

## COMMITTEE AGAINST TORTURE

### S. V. v. Canada

Communication No. 49/1996

15 May 2001

### VIEWS

*Submitted by: S. V. et al. (names withheld)  
[represented by counsel]*

*Alleged victim: The authors*

*State party: Canada*

*Date of communication: 15 May 1996*

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

Meeting on 15 May 2001,

Having concluded its consideration of communication No. 49/1996, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts its Views under article 22, paragraph 7, of the Convention.

1. The authors of the communication are Mr. S.V., his wife and daughter, citizens of Sri Lanka currently seeking refugee status in Canada. They claim that forcible return to Sri Lanka would constitute a violation of articles 3 and 16 of the Convention against Torture by Canada. They are represented by counsel.

1.2 On 12 June 1996 the Committee forwarded the communication to the State party for comments and requested it not to expel the authors while their communication was under consideration by the Committee.

### **The facts as submitted by the authors**

2.1 The author is a Tamil from the area of Jaffna in the north of Sri Lanka. He and his wife M have two children, an 8-year-old daughter and a 2-year-old son who was born in Canada and is a Canadian citizen. The authors claim that in the period from 1987 until their departure from Sri Lanka in 1992 they, and especially the author, suffered serious persecution from the Indian

Peacekeeping Force (IPKF), the Liberation Tigers of Tamil Elam (LTTE), the Sri Lankan Army (SLA) and the Colombo police. The author was arrested on several occasions and, in the course of at least two of them, he was tortured by the army and the police.

2.2 The author was a member of the Tamil United Liberation Front (TULF), which advocated the establishment of an autonomous Tamil state in Sri Lanka by peaceful means. In October 1987, a military conflict broke out between LTTE and IPKF. The author and his wife were forced to vacate their home, in Thirunelvely, Jaffna, to escape the bombing. When they returned to their home, they found that it had been occupied by IPKF members. When the author asked them to leave, they refused and accused him of being a member of LTTE.

2.3 In May 1988, the author was detained in a camp established on his own property by the Eelam People's Revolutionary Liberation Front, a militant Tamil group allied to IPKF. He was detained for 10 days, during which he was repeatedly assaulted and questioned about possible connections to LTTE.

2.4 In 1990, LTTE took control of the Tamil region. The author's property was appropriated by LTTE and he himself was threatened at gunpoint when he demanded that they vacate the property. He was then forced to abandon his home permanently and the family moved to Kaithady, Jaffna.

2.5 In December 1990, while travelling from Colombo to Jaffna, the author was detained by SLA in Vavuniya. He was questioned, accused of being a member of LTTE and brutally assaulted. Three days later he was beaten again in an attempt to extract a confession. His head was banged repeatedly against a wall until he fell unconscious. The authors claim that, as a result of this incident, the author suffered brain damage that has gravely impaired his ability to speak. Following this incident, the author went to Colombo seeking medical treatment.

2.6 In March 1991, after the assassination of the Sri Lankan Deputy Minister of Defence, the police began a round-up of all Tamil males in Colombo. The author, who had been staying with his cousin in Colombo, was arrested by four armed police officers on 4 March 1991. He was interrogated about his presence in Colombo and accused of being an LTTE member. He was repeatedly assaulted by the police with hands and rifle butts and stayed in detention for two days. He was released after the intervention of a lawyer retained by his cousin. His cousin advised the author that he could no longer reside with him as he feared further trouble with the police. The author returned to Jaffna.

2.7 On 18 February 1992, LTTE attempted to force the author to join the movement. When he refused, they ordered him to report to their office the next day. Should he fail to report, he was told that he would be considered an enemy of the Tamil people. The author understood this statement as a threat to kill him and fled for Colombo that evening.

2.8 On 3 March 1992, the lodge in which he was staying in Colombo was raided by the police and the author, along with other Tamil males, were arrested. He was taken to Wellawatte police station and questioned about his reasons for being in Colombo and his connections with LTTE. He was released the following day on condition that he report weekly to the police and not change his address in Colombo.

