



# 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. 884/2018\*, \*\*

<i>Communication submitted by:</i>	N.S. (represented by counsel, Daniel Taylor)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	10 September 2018 (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 10 September 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	21 July 2021
<i>Subject matter:</i>	Risk of torture or other cruel, inhuman or degrading treatment or punishment, if deported to country of origin (non-refoulement); prevention of torture
<i>Procedural issue:</i>	Admissibility – manifestly ill-founded
<i>Substantive issue:</i>	Deportation to Sri Lanka
<i>Article of the Convention:</i>	3

1.1 The complainant is N.S., a national of Sri Lanka born in 1989. His application for asylum in the State party has been rejected and he risks deportation. He claims that if the State party were to proceed with his deportation, it would violate his rights under article 3 the Convention. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 28 January 1993. The complainant is represented by counsel.

1.2 On 10 September 2018, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from expelling the complainant while the complaint was being considered.

#### Facts as submitted by the complainant

2.1 The complainant is of Tamil ethnicity. He grew up in an area that was closely contested by the Sri Lanka Army and the Liberation Tigers of Tamil Eelam (Tamil Tigers). His brother was shot and his brother-in-law arrested by the Sri Lanka Army. After finishing school, the complainant joined the Tamil Tigers and underwent a three-month self-defence

\* Adopted by the Committee at its seventy-first session (12–30 July 2021).

\*\* The following members of the Committee participated in the examination of the communication: Essadia Belmir, Claude Heller, Erdoğan İşcan, Liu Huawen, Ilvija Pūce, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.



training course, which included weapons training. He then worked as a medic for the Tamil Tigers, treating those who had been wounded in combat and driving them to hospitals if their injuries were too severe to be treated on site.

2.2 In 2008, the complainant left the Tamil Tigers and returned home to care for his mother, who had cancer. In 2010, he was asked through a friend to meet with three former friends from the Tamil Tigers to talk about the risks that they were facing and to discuss whether they should go to India. During their meeting, they were apprehended by the Sri Lanka Navy and the police. One of the complainant's friends had a pistol, which he threw away before his apprehension, but it was found by the Criminal Investigation Department. The complainant and his friends were taken to Kuchchaveli police station, where they were interrogated about the meeting and the pistol's origins. During the interrogation, the complainant was stripped down to his underwear and beaten with a pipe. The complainant was kept in custody for two weeks, during which time he was deprived of food and water and subjected to further torture.

2.3 The complainant was released on bail after two weeks, and was treated in hospital for the injuries that he had suffered. He was later abducted by the Karuna group and spent seven days in their custody, again being subjected to beatings. He was questioned about his uncle, who had earlier been shot by the Karuna group, and about his own contacts within the Tamil Tigers. The complainant's mother paid a bribe to the Karuna group, and he was released a week later and went into hiding.

2.4 On an unspecified date, the Criminal Investigation Department initiated a criminal case against the complainant on weapons charges. After he skipped bail and went into hiding, they went to his house and interrogated his father and younger brother. A warrant for his arrest was later issued and sent to his house.

2.5 The complainant entered the State party by boat on 18 July 2012, and was detained upon arrival. He was granted a bridging visa on 20 November 2012. The complainant was granted further bridging visas, and his last visa expired on 24 February 2016.

2.6 On 4 September 2013, the delegate of the Minister for Immigration refused to grant the complainant a protection visa. On 13 May 2015, the Refugee Review Tribunal confirmed the decision not to grant him a visa. On 2 September 2016, the Federal Circuit Court dismissed his application for a judicial review. On 16 February 2017, the complainant's application for leave to appeal the decision of the Federal Circuit Court was dismissed by the Federal Court of Australia. On 12 October 2017, the High Court of Australia dismissed the complainant's application for special leave to appeal.

2.7 The complainant submits that he was frightened to inform the State party authorities of his connections to the Tamil Tigers when he first claimed asylum. He was also frightened to provide evidence that he faced charges in Sri Lanka for alleged weapons offences arising from his connections with former members of the Tamil Tigers. The complainant's capacity to give cohesive evidence and to participate in the claims process was compromised by the effects of torture to which he had been subjected in Sri Lanka. He raised his claims that he had been a member of the Tamil Tigers before the Federal Court of Australia, but it determined that it could not hear those claims.

2.8 In July 2018, during an interview with the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, the complainant detailed his membership of the Tamil Tigers and the torture to which he had been subjected by the authorities in Sri Lanka. He was assessed as being mentally unwell, with dissociation and suicide attempts. The Service's report was submitted to the Minister of Home Affairs, requesting ministerial intervention to reconsider the complainant's claims. However, that request was refused on 3 September 2018, without referral to the Minister for consideration. A further application for ministerial intervention was lodged on 7 September 2018, but was refused on 10 September 2018. The complainant is being detained at Villawood Immigration Detention Centre.

