



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
22 June 2017

Original: English

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 648/2015**, ***

<i>Communication submitted by:</i>	S.S. (represented by counsel, Rasan T. Selliah)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	14 October 2014 (initial submission)
<i>Date of present decision:</i>	10 May 2017
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Admissibility — manifestly unfounded
<i>Substantive issue:</i>	Non-refoulement
<i>Articles of the Convention:</i>	3 and 22

Background

1.1 The complainant is S.S., a national of Sri Lanka, born in 1980. He claims that if it proceeds with his deportation to Sri Lanka, Australia would violate article 3 of the Convention. The State party made the declaration under article 22 of the Convention on 28 January 1993. The complainant is represented by counsel, Rasan Selliah.

1.2 On 7 January 2015, in application of rule 114, paragraph 1, of its rules of procedure, the Committee requested the State party to refrain from deporting the complainant to Sri Lanka pending the consideration of his case. On 27 July 2016, the State party requested the Committee to lift its request for interim measures. On 21 September, the Committee rejected this request.

Facts as presented by the complainant

2.1 The complainant is a Tamil of Hindu religion. He was born in Kalmunai in the Eastern Province of Sri Lanka. He worked in the jewellery business in Colombo. In 2006, due to the escalation of political troubles and the increase in criminal activities, including abductions and extortions of money from Tamils, he attempted to obtain a visa for Australia through a friend who was an “agent”. He was introduced to “a minister”. Papers were signed and handed over to the minister.

* Reissued for technical reasons on 21 July 2017.

** Adopted by the Committee at its sixtieth session (18 April-12 May 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.



2.2 Five days later, the complainant was arrested by agents of the Criminal Investigation Department and detained for five days on the fourth floor of its headquarters,¹ where he was beaten and tortured. The officers wanted to know why the complainant had tried to leave the country and if he was a member of the Pirapaharan or the Karuna faction of the Liberation Tigers of Tamil Eelam (LTTE).² The Department alleged that it had proof that the complainant had provided financial support to LTTE. The complainant explained that he had given money to the group because his family was threatened with harm if he did not do so. The Department tried to force him to confess to being a member of LTTE, which he refused to do. On 2 November 2006, the complainant was brought before the Chief Magistrate's Court and was held on remand in the Welikade prison. Along with several others, he was charged with being a member of a terrorist group which had planned destructive activities.³

2.3 The complainant's parents submitted business registration and other documents and, on an unspecified date, the court ordered the complainant's release on the condition that he report to the Criminal Investigation Department each month, for a period of six months. The Department extended the reporting period beyond six months, threatening to detain the complainant if he did not continue to report to them. At each visit, police officers forced him to pay bribes. After the second six-month period had ended, the officer in charge of his case insisted that he continue reporting, under threat of detention. He did not dare to complain to higher authorities for fear of further persecution. Unable to bear this harassment, the complainant sold his business and moved back to Kalmunai, where he worked for his brother's jewellery business.

2.4 On 7 July 2008, the complainant was abducted from his home in Kalmunai by the Karuna group of Tamil Makkal Viduthalai Puligal,⁴ a pro-Government group. He remained in a camp for three months. The group pressured him to join its cause and ill-treated him when he refused.⁵ Tamil Makkal Viduthalai Puligal said that it had proof that the complainant had contributed to LTTE and that he had to join them or give them money. When the complainant's wife went to the police for help, she was told to provide them with sexual favours if she wished her husband to be released. She later visited her husband at the camp, accompanied by village elders. She was told by guards there not to go to the police again. The complainant's wife was also warned that if she revealed information about the camp to others, her husband would be killed.

2.5 After three months in the camp, during which he was forced to perform hard manual labour⁶ and was regularly beaten, the complainant escaped. He did not return home and arranged for his identity papers to be brought to him, after which he went to Colombo and obtained a passport through an agent.⁷ He eventually arrived in Timor-Leste, by way of Singapore and Malaysia,⁸ in December 2008. The complainant was questioned by the Timor-Leste authorities.⁹ The interpreter was a Sri Lankan policeman, and the complainant still fears that this policeman reported him to Sri Lankan authorities. The complainant

¹ The complainant states that this location is notorious for its methods of interrogation and torture.

² Alluding to different factions of LTTE, named after their respective leaders.

³ The complainant provided an excerpt of the court record, in English, which he says lists his name at No. 15 in the list of suspects. The extract shows a similar name at No. 15, and the complainant provides further documentation which he claims corroborates the fact that his name had been misspelled on the charge sheet.

⁴ At first, the complainant stated that he was confused as to which faction of Tamil Makkal Viduthalai Puligal was holding him: the Karuna faction, whose leader, Colonel Karuna, is a deputy minister in the Government, or the Pillayan faction, whose leader is a presidential adviser. Later, he came to know that it was the former, as someone known to be senior in the organization, Iniyabarathy, visited the camp.

⁵ Further details are not provided.

⁶ Including digging bunkers and working in the kitchen.

⁷ It is not clear whether this is the same agent who had previously taken him to get an Australian visa.

⁸ On his first attempt, he was deported to Sri Lanka from Singapore. He claimed that he had passed through customs without being remarked by the authorities because a friend had bribed customs agents.

⁹ Dili was under United Nations control at that time.

worked in Timor-Leste illegally for seven months. Thereafter, he walked through the jungle for eight hours to Kupang and then travelled to Jakarta by vehicle.

2.6 On 10 March 2010, he boarded a boat for Australia and arrived at Christmas Island on 20 March. Upon arrival, the complainant learned that his parents had been visited by Criminal Investigation Department officers, who warned them to inform the Department immediately if they became aware of the complainant's whereabouts.

