



# 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. 725/2016\*, \*\*

<i>Communication submitted by:</i>	G.E. (represented by D.N., counsellor/social worker at Companion House Assisting Survivors of Torture and Trauma)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	15 January 2016 (initial submission)
<i>Date of adoption of decision:</i>	11 August 2017
<i>Subject matter:</i>	Deportation to Sri Lanka; risk of torture
<i>Substantive issue:</i>	Non-refoulement
<i>Procedural issue:</i>	Admissibility — manifestly ill-founded
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is G.E., a Sri Lankan national born in 1983. He claims that if Australia proceeds with his deportation to Sri Lanka, it would violate article 3 of the Convention. The State party has made the declaration under article 22 (1) of the Convention, on 28 January 1993. The complainant is represented by counsel, D.N.

1.2 On 18 January 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to issue a request for interim measures under rule 114 (1) of the Committee's rules of procedure and requested the State party not to return the author to Sri Lanka while the complaint was being considered by the Committee. On 5 December 2016, the State party requested the Committee to lift its request for interim measures. On 22 February 2017, the Committee, acting through the same Rapporteur, denied the State party's request to lift the interim measures.

#### The facts as presented by the complainant

2.1 The complainant is Tamil of Hindu ethnicity, from a village in the Batticaloa district of Sri Lanka. He claims that he and his family were badly affected during the war in Sri Lanka as they were caught in the conflict between the Liberation Tigers of Tamil Eelam (Tamil Tigers) and the Sri Lankan army. Around 1996, two of his father's brothers, who had been living with his family at the time, were forcibly recruited by the Tamil Tigers.

\* Adopted by the Committee at its sixty-first session (24 July-11 August 2017).

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

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After that incident, the complainant alleges that members of the Sri Lankan army harassed him and assaulted his father and brother. He submits that, around 1998, his brother was threatened and forcibly recruited by the Tamil Tigers. After he managed to escape, the group looked for the complainant. His father was beaten and the family had to make a payment to the group. As a consequence, the complainant had to run away from his village to the town of Batticaloa, where the Tamil Tigers only rarely came. There, his problems with the Sri Lankan army continued.<sup>1</sup> Between 2004 and 2006, he completed a two-year production engineering course. Between 2006 and 2007, he studied English privately. Subsequently, he found employment as an engineering instructor, where he remained for 5 years until he resigned in 2011 owing to a work-related accident that affected his eyes. Around that time, in January 2011, he got married.

2.2 On 17 October 2011, he started working as a security guard at the Eastern University in Batticaloa. At that time, the university chief had instructed security guards to stop senior students from harassing new students. The complainant states that there were lots of Sinhalese students among the senior students, who harassed female Tamil students. He submits that some of the senior students became angry at him for not allowing them to harass the new students. He claims that one senior Sinhalese student told him that he was the son of a minister and he would “teach him a lesson”.

2.3 On 11 November 2011, the complainant was working on night shift when the university was vandalized by a group of people who threatened to kill him and threw rocks and sticks at him and at university buildings, causing damage, including broken windows and doors, and injuring the complainant. He managed to run away and called other security guards, and the attackers disappeared. He and another security guard reported the incident to the police.

2.4 The following day, a group of students threatened the complainant. They surrounded him and said they would “take care of him again” if he continued to prevent them from harassing others. The complainant was warned not to report anything to anyone.

2.5 On or about 15 November 2011, the complainant claims he was dragged into a van by three men dressed in civilian clothes. They pointed a gun at him, told him they would shoot and kill him if he accused the Sinhalese students of the attack at the university, then let him go.

2.6 On an unspecified date, the officers of the Criminal Investigation Department interrogated the complainant about the vandalism incident. He informed them that he did not know who the perpetrators were because he had been unable to see them in the darkness. The officers threatened to put him in jail and insisted he must tell the truth. Eventually they released him in the evening.

2.7 The officers’ continued pressure and harassment led the complainant to take some time off from work. On 25 November 2011, the officers went to his home to ask further questions and enquire as to why he had not been at work. They accused him of having committed the vandalism and of hiding to avoid them.

2.8 The complainant states that he felt threatened by the officers who had said that they would charge him if he did not reveal who vandalized the university. He was also in fear of the people in the van who threatened to kill him. He went into hiding and became fearful of his employer because he had left his workplace without giving notice.

2.9 The complainant left Sri Lanka on 2 February 2012 and arrived in Australia by boat on 17 February 2012. He was detained upon arrival at Christmas Island as an unlawful non-citizen under the Migration Act. On 7 March 2012, he was transferred to Curtin Immigration Detention Centre in Australia. He was granted a bridging visa and released from immigration detention on 3 July 2012. The complainant’s last bridging visa expired on 12 August 2015. In 2015, after his first ministerial appeal in Australia was rejected, the claimant disclosed information about allegations made by the Criminal Investigation

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<sup>1</sup> The complainant does not specify what kind of problems he had in the town of Batticaloa with the Sri Lankan army.

Department regarding his connection with Tamil Tigers and about suffering a sexual assault by the officers.

2.10 The complainant also stated that, during their investigations into the incident at the university, Criminal Investigation Department officers had taken him to a building next to the police station in Eravur, where they told him that they knew about the involvement of his uncle and brother with the Tamil Tigers and started threatening him. He was beaten up, raped and sexually abused by the officers.