2.9 On 9 March 2019, the complainant submitted additional information with regard to his situation. He claims that on 10 September 2018, he was put on a plane back to Sri Lanka with a stopover in Perth, Australia. However, after landing in Perth, he was taken off the

plane and sent to a local detention centre. However, his suitcase – whose contents included photographs of himself and his friend in Tamil Tigers uniform, court papers for his asylum application, a copy of his arrest warrant, letters from his family, his Sri Lankan driver's licence and a flash drive containing revolutionary songs from the Tamil Tigers – was not taken off the plane in Perth with the complainant, and ended up being sent to the Bandaranaike International Airport in Sri Lanka. The complainant notes that he had been planning to destroy most of the items that had ended up being packed in his suitcase before his deportation, but the sudden nature of his removal meant that he was rushed and did not have an opportunity to carry out his plan.

2.10 According to the complainant, shortly after his suitcase was sent to Sri Lanka, several agents from the Criminal Investigation Department came to his parents' house looking for him. They said that they suspected that the complainant had also arrived in Sri Lanka, but had managed to escape from the airport without passing through border control. They warned the complainant's mother that they would return and would be looking for him. On 27 October 2018, the agents returned, again looking for the complainant. They knew that the complainant had been removed from the plane in Australia at the last minute, and questioned his mother as to the reasons for his removal. They also told her that they knew that the complainant had been part of the Tamil Tigers.

### **Complaint**

3. The complainant claims that his deportation to Sri Lanka would constitute a violation of his rights under article 3 of the Convention. He claims that there are substantial grounds to believe that he would suffer torture at the hands of the Criminal Investigation Department because of his suspected connections with the Tamil Tigers and the outstanding warrant for his arrest.

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

4.1 On 29 July 2019, the State party submitted its observations on admissibility and the merits of the complaint. 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. According to the State party, the claims have been thoroughly considered by a series of domestic decision makers, including the Department of Home Affairs during the determination of the complainant's application for a protection visa and the Refugee Review Tribunal during its independent merits review. The complainant also sought judicial review by the Federal Circuit Court and the High Court of Australia. Lastly, he requested ministerial intervention, which was also refused.

4.2 The State party refers to the Committee's decisions in *I.P.W.F. v. Australia* and *T.T.P. v. Australia*,<sup>1</sup> and notes that the Committee's approach in these cases reinforces its long-standing position that a communication must meet the basic requirements of admissibility. The State party refers to the Committee's general comment No. 4 (2017), in which the Committee notes that it gives considerable weight to findings of fact made by organs of the State party concerned. The State party asserts that it has thoroughly assessed the complainant's claims through domestic processes, and has found that the claims do not engage its obligations under article 3 of the Convention.

4.3 The State party submits that during the interview with the complainant as part of the protection visa application process, the delegate of the Minister found that some of the complainant's claims lacked credibility. In particular, the delegate of the Minister did not accept the complainant's claims that he was politically active in Sri Lanka, that he was of any adverse interest to the authorities, and that he held any kind of elevated profile locally or nationally for any reason. The delegate of the Minister also observed that the complainant had been able to depart for India and return to Sri Lanka legally in June 2010, which indicated that he had been of no interest to authorities at that time. The delegate of the Minister also determined that the complainant did not face a real chance of serious harm amounting to

<sup>1</sup> CAT/C/63/D/618/2014, para. 8.7, and CAT/C/65/D/756/2016, para. 6.3.

persecution on the basis of his Tamil ethnicity. That determination was based on various reports, including the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* and annual reports by the Department of State of the United States of America, according to which there had been no reports that Tamils risked persecution based on their ethnicity alone. With regard to the complainant's perceived personal connection to the Tamil Tigers, the delegate of the Minister held that there was no information that the complainant had personally been targeted, but was rather that he had been caught up in round-ups and questioned during and after the war. Despite the fact that he had been harmed in the past owing to general suspicion by the authorities about people in that area being involved with the Tamil Tigers, the delegate of the Minister referred to recent country information to conclude that she did not consider that the complainant faced the same general risk in the future, and that there was nothing specifically about the complainant that would lead the authorities to be suspicious that he was associated with or supportive of the Tamil Tigers. Lastly, the delegate of the Minister did not consider that the complainant's young age or the fact that he would be a returnee from a Western country would attract any adverse attention from the authorities upon his return. In view of the above, the complainant's protection visa application was refused on 4 September 2013.