2.7 The complainant applied to the Department of Immigration and Border Protection¹⁰ for a protection visa. His application was rejected by a delegate of the Minister on 17 August 2010. The delegate accepted the complainant's claims with regard to the incidents in 2006 and July 2008, but found that he did not meet the definition of a refugee as set out in article 1A of the 1951 Convention relating to the Status of Refugees.

2.8 The complainant appealed the decision via the independent merits review procedure, but his appeal was rejected on 13 May 2011. The complainant asserts that the reason given for the refusal to reverse the decision of 17 August 2010 was because his claim to have been detained and tortured by the Criminal Investigation Department was found to lack credibility. The complainant states that at the time he was not able to provide proof of this fact. He applied for judicial review of the first independent merits review to the Federal Magistrates Court,¹¹ which rejected his application on 2 November 2011.

2.9 He then appealed to the Federal Court of Australia, which found in his favour on 2 March 2012. As a result, his claims were reassessed in a second independent merits review. This time, he provided documentary evidence, in the form of a certified copy (in Sinhalese) of a report filed by the Criminal Investigation Department and the Terrorist Investigation Division with the Chief Magistrate's Court of Colombo, showing that 39 suspects alleged to have assisted LTTE had been arrested, kept in detention by the Division and brought before the Chief Magistrate's Court of Colombo under the Emergency Regulations. In the report, the complainant's name is listed at No. 15, but he claims that it was misspelled in Sinhala. Therefore, the reviewer in the second independent merits review decided that the document did not relate to the complainant and rejected his application. The complainant contends that the misspelling of his name was likely a result of a total disregard by police for Tamils, or a typographical error.

2.10 The complainant later obtained from the Registrar of the Magistrate's Court of Kalmunai¹² a document certifying that he had been charged with aiding and abetting a terrorist group and that his name was misspelled in the report. The complainant also obtained a letter from a Member of Parliament for the Batticaloa District, dated 27 August 2014, reiterating his claims.

2.11 The complainant applied to the Federal Circuit Court for judicial review of the second independent merits review on the basis of this new evidence. His application was rejected on 12 July 2013. His application to have the decision judicially reviewed was dismissed on 4 December. His application for special leave to appeal to the High Court was also rejected, on 15 August 2014. On 2 September, he applied for a waiver under section 48B of the Migration Act 1998 to allow him to lodge a new application for a protection visa. He also requested ministerial intervention, with a request to issue a favourable decision on humanitarian and compassionate grounds and exceptional circumstances. On 10 November, the complainant's application was rejected. The complainant maintains that he has thus exhausted all available domestic remedies.

2.12 The complainant's wife and daughter continue to live in Sri Lanka, in fear of harassment because the complainant is being sought by the authorities and pro-Government paramilitaries.¹³

¹⁰ Then the Department of Immigration and Citizenship.

¹¹ Renamed the Federal Circuit Court in 2013.

¹² The Registrar was approached by the complainant's wife and requested to provide this information.

¹³ The complainant cites country reports of Amnesty International and Human Rights Watch and the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* issued by the Office of the United Nations High Commissioner for Refugees in 2010

The complaint

3. The complainant claims that his deportation to Sri Lanka would violate his rights under article 3 of the Convention. He states that, since he is a Tamil man from an area formerly known for LTTE activities, he is suspected of having links with LTTE; that he has already been tortured by the Criminal Investigation Department and the Karuna group in the past and accused in court of terrorist activities; and, having escaped from detention by a pro-Government militia, upon return to Sri Lanka he faces torture by the authorities, who are still looking for suspected anti-Government elements. Therefore, by returning him to Sri Lanka, Australia would violate its obligations under article 3 of the Convention.

State party's observations on admissibility and the merits

4.1 By note verbale dated 16 October 2015, the State party provided its observations on the admissibility and merits of the complainant's communication.

4.2 The State party submits that the complainant's claims are unsubstantiated and inadmissible pursuant to rule 113 (b) of the Committee's rules of procedure, on the grounds that they are manifestly unfounded as he has failed to establish a *prima facie* case. The State party notes that the complainant's claims were thoroughly considered by a series of domestic decision makers, including an independent merits review and a judicial review by both the Federal Circuit Court and the Full Federal Court of Australia. These domestic processes determined that the complainant's claims were not credible and did not engage the State party's obligations. The complainant's claims were also considered under complementary protection provisions.

4.3 The State party asserts that the complainant has not provided any relevant new evidence in his submission to the Committee that has not already been considered through robust and comprehensive domestic administrative and judicial processes. It refers to the Committee's general comment No. 1 (1997) on the implementation of article 3 in which it is stated that the Committee is not an appellate or judicial body and that it gives considerable weight to findings of fact made by organs of a State party.

4.4 Regarding the complainant's reliance on general country information, the State party asserts that this does not, *prima facie*, establish a personal risk of torture. In concluding that there are no substantial grounds for believing that the complainant is at personal risk of torture in Sri Lanka, domestic decision makers have already considered extensive country information, including that provided by the State party's Department of Foreign Affairs and Trade and the Office of the United Nations High Commissioner for Refugees (UNHCR).

4.5 The State party refers to the initial decision relating to the complainant's refugee status. The refugee status assessment officer was not satisfied that the complainant was a reliable witness. In particular, he did not accept the complainant's alleged encounter with a Sri Lankan police officer during his stay in Timor-Leste. The complainant did not mention this encounter during his entry interview or in his written refugee status assessment submissions. Further, given the availability of other Tamil interpreters, the officer did not consider it plausible that a Sri Lankan police officer would be required to act as an interpreter. Moreover, it was not considered plausible that the complainant would take the risk of criticizing the Sri Lankan Government in front of a police officer. The refugee status assessment officer did accept the complainant's claims relating to his alleged detention by the Criminal Investigation Department in 2006 and his kidnapping in 2008. Nonetheless, the officer did not consider that these incidents gave rise to refugee protection obligations.

