



# 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. 968/2019\*, \*\*

<i>Communication submitted by:</i>	S.K. (represented by counsel, Alison Battisson, of Human Rights for All Pty Ltd)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	14 November 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 15 November 2019 (not issued in document form)
<i>Date of adoption of decision:</i>	22 April 2022
<i>Subject matter:</i>	Deportation to Sri Lanka; risk of torture
<i>Procedural issues:</i>	Exhaustion of domestic remedies; admissibility – manifestly ill-founded
<i>Substantive issue:</i>	Risk to life or risk of torture or other cruel, inhuman or degrading treatment or punishment, if deported to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1 The complainant is S.K., a national of Sri Lanka born in 1991. He claims that, by removing him to Sri Lanka, the State party would breach his rights under article 3 of the Convention. The State party 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 15 November 2019, pursuant to rule 114 (1) of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainant to Sri Lanka while his communication was under consideration by the Committee. On 27 January 2022, the Committee, acting through the same Rapporteur, denied the State party's request of 7 December 2021 to lift the interim measures.

\* Adopted by the Committee at its seventy-third session (19 April–13 May 2022).

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



**Facts as submitted by the complainant**

2.1 The complainant is of Tamil ethnicity and originates from Batticaloa in Eastern Province of Sri Lanka. He arrived in Australia on 2 October 2012 and applied for a protection (Safe Haven Enterprise) visa on 5 July 2017. In his statement of claims, he stated that in 2006 he had been abducted, assaulted and retained by two unknown people for five to six days for unknown reasons. As a result of this event, he has scars on his knees. He was released after his mother addressed the International Committee of the Red Cross (ICRC), which rescued him, took guardianship of him and enrolled him in school. He also stated that, in 2011, he had been abducted, assaulted and detained again for five to six days before escaping through a broken window, following which he stayed with his father for three to four months. When he returned home, his mother informed him that people had come looking for him. He further stated that he had been abducted for a third time on his way home and had been detained for 10 days before ICRC ensured his release. Since his arrival in Australia, his family has informed him that people were looking for him back home. His smuggler has harassed and threatened his mother as she has not paid the smuggler fully for his travel to Australia. Among other documents, the complainant submitted an affidavit from his father concerning his abductions. On 19 March 2018, a delegate of the Minister for Immigration and Border Protection rejected his application on the ground that the claims were vague and internally inconsistent. The delegate was therefore not satisfied that the complainant would be harmed in Sri Lanka.

2.2 Upon review before the Immigration Assessment Authority, the complainant provided an undated letter from the United Nations Children's Fund (UNICEF) stating that he was arrested by unknown persons in 2006 and that UNICEF officers had taken over from these persons and kept him in their custody at their office in Colombo. However, the Immigration Assessment Authority found that there were issues with the reliability of the letter and that it lacked real probative value. The Authority found that he had given inconsistent evidence regarding the number of times he had been abducted, when the first abduction occurred and the organization that had secured his release. It also found that his evidence regarding his abduction and escape through a window were vague, unconvincing, farfetched and implausible. It further found that he had been unable to provide any coherent reason as to why the unknown people had abducted him. Thus, even as the Authority accepted that he would be charged in Sri Lanka because of his illegal departure, it found that he would not be harmed, as he was not otherwise of interest to the Sri Lankan authorities. Thus, it confirmed the delegate's decision.

2.3 On 7 June 2018, the complainant sought judicial review of the decision of the Immigration Assessment Authority before the Federal Circuit Court, without legal representation and with only a minimal command of the English language. On 11 June 2019, the Federal Circuit Court dismissed his application.

2.4 The complainant submits to the Committee a second letter from the UNICEF Office in Sri Lanka, signed by its representative, and dated 13 November 2019. It states that, based on the information available to the Office, the complainant was recruited by the Liberation Tamil Tigers of Eelam (LTTE); that his family members made contemporaneous reports to UNICEF that he was abducted in or around Batticaloa by the Karuna Group, which is affiliated with the Tamil Makkal Viduthalai Pulikal,<sup>1</sup> four times between 2006 and 2008; and that UNICEF officials met his parents on several occasions because of his abduction and were present during his release by the Karuna Group in Batticaloa on one occasion in June 2007.