4.4 The State party notes that on 23 September 2013, the complainant applied to the Refugee Review Tribunal for a review of the merits of the decision to refuse him a protection visa. The complainant was physically present at the Tribunal hearing, was represented by his registered migration agent by telephone, and was able to make oral submissions with the assistance of an interpreter. The Tribunal found that the complainant was not a witness of truth and that he had fabricated most of his claims. The Tribunal noted that he had added to key claims as he had progressed through the application process and that his account during the hearing was vague and inconsistent and lacked credibility. He failed to mention at the outset two key and lengthy detentions in 2010, and his accounts of those detentions when he did mention them were inconsistent. He also failed to mention any political involvement, even when asked, contrary to his later claims of political involvement. According to the Tribunal, the complainant was detained neither by the authorities nor by the Karuna group nor by anyone else in 2010, and nobody was looking for him. It referred to evidence provided by the complainant that he had lived in the same area for many years since the end of the war without harm, asserting that had he been suspected of being associated with the Tamil Tigers, he would have been arrested and sent to a rehabilitation camp towards the end of the war. Based on the evidence and country information before it, the Tribunal concluded on 13 May 2015 that the complainant did not face a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment upon his return to Sri Lanka.

4.5 The State party submits that both the Federal Circuit Court and the Federal Court of Australia dismissed the complainant's claims raised in his appeals. Both courts ruled that there was no error in concluding that there was no substantial, clearly articulated claim that relied upon established facts that the complainant had the profile of a person suspected of links with the Tamil Tigers or that his profile fell under any of the categories of Tamils returning to Sri Lanka who would be subjected to detention and/or torture and/or ill-treatment. During his hearing before the Federal Court of Australia, the complainant also submitted that the interpreter at his hearing before the Refugee Review Tribunal had not properly interpreted what he had said; that he considered that the Tribunal member had confused him by the questions asked and, accordingly, that he had given incomplete answers; that if he had the opportunity, there were facts about his life that he could now disclose; and that the Tribunal member had not accepted the positive aspects of his case, only accepting aspects that went against him. The Federal Court of Australia ruled that there was nothing about the merits of those matters that would justify the granting of leave in order to raise them before it. It noted that the complainant had been satisfied with the interpretation and that no issue concerning interpretation had been identified at the Tribunal hearing.

4.6 The State party notes that the complainant also submitted requests for ministerial intervention under sections 48B and 417 of the Migration Act. Under these sections, the Minister for Immigration may intervene in individual cases if the Minister thinks that it is in the public interest to do so. According to the State party, to support his claim, the complainant submitted photographs and a purported copy of an arrest warrant dated 10 November 2017, copies of three assessments conducted in 2018 by International Health and Medical Services

and a copy of the report by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors in which the Service recommended that he resume counselling to assist him to manage his symptoms of depression and anxiety. With regard to the arrest warrant, the Departmental Officer (the delegate of the Minister) noted that she had reason to doubt the genuineness of the document, given that the High Commission of Sri Lanka did not advise the Australian Border Force of any arrest warrant when the latter sought a travel document for the complainant's removal. As the complainant did not provide an explanation as to why the warrant had not been provided when it was first issued, and given the earlier finding by the Refugee Review Tribunal that the complainant was not a credible witness, the Departmental Officer was not satisfied that there was in fact an outstanding warrant against the complainant. On 17 August 2018, it was determined that the complainant's request did not meet the criteria under section 417 of the Migration Act and that there were no unique or exceptional circumstances that would compel the Minister to intervene. Regarding the complainant's request under section 48B of the Migration Act, the Departmental Officer noted that the complainant had not previously claimed to have been a member of the Tamil Tigers and had provided no explanation as to why he was raising that claim only now. The Departmental Officer determined that there was no new credible information or claims that met the criteria for referral to the Minister.

4.7 The State party submits that on 7 September 2018, the complainant filed a further request for ministerial intervention on the premise that there had been a data breach whereby the personal details of a number of asylum seekers had inadvertently been posted on the Department's website. The State party informs the Committee that the complainant was not affected by the data breach. The data breach pertained to detainees in detention on 31 January 2014 only, and the complainant was not in detention at that time.

4.8 With regard to the additional information submitted by the complainant on 9 March 2019, the State party notes that his removal from Australia was cancelled while in transit on 10 September 2018 in response to the Committee's request for interim measures. On 8 October 2018, the complainant was informed that his suitcase had arrived at the Bandaranaike International Airport on 11 September 2018. The State party submits that the additional information provided by the complainant does not alter the assessment by its Government regarding his claims about his membership of or association with the Tamil Tigers. According to the State party, there are inconsistencies between the complainant's claims made during domestic processes regarding the issue and those that he has made to the Committee. The claims also changed at each stage of the domestic process of consideration prior to the complainant's submission of his communication to the Committee. The State party considers that the complainant has not provided credible evidence to substantiate his claims that the authorities in Sri Lanka perceive him to have a personal connection with the Tamil Tigers or to be affiliated with them in any way, or that there is foreseeable, personal, present and real risk that he will be tortured. The State party acknowledges that complete accuracy can seldom be expected from victims of torture.<sup>2</sup> However, this factor was taken into consideration by domestic decision makers in forming views on the complainant's credibility. Should the Committee find that the complainant's claims about his membership or association with the Tamil Tigers are credible, the State party submits that such membership or association would not elevate his profile in such a way as to attract any adverse attention from the authorities in Sri Lanka.