4.6 Regarding the first independent merits review, the State party explains that all claims for protection were considered *afresh*. The complainant was able to make written submissions and attend an interview with his migration agent and with the assistance of a Tamil interpreter. On 13 May 2011, after an assessment of all available evidence, the independent reviewer recommended that the complainant not be recognized as a person to

and 2012, confirming that the torture and ill-treatment of persons in custody have remained a problem since the armed conflict.

whom the State party owed protection under the Convention relating to the Status of Refugees.

4.7 The State party adds that the reviewer had significant concerns about the complainant's credibility. In relation to his detention by the Criminal Investigation Department in 2006, the reviewer found it far-fetched that the complainant, a goldsmith seeking to apply for a tourist visa for Australia, would be suspected of being an LTTE member or agent, and saw no other plausible reason for his detention. The reviewer noted inconsistencies in the reasons given by the complainant for leaving Colombo and found his account of the kidnapping by the Karuna group to be similarly inconsistent. Of particular concern was the fact that the complainant stated that the operators of the camp "pressed" him to join their group but also claimed that they did not tell him the name of the group during the three months he was held there. He also provided two different explanations of how he guessed the identity of the group.¹⁴

4.8 The reviewer found the claim that upon being deported from Singapore the complainant managed to avoid attracting the attention of the Sri Lankan authorities by having his agent friend bribe immigration officials to be lacking credibility. The reviewer also believed the claim regarding the ex-police officer interpreter lacked factual merit. Further, status as a failed asylum seeker was found not meet the criteria for granting refugee status.

4.9 The Federal Magistrates Court found that the reviewer did not make any error of law. In the complainant's appeal of this decision to the Federal Court of Australia he cited first as ground for the appeal a lack of procedural fairness; this was denied. However, the second ground for appeal — that the reviewer had failed to specifically consider the complainant's claim that he was a member of a particular social group¹⁵ — was allowed. While the reviewer had considered the complainant's claim of past harm, he had not considered the more general risk. The Federal Court remitted the complainant's case to the independent merits reviewer for reassessment.

4.10 In the second independent merits review, the complainant was able to make written submissions and attend an interview. Again it was recommended that the complainant not be recognized as an individual to whom the State party owed protection obligations. The reviewer did not find the complainant to be a reliable, credible or truthful witness. In particular, the reviewer took into account the complainant's submission that his ability to present his claims and evidence had been hindered by a range of factors, including interpretation services and the psychological effects of his perilous journey; the guidance given by the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, advising that no undue weight should be placed on a degree of confusion and omission in accounts given at various stages of the refugee status assessment; a torture and trauma report which assessed the complainant's cognitive functioning as normal; the complainant's interviews and written submissions in which no reference was made to errors by interpreters; and, finally, the complainant's presentation at the interview for the second independent merits review, in which he was articulate and demonstrated a clear understanding and in which he was able to participate effectively. The reviewer did not give any weight to, or even raise, the inconsistencies in the entry interview and subsequent communications, in the light of advice from UNHCR.¹⁶ Nonetheless, the reviewer considered that the complainant had tailored his evidence to suit his needs and that inconsistencies remained regarding central issues while many key claims were implausible and inconsistent.

4.11 The reviewer did not accept the complainant's claim that he was arrested by the Criminal Investigation Department on suspicion of being an LTTE supporter after he had applied for Australian visa. The complainant's changing evidence about how he came to

¹⁴ The type of work he was asked to do in one account and the identity of the leader in another.

¹⁵ That is, the category of young Tamil males from the east of Sri Lanka, whom the authorities generally suspect as having links to LTTE.

¹⁶ Including inconsistent evidence concerning his wife's attempts to arrange for his release from the paramilitary camp, how his wife managed to visit him at the camp and how he was able to depart Sri Lanka again so soon after having been deported from Singapore in 2008.

apply for a visa, with one story being repeated three times in previous interviews and then changing, is not consistent with his claim that previous decision makers had misunderstood his evidence. His revised version of events contradicted his claim that a member of staff at the High Commission must have been a Department informant. His evidence was also inconsistent as to whether he knew the “minister” who had assisted him with his visa application. Taken together, these inconsistencies, along with his business profile, did not support the complainant’s claim that his application for a visa resulted in his arrest by the Criminal Investigation Department on suspicion of links with LTTE.

4.12 In relation to the extract of the police report filed with the court in Colombo, the State party states that the reviewer did not consider that the content of the report outweighed the problems with the complainant’s own evidence. The complainant had pointed to the part which he claimed related to him, but stated that his name had been misspelled. A receipt was also provided, which the complainant stated was proof of having paid for an extract of the court record. This record and the receipt were not provided previously, despite the fact that the receipt was dated 11 June 2011. The complainant stated that this was because his agent had not asked for it. The reviewer did not consider the documents to relate to the complainant and consequently gave them no weight.

4.13 The complainant also claimed for the first time during the second independent merits review interview that he had provided financial support to LTTE. When asked why he had not recounted this fact at an earlier stage, he explained that he had been advised not to do so by others at the detention centre. However, the reviewer noted that the complainant had had access to a migration agent throughout all the processes. The reviewer also did not accept that the complainant had been abducted by the Karuna group or any other paramilitary group, owing to inconsistencies in his evidence about the method by which he was abducted, who had kidnapped him, how he had escaped and how he had departed from Sri Lanka. Regarding inconsistencies in his evidence as to who had kidnapped him, the complainant stated that it was hard to distinguish between all the groups.¹⁷ The reviewer further did not accept that the complainant could not identify a group which had tried to indoctrinate him over a three-month period. The complainant also stated that his statement that he had been kidnapped by LTTE was a mistake made by the first interpreter. He insisted that he had tried to correct this misunderstanding at the next interview. When it was pointed out that this was not reflected in the record of that interview, the complainant stated that he had been warned by other detainees not to reveal the identity of the group as that would get him into trouble. This explanation was not accepted.

