse him a protection visa was clearly arbitrary or amounted to a denial of justice.

7.9 In the light of the above, the Committee recalls its general comment No. 1, according to which the burden of presenting an arguable case lies with the complainant.<sup>15</sup> In the Committee's opinion, in the present case, the complainant has not discharged this burden of proof.<sup>16</sup>

8. The Committee, acting under article 22 (7) of the Convention, concludes that the decision of the State party to return the complainant to Sri Lanka does not constitute a violation of article 3 of the Convention.

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<sup>15</sup> See general comment No. 1, para. 5.

<sup>16</sup> See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.