



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

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 699/2015\*, \*\*

<i>Submitted by:</i>	J.M. (represented by counsel, Stewart Istvanffy)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of communication:</i>	9 September 2015 (initial submission)
<i>Date of decision:</i>	12 May 2017
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation of the complaint
<i>Substantive issue:</i>	Risk of torture
<i>Articles of the Convention:</i>	3, 4, 10 and 12

#### Background

1.1 The complainant is J.M., a national of Sri Lanka born in 1987 and subject to deportation from Canada. He claims that his deportation would constitute a violation by the State party of his rights under articles 3, 4, 10 and 12 of the Convention. The complainant is represented by counsel.

1.2 On 9 September 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to issue a request for interim measures under rule 114 (1) of the Committee's rules of procedure and requested the State party not to deport the complainant to Sri Lanka while the complaint was being considered by the Committee.

1.3 On 1 February and 28 April 2016, the Committee decided to deny the State party's requests to lift interim measures.

#### Facts as presented by the complainant

2.1 The complainant is a Tamil from northern Sri Lanka. He asserts that he fled Sri Lanka because of threats to his life from members of the security forces or from private militias or other extremist supporters of the current Government. He also claims that he was detained in the past in Sri Lanka on account of suspected links with the Liberation Tigers of Tamil Eelam (LTTE).

\* Adopted by the Committee at its sixtieth session (18 April-12 May 2017).

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



2.2 The complainant arrived in Canada on 17 October 2009 on board the *MV Ocean Lady*, a ship suspected of having links with LTTE. On 23 October 2009, the complainant applied for refugee status.

2.3 On 9 October 2013,<sup>1</sup> the Refugee Protection Division of the Immigration and Refugee Board rejected the complainant's refugee application. The Division considered that the complainant had not provided any persuasive evidence that he would be perceived as an LTTE supporter. The Division considered that the complainant's statements that he had been interrogated or persecuted by Sri Lankan authorities were inconsistent and lacked credibility. In particular, it found the complainant's statement that he was allowed to escape from the refugee camp where he had been held and interrogated after paying a bribe to an army official incompatible with his allegation that the army had searched for him following his escape. The complainant also stated that he was able to renew his passport on 10 August 2009 and to pass through security checkpoints using this passport without experiencing any problems. The Division noted that, had the complainant been identified as a "risk profile" under the guidelines issued by the Office of the United Nations High Commissioner for Refugees (UNHCR), he would not have been issued a passport or allowed to leave the country.

2.4 On 24 February 2014, the Federal Court rejected the complainant's application for leave and judicial review of the negative decision of the Immigration and Refugee Board. Following a successful application for a stay of removal, the complainant was allowed to remain in Canada and to file an application for a pre-removal risk assessment. In his application, the complainant argued that his brother had fought with LTTE between 1992 and 1997 and was killed in December 1997, and that his family was considered a "martyr family". His pre-removal risk assessment application was rejected on 28 April 2015. The complainant stated that he feared that if he had revealed that information, he would be immediately detained and deported. The pre-removal risk assessment officer found this explanation unconvincing. Additionally, the officer noted that the complainant had not been harmed in the past because of his brother's alleged affiliation 18 years ago and that that circumstance did not put him at risk of detention or mistreatment by Sri Lankan security forces.

2.5 The complainant filed an application for leave and judicial review of the negative decision of the pre-removal risk assessment, which was dismissed on 11 September 2015. On 29 July 2015, the Federal Court rejected the complainant's application for a judicial stay of his removal. The Court considered that the complainant's late submission regarding his brother's involvement with LTTE was unjustified and that the events were alleged to have occurred 18 years ago. The Court also noted that the complainant's parents, wife and children, who shared the same family ties, continued to live in Sri Lanka without any reported difficulty.

### **The complaint**

3.1 The complainant claims that his removal to Sri Lanka would expose him to a risk of being tortured or killed, in violation of article 3 of the Convention, because he is a young Tamil male and failed asylum seeker who arrived in Canada aboard the *MV Ocean Lady*, a ship which Sri Lankan authorities associate with LTTE sympathizers and which has been condemned publicly by Sri Lankan authorities as being an "LTTE operation". He would therefore be accused of having "terrorist sympathies". This risk is also based on his past detention for suspected links with LTTE and because he is considered to be a member of a "martyr family", as his brother was killed fighting for LTTE.