4.14 The complainant’s explanation of how he had escaped the camp was also found to be implausible and inconsistent,¹⁸ as was his explanation of where he went afterwards¹⁹ and when he obtained his passport.²⁰ When the conflicting evidence was presented to the complainant, he denied his earlier evidence, which was on record. Finally, the reviewer found that the complainant did not face a risk of harm on his return owing to his status as a failed asylum seeker. After reviewing the evidence, the reviewer was satisfied that the complainant had not experienced any difficulties upon re-entering Sri Lanka after he was deported from Singapore in 2008. The reviewer noted country information indicating that returnees are unlikely to face significant problems in the absence of a criminal or LTTE profile. The reviewer accepted that the complainant would be subject to routine screening at the airport but that this would not amount to significant harm.

4.15 On 4 July 2012, the complainant appealed the decision of the reviewer on three grounds, all of which related to the rejection of the complainant’s claim that he had been detained by the Criminal Investigation Department in 2006. The Federal Court rejected the submission, finding ultimately that the reviewer had not failed to consider the complainant’s alleged detention by the Department. The complainant claimed that he had

¹⁷ Various described by the complainant as an unknown group, the Karuna group, the anti-LTTE pro-Government Tamil Makkal Viduthalai Puligal and LTTE.

¹⁸ Including the number of guards present at the time of the escape, that they could have all gone to the toilet at the same time and that evidence was revised upon questioning.

¹⁹ It was found to be implausible that he would have returned to a house next door to his own.

²⁰ Various stated to be before or after his detention in the camp.

not been given the opportunity to comment on whether the court documents, if authentic, in fact related to him. The Court, in dismissing the claim, noted that the complainant had had the opportunity to attend a hearing and furnish additional facts to establish that his name had been misspelled on the record but had failed to do so. In any case, other material raised doubts about whether he had ever been detained by the Department. The third ground of appeal related to the reviewer's alleged failure to accord proper weight to the court documents as evidence that corroborated the complainant's claims. In that connection, the Court found that it was within the authority of the reviewer, in the light of her concerns about credibility, to find that the documents did not relate to the complainant and therefore to give them no weight as corroborating evidence.

4.16 The State party adds that the complainant's appeal of 2 August 2013 was dismissed by the Federal Court on 4 December. The appeal was based on the claim that the reviewer had denied the complainant procedural fairness by failing to advise him that she might find the report filed by the police with a court in Colombo genuine but not relating to the complainant. Consequently, it was claimed that the reviewer had failed to provide the complainant with an opportunity to provide further comments on that issue.

4.17 The Federal Court accepted that the critical issue on which the reviewer's decision was likely to turn was whether the complainant had been arrested and detained by the Criminal Investigation Department, and in turn that the reviewer was obliged to make the complainant aware of this issue. In the Court's view, the complainant had clearly been made aware of this situation and, specifically, was made aware that the reviewer might decide that the court document did not relate to him. The complainant's solicitor and migration agent were aware that the misspelling of the complainant's name was problematic. He was given the opportunity, which he availed himself of, to make written submissions thereon. The written submissions were considered by the reviewer and the complainant's representative was also invited to provide additional comments. The reviewer's conclusion on the question of the court document flowed from "an obvious and natural evaluation" of the document and the inherent and apparent weakness of that document. Therefore, the Court was not persuaded that there had been any lack of procedural fairness. In so finding, the Court noted that the complainant had not argued on appeal that it was not within the authority of the reviewer to give little or no weight to the court document in the light of the problems identified with the complainant's evidence.

4.18 The State party reiterated that, on 15 August 2014, the High Court of Australia dismissed the complainant's application for special leave to appeal the decision of the Full Federal Court of Australia as he had not identified any question of principle that would warrant a grant of special leave.

4.19 On 2 September 2014, the complainant requested a ministerial intervention under sections 417 and 48B of the Migration Act 1958 to permit him to apply further for a protection visa, which the Minister may grant if it is in the public interest. The State party explained that a request for intervention can be referred to the Minister for consideration if it contains additional information which is likely to enhance the person's chances of making a successful claim for protection. Consequently, the claims made by the complainant were again assessed in full by a delegate of the Assistant Minister for Immigration and Border Protection. The delegate found that no further information provided in the complainant's request indicated that he had a greater chance of making a successful protection visa application. The State party stated that the complainant had provided, for the first time, a letter from the Registrar of a magistrates court dated 1 September 2014 attesting that the complainant's name had been misspelled in the extract of the court record. The complainant also provided a letter from a Member of Parliament from Batticaloa District reiterating the complainant's claims of persecution by the Criminal Investigation Department and the Karuna group. The delegate considered that, in the light of the problems with the complainant's credibility, those documents should be given no weight by the Department of Immigration and Border Protection. The delegate did not refer the case to the Minister for consideration as none of the information provided indicated that the complainant had a better chance of making a successful application for a protection visa.

4.20 The State party asserts that for the reasons set out above, the complainant's claims are inadmissible and/or without merit.

Complainant's comments on the State party's observations

5.1 On 2 February 2016, the complainant submitted comments on the State party's submission.

5.2 The complainant claims that he has complied with rule 113 (b) of the Committee's rules of procedure, having established a *prima facie* case. Thus, his communication is not inadmissible or without merit.