**Complaint**

3. The complainant submits that he risks being exposed to torture in Sri Lanka. He expects that his removal is imminent, given the number of Tamils returned to Sri Lanka prior to the submission of the communication. While there is no arrest warrant against him, he will likely be charged and detained upon arrival as per official procedure. Given that he is a Tamil accused of assisting LTTE, that he was abducted several times by the Karuna Group and that

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<sup>1</sup> A breakaway faction of LTTE.

people have continued looking for him, he is in a particularly vulnerable situation and will likely be subjected to torture, including rape. The Karuna Group is associated with the incumbent Government of Sri Lanka and has been accused of assisting the army and committing human rights violations following the end of the civil war, including killings and abductions in Eastern Province. The complainant refers to country information concerning the torture of prisoners in prisons in Sri Lanka, the Tamil Makkal Viduthalai Pulikal and the expected consequences of a presidency of Gotabaya Rajapaksa.<sup>2</sup>

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

4.1 On 13 October 2020, the State party provided its observations on the admissibility and merits of the communication. The State party submits that the complainant has not exhausted all available domestic remedies, as he did not appeal the decision of the Immigration Assessment Authority to the Federal Court of Australia.<sup>3</sup>

4.2 The State party also submits that the communication is manifestly unfounded. It argues that the complainant's claims have been thoroughly considered by robust domestic processes under the complementary protection provision contained in paragraph 36 (2) (aa) of the Migration Act 1958, the International Covenant on Civil and Political Rights and the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty. The evidence provided by the complainant, with the exception of the UNICEF letter dated 13 November 2019 and the new country information, was already considered through these processes. The State party notes that the Committee gives considerable weight to findings of fact made by authorities of States parties<sup>4</sup> and requests the Committee to accept that its authorities have thoroughly assessed his claims and concluded that they were not credible and did not engage the State party's non-refoulement obligations. The decision makers took into account that complete accuracy is seldom to be expected of victims of torture and offered him ample opportunity to reflect on his purported problems in Sri Lanka. However, he appeared unable or unwilling to specify these problems in any concrete terms. The State party argues that the new material submitted is incapable of substantiating the communication, as it is not possible to verify the veracity of the information contained in the UNICEF letter and it contains significant differences to the earlier letter purported to be from UNICEF. Furthermore, document fraud is common in Sri Lanka and fraudulent sponsor letters are commonly relied upon.<sup>5</sup> The new country information does not relate to the complainant's personal circumstances and does not counter the findings of the domestic decision makers. The State party submits that, in accordance with article 22 of the Convention and rules 113

<sup>2</sup> [A/HRC/40/52/Add.3](#); [A/HRC/39/45/Add.2](#); International Truth and Justice Project, "Terrorism Investigation Division: Sri Lankan Police", September 2019, available from [https://itjpsl.com/assets/press/ITJP\\_TID\\_report\\_final\\_SINGLES.pdf](https://itjpsl.com/assets/press/ITJP_TID_report_final_SINGLES.pdf); Freedom from Torture, "Too Little Change: Ongoing Torture in Security Operations in Sri Lanka", February 2019; Graeme Swincer for Blue Mountains Refugee Support Group, "Update on the Dangers Facing Tamil Asylum Seekers upon Their Return to Sri Lanka", January 2019; United Kingdom of Great Britain and Northern Ireland, Home Office, "Country Policy and Information Note – Sri Lanka: Tamil Separatism", 8 June 2017; Erin Handley, "Tamils Fear Ongoing Persecution in Sri Lanka as Australia Prepares to Deport Biloela Family", ABC News, 4 September 2019; Kate Cronin-Furman, "Are Sri Lankan Officers Ordering Soldiers to Sexually Assault Tamil Detainees?", *Washington Post*, 16 November 2017; Canada, Immigration and Refugee Board, "Sri Lanka: The Tamil Makkal Viduthalai Pulikal (TMVP) and Karuna Factions: Their Relationship with Each Other; Reports concerning Their Treatment of Sinhalese and Tamil Citizens; Whether They Are Still Active As Paramilitary Groups", 17 February 2012; Sri Lanka Mirror, "Pillayan Gets 36 Seats at Mini Polls", 15 February 2018, available from <https://srilankamirror.com/news/7230-pillayan-gets-36-seats-at-mini-polls>; Brahma Chellaney, "The End of Sri Lankan Democracy?", Project Syndicate, 17 October 2019; and Ana Pararajasingham, "The Internal and International Dimensions of Sri Lanka's Presidential Elections", *The Diplomat*, 23 October 2019.