2.9 Henceforth, the author feared that he could at any time be arrested, interrogated and tortured on suspicion that he was a member of LTTE. He decided that his safety was no longer assured anywhere in Sri Lanka. He left for Canada on 13 March 1992 and arrived the following May.<sup>1</sup> He claimed Convention refugee status on the basis of persecution owing to his race, his political opinions and his membership in a particular social group.

2.10 The author's wife states that she was visited on several occasions in Jaffna by LTTE

members looking for her husband. An LTTE member demanded that she pay 200,000 rupees as punishment for her husband's disobedience, giving her one month in which to come up with the money. As a result she fled with her daughter to Colombo. In Colombo she had to register with the police and her identity card was confiscated. She was accused of being an LTTE supporter. In August 1992, after a police round-up of Tamils, she decided that there was no safe place for herself and her daughter in Sri Lanka and she left for Canada in September 1992. Upon her arrival she claimed refugee status for herself and her daughter.

2.11 The Immigration and Refugee Board, after a hearing on 4 March 1993, found that the authors could not be accorded refugee status. First, the extortion activities of LTTE did not constitute persecution but rather harassment not causing undue hardship. Secondly, the authors had in Colombo an internal flight alternative; the Board found that there was no serious possibility of the author being persecuted in Colombo and therefore, it was not unreasonable that he could find refuge in that city.

2.12 By decision, dated 7 January 1994, the Federal Court Trial Division dismissed the family's application for leave to apply for judicial review in which they alleged errors of fact and of law in the Refugee Board's decision.

2.13 On 28 January 1994, the authors applied for a review by Canadian Immigration, under the Post-Determination Refugee Claimant in Canada programme (PDRCC), of the decision not to grant the authors refugee status. The purpose of PDRCC review is to identify individuals who, although determined not to be Convention refugees, face an objectively identifiable risk to life or inhumane treatment should they be returned to their country of origin.

2.14 The authors' application for PDRCC review was rejected on 9 November 1995. It was the view of the PDRCC officer that, although there were strong grounds for the authors' fearing to return to the north of Sri Lanka, an internal flight alternative existed in Colombo. He noted in particular that the assault by SLA which caused the author's medical problems had occurred near Jaffna. The arrests by the Colombo police were part of a pattern of general harassment of Tamils by the police which he felt did not constitute an "objectively identifiable risk", given that most detainees were released within three days though some had been required to pay bribes to obtain their release. He also indicated that part of the authors' extended family lived in Colombo and could facilitate their successful settlement in the city. In addition, the medical report indicating that the author suffered post-traumatic stress disorder which might be aggravated if he were to return to Sri Lanka had only been made on the basis of one visit to a doctor rather than in the context of ongoing treatment and was not specific concerning the conditions that could trigger recurrence of the trauma.

2.15 The authors made a further appeal on 13 May 1995 to the Minister of Immigration based on the Humanitarian and Compassionate Grounds procedure under section 114 (2) of the Immigration Act. On 9 December 1996 a negative decision was issued. An application for leave to apply for judicial review against that decision was dismissed by the Federal Court on 11 April 1997.

## **The complaint**

3.1 The authors fear persecution and ill-treatment from the authorities in Sri Lanka given their past experiences and their absence from the country since 1992. They submit that in repatriating them Canada would violate article 3 of the Convention against Torture.

3.2 The authors provide medical evidence that the mental and physical injuries suffered by the author while in detention have had drastic long-term effects. He has difficulties in speaking and moving his neck and suffers symptoms of post-traumatic stress disorder (psychiatric medical reports are provided). They submit that, given these afflictions, the author would be particularly vulnerable to mistreatment and, further, would not receive the medical care he needs in Sri Lanka.

3.3 The authors further explain that their daughter, Nitarsha, is physically and mentally handicapped, suffering from cerebral palsy, right hemiparesis and an active seizure disorder. She requires special care, treatment and education. She would not receive those in Sri Lanka.

3.4 The authors submit that, given these medical conditions, the deportation of the family would amount to inhuman and degrading treatment on the part of the Canadian authorities in violation of article 16 of the Convention against Torture.