5.3 In relation to the second independent merits review, one of the complainant's central claims was that he had twice been detained as an LTTE supporter. The reviewer found this claim not to be credible owing to a discrepancy, which the complainant submits is a minor one, over the wording of his statement, namely that he first claimed that he had seen his visa application being lodged and later that he had been in the car and watched someone else enter the High Commission with the purpose of lodging the application. The complainant submits that this question is merely a semantic one, and that watching someone about to lodge an application on your behalf and watching your visa application actually being lodged are consistent.

5.4 The reviewer also referred to the complainant's statement that he had an informant within the High Commission, stating that this was inconsistent with his not personally knowing if his application for a visa had been lodged. The complainant submits that there is no inconsistency. His claim that his arrest by the Criminal Investigation Department indicated that there may have been an informant at the High Commission was purely speculation, and there may well have been another reason for his arrest such as his membership of a social group, payments to LTTE, etc. The complainant maintains that even if his claims about the High Commission were found to be inconsistent, his arrest by the Criminal Investigation Department is a separate matter.

5.5 Regarding perceived inconsistencies in the complainant's evidence as to whether the "minister" referred to was in fact a minister for Negombo and whether the complainant had visited his office, the complainant states that he was told that the person was "a minister" and he assumed it was "for Negombo".

5.6 The reviewer stated that the complainant had not provided court documents immediately upon obtaining them. The complainant submits that his previous representative misdirected him as to whether it was necessary to adduce these documents as evidence. Also, at the time the evidence was obtained the matter was before the court, so new evidence could not be introduced. The complainant requested that the Committee verify the document with the Sri Lankan authorities. The complainant draws the Committee's attention to the statement by a registrar, which had not been available to the second reviewer, verifying the charge sheet extract and explaining the misspelling.

5.7 The reviewer had further concluded that the complainant had been inconsistent in his statements regarding the identity of his kidnappers. The complainant submits that Liberation Tigers of Tamil Eelam (*Tamiḻiḻa viṭutalaip pulikal*) and Tamil Makkal Viduthalai Pulikal are very similar in the Tamil language due to the word "tiger" (*pulikal*), and that an error had been made by his first interpreter. The groups are both Tamil and had been unified before Tamil Makkal Viduthalai Pulikal splintered off. Even for Tamils, the situation can be confusing.

5.8 With reference to the fact that he did not raise in prior interviews the question of the payments he had been forced to make to LTTE, the complainant maintains that it was because the payments were not the primary reason that he feared harm; he believed that his abduction was related to his visa application.

5.9 The complainant referred to inconsistencies in the account of his escape from the Karuna group camp in 2008. He maintains that he consistently stated that there were several guards. He later clarified that there was only one guard in the immediate area at the time of his escape. He never stated that all the guards had gone to the toilet simultaneously. He states that the original reviewer implied that he had done so and he was not given an opportunity to clarify. He did so with the second reviewer, and denies that this represented a revision of his evidence.

5.10 The complainant also refers to the second reviewer's conclusion that he was inconsistent in stating during the first independent merits review interview that he had received his passport legally in 2006 and in the second review that he had received the passport after his detention in 2008. The complainant states that this is a misunderstanding of his evidence. He submits that these were not the same passports. The first was obtained legally for the purposes of his visa application and the second was obtained illegally after his escape from the Karuna camp.

5.11 The complainant submits that in its general comment No. 1 (1997), the Committee makes clear that it is not bound by the State party's finding of fact. He submits that the perceived inconsistencies are negligible or justified and should not have been given so much weight that official court documents corroborating his account were ignored. The complainant therefore requests the Committee to depart from the findings of the second reviewer and to accept the complainant's account of his detention as being true.

5.12 The complainant states that the second reviewer never put to him that she did not accept the authenticity of the court document, in which his name is misspelled. He became aware of the discrepancy only after the second reviewer had issued her decision, at which time he asked his wife to obtain corroborating evidence from the court explaining the misspelling. His wife then obtained a letter from the Registrar of the Magistrates Court of Kalumnai certifying that the complainant had been suspected and charged with LTTE involvement in the past and explaining the misspelling of his name on the charge sheet. She also obtained a letter from a Member of Parliament verifying the complainant's claims as to his detention and kidnapping.

5.13 The complainant therefore urges the Committee to verify the authenticity of these documents. He submits that they corroborate his claims and outweigh any minor inconsistencies leading to a finding that his account lacked credibility. Both of the documents mentioned above originate from credible and verifiable sources. There was no opportunity for them to be presented to the second reviewer.

5.14 As to the judicial review of the second independent merits review, the court only had jurisdiction to adjudicate errors of law, jurisdictional error or a denial of procedural fairness; it could not evaluate evidence or decide on the merits. The court could not consider new evidence that had not been before the reviewer, nor could it challenge the reviewer's highly discretionary credibility finding.

5.15 The complainant submits that he had exhausted all domestic avenues when he lodged an application for a waiver under section 48B of the Migration Act to allow him to lodge a new application for a protection visa and a request to the Minister to issue a more favourable decision under section 417 of the Act on humanitarian and compassionate grounds and exceptional circumstances. Those were the only domestic processes that could take the new evidence into consideration. Decisions whether to refer applications to the Minister are wholly discretionary and apply no legal standard; hence, they are not reviewable. In fact, the application under section 48B was never considered by the Minister as it is within the delegate's discretion whether to refer applications to the Minister and no reasons need be given. However, in its submission the State party indicated that the delegate of the Assistant Minister had found that the new evidence did not enhance the chance of making a successful protection visa application, and therefore the application was not referred.