<sup>3</sup> The State party refers to *P.A.C. v. Australia* (CAT/C/34/D/211/2002), para. 6.2.

<sup>4</sup> General comment No. 4 (2017), para. 50.

<sup>5</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report: Sri Lanka", 4 November 2019, available from <https://www.ecoi.net/en/file/local/2019380/country-information-report-sri-lanka.pdf>.

and 118 of its rules of procedure, the Committee is required to expressly consider and respond to the State party's arguments on admissibility.

4.3 The State party further submits that the communication is without merit. According to the State party, the complainant arrived in Australia on 23 April 2013. On 8 January 2015, the Minister for Immigration and Border Protection intervened to allow him to lodge an application for a protection visa. The Minister's delegate subsequently issued a decision on the complainant's application, rejecting his claims in their totality because of significant discrepancies between his statement of claims, where he mentioned three abductions, and his interview, where he mentioned only two. Furthermore, the complainant was unable to recall or did not provide precise details regarding the abductions, including with regard to the dates, the assailants, the assailants' intent or rationale, the struggles he faced in detention, the manner in which he escaped or secured release, and the reasons he would be harmed on his return. Moreover, the limited information provided reinforced the complainant's lack of credibility and increased the improbability that he experienced the harm alleged. In addition, the complainant's father and brothers had travelled from Sri Lanka lawfully without being targeted. The delegate also dismissed his alleged risk of harm upon arrival in Sri Lanka on account of being a returning failed Tamil asylum seeker who had departed the country illegally. In this regard, the delegate considered country information according to which returning Tamils have been detained on arrival because of actual or suspected links to LTTE. The delegate concluded that the complainant is not a refugee within the meaning of the Migration Act and that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to Sri Lanka, there was a real chance that he would suffer significant harm, even if he were held for a short period in detention on account of his illegal departure.

4.4 The State party observes that these conclusions were confirmed by the Immigration Assessment Authority, which found issues with the reliability of the initial UNICEF letter presented by the complainant, particularly the lack of a letterhead and signature and its appearance of replicating the information in the affidavit provided by the complainant's father. Therefore, the Immigration Assessment Authority was not satisfied that the letter had any real probative value. The Authority found that the complainant's evidence of his abductions by unknown persons was vague, inconsistent and unconvincing, including in relation to the number of abductions and the circumstances of his escape or release. It found that his claims were contrived and provided to enhance his claim for protection. It did not accept that he had been abducted by unknown people and that he had been unable to provide a coherent explanation as to the reasons for these abductions. In particular, neither he nor any of his family members had been involved with LTTE or any political activities and nothing suggested that he was of interest to the Sri Lankan authorities or any other groups or individuals for any other reason. Furthermore, the complainant provided insufficient medical evidence to satisfy the Authority of his alleged mental health issues and the origins of the scars on his knees. The Authority did not accept that unknown people had enquired about his whereabouts. The Authority accepted that the smuggler who had arranged the complainant's travel to Australia had harassed and threatened his mother, but found that he had not claimed that he would be harmed upon return due to his mother's outstanding debt. It found that even though the complainant is a monolingual Tamil, he and his family had no links or involvement with LTTE and was not satisfied that a 27-year-old Tamil male would be profiled as supportive of LTTE or opposed to the Government. Likewise, it was not satisfied that he faced a real chance of any harm as a Tamil asylum seeker from Eastern Province who had departed illegally and was returning from Australia, given the lack of a credible basis for his assertion that the authorities had searched for him, the absence of any arrest warrants or any indication that he would be treated as anything other than a passenger on the people-smuggling vessel, and as the Sri Lankan Immigration and Emigration Act is of general application and is not discriminatory. The Authority therefore confirmed the delegate's decision.

4.5 The State party observes that the Federal Circuit Court concluded that the complainant was unable, before it, to establish that the decision of the Immigration Assessment Authority was affected by jurisdictional error, and dismissed his application.

