



**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. 599/2014\*, \*\***

<i>Communication submitted by:</i>	T (represented by Michaela Byers, solicitor and Migration Agent)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	30 April 2014 (initial submission)
<i>Date of present decision:</i>	3 August 2016
<i>Subject matter:</i>	Deportation
<i>Substantive issues:</i>	Risk of torture upon return to country of origin
<i>Procedural issues:</i>	Admissibility - manifestly unfounded
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is T, a Sri Lankan national born in Batticaloa in 1988. He claims that his deportation to Sri Lanka would constitute a violation by Australia of article 3 of the Convention. The complainant is represented by counsel, Michaela Byers. Australia made the declaration under article 22 of the Convention on 28 January 1993.

1.2 On 2 May 2014, in application of rule 114 (1) of its rules of procedure, the Committee requested the State party not to deport the complainant to Sri Lanka while his complaint was being considered by the Committee. On 21 May 2015, the State party requested the Committee to lift the interim measures. On 26 October 2015, the Committee denied the State party's request to lift the interim measures. On 25 February 2016, the State party requested that the communication be considered by the Committee as soon as possible.

\* Adopted by the Committee at its fifty-eighth session (25 July-12 August 2016).

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



**Facts as presented by the complainant**

2.1 In 1998, the complainant left school as some children had been abducted and recruited by the Liberation Tigers of Tamil Eelam (LTTE).

2.2 He found employment as a jeweller in Colombo, from 2004 to 2012 (age 16 to 24 years). During this time, army officers would come to the jewellery shop three or four times a month to check his identification registration and would throw his equipment around.

2.3 In 2006, the complainant's brother was abducted by LTTE and his family has not seen him since.

2.4 Between 2007 and 2008, the complainant returned to Batticaloa to register with his family in an army camp after his family was displaced by fighting. On his way back to Colombo, he was abducted by five men in a white van. He states that he was abducted because the men in question mistook him for his brother who was an LTTE member. He was held for one day, beaten and interrogated regarding LTTE involvement. He was released later in the day and spent three months in hospital.

2.5 In February 2012, the complainant became sick and returned home. One day, five men came to the complainant's house and demanded that he attend a rally protesting United Nations findings on Sri Lanka. The complainant refused because he was sick. The men in question accused him of belonging to an LTTE family and slapped him twice and told him to be careful.

2.6 The complainant then hid at the houses of various friends and relatives until fleeing to Australia.

2.7 The complainant left Sri Lanka illegally by boat on 25 March 2012 from Beruwela, Western Province, and arrived at Christmas Island, an excised Australian migration zone, on 11 April 2012.

2.8 On 30 June 2012, the complainant applied for a protection visa and was interviewed by an officer of the Department of Immigration and Citizenship on 30 June 2012 at Scherger Immigration Detention Centre in Queensland. The complainant's application was rejected, as detailed in the written decision dated 17 August 2012. The complainant applied to the Refugee Review Tribunal for a review of the decision and was interviewed by a member of the Tribunal on 20 November 2012. On 1 May 2013, the Refugee Review Tribunal affirmed the decision not to grant the complainant a protection visa. On 13 May 2013, the complainant applied to the Federal Circuit Court for a review of the Tribunal's decision. On 22 November 2013, the Federal Circuit Court dismissed the complainant's application and awarded legal costs of \$2,500 against him. On 11 December 2013, the complainant requested the Minister for Immigration and Border Protection to exercise his public interest powers under section 417 of the Migration Act. On 3 March 2014, the Assistant Minister for Immigration and Border Protection declined to intervene. As the complainant's bridging visa had expired, the Department of Immigration and Border Protection scheduled a bridging visa interview for 2 May 2014. At the time of submitting the present communication, the complainant feared that he would be arrested at the interview and redetained for the purpose of removal to Sri Lanka.

### The complaint

3. The complainant claims that he will be arrested and detained under the Sri Lanka Immigrants and Emigrants Act upon return to Sri Lanka. He claims that he will be held in remand at Negombo Prison and face a real risk of significant harm consisting of prolonged detention, interrogation and torture, because his brother was an LTTE member and the complainant has had contact with Tamil Congress members in Australia. In addition, the conditions of detention at Negombo Prison constitute degrading treatment.

