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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. 713/2015*, **

Communication submitted by:	Y.R. (represented by counsel)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	27 October 2015 (initial submission)
Date of adoption of decision:	3 August 2017
Subject matter:	Deportation to Sri Lanka
Substantive issue:	Non-refoulement; torture prevention
Procedural issue:	Lack of substantiation
Articles of the Convention:	3 and 22

1.1 The complainant is Y.R., a Sri Lankan national of Tamil origin, born in 1989 in Sri Lanka. He sought asylum in Australia but his application was rejected and he risks deportation to Sri Lanka. He claims that his deportation would put him at the risk of torture by Sri Lankan authorities and would constitute a violation by Australia of article 3 of the Convention.

1.2 On 12 November 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant to Sri Lanka while the complaint was being considered. On 19 June 2017, the request for interim measures was lifted.

The facts as presented by the complainant

2.1 The complainant was born in Valachchenai, Sri Lanka, in 1989. Between 1997 and 2001, the complainant's family home was taken by the Sri Lanka Army. On an unspecified date, his father went to Saudi Arabia to work. His mother managed to get back their home in 2001. After that, army officers started harassing the complainant on his way to and from school. On several occasions, on unspecified dates, the complainant was detained at checkpoints and beaten with sticks. In 2002, when the complainant and his family were visiting a relative, their home was burnt by the Sri Lanka Army. After that, the complainant and his family became supporters of Tamil National Alliance. His mother is a member of the temple committee in their locality. The complainant supported the Alliance in the

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

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

parliamentary election campaign in April 2010 by addressing the meetings, distributing leaflets and pamphlets and generally promoting the Alliance. While studying for a Bachelor's degree in political science, the complainant was continuously harassed by the paramilitary groups Tamil Makkal Viduthalai Pulikal (TMVP) and Eelam People's Democratic Party (EPDP). They threatened that if he did not join them, he would be abducted by a "white van". The complainant was forced to quit his studies. On 15 April 2012 and 1 May 2012, groups of unknown men came in a white van to the family house, calling for the complainant and his brother. The complainant fled through the back door. On 2 May 2012, the complainant filed a written report with the police, but no investigation took place. The complainant left the country after the second incident.

2.2 On 18 May 2012, the complainant arrived in Australia and was detained at Christmas Island. On 23 August 2012, he applied for a protection visa claiming that the lack of security in Sri Lanka for young Tamils, in general, and from the white vans, and his refusal to join the paramilitary groups would result in his being harassed and possibly killed, that he would be in danger owing to the long-standing dispute with the Sri Lanka Army over their occupation of his family home between 1997 and 2001, and that he was a member of a particular social group — a failed asylum seeker who had left the country illegally. He claimed that upon return to Sri Lanka, he would be detained at the airport and tortured. The Australian Department of Immigration and Border Protection refused to grant him a protection visa on 29 October 2012. The complainant applied for a merits review to the Refugee Review Tribunal on 1 November 2012. The Tribunal upheld the Immigration Department decision on 28 June 2013. On 24 July 2014, the complainant appealed to the Federal Circuit Court for a judicial review of the Tribunal decision. The Federal Circuit Court dismissed his appeal on 28 July 2014. The complainant requested Ministerial intervention on 28 July 2014. On 15 September 2015, the Minister decided not to intervene.

The complaint

3. The complainant claims to have suffered persecution and white van abduction attempts by paramilitary groups, TMVP and EPDP (see para. 2.1 above). He claims that if returned to Sri Lanka, he would suffer torture at the hands of the Criminal Investigation Department and risk abduction by TMVP, in violation of article 3 of the Convention. He also claims that, because of his Tamil ethnicity, owing to his illegal departure from Sri Lanka and the fact that he would be a failed asylum seeker, he will be taken into custody by the Sri Lankan authorities upon arrival at Colombo Airport. Conditions in Negombo Remand Prison are well documented as cramped, unsanitary and unhygienic; the complainant claims that that alone constitutes degrading treatment, regardless of the length of time spent there on remand.

State party's observations on admissibility and the merits

4.1 On 10 May 2016, the State party submitted that the complaint should be ruled inadmissible as manifestly unfounded. However, should the Committee consider the complainant's allegations admissible, they should be dismissed as being without merit.

4.2 The State party submits that the complainant's claims before the Committee were thoroughly considered by a series of domestic decision makers. In the interview with the domestic authorities the complainant claimed that if returned to Sri Lanka, he would be arrested, interrogated, imprisoned and beaten or killed by the Sri Lanka Army, the Criminal Investigation Department, the paramilitary wing of TMVP, the police or other political groups supporting the Government of Sri Lanka in identifying supporters of the Liberation Tigers of Tamil Eelam (LTTE). He claimed that he was very likely to be detained for long periods without charge and interrogated under torture upon return to Sri Lanka.

