



**International Covenant on
Civil and Political Rights**

Distr.: Restricted*
9 May 2011

Original: English

Human Rights Committee
One hundredth and first session
14 March to 1 April 2011

Views

Communication No. 1763/2008

Submitted by: Ernest Sigman Pillai et al. (represented by counsel, Richard Goldman)

Alleged victims: Ernest Sigman Pillai, his wife Laeticia Swenthi Joachimpillai and their three children, Steffi Laettitia, Markalin Emmanuel George and Izabelle Soheyla Pillai.

State party: Canada

Date of communication: 29 February 2008 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 3 March 2008 (not issued in document form)

Date of adoption of Views: 25 March 2011

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Substantive issues:</i>	Risk of being of being detained and tortured if returned to Sri Lanka; risk of violation of the right to life; protection of minor children and right to family life.
<i>Procedural issues:</i>	Non-substantiation and non-exhaustion of domestic remedies
<i>Article of the Covenant:</i>	6, paragraph 1; 7, 9, paragraph 1, 23, paragraph 1 and 24, paragraph 1.
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (b).

On 25 March 2011, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1763/2008.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (one hundredth and first session)

concerning

Communication No. 1763/2008**

Submitted by: Ernest Sigman Pillai et al. (represented by counsel, Richard Goldman)

Alleged victims: Ernest Sigman Pillai, his wife Laetecia Swenthi Joachimpillai and their three children, Steffi Laetitia, Markalin Emmanuel George and Izabelle Soheyla Pillai.

State party: Canada

Date of communication: 29 February 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2011,

Having concluded its consideration of communication No. 1763/2008, submitted to the Human Rights Committee on behalf of Mr. Ernest Sigman Pillai et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Mr. Ernest Sigman Pillai and Ms. Laetecia Swenthi Joachimpillai, both Sri Lankan nationals born in 1969. The authors claim to be victims, together with their three children, Steffi Letitia, Sri Lankan national born in 2002, Markalin Emmanuel George, Canadian national born in 2004, and Izabelle Soheyla Pillai,

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

The texts of three individual opinions signed by Committee members Mr. Krister Thelin, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Sir Nigel Rodley and Mr. Yuji Iwasawa are appended to the present Views.

Canadian national born in 2005, of a violation of articles 6, paragraph 1; 7; 9, paragraph 1; 23, paragraph 1; and 24, paragraph 1 of the International Covenant on Civil and Political Rights.¹ The authors are represented by counsel, Mr. Richard Goldman.

1.2 On 3 March 2008, the Committee, pursuant to rule 92 of its rules of procedure, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to remove the authors and their children to Sri Lanka while the communication was under consideration by the Committee.

Facts as presented by the authors

2.1 In 1993, the authors married in Sri Lanka. Their eldest child, Steffi, was born on 4 July 2002, while they were living in Mattakuliya (Colombo). The family is of the Christian Tamil faith. Since their arrival in Canada on 8 May 2003, their son Emmanuel and their daughter Isabelle were born in April 2004 and November 2005, respectively. They are both Canadian citizens. The authors' life was relatively calm until 1999, when they found themselves caught between the LTTE Tamil Tigers, on one side, and the Sri Lankan police, on the other. They were subjected to a series of threats and extortion by the Tigers. In particular because Ms. Joachimpillai originated from Jaffna (North), the Tigers targeted her because they believed she would be likely to be sympathetic to their cause, whereas the police targeted her because they presumed she would be sympathetic to the Tigers. The authors were twice arrested by the police, on suspicion of lending support to the Tigers, in July 2001 and in February 2003. During their detention by the police, both were tortured.

2.2 During the first period of detention in 2001, Mr. Pillai was kicked in the groin, and threatened at gunpoint by a police officer. Ms. Joachimpillai was beaten and sexually abused by the police. They were released after two days following the intervention of Mr. Pillai's mother. During their detention in 2003, the officer interrogating Mr. Pillai punched him in the stomach and stomped on Mr. Pillai's foot with his boot. Then another officer brought in a pot of burning charcoal. They put some dried chillies in the pot and held Mr. Pillai's head in the smoke. He choked and was burned by the smoke and felt like he was going to die. Ms. Joachimpillai allegedly also suffered during those four days they were detained. She was beaten, dragged around by her hair, and they put a gun in her mouth and threatened to kill her. She was again sexually abused. After their release from this second period of detention, which was secured by Mr. Pillai's family's intervention, they left Sri Lanka. They arrived in Canada with visitors' visas on 8 May 2003 and applied for political asylum on 21 May 2003.

2.3 Amongst the evidence filed before the Immigration and Refugee Board (IRB) were a Diagnostic Interview Report by a psychotherapist (David Woodbury), containing a diagnosis of Post-Traumatic Stress Disorder (PTSD) for Mr. Pillai, attributed to threats by the Tigers to himself and his wife, extortion by the Tigers from himself and his wife, his own and his wife's arrest, detention and abuse. The report further noted that "the symptoms of PTSD often mimic the behaviours that we associate with shiftiness, mendacity or lying", the differential in apparent power between the Refugee Board Commissioners and the applicant may recall the torturer-victim relationship for the applicant, thus "exacerbating the already intense symptoms of anxiety and panic." According to the report, this could provoke "confusion due to extremely elevated autonomic arousal (and) difficulty concentrating", among other symptoms. The report considered it crucial that any judgements about the trustworthiness of Mr. Pillai's testimony take this into account. The report's final recommendation was that the victim must perceive his environment as safe, which could only occur far from the victim's torturer. The report therefore recommended

¹ The Optional Protocol entered into force in relation to Canada on 19 May 1976.

that the authors remained in the territory of the State party to start a new life and enable a recovery process. Also filed in evidence before the Immigration and Refugee Board was a letter from the authors' doctor, Pierre Dongier, which recommended that Mr. Pillai's wife represent both of them before the Immigration and Refugee Board, as she was considered stronger and less traumatized than her husband.

2.4 The refugee claim was heard on 24 January 2005 and rejected on 15 February 2005. The presiding Board Member mentioned Dr. Dongier's recommendation that the tribunal question Ms. Joachimpillai rather than Mr. Pillai, but then disregarded it. According to the authors, the Board Member reproached Dr. Dongier for failing to indicate what tests he administered, but provided no medical basis for rejecting his recommendation. The Board Member allegedly also preferred her own appreciation of Mr. Pillai's ability to testify to that stated in the Diagnostic Interview Report of Mr. Woodbury. Without providing any medical basis for rejecting the expert's opinion or raising any question about his professional qualifications, the Board member concluded that Mr. Pillai had some difficulty with the dates concerning his trips abroad and the alleged money extortion by the Tamil Tigers, but he believed these difficulties were linked to the credibility of his allegations, rather than to his psychological state.

2.5 The authors filed an application for leave to commence Judicial Review at the Federal Court but the leave application was denied on 24 May 2005, without reasons. They recall that the Judicial Review process with regard to asylum claims in Canada is a two-step process. During the first stage, the applicant must apply for "leave", meaning permission to commence Judicial Review. Only if "leave" is granted can the applicant proceed to the second stage, an oral hearing before the Federal Court. When leave is denied, no reasons are provided and the decision is without appeal. Leave is only granted in 10% of applications. Furthermore, questions of credibility and appreciation of evidence are only reviewed on a standard of "patent unreasonableness", rather than a standard of "correctness", as in a true appeal on the merits.