### **Observations by the State party on admissibility**

4.1 By a note dated 9 June 1997 the State party contested the admissibility of the communication. It indicated that the authors did not seek judicial review of the decision of PDRCC and that this remedy might still be available if time for filing were extended by the Court. Moreover, if the authors were to succeed in an application for leave to apply for judicial review, the decision of the Federal Court Trial Division on the judicial review application could be further appealed to the Federal Court of Appeal, should the judge of the Trial Division certify that the case raises a serious question of general importance. Moreover, a decision of the Federal Court of Appeal could be appealed, with leave, to the Supreme Court of Canada.

4.2 On judicial review, the authors would be entitled to raise arguments under the Canadian Charter of Rights and Freedoms. In this regard, it is relevant to note that in the context of extradition the Supreme Court of Canada has held that section 7 of the Charter is violated by returning someone to a country in circumstances that would “shock the conscience of Canadians”.

### **Counsel’s comments on admissibility**

5.1 In his reply, dated 28 April 1998, counsel indicated that the authors had applied for judicial review of the decision adopted by the Immigration and Refugee Board. However, leave to be heard on this question was refused by the Federal Court. There is no possibility of appealing that decision. It is the final step in the refugee determination procedure in which there is a judicial or quasi-judicial process that looks into the substance of the matter; all subsequent judicial controls look only into the procedures.

5.2 The post-determination review in November 1995 was negative. This procedure has been criticised by refugees, lawyers and church groups because it never results in a positive decision.

5.3 The only unresolved issue that is addressed by the State party is whether the refusal of PDRCC should have occasioned a request for judicial review by the Federal Court and whether this recourse can still be resorted to. Counsel pointed out that judicial review of the PDRCC procedure was not sought because of the lack of financial resources of the applicants and the futility of it. The jurisprudence of the Federal Court clearly establishes that the decision of the post-determination claims officer is an entirely discretionary decision and that the Court is only concerned with the procedural issues.

5.4 Instead of a request for judicial review, an appeal on humanitarian grounds covering the same questions in law was made. The issue of the post-traumatic stress was fully presented, as was the danger of return. The torture was fully documented and the immigration officer judged the story to be credible but refused to grant asylum because of the internal flight alternative.

5.5 The refusal of the appeal on humanitarian grounds was challenged in the Federal Court and leave was denied. According to the Court’s constant jurisprudence, decisions like the one under review are discretionary and, therefore, the Court does not intervene on the substance of the cases,

only on whether the procedures have been fair. All legal arguments were considered and disposed of by the Federal Court.

5.6 Counsel stated that it is objectively impossible to ask the Federal Court to litigate again on exactly the same questions. The Court would clearly consider that an abuse of the process.

5.7 The Canadian authorities concluded that the authors were at risk in the Jaffna peninsula, but that Colombo could be a safe haven for them. Counsel noted, however, that the author was severely mistreated by the police in Colombo in March 1991, that he was arrested arbitrarily in March 1992 and that there is a consistent pattern of arbitrary arrests, detention, and sometimes disappearances and extra-judicial executions of Tamils in Colombo.

5.8 The conclusion of the immigration officer in the humanitarian and compassionate review procedure was that risks were involved. He based his conclusion on the report of one of the doctors who examined the author according to which the latter suffers from post-traumatic stress disorder and his symptoms have increased as he is worried about being returned to Sri Lanka. In the doctor's opinion, the author would have great difficulty functioning in that country because of his neurological difficulties. In spite of this, application was refused on the grounds of "medical inadmissibility" that the authors had not shown that they had established themselves economically in Canada. The family has been living on social assistance since their arrival in Canada and, given their circumstances, they might become a chronic welfare case.

5.9 In the medical report referred to by the immigration officer the doctor also indicates that some Tamil refugees he had examined stated that they were at greater risk in Sri Lanka if they had scars or signs of injury, as these could be regarded by the authorities as an indication that their injuries occurred while fighting with LTTE. The author's neurological limitations could be regarded as having been caused in this manner. If he were questioned by the authorities in Sri Lanka he would not be able to express himself verbally and someone who was unaware of his neurological limitations could regard this as being obstructive or antagonistic.