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

4.1 On 7 November 2014, the State party submitted its observations on admissibility and the merits, in which it recalled that article 3 provided that States parties had 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> It also recalled that, in its views concerning *G.R.B. v Sweden*, the Committee had confirmed that the obligation under article 3 was directly linked to the definition of torture set out in article 1 of the Convention.<sup>2</sup> The Committee has also noted that several elements must exist for an act to constitute torture: the act must cause a person severe pain or suffering, which may be mental or physical; the act must be intentionally inflicted on a person or on a third person for the purposes of obtaining information, extracting a confession, punishment for an act that the person or a third person allegedly committed, intimidation or coercion, or for any reason based on discrimination of any kind; and the act must be inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.<sup>3</sup>

4.2 The State party notes that each case must be assessed according to its own facts. Whether conduct amounts to torture will depend on the nature of the alleged act. Furthermore, if it is established that the alleged acts constitute torture, article 3 of the Convention also requires that there must be substantial grounds for believing that an individual would be in danger of being subjected to torture, that is, 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> In order to show that a State party would be in breach of its non-refoulement obligations under article 3 of the Convention, an individual must be personally at risk of such treatment should he or she be returned to a country. In addition, 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. The Committee has also stated that the risk must be assessed on grounds that go beyond mere theory and suspicion.<sup>6</sup>

4.3 In the light of the above, the State party submits that the complainant's claims are inadmissible pursuant to rule 113 (b) of the Committee's rules of procedures on the grounds that they are manifestly unfounded. In its general comment No. 1, the Committee stated that it is the responsibility of the complainant to establish a prima facie case that there is a foreseeable, real and personal risk that he would be subjected to torture by the authorities of

<sup>1</sup> See, for example, communication No. 39/1996, *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; also the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, para. 4.

<sup>3</sup> See *G.R.B. v. Sweden*, para. 6.5.

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

<sup>5</sup> *Ibid.*; and the Committee's general comment No. 1, para. 7.

<sup>6</sup> See the Committee's general comment No. 1, paras. 6-7.

the country to which he is to be returned.<sup>7</sup> In this connection, the State party maintains that the complainant has failed to establish such risk. Should the Committee consider the communication admissible, the State party submits that the complainant's claims are without merit.

4.4 The State party argues that the complainant's claims were thoroughly considered by a number of domestic decision makers and review bodies, including the Federal Circuit Court. Each body specifically considered the complainant's claims and determined that he was not at a foreseeable, real or personal risk of torture under article 3 of the Convention if returned to Sri Lanka. In particular, the complainant's claims were assessed under the complementary protection provisions of section 36 (2) (aa) of the Migration Act, which contains the State party's non-refoulement obligations under, inter alia, the Convention. The State party notes that the complainant has not provided any relevant new evidence in his submissions to the Committee that has not already been considered in the domestic administrative and judicial proceedings. In this regard, the State party refers to the Committee's general comment No. 1, in which it is stated that the Committee is not an appellate or judicial body and that it gives considerable weight to findings of fact that are made by the organs of the State party concerned.

4.5 The State party acknowledges that complete accuracy can seldom be expected from victims of torture,<sup>8</sup> however, that factor was taken into consideration by the domestic authorities when forming their views on the complainant's credibility. In assessing the complainant's protection visa application, a reasonable margin of appreciation was given to flaws and inconsistencies in his testimony.

4.6 The State party notes that the complainant's claims were considered during the protection visa proceedings as well as in the independent merits review by the Refugee Review Tribunal, the judicial review by the Federal Circuit Court, the review of the complainant's appeal of the Federal Circuit Court's decision before the Federal Court of Australia and the review of his request for ministerial intervention of 11 December 2013.

4.7 In particular, the complainant lodged an application for a protection visa on 30 June 2012. He was granted a bridging visa on 16 August 2012 while his protection visa application was being considered by the Department of Immigration and Border Protection. On 16 August 2012, the complainant's protection visa application was refused. The complainant was granted additional bridging visas on 13 June 2013 and 14 August 2013 through ministerial intervention under section 195A of the Migration Act.

4.8 The State party submits that the authorities interviewed the complainant (with the assistance of an interpreter) and also considered other relevant material, such as country information provided by the Australian Department of Foreign Affairs Trade and by non-governmental organizations such as Amnesty International. The authorities had considered all of the claims made by the complainant in his submissions to the Committee, except the claim relating to his activities in Australia, which had not been raised by the complainant at that any stage. The authorities found that the complainant's claims that he left school when he was 10 years old because school attendance was too dangerous and that he subsequently spent six years living with family and friends in Colombo were not credible. The authorities also concluded that the difficulties experienced by the complainant at the hands of the army officers while he was employed as a jeweller in Colombo were not serious enough to constitute serious harm and therefore did not amount to persecution. The authorities further concluded that his past experiences of harassment did not provide evidence that he would

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<sup>7</sup> Ibid., para. 4; also *G.R.B. v. Sweden*.