2.6 The authors submitted their Pre-Removal Risk Assessment application (PRRA) on 11 April 2007, which was rejected on 28 December 2007 (communicated to the authors on 13 February 2008) on the basis that there was no evidence that the LTTE pursued people who refused to carry out low-level ancillary activities and that the authors therefore could not be considered at risk in case of return to their country of origin. They applied for a permanent residence permit on humanitarian and compassionate (H&C) grounds. Their request was rejected on 28 December 2007 and communicated to them on 13 February 2008. The authors explain that within the context of the H&C decision, a PRRA officer revisits the "risk" analysis he carried out in the initial PRRA decision. According to them, in the circumstances, "not surprisingly", his analysis closely mirrored that of his PRRA decision. However, the H&C decision acknowledged a risk of detention to the applicants, where the PRRA did not.

The complaint

3.1 The authors consider themselves to be victims of violations by the State party of articles 6, paragraph 1; 7; 9, paragraph 1, 23, paragraph 1 and 24, paragraph 1 of the Covenant.

3.2 With regard to the hearing before the Immigration and Refugee Board (IRB) dated 24 January 2005, the authors contend that Mr. Pillai had difficulty in testifying before the Board, and his failure to remember dates or details, as well as internal inconsistencies or contradictions with his wife's testimony were used to reject the refugee claim on the basis of lack of credibility. According to the authors, this alleged "lack of credibility" was in large part due to the Board Member wrongly substituting her own opinion of Mr. Pillai's capacity to testify for that of two health care professionals. Further, the inconsistencies and

memory lapses relied upon by the Board Member did not relate to the essential elements of the claim – i.e. whether the authors were actually the targets of extortion, detention and torture, but rather to peripheral details such as dates of events and how many Tamil Tigers were present at certain point of time. The authors further contend that the abuse and mistreatment they alleged was consistent with all human rights reports available at the time, including those filed in evidence before the Board. They recall the Committee’s position, according to which, in cases of imminent deportation, the material point for assessing an issue is at the moment the complaint is examined.² Consequently, even if the Board Member’s conclusion that Tamils were not being persecuted by the LTTE in Colombo was correct at the time of the IRB decision (February 2005), the evidence currently available shows there has been a significant change of circumstances since that time. According to the authors, evidence shows that, at the current time, they would face a considerable risk of abuse at the hands of Sri Lankan state authorities in Colombo.

3.3 With regard to the authors’ application for leave to commence Judicial Review at the Federal Court, which was denied on 24 May 2005, they contend that there is no true appeal on the merits of an IRB decision in Canada, at the present time even though the current *Immigration and Refugee Protection Act* contains provisions creating a Refugee Appeal Division of the IRB, which was intended to create such an appeal. These provisions however have never been enacted. The authors therefore consider they were never afforded a fair opportunity to contest the merits of their negative IRB decision.

3.4 The authors further contend that the Pre-Removal Risk Assessment (PRRA), which is a procedure offered to dismissed asylum seekers in Canada once the State party believes they are ready to be deported, was never intended to serve as an appeal to the IRB decision. They consider it a problematic recourse, mainly due to the fact that it is decided by civil servants who are employees of Citizenship and Immigration, and not an independent tribunal. According to the authors, the main conclusions of the PRRA officer were inconsistent with the evidence available. For instance, the PRRA Officer concluded that the authors had failed to demonstrate that they would be at greater risk than the general population. The authors refer to a UNHCR report dated December 2006 on the risk facing Tamils in Colombo, where the Pillai family resided. The report refers to increased risks of being arrested or at least being more regularly subjected to security checks. UNHCR also refers to a great risk of forced disappearances and killings for Tamils residing in the area of Colombo. As for Tamils originating from the North and East, in particular from LTTE-controlled areas, they are perceived by authorities as potential LTTE members or supporters and are more likely to be subjected to arrests, detention, abductions or even killings. The UNHCR report recommends that no Tamil from the North or East should be returned forcibly until there is a significant improvement in the security situation in Sri Lanka. According to the authors, the UNHCR report in question was available to the PRRA officer at the time he rendered his decision on 28 December 2007. The officer however overlooked the report, despite the fact that he did refer to some nine other governmental and non-governmental sources.

3.5 The authors also refer to the position of the European Court of Human Rights (ECHR), who, at the time of submission, had granted interim measures in all requests from Tamils facing removal to Sri Lanka. The ECHR also issued a letter to France and the United Kingdom asking those State parties to cease issuing removal orders to Tamils who fear returning to Sri Lanka. The UNHCR has welcomed these decisions by the Court. The authors consider that such position clearly indicates that both the UNHCR and the ECHR believe Tamils to be at greater risk “then the general population” of Sri Lanka.

² Communication No. 1069/2002, *Bakhtiyara v. Australia*, par 9.7

3.6 The authors further contest the PRRA officer's analysis according to which, there is no evidence that persons who face prosecution for serious offences would be unfairly treated under Sri Lankan law. The authors refer to the UN Special Rapporteur on Torture, who concluded his visit to Sri Lanka in October 2007 and stated that torture was widely practiced in Sri Lanka. As with the above-cited UNHCR report, this statement by the UN Special Rapporteur on Torture, which was issued two months before the PRRA officer issued his decision, was allegedly overlooked by the PRRA officer. In response to the PRRA Officer's contention that there is no evidence that the LTTE pursue people who refuse to carry out low-level ancillary activities, the authors refer to the 2006 UNHCR report which states, *inter alia*, that those who refuse to support the LTTE and those who are perceived as supporters or sympathizers of the Government, risk serious violations of human rights from the LTTE. Tamils who are perceived as opposing the LTTE, including those suspected of being government informants, those who are active in other political parties, and even those occupying low-grade government positions, are at risk of assassination. Thus, according to the authors, mere refusal to support the LTTE can lead to severe repercussions, and this is consistent with the authors' accounts of being the victims of threats and extortion at the hands of the LTTE.

3.7 The authors further note the PRRA Officer's conclusion that the Sri Lankan State authorities are capable of providing sufficient protection for Tamils in areas they control. They claim that this statement overlooks the fact that the Sri Lankan State is an agent of persecution for ethnic Tamils and particularly for those who have moved from LTTE-controlled areas to areas under State control. Further, torture by State authorities is widespread and practiced by several arms of government. Tamils can hardly be expected to rely on the Sri Lankan government for state protection. The authors contend that if the meaning of the PRRA officer's statement is to be construed more narrowly as "Sri Lankan State authorities are able to prevent the LTTE from carrying out attacks on individuals in areas under state control" then even this is inaccurate. The authors re-affirm that the LTTE can track down and attack opponents "throughout the country".

3.8 The authors further argue that they are at risk of being arbitrarily detained if returned to Sri Lanka. The PRRA Officer within the H&C process concluded that given the current state of alert, the possibility exists for the authors to be temporarily detained by the Sri Lankan authorities in Colombo. However the authors' involvement in the LTTE was incidental and it is therefore unlikely that they would be subject to prosecution. While the authors' Tamil origins make them a target for detention, the available evidence does not show that such discrimination has severe consequences. According to the authors, the initial conclusion to be drawn from the above passage is that the officer has acknowledged that they are indeed at particular risk of abuse due to their Tamil ethnicity, contrary the finding in the PRRA decision that the authors "are at no greater risk than the general population". A second conclusion is, according to the authors, that, notwithstanding the fact that the officer questionably characterizes arbitrary detention as mere "discrimination" and ultimately finds that it is insufficient to warrant a positive decision on the H & C application, the right not to be subjected to arbitrary detention *is* a right protected under article 9, paragraph 1 of the Covenant. The officer, thus, acknowledged that the authors' rights under the Covenant are at risk of being violated if they were returned to Sri Lanka. A final conclusion is, to the authors' opinion, that the officer once again ignored the evidence of torture and other abuse of persons who are detained by Sri Lankan authorities, in concluding that "the available evidence" does not show that such detention "has severe consequences".

