



# 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. 944/2019\*, \*\*

<i>Communication submitted by:</i>	Niroshanth Tharchanamoorthy (represented by counsel, John Sweeney)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	23 May 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 22 July 2019 (not issued in document form)
<i>Date of adoption of decision:</i>	12 November 2021
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Risk of torture upon return to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1 The complainant is Niroshanth Tharchanamoorthy, a national of Sri Lanka born in 1988. His asylum application has been rejected in Australia and he risks deportation. He claims that his deportation to Sri Lanka would constitute a violation of his rights under article 3 of the Convention. The complainant is represented by counsel. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 28 January 1993.

1.2 On 22 July 2019, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to issue a request for interim measures.

#### Facts as submitted by the complainant

2.1 The complainant is a Sri Lankan national of Tamil ethnicity from the north-east of the country and a Hindu by religion. His family ran a jewellery business comprising three shops. He submits that his father was detained by the Liberation Tigers of Tamil Eelam (LTTE)<sup>1</sup> in 2006, having once refused to go to an LTTE camp in response to an anonymous phone call. His father was kept in the camp for some days while his mother gathered money to secure his release. LTTE wanted the family to provide them with their son to fight in their ranks,

\* Adopted by the Committee at its seventy-second session (8 November–3 December 2021).

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

<sup>1</sup> Tamil separatist organization that was based in north-eastern Sri Lanka.



but the family paid money in lieu and continued to provide them with requested goods until the end of the war in 2009.

2.2 The complainant claims that in January 2012, his father was threatened by some men, one of whom he recognized as having been involved in his father's detention by LTTE and as working with the Karuna faction.<sup>2</sup> The complainant states that the man began accusing his father of being an LTTE sympathizer with a lot of money, and demanded that he should also support the Karuna faction. About a week later, the complainant's father was attacked and injured by some armed men in a local market and was hospitalized for 15 days.

2.3 On or about<sup>3</sup> 15 March 2012, four armed Karuna men came to the family shop demanding money and making threats. Amid heated discussion, the complainant pushed one of the men, attempting to defend his father. The men agreed to return in 15 days to collect money and confiscated the complainant's passport. The complainant did not report that his passport had been stolen because it was common knowledge that the police would not act against the Karuna faction.

2.4 The complainant submits that he immediately went into hiding in Kattankudy, and after making arrangements to get on a boat, he returned home to say goodbye and left for Beruwala<sup>4</sup> on 24 March 2012. On or about<sup>5</sup> 30 March 2012, the same four Karuna men came to his house, next door to the shop that the family had not opened since 15 March 2012. The complainant's father again refused to pay them. After the complainant's arrival in Australia, his family told him that there had been another visit, which involved pushing the father and slapping the complainant's sister.

2.5 On 11 April 2012, the complainant arrived at Christmas Island by boat. In June 2012, he applied for a protection visa, and he was interviewed on 13 July 2012. On 1 October 2012,<sup>6</sup> a delegate of the Minister for Immigration and Citizenship (hereinafter "the delegate") dismissed the complainant's application and decided not to grant a protection visa. The complainant appealed to the Refugee Review Tribunal, which upheld the decision on 22 February 2013. On 22 March 2013, he appealed the Refugee Review Tribunal's decision to the Federal Circuit Court, which sent the matter back to the Refugee Review Tribunal. The court order notes that the first tribunal erred in applying the real chance test when considering the complainant's claims that he would face a custodial sentence upon return. On 28 May 2015, the Refugee Review Tribunal again upheld the original decision.

2.6 In respect of the second decision taken by the Refugee Review Tribunal, the complainant argues that the Tribunal made unreasonable findings about his credibility and mistook his difficulties with the interrogation process, compounded by his inadequate schooling, for evasion and invention. The complainant notes that the Refugee Review Tribunal was concerned about the discrepancy regarding the time taken to secure the father's release from LTTE; the identity of a person who summoned his father to the LTTE camp by phone; the complainant's failure to mention the violent attack that resulted in his father's hospitalization; and his account of the confiscation of his passport, which seemed implausible to the Refugee Review Tribunal. He explains that the delegate who interviewed him had a misunderstanding about the time taken until the father's release, and that when he attempted to correct the mistake, there was not enough time during the interview.

2.7 The complainant further argues that when he said that he did not know who summoned the father by phone, he meant the name of this person or his/her authority within LTTE and that the family did know that the call was from LTTE. He also contends that this misunderstanding occurred because of his communication through an interpreter. Having understood that the lack of verification and delay in articulating his claim about his father's attack and hospitalization had contributed to the negative credibility finding, the complainant

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<sup>2</sup> An armed group that split from the Liberation Tigers of Tamil Eelam (LTTE) in 2004 and is believed to be working with the Sri Lanka Army.

<sup>3</sup> The complainant submits that he is not clear about the exact date.

<sup>4</sup> A town in Western Province, Sri Lanka.

