



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. 718/2015*, **

<i>Communication submitted by:</i>	S.P. (represented by Companion House)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	18 November 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 2 December 2015 (not issued in document form)
<i>Date of adoption of decision:</i>	22 November 2019
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Admissibility – manifestly ill-founded
<i>Substantive issue:</i>	Risk of torture in the event of deportation to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1. The complainant is S.P., a national of Sri Lanka born in 1985. His request for asylum in Australia was rejected and he risked forcible removal to Sri Lanka. The complainant asserts that if Australia were to proceed with his deportation, it would violate its obligations under article 3 of the Convention. The State party made the declaration under article 22 (1) of the Convention on 28 January 1993. The complainant is represented by counsel.

1.2. On 2 December 2015, pursuant to rule 114, paragraph 1, of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant to Sri Lanka while the communication was being considered by the Committee. On 19 December 2016, the Committee granted the request of the State party to lift the interim measures. In August 2017, the State party removed the complainant to Sri Lanka.

The facts as submitted by the complainant

2.1. The complainant, a national of Sri Lanka of Tamil ethnicity, was born in the district of Jaffna, Northern Province, Sri Lanka. From May to October 2009, the complainant lived

* Adopted by the Committee at its sixty-eighth session (11 November–6 December 2019).

** The following members of the Committee participated in the examination of the communication: Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.



in the Seven Four refugee camp in the city of Vavuniya, Sri Lanka, with his parents and his older and younger brothers. The complainant asserts that his older brother worked from 1998 to 2008 as a mechanic at a workshop near Killinochi owned by a member of the Liberation Tigers of Tamil Eelam (Tamil Tigers). Shortly after the family arrived at the refugee camp, the complainant and his older brother, together with other young men, were questioned by officers of the Sri Lankan army about their possible involvement with the Tamil Tigers. They underwent body searches by the Army aimed at detecting injuries as evidence.

2.2 In August 2009, the army officers returned to the refugee camp and arrested the complainant's older brother. The complainant submits that his brother was considered to be affiliated with the Tamil Tigers because of his former employment. He was taken from the refugee camp to an unspecified location and detained by the authorities for 14 months, during which time he was subjected to torture.

2.3 Since his parents feared that the complainant might also be taken by the army, they paid a bribe to the Karuna paramilitary group to secure his departure from the refugee camp and send him overseas. With the assistance of the Karuna paramilitary group, he obtained a passport and a tourist visa for Malaysia and managed to leave the refugee camp. On 30 October 2009, the complainant fled Sri Lanka for Thailand. He stayed in Bangkok for a few days before arriving in Malaysia, where he lived until March 2011, and from there he travelled on to Indonesia, the final transit country before reaching Australia.

2.4 On 1 December 2011, the complainant arrived at Christmas Island in Australia by boat. On 4 February 2012, he lodged an application for a protection visa, which was refused by the Department of Immigration and Citizenship on 29 February 2012. His case was subsequently examined under an independent protection assessment. On 11 October 2012, he was informed by the Department of Immigration and Citizenship that he had been considered not to meet the criteria for a protection visa. The officer concerned accepted as fact the complainant's accounts of his brother's employment in a workshop associated with the Tamil Tigers. It was also accepted that in August 2009 the complainant's brother had been arrested and detained by the authorities for 14 months, because of his former employment. It was also found plausible that the complainant had fled Sri Lanka because of his subjective fear that he would be persecuted in his country of origin by reason of an imputed political opinion that he was associated with the Tamil Tigers. His fear arose from his brother's circumstances, his Tamil ethnicity and the fact that he originates from the Northern Province of Sri Lanka. However, the officer considered that had the authorities had any real concerns about him at the time of his older brother's arrest, or soon after, they would have arrested the author as well and he would not have been able to obtain a passport and depart from Sri Lanka without incident. Accordingly, the officer found the alleged incidents to be insufficient to bring the complainant to the attention of the authorities. Having also considered the available country information, the officer concluded that the complainant would not be targeted because of his Tamil ethnicity or as a suspected supporter of the Tamil Tigers. Likewise, there was no reason to believe that the complainant would be at risk of torture as a failed asylum seeker upon his return.