3.9 The authors note that the PRRA officer, in ruling upon an H&C application, was required to take into account the best interests of the minor children affected by the decision. They claim, however, that instead of identifying or discussing whether it would be in the best interests of the three minor children to remain in Canada, rather than be returned to the "violence and chaos of Sri Lanka", the PRRA officer merely stated that because the

children are young, and “the family remains the centre of their social development”, he is “satisfied they will be able to transition successfully into Sri Lankan society”. According to the authors, the PRRA officer did not even begin to engage in a proper examination of the children’s best interests, in the light of the threats to their well-being they would face in Sri Lanka, even based on the limited threat he acknowledged (arbitrary detention due to their Tamil ethnicity), much less the threats from the considerable evidence he ignored, as detailed above. The authors consider that they did not benefit from a fair evaluation. In these circumstances, the authors allege that the return of their three minor children to Sri Lanka would constitute a violation of their rights under article 24, paragraph 1, of the Covenant.

3.10 The authors further note that, to the extent that removal to Sri Lanka would endanger the well-being of the parents, particularly the father, who has been diagnosed as suffering from Post-Traumatic Stress Disorder, thus potentially depriving the children of their parents’ care and protection, the authors’ removal would also constitute a violation of the children’s rights under article 23, paragraph 1, of the Covenant. Although the two younger children are Canadian citizens, and thus not subject to removal from Canada, the only alternative to their accompanying the other family members to Sri Lanka, if the other family members are removed, would be for the two younger children to remain in Canada with no one to care for them. This alternative would constitute a violation of their rights under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant.

3.11 Finally, the authors refer to an opinion issued by the Francophone section of Amnesty International Canada dated 27 February 2008, which considered the Pillai family to be at risk if forcibly returned to Sri Lanka, either to the North from which Mrs. Joachimpillai hails, or to Colombo where the family lived for many years. The Canadian francophone section further considered that the family’s request that its forcible removal at this time not occur should be respected, and that Canada should find a way to offer the family protection so as to fulfil its international obligations.

State party's observations on admissibility and authors' comments thereon

4. On 7 August 2008, the State party contested the admissibility of the communication on the basis that the authors had not exhausted domestic remedies. On 27 February 2008, the authors applied to the Federal Court for leave and judicial review against both the PRRA and H&C decisions dated 28 December 2007³. On 29 February 2008, before the Federal Court had decided whether to grant leave, the authors submitted the present communication to the Committee. On 3 July 2008, the Federal Court granted both of the author’s applications for leave to apply for judicial review. The hearing of both applications for judicial review was scheduled for 30 September 2008. The State party therefore requested the Committee to declare the communication inadmissible for non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

5. On 20 October 2008, the authors provided comments on the State party’s observations on admissibility. They argued that they had filed the communication to the Committee prior to the date scheduled for the hearing of the judicial stay application because they feared that, if the stay were denied, they would be left with little or no time to file a communication before the Committee. Indeed, in some cases, a judicial stay may be rendered just hours before a scheduled removal. The authors further point out that the filing of applications for judicial review of a negative PRRA or H&C decision did not, in and of themselves suspend the effect of a removal order. In other words, legally, their removal orders remain in effect.

³ See above, par. 2.6.

6. On 1 December 2008, the State party informed the Committee of the dismissal of the authors' judicial review applications, putting an end to internal judicial proceedings. The State party therefore informed the Committee of its intention to provide observations on the admissibility and merits of the communication, provided the Committee extended its deadline to do so.

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

7.1 In its submission on the admissibility and merits of the communication transmitted on 17 February 2009, the State party contends that the authors' allegations with respect to articles 6, paragraph 1; 7; 23, paragraph 1; and 24, paragraph 1 are inadmissible on the ground of non-substantiation, in that they have failed to establish a *prima facie* case. The State party argues that the communication is based on the same facts and evidence as were presented to the Canadian tribunals and risk assessment officer, whose decisions were reviewed and upheld by the Federal Court. There is nothing new to suggest that the authors are at personal risk of torture or any ill-treatment in Sri Lanka. The State party recalls that it is not the role of the Committee to re-evaluate facts and evidence unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice. The material submitted by the authors cannot lead to such conclusion. As for the authors' allegations in relation to article 9, the State party submits that they are incompatible with the provisions of the Covenant or, in the alternative, that they are inadmissible on the ground of non-substantiation. The State party is of the view that article 9 has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. In the event that the Committee would declare part or all of the allegations admissible, the State party requests that the Committee finds them without merits.

7.2 The State party observes that in their refugee claim dated 21 May 2003, the authors alleged that they had been subjected to threats and extortion by the LTTE, particularly because Mrs. Joachimpillai is from Jaffna, where support for the Tigers is strong. For the same reason, they claimed they were targeted by the police, who presumed them to be sympathetic to the Tigers. In January 1999, Mr. Pillai started a business named "Emanuel Communication" which, according to the authors, became the source of the problems which ultimately forced them to flee the country. They allege that in October 1999, three young Tamils claiming to be Tigers came into the communication centre and recognized Mrs. Joachimpillai from when she had lived in Jaffna. They returned a few days later and asked her to hide one of their members, taking her gold chain when she refused. In 2000, the Tigers allegedly returned three times to extort money from the authors. At that same time, various Tamils would come to Emanuel Communication to make phone calls. The police often came to the company asking Mr. Pillai to report anyone he suspected may be a Tiger.

7.3 On 28 July 2001, the LTTE attacked Sri Lanka's international airport. A few days later, the authors claimed that they were brought to the police station for questioning. Mr. Pillai was allegedly kicked and threatened with a gun. Mrs. Joachimpillai was allegedly beaten and sexually harassed. They were released two days later. In January 2003, Mr. Pillai allegedly added a new service to his communication centre, namely the distribution of videocassettes. On 2 February 2003, six young Tamils allegedly came to the communication centre and told Mr. Pillai to distribute LTTE videocassettes. Despite his objections they said they would soon bring him those cassettes. Two days later, the authors were arrested by the police due to their presumed support to the Tigers. They claimed Mr. Pillai was tortured and Mrs. Joachimpillai was beaten, sexually harassed and threatened with a gun. They were released four days later and were ordered to report to the police weekly, which they did until their coming to Canada in May 2003. In their refugee claim, the authors argued that should they be returned to Sri Lanka, they feared that the LTTE

would continue to extort money from them and the police may again detain and torture or even kill them.

7.4 On 24 January 2005 the authors' refugee claim was heard by the Refugee Protection Division of Canada's Immigration and Refugee Board (IRB), which, the State party emphasizes, is an independent and specialized tribunal. The authors had a chance to be heard to dissipate any possible misunderstanding. In its decision, the IRB found that the authors were neither refugees nor persons in need of protection and that their claim did not have a credible basis. The IRB came to the conclusion that the authors had not established that Mr. Pillai owned the communication centre which was at the source of all their problems. The State party emphasizes that Mr. Pillai's ownership of the communication centre between 2001 and 2003 was a central element of the claim, as the problems leading to their departure from the country were closely linked to it. However, even if Mr. Pillai did register a communication centre in 1999, he did not establish, on a balance of probabilities that he continued to be its owner between 2001 and 2003. Among the factors that led to substantial doubts regarding Mr. Pillai's ownership of the centre was that the only document proving the ownership was a "Certificate of Registration of an Individual Business" dated 23 January 1999. In addition, neither of the authors was able to give the Communication centre's address. On the other hand, Mr. Pillai had no problem remembering his own home address or even his uncle's business address.