4.6 According to the State party, the variations in the complainant's claims, including with respect to the UNICEF letter dated 13 November 2019, reinforce the findings of its decision makers. The allegation that he was recruited by LTTE is entirely new, despite the ample opportunity he had to raise it throughout the domestic processes. The delay of six years in putting forward this claim raises significant questions for the State party regarding its veracity. The allegation that the complainant was abducted by the Karuna Group four times between 2006 and 2008 is inconsistent with his previous claims of having been abducted three times by unknown persons, two of those times in 2011. The claim in the letter that UNICEF rescued him from being abducted is inconsistent with his prior claims that ICRC had secured his release. Finally, the complainant has not explained the significant differences between the purported UNICEF letter provided to the Committee and that provided to the Immigration Assessment Authority or why it could not have been provided earlier. Moreover, even if the Committee accepts the complainant's links to LTTE, contemporary information confirms that those with indirect and past connections with LTTE, unless at a very high level of the organization or through their involvement in criminal acts or war crimes, are not likely to face adverse consequences or harm on the basis of those past connections.<sup>6</sup> The State party argues there is no evidence that the complainant was involved at a high level of LTTE or in criminal acts or war crimes.

4.7 The State party argues that it was open to the complainant to submit to its domestic decision makers the country information invoked in the communication published prior to the domestic decisions. The State party also argues that the information does not clarify his personal risk in Sri Lanka. Furthermore, the decision makers considered country information from a variety of sources and there has been no significant change in this regard since the domestic assessments. The State party reiterates that the complainant is not wanted by the Sri Lankan authorities for any crime and does not have a profile that would warrant their attention.

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

5.1 In his comments dated 14 February 2021, the complainant contests that he failed to exhaust domestic remedies. He argues that the Federal Court of Australia cannot review the merits or new evidence, such as the UNICEF letter of 13 November 2019, which is material to determinative issues in his case and which he was only able to obtain after the rejection of his application for a protection visa. Such proceedings are therefore unlikely to bring effective relief. He refers to the Committee's views according to which "it is not a requirement to exhaust alternative legal avenues that would be directed essentially to the same end".<sup>7</sup> Moreover, they would be costly and result in an unreasonable delay in rendering a final decision in his case.

5.2 The complainant disputes that his communication is manifestly unfounded. He reiterates that his affiliation with LTTE, his history of detention and torture and indications that he is wanted by unknown persons render it highly likely that he would be charged and detained upon arrival in Sri Lanka and subjected to torture, including rape. Even if issues are found with his evidence, the communication is sufficiently substantiated for the purpose of admissibility.<sup>8</sup> He argues that the delegate of the Minister for Immigration and Border Protection and the Immigration Assessment Authority placed too much weight on the inconsistencies in his account and failed to consider the impact of trauma on his recollection of the abductions, among other things. Moreover, he was 21 years old at the time of the interview, did not speak English, was unrepresented and unfamiliar with the Australian judicial system and was required to recollect highly traumatic experiences. This impaired his ability to respond to the questions and rendered it unreasonable to expect him to know that he needed to raise all of his claims and provide all his evidence to the delegate. Furthermore, any inconsistencies are not significant, given the lapse of time between the events and the interview. Additionally, whereas the State party deemed the information provided to be limited, he left Sri Lanka fearing for his life and it was therefore not possible for him to gather

<sup>6</sup> See Australia, Country of Origin Information Service Section, "Sri Lanka – Common Claims – April 2020", 23 April 2020.

<sup>7</sup> *Osmani v. Serbia* (CAT/C/42/D/261/2005), para. 7.1.

<sup>8</sup> The complainant refers to *V.M. v. Australia* (CAT/C/67/D/723/2015).

further evidence. He argues that it is irrelevant that his father and brothers have left the country without being singled out, as they have not been abducted by LTTE or accused of assisting them.

5.3 The complainant provides a copy of an email from the UNICEF office in Sri Lanka to his counsel accompanying the letter dated 13 November 2019 to confirm its validity. He argues that the delay in producing the letter is attributable to the fact that his representatives at the time did not request UNICEF to provide relevant evidence and to the time it took for the UNICEF office in Sri Lanka to locate his file. Once UNICEF was contacted by the complainant's current counsel, it promptly provided the letter. Additionally, as the Immigration Assessment Authority did not grant him an interview, which affected the procedural fairness of his case, he could not have been expected to present the letter to the delegate, the Immigration Assessment Authority or the Federal Circuit Court. Moreover, any reticence by the author in relation to his involvement with LTTE is because of his fear of being associated with the group and of retaliation in Sri Lanka.