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

5.1 On 31 October 2019, the complainant submitted his comments on the State party's observations on admissibility and the merits. He submits that the Government of the State party has implemented a refugee review system that is effectively biased, in that it has sought to persecute former members of the Tamil Tigers through its characterization of them as security risks,<sup>3</sup> and by instilling fear into cohorts of Tamil asylum seekers, dissuading them

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<sup>2</sup> General comment No. 4 (2017), para. 42.

<sup>3</sup> The complainant submits that this characterization has been done through adverse assessments by the Australian Security Intelligence Organization (see

from freely raising their claims for protection. Additionally, the Department of Foreign Affairs and Trade has included the Tamil Tigers as a terrorist organization on its consolidated list since 21 December 2001. According to the complainant, he did not initially mention his time with the Tamil Tigers or his arrest and torture over the weapons possession incident owing both to his fear of an adverse assessment by the Australian Security Intelligence Organization and to his inability to speak about having been subjected to atrocious forms of torture. He notes that according to the reports by the psychologist from the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, he suffered extreme distress when recalling the torture that he had experienced.<sup>4</sup>

5.2 The complainant notes that the Refugee Review Tribunal rejected his claims without the benefit of forensic and clinical reports. He considers that the 2010 arrest and torture over the weapons possession incident was rejected principally because it had not been raised at his first interview, and because the applicant was slow in answering questions during the interview, which was perceived as being evasive. The Tribunal did not have the medical evidence before it and was therefore not aware of his psychological medical conditions relating to his experience of torture. As the Tribunal had found that this claim was fabricated and that the complainant was not a witness of truth, it subsequently disbelieved all of his other claims for protection. The complainant considers that the subsequent applications for ministerial intervention and submission of new evidence were rejected on the basis of the Tribunal's finding that the applicant was not a witness of truth.

5.3 According to the complainant, the member of the Refugee Review Tribunal lacked training in assessing whether a person was displaying symptoms of post-traumatic stress disorder. He submits that discussing matters of torture, especially of sexual torture, has been deeply traumatic to him, and discussing and disclosing these events brings feelings of deep shame, in particular when questioned about them by a female officer in an adversarial setting. The interviewing officer in the complainant's entry interview, his Government-appointed representative during the protection visa application process, the delegate of the Minister conducting the protection visa interview and the Tribunal member conducting the hearing were all female. The complainant notes that at no stage was he asked whether his claims or the presentation thereof were gender-sensitive, which amounted to a practical injustice.

5.4 As to his trip to India, the complainant submits that it happened in 2012 and not in 2010 as suggested by the State party. According to the complainant, he had two Sri Lankan passports, fraudulently obtained through an agent. One had been obtained in 2007 and the other in 2012, and they showed different spellings of his name, different birth dates and different national identity card numbers. He travelled to India using his 2012 passport, and he stayed for two weeks in a refugee camp in Tamil Nadu. Scans of both passports were submitted to the Minister on 18 September 2019 with his request for ministerial intervention. However, since he did not provide the original of his 2012 passport, it was ruled that the genuineness of the document could not be assessed and no weight was given to the document. The complainant argues that the Minister did not give genuine consideration to the document scan, since the Department of Home Affairs could have had the document checked by its document examination unit. He notes that since the authorities in Sri Lanka could identify that he has used a fraudulent passport in the past, he is at further risk of remand and imprisonment for up to five years under domestic law.

5.5 The complainant submits that the State party failed to consider his arrest warrant as part of his request for ministerial intervention. In his ruling, the Assistant Director at the Department of Home Affairs stated that there was reason to doubt the genuineness of the document, given that the High Commission of Sri Lanka did not advise the Australian Border Force of any match to an arrest warrant when the latter sought a travel document for the complainant's removal, and, similarly, Colombo Post did not mention a match against any Sri Lankan databases when his name was provided for clearance for removal. On this basis, and given the finding by the Refugee Review Tribunal that the complainant was not a credible witness, the Assistant Director did not believe that there was an outstanding warrant for his

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[www.thesaturdaypaper.com.au/news/immigration/2018/02/03/exclusive-all-57-asio-refugee-case-warnings-revised-after-review](http://www.thesaturdaypaper.com.au/news/immigration/2018/02/03/exclusive-all-57-asio-refugee-case-warnings-revised-after-review)).