7.5 The State party further notes that in 2001, Mr. Pillai started a new business venture, importing textiles and spare auto parts. In 2001 or 2002 (conflicting evidence was provided with respect to the dates) he travelled to India, Indonesia and Congo in connection with this business. From this fact and the conflicting testimony of the dates of Mr. Pillai's business travel, the IRB drew a negative inference as to the credibility of the claim that he was also still running his communication centre in 2001. Moreover, on his visitor visa application in 2003, Mr. Pillai indicated that his present employer was "Muthuwella Motors Store". In his interview, he told the Canadian visa officer that he had worked in spare parts for five years. He did not tell the visa officer that he had owned a communication centre. In his testimony before the IRB, however, Mr. Pillai claimed that he had stopped working in the motor business in 2002. He could not reasonably explain the inconsistency in his answers to the visa officer and the IRB.

7.6 The State party adds that the IRB considered that the authors' credibility was greatly damaged due to inconsistencies between what they considered fundamental elements reported in their Personal Information Form for persons claiming refugee protection in Canada (PIF) and their testimony before the IRB. For these factual inconsistencies the authors were unable to give satisfactory justifications. Despite these inconsistencies, the IRB assessed the authors' risk of being persecuted and found that possible extortion of money by the LTTE could not be the reason the authors had left the country, since these extortions occurred in 2000, that is three years before their arrival in Canada. On 24 May 2005, the Federal Court denied the authors' application for leave to apply for judicial review of the IRB decision on the ground that there was no fairly arguable case or a serious question to be determined.

7.7 With regard to the H&C application, the State party submits that the assessment of an H&C application consists of a broad, discretionary review by an officer to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. When allegations of risk upon return are made, as in the authors' case, the officer assesses the risk a person may face in the country to which he would be returned. In cases such as the authors' where the application is based on risk in the country of origin, a specifically trained Pre-Removal Risk Assessment officer assesses the H&C application. On 28 December 2007, the H&C applications were rejected. The officer found that, although the ceasefire in Sri Lanka had in effect been abandoned, the main incidents of

insecurity occurred in the Northern and Eastern parts and not in the Colombo area where the authors used to reside. The officer, who is required to take into account the best interest of the child, also considered that the authors' children would have access to health care and education and would be able to transition successfully into Sri Lankan society.

7.8 As for the PRRA application, the State party emphasizes that the risk assessment is performed by highly trained officers who consider the Canadian Charter of Rights and Freedoms as well as the Convention against torture and the American Declaration on the Rights and Duties of Man. They also keep up-to-date with new developments in the areas concerned and have access to most recent information on the matter. On 28 December 2007, the PRRA application was rejected. The PRRA officer recognized that the security situation had deteriorated since the applications' IRB hearing, though principally in the North and East of Sri Lanka rather than in Colombo. He considered however that none of the information provided supported the allegation of a personal risk of being persecuted, killed or tortured. The authors therefore did not demonstrate that they would be at greater risk than the general population. The officer considered that extortion of money by the LTTE, even if proven, could not amount to persecution. As for the risk to be tortured by the Sri Lankan authorities, the officer found that it was unlikely they would target the authors, given their limited involvement with the LTTE. On 25 November 2008, the Federal Court dismissed the authors' judicial review applications, upholding the finding of the PRRA officer.

7.9 The State Party contends that the authors' allegations related to articles 6, paragraph 1; 7; 23, paragraph 1; and 24, paragraph 1 are insufficiently substantiated for purposes of admissibility. The State party insists on the importance for the Committee not to re-evaluate findings of credibility made by competent tribunals⁴. Nor should it be the Committee's role to weigh evidence or re-assess findings of fact made by domestic courts or tribunals.⁵ However, should the Committee decide to re-evaluate findings with respect to the authors' credibility, the State party submits that a consideration of the totality of the evidence permits only one conclusion which is that the authors' allegations are not credible. In addition to the inconsistencies referred above, the State party refers to the authors' assertion that, in evaluating Mr. Pillai's testimony, the IRB took insufficient account of his diagnosis of Post-Traumatic Stress Disorder (PTSD). The authors had submitted to the IRB a psychological report and a note from a medical doctor. The psychological report indicates that the symptoms of PTSD include anxiety and panic, confusion and psychic numbness, and that these symptoms may be mistakenly attributed to "shiftiness, mendacity or lying". The report recommended that any judgments with respect to the trustworthiness of Mr. Pillai's testimony take this into account. Contrary to the authors' accounts, the IRB did take the report into account in evaluating Mr. Pillai's testimony. Because of Mr. Pillai's diagnosis, the panel avoided asking him any questions related to his alleged torture in detention. The State party notes however that during the hearing, Mr. Pillai's speech was coherent and intelligent rather than confused. After weighing both Mr. Pillai's testimony and the psychological report, the panel judged that the reason for Mr. Pillai's difficulty to

⁴ The State party refers to communication No. 891/1999, *Tamihere v. New Zealand*, Inadmissibility decision adopted on 15 March 2000; communication No. 728/1996 *Paul v. Guyana*, Views adopted on 1 November 2001, par. 9.3.

⁵ The State party refers to communication No. 215/1986, *G.A van Meurs v. The Netherlands*, Views adopted on 13 July 1990, par. 7.1; communication No. 485/1991, *V.B v. Trinidad and Tobago*, Inadmissibility decision adopted on 26 July 1993, par. 5.2; communication No. 949/2000, *Keshavjee v. Canada*, Inadmissibility decision adopted on 2 November 2000, par. 4.3; communication No. 934/2000, *G.V. v. Canada*, Inadmissibility decision adopted on 17 July 2000, par. 4.2-4.3; communication No. 761/1997, *Singh v. Canada*, Inadmissibility decision adopted on 29 July 1997, par. 4.2.

testify arose from a want of credibility in the allegations themselves. None of the information provided by the authors gives rise to a doubt about a possible arbitrariness in the procedure before the IRB.

7.10 The State party acknowledges the authors' submission of a number of reports describing the human rights situation in Sri Lanka, from, among others, UNHCR, Amnesty International and the International Crisis Group. It submits however that the authors have not submitted any evidence that Tamils in Colombo who are suspected of having provided low-level support to LTTE are at risk of torture or death. Even if human rights abuses against some Tamils in Sri Lanka, particularly high profile militants, continue to be reported, this is not sufficient by itself to be the basis of a violation of the Covenant if the authors are returned there. Quoting reports from the United Kingdom Home Office on the human rights situation in Sri Lanka, the State party contends that neither the LTTE nor the Sri Lankan authorities are likely to target low-level LTTE supporters; that while some Tamils suspected of being LTTE members or supporters are still detained, most are released quickly as the authorities are generally not concerned with individuals who have provided low-level support⁶. The State party insists that these statistics confirm that an extremely low proportion of Tamils are at risk of detention in Colombo and this risk of detention depends primarily on the individual's profile. The State party quotes the UN Committee against Torture which has held that Tamils may be deported to Sri Lanka "irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist there" where there is no evidence of personal risk.⁷ It also quotes the jurisprudence of the European Court for Human Rights (ECHR), which has found that despite the renewal of open hostilities in the civil war, Sri Lankan Tamils do not face a generalized risk of ill-treatment⁸.

