



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. 964/2019**, ***

<i>Communication submitted by:</i>	S.L. (not represented by counsel)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	2 August 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 29 October 2019 (not issued in document form)
<i>Date of adoption of decision:</i>	4 November 2022
<i>Subject matter:</i>	Deportation to Sri Lanka; risk of torture
<i>Procedural issues:</i>	Admissibility – <i>ratione materiae</i> ; admissibility – manifestly ill-founded
<i>Substantive issues:</i>	Risk of torture in the event of deportation to country of origin (non-refoulement); prevention of torture
<i>Articles of the Convention:</i>	2, 3 and 16

1.1 The complainant is S.L., a national of Sri Lanka, born on 6 May 1979. He claims that the State party has violated his rights under articles 2, 3 and 16 of the Convention.¹ He also claims that the State party would violate his rights under articles 2, 3 and 16 of the Convention if it removed him to Sri Lanka. The State party has made the declaration pursuant to article 22 (1) of the Convention effective from 29 January 1993. The complainant is not represented by counsel.

1.2 The complainant requested interim measures to prevent his deportation to Sri Lanka while his communication was pending determination by the Committee to avoid irreparable harm. The Committee, acting through its Rapporteur on new complaints and interim

* Reissued for technical reasons on 5 January 2024.

** Adopted by the Committee at its seventy-fifth session (31 October–25 November 2022).

*** The following members of the Committee participated in the examination of the communication: Todd Buchwald, Claude Heller, Erdogan İscan, Huawei Liu, Maeda Naoko, Ilvija Pūce, Ana Racu, Abderrazak Rouwane, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.

¹ The complaint, dated 2 August 2019, was received on 9 August 2019.



measures, decided not to issue a request for interim measures under rule 114 of the Committee's rules of procedure.²

Facts as presented by the complainant

2.1 The complainant is a Hindu of Tamil ethnicity, born in Batticaloa, Eastern Province, Sri Lanka. In 1990, the complainant's grandfather was abducted and later assassinated³ by a militant Islamic armed group, which, the complainant states, was aligned at that time with the Sri Lankan authorities in the town of Eravur. In 1992, the complainant was arrested by the Criminal Investigation Department and detained at the army camp in Batticaloa on suspicion of association with and support for the Liberation Tigers of Tamil Eelam (LTTE). He claims that he bears scars from the cigarettes used to burn his body during his subsequent interrogation.⁴ In 1995, when he was 15 years old, he claims that he was forcibly recruited by LTTE. Because of his age, the complainant was not forced to take part in active combat but was instead assigned to communications. In 1996, he was released at the request of his parents on the basis of the fact that he was the only male child of the family and was a minor. The complainant lived in Dubai for three months in 1999 and in Qatar from 2006 to 2009.

2.2 In March 2008, the complainant's father was elected to represent the Tamil Makkal Viduthalai Pulikal on the Eastern Provincial Council. The complainant states that, shortly after the election, members of LTTE shot at the offices of the Tamil Makkal Viduthalai Pulikal, injuring several people, including the complainant's parents. After a heart attack in 2009, the complainant's father attempted to resign from the Provincial Council, but the Tamil Makkal Viduthalai Pulikal would not accept his resignation.

2.3 In 2012, the complainant claims that his father participated in the campaign to elect the leader of the Tamil Makkal Viduthalai Pulikal to the office of the Central Ministry. The complainant also provided support to the campaign by printing campaign materials. When the candidate won, there was a celebratory gathering at the complainant's house, during which members of the Karuna Group⁵ came to the house and beat up the complainant and his father. His father made a complaint to the police but, fearing for his son's safety, arranged for him to leave the country.

2.4 In August 2012, unidentified men, presumed to be from the Criminal Investigation Department or LTTE, visited the complainant's father and threatened him if he did not refrain from supporting the United Peoples' Freedom Alliance party in an upcoming election. The father lodged a complaint⁶ about this threat to the police on 25 August 2012.

2.5 On 10 October 2012, the complainant arrived by boat, as an "unauthorized maritime arrival" in the Cocos (Keeling) Islands and claimed asylum in Australia as a refugee. After six months in detention, he was released into the community on the Australian mainland.

2.6 On 17 October 2012, the complainant's wife filed a complaint with the Batticaloa Regional Office of the Human Rights Commission of Sri Lanka about a visit made by unidentified men, in civilian clothing and armed, presumed to be officers of the Criminal Investigation Department, who threatened her, demanded that she divulge the whereabouts of the complainant and threatened to shoot him when they found him. When she did not disclose his location, they damaged the furnishings inside the home. His wife and children were traumatized by this incident.

2.7 On 24 February 2016, the complainant applied for a (Safe Haven Enterprise) visa ("protection visa") on the basis of his fear that he would be harmed by the Sri Lankan authorities, including the army and the Criminal Investigation Department, given: his previous detention and torture as a result of his membership in LTTE; his family's association

² The complainant made further requests for reconsideration of the denial of interim measures, however, since no new information was presented, those requests were denied on 9 September and 1 November 2019.

³ A copy of the death certificate with a certified translation was annexed to the communication.

⁴ No further information or evidence has been provided.

⁵ The Tamil Makkal Viduthalai Pulikal was a later iteration of the Karuna Group, which split from LTTE in 2004 and worked with the Government to combat the latter group.

⁶ The complaint is annexed to the communication.

with LTTE; his previous residency in the area controlled by LTTE; and the fact that he was seeking asylum in a Western country. He also claimed to fear reprisals from the Karuna Group. The complainant attended an interview for a protection visa on 30 June 2016.

2.8 On 11 July 2016, the Chief of the Batticaloa police department filed a criminal case against the claimant under the Prevention of Terrorism (Temporary Measures) Act, No. 48 of 1979. The Magistrate's Court of Batticaloa issued a summons to the complainant to appear before the court on 10 August 2016,⁷ and an arrest warrant was issued on 11 August 2016 for his failure to appear in court.⁸ The complainant asserts that he was then, and therefore remains, a person of interest to the authorities of Sri Lanka.

2.9 On 18 July 2016, the complainant's application for a protection visa was denied. The delegate of the Ministry for Immigration and Border Protection found that elements of the complainant's account of his forcible recruitment by LTTE and detention and torture by the Criminal Investigation Department and of his father's involvement and interactions with the Tamil Makkal Viduthalai Pulikal, the Karuna Group and the Sri Lankan authorities contained significant discrepancies. The complainant was asked about these matters but the delegate did not find that his responses were sufficient to satisfy his concerns regarding the credibility and veracity of his account. On 8 August 2016, the complainant submitted an appeal to the Immigration Assessment Authority.