2.11 He states that the Criminal Investigation Department is harassing his father and wife and asking about him. He also fears the people of the van who threatened to kill him. He is afraid that a scar on his leg could be assumed to be a war scar by the authorities.

2.12 As to the exhaustion of domestic remedies, on 30 May 2012, the complainant applied to the Department of Immigration and Citizenship for a protection visa (class XA), which was denied on 23 August 2012.

2.13 On 14 September 2012, the complainant filed an application for review before the Refugee Review Tribunal. On 11 December 2012, he attended a hearing before the Tribunal and, on 1 August 2013, the Tribunal upheld the decision to refuse him a protection visa.

2.14 The complainant appealed to the Federal Court, which, on 12 February 2015, upheld the decision by the Refugee Review Tribunal. On 20 March 2015, the complainant filed a request for ministerial intervention (a discretionary remedy). That appeal was rejected on 1 June 2015.

2.15 On 2 August, a second request for ministerial intervention was filed on the basis of new information given by the complainant and a psychiatrist's report. That appeal was rejected on 7 August 2015.

2.16 On 10 August, the second ministerial appeal was sent to a Senator and to the Minister for Immigration and Border Protection, with no response to date. The Senator's office communicated that the Minister seemed not to be prepared to rule on the case.

2.17 On 10 November, the complainant filed an application for interlocutory relief to the Federal Court of Australia. That application was dismissed on 12 November 2015. He was detained on 14 January 2016.

### **The complaint**

3. The complainant claims that his deportation to Sri Lanka would violate his rights under article 3 of the Convention. He states that, since he (a) is Tamil and suspected of having links with the Tamil Tigers, who were allegedly involved in the vandalism incident, (b) claims to have already been tortured by Criminal Investigation Department officers and threatened to be killed by unknown persons, and (c) left the country illegally, he would upon return to Sri Lanka face arrest by the Criminal Investigation Department at the airport and torture by the authorities, which continue to harass his relatives and look for him. Therefore, in returning him to Sri Lanka, Australia would violate its obligations under article 3 of the Convention.

### **State party submission on admissibility and merits and request to lift interim measures**

4.1 In a note verbale dated 19 July 2016, the State party provided its observations on the admissibility and merits of the complainant's communication and requested the Committee to withdraw its request for interim measures.

4.2 The State party submits that the complainant's allegations are inadmissible on the ground that his claims are manifestly unfounded pursuant to rule 113 (b) of the Committee's rules of procedure. Should the Committee find that the allegations are admissible, the State party submits that the claims are without merit as they have not been supported by evidence that there are substantial grounds for believing that the complainant is in danger of being tortured as defined by article 1 of the Convention.

4.3 The State party asserts that each case must be assessed on its own facts. Whether conduct amounts to torture will depend on the nature of the alleged act. It recalls that the obligation of non-refoulement under the Convention is confined to torture and does not extend to cruel, inhuman or degrading treatment or punishment,<sup>2</sup> and that the Committee has retained this distinction in its jurisprudence.<sup>3</sup> If it is established that the alleged acts would constitute torture, article 3 also requires that there exist “substantial grounds for believing” that the author would be in danger of being subjected to torture. That is, the author must be at a “foreseeable, real and personal risk of being subjected to torture”.<sup>4</sup> The Committee has also stated that the danger must be “personal and present”.<sup>5</sup> The onus of proving that there is such a risk of being subjected to torture upon extradition or deportation rests on the author. The risk must be “assessed on grounds that go beyond mere theory and suspicion”.<sup>6</sup>

4.4 The State party submits that it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of his complaint and, that he has failed to do so. His claims have been considered by a series of domestic decision makers, including the Department of Immigration and Border Protection during the determination of his protection visa application, and the Refugee Review Tribunal. He also sought a judicial review by the Federal Circuit Court of Australia and the Federal Court of Australia for legal error in the Tribunal’s decision. His claims were also assessed during the ministerial intervention process. Robust domestic processes have considered and determined that the complainant’s claims are not credible and do not engage the non-refoulement obligations of Australia. In particular, his claims have been assessed under the complementary protection provisions contained in paragraph 36 (2) (aa) of the Migration Act, which reflects the State party’s non-refoulement obligations under the Convention and the International Covenant on Civil and Political Rights.

4.5 The complainant lodged an application for a protection visa on 30 May 2012. He was granted a bridging visa on 3 July 2012, in order for him to reside lawfully in the community while his application was under consideration by the Department of Immigration and Border Protection. On 23 August 2012, the complainant’s protection visa application was refused. The decision maker conducted an interview with the author, with the assistance of an interpreter, and considered other relevant material, such as country information provided by the Australian Department of Foreign Affairs and Trade and available open-source material. The complainant’s application was based on his fear of harm from the Criminal Investigation Department, the Karuna group (and any men in the white van not associated with that group) and/or his previous employer. In particular, he alleged that he had been working as a security guard at the Eastern University in Batticaloa when, on 11 November 2011, a group of people he could not identify had attacked the arts faculty, where he was working. He stated that they threw rocks at the windows and at him and that he ran away and notified other security guards. When the author and other guards returned, the group had dispersed. The author said he reported the incident to the police the next day. He alleged that, on the following day, a group of students threatened him and implied that they were responsible for the incident. He further claimed that, on 15 November 2011, he had been returning home when he was forced into a white van by three men, who threatened to kill him if he reported any further on the incident and those involved. He alleged that he had been interrogated by the Criminal Investigation Department in relation to the incident on 11 November 2011. He stated that they had insisted he tell them who the perpetrators were and suggested that, as no one else had seen the perpetrators, he had caused the damage himself. He reported that he had taken time off work and the Criminal Investigation Department had continued to harass him ad hoc, including by questioning him at home on 25 November 2011. He claimed to have lived between his home and his aunt’s house for the following three months before leaving for

<sup>2</sup> See Committee against Torture general comment No. 1 (1997) on the implementation of article 3, para. 1.