<sup>5</sup> The complainant submits that he is not clear about the exact date.

<sup>6</sup> According to the State party's submission, the decision was rendered on 28 August 2012.

sought documentation through his mother and then submitted the hospital treatment note.<sup>7</sup> With regard to the Refugee Review Tribunal's doubts about the Karuna men taking his passport, he submits that he had retrieved his passport from the house to show a friend and they had compared stamps in their passports two or three days before the Karuna men came, and he then forgot to take it home and left it in the display case at the shop. He adds, regarding the doubts that the Refugee Review Tribunal had about why the Karuna men did not take jewellery or cash from the shop, that the shop had very little stock and cash and customers usually ordered from catalogues. He also claims to have been diagnosed as exhibiting symptoms of stress related to post-traumatic stress disorder, with associated difficulties of memory.<sup>8</sup>

2.8 The complainant filed for special leave to appeal to the High Court of Australia and was granted leave to appeal on 10 May 2018. He filed the appeal on the 15 May 2018, which was dismissed on 13 February 2019. The complainant appealed on 19 March 2019 to the Minister for Home Affairs to intervene on his behalf, and his appeal was rejected without being referred to the Minister on 27 March 2019. The complainant claims to have exhausted available domestic remedies.

### **Complaint**

3.1 The complainant argues that substantial grounds exist to believe that upon return he will be tortured by members of the Criminal Investigation Department of the Sri Lanka Police or the Sri Lanka Army. He contends that there are ongoing human rights violations in Sri Lanka, particularly affecting young and middle-aged Tamil men, and persons viewed as former sympathizers of LTTE.<sup>9</sup> He also claims that detention conditions in Sri Lanka are very harsh and that there are ongoing reports of torture in prisons.<sup>10</sup>

3.2 The complainant claims that as a failed asylum seeker returning without a valid passport, he faces a risk of being detained at the airport and charged with an offence under the Immigrants and Emigrants Act. He adds that his return will be flagged by the Criminal Investigation Department at the airport and notified to the local police, and that this information will likely be shared with the local Karuna office because of collaboration between the police and the Karuna faction. He claims that this element of his return was not considered by the Refugee Review Tribunal.

3.3 The complainant claims that by returning him to Sri Lanka, Australia will breach article 3 of the Convention against Torture.

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

4.1 In a note verbale dated 18 March 2020, the State party submitted its observations on admissibility and the merits. It stated that the complainant's claims were inadmissible as they were manifestly unfounded. However, should the Committee consider the complainant's allegations admissible, they should be dismissed as being without merit, on the basis that they are not supported by evidence that there are substantial grounds for believing that he is in danger of torture as defined in article 1 of the Convention.

<sup>7</sup> The complainant provided material to certify this claim.

<sup>8</sup> The author has attached a summary of his psychological treatment conducted in 2015, indicating that he found it "difficult to discuss and process trauma memories" and was "particularly concerned and distressed about his poor memory for past traumatic incidents".

<sup>9</sup> See the United States Department of State 2016 human rights report on Sri Lanka, pp. 1 and 19: "The most significant human rights problems were incidents of arbitrary arrest, lengthy detention, surveillance, and harassment of civil society activists, journalists, members of religious minorities, and persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam (LTTE)" and "Tamils throughout the country, but especially in the north and east, reported security forces regularly monitored or harassed members of their community, especially young and middle-aged Tamil men."

<sup>10</sup> The complainant refers to comments by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who, following his visit to Sri Lanka in 2016, concluded that "these combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment" – see <https://news.un.org/en/story/2016/05/528912-un-experts-urge-sri-lanka-adopt-measures-fight-torture-and-strengthen-justice>.

4.2 Regarding the complainant's claim that if returned to Sri Lanka he would be at future risk of harm from the Sri Lanka Army, the Criminal Investigation Department or the Karuna faction, 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 basis that the claims are manifestly unfounded. In this context, the State party refers to the Committee's jurisprudence where it has found claims to be manifestly unfounded when they lack sufficient documentary or other pertinent evidence to support the allegations made,<sup>11</sup> or where the allegations are "pure speculation" and fail to rise to a basic level of substantiation required for the purposes of admissibility.<sup>12</sup> It is the responsibility of the complainant to provide exhaustive arguments supporting the alleged violation of article 3 in such a way that establishes a prima facie case for the purposes of admissibility.<sup>13</sup> According to the State party, the complainant has failed to discharge this responsibility.

4.3 The State party contests the complainant's claims that, if returned to Sri Lanka, he will do so in a climate of heightened security, as a result of the Easter bombings and the community violence; that he will be questioned at the airport about his lost passport, on the presumption that he made protection claims in Australia; that he will be held in detention for having left the country illegally; that his return will be flagged by the Criminal Investigation Department at the airport and notified to the local police and that this information will possibly be shared with the local Karuna office; that the Karuna faction might hold him in detention on suspicion of having links with LTTE; that he will most probably be tortured during the investigation, and that even if he is released, the Karuna faction will be likely to carry out its threats against him. In this regard, the State party observes that the complainant's 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. More specifically, the communication is not supported by evidence that the complainant is a person who would be of interest to the Sri Lankan authorities or the Karuna faction if he were returned to Sri Lanka, or that he would be personally at risk of torture.