2.10 On 21 September 2016, the Immigration Assessment Authority confirmed the delegate's decision to refuse the protection visa, finding that the complainant's accounts lacked credibility owing to a number of inconsistencies. While it accepted that the complainant's father had been involved with the Tamil Makkal Viduthalai Pulikal, it did not find other elements of his account regarding events leading up to his departure from Sri Lanka to be credible. In particular, it noted discrepancies between statements made during his arrival interview, his application and interview for a protection visa and his submissions for appeal. These concerns included discrepancies in the year and duration of his detention by LTTE: having stated in his arrival interview that he was forcibly recruited by LTTE in 1995 and held for two days, in his interview for a protection visa he stated that he had been recruited in 1994 and held for six months. In listening to the recording of that interview, the adjudicator of the Authority found that he conversed easily, at times in English, and did not agree that he had been stressed to the degree that he would have made such an error. The complainant stated to the Authority that he had been held for six months and that this information was consistent with that given during his arrival interview. The Authority found further discrepancies in his statements regarding the reasons for and duration of his stay in Trincomalee, leading it to conclude that while he may have lived there for a period, it did not accept that his residence there was related to fears related to LTTE, the Criminal Investigation Department or any other group. The complainant's statements and evidence from the complainant's father about the Criminal Investigation Department looking for him after his departure were also not found to be credible as he had left Sri Lanka on two occasions, each time having legally obtained a passport to travel, first to Dubai and later to Qatar. Had he been wanted by the authorities, the Authority held that he would not have been issued a passport.

2.11 Given these inconsistent statements, the Immigration Assessment Authority did not accept that the complainant had been forcibly recruited by LTTE in 1994, that he had been arrested and tortured by the Criminal Investigation Department because of his involvement with LTTE nor that he went to live in Trincomalee in order to avoid harm from the authorities. Moreover, the Authority did not accept that the complainant was still wanted, as he had obtained two genuine passports and had travelled freely in and out of the country since his alleged recruitment in 1994. Although the Authority accepted that the complainant had relatives who were members of LTTE and that two of his cousins had gone missing, it did not accept that he himself had been subjected to any harm. While accepting that his father had received threats because of his political activities, the Authority did not consider that those threats amounted to serious harm, noting that his family, including his father, wife and children, still resided in Batticaloa and that his father had been able to continue his political

⁷ Magistrate's Court of Batticaloa, case No. MC/BAT/P/T/0680.

⁸ Under section 84 of the Administration of Justice Act, signed and sealed by the magistrate (annexed to communication).

activities unhindered until 2012. The Authority concluded that there was no credible evidence to suggest that the family had faced any harm owing to association with LTTE or the Tamil Makkal Viduthalai Pulikal. It also questioned the complainant's account of events leading up to and immediately after the elections in Eastern Province in September 2012. The Authority noted that, although the complainant stated in his interview for a protection visa that he and his father had been attacked in their home after the elections, owing to their political affiliation during the elections, and that he had been hospitalized as a result, it noted that none of those events had formed a part of the complaint made by his father to the Sri Lankan Human Rights Commission. In particular, the Authority noted that while the complaint was made in October 2012, after the events would have taken place, in the complaint only warnings received in August about the elections in September were mentioned. It also noted that, despite the complainant's assertion that the Karuna Group was responsible for perpetrating those acts, the Group had not run under that banner in the 2012 elections. Moreover, the Authority did not accept the explanation of the complainant that the representative of the humanitarian group assigned to assist him in making his written application for a protection visa must have abbreviated his evidence, in particular as the complainant had shown a good level of English and had been given a chance to review and approve his submissions, which he had done. The Authority did not therefore accept that the complainant or his father had been threatened by the Karuna Group, either before or after the September 2012 elections.

2.12 In its decision of 21 September 2016, stating that it had had regard to information referred to it under section 473CB of the Migration Act 1958, the Immigration Assessment Authority concluded that the complainant had not faced harm based on his ethnicity and did not have a risk profile with Sri Lankan authorities that would expose him to adverse attention on his return. It considered that although he would likely face a penalty for leaving Sri Lanka illegally, according to the 2015 country information report of the Department of Foreign Affairs and Trade,⁹ and while he might be questioned and charged, this would lead to a short period of detention only in the event that bail could not be met. However, as this was not found to reach the level of threat to his life or liberty or to rise to significant physical harassment or ill-treatment that would lead to a well-founded fear of persecution, the Authority therefore concluded that the complainant was not a person in need of international protection.

2.13 In April 2019, the complainant submitted an amended application for judicial review of the decision of the Immigration Assessment Authority before the Federal Circuit Court of Australia, appending an affidavit and supporting documents that had not previously been presented to the Authority. However, the affidavit and attached evidence was not permitted by the Court to be brought into evidence as it was assessed that the evidence pertained to the merits of his asylum claim and was therefore inadmissible with regard to the question of jurisdictional error, which is the only grounds of review permitted under the Migration Act. The complainant was not represented during the appeal process and did not file written submissions. The Circuit Court, which can only overturn a decision of the Authority where jurisdictional error is present,¹⁰ found that the complainant's grounds were, in effect, impermissible. Therefore, as the Court identified no jurisdictional error in the proceedings of the Authority, the Circuit Court dismissed the complainant's application on 9 June 2017.

2.14 On 16 June 2017, the complainant lodged an appeal against the decision of the Federal Circuit Court to the full Federal Court of Australia.¹¹ The complainant's grounds for appeal were that the Circuit Court had erred in finding that the failure of the Immigration Assessment Authority to consider certain evidence had not amounted to jurisdictional error. While the complainant was not represented when he initially filed his notice of appeal, he engaged counsel prior to the hearing to appear on his behalf. He claims that, seven days prior to the hearing before the Federal Court, his counsel had submitted a request to substantially amend the draft appeal grounds, proposing to replace the three original grounds in favour of a single, significantly reformulated, grounds of appeal. In the counsel's amended appeal, the

⁹ Department of Foreign Affairs and Trade, "DFAT Country Information Report: Sri Lanka", 2015.

¹⁰ On the basis of excess statutory power or a denial of procedural fairness.

¹¹ Federal Court of Australia, *CYO16 v. Minister for Immigration and Border Protection*, 10 January 2019.

complainant stated that the Circuit Court had erred in failing to conclude that the Authority had breached section 473CC of the Migration Act. However, as that particular formulation had not been raised before the Circuit Court, and as it was broader in scope than the grounds as originally presented, the Federal Court therefore refused to proceed on the new ground as the Circuit Court had not had the opportunity to consider the matter under that particular formulation. Therefore, leave was denied to amend the grounds and the appeal on the original grounds was denied on 10 January 2019.