<sup>3</sup> See communication No. 417/2010, *Y.Z.S. v. Australia*, decision dated 23 November 2012, para. 4.10.

<sup>4</sup> See communication No. 203/2002, *A.R. v. The Netherlands*, decision dated 14 November 2003, para. 7.3.

<sup>5</sup> See general comment No. 1, para. 7.

<sup>6</sup> See *A.R. v. The Netherlands* (note 5 above), para. 7.3.

Australia. The complainant also claimed that he would suffer harm if returned to Sri Lanka because he was Tamil from an area previously controlled by the Tamil Tigers and because he had left Sri Lanka illegally.<sup>7</sup>

4.6 The decision maker on the complainant's application for a protection visa considered the claims and accepted that the complainant was Tamil from the east of Sri Lanka; that he had been a security guard at the university and that, on the night of 11 November 2011, people had entered the university and broke the windows of one of the buildings. The decision maker accepted that he had been questioned by the authorities regarding the vandalism and that his employer had been dissatisfied by his lack of attendance at work following the incident. However, the decision maker did not accept that the complainant had been approached by students about the broken windows, as his account was inconsistent and changed a number of times. It was also not accepted that he had been subsequently abducted by people in a van, who warned him to be quiet.<sup>8</sup>

4.7 The State party further submits that the decision maker was not satisfied that available country information supported a finding that the complainant had a well-founded fear of persecution on account of being a failed asylum seeker or a Tamil returnee who had left illegally.<sup>9</sup> The decision maker was not satisfied that the complainant had a real chance of being persecuted or that his fear of persecution had been well-founded and, consequently, found that he was not a refugee. The decision maker was also not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Sri Lanka, there was a real risk that he would suffer significant harm under paragraph 36 (2) (aa) of the Migration Act, which reflects the non-refoulement obligations of Australia under article 3 of the Convention and under the Covenant.

4.8 On 14 September 2012, the complainant made an application Refugee Review Tribunal for a merits review of the decision by the Department of Immigration and Border Protection.<sup>10</sup> On 1 August 2013, the Tribunal affirmed the decision of the Department to not grant the complainant a protection visa. He was present at the Tribunal hearing and was able to make oral submissions with the assistance of an interpreter. The Tribunal also considered the documentation the complainant provided, including copies of the author's marriage certificate, staff identity card, letter of support from a member of parliament in Batticaloa district and a statutory declaration by the complainant, dated 30 May 2012. The Tribunal noted that country information supported the complainant's claims that the Tamil Tigers had tried to recruit young people at the time he was young, and accepted that he had experienced harassment and had to move around. However, it did not accept that the Tamil Tigers or Sri Lankan Army were or are searching for him in particular, or that he had been forced to move around because he was a target.<sup>11</sup>

4.9 The Refugee Review Tribunal accepted that the complainant had worked as a security guard at the university and that there had been an incident there, during which university property had been damaged. The Tribunal accepted that he had reported the damage to police but did not accept that he had been threatened or harassed by the police or Criminal Investigation Department in relation to the incident, or that there was a real risk of this happening if he was returned to Sri Lanka. The Tribunal also did not accept as true the claim that he had been threatened or harmed by those who had damaged the university or their associates, including the Karuna group. It did not accept there was a real risk he would be so harmed if returned to Sri Lanka. The Tribunal also did not accept that the

<sup>7</sup> Protection visa decision record, 4-5.

<sup>8</sup> Protection visa decision record, 5-7.

<sup>9</sup> In reaching this conclusion, the decision maker considered country information from Department of Foreign Affairs and Trade, the Home Office of the United Kingdom of Great Britain and Northern Ireland, the Department of State of the United States of America, Amnesty International, the International Crisis Group and the United Nations High Commissioner for Refugees.

<sup>10</sup> The Refugee Review Tribunal is a specialist body that provides independent review of decisions concerning protection visas. On 1 July 2015, the Tribunal merged with the Administrative Appeals Tribunal, within which it continues to provide independent review of protection related decisions under statute.

<sup>11</sup> Refugee Review Tribunal Statement of Decision and Reasons, (36).

complainant's father or other family members had been threatened or harmed by the police or Criminal Investigation Department in Sri Lanka because of his departure. It also did not accept that he would be targeted for serious harm because he is a Tamil male, has a scar, was a failed asylum seeker or because he had left Sri Lanka illegally.<sup>12</sup>

4.10 On 12 February 2015, the Federal Circuit Court dismissed the complainant's application for a judicial review of the Refugee Review Tribunal decision. He had legal representation at the Court hearing and oral submissions were made on his behalf; he was also granted leave to file post-hearing written submissions. He sought a judicial review of the decision by the Tribunal on the ground that it had failed to sufficiently consider his claims relating to his scar, status as a failed Tamil asylum seeker who had left Sri Lanka illegally and membership of a social group previously from an area controlled by the Tamil Tigers. The Court was not satisfied that the Tribunal had committed a jurisdictional error and dismissed the complainant's application.