5.16 In this connection, the complainant submits that the delegate erred in not referring the application to the Minister because the new evidence substantially corroborates his claims, comes from a credible source and could have been verified. The complainant adds that the delegate cannot justify giving the new evidence no weight on the basis of credibility issues because the evidence directly challenges any lack of credibility finding. The complainant therefore strongly asserts that the decision not to refer the application to the Minister removed the only chance for the new evidence to be considered and the entire testimony of the complainant to be reconsidered in the light of it. This resulted in the complainant being unjustifiably put in jeopardy of a return to Sri Lanka and consequently being subjected to persecution, including torture.

5.17 The application under section 417 was also rejected without reasons being given. Again, there is no obligation for the claim to be considered and, the procedure being discretionary, it cannot be reviewed.

5.18 The complainant avers that during his background check at the airport, Sri Lankan authorities will come to know of his court appearances in 2006 and his criminal record at the very least. Further, his interpreter in Timor-Leste was a Sri Lankan officer who may have communicated the fact of the complainant's claims to the Sri Lankan authorities.

5.19 The complainant states that the most recent country information demonstrates that young Tamil males suspected of LTTE involvement have a foreseeable, real and personal risk of being subjected to torture upon return to Sri Lanka, as already stated in his initial communication to the Committee. He also refers to a BBC report which outlines accounts of victims detained, tortured or gang raped by security forces, including under the Government of President Sirisena.²¹ The International Truth and Justice Project also outlines the continued allegations of torture and "white van" abductions despite the change in Government.²²

5.20 In conclusion, the complainant submits that his communication is admissible and has merit and that any attempt to deport him would violate the State party's obligations under the Convention. In particular, the Committee should not accept the decision of the second independent merits review to be correct and final as the new evidence clearly corroborates the complainant's claims. The new documents provide indisputable evidence that he was accused of LTTE involvement and is therefore likely to be suspected of such upon re-entry. The country information provided demonstrates that Tamil men are likely to experience torture upon return to Sri Lanka.

State party's additional observations on the complainant's comments

6.1 By note verbale dated 20 May 2016, the State party submitted its observations on the complainant's comments.

6.2 The State party maintains that the complainant offered a number of differing versions regarding his application for an Australian visa and considers that, despite the evolving narrative of the circumstances of the claim, the complainant has not provided any evidence to support the claim that he would be of interest to the Sri Lankan Government solely because he applied for such a visa.

6.3 Regarding the complainant's claim of having an informant at the Australian High Commission and his detention by the Criminal Investigation Department, the State party asserts that the complainant has provided no information or evidence to support the claim that he was detained because of his sex and no country information that would support this, and states that it therefore does not consider this claim to be credible.

6.4 The State party posits that even if it were to be accepted that the Criminal Investigation Department had arrested the complainant for any reason, they did not pursue him when he returned to his home village, Kalmunai, at the end of 2006, which indicates that he has not been of interest to the Department for 10 years. The State party therefore reiterates the conclusion of the Department of Immigration and Border Protection that there is no sufficient evidence to support the claim that the complainant would be at risk of torture in Sri Lanka.

6.5 The State party assesses that it is implausible that the Criminal Investigation Department would have released him if it had suspected him of being a terrorist.

6.6 Regarding the court documents produced by the complainant, the State party confirms that they were assessed by the Department of Immigration and Border Protection and found not to support any new and credible claim that the complainant would be at risk

²¹ The original link is no longer accessible, but the BBC report quoted is available from <http://lankanewsweb.net/news/item/1906-tamils-still-tortured-in-sri-lanka-say-rights-groups>, dated 8 January 2016.

²² See www.thesundayleader.lk/2016/01/10/sooka-reignites-white-van-abductions-debate/.

of torture in Sri Lanka. The reviewer did not give any weight to the document as the complainant's claims were found to be illogical and inconsistent.

6.7 The State party further argues that this claim was also considered by the Federal Magistrates Court and the Full Federal Court, which considered the matter again as the complainant claimed that the reviewer had denied him "procedural fairness by not disclosing to him the possibility that she might find that a Sri Lankan document produced by the appellant ... might not be related to the appellant". The Full Federal Court came to the conclusion that "the information in the document has an apparent weakness, which was both obvious and recognised by the appellant's solicitors and registered migration agents when putting them forward", and that it was "for the appellant to persuade the reviewer that the document did refer to him, despite the fact that on its face it did not, and to substantiate the claimed misspelling". The Federal Magistrates Court also acknowledged that the reviewer had come to the view that, irrespective of the court document, the complainant would no longer be of interest to the Criminal Investigation Department.

6.8 The State party asserts that the claim has been thoroughly considered at all stages of assessing the complainant's claims through the refugee status assessment process as well as judicial review. The complainant has not provided any further evidence or information to substantiate his claim that the document is evidence of his arrest by the Criminal Investigation Department. For completeness, the State party notes that the Department of Immigration and Border Protection has itself assessed the document and concluded that its authenticity, and therefore its validity as evidence of arrest by the Criminal Investigation Department, is questionable. Firstly, without the original it cannot be determined whether it is a translation of a genuine document. However, the inconsistency in the dates, fonts and formatting of the document indicates that information has been added, removed or copied over the top of what may have been a genuine translated copy. In addition, the translator's stamp on the second page is partially obscured, which provides further evidence that the document is not the original and has been modified.

6.9 As regards the supporting document submitted to attest to the spelling error in the court document described above, despite purportedly being from the Magistrates Court, there is no indication that it has been translated or copied, and therefore it is reasonable to assume that it is an original document. However, there is no formal letterhead, the signatory has not printed their name, and therefore there are no features by which to identify the origins of the letter. The State party asserts that these omissions are such that the content of the document is questionable and cannot be substantiated by the usual indicators of a letter from a government institution. Therefore, the State party gives the content of the letter no weight as evidence of a spelling error in a genuine court document or the complainant's alleged LTTE links or his arrest.