2.5 The complainant sought a judicial review of the decision of 11 October 2012 before the Federal Circuit Court of Australia. On 13 December 2013, the Federal Circuit Court dismissed the application for judicial review.

2.6 As the complainant was not aware of the 21-day deadline to appeal the decision of the Federal Circuit Court to the Federal Court of Australia, he chose an alternative legal avenue and made a request to the Minister for Immigration and Border Protection to exercise his power to grant a protection visa, which was declined on 19 June 2014.

2.7 Subsequently, the complainant decided to apply for an extension of time to appeal the decision of the Federal Circuit Court, which was partially granted. On 22 October 2015, the complainant's appeal to the Federal Court of Australia was dismissed. He then sought legal advice from his counsel on the likelihood of the High Court of Australia granting him special leave to appeal and was advised that the prospects were poor. The complainant therefore claims that he has exhausted all available domestic remedies.

The complaint

3.1 The complainant claims that his deportation to Sri Lanka would constitute a violation of his rights under article 3 of the Convention. He claims that there are substantial grounds for believing that he would be detained, killed and/or suffer torture or cruel, inhuman or degrading treatment or punishment at the hands of the Sri Lankan authorities. In particular, the complainant alleges that as a young Tamil male from the district of Jaffna, whose parents committed bribery to help him flee the country, he faces a real risk of ill-treatment upon his return. He submits that even though he, personally, has no connection with the Tamil Tigers, his brother's former detention and torture, as a suspected supporter of the Tamil Tigers, suggest that he would also be regarded as affiliated with the Tamil Tigers.

3.2 He further claims that he would be interrogated upon his return and if he admits to having paid a bribe to the Karuna group, he would "face problems" with both the Sri Lankan security forces and the Karuna group. He further submits that he faces a risk of harm as a failed asylum seeker who has lived abroad for at least four years.

State party's observations on admissibility and the merits

4.1 On 2 and 12 June 2016, the State party submitted its observations on the admissibility and merits of the communication. As to the issue of admissibility, the State party argues that the complainant's claim under article 3 is manifestly ill-founded and should therefore be declared inadmissible, pursuant to rule 113 (b) of the Committee's rules of procedure, for lack of sufficient substantiation. The State party also submits that the complainant's claims are without merit, as they have not been supported by evidence that there are substantial grounds for believing that the complainant would be in danger of being tortured, as defined by article 1 of the Convention, upon his return to Sri Lanka. The State party requested the Committee to lift the request for interim measures under rule 114 of its rules of procedure.

4.2 The State party submits that most of the complainant's claims have been thoroughly considered in a series of domestic decision-making processes and have been found not to engage its non-refoulement obligations under the Convention. The State party refers to the Committee's general comment No. 1 (1997) on the implementation of article 3 in the context of article 22 (para. 9),¹ in which the Committee states that as it is not an appellate or quasi-judicial body, it gives considerable weight to findings of fact that are made by the organs of a State party.

4.3 The State party provides thorough information on the decisions adopted by its domestic authorities. With regard to the proceedings before the Department of Immigration and Border Protection, the State party notes that the responsible authority thoroughly considered the complainant's circumstances, including his Tamil ethnicity, his brother's alleged involvement with the Tamil Tigers, the fact that his parents bribed the Karuna group to ensure his release from the refugee camp and his status as a failed asylum seeker. Nevertheless, having also considered the relevant country information, the responsible authority could not accept that the complainant would be of any interest to the authorities in Sri Lanka.