4.11 On 20 March 2015, the complainant made a request under sections 417 and 48 B of the Migration Act.<sup>13</sup> There was no further information provided in the author's request for intervention to indicate the author had an enhanced chance of making a successful protection visa application. Therefore, on 6 May 2015, it was determined the author's claims did not meet the section 48 B guidelines for ministerial intervention. On 2 August 2015, the complainant made another request for ministerial intervention under sections 417 and 48 B of the Migration Act.<sup>14</sup> That request included evidence from a psychiatrist<sup>15</sup> detailing new claims that the Tamil Tigers had tried to forcibly recruit the complainant when his brother deserted, and his parents had paid large amounts of money to prevent this; that two of his paternal uncles had been forcibly recruited to the Tamil Tigers, and that one was missing and another was disabled and in hiding; that a third paternal uncle had been killed by the army during the civil war; that the authorities believed he or his family knew the location of his brother; that the family had burned all evidence of links to the Tamil Tigers for fear of reprisal from the authorities; that the complainant's father had been questioned, detained and beaten in relation to his family's links to the Tamil Tigers, including after the complainant arrived in Australia; and that the complainant had experienced oral and anal sexual assault by male officers of the police or Criminal Investigation Department as part of his interrogation while in Sri Lanka.<sup>16</sup>

4.12 The psychiatrist's report also states that an assessment was undertaken and the complainant was diagnosed with major depressive episode, post-traumatic stress disorder and associated melancholic features and cognitive impairment. The psychiatrist states those illnesses may restrict his ability to recount personal history, engage with bureaucratic process and recall dates and details, and that those factors, and his severe shame, were the most likely reasons the claim had not been raised earlier.

4.13 On 7 August 2015, it was determined that the complainant's claims did not meet the section 48 B or section 417 guidelines for ministerial intervention. During the assessment

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<sup>12</sup> In reaching this conclusion, the Refugee Review Tribunal considered country information referred to by the complainant and the departmental decision maker, as well as from the Danish Immigration Service and Human Rights Watch.

<sup>13</sup> Under these non-compellable powers, the Minister for Immigration and Border Protection (the Minister) can intervene in individual cases to grant a visa or allow a further protection visa application, if the Minister thinks it is in the public interest to do so. The claims made by the complainant were assessed, with consideration given to the decisions reached by the Refugee Review Tribunal and Federal Circuit Court of Australia.

<sup>14</sup> In limited circumstances, a further request for intervention will be sent to the Minister where the Department of Immigration and Border Protection is satisfied that there has been a significant change in the circumstances of an applicant which raises new substantive issues not previously considered.

<sup>15</sup> Copy on file.

<sup>16</sup> There is no documentary evidence of these claims. The documentary evidence on file includes: a copy of the complainant's passport, birth and marriage certificate, a letter from his father and from his mother, and a Certificate to Insecure Status of 12 March 2012 by a Batticaloa District MP stating that the parents of the complainant brought to his notice the University incident, the fact that the complainant sustained injury and was kept in a hospital for 3 days, that he complained about this to the police and later the unidentified group threatened him again.

of his second ministerial intervention request, the decision maker acknowledged that he had been through great hardship in his life during the civil war in Sri Lanka, like many other Tamils, and that his traumatic experiences had had an impact on his mental health. The decision maker took note of the psychiatrist's report, which had been based on information provided by the complainant, but found that there was no information to indicate he would be denied access to mental health services/facilities in Sri Lanka.

4.14 The State party acknowledges that complete accuracy is seldom to be expected by victims of torture.<sup>17</sup> Mental health is a factor taken into consideration by domestic decision makers in forming views on an asylum seeker's credibility. For example, although he had not raised mental health claims during his protection visa application, the Department of Immigration and Border Protection decision maker acknowledged that "when assessing credibility, an officer must be sensitive to the difficulties often faced by asylum seekers".<sup>18</sup> The decision maker also found the complainant's claim of sexual abuse to be not credible, owing to the significant delay between the complainant lodging his protection visa application and raising the claim; and because the complainant's claim of experiencing harm from officers of the Criminal Investigation Department had not previously been found to be credible. The decision maker found that "the frequency of the inconsistencies coupled with the applicant's frequent adjustment of his testimony whenever adverse information was put to him, leaves [the Department] with questions around the applicant's general credibility and unsatisfied about the credibility of his claims". Furthermore, the complainant had claimed before the Refugee Review Tribunal that Criminal Investigation Department officers had harmed and threatened to harm him, a claim that the Tribunal did not accept. As such, the decision maker did not consider it reasonable to accept the additional claim that he had been sexually assaulted during the alleged interrogation by the Criminal Investigation Department.

4.15 On 12 November 2015, the Federal Court of Australia dismissed the complainant's application for interlocutory relief pending a judicial review of the decisions by the Department of Immigration and Border Protection not to refer the second ministerial intervention request to the Minister and to refuse the complainant a protection visa. On 23 November 2015, he subsequently discontinued his application to appeal those departmental decisions.

4.16 Furthermore, the State party clarifies the issue of the new evidence regarding the incident that took place at the university on 11 November 2011 and the new claim regarding injuries sustained by the complainant, as well as of new evidence regarding harassment and assault from the Tamil Tigers and Criminal Investigation Department officers. The complainant has provided further evidence to support his claim that, on 11 November 2011, a group of people he could not identify attacked the university where he worked. This evidence includes letters from the Millar Sports Club in Sri Lanka, a student of the university at the time of the incident, the author's father (endorsed by the Grama Niladhari and counter signed by the Divisional Secretariat, Koralaipattu, Valaichenai) and the complainant's mother. He also provided a medical certificate, dated 1 March 2012, which notes an abrasion and recommends rest for the period of 13-16 November 2011. The latter was provided in support of the new claim that he had been injured during the attack on the university and is consistent with his claim that he had been interviewed by police until the following night and only attended hospital after the police had released him.