2.15 On 21 January 2019, the complainant filed an application for special leave to appeal the decision of the Federal Court of Australia before the High Court of Australia. Leave to appeal was denied on 17 April 2019 on the basis that the application did not raise any doubt as to the correctness of the decision of the Federal Court.¹²

2.16 On 1 May 2019, the complainant made a request to the Minister for Immigration, Citizenship and Multicultural Affairs to review the denial of a safe haven enterprise visa under the discretionary powers conferred by section 48B of the Migration Act. On 20 June 2019, the complainant was informed that as his request did not meet the guidelines it had been finalized without referral.

2.17 The complainant subsequently submitted additional information to the Committee, including a report from a mental-health social worker,¹³ which provided that the complainant has shown symptoms of depression and anxiety and has claimed a risk of harm upon return to Sri Lanka. He also provided an issue of the *Sri Lanka Gazette*, the public journal of the Government of Sri Lanka, containing an amended list of persons designated as having links to terrorism,¹⁴ to which 424 individuals of Tamil ethnicity and 16 Tamil diaspora organizations, alleged to have links to LTTE, were added in 2021.

2.18 The complainant reiterates that he has a well-founded fear of persecution and serious ill-treatment contrary to article 3 of the Convention if he is returned to Sri Lanka owing to: (a) the fact that he has previously suffered persecution and mistreatment; (b) his family's links to LTTE, in particular his high-ranking relatives and friends; (c) his and his father's political activities; and (d) in the context of recent significant changes in the political, security and human rights landscape, which directly affect the Tamil minority in the north and east parts of Sri Lanka, he remains a person of interest, as evidenced by the criminal case pending under the Prevention of Terrorism Act at the Batticaloa Magistrate's Court and the open warrant issued for his arrest.

Complaint

3.1 The complainant submits that his rights under articles 2, 3 and 16 of the Convention would be violated if returned to Sri Lanka.

3.2 The complainant claims that domestic authorities did not take into consideration the 2019 report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concerning the situation of Tamils and the general prevalence of torture and violence in Sri Lanka.¹⁵

3.3 The complainant refers to a report written by a mental health social worker on 29 July 2019 and claims that he is suffering from post-traumatic stress disorder for which there is no proper treatment in Sri Lanka.

¹² High Court of Australia, *CY016 v. Minister for Immigration and Border Protection & Anor*, 17 April 2019.

¹³ Report from mental health and social worker, dated 29 July 2019.

¹⁴ Proscribed under regulation 4 (7) of the United Nations Regulations No. 1 of 2012, made under the United Nations Act, No. 45 of 1968, giving effect to Security Council resolutions on the financing of terrorism, published in the *Sri Lanka Gazette*, No. 2216/357, dated 25 February 2021, amending the *Sri Lanka Gazette* dated 9 November 2016.

¹⁵ [A/HRC/40/52/Add.3](#).

State party's observations on admissibility and the merits

4.1 The State party provided its observations on the complainant's communication on 27 June 2020. It argues that the complainant's allegations are inadmissible on the following grounds: (a) the complainant's claims in respect of the future risk of harm are inadmissible *ratione materiae*; and (b) the complainant's claims are manifestly unfounded pursuant to rule 113 (b) of the Committee's rules of procedure.

4.2 The State party asserts that, in the event that the Committee finds the complainant's allegations to be admissible, the claim is without merit as it is not supported by evidence that there are substantial grounds for believing that the complainant is in danger of being tortured, as defined by article 1 of the Convention, or that the State party has breached or would breach its obligations under articles 2, 3, 7 or 16 of the Convention.

4.3 The State party refers to the complainant's claims that, if returned to Sri Lanka, he would be at risk of harm from Sri Lankan authorities, including the Criminal Investigation Department, the Sri Lankan Army and the Karuna Group. However, the State party argues that the complainant has not provided information about the nature of the alleged harm.

4.4 The State party submits that the complainant's claims regarding his fear of "persecution and severe discrimination", his mental health and the lack of medical assistance available in Sri Lanka to address mental health issues do not meet the threshold of torture under article 1 of the Convention and therefore do not engage the non-refoulement obligations of Australia under article 3 of the Convention.

4.5 The State party notes that the complainant has not made any submissions pertaining to the breaches of article 2 or 16 of the Convention, which relate to the prohibition against and prevention of torture and other cruel, inhuman or degrading treatment or punishment under the jurisdiction of Australia. It notes that both articles 2 and 16 impose obligations on a State party to prevent acts in "any territory under its jurisdiction". As those obligations are territorially limited, they do not impose obligations on Australia with respect to acts in Sri Lanka. Therefore, the State party respectfully submits that the complainant's claims with respect to articles 2 and 16 are inadmissible *ratione materiae*.

4.6 The State party also notes the complainant's assertion that his removal to Sri Lanka, where he claims "it is unlikely that [he] would receive the treatment necessary for [his] mental illness", would amount to a violation of article 7 of the Convention. However, it notes that article 7 of the Convention relates to the prosecution of offences, set out in article 4 of the Convention. The State party submits that the complainant has not provided any explanation regarding the relevance of article 7 of the Convention to his complaint. The State party confirms that the complainant is not alleged to have committed any offence referred to in article 4 in Australia. Accordingly, the State party respectfully submits that the complainant's claims with respect to article 7 are inadmissible *ratione materiae*. Further, it asserts that, in the event that the complainant intended to refer to article 7 of the International Covenant on Civil and Political Rights, consideration of the Covenant is outside the Committee's jurisdiction under article 22 of the Convention. The State party submits that, accordingly, if the complainant's claim relates to article 7 of the Covenant, it is inadmissible *ratione materiae*.

4.7 The State party submits that the complainant's claims are inadmissible pursuant to article 22 (2) of the Convention and rule 113 (b) of the Committee's rules of procedure on the grounds that the claims are manifestly unfounded. It contends that the complainant has failed to provide exhaustive arguments supporting the alleged violation of article 3 in such a way that establishes a prima facie case for the purpose of the admissibility of his complaint.