4.4 The State party observes that the complainant's protection claims, including his account of his past experiences in Sri Lanka, have been thoroughly considered in a series of domestic decisions. These decisions included assessment of his claims under the complementary protection provision contained in the Migration Act 1958.<sup>14</sup> The State party notes that on 28 August 2012, the delegate assessed and rejected the complainant's protection visa application. The State party's non-refoulement obligations were also considered in the Refugee Review Tribunal decision of 2 August 2013. The matter was appealed to the Federal Circuit Court, which resulted in orders that the first Refugee Review Tribunal decision be quashed and the matter remitted to the Refugee Review Tribunal for reconsideration according to law. These orders were made by consent of the parties, the Minister having conceded a jurisdictional error in the first Refugee Review Tribunal decision, consistent with the obligation of the Government of Australia to act as a model litigant. The matter was then heard again by a differently constituted Refugee Review Tribunal.

4.5 On 28 May 2015, the Refugee Review Tribunal again affirmed the delegate's decision (the second Refugee Review Tribunal decision), after having considered the totality of the complainant's evidence. The Tribunal found that the complainant had "fabricated most of his claims" and that he was "not a witness of truth".

4.6 The State party observes that the complainant's further appeals to the Federal Circuit Court and the Federal Court of Australia were dismissed on 4 November 2016 and 29 November 2017 respectively. On 13 February 2019, the High Court of Australia dismissed the complainant's special appeal, noting that the Federal Court of Australia had correctly found no appealable error in the decision of the Federal Circuit Court.

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<sup>11</sup> *R.S. v. Denmark* (CAT/C/32/D/225/2003), para. 6.2.

<sup>12</sup> *H.S.V. v. Sweden* (CAT/C/32/D/229/2003), para. 8.3.

<sup>13</sup> See the Committee's general comment No. 4 (2017), para. 31.

<sup>14</sup> Reference is made to para. 36 (2) (aa) of the Migration Act, which reflects the non-refoulement obligations of Australia under the Convention and the International Covenant on Civil and Political Rights.

4.7 The State party observes that it is obliged to act as a model litigant and act honestly and fairly in handling claims and litigation brought by or against it. In this context, the complainant's claims have been considered through robust domestic processes and have been determined not to be credible, thus not contesting the State party's non-refoulement obligations. The State party refers to the Committee's statement in its general comment No. 4 (2017) that it gives considerable weight to findings of fact that are made by organs of a State party.<sup>15</sup> The State party asserts that it has thoroughly assessed the complainant's claims through its domestic processes and has found that they do not engage the State party's obligations under article 3 of the Convention.

4.8 The State party further observes that the delegate also expressed doubts regarding the credibility of the complainant's story about his family's experience of extortion, but ultimately accepted that he had faced a personal threat of harm in the context of an attempted extortion. Thus, a reasonable margin of appreciation was given to flaws and inconsistencies in the complainant's evidence by the delegate as the primary decision maker in the protection claim. The delegate nevertheless determined that, even if the complainant's claims regarding attempted extortion in the past were accepted, the complainant would not be at risk of significant harm in Sri Lanka.

4.9 Referring to the second Refugee Review Tribunal decision, the State party notes that the Tribunal also accepted that the complainant's application for refugee status may face particular problems of proof, and accepted the guideline that if an applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. The Tribunal took into account nervousness and was mindful of nuances in language when communicating through an interpreter. The Tribunal was satisfied that the standard of interpreting at the hearing was competent and reasonable. However, it found that the complainant's evidence at the second hearing lacked credibility, as he changed his evidence, making it inconsistent.

4.10 The State party observes that the complainant provided several documents not previously considered in the domestic administrative and judicial processes, including the hospital treatment notes and the summary of psychological treatment. The complainant also provided other documents and various additional country information reports. In this regard, the State party notes that these materials are prima facie incapable of substantiating the complainant's claim under article 3 of the Convention for the purposes of admissibility.

4.11 The State party emphasizes that under article 22 of the Convention and rules 113 and 118 of the Committee's rules of procedure, the Committee is required to expressly consider and determine a State party's submissions that a communication is inadmissible, particularly where a State party has provided detailed submissions supporting its view that the communication is inadmissible.