4.4 The complainant's case was then referred to the independent protection assessment reviewer who was to make a recommendation to the Department of Immigration and Border Protection as to whether the complainant was a person to whom the State party owed protection obligations under the Migration Act. The independent protection assessment reviewer did not find it plausible that at the time when the complainant left the refugee camp, he was suspected by the authorities of having any links with the Tamil Tigers. In that respect, the reviewer was of the view that neither the State authorities nor the Karuna group would be concerned about the circumstances of the complainant's departure, including the payment of a bribe, given his low profile and the fact that he left Sri Lanka with his own passport. Accordingly, the reviewer was not satisfied that the State party owed protection obligations, including non-refoulement obligations, to the complainant.

¹ At its sixty-second session, the Committee adopted general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, which has replaced general comment No. 1.

4.5 The State party further notes that the Federal Circuit Court, claiming the lack of error in application of the law, dismissed the complainant's application for a judicial review of the recommendation of the independent protection assessment reviewer. The complainant's claim was further rejected by the Federal Court of Australia and by the Minister for Immigration and Border Protection.

4.6 The State party states that the relevant country information has already been considered under domestic processes and that the newly submitted reports about the ill-treatment of failed asylum seekers and Tamil individuals with suspected connections to the Tamil Tigers do not establish the existence of additional grounds to show that the complainant would be at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

Complainant's comments on the State party's observations

5.1 On 12 August 2016, the complainant commented on the State party's observations. In response to the State party's allegation about the lack of personal harm to the complainant upon his return, he reiterates that he is at personal risk of torture if he were to be forcibly removed to Sri Lanka. He provides the Committee with letters from his mother, sister, brother and an attorney attesting to his statement that he would face personal risk of torture at the hands of the Sri Lankan army upon his return, as happened to his older brother. The complainant further submits that despite his brother's release, the army continues to ask questions of him from time to time, including about the complainant's whereabouts.

5.2 The complainant further reiterates that even though he denied having any connections with the Tamil Tigers, the army did not believe him and he was suspected of having links with them. He further refers to numerous country reports in order to show that persons of Tamil ethnicity continue to be targeted in Sri Lanka.² He reiterates that as a failed asylum seeker he faces a heightened risk of ill-treatment, as the reports show that returnees are subject to ill-treatment by the Sri Lankan authorities.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint on this ground. Accordingly, the Committee considers that it is not precluded by article 22 (5) (b) from examining the present communication.

6.3 The Committee notes the State party's argument that the communication is inadmissible as manifestly unfounded, since the complainant has not provided proof of the existence of substantial grounds for believing that he would face a foreseeable, present, personal and real risk of harm, including 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 his 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.

² For example, Amnesty International, *Amnesty Report 2014/2015. The State of the World's Human Rights*; and Human Rights Watch, *World Report 2015*.

Consideration of the merits

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

7.2 In the present case, the issue before the Committee is whether the return of the complainant to Sri Lanka has violated the State party's obligation under article 3 of the Convention not to expel or return 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. 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.³ 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.⁴ 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.⁵

7.3 The Committee recalls its general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, according to which the Committee will assess "substantial grounds" and consider the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his or her deportation. Indications of personal risk may include, but are not limited to: (a) the complainant's ethnic background; (b) political affiliation or political activities of the complainant or his or her family members; (c) arrest or detention without guarantee of a fair 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). 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).

7.4 In assessing the risk of torture in the present case, the Committee notes the complainant's claim that if he were returned to Sri Lanka, he would face a risk of torture and other kinds of ill-treatment by the Sri Lankan army because of his Tamil ethnicity. The Committee takes note of the complainant's assertion that on one occasion in the refugee camp, the complainant, together with other men, was interrogated by the Sri Lankan army about their possible involvement with the Tamil Tigers. On another occasion, the complainant's brother, who had previously worked in a workshop owned by the Tamil Tigers, was arrested, detained and ill-treated by the army because of his past employment. These circumstances show, according to the complainant, that the Sri Lankan army believes he has been affiliated with the Tamil Tigers and would be again if he were returned to Sri Lanka. The Committee also notes his contention that he escaped from the camp and managed to leave Sri Lanka after his parents arranged for his release by paying a bribe to the Karuna group and he is therefore at risk of harm because of his illegal departure from Sri Lanka and his profile as a failed asylum seeker.