3.2 The complainant maintains that he is a target of the police and the military in Sri Lanka because of his ethnic origin and because he witnessed human rights abuses by government forces that occurred in northern Sri Lanka during the civil war. He adds that he would also be threatened by extremist followers of the current repressive regime in Sri Lanka.

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<sup>1</sup> There is no information in the file to explain why the Immigration and Refugee Board took four years to decide on the complainant's asylum request.

3.3 The complainant asserts that the Government of Sri Lanka is extremely concerned about its international reputation and the accusation that it does not respect international human rights law. This is why a large number of journalists, human rights workers and humanitarian aid workers who have reported on human rights violations in Sri Lanka have been killed or disappeared.

3.4 The complainant submits that the Canadian decision makers erred in disregarding the existing risk for young Tamil males from northern Sri Lanka. In particular, the Immigration and Refugee Board failed to recognize the extent of State terrorism in Sri Lanka and the lack of protection of the State.

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

4.1 On 16 February 2016, the State party submitted that the complaint was inadmissible on the grounds that domestic remedies had not been exhausted and that the alleged risk of torture had not been substantiated.

4.2 The State party notes that the complainant has failed to exhaust an effective domestic remedy, namely an application for permanent residency on the basis of humanitarian and compassionate grounds. The complainant became eligible to file such an application on 9 October 2014 but has not availed himself of this remedy.<sup>2</sup> Humanitarian and compassionate applications are examined by the Minister of Citizenship and Immigration<sup>3</sup> or his delegate, and the assessment consists of a broad, discretionary review by the decision maker to determine whether an individual should be granted permanent residency in Canada for those reasons. Applications for residency on humanitarian and compassionate grounds involve the consideration of different risks than those assessed within the separate Refugee Protection Division and pre-removal risk assessment processes. Applicants may base their request on any relevant facts that they wish to have considered, such as establishment in and ties with Canada; separation of relatives and the best interests of children affected by the application; health conditions; and adverse country conditions that have a direct, negative impact on the application such as war, unfair treatment of minorities, political instability or widespread violence. A humanitarian and compassionate application would allow the complainant to submit as evidence any circumstances that he foresees facing upon his return to Sri Lanka and which he perceives as constituting hardship that is unusual or undeserved or disproportionate.

4.3 The State party notes, firstly, that humanitarian and compassionate officers, like pre-removal risk assessment officers, are senior immigration officials employed by Citizenship and Immigration Canada and have been recognized by the courts as being equally as independent and impartial. Secondly, while a stay of removal is not automatically available on a humanitarian and compassionate application, removal orders are stayed upon initial approval of the application. A stay of removal may also be obtained from the Federal Court if compelling humanitarian and compassionate grounds can be demonstrated. An administrative deferral of removal may also be requested. Thirdly, regardless of the grounds, such application protects the applicants from removal to a country where they allege to be at risk. The complainant has not raised any objections to the humanitarian and compassionate process, nor has he suggested that such process would be ineffective or unfair in his particular case.

4.4 The State party maintains that the complaint is manifestly unfounded and, alternatively, without merit. Neither the complainant's personal history nor his status as a failed asylum seeker who travelled aboard the *MV Ocean Lady* creates substantial grounds to believe that he would face a real and personal risk of torture if he were returned to Sri Lanka.

<sup>2</sup> The State party cites, inter alia, the Committee's decisions in communications No. 66/1997, *P.S.S. v. Canada*, para. 6.2 and No. 95/2000, *L.O. v. Canada*, para. 6.5. At the same time, it "regrets the view of the Committee in some recent cases, in which it viewed the [humanitarian and compassionate] applications as remedies that do not need to be exhausted for the purposes of admissibility".

<sup>3</sup> Now the Minister of Immigration, Refugees and Citizenship.

