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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. 856/2017*, **

Communication submitted by:	G.W.J. (represented by counsel, Alison Battisson)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	7 December 2017 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 11 December 2017 (not issued in document form)
Date of adoption of decision:	12 November 2021
Subject matter:	Deportation of the complainant from Australia to Sri Lanka
Procedural issue:	Admissibility – manifestly unfounded
Substantive issues:	Non-refoulement; prevention of torture
Article of the Convention:	3

1.1 The complainant is G.W.J., a national of Sri Lanka and ethnic Tamil born in 1981. His asylum claim was rejected and he risks deportation. He asserts that if Australia were to proceed with his deportation, it would violate the obligations of Australia under article 3 of the Convention. Australia 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 11 December 2017, 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 to Sri Lanka while it considered his complaint.

Facts as submitted by the complainant

2.1 The complainant is a Tamil asylum seeker from Sri Lanka. He arrived in Australia by boat on 14 October 2012. A Sri Lankan arrest warrant has been issued in respect of the complainant. He is accused of assisting anti-government activities and support of a terrorist organization, as a result of having harboured Liberation Tigers of Tamil Eelam (LTTE) members. The episode stems from a 2001 attack on Bandaranaike International Airport by

* 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, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.

LTTE forces. Two LTTE members who took part in that attack had stayed at the complainant's house a week prior to the attack. After the attack, the police came to the complainant's house and took away his father. One week later, his father was brought back, severely beaten. As the complainant's father was a businessman, the police (Criminal Investigation Department) started extorting money from him on a regular basis. When he could not pay, they would beat him up. After his father's death in 2002, the complainant took over the business and continued paying off the police. In 2012, the complainant was jailed for assisting anti-government activities and support of a terrorist organization. He was punched in the face, his hands and legs were tied with steel cables, and he was burned with cigarette butts. He still suffers pain in his legs from the beatings, and has scars on his arm, near his ear and on his neck. Towards the end of 2012, the complainant managed to escape jail and fled to Australia. After his escape, the police came to his house looking for him. They also asked for the complainant's brother, who was not at home at the time. To avoid any problems, his brother then also went into hiding at a friend's house.

2.2 On 2 September 2015, the Department of Immigration and Border Protection invited the complainant to apply for a protection visa. Prior to that date, he had no rights under Australian law to apply for a visa. On 17 September 2015, the complainant applied for a temporary protection visa. On 1 July 2016, he withdrew that application and applied for a Safe Haven Enterprise Visa.

2.3 The Safe Haven Enterprise Visa application was refused on 24 August 2016, and the complainant was referred to the Immigration Assessment Authority for review. On 30 November 2016, the Immigration Assessment Authority upheld the decision by the Department of Immigration and Border Protection not to grant the complainant a Safe Haven Enterprise Visa.

2.4 In early 2017, the complainant applied to the Federal Circuit Court for review of the Immigration Assessment Authority decision. Following the hearing of similar cases, he was instructed by his legal representatives to withdraw his application to the Federal Circuit Court, which he did.

2.5 On 24 November 2017, a ministerial intervention regarding the complainant was lodged with the Department of Immigration and Border Protection. The ministerial intervention included a translated copy of an outstanding Sri Lankan arrest warrant for the complainant. On 6 December 2017, the Department of Immigration and Border Protection refused to consider the ministerial intervention. Under Australian law, the complainant does not have the right to a merits review of his case, which would include consideration of the arrest warrant.

2.6 On 6 December 2017, the complainant was instructed by his Department of Immigration and Border Protection case manager that he should prepare to be returned to Sri Lanka. The complainant has been in detention since January 2015, when he was charged with a criminal offence relating to entering a property and was detained. The charge was dismissed on 21 February 2016 but he remains in administrative detention.

2.7. On 10 May 2018, upon the request of the State party, the complainant submitted a copy of the arrest warrant in its original form. He submits that a copy was obtained by his family in Sri Lanka.

Complaint

3. The complainant claims that his removal would entail a violation of article 3 of the Convention, because he will face State-sanctioned torture. He claims that the outstanding arrest warrant will be exercised on his arrival in Sri Lanka, and he will then be placed in custody. As a Tamil accused of assisting LTTE, it is then highly likely that he will be subjected to a range of torture practices, including rape.