7.5 The Committee notes the State party's submission that the complainant makes his claims on the basis of generalized information from various public reports and refers to

³ See *M.S. v. Denmark* (CAT/C/55/D/571/2013), para. 7.3.

⁴ *Ibid.*

⁵ *Ibid.*

general country information on Sri Lanka, failing to adduce evidence that he would be personally at risk of torture if he were returned. It notes the State party's submission that the complainant's allegations have been thoroughly considered under its national processes but have been found not to engage the State party's non-refoulement obligations under the Convention. Even though the complainant's accounts of the incidents that took place in the refugee camp, including his brother's detention, were accepted as fact, the domestic authorities did not find it plausible that the complainant had been suspected by the authorities of having links with the Tamil Tigers.

7.6 The Committee also 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 of the persistence of abductions, torture and ill-treatment perpetrated by the State security forces, including the military and the police, which had continued in many parts of the country after the conflict with the Tamil Tigers ended in May 2009 (CAT/C/LKA/CO/5, paras. 9–12). It also refers to credible reports by non-governmental organizations⁶ concerning the treatment by the Sri Lankan authorities of individuals returned to Sri Lanka.⁷ However, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that a complainant runs a personal risk of torture.⁸ 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 he is returned to Sri Lanka.⁹

7.7 In the present communication, the Committee observes that the complainant was not recruited by the Tamil Tigers, nor did he receive any substantial military training or participate in fighting against the Sri Lankan army. There is also no evidence of his family's involvement with the Tamil Tigers, except for his brother's past employment in a workshop allegedly owned by them. It is observed in that respect, that even though Sri Lankans of Tamil ethnicity with a prior personal or familial connection to the Tamil Tigers facing forcible return to Sri Lanka may be at risk of torture, in the present case¹⁰ the complainant makes reference to a one-time interrogation at the refugee camp and, contrary to his brother, has never been arrested or ill-treated by the authorities. Furthermore, considering that the complainant's brother was eventually released by the State authorities, it seems that he was able clear himself from the accusation of having links to the Tamil Tigers. The Committee further observes that the fact that the complainant was able to leave Sri Lanka with his own passport without incident also shows the lack of interest of the State authorities in his whereabouts. In addition, he alleges harassment of his family after his departure from Sri Lanka, however, his allegations have only been substantiated by letters written by his relatives and, weighing all the circumstances of the case and the complainant's low profile, they may have been produced for the occasion. Furthermore, the Committee is mindful of the length of time (at least seven years) that has elapsed since the alleged incidents concerned and of the absence of allegations as to whether the complainant has been sought by the Sri Lankan authorities. Finally, the Committee notes that on 19 December 2016, it granted the request of the State party to lift the interim measures. In August 2017, the State party returned the complainant to Sri Lanka.

8. The Committee refers to its general comment No. 4 (2017), according to which the burden of proof is upon the author of the communication, who must present an arguable case (para. 38). In the Committee's opinion, in the present case, the complainant has not discharged that burden of proof. Furthermore, the complainant has not demonstrated that the authorities of the State party failed to conduct a proper assessment of his allegations.

9. The Committee therefore concludes that the complainant has not adduced sufficient grounds to enable it to believe that he would run a real, foreseeable, personal and present risk of being subjected to torture upon his return to Sri Lanka.

⁶ See Freedom from Torture, "Tainted peace: torture in Sri Lanka since May 2009" (August 2015).

⁷ See *J.N. v. Denmark* (CAT/C/57/D/628/2014), para. 7.9.

⁸ See, for example, *R.D. v. Switzerland* (CAT/C/51/D/426/2010), para. 9.2.

⁹ See, for example, *Subakaran R. Thirugnanasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 8.7.

¹⁰ See *J.N. v. Denmark*, para. 7.9.

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