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

face persecution or significant harm if returned to Colombo, and that there was no indication that any harm would escalate to a level that would constitute persecution or significant harm in the future. In addition, the authorities inferred that there was not a real chance of the complainant facing persecution for suspected links to LTTE as he had not experienced any harassment between 2007 and 2012 and he left Colombo because of illness, not out of fear. Moreover, the authorities concluded that the complainant's fear of being persecuted by the United People's Freedom Alliance or by government forces because he refused to attend a rally protesting the United Nation's findings on Sri Lanka was not well-founded as there were no further threats to him or visits to his house since that time; he did not have an United People's Freedom Alliance profile and was not obliged to live in Batticaloa; and it is unlikely that the United People's Freedom Alliance would have recorded his name and shared it with the authorities in Colombo that would enable them to locate the complainant on his return. The domestic authorities also concluded that the complainant did not fear any kind of harm in Colombo, but merely wanted to avoid employment difficulties, and that his fear of being persecuted by the Sri Lankan authorities because he would be a returned Tamil asylum seeker was not well-founded as he did not have a criminal record nor was he suspected of LTTE involvement by the security forces. Therefore, given that there were no substantial grounds for believing that the complainant would face a foreseeable, real and personal risk of being subjected to torture, the Australian authorities rejected his protection visa application.

4.9 The complainant subsequently filed an application for an independent merits review with the Refugee Review Tribunal — an external review body that provides a full and independent merits review of decisions concerning protection visas. On 1 May 2013, the Tribunal affirmed the decision of the Department of Immigration and Border Protection not to grant the complainant a protection visa. In this regard, the State party notes that the complainant was physically present at the Tribunal hearing and was represented by a registered migration officer. He was able to make oral submissions with the assistance of an interpreter.

4.10 The Refugee Review Tribunal accepted that the complainant had been abducted, beaten and released the same day and that this had occurred due to mistaken identity; the mistake of identity had been quickly rectified; the complainant's brother had been abducted; there had been some degree of security checking at the complainant's workplace by soldiers of the Sri Lanka Army; and tighter procedures had recently been adopted for those returning to Sri Lanka in breach of immigration laws. However, the Refugee Review Tribunal did not accept the following as credible: that the abduction of the complainant's brother in and of itself had led the authorities to identify the complainant as being an LTTE supporter; that the complainant had been imputed with a pro-LTTE political opinion owing to his brother's involvement with LTTE; that five unidentified men came to his home to demand that he attend a rally protesting the United Nations findings on Sri Lanka and that when he refused, he was slapped and told to be careful; that the alleged intruders subsequently returned to his house after he had left the country; that the admonition to be careful and the incident relating to his refusal to attend the rally protesting the United Nations findings on Sri Lanka had caused him to go into hiding for some time and precipitated his decision to leave Sri Lanka; that he would be harmed on his return to Sri Lanka because of the pro-LTTE political opinion with which he is supposedly imputed; that the security checks at the complainant's workplace in Colombo were carried out with the frequency or degree of harassment claimed; that he was under suspicion for LTTE involvement; that he had encountered any particular or unusual difficulties registering with the local police; that the complainant had suffered serious or significant harm because of his Tamil ethnicity; that he would suffer harm or persecution on return to Sri Lanka because he was part of the particular social group of failed asylum seekers; and that his being charged, fined or held on remand on his return would amount to serious harm. The Refugee

Review Tribunal stipulated that the complainant would likely face arrest on charges of leaving the country illegally and that he could be placed in remand for a brief period while awaiting a bail hearing and may later be fined. However, the Tribunal concluded that there were no substantial grounds for believing that there was a real risk of the complainant being subjected to torture if removed to Sri Lanka.

4.11 The State party also notes that, on 22 November 2013, the Federal Circuit Court dismissed the complainant's application for judicial review of the Refugee Review Tribunal's decision. The complainant was present at the Circuit Court hearing and made submissions. In particular, the Circuit Court concluded that the complainant was unable to point to any legal error by the Tribunal and the court could not find anything illogical or irrational in its analysis.