State party's observations on admissibility and the merits

4.1 On 15 November 2019, the State party submitted its observations on the admissibility 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 as manifestly unfounded. According to the State party, the claims have been thoroughly considered by a series of domestic decision-making processes and it has been determined that they are not credible and do not engage the State party's non-refoulement obligations. The State party refers to the Committee's decisions in *I.P.W.F. v. Australia*[1] and *T.T.P. v. Australia*,[2] 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 requests that the Committee accept that it has thoroughly assessed the complainant's claims through its domestic processes and found that they do not engage the obligations of Australia under article 3 of the Convention.

4.2 The State party submits that if the Committee considers the complainant's claims to be admissible, it should find them without merit as demonstrated in the findings made by the domestic authorities. The State party notes that during the complainant's Safe Haven Enterprise Visa application process, the decision maker (the Department of Immigration and Border Protection) conducted an interview with the complainant with the assistance of an interpreter and also considered other relevant material such as country information provided by the Department of Foreign Affairs and Trade as well as supporting country information provided by the complainant's representative. The decision maker considered the claims made by the complainant in his submissions to the Committee, with the exception of his claims concerning the outstanding arrest warrant.

4.3 The State party notes, in particular, that the decision maker considered, with supporting country information, the complainant's claim for protection on the basis that he had an imputed association with LTTE, was of Tamil ethnicity and was a failed asylum seeker. With regard to his ties to LTTE, the complainant claimed that his father had allowed two LTTE members to reside in the family home for one week, who may have been involved in an incident at Bandaranaike International Airport on 24 July 2001, and that he had recognized one of the alleged perpetrators of the bombing from a photograph in a newspaper article. The State party submits that the decision maker concluded that those claims were not credible. In coming to that conclusion, the decision maker considered commentary on the aforementioned attack from media sources and noted that it had been unable to locate any photographs of the alleged perpetrators in those sources. Moreover, the decision maker observed that no mention had been made in the media sources of specific individuals; rather, the perpetrators were referred to generally as "rebels". The decision maker did not find it plausible that any surviving LTTE members involved in the incident would remain in Negombo, which is only 35 kilometres from Bandaranaike International Airport, and that they would stay in the complainant's father's house. The decision maker was also not convinced that the Criminal Investigation Department would continue to question the complainant and his brother in relation to their alleged association with the bombing incident years after the incident had occurred. Finally, the decision maker also noted that even though the complainant claimed that his family had had problems with the Criminal Investigation Department since 2001 and that he had been mistreated by that Department, he made no attempt either to relocate within Sri Lanka or to depart the country until 12 years later. The decision maker therefore did not find credible the complainant's claim of having an imputed association with LTTE, and did not find credible the complainant's claim that he, or his brother, had been of interest to the Criminal Investigation Department.

4.4 The State party further notes that even though the complainant did not specifically raise any claims of being harmed because of his Tamil ethnicity, the decision maker went on to consider whether he was at risk of harm from Sri Lankan authorities because of his Tamil ethnicity. The decision maker considered the Office of the United Nations High Commissioner for Refugees (UNHCR) 2012 eligibility guidelines on assessing the protection needs of asylum seekers from Sri Lanka.[3] The decision maker noted that although the guidelines included persons suspected of certain links with LTTE as a group at risk, UNHCR did not list Tamils, young Tamil men from former LTTE-controlled areas, or from the north,

[1] CAT/C/63/D/618/2014, para. 8.7.

[2] CAT/C/65/D/756/2016, para. 6.3.

[3] Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, 21 December 2012, HCR/EG/LKA/12/04, available at https://www.refworld.org/docid/50d1a08e2.html.

or failed Tamil asylum seekers, as being among the groups at risk.[4] The decision maker also noted that while country information from a Human Rights Watch report of 2014 indicated that Sri Lankan Tamils continued to experience hardship, the 2014 report by the Department of Foreign Affairs and Trade on LTTE indicated that since the end of the civil war in 2009, the risk of harm to Sri Lankan citizens on the basis of their Tamil ethnicity had substantially reduced.[5] The decision maker also observed that since the election of Maithripala Sirisena as President in 2015, efforts towards reconciliation had increased. For example, in January 2015, Mr. Sirisena's Government had appointed a Tamil as Chief Justice of the Supreme Court, and in July 2015, 3,500 former LTTE cadres had been appointed to permanent positions with the Civil Defence Force. Therefore, the decision maker concluded that the complainant did not have a profile that would be of interest to the Sri Lankan authorities.