4.5 The State party notes that, according to objective reports, there continues to be serious human rights violations in Sri Lanka, including with regard to post-conflict justice, torture, disappearances and arbitrary detentions,<sup>4</sup> with a disproportionate number of victims of such violations being Tamils<sup>5</sup> and the most affected regions being those with a significant Tamil population, including the northern provinces. Reports also indicate that Tamil males who have been detained by the Sri Lankan police can be at risk of torture, particularly where they are suspected of having links with LTTE. If an individual faces a real risk of irreparable harm from Sri Lankan authorities, there would be no internal flight alternative.<sup>6</sup>

4.6 Despite these serious human rights issues, not all Sri Lankan Tamil males originating from the north would be at a real risk of irreparable harm from Sri Lankan authorities. According to the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* of 2012: “At the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas necessarily had some contact with the LTTE and its civilian administration in their daily lives. Originating from an area that was previously controlled by the LTTE does not in itself result in a need for international refugee protection.”<sup>7</sup> What is required is “significant and concrete links with the LTTE”<sup>8</sup> and being perceived to be “a threat to the integrity of Sri Lanka as a single state because ... [of a] significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka”.<sup>9</sup> The complainant is not perceived by Sri Lankan authorities as having any links with LTTE or representing a risk to the unitary State of Sri Lanka. As such, the complainant’s profile does not create substantial grounds to believe that he would be in danger of being subjected to torture upon return.

4.7 The complainant bases the risk of torture, first, on a brief period of alleged detention between April and August 2009 during the civil war in Sri Lanka. The State party relies on the findings of the Refugee Protection Division that the author was not deemed credible with regard to his alleged detention. The complainant also failed to present any medical evidence of prior mistreatment or any basis on which to conclude that he would face a personal and present risk upon return. In this regard, the Division concluded that he had not provided any persuasive evidence or testimony that he had been personally targeted on the occasion he was questioned by authorities in Sri Lanka. After a thorough consideration of his testimony about his personal profile and history in Sri Lanka, the Division found that the complainant did not meet the UNHCR criteria for persons suspected of certain links with LTTE and that he would therefore face no serious possibility of persecution on that basis should he return to Sri Lanka.

4.8 The complainant’s second argument in support of his claim that he risked torture is based on the fact that his brother had fought with LTTE between 1992 and 1997. The State party notes that the complainant raised this argument for the first time in his pre-removal risk assessment application and that he did not provide a convincing justification for not having disclosed this information previously to the Refugee Protection Division or the Canada Border Services Agency. The pre-removal risk assessment officer also noted that

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<sup>4</sup> The State party cites, inter alia, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, issued in 2012; the concluding observations of the Human Rights Committee on the third through fifth periodic reports of Sri Lanka (CCPR/C/79/Add.56, CCPR/CO/79/LKA and CCPR/C/LKA/CO/5), *Amnesty International Report 2014/15: The State of the World’s Human Rights* and Freedom House, *Freedom in the World 2015*.

<sup>5</sup> United States of America Department of State, Country Reports on Human Rights Practices for 2014, Sri Lanka, p. 2.

<sup>6</sup> *UNHCR Eligibility Guidelines*.

<sup>7</sup> The State party cites, in this regard, the decision of the Australian Refugee Review Tribunal in its case No. 1304427, decision adopted on 11 October 2013.

<sup>8</sup> *UNHCR Eligibility Guidelines*.

<sup>9</sup> United Kingdom of Great Britain and Northern Ireland, Upper Tribunal (Immigration and Asylum Chamber), *G.J. and others v. Secretary of State for the Home Department*, decision adopted on 8 July 2013, para. 356 (7) (a).

the complainant had not been harmed in the past in Sri Lanka because of his brother's alleged association and that that did not justify a future risk for the complainant, especially considering that his brother had died some 18 years ago, long before Sri Lanka took steps towards reconciliation. Additionally, the Refugee Protection Division and the Federal Court determined that the complainant's wife, children and parents, who shared the same family ties, continued to reside in Sri Lanka without apparent difficulty or significant harassment.

4.9 The State party recalls that it is not for the Committee to review evidence or reassess findings of fact made by national courts and tribunals. The complainant's allegations and supporting evidence are substantially the same as those previously considered by national instances. In particular, the Refugee Protection Division heard the complainant, who had legal representation, and sought clarifications during the oral hearing on the many factual inconsistencies regarding his past detention and persecution. On that basis, the Division determined that the complainant was not credible regarding his need for international protection. The complainant has therefore failed to establish a *prima facie* case that he would risk being subjected to torture if returned to Sri Lanka in 2016.