4.8 The State party further submits that the merits of all of the complainant's claims, except for those being raised for the first time (considered separately below), have been thoroughly assessed by a series of domestic decision-making authorities, including in the review of the complainant's application for a protection visa to the Department of Home Affairs by the Immigration Assessment Authority. The complainant also sought judicial review of the determination of the Authority in the Federal Circuit Court and the Federal Court of Australia. The High Court of Australia duly considered the complainant's application for special leave to appeal the decision of the Federal Court, which was refused

after consideration. Furthermore, the complainant's request for a ministerial intervention was comprehensively reviewed and was determined not to meet the ministerial guidelines.¹⁶

4.9 The State party notes its obligation to act as a model litigant in handling claims and litigation brought by or against the Commonwealth or its agencies.¹⁷ It asserts that this obligation has been met with respect to the claims herein. Therefore, it argues that robust domestic processes have considered the complainant's claims in good faith and determined that they did not engage the non-refoulement obligations of Australia, which it takes seriously.¹⁸

4.10 In respect of the finding at the domestic level on the complainant's credibility, the State party acknowledges that while complete accuracy is seldom to be expected from victims of torture, this was taken into consideration by domestic decision-makers.

4.11 The State party refers to claims made by the complainant in his communication to the Committee that have not previously been considered by domestic processes, including claims regarding his mental health, the conduct of domestic decision-making processes in the State party and the current situation in Sri Lanka.¹⁹ For the purposes of admissibility, the State party submits that those materials are *prima facie* inadequate grounds for substantiating the complainant's claim under article 3 of the Convention.

4.12 Regarding the report of the mental-health social worker,²⁰ submitted to substantiate the complainant's allegation that he would face a real risk of torture if returned to Sri Lanka, the State party notes that the document records the complainant's account, as repeated to the social worker, but it does not strengthen the complainant's claim that he would face a real risk of torture if returned to Sri Lanka. In addition, it notes that no corroborative evidence has been provided with respect to the complainant's claim of having received a diagnosis of post-traumatic stress disorder. The State party therefore submits that the complainant's claims regarding his mental health in relation to his removal to Sri Lanka are not supported by evidence and are therefore manifestly unfounded.

4.13 In relation to general claims made by the complainant that the Migration Act requires a higher standard of proof than required by the Convention, that the fast-track visa process carries an "unacceptably high risk of unfairness" and that he was not afforded procedural fairness by the Federal Circuit Court, the Federal Court of Australia nor in relation to his request for ministerial intervention, the State party asserts that those claims are not supported by documentary evidence capable of establishing a *prima facie* case and therefore do not meet the basic level of substantiation required for the purposes of admissibility.

4.14 The State party therefore avers that the complainant's claims under article 3 remain manifestly unfounded and should therefore be held inadmissible.

4.15 If the Committee finds the complainant's claims to be admissible, the State party submits that they are in any case without merit, which is the same conclusion reached by domestic decision-makers concerning the complainant's claims and by the State party in its consideration of the additional issues raised in the complainant's submission to the Committee.

4.16 With regard to the consideration of the complainant's application for a protection visa, the State party submits that the delegate conducted an interview with the complainant (using

¹⁶ Under sect. 48B of the Migration Act for referral to the Minister for Immigration, Citizenship and Multicultural Affairs.

¹⁷ The obligation includes a duty not to take advantage of a claimant who lacks the resources to litigate a legitimate claim. The obligation also includes a duty to adhere to the highest professional standards, including by assisting the court to arrive at the proper and just result. See *Legal Services Directions 2017* (made under sect. 55ZF of the Judiciary Act 1903), registered on 2 July 2018.

¹⁸ Under the complementary protection provision contained in para. 36 (2) (aa) of the Migration Act, which reflect the non-refoulement obligations of Australia under the Convention and the International Covenant on Civil and Political Rights.

¹⁹ The new claims and evidence submitted by the complainant are addressed by the State party in its submission on the merits of the complainant's claims.

²⁰ The medical report claims that the complainant's severe depression began when he learned that his wife was having an extramarital affair, leading to their subsequent divorce in 2014.

a Tamil interpreter) and considered relevant material, such as country information provided by the Department of Foreign Affairs and Trade.²¹ Regarding his credibility, the delegate found the complainant's responses to be vague and his account implausible, containing significant inconsistencies and discrepancies that were not explained. The delegate concluded that the complainant was not a credible witness and that he had contrived elements of his account to strengthen his application.

4.17 Regarding the complainant's risk in Sri Lanka owing to his and his family's prior association with LTTE, the State party notes that the delegate accepted that the complainant may have incurred some ill-treatment from Sri Lankan authorities and LTTE during the armed conflict but did not accept that he was kidnapped by LTTE in 1995 or later detained and tortured by Sri Lankan authorities, nor that the complainant or members of his family would currently attract any specific interest from authorities, noting that he had, since the events put forward at the merits stage, travelled on an Sri Lankan passport.²² It further notes that the delegate had observed that the account provided during the complainant's entry interview conflicted with that advanced at the interview for a protection visa. In particular, it notes that the complainant only claimed that he had been subjected to torture by the Criminal Investigation Department during the latter interview. The delegate did not accept that this could be explained by the stress he was under during the entry interview. The State party notes that the delegate found that an association with LTTE would not be imputed to the complainant based on his Tamil ethnicity, citing the delegate's observation that in its latest guidelines, published in 2012, the Office of the United Nations High Commissioner for Refugees (UNHCR) did not list Tamils, on the basis of their ethnicity alone, as being a potential risk profile.²³ The delegate concluded that the complainant's claims of a real or imputed connection with LTTE or of being of particular interest to Sri Lankan authorities were unsubstantiated and therefore that the complainant did not face a real chance of persecution if returned to Sri Lanka.

4.18 In relation to the complainant's claims regarding the Tamil Makkal Viduthalai Pulikal, the delegate did not accept that the complainant's father had been a member or an elected representative of the party as he did not believe that the complainant's father would have aligned himself with the party a year after the war ended, especially if, as claimed, the complainant's close relatives were high ranking members of LTTE. Secondly, the spelling of his father's name on the ballot was different from that given by the complainant and the delegate did not accept that this was attributable to a transliteration error. In relation to the events involving the Karuna Group, which formed the basis of the complaints by the complainant's father and wife to the Sri Lankan Human Rights Commission in August and October of 2012, the delegate noted that, in his application for a protection visa, the complainant had stated that the incidents reported in August happened after the elections in September 2012. The delegate also queried why the complainant had referred to threats made against him as a result of his association with the Tamil Makkal Viduthalai Pulikal in his entry interview but claimed he had been beaten and hospitalized in his application for a protection visa. When this was put to the complainant, his explanation was not accepted. The delegate did not accept the complainant was involved in the 2012 election in Batticaloa, despite noting the complainant's explanation that his contribution had only extended to distributing pamphlets and that he did not have much knowledge of politics. In the light of this, the delegate did not accept that supporters of the Karuna Group visited the complainant's home and beat him and his father as a result of their support for the Tamil Makkal Viduthalai Pulikal in the 2012 election in Batticaloa nor that the complainant or his father were of any specific interest to the Karuna Group because of their political opinions. The delegate was therefore not satisfied that the complainant had ever been harmed by or genuinely feared

²¹ The State party notes that some claims raised by the complainant in his protection visa application differ from those in his submissions to the Committee.