4.5 With regard to the complainant's claim that he would be at risk as a failed asylum seeker, the State party notes that the decision maker accepted that the complainant may be fined and possibly detained in accordance with Sri Lankan laws on illegal departure, although this did not reach the threshold of persecution. The decision maker also noted that these laws are applicable to all citizens of Sri Lanka and found no evidence to indicate that Sri Lankan authorities applied the relevant laws discriminately to Sri Lankan Tamils. The decision maker found that country information did not support the complainant's fear of persecution as a failed asylum seeker. Accordingly, the State party submits that there is not a real chance of persecution due to being a failed asylum seeker, should the complainant be returned to Sri Lanka.

4.6 The State party further notes that the complainant's visa refusal decision was referred to the Immigration Assessment Authority on 25 August 2016 for a merits reviews. On 30 November 2016, the Immigration Assessment Authority affirmed the decision of the Department of Immigration and Border Protection not to grant the complainant a protection visa. The Immigration Assessment Authority found that the complainant had not presented a credible, detailed or plausible account of the events that had led to his decision to leave Sri Lanka. In particular, the Immigration Assessment Authority noted that the complainant had made contradictory statements during his Safe Haven Enterprise Visa interview with regard to whether he had ever reported the mistreatment by the Criminal Investigation Department, and whether he had tried to leave Sri Lanka before travelling to Australia. The Immigration Assessment Authority noted that in his temporary protection visa application, which was later withdrawn when he made his application for a Safe Haven Enterprise Visa, the complainant claimed that he and his brother had made a complaint to the Human Rights Commission of Sri Lanka, but they had been told that nothing could be done. However, when asked during his Safe Haven Enterprise Visa interview, the complainant said that he had not reported the extortion or abuse to anyone, and when specifically asked about the Human Rights Commission, he replied that he had never heard of the Commission before coming to Australia. After a break in the interview, the complainant then stated that he and his brother had tried to complain to the police three times but the police had refused to take their complaints. The Immigration Assessment Authority also noted discrepancies in the complainant's account of the profitability of the family business and did not accept that the complainant or his family were under constant surveillance by the Criminal Investigation Department for over 10 years or subject to extortion and physical abuse and torture during that time period. In rejecting the latter claim, the Immigration Assessment Authority noted that if the complainant or his family had been serious suspects, it was unlikely that they would be under constant surveillance for over 10 years without any further action being taken against them.

4.7 The State party notes that the complainant claimed for the first time in his written submission to the Immigration Assessment Authority that on 23 August 2012, he had been arrested and jailed for assisting anti-government activities and supporting and assisting a terrorist organization. The submission stated that an arrest warrant was attached to the submission, however no arrest warrant was provided by the complainant to the Immigration

[4] Department of Immigration and Border Protection, "Protection visa decision record", 24 August 2016, CLF2015/54341, pp. 6–7.

[5] Ibid.

Assessment Authority and no explanation was provided for why such an important claim was not raised during the complainant's Safe Haven Enterprise Visa interview. The State party notes that the complainant was legally represented when he completed his application for a Safe Haven Enterprise Visa, and, additionally, his representative attended the Safe Haven Enterprise Visa interview and lodged a written submission after the interview. In these circumstances, the Immigration Assessment Authority was not satisfied that the information could not have been provided to the Department of Immigration and Border Protection before it had made the decision. The Immigration Assessment Authority reasoned that if this particular claim was true, it was difficult to understand why the complainant had not raised it during the Safe Haven Enterprise Visa process, noting also the complainant's failure to provide an explanation for not doing so. Accordingly, the Immigration Assessment Authority did not consider this new information, particularly given the absence of an arrest warrant.

4.8 According to the State party, on 3 January 2017 the complainant lodged an application with the Federal Circuit Court of Australia for a judicial review of the Immigration Assessment Authority's decision. However, on 13 September 2017 he withdrew his application. Accordingly, no finding on the legality of the Immigration Assessment Authority's decision was made by the Federal Circuit Court.

4.9 The State party submits that on 24 November 2017, the complainant made a request for ministerial intervention under section 48B of the Migration Act. During this process, the complainant provided additional documentation and information to support his claims. In particular, he provided a copy of an English translation of his claimed arrest warrant from 2012 and new country information that post-dated the Immigration Assessment Authority's decision. The complainant's representative also claimed for the first time that the complainant suffered from mental health problems which were either "caused or exacerbated by arbitrary detention".