4.12 As regards the merits of the communication, the State party observes that the delegate considered substantively similar factual claims to those raised in the present communication, that is to say, that the complainant would be at risk of the following forms of harm if returned to Sri Lanka: persecution by reason of his Tamil ethnicity; persecution by reason of his political opinion as an imputed supporter of LTTE, and because he had refused to comply with the demands of the Karuna faction; persecution by reason of his membership of a particular social group, namely failed returned Sri Lankan asylum seekers; and being beaten, tortured or killed by the Karuna faction or groups associated with or related to it. The delegate thoroughly assessed all these claims and came to the conclusion that the State party did not have protection obligations towards the complainant because he did not face a real chance of persecution for any reasons under the Convention relating to the Status of Refugees, of 1951, and because there were not substantial grounds for believing that there was a real risk that he would suffer significant harm, such as torture, if removed to Sri Lanka. Accordingly, the complainant's protection visa application was refused on 28 August 2012.

4.13 On 2 August 2013, the Refugee Review Tribunal affirmed the decision of the delegate not to grant the complainant a protection visa. The Tribunal did not accept the complainant's claims regarding the interest by LTTE in his father and found his evidence inconsistent with

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<sup>15</sup> See para. 50.

the claims made in his visa application. According to State party, the complainant could not explain discrepancies revealed by the Tribunal, for example in relation to the circumstances of the alleged abduction of his father by LTTE. The Tribunal ultimately did not accept that the complainant's father had been taken by LTTE, and thus did not accept that the complainant faced a real chance of being imputed with LTTE political opinion or membership. Nor did the Tribunal accept the complainant's allegations regarding his father's contact with the Karuna faction in 2012 and their extortion attempts. The Tribunal assessed the complainant's evidence regarding various other interactions between himself, his family and the Karuna faction during 2012 and found that key aspects of the complainant's story were implausible, vague, confusing and far-fetched. The Tribunal did not accept that the complainant or his family had come to the attention of the Karuna faction in the past, and did not accept that there were substantial grounds for believing that there was a real risk that the complainant would suffer significant harm from Sri Lankan authorities, the Karuna faction or other paramilitary groups, if returned to Sri Lanka.

4.14 The State party observes that the Tribunal also considered the complainant's claims of fear of harm based on his Tamil ethnicity. Based on its finding that the complainant's family had not had any past association with LTTE, as well as his own evidence in the hearing that he had not personally experienced any problems, the Tribunal assessed that the complainant did not face a real risk of being killed, arbitrarily detained, tortured or subject to inhumane or degrading treatment or punishment from Sri Lankan authorities or anyone else because of his Tamil ethnicity. The Tribunal also was not satisfied that there was a real risk the complainant would face significant harm on arrival in Sri Lanka as a person who had sought protection in Australia. The State party submits that having regard to the complainant's claims individually and cumulatively, the Tribunal upheld the decision not to grant the complainant a protection visa.

4.15 Referring to the quashing of the Refugee Review Tribunal decision by the Federal Circuit Court on 19 November 2014, the State party observes that consistent with the obligation to act as a model litigant, the Minister concluded that the Tribunal had conceded a jurisdictional error by failing to apply the real chance test when considering the complainant's claims under the complementary protection provisions in the Migration Act. The State party underlines that the Tribunal's error related to the applicable legal test in Australian law, and not to factual findings or the assessment of the complainant's credibility in the first Refugee Review Tribunal decision.

4.16 On 28 May 2015, the Refugee Review Tribunal rendered its second decision and found that the complainant had fabricated most of his claims. The Tribunal did not accept the complainant's claims about him being suspected of being pro-LTTE or anti-Government, or that the Karuna faction (or any related groups) had questioned, threatened or assaulted him or his family, or that they were looking for him. Nor did it accept that the complainant's father had been detained by LTTE, or that the Karuna faction, or the authorities, or anyone or any group, had an adverse interest in the complainant or his family. The Tribunal assessed that there was no real risk of harm to the complainant in this regard. It also found there to be no real risk of significant harm to the complainant based on him being a Tamil male, or a young Tamil male from the east, or having sought asylum in Australia, or because his family had provided support to LTTE during the conflict, or because his family had a jewellery store or were considered to be wealthy Tamil business people. Concerning his claims that he could be detained and fined in Sri Lanka for illegal departure, the Tribunal found that the complainant would be bailed and would not face a custodial sentence, and that there was no real risk of torture or other significant harm to the complainant in this regard. The Refugee Review Tribunal concluded that the complainant was not a person in respect of whom the complementary protection obligations of Australia applied.

4.17 The State party observes that on 4 November 2016, the Federal Circuit Court dismissed the complainant's application, finding no jurisdictional error in the Tribunal's decision. On 29 November 2017, the Federal Court of Australia dismissed the complainant's application to appeal the Federal Circuit Court decision. On 13 February 2019, the High Court of Australia dismissed the complainant's appeal, finding that the Federal Court of Australia had correctly found no appealable error in the decision of the Federal Circuit Court.

On 19 March 2019, the complainant made a request for ministerial intervention under sections 417 and 48B of the Migration Act,<sup>16</sup> but his request was dismissed.