4.12 On 11 December 2013, the complainant filed a request for ministerial intervention under sections 48B and 417 of the Migration Act. The claims made by the complainant were again assessed in full with consideration also given to the decisions of the Refugee Review Tribunal and the Federal Circuit Court. However, the complainant's request for ministerial intervention was rejected as he did not provide any further information to justify such intervention. In this regard, the decision maker noted that the Tribunal was not satisfied with the complainant's claims that he would be harmed upon return to Sri Lanka because he was part of the particular social group of failed asylum seekers. The decision maker also noted that, while the Tribunal accepted that the complainant was likely to face arrest because he left the country illegally and that he might be placed in remand and fined, it was not satisfied that this treatment could reasonably be said to amount to serious or significant harm under section 36 (2) (aa) of the Migration Act.

4.13 In the light of the above, the State party maintains that all of the complainant's claims were considered and all the evidence provided was verified by the domestic authorities at every stage of the process. All of the processes concluded that there were no substantial grounds for believing that the complainant was at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

4.14 Regarding the complainant's alleged activities in Australia, the State party notes that the complainant did not provide evidence to substantiate his new claims regarding his activities with the Tamil Congress in Australia. The complainant submitted that while he was in immigration detention, he had been approached by members of the Tamil Congress who were willing to provide assistance regarding his protection visa application. The complainant claims that, if he were forcibly returned to Sri Lanka, the fact that he had been in contact with the Tamil Congress would result in his being arbitrarily detained and interrogated on the regrouping of LTTE abroad. In this regard, the State party submits that the complainant did not explain how or why that would put him at risk of torture. The State party also submits that the complainant's Tamil ethnicity and alleged links with LTTE were thoroughly assessed and both the Department of Immigration and Border Protection and the Refugee Review Tribunal found that the complainant did not have any form of connection with LTTE nor was he suspected of such links or a criminal suspect.

4.15 Finally, with regard to the complainant's claim that, because he is a failed asylum seeker, he would be subjected to torture and killed if returned to Sri Lanka, the State party notes that the complainant has not provided any information in support of that claim. The State party acknowledges that article 3 (2) of the Convention requires that all relevant considerations 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, the State party notes that the existence of a general risk of violation does not constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to a country. Additional grounds must exist to show that the individual concerned would be personally at

risk of torture.<sup>9</sup> The State party maintains that the complainant has not established the existence of additional grounds to show that he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

4.16 In addition, the State party submits that the issues raised by the complainant relating to the human rights violations in and the treatment of failed asylum seekers returned to Sri Lanka have been specifically and carefully considered by all domestic processes. In particular, during the complainant's protection visa application review, material before the authorities included country information from NGOs such as Amnesty International and Human Rights Watch as well as guidance from the Office of the United Nations High Commissioner for Refugees.<sup>10</sup>

4.17 Furthermore, the Refugee Review Tribunal considered a wide range of country information pertaining to Sri Lanka, including information specifically relating to the risk of persecution of Tamils in Sri Lanka and failed asylum seekers returning to Sri Lanka. The Tribunal accepted that, at least up to the end of the civil war in May 2009, Sri Lankan citizens who were Tamils were at risk of persecutory harm by the authorities because of their Tamil ethnicity. The Tribunal also noted that the security situation had stabilized and the risks posed to Tamils were substantially reduced, as indicated in the 2010 UNHCR Eligibility Guidelines which no longer referred to a presumption of eligibility for protection of Sri Lankans simply on the grounds that they were Tamils originating in the north of the country. The 2012 UNHCR Eligibility Guidelines maintains the assessment set out in the 2010 Guidelines even though it cautions that a merits-based assessment in relation to individual circumstances is still necessary and that Tamil ethnicity and place of origin may still be factors that would increase the vulnerability of persons with other risk profiles whose protection claims warrant particularly close attention and that the risk profiles listed should not be considered as exhaustive. The Tribunal did not find that the information before it indicated that Sri Lankans who are of Tamil ethnicity, whether or not they are from areas formerly under the control of LTTE, faced serious harm simply because of their ethnicity, or that the complainant faced a real risk of serious harm for such a reason.