4.10 The State party notes that with respect to his claim of being arrested and jailed for assisting anti-government activities and supporting and assisting a terrorist organization, the complainant had not provided an original language copy of the arrest warrant and had not explained how or when he obtained the English translation of the warrant. The complainant submitted that he did not raise this claim during the Safe Haven Enterprise Visa process because he was afraid and was unfamiliar with "Australian circumstances" at the time, and also forgot to provide a copy of the arrest warrant to the Immigration Assessment Authority. The officer assigned to the complainant's case considered the Immigration Assessment Authority's credibility findings regarding the complainant and the lack of an explanation from him as to how he had obtained the arrest warrant and, accordingly, did not consider it plausible that the complainant had forgotten to provide the arrest warrant during the Immigration Assessment Authority determination process. The case officer therefore gave no weight to the English translation of the arrest warrant in assessing the complainant's request for ministerial intervention.

4.11 The State party notes that in relation to the complainant's claims regarding his mental health problems, the case officer considered two reports by a counsellor from the New South Wales Service for Treatment and Rehabilitation of Torture and Trauma Survivors. Both reports indicated that the complainant would benefit from attending further counselling. However, the case officer observed that the complainant had not provided recent evidence of attending counselling for any reason. Additionally, the case officer observed that both reports pre-dated the Immigration Assessment Authority decision, yet the complainant did not provide an explanation for the delay in submitting the reports. In any case, the case officer found that there was no evidence indicating that the complainant would be denied medical treatment on return to Sri Lanka.

4.12 With regard to the complainant's arrest warrant, the State party notes that following receipt of what was alleged to be a copy of the original arrest warrant, the Government of Australia conducted an assessment of the complainant's claims and came to the view that the arrest warrant did not appear to be genuine. The State party submits that it has conducted enquiries concerning the arrest warrant and has confirmed that the Negombo court case number on the warrant – B1254/2008 – does not relate to the complainant. This was confirmed on the basis that the court case number concerns a case involving another individual, in relation to a stolen mobile phone, with no known offender listed. The State

party notes that the court case number of B1254/2008 likely implies that the year 2008 is of some importance in this matter. Given that the complainant claimed in his entry interview that he had first been arrested in 2000 and that his father had been detained in relation to the airport bombing in 2001, and also that the complainant claimed to have been arrested again in 2012, the State party submits that it is unable to discern a link to 2008. The State party also observes that if this matter was being investigated in 2008 and the complainant claims that he had been persistently harassed by the Criminal Investigation Department since 2001, there is no reasonable explanation as to why it took at least four years for the complainant to be arrested.

4.13 The State party notes that country information indicates that fraudulent documentation is widespread in Sri Lanka and easy to procure. For instance, in November 2019, the Department of Foreign Affairs and Trade reported that "most official records in Sri Lanka are kept in a centralized location in hard-copy format; government departments lack computerized information databases".[6] Furthermore, "genuine identity documents can be obtained by submitting fraudulent supporting documents, including birth certificates and national identity cards. Counterfeit documents are the primary cause of fraud in the issue of national identity cards, passports and driver's licences."[7] The report also notes that other asylum destination countries have reported receiving fraudulent documentation from asylum seekers.[8] Based on the above and the fact that the onus lies with the complainant to provide all relevant evidence to the Committee to substantiate his claims, the State party submits that it does not consider the arrest warrant as provided by the complainant to be genuine.

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

5.1 On 20 March 2020, the complainant submitted his comments on the State party's observations on admissibility and the merits. The complainant notes that he forms part of a significant cohort of asylum seekers in the State party who did not feel comfortable with telling the Government of Australia that they had been the subject of an arrest warrant in their home countries. He notes that, in his own case, he had to wait for more than three years in a detention centre environment to be invited to apply for protection. The complainant acknowledges that he was provided with legal representation to assist him in completing his protection visa application, from the Primary Application Information Service. However, he notes that, while helpful, this system is limited. Protection visa applications are often completed in a short period of time, frequently in just one hour, with limited or no ability for further communication with the Primary Application Information Service provider. Also, because Primary Application Information Service providers are paid by the Government of Australia, many refugees do not feel comfortable sharing all details of their claims with their Primary Application Information Service providers. The complainant submits that this was the case for him – he did not feel comfortable with the Primary Application Information Service provider and, as such, did not share all the details of his claim, including in relation to the arrest warrant. The complainant also notes that there is no evidence of a legal representative attending the protection visa interview with him. He submits that he has no memory of a legal representative attending the interview with him.