4.18 The State party refers to the complainant's claims: that the process leading to the second Refugee Review Tribunal decision was unreasonable and the Tribunal made erroneous findings about the credibility of the complainant; that minor inconsistencies or errors in the complainant's evidence weighed against his credibility; and that errors made by the complainant were not caused by intent to deceive, but by various difficulties and other factors, including his state of mental health, the stressful nature of the process and his low level of formal education. The State party observes that it does not accept this characterization of the Tribunal's reasoning, and stresses that the Tribunal's decision did not turn on one or two minor discrepancies, but on the evidence as a whole, including multiple inconsistencies and shifts in the complainant's evidence throughout the various phases of the proceedings. The Tribunal took into account nerves, anxiousness or being tense at the hearing, but found that this did not explain the omissions and inconsistencies in the complainant's claims.

4.19 The State party disagrees with the complainant's statement that the Refugee Review Tribunal's four chief concerns were: (a) the discrepancy in the complainant's evidence with regard to the length of time it took to secure his father's release from LTTE in 2007; (b) the question of who summoned the complainant's father to the LTTE camp by phone; (c) the complainant's failure to mention the violent attack resulting in the hospitalization of his father in January 2012; and (d) the circumstances of the confiscation of his passport in mid-March 2012. In this context, the State party observes that it has assessed the complainant's submissions and considers them to be unpersuasive, unsupported by any compelling evidence and generally incapable of furthering his claim that he would be personally at a real risk of torture if he were returned to Sri Lanka. The State party further contests the complainant's argument that the interviewing delegate misunderstood the circumstances surrounding his father's abduction, and observes that the complainant's explanation is a mere assertion, unsupported by evidence. Similarly, the inconsistency regarding the identity of the persons who allegedly summoned the complainant's father to the LTTE camp is described as a misunderstanding caused by the difficulty of conducting interviews via interpreters. The State party does not accept such an interpretation of the situation and notes that the Tribunal was mindful of nuances in language when communicating through an interpreter, and was satisfied that the standard of interpreting at the hearing was competent and reasonable.

4.20 The State party refers to the documentary evidence submitted by the complainant to substantiate his claim, certifying his father's hospitalization for 15 days in January 2012 as a result of a violent attack. The two pages of a document headed "Diagnosis ticket" are only partially legible; there is no detailed explanation in the complainant's submission, and one page of the document appears to refer to a motorcycle accident. The State party concludes that it does not consider the document to substantiate the complainant's allegations that the Karuna faction attacked his father.

4.21 Referring to the complainant's account of confiscation of his passport (which the Tribunal found to be implausible), the State party argues that the complainant now provides an explanation but does not provide any evidence to support his claim. Considering the evidence as a whole, and the findings of various domestic decision makers, including the Refugee Review Tribunal's assessment that the complainant had fabricated most of his claims and was not a truthful witness, the State party submits that the complainant's new explanations should not be attributed any significant weight.

4.22 The State party further observes that the complainant failed to substantiate his claim that he had been severely tortured in the past. The complainant's claim is not only inconsistent with the findings in multiple domestic processes, but also with the complainant's own submissions and evidence accompanying his application for a protection visa under the Migration Act, which does not appear to have included a claim that he had previously been tortured.

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<sup>16</sup> Under these non-compellable powers, the Minister for Immigration and Border Protection can intervene in individual cases if he or she thinks that it is in the public interest to do so.

4.23 Finally, the State party refers to various sources of country information, including on the political situation, security, the consequences of returning without a passport, and the behaviour of Sri Lankan security forces, as well as on the Karuna faction, and observes that the existence of a general risk of violence does not constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon return to that country: additional grounds must exist to show that the individual concerned would be personally at risk.<sup>17</sup> The issues raised by the complainant relating to the human rights concerns in Sri Lanka have been specifically and carefully considered by all domestic processes. The State party asserts that the complainant failed to establish the existence of additional grounds to show that he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka. The State party concludes that complainant's claims are inadmissible and/or without merit.

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

5.1 On 3 July 2020, the complainant commented on the State party's observations and maintained that the State party would violate article 3 of the Convention if it returned him to Sri Lanka.

5.2 The complainant believes that the State party has failed to substantiate its argumentation as to the admissibility of the communication. The complainant doubts that the State party has acted as a model litigant. He disagrees with the State party's reliance on the findings of the delegate and the Refugee Review Tribunal regarding his protection claim. He disagrees with State party's submission where it is written that a reasonable margin of appreciation was given to flaws and inconsistencies in the complainant's evidence.

5.3 The complainant submits that the State party made a wrong credibility assessment, as it failed to properly appraise the difficulties faced by the complainant throughout the process of making his claims. He further submits that the State party referred to several "inconsequential" inconsistencies which were allowed to infect the whole of the decision and contributed to the wide-ranging negative credibility finding when they should not have influenced it at all. These inconsistencies were reflected in the decision record and were considered to be relevant. The complainant submits that these inconsistencies are relevant in a different way, that is, showing that there were problems with the complainant providing evidence that would prove more than just the desire to deceive.