<sup>4</sup> The complainant notes that there have been three such reports, the most recent dated 14 August 2019.

arrest. The complainant argues that this reasoning displays a lack of serious engagement in the ministerial intervention process, including a realistic assessment of the risks that he would be tortured should he be removed to Sri Lanka. According to the complainant, the High Commission of Sri Lanka was not asked whether there were any outstanding warrants. There is no reason to believe that the High Commission would disclose to the Australian Government whether a warrant had been issued for his arrest if such information was not requested. Indeed, for the High Commission to do so would be tantamount to informing the Government of Australia that the complainant was a refugee and that it had international protection obligations. The complainant notes that despite the fact that the Government of Australia had held information about his arrest warrant since 16 August 2018, it never took the opportunity to check its genuineness with the authorities in Sri Lanka.

5.6 The complainant also makes two *sur place* claims. First, the complainant submits that the Federal Circuit Court included in its decision information related to his identity – his date of birth, date of arrival in Australia, place of work in Sri Lanka, biographical details and details of his claims for protection – and the decision was published as open source material on the website of the Australasian Legal Information Institute. A copy of the transcript of the court proceedings during which he had indicated that he was a member of the Tamil Tigers was also attached and open to the public.

5.7 The complainant's second *sur place* claim is that sensitive documents – including documents related to his application for asylum, a copy of his arrest warrant, photographs showing him with weapons, a copy of the report containing his claims that he had been tortured by the authorities in Sri Lanka and a flash drive containing revolutionary songs – were erroneously sent in his suitcase to Sri Lanka on 10 September 2018. Since then, agents from the Criminal Investigation Department had visited the complainant's parents' home twice, as they were concerned that he may have arrived in Sri Lanka but then escaped from the airport through bribery.

5.8 The complainant submits that his scarring also indicates his involvement with the Tamil Tigers. He notes that he was injured on the left side of his neck during the war when a Claymore mine exploded, and that has scarring on his right elbow from his torture in 2010. He submits that his hip and knees were also injured and that he suffered as a result of his sexual torture, referring to reports of the counsellor and psychologist for descriptions of those injuries.

5.9 The complainant notes that the ruling refusing his request for ministerial intervention lodged on 18 September 2019 indicated that an overview of the evidence was not considered, with each piece of evidence refused almost exclusively on the basis that the Refugee Review Tribunal had found the complainant not to be a witness of truth. He argues that no further evidence would consequently be considered properly by the State party after a refusal by the Tribunal. According to the complainant, since the arrest warrant and the three reports by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors post-date the decision of the Tribunal, the Minister's refusal to consider this evidence in a genuine way – for example, through a process of document examination, and examination of the evidence and his later claims in a cumulative and holistic manner – constitutes a failure to conduct a serious and competent assessment of the State party's obligations under article 3 of the Convention.

#### **State party's additional observations on the merits**

6.1 On 5 March 2020, the State party submitted additional observations on the merits of the complaint. The State party rejects the complainant's claims that the refugee review system in Australia is "effectively biased" and that the Government has failed to undertake serious consideration or assessment of his evidence and claims. The State party notes that the Committee has commented previously that the domestic legal system in Australia offers a robust process of merits and judicial review to ensure that any error made by an initial decision maker can be corrected.<sup>5</sup> It submits that if the complainant has claims that still have

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<sup>5</sup> *Y.Z.S. v. Australia* (CAT/C/49/D/417/2010), para. 4.13.

not been raised before domestic decision makers, he can have them assessed by submitting further requests for ministerial intervention.

6.2 The State party notes that the complainant's claim of further risk of remand and imprisonment for up to five years for using a false passport was most recently considered as part of the ministerial intervention assessment of 18 September 2019. The Departmental Officer found that this claim had already been assessed by the Refugee Review Tribunal, which had concluded that the complainant would be charged, bailed and fined for having departed Sri Lanka illegally, but that such action would not amount to serious harm. The State party submits that the fact that the complainant has travelled on a false passport does not alter the Government's assessment that there are no substantial grounds for believing that he faces a real risk of irreparable harm in Sri Lanka. It refers to the Government's most recent country information report on Sri Lanka, published by the Department of Foreign Affairs and Trade on 23 May 2018, which includes information on the treatment of Sri Lankan refugees. According to that report, failed asylum seekers who leave Sri Lanka illegally and are returned may receive a fine or a custodial sentence under the Immigrants and Emigrants Act; in practice, however, most cases result in a fine and not imprisonment.<sup>6</sup>

6.3 With regard to the complainant's claim that the fact that his suitcase was sent to Sri Lanka elevates his profile with the authorities there, the State party argues that this incident does not alter its assessment of the complainant's membership of or association with the Tamil Tigers, noting that this claim was considered as part of the assessment, dated 14 October 2019, of the request for ministerial intervention under section 48B of the Migration Act. The State party refers to *V.M. v. Australia*, in which the Committee indicated that it must consider whether the complainant currently ran a risk of torture if returned to Sri Lanka.<sup>7</sup> According to the State party, the complainant provided no additional evidence to substantiate his claim that he would be of adverse interest upon return to Sri Lanka.