6.10 The State party further refers to the letter submitted by the complainant from the Member of Parliament, Packiyaselvam Ariyanethiran, in which he reiterates the complainant's claims. In view of the lack of additional supporting evidence and the reasons given above for not accepting these claims, the State party does not consider that the letter from Mr. Ariyanethiran constitutes, in and of itself, sufficient evidence to substantiate the claims that the complainant is currently of interest to the Sri Lankan Government. It therefore assesses that there are no credible reasons or evidence to suggest that the complainant has been in the past, or is currently, of interest to the Criminal Investigation Department.

6.11 The State party refers to the complainant's contention that it was an interpretation error which led to the second independent reviewer concluding that his claims were not credible since he could not identify his kidnappers. Even if these claims were to be accepted, the second reviewer considered that they had been embellished over time.

6.12 The State party refers to the fact that the complainant states that he did not bring up at first the fact that he had provided financial support to LTTE because it was not the primary reason he feared harm, believing the primary reason to be his application for an Australian visa. It also notes that during the second independent merits review, he stated it was because others in immigration detention had told him he would get into trouble for having provided such support. The State party asserts that it is illogical that the complainant

would fear harm because of the visa issue and not the financial contributions. It does not accept that the complainant has only recently become cognizant of the risk engendered by financial support to LTTE.

6.13 On the subject of his escape from the Karuna camp and inconsistencies in relation thereto, the State party considers that the Karuna group would, in any case, be highly unlikely to remain concerned about his escape from a camp in 2008. In view of the complainant's lack of a relevant profile and the passage of time, the State party concludes that there is no evidence to support the claim that the complainant would be suspected of links with LTTE and would be at any risk of harm if returned.

6.14 Concerning the issue of the complainant's passport, the State party notes that the complainant, in his entry interview, claimed that he had travelled to Singapore and Timor-Leste on a genuine passport. In the first independent merits review, the decision record notes that the complainant advised the reviewer that he had travelled from Sri Lanka on his own passport. At the second review, he stated that he had filled out the papers and gave them, along with photographs, to his friend and was not sure if the passport he received was a genuine document. He denied that he had ever said it was obtained legally. The complainant claimed that when he returned to Sri Lanka he was assisted in getting through security. The State party considers that there is no reason to believe that the complainant was of any interest to authorities such that assistance was necessary or that he had such connections as would save him from negative attention if he were of interest. The second independent merits review concluded that the complainant had departed and returned to Sri Lanka legally on his own passport without repercussions and is therefore of no interest to the authorities in Sri Lanka. Claims that he left illegally are not accepted by the State party as it maintains that no evidence has been adduced in support.

6.15 Regarding the complainant's claim that as a young Tamil male from the Eastern Province he would be vulnerable to persecution, the State party assesses that the country situation is now stable and the complainant has adduced no information which would change the assessment of the second independent merits review that he would not be at risk of harm for this reason.²³

6.16 Finally, even were all of the author's claims to be accepted, his treatment, of itself, does not necessarily engage Australia's non-refoulement obligations under the Convention. The complainant has had no profile, either before or after departing Sri Lanka, that would be of any interest to the Government or the Karuna group such that he would suffer torture if returned to Sri Lanka.

State party's request to lift interim measures

7. By note verbale dated 28 July 2016, the State party requested the Committee to withdraw its request for interim measures on the basis of the domestic processes and conclusions reached as outlined in prior submissions.²⁴

Complainant's comments on the State party's additional observations

8.1 The complainant's representative presented further comments on 29 August 2016.

8.2 Regarding the lodging of an application for the complainant's visa at the High Commission, the complainant restates his claim that the accounts he gave are consistent and that any differences can be attributed to simple semantics. He reiterates that his statement about a potential informant was mere speculation based on the assumption that the visa application had been lodged, and therefore produced no inconsistency.

²³ The State party also refers to the change in Government in Sri Lanka, the new President and the Task Force on Reconciliation set up by him. These facts, avers the State party, are evidence of an improvement in the security situation since the complainant's claims were considered by the State party's authorities and therefore there has been no decline in the country situation that would indicate that he would now be at risk of torture under article 3 of the Convention upon return to Sri Lanka.

²⁴ Prior submissions were annexed to the note verbale.

8.3 He submits that the State party has misconstrued his statement regarding his sex. He only speculated that another possible reason for his arrest by the Criminal Investigation Department was that he was suspected of LTTE involvement, as were many young Tamil males, making his sex a contributing factor.

8.4 The complainant clarifies that he was released by the court on the condition that he report to the Criminal Investigation Department. Hence, the Department did not willingly release him. The complainant further wishes to clarify that after having had to report to the Department for more than a year following his release, the Department approached his family following his escape from Sri Lanka. He claims that this was not purely on the basis of information gleaned 10 years ago but was also due to the fact that he had escaped from government agents and fled Sri Lanka illegally.

8.5 As to the court record extract,²⁵ the complainant states that the second reviewer never put to him that the authenticity of the document was at issue. The fact that corroborating documents cannot be considered on their own merit and therefore cannot affect the credibility decision at a later stage shows a weakness in the Australian system of judicial review. A copy of the original photocopy of the court record extract was sent to the independent merits reviewer (which the complainant also attached) so that the translation could be verified. Owing to problems with the photocopy sent, the complainant also sent another photocopy, obtained later for the purpose of the communication, extracted from the record on 25 July 2015.

8.6 The complainant submits that he genuinely believes himself to be wanted by the Criminal Investigation Department in relation to his attempt to obtain an Australian visa, as at the time many LTTE members were fleeing the country. The financial contribution was forcibly acquired, a common occurrence well known to the Department. Therefore, his assumption that the visa application was the reason for his detention was justified.