5.2 With regard to the Immigration Assessment Authority review, the complainant notes that it is the subject of much criticism. Applicants have no right to an oral hearing and the Immigration Assessment Authority will only consider new evidence in very limited circumstances. Furthermore, he had no legal representative to help him with the Immigration Assessment Authority process.

5.3 Finally, with regard to the ministerial intervention process, the complainant submits that it is not an independent process. It is conducted internally by the Department of Home Affairs and is not subject to review. Cases are assessed against strict guidelines, which do not include a re-examination of an applicant's case when new evidence is presented.

[6] Government of Australia, Department of Foreign Affairs and Trade, *DFAT Country Information Report: Sri Lanka*, 4 November 2019, para. 5.68.

[7] Ibid., para. 5.69.

[8] Ibid., para. 5.70.

5.4 The complainant claims that as such, at no stage was the arrest warrant part of a thorough reassessment process, or even a process in which he could provide a response to allegations that the arrest warrant was fraudulent. He notes that the Immigration Assessment Authority did not even request to see the warrant.

5.5 The complainant submits that it is extremely difficult to respond to the State party's allegation that his arrest warrant is not genuine because it would require contacting the Government of Sri Lanka, which would be irresponsible to do in view of his protection claim. Furthermore, there is no reason for the Sri Lankan authorities to respect any requests for information if he were to submit them. In relation to the dates on the arrest warrant, the complainant notes that it is normal practice for Sri Lankan authorities to take years between filing a case and issuing an arrest warrant. The timing of the filing of the case, in 2008, was towards the end of the Sri Lankan civil war, when the country was in chaos, and it is not surprising that an arrest warrant was not issued at that time. Furthermore, he notes that Sri Lanka does not have a central computerized database, meaning that it is possible for information to be duplicated and human error to creep into records. The complainant also notes that the arrest warrant is stamped using the seal of A.M.N.P. Amarasinghe and that there are records confirming he was a magistrate in Negombo in 2012. According to the complainant, while other documents in Sri Lanka are, perhaps, able to be forged, arrest warrants are very rarely forged. Finally, the complainant submits that the State party has not provided any evidence of communications with the Government of Sri Lanka, thus its allegation that it has been confirmed that the Negombo court case number of B1254/2008 on the complainant's arrest warrant does not relate to him cannot reasonably be relied on.

5.6 Finally, the complainant notes that since the date of his protection visa application, the Rajapaksa family has regained control of the Government of Sri Lanka. In particular, he notes that the current President was Secretary to the Minister of Defence during the Sri Lankan civil war when many Tamils were killed or were disappeared.

State party's additional observations

6.1 On 28 October 2020, the State party submitted its additional observations on the merits of the complaint. It notes that the complainant was represented during the protection visa application and interview stage, as confirmed in the reasoning of the Immigration Assessment Authority. The State party reiterates that the complainant was found to be a "fast track applicant", and the Australian fast track assessment offers applicants procedural fairness. Its primary purpose is to more efficiently manage a large number of cases stemming from an influx of boat arrivals. Fast track assessment places an emphasis on applicants fully and truthfully articulating their protection claims at the earliest possible opportunity. The State party notes that while fast track assessment has some shortened time frames, for example for responding to requests for further information, the key features of the Australian fast track assessment system are: (a) no merits reviews in certain circumstances, such as where the person's claims are found to be manifestly unfounded or the person already has access to protection in another country; and (b) where a merits review is available, as it is in the vast majority of cases, the Immigration Assessment Authority conducts an "on the papers" review rather than a full de novo assessment of a person's claims. However, the Immigration Assessment Authority considers the merits of the decision afresh rather than merely correcting any errors made by a delegate in the Department of Home Affairs.

6.2 The State party notes that while there are discretionary powers for the Immigration Assessment Authority to consider new and relevant information (including orally or in writing), the Immigration Assessment Authority is under no duty to accept or request new information or interview an applicant. New information will only be considered if the Immigration Assessment Authority is satisfied that there are exceptional circumstances to justify its consideration. The types of exceptional circumstances that the Immigration Assessment Authority identifies in review cases generally fall into one of three broad categories of events that have arisen in a fast track review of an applicant's case after the delegate's decision: (a) circumstances where significant and rapidly deteriorating conditions have emerged in the fast track review applicant's country of claimed persecution, for example a change in the political or security landscape; (b) circumstances where new credible personal information has arisen and was not previously known and available, which suggests that a

fast track review applicant will face a significant threat to his or her personal security, human rights or human dignity if returned to the country of claimed persecution; or (c) a change of relevant provisions in the Migration Act after the delegate's decision which apply to a fast track review applicant's case.