5.4 Referring to State party's submission that the Refugee Review Tribunal took into account "nerves, anxiousness or being tense at the hearing" and that it was mindful of nuances in language when communicating through an interpreter, the complainant submits that no evidence of this "taking into account" or "being mindful" was ever offered. The complainant believes that the Tribunal was merely ticking the box to cover itself in the event of judicial review. Nor did it bother to show how it had taken these elements into account. The complainant also states that it was merely an assertion on the part of the interviewing government agent when he concluded that there was inconsistency regarding the circumstances of his father's abduction. He adds that dismissing his account of the abduction as "a mere assertion" in such a misleading way is not the behaviour of a model litigant.

5.5 The complainant further notes that there is very little transparency about the appointment of those who serve on the Refugee Review Tribunal or what their "key performance indicators" might be. The fact that the court found that the wrong legal test had been applied in the complainant's case should indicate that something was seriously amiss, since applying the correct test is such a fundamental duty of the Tribunal. According to the complainant, this goes beyond a "simple mistake".

5.6 The complainant submits that the government agent attempted to unduly influence the Refugee Review Tribunal in the performance of its duties by issuing a certificate.<sup>18</sup> Even though the High Court of Australia found that this procedure was wrong but, in the

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<sup>17</sup> *G.R.B. v. Sweden* (CAT/C/20/D/83/1997), para. 6.3.

<sup>18</sup> The complainant claims that the delegate attempted to unduly influence the Refugee Review Tribunal in the performance of its duties by issuing a certificate providing the Tribunal with information that concerned the complainant, the effect of which was to keep that information from the complainant.

complainant's case, would have made no difference to the outcome, this does not make the government agent a model litigant. The complainant asserts that the State party's challenges relating to admissibility require further consideration and are fundamentally linked to the merits of the case.

5.7 The complainant submits that there is evidence proving the existence of general persecution of Tamils on the basis of their race, and that the Karuna faction still has a political role to play, especially given the new political circumstances in Sri Lanka.

5.8 With regard to the State party's observations concerning multiple inconsistencies and shifts in the complainant's evidence throughout the various phases of the proceedings and the statement that he was not a witness of truth, the complainant argues that there was no attempt to isolate the inconsistencies that were immaterial or had no discernible reason behind them to deceive. The complainant explains that those particular inconsistencies indicate that there were other causes for them, rather than an intention to deceive, and that therefore those inconsistencies should not be aggregated to produce that conclusion. In this context, the complainant reiterates that his initial statement was made in challenging circumstances and that it is not surprising that with time and better advice, he realized that his initial statement was less than perfect. He believes that another construction of events is possible, even probable, which does not require tarring of the complainant as a liar.

5.9 Referring to the late submission of the medical note headed "Diagnosis ticket", the complainant submits that by doing this he was trying to provide evidence, because he has been afflicted for so long with accusations of attempting to deceive.

5.10 The complainant submits that since his initial submission, the situation in Sri Lanka has changed yet again, noting that a new President had been elected. The complainant referred to the inaugural public lecture at the Sri Lanka Foundation Institute, the central theme of which was the terrorist threat posed by LTTE through its extensive international network.<sup>19</sup> In this context, the complainant referred to recent comments and analytical reports raising concerns over the heightened ethnic tensions and raising fears among ethnic and religious groups.<sup>20</sup>

5.11 The complainant submits that there is a high possibility of far more stringent checks concerning returns of Tamils and Muslims, as well as political opponents of the President. Those stringent checks will more frequently lead to prolonged detention and torture under interrogation of those suspected of "terrorist" activities. The complainant also states that the political situation in Sri Lanka is volatile and that anti-Tamil and anti-Muslim sentiment are significant elements of the political contention in the country. This fact, and the continued failure to carry out any credible investigation into the war crimes allegedly committed during the conflict, indicate that no blanket finding that the situation has improved is sufficient to assess whether a particular individual faces a real risk of serious harm if returned there.

5.12 The complainant concludes that he has provided sufficient information for the Committee's consideration for it to declare the communication admissible and adopt its Views on the merits. The complainant recommends that the Committee set aside the wide-ranging negative credibility finding and take into account the fact that one Refugee Review Tribunal process was legally flawed. The Committee should also take into account the changing political situation in Sri Lanka, which increases the likelihood of the complainant being targeted by the Karuna faction and gives reason to believe that more aggressive policies will be put in place against LTTE and Tamils.

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<sup>19</sup> On 10 January 2012, Gotabaya Rajapaksa, then Secretary for Defence and Urban Development, delivered his speech entitled "Future challenges of national security in Sri Lanka". He was elected President of Sri Lanka in 2019.

<sup>20</sup> The complainant refers to *Foreign Policy Magazine* published by the Australian Institute of International Affairs and the Lowy Institute.

**Further submissions by the State party**

6.1 On 26 October 2020, the State party rejected in the strongest terms any allegation or suggestion that it had acted, or was acting, inconsistently with the obligation upon Australia and its agencies to behave as model litigants in the conduct of litigation.