7.11 In relation to article 6, paragraph 1, the State party maintains that the authors have not shown that the necessary and foreseeable consequence of the deportation⁹ would be that they would be killed or that the State could not protect them; nor have they established that, even if their lives were in danger in Colombo, they would not have an internal flight alternative in Sri Lanka. The State party therefore concludes the communication with regard to article 6, paragraph 1 of the Covenant to be inadmissible. As far as article 7 is concerned, the State party maintains that even if it is accepted that the authors were tortured by the Sri Lankan authorities in the past, which the State party considers has not been established, this is not of itself proof of a risk of torture in the future. With respect to the possibility of mistreatment by the LTTE, the State party adopts the finding of the IRB panel that, even if accepted as true, the three incidents of extortion by the LTTE did not constitute persecution, and in any event ended three years before the authors left Sri Lanka. The State party therefore concludes that the authors have not sufficiently substantiated their claim with regard to article 7 of the Covenant.

7.12 With respect to article 23, paragraph 1, whereby the authors' deportation would endanger their well-being thereby potentially depriving the children of their parents' care and protection, the State party considers that the lack of substantiation of the authors'

⁶ The State party particularly refers to a report from the UK Home Office, namely "Operational Guidance Note: Sri Lanka", August 2008, par. 3.6.24, 3.7.19 and 3.7.20.

⁷ The State party refers to CAT jurisprudence in communication No. 182/2001, *A.I. v. Switzerland*, par. 6.4; communication No. 191/2001, *S.S v. The Netherlands*, par. 6.2.

⁸ The State party quotes *inter alia*, ECHR, *N.A v. The United Kingdom*, 17 July 2008, no. 25904/07, para. 125.

⁹ The State party quotes the jurisprudence of the Committee in communication No. 692/1996, *A.R.J v. Australia*, Views adopted on 26 July 1997, para. 6.11-6.13; communication No. 706/1996, *G.T v. Australia*, Views adopted on 4 November 1997, para. 8.1-8.2.

claims under articles 6 and 7 renders article 23, paragraph 1 entirely devoid of substantiation. As for the authors' allegations with respect to article 24, paragraph 1, the State party submits that it has taken the necessary measures to meet its obligations, as the best interests of the authors' children were explicitly considered in the authors' H&C application, as required by statute¹⁰. After consideration of the evidence, the officer concluded that the children would benefit from the extensive public education and health care systems in that country. The State party concludes to the inadmissibility of articles 23, paragraph 1 and 24, paragraph 1 for non-substantiation.

7.13 As for the authors' allegations related to article 9, paragraph 1, the State party reiterates that this part of the communication should be declared incompatible with the provisions of the Covenant. The authors have not alleged that the State party has arrested or detained them in violation of article 9, paragraph 1 but that by deporting them to Sri Lanka where they might be arbitrarily detained, the State party would violate this provision. It emphasizes on the limited number of rights to which the Committee has given extraterritorial application, article 9, paragraph 1 not being one of those. The State party quotes General Comment No 31 which states that only the most serious breaches of fundamental rights can constitute exceptions to the power of the State to determine the conditions for allowing foreigners to enter and remain on its territory. The State party submits that arbitrary arrest or detention does not rise to the level of grave, irreparable harm contemplated in General Comment No 31¹¹. The State party therefore requests that article 9, paragraph 1, be considered inadmissible as incompatible with the provisions of the Covenant. In the alternative, it requests the Committee to find it inadmissible for non-substantiation.

7.14 The State party reminds the Committee that it is not within its competence to consider the Canadian system in general, but only to examine whether, in the present case, it complied with its obligations under the Covenant. It also reminds the Committee that it has, in the past, with respect to similarly unsubstantiated allegations considered that the author had not substantiated how the Canadian authorities' decisions failed thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 of the Covenant.¹²

Authors' comments on State party's observations

8.1 On 23 April 2009, the authors provided comments on the State party's submission. Contrary to State party's contention, they consider that the Committee's jurisprudence is clearly to the effect that Covenant rights, other than those contemplated in articles 6 and 7, do apply in the context of removals of non-citizens from a State party's territory.

8.2 With regard to the authors' allegations related to articles 6, 7 and 9, the authors maintain that it is within the Committee's competence to revisit negative credibility findings by the IRB, where a denial of justice has occurred as stated by the Committee against Torture in its jurisprudence *Falcon Rios v. Canada*¹³. In this case, the Committee

¹⁰ The State party refers to a jurisprudence of the Canadian Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, where the Supreme Court of Canada emphasized the importance of and need to consider the best interests of the child in humanitarian and compassionate grounds applications.

¹¹ The State party refers to General Comment 31 on article 2 of the Covenant regarding the nature of the general legal obligation imposed on States parties to the Covenant, 2004.

¹² The State party refers to the Committee's jurisprudence in communication No. 1302/2004, *Khan v. Canada*, Inadmissibility decision adopted on 25 July 2006, par. 5.5 and communication No. 1315/2004, *Singh v. Canada*, Inadmissibility decision adopted on 30 March 2006.

¹³ Communication No. 133/1999, *Falcon Rios v. Canada*, Views adopted on 17 December 2004.

against Torture found that the IRB had erred in failing to give proper weight to the psychological report tendered as evidence to corroborate that the author had been a victim of torture. The authors submit that the State party, through the IRB, committed the very same error in their case. In addition, even if the IRB had been correct in finding in 2005 that the authors were not in danger if returned to Sri Lanka, the relevant moment for the Committee's assessment of alleged violations of the Covenant is the present. In that regard, the authors note that the State party has failed to comment directly on the findings of the UNHCR *Position on the International Protection needs of Asylum Seekers from Sri Lanka*, provided by the authors in the present communication.

8.3 The UNHCR report states that the significant majority of reported cases of human rights violations in Sri Lanka involve persons of Tamil ethnicity who originate from the North and East, such as Ms. Joachimpillai. As stated earlier, the report refers to increased arrests, detention as well as systematic police registration of Tamils originating from the North and East. With regard to internal flight/relocation alternative (IFA/IRA), the UNHCR finds that because of the activities and affiliations frequently attributed to Tamils from the North and East, Tamils from these regions continue to be at risk of human rights violations in other parts of the country and are, therefore, without a reasonable IFA/IRA in Sri Lanka. The report also finds that many of the abductions involve civilians who are suspected to be LTTE members or sympathizers. With regard to torture, ill-treatment and arbitrary detention, the report refers to the extensive use of torture by police, security or armed forces in Sri Lanka and states that Tamils, particularly from the North, face a substantial risk of violation of their rights under articles 6, 7 and 9, paragraph 1 of the Covenant simply on the basis of their ethnicity. The authors observe that the three CAT Views¹⁴ cited by the State party were rendered prior to the above-mentioned report, the termination of the ceasefire, and the severe deterioration of the country situation.

8.4 The authors further allege that they face a substantial and personal risk of violation of their rights under articles 6, 7 and 9, paragraph 1 of the Covenant. They face several of the risk factors identified by the European Court of Human Rights in *NA v. The United Kingdom*, most notably the authors were twice arrested and detained by Sri Lankan police on suspicion of lending support to the LTTE, Ms. Joachimpillai is from the North of Sri Lanka putting her at higher risk of suspicion of supporting the LTTE, both spouses and the eldest child have made asylum claims abroad and effectively alerted the Sri Lanka authorities to this situation by applying, at the request of the State party, to the Sri Lanka High Commission in Canada to renew their passports. The authors further reject the State party's analysis that only high profile support to the LTTE is sanctioned by Sri Lankan authorities. The use of the term "high profile" in ECHR's decision *NA v. The United Kingdom* refers to the risk of abuse emanating from the LTTE and not from Sri Lankan authorities.