4.10 With regard to the complainant's status as a failed asylum seeker who entered Canada aboard the *MV Ocean Lady*, the State party notes that, as argued by the Refugee Protection Division and the Federal Court, there is no evidence that the complainant would be perceived as an LTTE supporter by Sri Lankan authorities, either by virtue of having travelled on that ship or having made an unsuccessful refugee claim in Canada. While acknowledging that the *UNHCR Eligibility Guidelines* indicate that many returnees undergo security screening by immigration officials or members of the State intelligence service upon return, the State party argues that, in the absence of significant links with LTTE, such verifications do not constitute a real and personal risk of irreparable harm. In fact, both UNHCR and the International Organization for Migration have undertaken voluntary repatriation programmes to Sri Lanka in which over 1,900 individuals participated in 2011. Additionally, the complainant travelled on his own passport and left his country legally, and there is no indication that there is an arrest warrant pending against him or that he is suspected of having significant ties with LTTE or involvement in political opposition activities, either in Sri Lanka or in Canada.

4.11 The State party refers to the five new documents submitted to the Committee by the complainant after the conclusion of national asylum proceedings. The first is a letter from his wife dated 30 August 2015, reporting that unidentified persons had visited her twice in August 2015 and threatened her, following which she filed two police reports and sought protection at a local human rights office. In that regard, the State party notes that the complainant has submitted neither the alleged police reports nor the attestation from the human rights office. The second document is a letter from the complainant's father dated 7 September 2015, alleging several visits by persons purporting to be affiliated with the Sri Lankan intelligence agency inquiring about the complainant's whereabouts. This letter has not been independently corroborated. The third is a letter from the Secretary-General of the Tamil National People's Front. No weight should be accorded to it as it exceeds the complainant's claims, alleging that the Sri Lankan military "started to threaten and torture the complainant frequently and even tried to kill him", and it does not provide the source of the information. As to the letter of support by a family friend who has lived in the United States of America since 1983 and who confirmed the risk of torture or death if the complainant should return to Sri Lanka, and an affidavit from a former aid worker in the Middle East who has never met the author but claims to "fear for his situation in Sri Lanka", the State party determines that both documents were prepared without personal knowledge of the complainant's circumstances in Sri Lanka.

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

5.1 In his submission dated 15 April 2016, the complainant states that he submitted a letter on 15 September 2015 to the judge who was to decide on his request for judicial review of the pre-removal risk assessment decision, informing him of the complaint submitted to the Committee and raising the issue of collaboration between the Canada Border Services Agency and the Terrorism Investigation Division in Colombo, which has been heavily involved in the detention and torture of Sri Lankan deportees. However, the

complainant was informed that the case had already been decided and that the judge had issued an order stating that the letter should be excluded from the file.

5.2 The complainant notes that he wishes to extend his complaint to a violation of article 4 of the Convention because of the actions of the Canada Border Services Agency in the case mentioned in a “marine migrant’s ministerial disclosure package”.<sup>10</sup> Additionally, the complainant submits that the State party’s obligation to provide education and information regarding the prohibition of torture has not been respected, in violation of article 10 of the Convention. Finally, the complainant also claims a violation of article 12 of the Convention because the Government of Canada has an obligation to investigate the case of complicity in torture which is shown in that document.

5.3 The complainant submits that the State party’s position that he does not have the profile of someone who is at risk is strongly contradicted by the *UNHCR Eligibility Guidelines* and by national jurisprudence of the Refugee Protection Division, the Immigration and Refugee Board and the Federal Court, as well as by the affidavit of an aid worker which gives a clear idea of the fate of returned asylum seekers to Sri Lanka, citing cases of torture and returnees who had to flee the country a second time. The complainant reiterates that he is at great risk of torture, forced disappearance or extrajudicial execution in Sri Lanka because he was on the *MV Ocean Lady* and comes from a Tamil Tigers “martyr family”.

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

#### *Consideration of admissibility*

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

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of said remedies has been unreasonably prolonged or is unlikely to bring effective relief.<sup>11</sup> The Committee takes note of the State party’s argument that domestic remedies have not been exhausted in the present case because the complainant was eligible to file an application for permanent residence based on humanitarian and compassionate grounds. However, the Committee considers that the humanitarian and compassionate application is not an effective remedy for the purposes of admissibility given its discretionary and non-judicial nature, and the fact that it does not stay the removal of a complainant. Accordingly, the Committee considers that it is not precluded by the requirements of article 22 (5) (b) from examining the communication.

6.3 The Committee further 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 the purposes of admissibility.<sup>12</sup> In this respect, the Committee considers that the complainant’s claims under articles 4, 10 and 12 of the Convention, which were presented in his submission dated 15 April 2016, are very general and unrelated to the specific situation of the author. The Committee therefore considers that these claims are manifestly unfounded and declares them inadmissible under article 22 of the Convention.