6.2 Referring to the complainant's disagreement that a "reasonable margin of appreciation was given to flaws and inconsistencies in the complainant's evidence" and to his argument that "inconsequential" inconsistencies were allowed to infect the whole of the decision and contributed to the wide-ranging negative credibility finding when they should not have influenced it at all, that State party responds that this statement is misguided, as the delegate's decision did not turn solely on negative credibility findings. While the delegate expressed puzzlement and doubt as to certain aspects of the complainant's claims, he accepted other aspects, including the claim that the complainant had faced a personal threat of harm in the context of an extortion attempt. However, this was not sufficient to substantiate a claim that the complainant faced a real risk of torture if removed to Sri Lanka. The State party reiterates that the delegate thoroughly considered whether the complainant could be at risk of persecution or significant harm (such as torture) on a number of different bases. In doing so, the delegate had regard not only to the complainant's claims relating to his past experiences, but also to country information relevant to assessing the existence of current and continuing risks. Without making wide-ranging negative credibility findings, the delegate still found that the complainant was not at risk of persecution or significant harm such as torture.

6.3 Concerning the complainant's contention that although the Refugee Review Tribunal claims to have taken into account the complainant's nerves at the hearing, it does not substantiate having done so: the State party disagrees with this characterization, since it does not bear a burden of "substantiating" the outcomes of multiple, robust processes for the assessment of the complainant's claims under the Migration Act. Rather, as previously submitted, it is for the complainant to substantiate his claims under the Convention, by showing substantial grounds for believing that he would be in danger of being subjected to torture.

6.4 The State party reiterates that in assessing the complainant's claim for protection under the Convention, it is appropriate to give significant weight to findings of facts reached by domestic decision makers, including assessments of the truthfulness of the complainant's written and oral evidence. This includes the findings of the delegate, as well as of the Refugee Review Tribunal. These decision makers had the benefit of receiving evidence from the complainant himself in person, which he provided in his native language (Tamil) with the assistance of an interpreter. The complainant was supported by his migration agent in making his protection visa application to the Department of Immigration and Citizenship, and in the consideration of his case at both the first and the second Refugee Review Tribunal reviews. The complainant's agent submitted extensive and detailed written submissions in support of the complainant's claims, and these processes enabled a thorough assessment of his claims under the complementary protection provisions contained in the Migration Act, which reflect the State party's non-refoulement obligations under the Convention and under the International Covenant on Civil and Political Rights and its Second Optional Protocol.

6.5 Regarding the complainant's submission that the State party attempted to unduly influence the Refugee Review Tribunal, the State party strongly rejects this allegation and refers to the decision of the High Court of Australia which stated that this characterization cannot be accepted. The State party notes that the judgment of the High Court does not support the complainant's assertions that the Government of Australia failed to act as a model litigant and that the only point of relevance of the litigation is that the High Court judgment confirms there was no error of law in the second Refugee Review Tribunal decision.

6.6 Referring to the complainant's submission about the changed political situation in the country, the State party reiterates that the existence of a general risk of violence in a country does not constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country; additional grounds must exist to show the individual concerned would be personally at risk.

6.7 In the State party's view, the evidence does not support the assumption that the complainant would be suspected of terrorist activities merely by virtue of his Tamil ethnicity,

and that he would face a real risk of torture on that basis. Country information published by the Department of Foreign Affairs and Trade indicates that most Sri Lankan returnees are questioned upon return and may be apprehended and charged for departing Sri Lanka illegally, however the Department of Foreign Affairs and Trade is not aware of mistreatment of returnees during that process. The Department of Foreign Affairs and Trade also reported that it was not aware of returnees, including failed asylum seekers, being treated in such a way that endangered their safety and security. The State party does not consider the material referred to in the complainant's further submissions to contain any evidence to the contrary. The State party also considers that the complainant was unable to substantiate his claims that as a result of the adoption of more aggressive anti-LTTE and anti-Tamil policies he might be violently targeted by the Karuna group.

6.8 Finally, the State party concludes that the complainant's claims are inadmissible as manifestly unfounded within the meaning of rule 113 (b) of the Committee's rules of procedure. Should the Committee find the allegations admissible, the complainant's claims are without merit.

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

#### *Consideration of admissibility*

7.1 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.

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. 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.

7.3 The Committee considers that the complainant has sufficiently substantiated, for the purposes of admissibility, his claims based on article 3 of the Convention, regarding his risk of being subjected to torture and ill-treatment if returned to Sri Lanka. Accordingly, it declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

8.1 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.

8.2 In the present case, the issue before the Committee is whether the forcible removal 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 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.

8.3 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. In this context, the Committee refers to its consideration of the fifth periodic report of Sri Lanka,<sup>21</sup> during 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 end of the conflict with LTTE in May 2009.<sup>22</sup> It also refers

<sup>21</sup> CAT/C/LKA/CO/5, paras. 9–12.