4.18 The Tribunal accepted that, since failed asylum seekers would have generally left Sri Lanka illegally, they would be dealt with under the relevant Sri Lankan laws that are of general application. The Tribunal reviewed the submissions, the material cited in the complainant's decision record and UNHCR Eligibility Guidelines as well as considered personal risk factors. It accepted that, in recent times, some of those returned to Sri Lanka had reportedly suffered torture and other abuses at the hands of the authorities, but that those cases overwhelmingly involved people who had some form of connection to LTTE or who were suspected of having such links or who were criminal suspects. However, the Tribunal did not consider that this would be the case for the complainant. In the light of the country information available and the complainant's personal circumstances, the Tribunal concluded that the complainant would not suffer harm on return to Sri Lanka owing to the fact that he had unsuccessfully sought a protection visa in Australia or that he was part of the particular social group of failed asylum seekers. The Tribunal reviewed the reports provided by the Department of Foreign Affairs and Trade and did not consider that the treatment of returnees who had left Sri Lanka illegally, either upon arrival at the airport or while held in remand awaiting a bail hearing or when before the courts, could reasonably be seen as constituting serious harm amounting to persecution.

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<sup>9</sup> See *G.R.B. v. Sweden*, para. 6.3.

<sup>10</sup> See Office of the United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (July 2010 and December 2012).

4.19 In summary, the Tribunal did not consider that the complainant ran a real risk, on return to Sri Lanka, of suffering serious harm that would amount to persecution because of his Tamil ethnicity, the political opinion imputed to him or the fact that he is part of the particular social group of failed asylum seekers. The complainant does not claim to fear harm for any other Convention reason and no other reason is apparent from the information before the Tribunal. The Tribunal also did not consider that the complainant had a well-founded fear of persecution for a Convention reason upon return to Sri Lanka, either now or in the reasonably foreseeable future, or that he was a refugee in need of protection.

4.20 Moreover, the country information provided by the Department of Foreign Affairs and Trade was considered in the assessments of the complainant's requests for ministerial intervention. It was verified that, although failed asylum seekers are detained on return to Sri Lanka under the laws relating to leaving the country illegally, all persons are granted bail if a family member stands as guarantor, with no discrimination as to ethnicity or religion. It was noted that the complainant has family — his mother and seven siblings — residing in Sri Lanka who can assist him. There is no information to indicate that he would not be granted bail or that he would be discriminated against or tortured because he is a failed asylum seeker and/or Tamil.

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

5.1 On 4 February 2015, counsel for the complainant submitted his comments on the State party's observations. Regarding the State party's submission that the complainant would likely be arrested on charges of having left the country illegally and could be placed in remand for a relatively brief period while awaiting a bail hearing and that the Tribunal did not consider that this would involve treatment that could reasonably be said to engage Australia's non-refoulement obligations, the complainant submits that this reasoning was found to constitute a legal error in *WZAPN v. Minister for Immigration and Border Protection [2014] FCA 947*. In that case, the Federal Court found that "by making a qualitative assessment of the nature and degree of the harm experienced by the applicant when asking whether the threat to the applicant's liberty was sufficiently significant, the reviewer in the present case applied the wrong test in the application of section 91R(2)(a), and thereby fell into jurisdictional error" (para. 45).

5.2 Furthermore, with regard to his application to the Federal Circuit Court, the complainant was not represented by counsel. He had to find a lawyer on his own and had little English-language skills. He submits that this was a breach of article 14 of the International Covenant on Civil and Political Rights. The complainant also submits that his particular status in relation to the particular social group of failed asylum seekers is much broader in that he is a failed asylum seeker suspected of LTTE connections and he left the country illegally. The complainant submits that his claims have merit and that he should be protected from refoulement as there are substantial grounds for believing that there is a real risk in the foreseeable future that he would face torture and other cruel, inhuman and degrading treatment or punishment upon return to Sri Lanka.

5.3 On 16 August 2015, counsel for the complainant submitted his comments on the State party's request of 21 May 2015 to lift the interim measures. The complainant noted that, at the first court hearing on 29 May 2013, the Court had indicated to the complainant that his application did not have any prospect of success and that he should seek the advice of a lawyer. He submits that he detected a "jurisdictional error" in the Tribunal's decision record, himself. The complainant submits that, at a subsequent court date on 22 November 2013, he did not file anything further and confirmed that he had spoken to a lawyer. He also submits that the minister's lawyer requested that the Court proceed immediately to a "show cause" hearing in order to dismiss the application. The court did so and ruled that the complainant's application was an impermissible merits review and did not disclose any

jurisdictional error on the part of the Tribunal. The complainant submits that this process was in no way a robust and thorough review of the Tribunal's decision as not all of the evidence was before the court, such as the transcript of the Tribunal hearing.

5.4 The complainant submits that the ministerial intervention process under section 417 of the Migration Act lacked transparency. He also submits that he was not interviewed and that the refusal letter did not indicate why his case did not meet the ministerial requirements. He further submits that the Government did not provide any evidence of this process to the Committee.