6.3 With regard to the complainant's claim that the ministerial intervention process is not independent because it is conducted internally by the Department of Home Affairs and is not subject to review, the State party reiterates that under the non-compellable power in section 48B of the Migration Act, the Minister for Home Affairs (previously the Minister for Immigration and Border Protection) can intervene in individual cases if he thinks that it is in the public interest to do so. On 6 December 2017, the Department of Home Affairs determined that the complainant's claims did not meet the guidelines for ministerial intervention. According to the State party, the Minister considers the following circumstances to be exceptional: (a) the person is making a plausible claim that the information was not known to him or her, or did not exist, at the time of the protection visa application; (b) the information was not raised at the time of the protection visa application for compelling and compassionate reasons; or (c) plausible protection claims have been made as a result of changed conditions in the person's country of origin.

6.4 With regard to the complainant's information about the Rajapaksa family regaining control of the Government of Sri Lanka, the State party notes that its domestic decision makers did not have the opportunity to consider this information, since the results of the Sri Lankan presidential elections were only confirmed after the Government of Australia had submitted its views on the admissibility and the merits of the complainant's claims to the Committee. Notwithstanding, the State party submits that this new information is not sufficient to demonstrate that the complainant is at personal risk of harm, and that the existence of a general risk of violence in a country 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. It reiterates that no domestic decision maker has been satisfied that the complainant would be subject to ongoing suspicion of LTTE activities, or that he would be of adverse interest to the authorities, if he were returned to Sri Lanka.

6.5 Finally, with respect to the complainant's claims about the arrest warrant, the State party reiterates that the warrant was considered during the Immigration Assessment Authority's review of the Department of Immigration and Border Protection's decision, and also by the Department of Home Affairs as part of the complainant's application for ministerial intervention. The State party then carried out a further assessment of his claims, including with regard to the arrest warrant, following receipt of the complainant's communication by the Committee, in accordance with the State party's policy on interim measures requests. The arrest warrant was at each stage found not to be credible.

6.6 Based on the above, the State party submits that the complainant's claims are inadmissible as manifestly unfounded pursuant to rule 113 (b) of the Committee's rules of procedure. Should the Committee find the allegations admissible, the State party submits that the complainant's claim is without merit as it is not supported by evidence of substantial grounds for believing that he is in danger of torture as defined in article 1 of the Convention.

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

7.1 On 24 February 2021, the complainant submitted his comments on the State party's additional observations. He reiterates that a lack of procedural fairness in the current assessment process of the Immigration Assessment Authority means that his arrest warrant has not been considered by the State party. He notes that the Migration Act 1958 provides that the Immigration Assessment Authority must not consider new information on an applicant's protection claim unless there are compelling reasons why the information was not provided to the original decision maker – that is, information that the applicant could not have known about even though it existed prior to the Immigration Assessment Authority hearing. The complainant argues that this sets a very high bar that is almost never met. According to the complainant, this also means that the Immigration Assessment Authority process is not a de novo hearing, meaning that the assessment process is premised on an assumption that applicants present all their claims and evidence at the primary stage – with the Department of Immigration and Border Protection. He notes that this is highly

problematic, because applicants will often have limited knowledge of English and little, if any, understanding of the administrative processes. In his own case, at the primary assessment stage, he claims that he played down issues with the authorities in Sri Lanka, so as to show the Australian authorities that he would be a good citizen.

7.2 With regard to the change in the presidency in Sri Lanka, the complainant rejects the State party's submission that there is no personal risk for him in returning. He submits that his perceived affiliation with LTTE, the previous harassment and persecution to which he was subjected, and the arrest warrant, show that he is of adverse interest to the authorities, and these factors put him at a risk of being charged and detained in Sri Lanka and subjected to a range of torture practices. The complainant notes that the Rajapaksa family played a major role in the killing and torture of LTTE members and people perceived as being associated with LTTE. Thus, any individual with LTTE affiliation, such as himself, who is subject to an arrest warrant for "assisting anti-government activities and supporting and assisting a terrorist organization" will be targeted by the Rajapaksa Government.