²² The State party refers to other claims before domestic authorities, which it did not accept. In particular, the delegate did not accept that the complainant's cousins had been high-ranking members of LTTE or that they had disappeared following a period of detention by the Sri Lankan authorities.

²³ Decision of the Immigration Assessment Authority, citing the Office of the United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

future persecution from the Karuna Group. His risk level was therefore assessed solely based on his Tamil ethnicity and the likelihood of his imputed LTTE connections as a result. The delegate noted country information indicating that Tamils who do not have real or perceived links are not specifically persecuted on the basis of their ethnicity alone. As the complainant was not thought to have experienced any adverse treatment stemming from suspected LTTE support or links, the delegate concluded he would face no real risk of significant harm either on the sole basis of his Tamil ethnicity or in combination with suspicion of LTTE involvement if he were returned to Sri Lanka.

4.19 The State party notes that the delegate accepted that if returned to Sri Lanka, the complainant would, as a failed asylum-seeker who had departed illegally, be treated in accordance with standard procedures, regardless of his Tamil ethnicity. While this would likely include being arrested and briefly detained on charges under the Sri Lankan Immigrants and Emigrants Act of 1988, the delegate did not accept, having regard to the facts, that a custodial sentence would be imposed on the complainant. The delegate accepted that the complainant could be subjected to low level monitoring upon his return, but that this would not amount to serious harm, including torture. Therefore, the complainant would not be at risk of a real chance of mistreatment, noting in particular the complainant's previous frequent travel through Colombo airport.

4.20 After consideration of the circumstances in their totality, the delegate found that the complainant was not at risk of serious harm and therefore concluded that his claims did not engage the protection obligations of Australia under section 5H (1) of the Migration Act, under the 1951 Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees or under the complementary protection criteria, which the State party notes includes treatment covered under article 3 of the Convention.

4.21 The Department referred the decision on the protection visa to the Immigration Assessment Authority for merits review on 8 August 2016.²⁴ On 21 September 2016, the Authority affirmed the delegate's decision not to grant the complainant a protection visa,²⁵ again noting the discrepancies between the complainant's accounts. It did not therefore accept the complainant's account of conscription by LTTE in 1994 nor that he had been arrested, held and beaten by the Sri Lankan Army in 1995. On listening to the recording of the interview for the protection visa, it was noted that he had conversed freely and openly with the interviewer and that his standard of English was good, the Authority therefore did not accept that stress during that interview accounted for the discrepancies. While it was accepted that he had moved from Batticaloa to Trincomalee to complete his studies, his account of having fled Batticaloa for Trincomalee to avoid harm from the Sri Lankan authorities owing to his alleged involvement with LTTE and that the Criminal Investigation Department was still looking for him even after his arrival in Australia was not believed. Contrary to the delegate's findings, the Authority accepted that the complainant had relatives who were members of LTTE and who had disappeared at the end of the war, but it did not accept that the complainant faced any persecution on that basis.

4.22 Regarding his father's association with the Tamil Makkal Viduthalai Pulikal, the Immigration Assessment Authority noted the complainant's claims,²⁶ in support of which he had submitted a number of documents.²⁷ The Authority accepted, diverging from the delegate, that the complainant's father had been elected to represent the Tamil Makkal Viduthalai

²⁴ The Immigration Assessment Authority is an independent body within the Administrative Appeals Tribunal, which reviews fast-track decisions concerning protection visas. Established under the Migration Act, sect. 473JA (see http://classic.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s473ja.html).

²⁵ The Authority examined material referred to it by the Secretary of the Department under sect. 473CB of the Migration Act, as well as a submission made by the complainant on 8 August 2016.

²⁶ The complainant claimed that he was involved in printing leaflets and other propaganda material for the Tamil Makkal Viduthalai Pulikal during the 2012 election campaign and was threatened by LTTE and members of the Karuna Group.

²⁷ Including his father's membership identification card, an affidavit written by the complainant's father attesting to his membership and a service letter addressed to the complainant's father confirming his membership in the Tamil Makkal Viduthalai Pulikal between 2008 and 2012.

Pulikal in the 2008 Batticaloa elections,²⁸ that the discrepancy in spelling was attributable to a transliteration error and that the complainant's father had received threats from LTTE due to his political status and opinions. However, it was not satisfied that those threats amounted to serious harm, citing his father's continuing association with the Tamil Makkal Viduthalai Pulikal, until 2013, and having regard to the fact that his father continued to live in Batticaloa. Furthermore, the Authority did not accept that the complainant had personally received threats from LTTE during the 2008 election period as, according to his own account, he was in Qatar at the time. The Authority noted that LTTE had been defeated in 2008 and therefore no longer existed or posed a threat generally. The Authority accepted that the complainant had had some involvement in the 2012 election campaign. However, having only distributed pamphlets, noting his admission that he does not have much knowledge of politics, it did not accept that the complainant or his father had been threatened or beaten by the Karuna Group after the 2012 election.

4.23 Regarding the inconsistencies between his entry interview and his application and interview for a protection visa, the complainant's assertion that the representative of the humanitarian group who helped with his application must have omitted information, the Immigration Assessment Authority noted that the complainant's English skills were good, and that he had signed and attested to the accuracy of the statement. Furthermore, the complainant had been allowed to submit additional clarifying information within seven days of the interview but he had not provided any additional submissions.

4.24 Regarding the complainant's risk of harm on account of his Tamil ethnicity, the Immigration Assessment Authority, citing assessments conducted by the Department of Foreign Affairs and Trade and UNHCR, found that Tamils do not have a heightened risk profile on the basis of their ethnicity alone.

4.25 In considering the return of the complainant to Sri Lanka as a failed asylum-seeker, the Immigration Assessment Authority noted that, while the penalty for persons who departed Sri Lanka illegally could include imprisonment of up to five years, in addition to a fine, the report of the Department of Foreign Affairs and Trade indicated that no passenger on a people-smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. It concluded that the complainant would, at most, be fined and released without a custodial sentence. The Authority noted that reports of mistreatment of returning Tamil asylum-seekers were largely from those with an actual or imputed connection to LTTE. The Authority also considered the complainant's claims to complementary protection provisions and concluded that the complainant did not face a risk of serious harm, including torture, as a necessary or foreseeable consequence of his removal to Sri Lanka. It therefore determined that the complainant had not suffered serious harm either from authorities or opposition factions and therefore did not have an adverse risk profile that would prevent his return to Sri Lanka on the basis of international or domestic obligations.