5.5 The complainant also attached a report from the Edmund Rice Centre, which contains details of the State party's role in providing the Sri Lankan authorities with instruments of torture and technology for surveillance and monitoring. In this regard, he submits that this information undermines the veracity of any assessment of or decision on the real risk of serious or significant harm upon one's return to Sri Lanka. The complainant submits that his contact with Tamil Congress members in Australia would be known in Sri Lanka and the Sri Lankan authorities would question and interrogate him upon his return about the Tamil Congress and its activities.

5.6 On 5 November 2015, counsel for the complainant submitted the transcripts of the High Court of Australia that dismissed the complainant's application and noted that the complainant had exhausted all domestic remedies to obtain protection in Australia.

#### **State party's additional observations**

6.1 On 23 December 2015, the State party referred to, inter alia, the complainant's submissions dated 4 February 2015 and 16 August 2015.

6.2 The State party noted that the reference to *WZAPN v. Minister for Immigration and Border Protection [2014] FCA 947* was misinterpreted. In that case, on 17 June 2015, the High Court considered that the question of whether the risk of loss of liberty constituted "serious harm" for the purpose of section 91R of the Migration Act, which requires a qualitative evaluation of the nature and gravity of the apprehended loss of liberty. The decisions of both the Federal Court and the High Court related to the interpretation of the provisions of Australian legislation insofar as they concerned the implementation of the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees and are not relevant to the Convention obligations of the Australian Government with regard to the complainant. The State party submits that these claims are inadmissible, *ratione materiae*, under rule 113 (c) of the Committee's rules of procedure.

6.3 Regarding the complainant's claim that his status is far wider than the particular social group of failed asylum seekers as he is a failed asylum seeker, suspected of LTTE connections and whose departure was illegal, the State party submits that the Federal Circuit Court found that there was no legal error in the decision of the Refugee Review Tribunal. The Circuit Court found that it was reasonably open to the Tribunal to make its decision on what was before it. The Tribunal gave cogent reasons for not believing the applicant's evidence. The Department of Immigration and Border Protection also assessed the complainant's claim that he was a failed asylum seeker with LTTE connections and had left the country illegally. In the light of current country information, the Department considered, like the previous assessments, that the complainant did not have LTTE connections and therefore would not be at risk of significant harm by the Sri Lankan authorities on that basis, nor as a failed asylum seeker.

6.4 The State party submits that the Department of Immigration and Border Protection had also assessed the claims that the complainant would be questioned and interrogated upon return to Sri Lanka owing to his association with the Tamil Congress in Australia. However, the State Party notes that the complainant did not explain how or why his

interactions with the Tamil Congress would put him at risk of torture. The State party also submits that the issue of the complainant's Tamil ethnicity and alleged links with LTTE had been thoroughly assessed and both the protection visa assessment by the Department of immigration and Border Protection and the Refugee Review Tribunal's assessment found that he did not have any connection with LTTE, nor was he suspected of such links or a criminal suspect. The State party further submits that in its assessment, the Department considered that the complainant's claims that his activities in Australia placed him at risk of torture if returned to Sri Lanka had not been substantiated.

6.5 With regard to the Edmund Rice Centre report of 12 August 2015,<sup>11</sup> the State Party submits that the Department of Immigration and Border Protection used recent and relevant country information to assess the complainant's claims and that the report does not alter the Department's conclusion that the complainant would not be at a real and personal risk of torture upon return to Sri Lanka. The State party also submits that any claims made in further submissions with respect to article 14 of the International Covenant on Civil and Political Rights are inadmissible, *ratione materiae*, under rule 113 (c) of the Committee's rules of procedure. Furthermore, noting that the complainant has exhausted all domestic remedies, the State party requests that the Committee consider the complainant's communication.

6.6 On 26 February 2016, the State party requested that the Committee fast-track the consideration of the complainant's communication as all domestic processes had been finalized in that case.

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

#### *Consideration of admissibility*

7.1 Before considering any claim 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.

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not contested that the complainant has exhausted all available domestic remedies.<sup>12</sup> The Committee therefore finds that it is not precluded from considering the communication under article 22 (5) (b) of the Convention.

7.3 As regards the other arguments by the State party that the communication should be declared inadmissible on the grounds that it is manifestly unfounded, the Committee considers that these arguments are closely related to the merits of the case and therefore declares the communication admissible insofar as it raises issues under article 3 of the Convention. Finding no further obstacles to admissibility, the Committee declares the present communication admissible.