8.5 As for the authors' allegations under articles 23, paragraph 1 and 24, paragraph 1, they submit that the best interest of the children were not a primary consideration before the PPRA officer. Under the refugee-immigration legislative scheme, the only application in which the best interest of the child is considered is the H&C application. In the authors' case, both PRRA and H&C applications were considered at once, by the PRRA officer. Rather than considering where the best interest of the children lay, the officer merely concluded that the children could adapt to life in Sri Lanka. The question of whether the child can adapt to a situation is far different than the question of whether it is the child's best interest to be obliged to do so. The officer took no account of the country conditions that would pose a threat to the children's security in Sri Lanka. The result has been a denial

¹⁴ See par. 5.10 above.

of justice to their children and a violation of their rights under article 24, paragraph 1 of the Covenant. The authors further submit that even a threat that falls short of a violation of their rights under articles 6 and 7, but which affects their capacity to act as parents and to protect their children violates the rights of the family under articles 23, paragraph 1 and 24, paragraph 1 of the Covenant. The findings of the psychological report on Mr. Pillai stated that his perceived safety could only be found far from his torturers. It was recommended that Mr. Pillai stayed in Canada where he could establish a new life and begin the recovery process. The authors conclude that any harm befalling the parents, whether amounting to a violation of their rights under articles 6 and 7, or otherwise impairing their capacity to care for and protect their children, would constitute a violation of the provisions mentioned above.

8.6 The authors' reject State party's argument that it is not within the Committee's competence to consider the Canadian system in general. They recall paragraph 17 of the Committee's General Comment No 31 where it stated that it has been frequent practice of the Committee in cases under the Optional protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State party's laws or practices. General Comment No 31 adds in its paragraph 15 that remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. In their original submission, the authors pointed out a certain number of shortcomings in the Canadian system such as the absence of an appeal on the merits of negative refugee determination decisions, the requirement of applying for "leave" for Judicial Review at the Federal Court, the inherent limitations of judicial review (as opposed to a true appeal on the merits), even when "leave" is granted, and the limited scope of the PRRA examination.

8.7 The authors consider that the inadequate training of PRRA officers, their lack of independence and the highly discretionary nature of H&C decision-making in Canada, which are systemic problems, have also contributed to the denials of justice which they consider themselves victims of. The authors quote a recommendation issued by the Parliamentary Standing Committee that the government remove the PRRA from the jurisdiction of Citizenship and Immigration Canada officials and instead mandate the IRB to carry out PRRAs. With regard to the H&C decision-making in Canada, the authors quote the Committee against Torture (CAT) in its jurisprudence *Falcon Rios* where it stated that the H&C process depended on the discretion of the executive branch of the government and was thus "ex gratia" in nature. It could therefore not be considered a domestic recourse that must be exhausted prior to lodging a complaint before CAT. As the best interest of the child is assessed during this highly discretionary process, the authors doubt that a fair application of country conditions within the context of the best interests of the child analysis can be carried out. The authors propose a series of legislative reforms which would enable a fair process of asylum consideration.

State party's additional observations on admissibility and merits

9.1 On 3 December 2009, the State party provided further observations in response to the authors' comments. It refers to the authors' argument with regard to article 9, paragraph 1 and remarks that neither of the two cases the authors cite is an example of extraterritorial application, as in neither of them did the Committee determine a State party responsible for a violation of the Covenant in another State. In both cases, the Committee found that the deportation of a parent would have violated the Covenant because it would have forced the other members of the family either to live separately or to move to a country they did not know. It was the action of the removing State which would have been responsible for the resulting interference in family life, not any action by the receiving State. Thus, these cases

do not support the further extension of extraterritorial application of the Covenant in the removals context beyond articles 6 and 7.

9.2 With regard to UNHCR's *Position on the International Protection Needs of Asylum Seekers from Sri Lanka*, as support to their argument that the authors would face a personal risk of torture and persecution upon return to Sri Lanka, the State party notes that the report was compiled before the formal end of hostilities in Sri Lanka with the military defeat of the LTTE in May 2009. It refers to an updated *Note on the Applicability of the 2009 Sri Lanka guidelines* issued by UNHCR in July 2009 and acknowledges that since the military defeat of the LTTE, the general human rights situation for Tamils in Sri Lanka has remained of concern. It considers however that there are indications that the situation of Tamils failed asylum-seekers returning to Colombo, such as the authors, is not such as to warrant the finding that the authors would be at risk of a violation of their rights under articles 6 and 7. The State party further submits that although the authors can be expected to be questioned upon their arrival in Colombo, and may be subjected to spot checks within Colombo, security checks can be expected during the transitional post-war period by all Tamils. There is no reason to believe that the authors would be more at risk on the grounds of their previous arrests, or because they are returning failed asylum seekers.

9.3 As for the authors' allegations under articles 23, paragraph 1 and 24, paragraph 1, the State party reiterates that the PRRA officer did in fact address the best interest of the child. The authors' citation of the Committee's jurisprudence in *Madafferi v. Australia* is not relevant in the present communication since the children involved were 11 and 13 and given their integration in Australia there was no real prospect of them following their father to Italy. In the current communication, by contrast, both parents and the elder child are Sri Lankan nationals. The younger children were born in 2004 and 2005 and would accompany their parents were they to be removed from Canada. Given their young age, the fact that they would follow their parents and the availability of public health care and education in Sri Lanka, the PRRA officer reasonably concluded that the children would be able to successfully re-integrate into Sri-Lankan society.

9.4 As for Canada's refugee protection system, which the authors criticize in their submission, the State party firmly considers that there is no need for a systemic review by the Committee of a system that the UN High Commissioner for Refugees has called one of the best in the world. It adds that the Committee has consistently found that the PRRA and the H&C procedures are effective mechanisms for the protection of refugees and that the judicial review in the Federal Court is an effective means of ensuring the fairness of the system¹⁵. In the alternative, should the authors wish to raise general claims against the Canadian refugee protection system, they should first exhaust domestic remedies, which they have not.

9.5 With respect to the authors' allegations that PRRA decision-makers are not adequately trained, the State party informs the Committee that the Canadian Government provided a response to the Parliamentary Standing Committee's report mentioned by the authors. With respect to the allegation that PRRA decision-makers are not independent, the State party refers the Committee to several decisions of the Supreme Court, including *Say v. Canada (Solicitor General)*¹⁶, where the Court concluded that in a substantial number of cases, the independence of PRRA decision-makers could not be challenged. This decision occurred before the 2004 legislative change that has placed PRRA officers under the authority of the Minister of Citizenship and Immigration, thereby further reinforcing the

¹⁵ The State party refers inter alia to communication No. 1302/2004 *Khan v. Canada*, Inadmissibility decision adopted on 25 July 2006, par. 5.5.

¹⁶ The State party refers to *Say v. Canada (Solicitor General)*, 2005 FC 739, par. 39.

Officers' independence. As for the authors' allegations that the decision-making with respect to applications made on H&C grounds do not adequately take account of the best interest of the child, the State party responds that the Supreme Court of Canada has made clear that the decision-maker must be alert, alive and sensitive to those interests. The Federal Court has on many occasions overturned H&C decisions as unreasonable because the decision-maker was not sufficiently alert, alive or sensitive to the children's best interests. In the present case, both PRRA and H&C application processes, with the attendant possibility of judicial review by the Federal Court, were fully consistent with State party's obligations under articles 6, 7, 23 and 24 of the Covenant.

Proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

10.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to substantiate the authors' claims under articles 6, paragraph 1; 7; 9; 23, paragraph 1; and 24, paragraph 1 of the Covenant. As far as article 6 is concerned, the Committee notes that the authors have not explained why they believe that their expulsion to Sri Lanka would expose them to a real risk of a violation of their right to life. The Committee therefore finds that this part of the communication is insufficiently substantiated for purposes of admissibility, pursuant to article 2 of the Optional Protocol.

10.4 With regard to the authors' claims under article 9, paragraph 1, the Committee notes the State party's argument that this provision has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. The Committee takes note of the authors' allegations that the extraterritorial application of the Covenant in the removals context is not limited to articles 6 and 7 of the Covenant. The authors have not however explained why they would face a real risk of a serious violation of article 9 of the Covenant. The Committee therefore finds this part of the communication inadmissible, pursuant to article 2 of the Optional Protocol.

10.5 Regarding the authors' claims under article 7, the Committee notes that the authors have explained the reasons why they feared to be returned to Sri Lanka, giving details about the extortion they were allegedly victims of by the LTTE, the arrest and detention by the Sri Lankan authorities on two occasions and the treatment they allegedly both suffered in the hands of the authorities. The Committee also notes that the authors have provided evidence, such as the Diagnostic Interview Report by a psychotherapist, containing a diagnosis of Post-Traumatic Stress Disorder (PTSD) as well as a medical certificate for Mr. Pillai. The Committee considers that such claims are sufficiently substantiated for purposes of admissibility and that they should be considered on their merits. As for the allegations concerning violations of articles 23, paragraph 1 and 24, paragraph 1, the Committee considers them intimately linked to the authors' allegations under article 7, which need to be determined on the merits. The Committee accordingly finds the authors' claims under articles 7, 23, paragraph 1 and 24, paragraph 1 admissible and proceeds to their consideration on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee considers it necessary to bear in mind the State party's obligation under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens¹⁷. The Committee recalls that it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases.

11.3 The Committee takes note of the authors' arguments that the Immigration and Refugee Board (IRB) Member did not sufficiently take account of the Diagnostic Interview Report, containing a diagnosis of Post-Traumatic Stress Disorder (PTSD) for Mr. Pillai and of the opinion of two health care professionals regarding his capacity to testify. The Committee also takes note of the State party's argument that the IRB Member did take the Diagnostic Interview Report into consideration during the hearing; that because of Mr. Pillai's diagnosis, the panel avoided asking him any questions related to his alleged torture in detention; that during the hearing, Mr. Pillai's speech was coherent and intelligent rather than confused; and that after weighing both Mr. Pillai's testimony and the psychological report, the panel judged that the reason for Mr. Pillai's difficulty to testify arose from a lack of credibility.

11.4 With regard to the authors' claim that, should the State party deport them to Sri Lanka, they would be exposed to a real risk of torture, the Committee notes the argument invoked by the State party regarding the harm being the necessary and foreseeable consequence of the deportation. In that respect the Committee recalls its General Comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm.¹⁸ The Committee further notes that the diagnosis of Mr. Pillai's post-traumatic stress disorder led the IRB to refrain from questioning him about his earlier alleged torture in detention. The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the authors' allegations of torture and the real risk they might face if deported to their country of origin, in the light of the documented prevalence of torture in Sri Lanka¹⁹. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee considers that further analysis should have been carried out in this case. The Committee therefore considers that the removal order issued against the authors would constitute a violation of article 7 of the Covenant if it were enforced.

11.5 In the light of its findings on article 7, the Committee does not deem necessary to further examine the authors' claims under articles 23, paragraph 1 and 24, paragraph 1 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the authors' removal to Sri Lanka would, if implemented, violate their rights under article 7 of the Covenant.

¹⁷ See General Comments No. 6 and 20 of the Committee.

¹⁸ See General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paragraph 12.

¹⁹ See for instance paragraphs 3.4 to 3.6 above.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including a full reconsideration of the authors' claim regarding the risk of torture, should they be returned to Sri Lanka, taking into account the State party's obligations under the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Committee member Mr. Krister Thelin (dissenting)

The majority has found some of the authors' claim admissible and considered them on the merits. I disagree. The views should, in my opinion, in paragraph 10.5 read as follows.

“10.5 Regarding the remainder of the authors' claim the Committee notes the State Party's argument that it is not for the Committee to re-evaluate findings of credibility made by competent tribunals, nor to weigh evidence or re-assess findings of facts made by domestic courts or tribunals. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that evaluation was clearly arbitrary or amounted to a denial of justice.¹ This jurisprudence has also consistently been applied to deportation proceedings.² The material before the Committee does not show that the domestic proceedings suffered from any such defects, including the important assessment of the risk of a violation of the authors' rights under the Covenant, were they to be deported to Sri Lanka. Accordingly, the Committee holds that the authors have failed to substantiate their claims, for the purpose of admissibility, and concludes that the communication is inadmissible under article 2 of the Optional Protocol.”

Having been outvoted on the issue of admissibility, I join Committee member Mr. Yuji Iwasawa in his dissenting opinion on the merits.

[*signed*] Krister Thelin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

¹ Communication No. 541/1993, *Errol Simms v. Jamaica*, No. 1544/2007, *Hamida v. Canada*, No. 1551/2007 *Solo Tarlue v. Canada*, No. 1455/2006, *Kaur v. Canada*, No. 1540/2007, *Nakrash v. Sweden*, No. 1494/2006, *A.C. v. The Netherlands* and No. 1234/2003, *P.C. v. Canada*.

² *Solo Tarlue v. Canada*, *Kaur v. Canada* and *A.C. v. The Netherlands*.

Individual opinion by Committee members Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O’Flaherty and Sir Nigel Rodley (concurring)

The Committee’s usual conciseness may make it difficult for some readers to understand a passage in its Views that we regard as particularly significant. For that reason, we write to set forth our own understanding of the issue.

The Committee has long recognized that Article 7 of the Covenant prohibits States parties from removing individuals to countries where they face torture or cruel, inhuman or degrading treatment or punishment. The Committee’s General Comment 31 expressed this principle in terms of an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.²²

In the early 1990’s, however, when the Committee was first exploring the principle of States parties’ responsibility for consequences of their removal decisions, it began by articulating a narrower version of the obligation. Thus, in *Kindler v. Canada* (1993)²³, which involved the extradition of a convicted capital defendant to the United States, the Committee observed:

a State party’s duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

The Committee repeated the idea that transfer of the individual could violate Article 6 or Article 7 of the Covenant if the feared harm *would take place* in the receiving country in a few other cases of the 1990’s such as *Cox v. Canada* (1994) (involving extradition of a capital defendant to the United States).²⁴ In *G.T. v. Australia* (1997),²⁵ the Committee observed that it was not a foreseeable and necessary consequence of [the author’s] deportation that he *will be* tried, convicted and sentenced to death, or subjected to corporal punishment in Malaysia.

The degree of certainty suggested by these early Views contrasts with the standard set forth in Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits sending a person to “another State where there are substantial grounds for believing that he would be *in danger of* being subjected to torture” (emphasis added). The focus on danger, or risk, has characterized the

²² General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

²³ Communication No. 470/1990, Views adopted on 30 July 1993, para. 6.2.

²⁴ Communication No. 539/1993, Views adopted on 31 October 1994, paras. 10.4, 16.1.