6.4 The State party rejects the complainant's allegation that various pieces of evidence relevant to his case, including forensic and clinical reports, evidence of a false passport and evidence of an arrest warrant, have not been considered. It submits that the domestic processes have had regard to the complainant's claims and evidence, including having due regard to inconsistencies and problems of proof in relation to his claims. According to the State party, the Refugee Review Tribunal noted that, throughout the hearings, it had clarified the complainant's evidence to ensure accuracy of understanding, had taken account of nervousness and had been mindful of nuances in language when communicating through an interpreter. As to the complainant's medical records, in his request for ministerial intervention of 16 August 2018, the Departmental Officer was provided with copies of three assessments conducted by International Health and Medical Services, dated 25 May 2018, 13 June 2018 and 29 June 2018, and a copy of the report by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, dated 16 July 2018, in which the Service recommended that the complainant resume counselling to assist him to manage his symptoms of depression and anxiety. The Departmental Officer observed that the mental health of asylum seekers was taken into consideration throughout the domestic process, and that the complainant had still been found not to be a credible witness by the primary decision maker and by the Tribunal.

6.5 The State party notes that the complainant's claims regarding a false passport were also considered by the domestic authorities, but that those claims changed throughout the domestic processes. The primary decision maker initially noted that the complainant had travelled on a legal passport. Later in the interview, he noted that the complainant was not sure if the passport was legal or not. However, the complainant confirmed that it showed his own photo and name. The decision maker concluded that the complainant had travelled in and out of Sri Lanka on a genuine passport, or at least on a passport obtained through the appropriate authorities with accurate biodata and photo. In the complainant's request for ministerial intervention request of 18 September 2019, the Departmental Officer noted that

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<sup>6</sup> Australia, Department of Foreign Affairs and Trade, "DFAT country information report: Sri Lanka", 23 May 2018, para. 5.32.

<sup>7</sup> *V.M. v. Australia* (CAT/C/67/D/723/2015), para. 7.8.



the complainant had not provided an original document to the Department of Home Affairs for examination and, as such, the document's genuineness could not be assessed.

6.6 As to the complainant's arrest warrant, the State party reiterates that since there has been no explanation as to why the warrant was not provided when it was first issued, and because the High Commission of Sri Lanka did not advise the Australian Border Force of any arrest warrant when the latter sought a travel document for the complainant's removal, the Departmental Officer found the complainant not to be a credible witness and was not satisfied that he had an outstanding warrant.

#### **Additional information from the complainant**

7.1 On 5 March 2020, the complainant submitted additional information on the communication. He notes that on 24 February 2020, he discovered that the Federal Circuit Court had in September 2018 published his name on its website, the Commonwealth Courts Portal, in connection with the pseudonym "BBE15" under which it had published substantial details of his claims for protection. He submits that the State party was notified of this breach of his confidentiality in respect of his claims for protection on 25 February 2020 by email and by affidavit filed in that Court. He regrets that the State party has not brought this matter to the attention of the Committee. The complainant requests that the Committee take this information concerning the inadvertent publication of his claims in connection with his name, by the State party's Government, into account in considering his complaint.

7.2 On 11 July 2020, the complainant submitted further information to the Committee. He notes that on 10 July 2020, the Federal Circuit Court found that the Court had no duty to remedy any errors in data disclosure either by the Court or by the Government and that any remedy was at the absolute discretion of the Minister. The complainant notes that the power of the Minister to decide whether to provide relief under section 48B of the Migration Act is completely discretionary, that his requests for such relief have already previously been refused on multiple occasions, and that there is no right of judicial review in respect of any such decision. On 22 December 2020, the appeals court of the Federal Court of Australia rejected the complainant's appeal.

7.3 On 10 September 2020, the complainant requested interim measures in order to be released from the immigration detention facility while the Committee considered his complaint, because of his deteriorating mental health due to prolonged detention since 2018. The request was granted on 19 October 2020.

7.4 On 9 June 2021, the complainant submitted a new psychological report attesting to his mental health, including a risk of suicide or significant self-harm. He also submits that he has previously been involved with the Australian Tamil Congress, including in organizing activities for the remembrance of the Mullivaikal genocide, and that that organization has now been banned as a terrorist organization according to the Sri Lanka Government Gazette. The complainant submits publicly available information from Facebook about his Tamil diaspora separatist activities and associations in which he has been involved.