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<sup>11</sup> Edmund Rice Centre, "Australian sponsored torture in Sri Lanka? The unforeseen consequences of supporting a brutal regime to stop the boats at any cost", 12 August 2015.

<sup>12</sup> See, for example, communication No. 455/2011, *X.Q.L. v. Australia*, decision adopted on 2 May 2014, para. 8.2.

*Consideration of the merits*

8.1 In accordance with 22 (4) of the Convention, the Committee has considered the present communication in the light of all the information made available to it by the parties concerned.

8.2 In the present case, the issue before the Committee is whether the forced removal 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.

8.3 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 in the country. However, the Committee recalls that the aim of such evaluation 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 would be personally at risk. 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.<sup>13</sup>

8.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, 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), the Committee recalls 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.<sup>14</sup> The Committee further recalls that it gives considerable weight to findings of fact that are made by organs of the State party concerned. However, under the terms of its general comment No. 1, the Committee is not bound by such findings and instead has the power, under article 22 (4) of the Convention, to freely assess the facts based upon the full set of circumstances in every case (para. 9).<sup>15</sup>

8.5 The Committee notes the complainant's claim that his forcible removal to Sri Lanka would amount to a violation of his rights under article 3 of the Convention as he would be exposed to the risk of being detained and tortured by the Sri Lankan authorities owing to the fact that his brother was an LTTE member; he was in contact with Tamil Congress members in Australia; and his status as a failed asylum seeker of Tamil ethnicity.

8.6 The Committee also notes the State party's submission that, in the present case, the complainant did not provide credible evidence and failed to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if he is returned to Sri Lanka and that his claims were reviewed by the competent domestic authorities in accordance with domestic legislation and taking into account the current human rights situation in Sri Lanka.

<sup>13</sup> See communication No. 550/2013, *S.K. and others v. Sweden*, decision adopted on 8 May 2015, para. 7.3.

<sup>14</sup> See *A.R. v. Netherlands*, para. 7.3.

<sup>15</sup> See communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

8.7 In this regard, the Committee notes the State party's submission that the complainant has not provided any objective evidence to substantiate his claims nor any relevant new evidence in his submissions to the Committee that had not already been considered by the State party's administrative and judicial procedures, in particular, with respect to the complainant's claims that: after leaving school in 1998 at the age of 10, because attendance was too dangerous, he spent the next six years living with family and friends in Colombo; he was subjected to frequent security checks by the military at his place of employment in Colombo; he was abducted by five men in a white van, beaten and interrogated regarding LTTE involvement and released on the same day, then spent three months in the hospital; he was threatened by five men when he refused to attend a pro-Government rally; and he subsequently fled out of fear. The Committee also notes the State party's submission that the complainant's description of the events lacked detail; he provided little information about his assailants and the injuries sustained; and he did not produce any hospital records or other proof of that incident nor details of where he stayed after fleeing the family home.

8.8 The Committee further notes the State party's submission concerning the lack of credibility of the complainant's statements owing to inconsistencies in his testimony, including with regard to the date on which he was abducted by five men in a white van and the description of the visit by the five men who wanted him to attend a pro-Government rally.

8.9 The Committee notes the State party's observations that if the Sri Lankan authorities believed that the complainant was involved with LTTE in April 2007, it would be difficult to understand that they issued him a passport three months later in July 2007; that none of his family was ever questioned about LTTE involvement, notwithstanding the complainant claim's that he was imputed with having pro-LTTE political opinions by virtue of his brother's involvement with LTTE; and that the complainant was not arrested or detained after the abduction incident in his village or while working in Colombo during the years when the conflict was in progress or subsequently.

8.10 Regarding the complainant's claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a failed asylum seeker of Tamil ethnicity, the Committee, while not underestimating the concerns that may be legitimately expressed with respect to the current human rights situation in Sri Lanka and treatment of, inter alia, failed asylum seekers from overseas, recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that the individual runs a personal risk of torture.<sup>16</sup> The Committee observes that the 2012 UNHCR Eligibility Guidelines no longer refer to a presumption of eligibility for protection of Sri Lankans simply on the grounds that they are Tamils originating from the north of the country, even though it does caution that a merits-based assessment, taking into account individual circumstances, is still warranted and that Tamil ethnicity and place of origin may still be factors increasing the vulnerability of persons within other risk profiles whose protection claims warrant particularly close attention.