4.17 The decision maker for the protection visa application and the Refugee Review Tribunal accepted that the incident at the university had occurred and that the windows of one of the buildings had been broken. The Department of Immigration and Border Protection assessed the new evidence and concluded that, while the four letters support the accepted fact that the university had been vandalized, there was no information in the letters that was specific to the complainant to indicate he had suffered, or would suffer, harm as a

<sup>17</sup> Communication No. 21/1995, *Alan v. Switzerland*, decision of 8 May 1996, para. 11.3.

<sup>18</sup> The decision maker also had access to the United Nations High Commissioner for Refugees Eligibility Guidelines For Assessing The International Protection Needs Of Asylum Seekers From Sri Lanka guidance which states "[asylum seekers] may experience serious difficulties, technical and psychological ...".

result of this event. Furthermore, the medical certificate from Sri Lanka appeared to be backdated and was most likely issued while the complainant was in Australia. Consequently, the Department did not consider it to be credible evidence and did not accept the new claim he had been harmed during the incident at the university.

4.18 The State party submits that the complainant provided further evidence to support his claim of harm from the Tamil Tigers and Criminal Investigation Department. This included the above-mentioned letter from his father, detailing allegations that family members had been targeted by the Tamil Tigers for forcible recruitment and that members of the Criminal Investigation Department and the Tamil Tigers had assaulted the complainant and his father. It also included the above-mentioned letter from the complainant's mother, attesting to the assault by the Criminal Investigation Department officers and threats made to her eldest son and husband. Both letters alleged that the Criminal Investigation Department were still looking for the complainant and the letter from his mother alleged that he would be detained and tortured if returned to Sri Lanka. The Refugee Review Tribunal accepted that the complainant had experienced some harassment from the Tamil Tigers while growing up and had to move around. However, it did not accept that he had suffered harm from the Criminal Investigation Department, or that he was at risk of suffering harm on return to Sri Lanka. His claim relating to his brother and uncles being forcibly recruited by the Tamil Tigers and his claim of being assaulted were raised for the first time in his second ministerial intervention request, which concluded he had not advanced any credible new claims.

4.19 According to the State party, sources<sup>19</sup> suggest Tamils who are suspected of having links to the Tamil Tigers may be detained and tortured upon return to Sri Lanka. However, the Refugee Review Tribunal did not accept that the complainant had been or would be identified or perceived to be a member or supporter of the Tamil Tigers.<sup>20</sup> Furthermore, country information from the Department of Foreign Affairs and Trade suggests that close relatives of Tamil Tigers members, particularly high-profile members, who are wanted by Sri Lankan authorities may be subject to monitoring. Thus, even if the Department of Immigration and Border Protection were to accept the claim as credible as a result of the new evidence, it would not alter the finding that the complainant was not a person in respect of whom the State party had protection obligations, as there was no evidence to indicate his uncles or brother were high-profile members of the Tamil Tigers or wanted by authorities, and monitoring, in and of itself, does not constitute torture under the Convention or otherwise engage the State party's non-refoulement obligations.

4.20 The State party submits that there has been no relevant adverse change to the country situation since the complainant's claims were last assessed to indicate that its non-refoulement obligations would be engaged in his case. It asserts that, in respect of domestic processes and in submissions to the Committee, the complainant has not established the existence of additional grounds to show he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka. Furthermore, the issues raised by him relating to the human rights violations in and the return of asylum seekers to Sri Lanka have been specifically and carefully considered by all domestic processes. Relevant decision makers considered extensive country information and concluded that the complainant did not have a profile of significance that might draw adverse attention. The State party therefore reiterates that the complainant has not provided sufficient evidence that indicates he would be personally at

<sup>19</sup> See Human Rights Watch, *World Report 2016* (New York, 2015), pp. 530-532. Available from [www.hrw.org/sites/default/files/world\\_report\\_download/wr2016\\_web.pdf](http://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf). See also Amnesty International, *Report 2015/16* (London, 2016), p. 340. Available from [www.amnesty.org/en/documents/pol10/2552/2016/en](http://www.amnesty.org/en/documents/pol10/2552/2016/en).

<sup>20</sup> Since his election in January 2015, President Maithripala Sirisena, who was supported by the Tamil National Alliance, has reduced the number of banned organizations and individuals related to the Tamil Tigers from 16 and 424 to 8 and 155, respectively, in an effort to aid reconciliation with Tamils. Furthermore, when speaking to the Prime Ministers of Australia and Canada at the Commonwealth Heads of Government Meeting, the President invited Sri Lankans who had fled to those countries to return. President Sirisena also released 30 suspected former Tamil rebels from detention on bail and returned thousands of acres of confiscated land to Tamils.



risk of torture, or that this would amount to treatment that would be considered torture under article 1 of the Convention.