5.10 Counsel argued that neither the Government of Canada nor the Office of the United Nations High Commissioner for Refugees (UNHCR) evaluated the objective risk for the individuals in this particular case but only considered the question of deportations to Sri Lanka in general.

5.11 Counsel contended that returning a person who suffers from serious physical and mental damage as a result of human rights abuses to the country where he was subjected to those abuses constitutes inhuman treatment. The lack of medical care or proper psychiatric assistance in Sri Lanka could per se constitute a violation of article 16 of the Convention. Counsel, however, raised this as a circumstance aggravating the inhuman treatment involved in the deportation.

### **Committee's decision on admissibility**

6.1 At its twentieth session, the Committee considered the admissibility of the communication. The Committee was of the opinion that once the Humanitarian and Compassionate Grounds procedure, including a leave application addressed to the Federal Court, was completed, all available domestic remedies had been exhausted. Accordingly, article 22, paragraph 5 (b), did not prevent it from considering the communication. The Committee considered that there was no other obstacle to the admissibility of the communication. It therefore decided that the communication was admissible.

### **Observations of the State party on the merits of the communication**

7.1 According to the State party, the facts as presented by the authors were examined by a competent and independent domestic tribunal following a fair process, in accordance with Canada's refugee determination procedure. The State party also notes that the authors were represented by counsel during the course of the proceedings, interpretation was provided and the author's viva voce testimony was elicited.

7.2 It was the view of the Refugee Board that the central issue with respect to the author's situation is that he was released by the police. This clearly indicates that the author was not considered an LTTE member or sympathizer by the very authorities he fears. The Board stated in its reasons that it considered the authors' allegations concerning the beatings received at the hands of the Sri Lankan army and the medical reports he filed with the Board. However, the Board noted that the definition of "Convention refugee" is forward-looking and past experiences, though relevant, are not determinative in the assessment. It states that this is also true of article 3 of the Convention against Torture.

7.3 Regarding the author's wife and child, the Board determined that they were not Convention refugees as they did not have problems when they were in Colombo. Furthermore, as their claims were joined with and dependent upon the author's claim, the Board determined that they were not Convention refugees.

7.4 With respect to the authors' application to PDRCC, the State party explains that, in most cases, the Convention refugee definition will overlap with article 3 of the Convention against Torture. In circumstances where there is no overlap, officials conducting the post-determination review must give consideration to article 3 of the Convention. In accordance with the criteria for these reviews, the post-determination officer reviewed the authors' written submissions prepared on their behalf by their lawyer, the documentation they attached and documentation on the situation in Sri Lanka. The submissions included evidence not produced at the time of the hearing before the Refugee Board, notably a medical report and a 1994 report by Amnesty International.<sup>ii</sup>

7.5 Regarding the humanitarian and compassionate review of the case under section 114 (2) of the Immigration Act, the State party contends that the reviewing officer took into account all the submissions of the applicants and a wide range of circumstances, including the risk of unduly harsh or inhumane treatment in the country of return, current conditions in the country and new developments in Sri Lanka since the hearing before the Refugee Board and the PDRCC review. The immigration officer indicated that "risks were involved"<sup>iii</sup> but did not confirm that torture was one of them. The risk assessment is not limited to the risk of torture.<sup>iv</sup>

7.6 According to the State party, the above-mentioned national proceedings demonstrate no manifest error or unreasonableness and were not tainted by abuses of process, bad faith, manifest bias or serious irregularities. It also states that it is not for the Committee to evaluate the facts and evidence of a particular case.

7.7 In the State party's view, the communication reveals that the authors of the communication left their country because they feared LTTE or because they feared being caught between LTTE and the governmental authorities. Such fear does not suffice to substantiate a communication under the Convention. The authors also state in their submission - and this is confirmed in the medical report - that they feared torture at the hands of LTTE if they are returned to Sri Lanka. The author himself claimed that it was the order to join LTTE that prompted him to leave for Colombo in 1992. Consequently, the State party argues that, in the north of the country, the authors do not fear the Sri Lankan authorities but LTTE.