8.11 In this context, the Committee refers to its concluding observations on the combined third and fourth periodic reports of Sri Lanka, in which it expressed serious concern about reports suggesting that torture and ill-treatment perpetrated by State actors in Sri Lanka, both the military and the police, had continued in many parts of the country after the conflict with LTTE had ended in May 2009.<sup>17</sup> The Committee also refers to the preliminary

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<sup>16</sup> See communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

<sup>17</sup> See CAT/C/LAK/CO/3-4, para. 6.

observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment on the official joint visit to Sri Lanka, with the Special Rapporteur on the independence of judges and lawyers, from 29 April to 7 May 2016, in which it is noted that “torture is a common practice” and the “current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General’s Office and judiciary perpetuate the real risk that the practice of torture will continue”.<sup>18</sup> The Committee also takes note of credible reports published by NGOs concerning the treatment by the Sri Lankan authorities of individuals returned to Sri Lanka.<sup>19</sup> The Committee considers that all of the above-mentioned reports show that Sri Lankans of Tamil ethnicity with a prior personal or familial connection to LTTE and facing forcible return to Sri Lanka may face a risk of torture.<sup>20</sup>

8.12 The Committee also notes that the existence of a general risk of violence in a country does not constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country and that additional grounds must exist to show the individual concerned would be personally at risk. In the Committee’s opinion, the complainant has not established the existence of additional grounds to show that he would be at a foreseeable, real and personal risk of torture if returned to Sri Lanka. The issues relating to human rights violations of returned asylum seekers were also considered by all the Australian processes, including the protection visa assessment by the Department of Immigration and Border Protection and the independent merits review by the Refugee Review Tribunal. The Committee notes that the State party’s authorities, in their assessment of the complainant’s asylum application, 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.

8.13 The Committee further notes the State party’s submission that the complainant did not substantiate his claim regarding his activities in Australia. According to the file, the State party sought to verify the claims, but considered them not credible in that the complainant did not explain how or why his contacts with members of the Tamil Congress would put him at risk of torture. The issue of the complainant’s Tamil ethnicity and alleged links with LTTE were also thoroughly assessed. Both the Department of Immigration and Border Protection that carried out the protection visa assessment and the Refugee Review Tribunal found that the author did not have any form of connection to LTTE nor was he suspected of such links nor was he a criminal suspect. The complainant also did not substantiate his claim that detention in Sri Lanka would constitute degrading treatment, which would not in itself suffice to establish that a forcible removal of the complainant would entail a violation of his rights under article 3 of the Convention.

<sup>18</sup> Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez, on the official joint visit to Sri Lanka, 29 April to 7 May 2016 (Colombo, 7 May 2016).

<sup>19</sup> See Edmund Rice Centre, “Australian sponsored torture in Sri Lanka? The unforeseen consequences of supporting a brutal regime to stop the boats at any cost”, 12 August 2015, available from [http://erc.me/index.php?module=documents&JAS\\_DocumentManager\\_op=downloadFile&JAS\\_File\\_id=522](http://erc.me/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=522); Amnesty International, “Sri Lankan asylum seekers tortured after being forcibly returned from Australia”, 3 September 2010, available at: [www.amnesty.org.au/news/comments/23625](http://www.amnesty.org.au/news/comments/23625); and Human Rights Watch, “UK: Suspend deportations of Tamils to Sri Lanka”, 29 May 2012, available at [www.hrw.org/print/news/2012/05/29/uk-suspend-deportations-tamils-sri-lanka](http://www.hrw.org/print/news/2012/05/29/uk-suspend-deportations-tamils-sri-lanka).

<sup>20</sup> See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

8.14 The Committee recalls its general comment No. 1, according to which the burden of presenting an arguable case lies with the complainant (para. 5). In the Committee's opinion, in the present case, the complainant has not discharged this burden of proof.<sup>21</sup> Furthermore, the complainant has not demonstrated that the State party's authorities failed to conduct a proper investigation into his allegations.<sup>22</sup>

9. Consequently, the Committee considers that the evidence and circumstances invoked by the complainant do not constitute sufficient grounds for believing that he would run a real, foreseeable, personal and present risk of being subjected to torture upon return to Sri Lanka.<sup>23</sup> The Committee thus considers that the material on file does not enable it to conclude that the return of the author would constitute a violation of article 3 of the Convention.

10. In the light of the foregoing, 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>21</sup> See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.

<sup>22</sup> See communication No. 571/2013, *M.S. v. Denmark*, decision adopted on 10 August 2015, para. 7.9.

<sup>23</sup> *Ibid.*, para. 8.