4.26 The State party further notes that, on 9 June 2017, the Federal Circuit Court dismissed each of the three main grounds upon which judicial review was sought, concluding that the complainant had not established that the decision of the Immigration Assessment Authority revealed any jurisdictional error.

4.27 The Federal Circuit Court found that the complainant's contention that the Immigration Assessment Authority had considered country information that had not been presented before the delegate did not warrant permission for leave of the court to present it as new information, since the Authority had considered updated country information in reaching its conclusions.²⁹ No error of law was found on the other grounds.

4.28 The State party notes that, on 17 April 2019, the complainant's application for special leave to appeal to the High Court of Australia was also refused on the basis that his claim did not raise any reason to doubt the correctness of the decisions of the lower instances.

²⁸ The delegate had not accepted that the complainant's father's name had been transliterated in English differently on the election records.

²⁹ Leave should only be granted if justice requires it, that is, in a matter which turns primarily, but not exclusively, on the merit of the proposed ground.

4.29 On 3 May 2019, the complainant made a request for ministerial intervention.³⁰ In addition to reiterating his previously raised claims, the complainant raised the additional concern that he was suffering from depression and anxiety due to fear of being returned to Sri Lanka. On 20 June 2019, the Department denied the request. It determined that the complainant's claims did not meet the guidelines for ministerial intervention³¹ as he had not presented any corroborative evidence to substantiate claims that he would be negatively affected, mentally or psychologically, as a result of returning to Sri Lanka and had not provided any information to contradict the findings of the Immigration Assessment Authority.

4.30 The State party also submits that, as a result of events in Sri Lanka since the conclusion of the proceedings, which qualified as new circumstances, the Department undertook a further assessment and concluded that the protection obligations of Australia were not engaged in the complainant's case and that therefore, in line with the guidelines, it did not refer the request to the Minister.

4.31 The State party addresses the complainant's allegations regarding the fairness of the migration processes of Australia, in particular that the standard of proof required under the Migration Act is stricter than that required by the Convention, which he further claims is not incorporated into domestic legislation. It refers to his claims that the Act "places the onus of proof upon applicants to ensure that the Minister 'is satisfied' that they have a genuine fear based upon a real risk of persecution", while under the Convention the burden of proof "is placed upon the State in which relief is sought" and he claims that the paramount aim is to protect applicants from torture "despite doubts which may exist concerning the facts of a case". The State party submits that there is no such legal "onus of proof" or "standard of proof" in administrative decision-making. Rather, "satisfaction" is the general administrative decision-making standard, meaning, in essence, that decision-makers are satisfied that they have enough information to make a finding against relevant criteria, tests or requirements. It notes that it is the responsibility of applicants to put the particulars of their claims and any substantiating evidence to the delegate in order to ensure that the delegate reaches the requisite state of satisfaction that requirements under section 5AAA of the Act are met. It asserts that the delegate (and the Immigration Assessment Authority) must, in turn, provide applicants with a real opportunity to provide evidence to support their claims. The delegate (and the Authority) can also ask for further information, where necessary. However, decision-makers are not required to fill out claims on behalf of applicants. The State party observes that this is the Committee's approach, as set out in its general comment No. 4 (2017).

4.32 The State party also notes that in assessing credibility, decision-makers have regard to mitigating circumstances and their impact on the person's ability to present their claims. It reiterates that all of these factors were considered in assessing the complainant's credibility.

4.33 Regarding the tests used in section 36 of the Migration Act and the complainant's claims that the Migration Act "does not purport to incorporate the non-refoulement obligations" arising under the Convention, the State party submits that the Migration Act and related regulations fulfil the non-refoulement obligations of Australia, including under article 3 of the Convention. It submits that domestic legislation reflects, in substance and form, the definition of torture characterized under article 1 of the Convention and mirrors the wording of the non-refoulement obligation in article 3 of the Convention. In conclusion, the State party submits that the complainant was afforded procedural fairness in the assessment of his asylum claim, consistent with its obligations under the Convention.

4.34 Regarding claims that the fast-track assessment procedure applied to the unauthorized maritime arrival status, which the complainant claims "imposes severe time restrictions on applicants seeking review of migration decisions", the State party submits that all applicants are afforded procedural fairness guarantees. It notes that the fast-track procedure places an emphasis on the full and truthful articulation by applicants of their protection claims at the earliest possible opportunity and provides them with a full and comprehensive assessment of their claims. The State party submits that the "prompt and transparent process", provided for

³⁰ Under sect. 48B of the Migration Act, on non-compellable public interest power, the Minister can intervene in individual cases to allow a person to make a further application for a protection visa if the Minister thinks it is in the public interest to do so.

³¹ See <https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service/ministerial-intervention>.

by the Committee in its general comment No. 4 (2017), is honoured through the fast-track procedure.

4.35 Regarding the discretion of the Immigration Assessment Authority to consider new and relevant information (both orally or in writing), the State party notes that while it is under no duty to accept or request new information or to interview an applicant, new information will be considered if the Authority is satisfied that there are exceptional circumstances to justify its consideration. It avers that the exercise of this discretion must not be legally unreasonable and that illegality can be challenged in court.

4.36 In respect of claims relating to the complainant's level of English or lack of representation, the State party notes that the complainant's good level of English was noted both by the delegate and the Immigration Assessment Authority and that he had the assistance of interpreters, including prior to the court decisions. The State party observes that the complainant's protection visa application was prepared by a representative from the humanitarian group. Furthermore, during the complainant's hearing before the Federal Circuit Court, where he represented himself, the judge explained the nature of the proceedings to the complainant at the commencement of the hearing and the complainant confirmed that he understood.