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

5.1 On 5 December 2016, the complainant submitted comments on the State party's observations. He objects to the State party's request to lift the interim measures request. He contends that all evidence indicates that he is a survivor of sexual torture and he made efforts to disclose this during later stages of his protection claims assessment and in his second ministerial appeal. He further challenges the State party's conclusions that he is not at real and foreseeable risk if returned to Sri Lanka, claiming they are based on findings of a protection assessment process that do not take into adequate consideration his psychological state (post-traumatic stress disorder and severe depression). He further comments on the issues of his disclosures of torture, his credibility, interpreter variations and difficulties and the engagement of the State party obligations of non-refoulement.

5.2 He claims that his mental health conditions arising from his experience of torture were not adequately taken into account in terms of assessing his credibility. As a result, his initial disclosure of torture was incorrectly viewed as lacking in credibility. Psychological evidence from counselling and psychiatrist reports support the view that he did suffer torture, including sexual torture. Those torture methods were commonly used by the Criminal Investigation Department.

5.3 The complainant first disclosed his experience of torture, including sexual torture, at the hearing of the Refugee Review Tribunal, as reported in its decision of 1 August 2013.<sup>21</sup> The fact that he did not disclose that experience in his initial claim or in his initial interview was then cited by the State party as a reason to doubt his credibility. However, most asylum seekers found it difficult to disclose torture. The complainant refers to a study that found that those with a history of sexual violence reported more difficulties in disclosing personal information during interviews and were more likely to dissociate during those interviews, and scored significantly higher on measures of post-traumatic stress symptoms and shame than those with a history of non-sexual violence. The study also describes how cultural factors also play a part in non-disclosure.<sup>22</sup> The complainant's gender and culture, along with the psychological impact of torture, including sexual torture, led thus to non-disclosure. The claim that the Criminal Investigation Department continuously tortured the complainant while interrogating him about the incident at the university was apparently not considered by the Tribunal and the State party treats it as another inconsistency. The complainant's legal representative at the Tribunal hearing also did not press for the claim of torture to be considered.

5.4 Following the rejection of his appeal to the Refugee Review Tribunal, the complainant sought counselling and, on 3 September 2013, began seeing a counsellor at Companion House Assisting Survivors of Torture and Trauma. According to the social worker and the director of that organization, he first reported some details of his past history on 1 October 2013.<sup>23</sup> The report describes how the complainant said there were some things he could not talk about and that he was unable to talk about it. He did not disclose details of his experience of torture again until 9 June 2015. The complainant was in a highly distressed state during his recounting of the torture. After the disclosure, his psychological state deteriorated very rapidly and he had to be admitted the same day to

<sup>21</sup> The Refugee Review Tribunal decision of 1 August 2013 is part of the case file and shows that the complainant claimed that he had been questioned and harassed by the Criminal Investigation Department and police in relation to the damage at the university. It does not show that he had disclosed a specific torture experience, either physical or sexual in nature, at that stage of the proceedings.

<sup>22</sup> See study by Bogner, Herlihy and Brewin (2007), pp. 75 and 79. Available from <http://csel.org.uk/assets/images/resources/bogner-herlihy-brewin-2007-bjpsych/bogner-bjpsych-disclosure-article.pdf>.

<sup>23</sup> Counselling summary report of 6 November 2015 is part of the case file. According to the report, the complainant had 55 sessions, each one lasting approximately one hour, between 10 September 2013 and 6 November 2015.

psychiatric hospital owing to suicidal tendencies.<sup>24</sup> The complainant's experience of sexual torture was detailed in the psychiatrist's statement of 15 June 2015 and his statement of 24 July 2015, both of which were submitted in the second ministerial appeal of 2 August 2015, which was rejected on 7 August 2015. Just as it had at the Tribunal appeals stage, his claim of sexual torture was not taken into account. Three experienced health professionals, a psychiatrist, a counsellor and his doctor concluded that the psychological effects of torture and trauma had influenced when and how the complainant reported details of his claim and in particular of his torture. According to the psychiatrist's report of 15 July 2015, the complainant often felt helpless and overwhelmed emotionally, and that no one believed him; he had tried to talk about the torture previously but his mind went blank and he experienced a severe shame. The psychiatrist also addresses the issue of shame and its inhibitory effect in an addendum of 18 November 2016 to the psychiatric report.<sup>25</sup>

5.5 As to the issue of the complainant's credibility, findings of lack of credibility led to the incorrect conclusion that he had not been tortured and that other parts of his protection claims were not true. It is evident that the complainant's credibility was called into question at the initial decision stage and this seems to have had an influence in subsequent appeals stages of the process. In relation to the grounds for this initial assessment of lack of credibility, the complainant notes that the decision makers referred to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and to guidelines by the Office of the United Nations High Commissioner for Refugees regarding the assessment of the credibility, notably that "benefit of the doubt should be given to those who are generally credible, but are unable to substantiate all their claims". Despite those references in assessing the credibility, the original decision maker did not adequately take them into account and erred in deciding that the complainant was not a credible person. This negative assessment of his credibility then had a major influence on further appeals processes and in particular on the disclosure of torture, which was first recorded in the decision record at the Refugee Review Tribunal appeals level.

5.6 The complainant submits the decision maker's assessment of 23 August 2012 of the complainant's lack of credibility also failed to take into adequate account the influence of interpreter variations and difficulties and an understanding of the psychological effects of torture and trauma on memory and recounting of experience. The complainant explains that different Tamil interpreters were used at different stages of the process and it is reasonable to assume that the quality of interpreting may also have varied. Health professionals involved with the complainant — both the psychiatrists and the counsellor — state they experienced problems with interpreting services. The interpretation during the counselling sessions with the counsellor and the sessions with the psychiatrist took place over the telephone. According to the psychiatrist, the complainant was not articulate, spoke slowly and his voice was so subdued that the interpreter had to ask him to move right next to the telephone to hear him more clearly.