7.8 The State party submits that acts committed by LTTE do not fall under the competence of the Committee since the definition of "torture" in the Convention refers expressly to acts committed "by or at the instigation of or with the consent or acquiescence of a public official or other person

acting in an official capacity”. Acts committed by LTTE cannot be attributed to the State and therefore are not covered by the Convention.

7.9 As to the alleged risk of torture at the hands of the State, the State party submits that the authors of the communication have not established substantial grounds to believe that, if the authors were deported to Sri Lanka, there is a personal, present or foreseeable risk of torture. It states that the authorities are not interested in the authors and makes the following points in this regard:

Although the author claimed, before the Refugee Board, to be an ardent supporter of TULF, he never indicated that he was a member of this movement or had been involved in political activities. In any event, TULF is now represented in Parliament and supports peace initiatives taken by the Government;

In his refugee application, the author claimed that he chose Canada because he was unable to go anywhere else. However, his Personal History Form, completed by him on his arrival into Canada, shows that he travelled to many different countries and for long periods, returning voluntarily to his country each time, even after the incidents in which he alleges that he had problems with the authorities. In particular, almost one year after his alleged torture by the army in December 1990, the author left his country for Singapore and returned voluntarily to Sri Lanka;

The author travelled many times to Colombo and had no problems with the authorities except in March 1991 and March 1992. This establishes that the author is not suspected of complicity with LTTE;

While the author claimed that he was tortured by the authorities when arrested in December 1990, March 1991 and March 1992 he has not provided any evidence to indicate that any pain suffered in March 1991 amounted to torture as defined by the Convention. Also, when last arrested in 1992, the event which is alleged to have prompted him to leave the country, the author was not beaten and was released the next day with the only obligation being to report to the authorities once a week;

As to the author’s physical condition, his wife stated that, apart from a longer period of questioning because of his speech difficulties, her husband had no other problem with the police when he was in Colombo. The author himself stated that the police were able to understand him when he spoke with them;

As to the argument that the author would face torture because of his speech difficulties, the State party argues that this is mere conjecture and is based on the medical report which states that “(s)ome Tamil refugees, whom I have examined, have indicated that they believe that they are at risk in Sri Lanka if they have scars or signs of injury as these could be regarded by the authorities as an indication that their injuries had occurred while fighting with the LTTE”. Such beliefs cannot constitute substantial grounds required by article 3 of the Convention;

The author’s wife has not herself been arrested by the authorities and she had no problem with the police in Sri Lanka. Therefore, there is a total lack of evidence that she was accused or suspected of being an LTTE supporter;

Contrary to the author’s wife’s claim, there is no evidence that her identity card was taken away by the Sri Lanka authorities. In any event, she was not arrested, detained, accused or asked to make any subsequent reports to the police;

In 1991, the author, and in 1992, his wife, legally obtained passports in Sri Lanka;

The authors have not claimed that persons in their immediate circle, notably family members, were arrested or tortured.

7.10 The State party refers to decisions of the Committee where the authors have failed to show that the danger is personal and present.<sup>v</sup> The State party also refers to a case decided by the European Court of Human Rights involving the removal of Sri Lankans. In that case the allegation of a violation of article 3 of the European Convention on Human Rights was dismissed as the plaintiffs did not establish that their personal position was any worse than that of other members of the Tamil community who were returning to their country. The mere possibility of ill-treatment was not in itself sufficient to foresee that they would be subjected to ill-treatment following their return.<sup>vi</sup>

7.11 The State party submits that the communication rests mainly on the general situation of human rights in Sri Lanka. The authors do not link that general situation to their personal situation. As to the general situation in Sri Lanka, the report of the Working Group on Enforced or Involuntary Disappearances (1998) indicates that persons most often reported detained and missing were young Tamil men accused or suspected of belonging to, collaborating with, aiding or sympathizing with LTTE. The State party argues that the authors do not fall into this category.