4.37 Finally, in answer to the complainant's claims that available country information confirms that Tamils continue to experience human rights violations in Sri Lanka and that they are victims of "communal oppression", the State party notes that the complainant relies on country information concerning, inter alia, the failure of the Government of Sri Lanka to investigate "white van" abductions and the torture of numerous individuals and that there has been a change of the security and human rights situations, including "prevailing violence due to bomb attacks in Sri Lanka". He further claims that both the Immigration Assessment Authority and the courts failed to consider the above-mentioned report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the country report entitled "Silenced: survivors of torture and sexual violence in 2015" issued by the International Truth and Justice Project Sri Lanka in January 2016. The State party recalls that the existence of a general risk of violence does not constitute sufficient grounds for concluding that a particular person would be in danger of being subjected to torture upon return to that country and that "additional grounds must exist to show the individual concerned would be personally at risk". It asserts, therefore, that the general information referenced does not establish the existence of additional grounds for believing that the complainant is at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

4.38 With regard to the complainant's additional submissions that the State party has adopted dissuasive measures,³² including regarding conditions placed on his bridging visa E, denying him the right to work while his protection claim was assessed, it submits that condition 8101 was not in fact imposed on the complainant as a condition on his bridging visa E.³³ As a result, it claims that those allegations fail to rise to a basic level of substantiation and are consequently inadmissible on the basis that they are manifestly unfounded, pursuant to article 22(2) of the Convention and rule 113 of the Committee's rules of procedure. The State party also notes the complainant's submission that visa condition 8207, on "no study", was imposed on him. The State party rejects this allegation and submits that this claim is inadmissible *ratione materiae* as the obligation of non-refoulement under article 3 of the Convention is confined to circumstances in which there are substantial grounds for believing that a returnee would be in danger of being subjected to torture and that thus those claims are manifestly unfounded.

4.39 The State party therefore submits that the complainant's claims are inadmissible and without merit.

³² Such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolonging them or cutting funds for assistance programmes to asylum-seekers.

³³ The bridging visa grant notice issued by the Department of Home Affairs on 4 February 2021 outlined that the complainant would have full permission to work while his visa is in effect.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 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.

5.2 The Committee notes the argument of the State party that the complainant's allegations under article 3 of the Convention are inadmissible and manifestly unfounded as it considers that the complainant has failed to substantiate the existence of grounds for believing that he would face a foreseeable, present, personal and real risk of persecution if he were to be returned to Sri Lanka. The Committee notes that the complainant's claims of having been arrested and subjected to ill-treatment in Sri Lanka and forcibly recruited by LTTE and that his ethnicity, background and family's links to LTTE, political activities and the open warrant for his arrest would expose him to a serious, personal, foreseeable and imminent risk of ill-treatment, contrary to article 3 of the Convention, if he were to be returned to Sri Lanka, are sufficiently substantiated for the purposes of admissibility. It therefore finds that it is not precluded from considering these claims under article 22 (2) of the Convention.

5.3 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. The Committee notes, in the present case, the State party's assertions that certain of the complainant's claims were not raised before domestic authorities, including allegations regarding flaws in the State party's fast-track asylum procedure, the burden of proof under the Migration Act, evidence regarding the complainant's mental health and submissions on the "Easter bombings", and that those claims are therefore inadmissible, either *ratione materiae* or as being manifestly unfounded as they do not support his claims under article 3. The Committee considers that as the substance of these elements (mental health, inability to challenge factual findings, procedural limitations and changes in country information) were raised before domestic authorities, it is not precluded, under article 22 (5) (b), from considering claims as submitted by the complainant under article 3 of the Convention.

5.4 With regard to the claims made under articles 2, 7 and 16 of the Convention, the Committee notes the State party's argument that those claims relate only to acts under the territorial jurisdiction and effective control of Sri Lanka and therefore are manifestly unfounded. The Committee notes that the complainant's communication does not relate any of those claims to the actions of the State party and that they do not relate to alleged violations that would fall within the territorial jurisdiction or effective control of the State party, in contrast with the claims made under article 3. Accordingly, the Committee declares the complainant's claims under articles 2, 7 and 16 inadmissible under article 22 (2) of the Convention and rule 113 (b) and (c) of its rules of procedure.

5.5 In the absence of any further submissions on the admissibility of the communication, the Committee considers that it is not precluded from considering the claims under article 3 and therefore proceeds with its consideration of the merits.

Consideration of the merits

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

6.2 In the present case, the issue before the Committee is whether the forced removal of the complainant to Sri Lanka constitutes a violation of the State party's obligations, under article 3 of the Convention, not to expel or 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.

6.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would personally be at risk of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must have regard to 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.

6.4 The Committee recalls its general comment No. 4 (2017), according to which “the Committee will assess ‘substantial grounds’ and consider the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of the complainant’s deportation”. Indications of personal risk may include, but are not limited to the complainant’s: (a) ethnic background; (b) political affiliation or political activities of the complainant or his or her family members; (c) arrest and/or detention without guarantee of a fair treatment and trial; [...] (g) previous torture; (h) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; and (i) clandestine escape from the country of origin following threats of torture (para. 45). With respect to the merits of a communication submitted under article 22 of the Convention, the burden of proof is upon the author of the communication, who must present an arguable case, that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real (para. 38). The Committee also recalls that it gives considerable weight to findings of fact made by organs of the State party concerned. However, it is not bound by such findings, as it can make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, considering all the circumstances relevant to each case (para. 50).

6.5 The Committee refers to its concluding observations on the fifth periodic report on Sri Lanka,³⁴ in which it voiced serious concerns about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including by the police, had continued in many parts of the country after the conflict with LTTE ended in May 2009. It also refers to credible reports by non-governmental organizations concerning the ill-treatment of returnees by the authorities in Sri Lanka. It further notes the most recent findings of the Office of the United Nations High Commissioner for Human Rights (OHCHR)³⁵ in relation to continuing reports it has received of surveillance, intimidation and harassment, including families of the disappeared and persons involved in memorialization initiatives, by intelligence services, military and police, particularly in the north and east. Noting, in particular, that former LTTE cadres are subjected to intensive surveillance, resulting in a pervasive culture of surveillance and an oppressive environment. Furthermore, the report notes that despite amendments to and a moratorium on the use of the Prevention of Terrorism Act, those deemed critical of the regime continue to be arrested and detained under the Act.³⁶

6.6 Regarding the complainant’s claims that he would be at risk of treatment contrary to article 3 of the Convention if returned to Sri Lanka, the Committee notes the complainant’s claims that he was forcibly recruited by LTTE and employed in communications (he provides identifying information) and that, upon his release, this association brought him to the attention of Sri Lankan authorities who arrested, detained and tortured him. The Committee notes the complainant’s claims that: (a) after his arrest and torture he first left his local area and subsequently travelled abroad; (b) following his father’s involvement in politics in 2012, in which he had played a part, having received threats from opposing elements, he left Sri Lanka for Australia to avoid serious harm; (c) he remains a person of interest, owing to his family’s political activities, links to and conscription by LTTE and the fact that he left Sri Lanka illegally; (d) as an individual in unauthorized maritime arrival status in Australia, he falls under the provisions of the Migration Act 1958,³⁷ dictating that, as a fast-track applicant, the merits review of the Immigration Assessment Authority was in paper form only; (e) as a fast-track applicant, he was not permitted to appear in person and explain the discrepancies on which the negative credibility finding was based; (f) the burden of producing evidence under the Migration Act 1958 is unduly onerous; (g) country information relevant to his claim

³⁴ CAT/C/LKA/CO/5, para. 11.