5.7 As to the psychological effects of torture and trauma on memory and recounting of experience, in his report of 23 August 2012, the decision maker found the complainant to be "well educated and able to comprehend the questions and articulate his answers clearly". On that basis, the decision maker concluded that the inconsistencies in the complainant's account were not explained; the decision maker was therefore not satisfied with the complainant's general credibility and the credibility of his claims. At the time of the second ministerial intervention request, another decision maker was involved, the original decision maker not being in a position to assess the complainant's mental health. At that point, the complainant had not disclosed his experience of torture, and in particular the symptoms of post-traumatic stress disorder that inhibited his ability to recount a consistent narrative were clearly misinterpreted as inconsistencies, which led the decision maker to doubt the credibility of his claims. The decision maker at the second ministerial level did, however, have specialist information regarding the complainant's mental health and its impact on his ability to put forward his protection claim. The complainant challenges the State party

<sup>24</sup> He remained in the hospital for three days, after hospital staff assessed him to be at high risk of suicide.

<sup>25</sup> Annexed to the complainant's comments.

claims that, at the time of the second ministerial intervention request, the decision maker took note of the psychiatrist's report and acknowledged that his traumatic experiences had had an impact on his mental health. The complainant submits that it was incumbent on the decision maker to recognize the psychiatrist specialist report (of 15 July 2015, based on the assessment made on 8 July 2015) and the disclosure of torture, which amounted to a new substantive issue that had not previously been considered. The State party erred in not reviewing the whole of the complainant's claims on the basis of the psychological impact of his experience of torture. According to the doctor, the counsellor and the psychiatrist, the complainant presented significant consistent symptoms of post-traumatic stress disorder, anxiety and depression; he had a poor appetite and sleep disruption and was in full fear and some suicidal ideation. The psychiatrist concluded that his symptoms and presentation were consistent with his history of abuse and torture, and subsequent expression of major depression.<sup>26</sup> This explains why the complainant did not disclose sexual torture earlier, but also why his evidence was seen by the decision maker as inconsistent or changing in detail. Thus the psychological evidence strongly supports the view that the complainant had suffered torture, including sexual torture. He reported that he had been accused of having ties with the Tamil Tigers and that he continued to be at risk of torture in Sri Lanka. As a Tamil male who had suffered torture, he engages the State party obligations of non-refoulement.

5.8 In conclusion, the complainant submits that all evidence indicates that he is a survivor of sexual torture and it is clear that he made efforts to disclose this during his protection claims appeals process, at both the Refugee Review Tribunal level and the second ministerial appeal level. The State party protection assessment process did not take the complainant's psychological state into adequate consideration.

## **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. It notes that in the present case, the State party has not disputed that the complainant has 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 In accordance with article 22 (4) of the Convention, the Committee has considered the present communication in the light of all information made available to it by the parties.

7.2 The issue before the Committee is whether the removal of the complainant to Sri Lanka would violate 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

<sup>26</sup> Reference is made to a large body of research evidence in the field of psychology and neurobiology which details the effects of torture and trauma on memory.

for believing that he or she would be in danger of being subjected to torture. In assessing this 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. 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>27</sup> Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

7.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3, 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, the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk. The Committee further recalls that, in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,<sup>28</sup> 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, to assess freely the facts based upon the full set of circumstances in every case.

7.4 In assessing the risk of torture in the present case, the Committee notes the complainant's contention that there was a foreseeable, real and personal risk that he would be tortured if returned to Sri Lanka owing to his imputed links to the Tamil Tigers, born or belonging to a particular social and ethnic group (a Tamil male from an area previously controlled by the Tamil Tigers who has a scar on his leg that could be seen as being a war scar), his fear of harm from the Criminal Investigation Department, the Karuna group (and any men in the white van not associated with that group) and his previous employer, his alleged torture, including sexual torture, by the Criminal Investigation Department during the investigation of the university incident in 2011 and his unlawful departure from Sri Lanka. The Committee also notes the State party's observation that its domestic authorities found that the complainant lacked credibility owing to inconsistencies in his factual account of events; that the complainant has not provided credible evidence and has failed to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to Sri Lanka; that his claims have been reviewed by the competent domestic authorities, in accordance with domestic legislation and taking into account the current human rights situation in Sri Lanka; and that the domestic authorities were not convinced that the complainant fell within the category of persons entitled to protection under the 1951 Convention relating to the Status of Refugees.

7.5 The Committee notes the State party authorities did not accept that the complainant had been approached by students about the broken windows at the university; that he had been abducted by people in a van warning him to be quiet; and that he had been threatened or harassed by the police or Criminal Investigation Department in relation to the incident as his account was inconsistent and changed a number of times. In that regard, it observes that the complainant was able to remain living around his home area in his country and to continue working in his job at the university as a security guard until shortly before he left Sri Lanka to come to the State party. The Committee notes that the State party authorities did not accept either that his father or other members of the family had been threatened or

<sup>27</sup> See, for example, 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; No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010; No. 550/2013, *S.K. and others v. Sweden*, decision adopted on 8 May 2015, para. 7.3; and No. 648/2015, *S.S. v. Australia*, decision adopted on 10 May 2017, para. 10.2.