²⁵ Communication No. 706/1996, Views adopted on 4 November 1997, paras. 8.4, 8.6 (emphasis added).

approach of both the Committee against Torture and the European Court of Human Rights to the question of return to torture.²⁶

This Committee has also concluded that Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, quoted above, demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a "necessary and foreseeable consequence" of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.²⁷

In its submissions on the present Communication, the State party has referred without distinction to early Views of the Committee such as *Kindler* and to more current Views, and it has described the relevant issue as whether the necessary and foreseeable consequence of the deportation would be the killing or torture of the authors. That is not the proper inquiry. The question should be whether the necessary and foreseeable consequence of the deportation would be a *real risk of* the killing or torture of the authors. The other factors identified by the Committee in its present Views suggest that this misunderstanding of the relevant standard may have deprived the authors of a proper evaluation of their claims under Article 7 of the Covenant.

[signed] Helen Keller
[signed] Iulia Antoanella Motoc
[signed] Gerald L. Neuman
[signed] Michael O'Flaherty
[signed] Nigel Rodley

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

²⁶ See for example Committee against Torture, general comment No. 1, para. 6; *Saadi v. Italy* [GC], App. No. 37201/06, ECHR 2008-_, para. 125 (2008); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

²⁷ See for example communication No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 14.2 ("The risk of an extraterritorial violation must be a necessary and foreseeable consequence..."); communication No. 1205/2003, *Yakupova v. Uzbekistan*, Views adopted on 3 April 2008, para. 6.3 ("substantial grounds for believing that, as a necessary and foreseeable consequence of the transfer to Kazakhstan, there was a real risk that he would be subjected to treatment prohibited by Article 7.").

Individual opinion by Committee member Mr. Yuji Iwasawa (dissenting)

1. I am unable to associate myself with the Views of the Committee for the following reasons.

2. In *A.R.J. v Australia*, the Committee stated that “what is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (*that is, a necessary and foreseeable consequence*) of a violation of his rights under the Covenant” and that “the risk of such treatment must be real, *i.e. be the necessary and foreseeable consequence* of deportation to Iran.”¹ Such statements have led some States parties to claim that the Committee has equated “a necessary and foreseeable consequence” with “a real risk.”²

While General Comment 31 (2004) refers only to “a real risk,” the Committee has continued to use references to “a necessary and foreseeable consequence,” even after 2004. The formula used by the Committee in recent years is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the author’s removal, there is a real risk that the author would be subjected to a violation of his rights under the Covenant (e.g. torture).³

In addition, the risk must be personal as well, although the Committee does not articulate it clearly. The Committee against Torture explicitly requires that “the risk of torture must be foreseeable, real and personal.”⁴

The concurring opinion of Ms. Keller and others points out that the Human Rights Committee in the recent decade asks whether the necessary and foreseeable consequence of the deportation would be a real risk of torture, rather than the actual occurrence of torture. The jurisprudence of the Committee is, however, not consistent. Even in recent years, the Committee asks whether the necessary and foreseeable consequence would be a violation of rights, rather than a real risk of a violation.⁵ Moreover, the Committee constantly cites as the authority *A.R.J. v Australia*,⁶ which sets out a necessary and foreseeable consequence of a violation as the test. Thus, the test of the Committee needs clarification.

In any event, in the present case, whether the necessary and foreseeable consequence of the deportation would result in the killing or torture of the author was not the test used by the State party’s authorities. In the removal risk assessment procedures, the authorities assessed whether the authors would face a personal *risk* of being persecuted, killed or tortured (paragraph 7.8, emphasis added), thus applying the test recognized as proper by the above-mentioned concurring opinion.

¹ Communication No. 692/1996, *A.R.J. v Australia*, Views adopted on 28 July 1997, para. 6.8, 6.14 (emphasis added). See also No. 706/1996, *GT v Australia*, Views adopted on 4 Nov. 1997, para. 8.1.

² E.g., Communication No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 Oct 2006, para. 4.5 (State party’s observations on merits).

³ E.g., Communication No. 1540/2007, *Nakrash v. Sweden*, inadmissibility decision adopted on 30 Oct. 2008, para. 7.3.

⁴ E.g., Communication No. 203/2002, *M.F. v. Sweden*, Decision adopted on 14 Nov. 2008, para. 7.3 (CAT).

⁵ Communication No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 7.5.

⁶ E.g., Communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 Mar. 2010, para. 8.7, n.19.

3. It has been the constant practice of the Committee in removal proceedings to recall its jurisprudence that “it is generally for the courts of the States parties to the Covenant to evaluate *facts and evidence* of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.”⁷ Moreover, the Committee has explicitly acknowledged that “[this] jurisprudence has been applied to removal proceedings.”⁸

In the present Views, however, the Committee changed the formula without explanation as follows: “it is generally for the instances of the States parties to the Covenant to evaluate *facts* in such cases [expulsion of non-citizens]” (para.11.2, emphasis added). The Views, however, acknowledge in the following paragraph that “deference [is] given to the immigration authorities to appreciate the *evidence* before them” (para. 11.3, emphasis added). Under the circumstances, I can only reasonably interpret the present Views as not having changed the established jurisprudence of the Committee that it is generally for the courts of the States parties to the Covenant to evaluate *facts and evidence* of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee should refrain from acting as a fourth instance tribunal to re-evaluate facts and evidence before the authorities in the State party in removal proceedings, unless there are clear and specific reasons for doing so.

4. In the present communication, I take note of the conflicting arguments provided by the authors and the State party on the extent to which the Diagnostic Interview Report, containing a diagnosis of Post-Traumatic Stress Disorder for Mr. Pillai, was taken into account by the IRB. I also take note of the State party’s arguments that major inconsistencies arose in the testimonies provided in the Personal Information form and during the hearing before the IRB; that Mr. Pillai did not establish that he owned the communication centre which was at the source of all their problems; that possible extortion of money by the LTTE could not be the reason the authors had left the country, as these extortions occurred three years before their arrival in Canada; that the authors’ claims were not credible based on the consideration of the evidence; that the authors have not proven that they are at a greater risk than the general population nor that Tamils in Colombo suspected of having provided low-level support to LTTE are at risk of torture or death by the Sri Lankan authorities; that even if their lives were in danger in Colombo, they would have an internal flight alternative in Sri Lanka; and that the authors have not proven that they face a personal risk of torture or ill-treatment if returned to Sri Lanka.

While I agree that during the refugee claim determination process insufficient weight seems to have been given to the conclusion of the Diagnostic Interview Report, I cannot conclude that the material before the Committee demonstrates that the evaluation of facts and evidence carried out by the authorities of the State party was arbitrary or amounted to a denial of justice. Thus, I consider that the facts before the Committee do not disclose a violation of the Covenant.

[signed] Yuji Iwasawa

⁷ Communications No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 Mar. 2010, para. 8.4 (emphasis added). See also No. 1551/2007, *Solo Tarlue v. Canada*, inadmissibility decision adopted on 27 Mar. 2009, para. 7.4; No. 1455/2006, *Kaur v. Canada*, inadmissibility decision adopted on 30 Oct. 2008, para. 7.3; No. 1540/2007, *Nakrash v. Sweden*, inadmissibility decision adopted on 30 Oct. 2008, para. 7.3; No. 1494/2006, *A.C. v The Netherlands*, inadmissibility decision adopted on 22 July 2008, para. 8.2; No. 1234/2003, *P.C. v Canada*, inadmissibility decision adopted on 20 Mar. 2007, para. 7.3.

⁸ *Solo Tarlue v. Canada*, *ibid.* *Kaur v. Canada*, *ibid.* *A.C. v The Netherlands*, *ibid.*

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