7.12 Furthermore, it states that the information provided by UNHCR indicates that torture and other forms of mistreatment are not practised by the police and security authorities in Colombo. The United States Department of State Country Report for 1998 (dated February 1999) indicates that there were no reports of disappearances in Colombo and Jaffna. In March 1997, UNHCR reported that rejected asylum-seekers who arrived with national travel documents should have no problems when arriving at Colombo airport.

7.13 Moreover, the State party argues that in its assessment of the communication, the Committee should take into consideration the different measures taken by the Sri Lankan authorities to investigate and prevent acts of torture, as well as remedies available to the authors. In this context, the State party notes that, *inter alia*, all arrests and detentions must be reported to the Human Rights Commission (established in 1997) within 48 hours, the reports of three presidential commissions of inquiry into past disappearances have been made public, investigations into 485 of the 3,861 cases of alleged human rights violations have been completed and 150 alleged perpetrators charged in the High Court, and a 24-hour service to deal with public complaints of instances of harassment by elements in the security forces has been established by the Government.

7.14 With respect to the alleged violation of article 16 of the Convention, the State party argues that this article obliges States parties to apply the obligations contained in articles 10 to 13 to acts of cruel, inhuman or degrading treatment or punishment. As article 16 does not mention article 3, it does not create an obligation not to remove someone from a State in the circumstances described in that article.<sup>vii</sup>

7.15 The State party is of the view that should article 16 of the Convention be found to apply where it is alleged that removal per se constitutes cruel, inhuman or degrading treatment or punishment, it should do so only in very exceptional circumstances. It is submitted that the aggravation of the author's state of health possibly caused by his deportation would not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention and attributable to the State party; reference is made in this regard to the Committee's decision in G.R.B. v. Sweden. Furthermore, article 16 of the Convention obliges States to prevent the proscribed treatment; it does not create a positive duty to provide medical care should the authors allegedly not receive comparable medical care in their home country. Further, it is submitted that there is no evidence that the required medical care in Sri Lanka is inadequate. Finally, article 16, paragraph 2, indicates that the provisions of the Convention are without prejudice to the provisions of national law which relate to expulsion.

## **Counsel's comments on the merits**

8.1 Counsel contests the State party's assertion that this case was examined by "a competent and independent domestic tribunal". He claims that the Immigration and Refugee Board failed to appreciate both the facts of the case and the applicable law.

8.2 Counsel states that the most recent evidence available from Sri Lanka shows a situation of terrible human rights abuses in line with those described in article 3, paragraph 2, of the Convention against Torture. There have been several suicide bomb attacks in Colombo and other areas of the country. There has also been a major LTTE offensive in the north. There are reports of large-scale round-ups of Tamils in the centre and the capital of the country, as well as a serious resurgence of forced disappearances.<sup>viii</sup>

8.3 Counsel refers to the Committee's general comment on article 3 of the Convention against Torture and argues that article 3 applies to the author's case as follows.

(a) There is a situation in Sri Lanka of a "consistent pattern of gross, flagrant or mass violations of human rights". The existence of torture with impunity, on a massive and systematic scale, is clear from any reading of the situation;

(b) The author has been mistreated in the past by agents of the Sri Lankan State. He has brain damage because of severe mistreatment by soldiers of the Sri Lankan army. He has been detained on more than one occasion in Colombo and mistreated by the police. This happened shortly before he left Colombo;

(c) There is independent medical and psychiatric evidence from doctors and psychiatrists associated with the Canadian Centre for Victims of Torture that establishes clearly that he is a torture victim. The torture has had a long-lasting effect on the author and his family;

(d) There is no substantive change in the situation in Sri Lanka since the author left the country. The situation at the time of counsel's submission is said to have been very serious and dangerous. A high level of repression and the legal arsenal that permits almost total impunity are firmly in place;

(e) The author was a supporter of the main Tamil party, TULF. He is from the north and he has suffered torture in the past. His situation as a torture victim in the past puts him greatly at risk today;

(f) The author is highly credible, with strong support from serious organizations in Canada. The original decision did not find against him on the issue of credibility;

(g) There is nothing incoherent or implausible about what the author says. His personal security and his life are at risk in Sri Lanka today.