4.3 The complainant applied for a protection visa on 23 August 2012 and was interviewed — with the assistance of a Tamil interpreter — on 28 August 2012. On 29 October 2012, the complainant's application was refused. The decision maker considered all the claims that the complainant raised in his submission to the Committee. The decision maker assessed the complainant's claims with reference to the country information on Sri Lanka and found that there was not a real risk that he would be persecuted if returned to Sri Lanka on the basis of his race, political opinion or for being a young Tamil man returning

as a failed asylum seeker. The decision maker also concluded that the complainant did not qualify for complementary protection under section 36 (2) (aa) of the Migration Act, which reflect the State party's non-refoulement obligations under the Convention.

4.4 The complainant subsequently applied to the Refugee Review Tribunal for a merits review on 1 November 2012. He was present at the Tribunal hearing, assisted by a registered migration agent and a Tamil-language interpreter and was able to make oral submissions himself and through his agent. The Tribunal had doubts about the credibility of the complainant's claims and considered some of the evidence that he presented to be vague and lacking in relevant detail. The Tribunal did not accept the complainant's claims that officers of the Criminal Investigation Department had visited his home on multiple occasions since he left Sri Lanka or that he was of any interest to the Sri Lanka Army or paramilitary groups. The Tribunal concluded that the complainant did not have an adverse profile at the time that he had left Sri Lanka nor had he been singled out for harm or otherwise threatened by paramilitary groups. The Tribunal accepted that the complainant would be charged with offences under the Immigrants and Emigrants Act (1949) and that he might be detained for a number of days before most likely being fined, as his ultimate penalty. However, based on the available country information, the Tribunal did not consider that the complainant would be detained for a prolonged period or otherwise face the risk of significant harm, including torture, upon return to Sri Lanka. On 28 June 2013, the Tribunal upheld the decision not to grant the complainant a protection visa.

4.5 On 28 July 2014, the Federal Circuit Court of Australia dismissed the complainant's application for a judicial review of the decision of the Refugee Review Tribunal, finding that the Tribunal had considered all the complainant's claims and taken into account all relevant considerations in making its decision.

4.6 On 28 July 2014, the complainant requested Ministerial intervention and put forward three new claims. He claimed that: if sent back to Sri Lanka, he would be found to have violated section 45(1) (b) of the Immigrants and Emigrants Act (illegal departure from Sri Lanka); on this basis, he would suffer cruel, inhuman or degrading treatment because he would be prosecuted and punished under that legislation; and the penalties that he would face could be harsher owing to his perceived connection to or support for LTTE. On 15 September 2015, the Assistant Minister for Immigration and Border Protection declined to exercise her power under section 417 of the Migration Act.

4.7 The State party provided clarification on the new evidence that the complainant submitted to the Committee, namely, a letter written by the complainant's neighbour in Sri Lanka, who claims to have been an eye witness to the second white van abduction attempt made on the complainant; a complaint filed by the complainant with the police on 2 May 2012 about one of the attempted white van abductions; and an extract from a report of the United Nations Office of the High Commissioner for Human Rights as evidence of white van abductions in Sri Lanka. The State party submits that the first two pieces of evidence are inconsistent with each other and that the claims that they are meant to support had been considered and dismissed by the domestic authorities; and the third evidence has nothing relating specifically to the complainant's circumstances. As such, the new pieces of evidence do not add any weight to his claims.

4.8 Regarding the statement from a Sri Lankan national who was detained and tortured after being returned from Australia, the State party observes that given the Refugee Review Tribunal's assessment of the circumstances of the complainant's case and the non-personalized nature of the information in question, this evidence does not add any weight to the complainant's claims. The State party concludes that none of the new evidence submitted by the complainant indicates that there has been any material change to the country situation since the complainant's claims were last assessed.

Complainant's comments on the State party's observations

5. In his submission of 26 May 2016, the complainant claims that the State party has not assessed what would happen to him at Colombo Airport upon his arrival, taking into account his illegal departure, nor did it assess the danger he would face when he returned to his home area, despite the fact that much of his claims relate to events that took place in his

home area when he was a student. He also argues that it is not necessary to have a high profile to risk abduction by a "white van" and refers, among others, to his submission and a testimony of a young Tamil returnee — a failed asylum seeker without a high political profile — who was detained at the airport and tortured.

Additional submissions by the parties

6. On 12 May and 8 June 2017, the State party requested the Committee to lift the interim measures.

7. The complainant submitted his comments to the State party's requests on 14 June 2017 reiterating his claim that he would be at risk of unlawful detention, torture and abduction.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint unless it has ascertained that all available domestic remedies have been exhausted. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint on this ground.

8.3 The Committee takes note of the State party's argument that the complaint should be declared inadmissible for lack of substantiation. The Committee, however, considers that the arguments before it raise substantive issues under article 3 of the Convention, which should be dealt with on the merits and not on admissibility considerations alone. As the Committee finds no further obstacles to admissibility, it declares the present complaint admissible and proceeds with its consideration of the merits.