³⁵ A/HRC/51/5.

³⁶ Ibid.

³⁷ Migration Act, art. 7AA.

was not considered; and (h) he was prejudiced in his ability to present his case to decision-makers because of the limitations of court jurisdiction. In addition, the complainant claims that the above, combined with being unrepresented and the restrictive conditions attached to the bridging visa, amount to dissuasive measures by the State party in an attempt to reduce the inflow of migrants, meaning that it fails to effectively review claims that trigger its non-refoulement obligations.

6.7 The Committee also notes the arguments of the State party that the complainant's asylum claims were subject to robust merits review in two instances, which were found to be free of jurisdictional error by three judicial instances; that he was able to file written submissions to the delegate after the interview for a protection visa; that he appeared in person at his arrival and protection visa interviews; that he had the assistance of an interpreter and legal counsel; that he was invited to provide additional submissions after the hearing, which he failed to do; and that his written submissions to the Immigration Assessment Authority were duly considered and he was able to have that decision reviewed as to its legality by the Federal Circuit Court of Australia, the Federal Court of Australia and the High Court of Australia. It therefore asserts that the complainant has had the merits of his asylum claim comprehensively and robustly reviewed, in accordance with both its domestic and international obligations.

6.8 The Committee notes that it is not in contention that, based on significant inconsistencies in the complainant's account of events leading to his departure from Sri Lanka, neither the delegate nor the Immigration Assessment Authority accepted that the complainant had ever been forcibly recruited by LTTE, arrested, detained and subjected to torture by Sri Lankan authorities or attacked or threatened by opposition elements as a result of his or his father's, political activities. While domestic authorities accepted the complainant's claims as to his ethnicity, geographical origins, family links to LTTE, his father's political activities and his involvement in the 2012 elections, including that he may have been ill-treated by LTTE during the conflict, and that he had left Sri Lanka illegally and may face charges and a short period of detention on his return, the authorities did not accept that he faced a risk of serious harm on his return which would rise to the level necessary to trigger the State party's non-refoulement obligations.

6.9 The Committee therefore notes that the refusal of the complainant's protection visa was determined, and ultimately failed, based on a perceived lack of credibility, attributed to his account of having been forcibly recruited by LTTE and tortured by the Criminal Investigation Department. The Committee notes that the complainant, in his communication, clearly sets out and annexes a summons and an arrest warrant, in his name, issued by the police department in Batticaloa, dated 10 and 11 August 2016, respectively. He also gave details of his LTTE name, badge and identification tag numbers and claims that he has scars from the cigarettes used to burn him during his interrogation by the Criminal Investigation Department. It notes that as the State party does not directly reference these documents but rather infers from the fact that they were not alleged by it to have been raised for the first time in the complaint before the Committee, it can be assumed that the State party's domestic authorities were made aware of these documents during ongoing proceedings. While there is no submission from either party on the specific moment at which they were introduced into domestic proceedings, it seems likely, given the date of the complainant's last submission to the Immigration Assessment Authority (8 August 2016), the date of issuance of the summons and warrant (10 and 11 August 2016, respectively) and the date of the complainant's amended application to the Federal Circuit Court (9 June 2017), that the documents were among those submitted to the Circuit Court and noted by it as part of the merits of his protection claim. Nevertheless, not having been put before the Authority, they were found inadmissible as irrelevant to the sole question before the Court, that of jurisdictional error by the Authority.

6.10 The Committee notes that the scope of review by the Federal Circuit Court is strictly limited under the Migration Act³⁸ to evaluating whether the Immigration Assessment Authority has made a jurisdictional error in affirming the delegate's refusal of a visa and that the High Court of Australia is confined to assessing whether a procedural error is so grave as

³⁸ Migration Act, sect. 476 A.

to necessitates reconsideration on grounds of the interests of justice. Furthermore, the Minister's intervention is wholly discretionary and the guidelines for referral are not exhaustive and do not provide for a reasoned decision for non-referral. Regardless of these particularities, the Committee notes that the Federal Circuit Court of Australia, the Federal Court of Australia, the High Court of Australia and the delegate for the Minister each had before them the evidence in question, supporting the complainant's protection claim, which had not been available at the merits stage. For an unrepresented litigant, for whom English is not his first language, regardless of his conversational abilities, the legislative barriers to successfully challenging a visa refusal reviewed, particularly in the light of new evidence, without the benefit of access to legal aid, effectively necessitates a detailed understanding of the Migration Act, administrative procedural rules, the common law system and domestic precedent on jurisdictional error, not to mention the ability to draft adequate pleadings. Noting that the Migration Act explicitly excludes common law principles of procedural fairness and excepts fast-track claims from common law principles of judicial review, the new information in the case was not remitted back to the fact-finder for an assessment as to its relevance or probity by the Circuit Court or the Federal Court, nor was it deemed sufficient to justify a referral to the Minister for consideration on the merits, despite the guidelines citing that referral in "circumstances not anticipated by relevant legislation; or (to avoid) clearly unintended consequences of legislation; or (where) the application of relevant legislation leads to unfair or unreasonable results in your case". There is nothing before the Committee to suggest that the complainant was given an opportunity to have this information reviewed against the criteria for international protection nor against non-refoulement principles under the Convention.

6.11 In the light of the foregoing, the Committee considers that the failure to assess key evidence, which was unavailable at the review stage on the merits but central to the complainant's protection claim as it undermined the negative credibility finding, lead it to conclude that the State party did not discharge its obligations to undertake a comprehensive, individualized assessment of the risk of a foreseeable, present, personal and real risk that the complainant would be subjected to torture if deported to Sri Lanka.

7. The Committee, acting under article 22 (7) of the Convention, concludes that, without such an assessment, the deportation of the complainant to Sri Lanka would constitute a breach of article 3 of the Convention by the State party.

8. The Committee is of the view that, pursuant to article 3 of the Convention, the State party has an obligation to reconsider the complainant's asylum application in the light of its obligations under the Convention and the present decision and to refrain from deporting the complainant while his application for asylum is being considered.

9. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days of the date of transmittal of the present decision, of the steps it has taken to respond to the above observations.