7.5 On 16 July 2021, the complainant submitted a new photograph of himself, which shows him with heavy weapons as a former member of the Tamil Tigers. He notes that the photo has not previously been provided to the State party's Government owing to his fear of being indefinitely detained by the Australian Security Intelligence Organization as a former member of the Tamil Tigers. He also notes that he was previously unable to recover the photograph because the flash drive on which it was stored had been taken to Sri Lanka in his luggage by the State party's Government, but that he was recently able to recover the photograph from his electronic records. According to the complainant, while before 2012 the authorities in Sri Lanka had not identified him as a former member of the Tamil Tigers, it is now certain that he will be identified, through examination of his possessions sent to Sri Lanka by the State party's Government and given the publication of his claims together with his name on the Commonwealth Courts Portal.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

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

8.3 The Committee notes the State party's argument that the communication is inadmissible as manifestly unfounded since the complainant has not substantiated the existence of substantial grounds for believing that he would face a foreseeable, present, personal and real risk of torture if he were returned to Sri Lanka. The Committee considers, however, that the communication has been substantiated for the purposes of admissibility, as the complainant has sufficiently detailed the facts and the basis of the claim for a decision by the Committee. As the Committee finds no obstacles to admissibility, it declares the communication submitted under article 3 of the Convention admissible and proceeds with its consideration of the merits.

### *Consideration of the merits*

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

9.2 In the present case, the issue before the Committee is whether the return of the complainant to Sri Lanka would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.<sup>8</sup>

9.4 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 his or her deportation. Indications of personal risk may include, but are not limited to: (a) the complainant's ethnic background; (b) political affiliation or political activities of the complainant or his or her family members; (c) arrest or detention without guarantee of a fair

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<sup>8</sup> *M.S. v. Denmark* (CAT/C/55/D/571/2013), para. 7.3.

treatment and trial; (d) sentence in absentia; and (e) previous 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).<sup>9</sup> 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, taking into account all the circumstances relevant to each case (para. 50).

9.5 The Committee notes the complainant's claim that he would face a risk of torture if he were returned to Sri Lanka because, in the past, he underwent a three-month self-defence training course with the Tamil Tigers, which included weapons training. After the training, he worked as a medic for the Tamil Tigers, treating those who had been wounded in combat and driving them to hospitals if their injuries were too severe to be treated on site. The Committee also notes the complainant's claim that in 2010, he was charged with weapons possession following his arrest by the Sri Lanka Navy during a meeting with three former friends from the Tamil Tigers, one of whom had a pistol. The complainant was taken to Kuchchaveli police station, where he was stripped down to his underwear and beaten with a pipe. After two weeks in custody, during which time he was subjected to further torture, the complainant was released on bail. However, after his release on bail, he was abducted by the Karuna group and spent seven days in their custody, again being subjected to beatings. He was questioned about his uncle, who had earlier been shot by the Karuna group, and about his own contacts within the Tamil Tigers. The complainant's mother paid a bribe to the Karuna group, and he was released a week later and went into hiding.

9.6 The Committee also notes the State party's submission that the domestic processes have had regard to the complainant's claims and evidence, including having due regard to inconsistencies and problems of proof in relation to his claims. According to the State party, those claims also changed at each stage of the domestic process of consideration prior to the complainant's submission of his communication to the Committee. The State party considers that the complainant has not provided credible evidence to substantiate his claims that the authorities in Sri Lanka perceive him to have a personal connection with the Tamil Tigers or to be affiliated with them in any way, or that there is foreseeable, personal, present and real risk that he will be tortured. The Committee notes that the State party acknowledges that complete accuracy can seldom be expected from victims of torture, and that this factor was taken into consideration by domestic decision makers in forming views on the complainant's credibility.

9.7 The Committee notes in this connection that according to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his or her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged that can be substantiated.<sup>10</sup>

9.8 The Committee further notes the current human rights situation in Sri Lanka and refers to its concluding observations on the fifth periodic report of Sri Lanka, in which it expressed concern, inter alia, about reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the military and the police, which had continued in many parts of the country after the conflict with the Tamil

<sup>9</sup> *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

<sup>10</sup> See Office of the United Nations High Commissioner for Refugees, "Note on burden and standard of proof in refugee claims", 16 December 1998.