Consideration of the merits

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 (4) of the Convention.

9.2 In the present case, the issue before the Committee is whether the return 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.

9.3 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 this context, the Committee refers to its consideration of the fifth periodic report of Sri Lanka,[1] during which it voiced serious concerns about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the police, had continued in many parts of the country after the conflict with LTTE had ended in May 2009.[2] The Committee had also expressed concern at reprisals against victims and witnesses of acts of torture and at acts of abduction and torture in unacknowledged detention facilities, and had enquired whether a prompt, impartial and effective investigation of such acts had been undertaken.[3] However, the Committee recalls that the

[1] See CAT/C/SR.1472 and 1475; and CAT/C/LKA/CO/5, paras. 9-12.

[2] See CAT/C/LKA/CO/3-4, para. 6.

[3] See CAT/C/SR.1472, paras. 36 and 42; and CAT/C/SR.1475, paras. 10 and 27.

aim of the 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 concerned would be personally at risk. [4]

9.4 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. [5] Although, under the terms of general comment No. 1, the Committee must give considerable weight to the findings of fact that are made by organs of the State party concerned, it is not bound by such findings and is free to assess the facts on the basis of the full set of circumstances in every case (para. 9).[6]

9.5 In the present case, the complainant claims that he will be detained and tortured if returned to Sri Lanka as a failed asylum seeker who left the country illegally, and that he will face the risk of torture and possibly death from paramilitary groups who persecuted him before he left the country. The Committee takes note of the State party's submission that: the complainant has failed to provide credible evidence and to substantiate that there is a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to Sri Lanka; and his claims were thoroughly reviewed by the competent domestic authorities and courts, in accordance with domestic legislation and taking into account the current human rights situation in Sri Lanka.

9.6 The Committee notes the complainant's claims that: he was harassed by the Sri Lanka Army on his way to/from school after the family had re-appropriated their house from the Army in 2001; both he and his mother were active supporters of the Tamil National Alliance; as a student, he was harassed and threatened by TMVP and EPDP regarding joining them; and there had been attempts to abduct him and his brother by unknown men who came to his family home in a white van. The Committee also notes the complainant's claims that he will be detained and tortured at the airport as a failed asylum seeker who had left the country illegally. The Committee observes that: the harassment of the complainant by the Sri Lanka Army dates back to 2005-2006 and the complainant continued to attend school; the complainant continued living in his family home until he left the country in 2012. The submission presents general claims about threats by paramilitary groups while the complainant was studying at university. The Committee further notes that the complainant's mother, a supporter of the Tamil National Alliance, continued to live in the same family home without any reported problems. His two brothers, one of whom was allegedly threatened, along with the complainant, by unknown men who had come to their house in a white van, stayed in the family home and continued their studies without any reported problems, after the complainant had left Sri Lanka.

9.7 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, the Committee, referring specifically to its concluding observations on the fifth periodic report of Sri Lanka, in which it expressed concern about, inter alia, reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the military and the police, which had continued in many parts of the country after the conflict

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

[5] See also communication 203/2003, *A.R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3.

[6] See, for example, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

with LTTE had ended in May 2009, and noting credible reports by non-governmental organizations [7] concerning the treatment of returned individuals by the Sri Lankan authorities, considers that the foregoing shows that Sri Lankans of Tamil ethnicity with a prior personal or familial connection to LTTE who are forcibly returned to Sri Lanka may face a risk of torture. [8] However, while not underestimating the concerns that may legitimately be expressed with respect to the current human rights situation in Sri Lanka, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that an individual runs a personal risk of torture.[9] The Committee also recalls that, although past events may be of relevance, the principle question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka. [10] The Committee notes that, in its assessment of the complainant's application for a protection visa, the State party's authorities 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.

9.8 In the light of the foregoing and on the basis of all the information submitted by the complainant and the State party, including on the general situation of human rights in Sri Lanka, the Committee considers that the complainant has not discharged the burden of proof[11] as he has not adequately demonstrated the existence of substantial grounds for believing that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. Although the complainant disagrees with the assessment of his claims by the State party's authorities, he has failed to demonstrate that the decision to refuse him a protection visa was clearly arbitrary or amounted to a denial of justice.

10. Consequently, the Committee considers that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

11. The Committee, acting under article 22 (7) of the Convention, decides 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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[7] See, for example, Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009*, August 2015, available at: www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf; and Yasmin Sooka, The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, Sri Lanka, *An Unfinished War, Torture and Sexual Violence in Sri Lanka 2009-2014*, March 2014, available at www.barhumanrights.org.uk/wp-content/uploads/2014/03/an_unfinihsed_war._torture_and_sexual_violence_in_sri_lanka_2009-2014_0-compressed.pdf.

[8] See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

[9] See, for example, communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

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

[11] See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5-10.6.