8.7 Regarding his escape from the Karuna group camp, the complainant states that the threat is real. The documents show that it has been imputed that he has links to LTTE and his escape from the camp aggravates the risk.

8.8 While he accepts that in his entry interview he erroneously stated that his passport was genuine, he claims that this was due to the fast-paced and confusing nature of the interview. In his first independent merits review he was asked if he had travelled on his passport (i.e., not if the passport was legal). He submits, therefore, that the questioning was misleading if its purpose was to determine the legality of the passport.²⁶

8.9 In conclusion, the complainant claims that his past detentions, his appearance in court, his sex, his ethnicity and the fact that he illegally departed Sri Lanka demonstrate that he is and will be suspected of links to LTTE should he return to Sri Lanka and therefore that to return him would constitute a violation of his rights under article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained 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.

²⁵ The complainant restates that this is a certified translation of the court record, which is in Sinhalese.

²⁶ When he stated at that interview that the passport had been issued on the day he left and obtained by a friend, the complainant asserts that it is clear that he was referring to an illegal passport. He therefore claims that the first independent merits review wrongly inferred from his statements that his 2008 passport was legal and that this caused the second review to perceive an inconsistency that did not exist.

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

9.3 The Committee also recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility. The Committee notes the State party's argument that the communication is manifestly ill-founded owing to a lack of substantiation. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues under article 3 of the Convention and that the merits of those arguments should be addressed. Accordingly, the Committee declares the communication admissible.

Consideration of the merits

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

10.2 The issue before the Committee is whether the removal of the complainant to Sri Lanka would violate the State party's obligation under article 3 of the Convention not to expel or to return (refouler) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

10.3 The Committee recalls its general comment No. 1 (1997) in the context of article 22 (refoulement and communications), according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk. The Committee further recalls that, in accordance with its general comment No. 1 (1997), it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

10.4 In assessing the risk of torture in the present case, the Committee notes the complainant's contention that there was a foreseeable, real and personal risk that he would be tortured if returned to Sri Lanka owing to his imputed links to LTTE, born of belonging to a particular social and ethnic group, his alleged detention and torture by police in 2006 after attempting to leave the country, his alleged appearance in court on terrorist charges, his escape from a camp run by pro-Government elements and his unlawful departure from Sri Lanka. The Committee also notes the State party's observation that its domestic authorities found that the complainant lacked credibility owing to inconsistencies in his factual account of events prior to and since leaving Sri Lanka; that the complainant has not provided credible evidence and has failed to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to Sri Lanka; that his claims have been reviewed by the competent domestic authorities, in accordance with domestic legislation and taking into account the current human rights

situation in Sri Lanka; and that the domestic authorities were not convinced that the complainant fell within the category of persons entitled to protection under the 1951 Convention relating to the Status of Refugees.

10.5 The Committee takes note of the court record extract provided by the complainant to substantiate the claim that he had been charged with terrorist activities and of the two letters which are provided to refute weaknesses in the court document and further corroborate his account. The Committee notes the State party's assertion that its competent authorities thoroughly evaluated all of the evidence presented by the complainant and found it to be of limited probative value owing to its content and timing.

10.6 The Committee takes notes that no link to LTTE has ever been claimed by or successfully imputed to the complainant. In relation to his alleged detention by the Criminal Investigation Department, no information is given about the torture (method, perpetrators) he claims to have suffered. The Committee notes that, despite claiming to have been held on terrorism charges, the complainant was released on bail and no further information is furnished as to whether a trial ever took place, whether he was convicted in absentia and whether, in fact, the charges were dropped. The letter from the Registrar of the Colombo Magistrates Court provided to establish that the complainant was indeed the suspect named on the charge sheet extracted from the Court record, and which explains the misspelling, is issued by a different court, the Magistrates Court in Kalmunai, with no explanation as to how this information was verified, and contains only a stamp but no letterhead. In the absence of any further pertinent documentation or information, and having regard to the fact that the complainant was able to move back to Kalmunai without suffering any harm, the Committee considers that, even if the complainant was a suspect in the past, it appears that the authorities did not consider him a danger and allowed him to move freely about the country. Further, it is the case that his name does not appear in the original court document in Sinhalese and therefore there is nothing to suggest that he would be flagged upon re-entry. As to his escape from the Karuna group camp, there is no evidence which would lead to the conclusion that members of this group are in pursuit of, or interested in, the complainant, nor is there information as to whether the group in question is still in existence. Moreover, the Committee notes that when the complainant was deported from Singapore to Sri Lanka, he was able to re-enter without a problem and was not arrested or harmed in any way.

10.7 Regarding the complainant's general claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a failed asylum seeker, and while not underestimating the concerns that may legitimately be expressed with respect to the current human rights situation in Sri Lanka and with specific reference in this regard to its concluding observations on Sri Lanka's fifth periodic report (CAT/C/LKA/CO/5), the Committee recalls that the occurrence of human rights violations in his or her country of origin is not sufficient in itself to conclude that a complainant runs a personal risk of torture. In addition, the Committee notes that, in its assessment of the complainant's asylum application, the State party's authorities also considered the possible risk of ill-treatment of failed asylum seekers upon return to Sri Lanka and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the complainant's claim.

10.8 In the light of these considerations, read as a whole, the Committee concludes that the complainant has not adduced sufficient grounds for it to conclude that the complainant runs a real, foreseeable, personal and present risk of being subjected to torture upon return to Sri Lanka. Furthermore, the complainant has not demonstrated that the State party's authorities failed to conduct a proper investigation into his allegations.

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