### **State party's additional observations**

6.1 In its additional observations dated 17 June 2021, the State party argues that financial concerns cannot negate the requirements under article 22 (5) (b) of the Convention<sup>9</sup> and that nothing indicates that an appeal to the Federal Court of Australia would generate an unreasonably prolonged delay. The State party submits that the purpose of its appeal courts is to consider whether decision makers have made a legally correct decision. Thus, the Federal Court of Australia does not consider evidence not presented at first instance, unless it grants leave to present such evidence. The State party affirms that the Court's abstention from examining new evidence is not prejudicial to the complainant and that mere doubts about the effectiveness of a remedy do not excuse a failure to exhaust it. The State party contests the complainant's reference to the Committee's views in *Osmani v. Serbia*, where the Committee held that the complainant had successfully exhausted one remedy. The State party maintains that this is not the case in the present communication.

6.2 The State party reiterates that the communication is insufficiently substantiated and disputes the complainant's reference to *V.M. v. Australia*. In that case, the Committee found that the complainant had sufficiently detailed the facts and the basis of the claim.

6.3 The State party reiterates that the UNICEF letter dated 13 November 2019 demonstrates the variations in the complainant's claims over time. The confirmation of the provenance of the letter from UNICEF does not address the credibility issues inherent in the claims made therein, and it is not clear whether these are based on the complainant's self-reporting or whether they are corroborated by any evidence. Together with the uncertainty surrounding the origins of the document, the delay in its provision and the lack of evidence around the purported events, these discrepancies reinforce the lack of credibility of the complainant's claims.

6.4 The State party rejects the complainant's claims of a lack of procedural fairness. It observes that he was provided with interpreters in the proceedings before the delegate of the Minister for Immigration and Border Protection and the Federal Circuit Court. It argues that the Australian decision makers are required by law to provide applicants with procedural fairness and that the State party is obliged in all court proceedings to act as a model litigant.

### **Additional submissions by the parties**

#### *By the complainant*

7.1 In his additional comments of 30 June 2021, the complainant notes that, in its judgment of 23 June 2021 in *Commonwealth of Australia v. AJL20*, the High Court of Australia confirmed the lack of a remedy to challenge immigration detention. If the complainant were to be detained again, he would thus have to seek mandamus to force the authorities to release him.

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<sup>9</sup> The State party refers to *S.H. v. Norway* (CAT/C/23/D/121/1998).



7.2 The complainant notes that in *KK and RS v. the Secretary of State for the Home Department*,<sup>10</sup> the Upper Tribunal of the Immigration and Asylum Chamber of the United Kingdom of Great Britain and Northern Ireland refused to rely on a report issued in 2019 by the Department of Foreign Affairs and Trade of Australia, as sources were not referenced and information was found to be unreliable. Instead, the Upper Tribunal found that Tamils face persecution in Sri Lanka.<sup>11</sup> The report in question was an updated version of the one used to deny the complainant's refugee status.

*By the State party*

8.1 In its additional observations of 7 December 2021, the State party argues that the complainant's claim based on the decision of the High Court of Australia in *Commonwealth of Australia v. AIL20* is inadmissible *ratione materiae*, as it does not relate to an allegation of torture in Sri Lanka. Furthermore, that decision does not alter the availability of judicial review of the lawfulness of detention or the State party's assessment of its non-refoulement obligations.

8.2 The State party argues that the Upper Tribunal of the of the Immigration and Asylum Chamber of the United Kingdom did not reject the country information report of the Australian Department of Foreign Affairs and Trade. Instead, the Upper Tribunal relied on it in several places and placed "appropriate weight" on it. The State party observes that country information reports of the Department of Foreign Affairs and Trade do not bind decision makers and do not contain policy guidance. It reiterates that the complainant has not shown that he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

*By the complainant*

9.1 In his additional comments of 14 December 2021, the complainant notes that Ministerial Direction No. 84 of 24 June 2019 stipulates that decision makers must consider reports of the Department of Foreign Affairs and Trade in the consideration of protection visa applications.