<sup>28</sup> See, for example, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

harmful by the police or Criminal Investigation Department because of his departure. The Committee observes that the complainant had not been recruited by the Tamil Tigers and there is no documentary evidence to substantiate the alleged involvement of his family with the Tamil Tigers. The Committee observes that the complainant's wife, parents, sisters, brother and sister-in-law continue to reside in Sri Lanka.

7.6 As to the new allegations of sexual assault, the Committee notes the complainant's claim that he first disclosed his experience of torture, including sexual torture, at the Refugee Review Tribunal hearing, as reported in the Tribunal decision of 1 August 2013. However, the Committee observes that the complainant's allegations in this regard are not supported by the above-mentioned decision, which is part of the file. The Committee observes that the complainant claimed that in 2011 he had been questioned and harassed by the Criminal Investigation Department or police in relation to the damage at the university; however, it appears he did not disclose any physical and/or sexual torture experience at that stage of the domestic proceedings. Irrespective of that, the Committee observes that the complainant's credibility could not be assessed solely on the basis of the significant delay between him lodging his protection visa application and raising the claim of sexual torture. It also observes that complete accuracy is seldom to be expected by victims of torture<sup>29</sup> and that, in the present case, the complainant's psychological state and suffering of post-traumatic stress disorder and depression are well documented medically.

7.7 The Committee takes note of the evidence from a psychiatrist based on a 90-minute assessment that took place on 8 July 2015 and was provided in the complainant's second request for ministerial intervention of 2 August 2015, in order to support the complainant's new claims that: (a) the Tamil Tigers tried to forcibly recruit him when his brother deserted, and his parents paid a large amount of money to prevent this; (b) that two of his paternal uncles were forcibly recruited to the Tamil Tigers, one of whom is missing and the other is disabled and in hiding, while a third was killed during the civil war; and (c) that the family burned all evidence of links to the Tamil Tigers and that he had experienced sexual assault by male officers of the police or Criminal Investigation Department. The Committee notes the State party's assertion that its competent authorities evaluated thoroughly all the evidence presented by the complainant and found it to be of limited probative value owing to its content and timing. The Committee observes that the State party authorities recognized and considered the psychiatrist specialist report of 15 July 2015 and therefore took into account and assessed the complainant's new claim of sexual assault. The Committee notes that the State party's authorities did not accept as a fact that the complainant had been subjected to sexual torture by the Criminal Investigation Department officers. The Committee also takes note that the State party's authorities acknowledged that the complainant had been through hardship during the civil war and the traumatic experiences have made an impact on his mental health. However, the Committee notes that the authorities found no information to indicate he would be denied access to mental health services in Sri Lanka and assessed his claim of sexual abuse to be not credible owing to the frequency of inconsistencies coupled with frequent adjustment of his testimony whenever adverse information was put to him.

7.8 Regarding the complainant's general claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a Tamil male with real or perceived links with the Tamil Tigers, and as a failed asylum seeker returning from overseas, the Committee agrees that Sri Lankans of Tamil ethnicity with a real or perceived prior personal or familial connection to the Tamil Tigers facing forcible return to Sri Lanka may face a risk of torture. In that connection, the Committee notes the current human rights situation in Sri Lanka and refers to its concluding observations on the fifth periodic report of Sri Lanka, in which it expressed concern *inter alia* about reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including military and police,<sup>30</sup> which had continued in many parts of the country after the conflict with the Tamil Tigers ended in May 2009, and to credible reports

<sup>29</sup> See communication No. 21/1995, *Alan v. Switzerland*, decision of 8 May 1996, para. 11.3.

<sup>30</sup> See CAT/C/LKA/CO/5, paras. 9-12.

by non-governmental organizations<sup>31</sup> concerning the treatment of individuals returned to Sri Lanka by the Sri Lankan authorities.<sup>32</sup> However, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that a complainant runs a personal risk of torture.<sup>33</sup> The Committee also recalls that, although past events may be of relevance, the principle question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.<sup>34</sup> In the present case, the complainant has not demonstrated a foreseeable, real and personal risk of being subjected to torture if returned to Sri Lanka, owing to the numerous inconsistencies and frequent adjustment of his testimony affecting his credibility. In addition, the Committee notes that, in its assessment of the complainant's asylum application, the State party's authorities also considered the possible risk of ill-treatment of failed asylum seekers upon return to Sri Lanka and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the complainant's claim.

7.9 On the basis of all the information submitted by the complainant and the State party, including on the general situation of human rights in Sri Lanka, the Committee considers that, in the present case, the complainant has not discharged the burden of proof<sup>35</sup> as he has not adequately demonstrated the existence of substantial grounds for believing that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. 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.

8. In the light of the above, the Committee, acting under article 22 (7) of the Convention, concludes that the complainant's removal to Sri Lanka by the State party would not constitute a breach of article 3 of the Convention.

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<sup>31</sup> See Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009" (London, August 2015).

<sup>32</sup> See communication No. 628/2014, *J.N. v. Denmark*, decision of 13 May 2016, para. 7.9.

<sup>33</sup> See, for example, communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

<sup>34</sup> See, for example, communications No. 61/1996, *X.Y. and Z. v. Sweden*, decision adopted on 6 May 1998, para. 11.2; No. 435/2010, *G.B.M. v. Sweden*, decision of 14 November 2012, para. 7.7; or No. 458/2011, *X. v. Denmark*, decision adopted on 28 November 2014, para. 9.5.

<sup>35</sup> See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.