<sup>22</sup> CAT/C/LKA/CO/3-4, para. 6.

to reports by non-governmental organizations<sup>23</sup> concerning the treatment of individuals, by the authorities of Sri Lanka, who have been returned to Sri Lanka. However, the Committee recalls that the aim of the evaluation undertaken in the context of individual complaints 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.<sup>24</sup> The Committee also recalls that, 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.

8.4 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 fair treatment and trial; and (d) sentence in absentia (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>25</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).

8.5 In the present case, the complainant claims that he would be at risk of treatment contrary to article 3 of the Convention if he were returned to Sri Lanka, as he would be questioned at the airport about his lost passport, on the presumption that he made protection claims in Australia, arrested for his illegal departure from Sri Lanka, and subjected to torture and ill-treatment during his detention due to his political opinion as an imputed supporter of LTTE. The Committee further notes the complainant’s claims that information about his return would be shared with the local Karuna office which would persecute him for his Tamil ethnicity and hold him in detention on suspicion of having links with LTTE, that he would most probably be tortured during the investigation, and that even if he were released, the Karuna faction would be likely to carry out its threats against him.

8.6 The Committee notes the State party’s submission that the claims made by the complainant have been thoroughly considered by the competent domestic authorities, which found that he would not be at risk of treatment contrary to article 3 of the Convention in Sri Lanka. The Committee notes that the complainant made inconsistent statements in relation to the circumstances of the alleged abduction of his father by LTTE, as well as in regard to interest by LTTE in his father. The national authorities assessed that the complainant made contradictory statements about his father’s contacts with the Karuna faction and about attempts by the latter at extortion against his family, and came to the conclusion that the complainant would not be imputed with LTTE political opinion or membership. The domestic authorities also dismissed the complainant’s claims that he or his family had come to the attention of the Karuna faction in the past, and therefore did not accept that there were substantial grounds for believing that there was a real risk that the complainant would suffer

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<sup>23</sup> Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009* (London, 2015); and Human Rights Watch, *World Report 2019* (New York, 2019).

<sup>24</sup> *S.P.A. v. Canada* (CAT/C/37/D/282/2005), *T.I. v. Canada* (CAT/C/45/D/333/2007) and *A.M.A. v. Switzerland* (CAT/C/45/D/344/2008).

<sup>25</sup> *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

harm from Sri Lankan authorities, the Karuna faction or other paramilitary groups, if returned to Sri Lanka.

8.7 Regarding the complainant's claims that he would be detained, remanded and fined for illegal departure upon his arrival in Sri Lanka, the Committee notes that the Refugee Review Tribunal found that the complainant would be bailed and would not face a custodial sentence, and that there was no real risk of torture or other significant harm to the complainant in that regard. The national authorities also made an assessment and found that the complainant would not face a real risk of harm by reason of being a Tamil male, or a young Tamil male from the east, or because his family had provided support to LTTE during the conflict, or because his family had a jewellery store or were considered to be wealthy Tamil business people. The Committee also notes that the State party thoroughly assessed the complainant's documents, including the hospital treatment notes, and notes its conclusion that it does not consider the documents to substantiate the complainant's allegations that the Karuna faction attacked his father.

8.8 With regard to the submission of various sources of country information, including in relation to the political situation, security, the consequences of returning without a passport, the behaviour of Sri Lankan security forces, and in relation to the Karuna faction, the Committee notes that the existence of a general risk of violence does not constitute sufficient grounds for determining 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 that the individual concerned would be personally at risk.

8.9 Referring to the difficulties that the complainant faced during the interview processes, the Committee notes that the Refugee Review Tribunal took into account the special circumstances of nervousness, was mindful of nuances in language when communicating through an interpreter, and stated that the standard of interpreting at the hearing was competent and reasonable.

8.10 The Committee notes that the Refugee Review Tribunal's decision did not turn on one or two minor discrepancies, but on a multitude of evidence taken as a whole, including multiple inconsistencies and shifts in the complainant's evidence throughout the various phases of the proceedings. It notes that the complainant's claims have been considered through a robust domestic process, which assessed them not to be credible. The Committee notes that the national authorities, after having considered the totality of the complainant's evidence, found that the complainant had fabricated most of his claims and that he was not a witness of truth.

9. In the light of the above considerations, and on the basis of all the information submitted to it by the parties, the Committee considers that, in the present case, the complainant has failed to adduce sufficient evidence and to adequately substantiate his contention that his alleged past events would attract real interest from the authorities of Sri Lanka. Having also considered the general situation of human rights in Sri Lanka, the Committee is of the view that the complainant has failed to substantiate his claims that his removal to Sri Lanka would amount to a foreseeable, present, personal and real risk of being subjected to treatment contrary to article 3 of the Convention.<sup>26</sup>

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

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<sup>26</sup> See the Committee's general comment No. 4 (2017), para. 38.