9.2 The complainant argues that the State party appears to allege that an official letter from a UNICEF representative obtained by his counsel is a fraud. He argues that this is disingenuous, insulting and defamatory. He notes that the letter states that "family members made contemporaneous reports to UNICEF" about his abductions and that UNICEF officials met his parents on several occasions due to his abductions and were present when he was released by the Karuna Group in Batticaloa in June 2007. He argues that these elements are sufficient to verify the letter's veracity and that the State party has not put forward any reasons why his parents would invent his abduction. He also argues that the letter dated 13 November 2019 is not inconsistent with the earlier, undated letter, which was concerned only with his first abduction in December 2006 and release to UNICEF in February 2007. However, the complainant relies on the letter dated 13 November 2019, which, he claims, takes precedence over the earlier letter without date, letterhead or signature.

9.3 The complainant refers to information on the torture of Tamil prisoners in Sri Lankan prisons and on the presidency of Gotabaya Rajapaksa.<sup>12</sup>

<sup>10</sup> Decision of 27 May 2021.

<sup>11</sup> The complainant refers to the following press release: <https://asrc.org.au/2021/06/03/joint-media-release-human-rights-groups-demand-suspension-of-reports-on-sri-lanka-to-assess-refugee-applications-following-rejection-by-a-uk-court/>.

<sup>12</sup> Amnesty International, "Sri Lanka: Minister Accused of Holding Tamil Prisoners at Gunpoint Must Face Investigation", 15 September 2021; Meenaskshi Ganguly "Sri Lankan Minister Threatens Prisoners at Gunpoint: Incidents Highlight Abusive Prevention of Terrorism Act", Human Rights Watch, 15 September 2021; South Asia Monitor, "Detainees Tortured in Sri Lankan Prison, Says Report; Colombo Denies", 11 September 2021; Human Rights Commission of Sri Lanka, "Prison Study", December 2020, available from <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf>; Ambika Satkunanathan, "Living in Hell: The Plight of Prisoners Held under the PTA", Groundviews, 27 January 2021; N. Rangesh, "Human Rights Study Exposes Brutal Conditions in Sri Lankan Prisons", World Socialist Website, 26 January 2021; Human Rights Watch, "Open

*By the State party*

10. In its additional observations of 25 March 2022, the State party observes that all relevant considerations should be taken into account when determining whether article 3 (1) of the Convention is engaged, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. However, additional grounds must exist to show that the individual concerned would be personally at risk.<sup>13</sup> The State party submits that the reports that the complainant invokes concerning the situation in Sri Lanka do not indicate that he would be personally at risk of harm amounting to torture.

*By the complainant*

11. In his additional comments of 5 April 2022, the complainant argues that he has already established 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 complainant reiterates his previous submissions in this regard. He notes that the State party has not responded to his arguments in his comments of 14 December 2021 according to which the UNICEF letter of 13 November 2019 constitutes sufficient and pertinent documentary evidence of his protection claims.

**Issues and proceedings before the Committee***Consideration of admissibility*

12.1 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.

12.2 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 the State party's submission that the complainant has not exhausted all available domestic remedies, as he did not appeal the decision of the Federal Circuit Court to the Federal Court of Australia. It also notes, however, that the State party has not specified whether such an appeal would have suspended the complainant's removal from Australia for the duration of the proceedings. The Committee recalls its earlier decisions according to which, for a domestic remedy to be effective in the context of a communication invoking article 3 of the Convention, it should suspend the complainant's removal.<sup>14</sup> In the absence of information in this regard, the Committee is unable to ascertain that an appeal to the Federal Court of Australia would have constituted an effective remedy for the complainant. Therefore, the Committee cannot conclude that the complainant's non-use of this remedy precludes it from examining the communication under article 22 (5) (b) of the Convention.

12.3 However, the Committee notes that the complainant did not present the UNICEF letter dated 13 November 2019 before the national authorities, nor did he claim that he was recruited by LTTE in the context of domestic proceedings. The Committee recalls its views according to which the State party must have the opportunity to examine new evidence covered by article 3 of the Convention before it is considered by the Committee as a communication under article 22 of the Convention.<sup>15</sup> However, while the Committee notes the complainant's justification for the delay in the production of the letter, the complainant's arguments do not appear to explain the gap of 11 years between the date of the letter and the events invoked in it. The Committee also notes that the complainant has not provided any

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Wounds and Mounting Dangers: Blocking Accountability for Grave Abuses in Sri Lanka", 1 February 2021.