6.4 The Committee considers, however, that the arguments put forward by the complainant concerning the personal risk he may run should he be returned to Sri Lanka

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<sup>10</sup> No further information is provided.

<sup>11</sup> See, inter alia, communication No. 307/2006, *E.Y. v. Canada*, decision adopted on 4 November 2009, para. 9.2.

<sup>12</sup> See, inter alia, communication No. 555/2013, *Z. v. Denmark*, decision adopted on 10 August 2015, para. 6.3.

have been sufficiently substantiated for purposes of admissibility, and declares them admissible with regard to article 3 of the Convention.

### *Consideration of the merits*

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

7.2 With regard to the complainant's claim under article 3 of the Convention, the Committee must determine whether there are substantial grounds for believing that he would be personally in danger of being subjected to torture should he be returned to Sri Lanka. 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.<sup>13</sup> 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.

7.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, 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.<sup>14</sup> The Committee further recalls that, in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,<sup>15</sup> 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.

7.4 The Committee notes the human rights situation in Sri Lanka and the prevalence of violations against Tamils, including the abduction and torture of Tamils.<sup>16</sup> In assessing the risk of torture in the present case, the Committee notes the complainant's argument that he would risk being tortured or killed if returned to Sri Lanka because he would be perceived as an LTTE supporter. This argument is based on the complainant's past detention in Sri Lanka, his brother's involvement with LTTE and the fact that the complainant is a failed asylum seeker who arrived in Canada aboard a ship that Sri Lankan authorities associate with LTTE. The complainant has also argued that he would be targeted by Sri Lankan authorities because he witnessed human rights abuses committed in the northern provinces during the country's civil war.

7.5 With regard to the complainant's alleged detention in 2009, the Committee observes that the complainant has failed to provide any detailed information or evidence regarding such detention, and that the alleged facts occurred 18 years ago. The Committee also notes the State party's arguments that the Refugee Protection Division thoroughly assessed the complainant's statements regarding his alleged detention but found that he lacked credibility, in particular regarding his alleged escape from the refugee camp and his

<sup>13</sup> See, inter alia, communication No. 470/2011, *X. v. Switzerland*, decision adopted on 24 November 2014, para. 7.2.

<sup>14</sup> See, inter alia, communications No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003 and No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005.

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

<sup>16</sup> See CAT/C/LKA/CO/5, para. 11.

persecution thereafter, and that he has not provided any evidence that he had been personally targeted.

7.6 As to the alleged involvement of the complainant's brother with LTTE, the Committee notes the State party's argument that the complainant raised this issue for the first time in his pre-removal risk assessment application in November 2014, and did not provide any reasonable explanation for not having disclosed this information before. The Committee also notes that both the pre-removal risk assessment officer and the Federal Court examined these allegations but considered that his brother's alleged death happened 20 years ago and would therefore not justify a present risk for the complainant, and that the complainant's family continues to live in Sri Lanka without any apparent major difficulties related to the alleged links with LTTE.

7.7 Regarding the complainant's arrival aboard the *MV Ocean Lady* and his failed asylum application, the Committee notes that the author's allegations lack precision and are not supported by credible evidence. The Refugee Protection Division and the Federal Court noted in this respect the lack of evidence to suggest that having merely travelled on that ship or having failed to obtain asylum in Canada would indicate that the complainant would be perceived as an LTTE supporter and therefore be at a real and personal risk of an article 3 violation. The Committee also notes the State party's argument that the complainant travelled legally with his own passport and that there is no indication that he would be suspected of having any significant ties with LTTE or any political involvement through activities either in Sri Lanka or in Canada.

7.8 Finally, the Committee observes that the complainant has failed to provide any detailed information regarding his allegation that he witnessed human rights violations committed by Sri Lankan authorities in the north during the civil war. The Committee recalls paragraph 5 of its general comment No. 1, according to which the burden of presenting an arguable case is on the author of a communication, and considers that the complainant has not fulfilled this burden of proof.

8. In the light of the foregoing, the Committee considers that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to Sri Lanka would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

9. The Committee, acting under article 22 (7) of the Convention, therefore concludes that the complainant's removal to Sri Lanka would not constitute a breach of article 3 of the Convention.

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