Tigers had ended in May 2009.<sup>11</sup> The Committee also refers to credible reports by non-governmental organizations concerning the ill-treatment by the authorities in Sri Lanka of individuals who have been returned to the country.<sup>12</sup> However, the Committee recalls that the occurrence of human rights violations in a complainant's country of origin is not sufficient in itself to conclude that the complainant runs a personal risk of torture.<sup>13</sup> Moreover, although past events may be of relevance, the principal question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.<sup>14</sup>

9.9 In the present communication, the Committee observes that the domestic authorities found that the complainant's account of his alleged membership of the Tamil Tigers, the 2010 incident that allegedly resulted in weapons charges and his subsequent abduction by the Karuna group – the central elements of his claim and the incidents that seem to have eventually triggered his departure from Sri Lanka – was not credible, because of its late presentation, doubts as to its genuineness and inconsistencies in the complainant's prior statements during the domestic process of consideration. The Committee notes the complainant's contention that he did not initially mention his time with the Tamil Tigers or his arrest and torture over the weapons possession incident because of his fear of an adverse security assessment as a member of a terrorist organization by the Australian Security Intelligence Organization, which could have resulted in indefinite detention. However, the Committee observes that the complainant was granted his first bridging visa on 20 November 2012 and released from detention on 15 February 2013, long before the conclusion of his protection visa application and Refugee Review Tribunal proceedings. The Committee also notes that after a copy of the arrest warrant became available to the complainant, he promptly submitted it as part of his request for ministerial intervention, along with his admission to having been a member of the Tamil Tigers. The Committee observes that no explanation was given by the complainant as to why he decided to reveal that information only at that particular point of the proceedings, and why the arrest warrant for him was issued only on 10 November 2017, when he allegedly skipped his bail on weapons charges in 2010 and left Sri Lanka in 2012.

9.10 The Committee notes that the complainant has failed to provide any information on his whereabouts between 2010 and 2012, except that he visited India for two weeks in 2012 using a false passport, for which he alleges to be at further risk of remand and imprisonment for up to five years. The Committee observes that the State party considered the possible risk for failed asylum seekers who leave Sri Lanka illegally and are returned, but did not accept that the complainant would face a real risk of irreparable harm, although he might receive a fine or a custodial sentence under the Immigrants and Emigrants Act.

9.11 Lastly, the Committee notes the complainant's *sur place* claims: (a) that information related to his identity and details of his asylum claims were inadvertently published by Federal Circuit Court on the website of the Australasian Legal Information Institute; and (b) that several sensitive documents, including documents related to his asylum claim and photographs showing him with weapons, were mistakenly sent in his suitcase to Sri Lanka during his removal proceedings on 10 September 2018, and that since then, agents from the Criminal Investigation Department had visited the complainant's parents' home twice, as they were concerned that he may have arrived in Sri Lanka but then escaped from the airport through bribery. The Committee notes the State party's submission that the complainant was not affected by the data breach, as it pertained to detainees in detention on 31 January 2014 only, and the complainant was not in detention at that time. The Committee further notes that the Federal Circuit Court and the Federal Court of Australia both upheld the determination of the Refugee Review Tribunal in which it did not accept that the appellant was suspected of being or perceived to be a member of the Tamil Tigers. With regard to the complainant's second *sur place* claim, the Committee notes that the State party argues that this incident does not alter its assessment regarding the complainant's claims about his membership of or association with the Tamil Tigers, and notes that this claim was considered as part of

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<sup>11</sup> CAT/C/LKA/CO/5, paras. 9–12.

<sup>12</sup> See Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009* (London, 2015). See also *J.N. v. Denmark* (CAT/C/57/D/628/2014), para. 7.9.

<sup>13</sup> *R.D. v. Switzerland* (CAT/C/51/D/426/2010), para. 9.2.

<sup>14</sup> *Thiruganasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 8.7.

assessment of the request for ministerial intervention under section 48B of the Migration Act. The Committee observes that other than the fact that his suitcase was mistakenly sent to Sri Lanka, the complainant has been unable to provide any evidence that it contained documents or materials that would clearly point to his alleged membership in the Tamil Tigers. In this regard, the Committee takes note of the documents that the complainant submitted as part of his request for ministerial intervention dated 16 August 2018: the complainant was only able to produce photos of himself taken in front of a poster dated 2013 and in front of a Tamil Tigers shrine in a room, which do not prove his membership, and a photo of a young male in military uniform, who could not be conclusively identified as the complainant. The Committee expresses serious doubts as to the complainant's claim of having included sensitive material in a suitcase for his return to Sri Lanka, thus exposing himself as a member of the Tamil Tigers: it is well known that returned asylum seekers in Sri Lanka are usually detained and interrogated at the airport, and carrying sensitive, self-incriminating material in this context seems unnecessary and unjustified and cannot be seen as reasonable.

9.12 In the light of the considerations above, and on the basis of all the information submitted to it by the complainant and the State party, including on the general situation of human rights in Sri Lanka, the Committee considers that, in the present case, the complainant has not discharged the burden of proof to demonstrate that his return to Sri Lanka would entail a violation of article 3 of the Convention. Furthermore, the complainant has not demonstrated that the authorities of the State party failed to conduct a proper investigation into his allegations.

10. The Committee therefore concludes that the complainant has failed to adduce sufficient grounds to enable it to believe that he would run a real, foreseeable, personal and present risk of being subjected to torture upon his return to Sri Lanka.

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

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