<sup>13</sup> *G.R.B. v. Sweden* (CAT/C/20/D/083/1997), para. 6.3.

<sup>14</sup> *Dar v. Norway* (CAT/C/38/D/249/2004), para. 6.5; *T.I. v. Canada* (CAT/C/45/D/333/2007), para. 6.3; and *S.A.C. v. Monaco* (CAT/C/49/D/346/2008), para. 7.2.

<sup>15</sup> *A.E. v. Switzerland* (CAT/C/14/D/24/1995), para. 4; and *F.M.-M. v. Switzerland* (CAT/C/46/D/399/2009), para. 6.5.



information to show that any failure by his representatives to request the letter is attributable to the State party.<sup>16</sup> It further notes the complainant's stated fear of being associated with LTTE and of retaliation in Sri Lanka, but finds that this statement, by itself, does not mean that domestic remedies in Australia for raising a claim of being involved with LTTE would be unreasonably prolonged or unlikely to bring effective relief. In light of the above, the Committee concludes that it is not precluded by article 22 (5) (b) from examining the communication, except insofar as the UNICEF letter dated 13 November 2019 and the claim of recruitment by LTTE are concerned.

12.4 The Committee notes the State party's submission that the communication is manifestly unfounded, as its authorities thoroughly considered the evidence presented in the communication, with the exception of the UNICEF letter dated 13 November 2019 and the new country information. It also notes the State party's observation that the complainant appeared unable or unwilling to specify concretely his purported problems in Sri Lanka, which led the decision makers to conclude that his claims lacked credibility. In this regard, the Committee notes the complainant's arguments that his ability to answer questions at the interview was impaired and that it was unreasonable to expect him to know that he must raise all of his claims and provide all his evidence, given the impact of his trauma on his recollections; the fact that he was 21 years old at the interview, did not speak English, was unrepresented and unfamiliar with the Australian judicial system; the lapse of time between the events and the interview; and his inability to gather more evidence during his flight.

12.5 The Committee recalls that it is for the courts of the States parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the manner in which such facts and evidence were evaluated was clearly arbitrary or amounted to a denial of justice.<sup>17</sup> In the present case, the Committee notes that the State party's authorities found significant discrepancies and lack of detail in material elements of the complainant's account of his abductions, including with regard to the number and dates of the abductions, the assailants, the assailants' intent or rationale for the abductions, the struggles the complainant faced in detention, the manner in which he escaped or secured release, and the reasons why he would be harmed on his return. The Committee also notes that the State party's authorities found no basis for the complainant's assertion that Sri Lankan authorities had searched for him and that no arrest warrant had been issued in his respect. The Committee further notes that a review of the documentation on file shows that the Immigration Assessment Authority considered that the complainant had provided insufficient evidence to substantiate the existence of his mental health issues. The Committee notes that the complainant has not argued that this conclusion was arbitrary or manifestly unreasonable or why the Committee should come to a different appreciation of the alleged impact of his mental state on his memory. The Committee further notes that the complainant was assisted by interpreters and that his reference to representatives (see para. 5.3 above) renders the extent to which he was unrepresented unclear. The Committee notes, moreover, that the complainant's reference to his age at the time of the interview, his lack of familiarity with the Australian judicial system, the lapse of time, the impossibility of gathering more evidence due to his flight and the updated country information are not of a nature to permit the conclusion that the assessment of the State party's decision makers was clearly arbitrary or amounted to a denial of justice. Therefore, the Committee finds that the communication does not establish that the domestic evaluation of the facts and evidence concerning the complainant's alleged risk of treatment contrary to the Convention upon return to Sri Lanka suffered from any such defects.

12.6 The Committee recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must not be manifestly unfounded. In light of the above, and in the absence of any further relevant information, the Committee concludes that the complainant has failed to substantiate his claims sufficiently for the purpose of admissibility.

<sup>16</sup> *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4; and *H.E.M. v. Canada* (CAT/C/46/D/395/2009), para. 6.4.

<sup>17</sup> *G.K. v. Switzerland* (CAT/C/30/D/219/2002), para. 6.12; *Z.S. v. Georgia* (CAT/C/69/DR/915/2019), para. 7.4.

13. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 of the Convention and rule 113 (b) of its rules of procedure;

(b) That this decision shall be communicated to the complainant and to the State party.

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