8.4 Counsel also contests the assertion that the authors' main fear is of the Tamil Tigers. Counsel contends that the jurisprudence cited by the Canadian authorities appears to relate to cases that were not substantiated or where the author in question was not previously subjected to torture or directly targeted.

8.5 Counsel states that it is untrue to say that there is no longer torture in Colombo. All of the international human rights reports that are available state the contrary. Even the Federal Court of Canada recognized, in its decision granting the stay, that there is a risk of irreparable harm for the author if he were sent back, as did the immigration agent examining his case.

## Issues and proceedings before the Committee

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

9.2 The issue before the Committee is whether or not the forced return of the authors to Sri Lanka would violate the obligation of Canada under article 3 of the Convention not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

9.3 In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individuals concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

9.4 The Committee recalls its general comment on the implementation of article 3, which reads:

“Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (A/53/44, annex IX, para. 6).

9.5 The Committee recalls that the State party’s obligation to refrain from forcibly returning 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 is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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”. The Committee considers that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention. Consequently, the issue, on which the authors base part of their claim that they would suffer torture by LTTE or other non-governmental entities on return to Sri Lanka, cannot be considered by the Committee.

9.6 With respect to the possibility of the author suffering torture at the hands of the State on return to Sri Lanka, the Committee notes the author’s allegations that he was tortured by the Sri Lankan army in December 1990 and that this treatment, which left him disabled, amounted to torture in terms of article 3 of the Convention. It also notes the allegations that he was maltreated by the police in Colombo in 1991. However, the Committee also notes the State party’s contention, unchallenged by the author, that he left Sri Lanka regularly and always returned, even after the

incident in December 1990. The Committee notes that with respect to the incident in March 1992, which according to the author was the reason for his departure, he was not maltreated and was released by the authorities. Furthermore, the author has not indicated that since that period he has been sought by the authorities. In fact, the author has not alleged to have been engaged in political or other activity within or outside the State, or alleged any other circumstance which would appear to make him particularly vulnerable to the risk of being placed in danger of torture. For the above-mentioned reasons, the Committee finds that the author has not provided substantial grounds for believing that he would be in danger of being tortured were he to be returned to Sri Lanka and that such danger is personal and present.

9.7 Similarly, the author's wife and their daughter have never been arrested or subjected to torture. The obligation to register at the police station at Colombo and the allegation, challenged by the State party, that the police took her identity card are not substantial grounds for believing that they would be in danger of being subjected to torture were they to be returned to Sri Lanka and that such danger is personal and present.

9.8 The Committee recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In light of the foregoing, the Committee deems that such a risk has not been established by the authors. Moreover, the Committee observes that article 3 applies only to situations of torture as defined in article 1 of the Convention.

9.9 With regard to the authors' allegation that the decision to expel them would in itself constitute an act of cruel, inhuman or degrading treatment or punishment in contravention of article 16 of the Convention, the Committee notes that the authors have not submitted sufficient evidence in substantiation of this claim.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the authors' removal to Sri Lanka by the State party would not constitute a breach of article 3 or article 16 of the Convention.

## Notes

<sup>i</sup> According to the State party, the author went first to Malaysia, where he stayed until 16 May 1992, then to Singapore on 16 May 1992 and finally arrived in Canada on 19 May 1992. The author did not claim protection in either of the first two countries.

<sup>ii</sup> The State party provides an explanation of this procedure in its PDRCC Guidelines.

<sup>iii</sup> The State party does not say what the specific risks were in relation to this case.

<sup>iv</sup> The State party has provided the text "Immigration Applications in Canada made on Humanitarian or Compassionate (H&C) Grounds", which describes this procedure in detail.

<sup>v</sup> X v. The Netherlands (036/1995), J.U.A. v. Switzerland (100/1997), H.D. v. Switzerland (112/1998), S.M.R. and M.M.R. v. Switzerland (103/1998).

<sup>vi</sup> The State party does not provide the name or the registration number of this case.

<sup>vii</sup> Travaux préparatoires of the Convention.

<sup>viii</sup> Reports of Amnesty International and other organizations are provided by counsel in support of this argument.