Further observations by the State party

8. On 28 April 2021, the State party submitted further observations on the merits of the complaint. It notes that it has already responded to the complainant's arguments raised in his comments of 24 February 2021 in its previous submissions. It reiterates that, although the complainant has previously alleged being tortured in Sri Lanka, he did not raise in his further submissions or during the domestic assessment process that he had been subjected to detention and torture by the previous Rajapaksa Government. Thus, the State party's assessment remains that a change in presidency in Sri Lanka does not sufficiently demonstrate that the complainant is at personal risk of harm.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 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.

9.3 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, personal, present 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

10.1 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.

10.2 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.

10.3 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.

10.4 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; (d) sentence in absentia; and (e) previous torture.[9] 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.[10] 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.[11]

10.5 The Committee notes the complainant's claim that he would face a risk of torture if he were returned to Sri Lanka because he has been accused of assisting anti-government activities and supporting a terrorist organization and there is an arrest warrant issued for him. The Committee also notes the complainant's claim that his father was tortured by the Criminal Investigation Department in 2001 for letting two alleged members of LTTE, who later participated in the attack on Bandaranaike International Airport, to stay in the family home. According to the complainant, after releasing his father, the Criminal Investigation Department began extorting money from him, and after his death in 2002, continued to extort money from the complainant because he was running the family business. In 2012, the complainant was jailed for assisting anti-government activities and support of a terrorist organization. While in detention, he was tortured by the Criminal Investigation Department and still suffers pain in his legs from the beatings, and has scars on his body.

10.6 The Committee also takes note of the State party's submission that it has conducted an assessment of the complainant's claims and has come to the view that the arrest warrant does not appear to be genuine, and that its enquiries have confirmed that the Negombo court case number of B1254/2008 on the arrest warrant does not relate to the complainant. According to the State party, the complainant had not presented a credible, detailed or plausible account of the events that led to his decision to leave Sri Lanka. The State party considers that the complainant has not provided evidence that there is a foreseeable, personal, present and real risk that he will be tortured.

[9] See para. 45.

[10] Ibid., para. 38; and *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

[11] See the Committee's general comment No. 4 (2017), para. 50.

10.7 The Committee refers in this connection to a relevant UNHCR guidance document stating that, according to general legal principles of the law of evidence, the burden of proof lies with the person who makes the assertion.[12] 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.[13]

10.8 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 LTTE had ended in May 2009.[14] 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.[15] 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.[16] 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.[17]

10.9 In the present communication, the Committee observes that the domestic authorities found the complainant's account of his association with LTTE and of him being of interest to the Criminal Investigation Department not to be credible because of his contradictory statements made at different stages of the asylum procedure. With respect to the arrest warrant – the central element in his claim – the complainant had not provided its original language copy to the State party or to the Committee until the State party formally requested him to do so. According to the State party, in his submission to the Immigration Assessment Authority, the complainant stated that an arrest warrant was attached to the submission, however no arrest warrant was provided to the Immigration Assessment Authority and no explanation was provided for why such an important claim was not raised during the complainant's Safe Haven Enterprise Visa interview. The Committee notes the complainant's contention that he played down issues with the authorities in Sri Lanka, so as to show the Australian authorities that he would be a good citizen. However, no plausible 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 was he jailed for assisting anti-government activities and supporting a terrorist organization in 2012 when the airport attacks took place in 2001 and the police allegedly visited him and his family during that period on a regular basis. The Committee considers that, even if it were to disregard the alleged inconsistencies in the complainant's account of his past experiences in Sri Lanka and accept his statements as true, the complainant has not provided any information credibly indicating that he would presently be of interest to 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 information before it does not allow it to conclude that the complainant's deportation to Sri Lanka would expose him to treatment contrary to article 3 of the Convention.[18]

[12] UNHCR, "Note on burden and standard of proof in refugee claims", 16 December 1998.
[13] Ibid.
[14] CAT/C/LKA/CO/5, paras. 9–12.
[15] 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.
[16] *R.D. v. Switzerland* (CAT/C/51/D/426/2010), para. 9.2.
[17] *Thirugnanasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 8.7.
[18] *S.S. v. Australia* (CAT/C/61/D/720/2015), para. 9.7.

10.10 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 necessary to demonstrate that his return to Sri Lanka would expose him to a real, foreseeable, personal and present risk of being subjected to torture. Furthermore, the complainant has not demonstrated that the authorities of the State party failed to conduct a proper investigation into his allegations.

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.