



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General  
5 July 2017

Original: English

## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 623/2014\*, \*\*

<i>Communication submitted by:</i>	N.K. (represented by counsel, R. Nandoe)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	The Netherlands
<i>Date of complaint:</i>	14 August 2014 (initial submission)
<i>Date of present decision:</i>	1 May 2017
<i>Subject matters:</i>	Non-refoulement; prevention of torture
<i>Substantive issue:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Lack of substantiation
<i>Articles of the Convention:</i>	3 and 22

#### Background

1.1 The complainant is N.K., a national of Sri Lanka of Tamil origin born in 1992 in Sri Lanka, who sought asylum in the Netherlands. His application was rejected and he risks deportation to Sri Lanka. He claims that his deportation would put him at risk of torture by Sri Lankan authorities and would constitute a violation by the Netherlands of article 3 of the Convention.

1.2 On 21 August 2014, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant while the complaint was being considered.

#### Facts as presented by the complainant

2.1 The complainant was born in Point Pedro, Sri Lanka, in 1992. In 1995, his parents fled from Point Pedro, an area controlled by the Sri Lankan army, to an area in Puthukkudiyiruppu controlled by the Liberation Tigers of Tamil Eelam (LTTE). In 2008, under pressure in school, he signed a written consent to join LTTE. The same year, he was forcibly conscripted, passed the LTTE military training and participated in a fight against the Sri Lankan army. LTTE took his photograph for a registration card and took pictures of him during the military training. He escaped from LTTE on 15 January 2009. His uncle helped him to get to Colombo and to leave the country with a falsified passport.

\* Decision adopted by the Committee at its sixtieth session (18 April-12 May 2017).

\*\* The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.



2.2 On 9 March 2009, the complainant arrived in the Netherlands.

2.3 On 28 November 2011, a family friend notified the complainant that his parents had died during the last phase of the civil war, and that the army was looking for former LTTE members and had asked several people about the complainant's whereabouts. On 30 March 2012, a handwritten letter was sent to his former address in Puthukkudiyiruppu by the commanding officer of the army camp in Paranthan, requesting the complainant to present himself and informing him that the army discovered that he had participated in military training during the war. The letter was sent to the complainant by a neighbour.

2.4 While in the Netherlands, the complainant joined a Tamil sports club and participated in LTTE-organized sports events for several years, including matches commemorating LTTE Heroes' Day. Photographs of himself taken in September 2013 on Heroes' Day show him placing a candle next to a photograph of an LTTE fighter during a commemoration ceremony, wearing medals which he received from LTTE, with the LTTE flag in the background. The pictures were posted on Facebook in October 2013.

2.5 Between 11 March 2009 and July 2014, the complainant applied for asylum four times. He claimed that he would be at risk of torture by the Sri Lankan authorities upon return because he was a young Tamil male from the north of Sri Lanka who had links with LTTE and a family member connected to LTTE who is being forcibly returned from a foreign country considered to be a centre of LTTE fundraising activities, and he is a failed asylum seeker who has visible scars and does not possess an identity card. He claims that the authorities could identify him from the pictures on Facebook and establish that he participated in LTTE events in the Netherlands. Each of his asylum requests was denied by the Immigration and Naturalization Service, and by the courts and the Council of State upon appeal. The Immigration and Naturalization Service and the appeal courts came to the conclusion that there were no indications to believe that the Sri Lankan authorities knew about the complainant's involvement with LTTE or that he would attract the attention of the authorities upon his removal to Sri Lanka.

2.6 According to a statement from a youth health centre in the Netherlands dated 28 March 2011, the complainant was suffering from depression and sleeplessness and had suicidal thoughts.

### **The complaint**

3. Referring to numerous reports concerning the risk of torture for returning Tamils,<sup>1</sup> the complainant claims that if returned to Sri Lanka, being a suspected LTTE supporter, he will be detained and tortured by the Sri Lankan authorities. He claims to belong to the group of persons who are at risk of torture by the Sri Lankan authorities upon return because he is a young male Tamil from the north of Sri Lanka; a former member of LTTE who received LTTE military training and participated in engagements against the army; had a relative in LTTE who was killed in the fighting; has visible facial scars; left Sri Lanka illegally and would return with no national identify card on an emergency passport from a country where funds were raised for LTTE; has participated in LTTE activities abroad; and applied for asylum. On the basis of the foregoing, the complainant claims that the State party will violate article 3 of the Convention should he be removed to Sri Lanka.

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

4.1 On 2 March 2015, the State party submitted its observations on admissibility and the merits. After explaining the legislation and procedures applicable to the complainant's case, as well as the country situation in Sri Lanka, the State party submits that the complainant has not established satisfactorily that he would be at risk of treatment contrary to article 3 of the Convention if returned to Sri Lanka. The risk factors cited by the complainant,

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<sup>1</sup> The complainant refers, among others, to Human Rights Watch reports dated 24 February 2012 and 7 August 2012; Tamils against Genocide reports dated May and 16 September 2012 and 13 March 2013 and an article dated 26 February 2013; a Freedom from Torture report dated 13 September 2012; and information from the Dutch Refugee Council obtained on 23 March 2014 via email.

viewed individually and combined, have not demonstrated that he has ever been of interest to the Sri Lankan authorities, in the past or at present.

4.2 Citing the judgment of the European Court of Human Rights in *N.A. v. United Kingdom*<sup>2</sup> and the decision of the Upper Tribunal of the United Kingdom of Great Britain and Northern Ireland in *G.J. and others*,<sup>3</sup> and on the basis of his claims, the State party assesses that there is no real risk that the complainant would be perceived to have a significant role in diaspora activities designed to destabilize the unitary Sri Lankan State and revive the internal armed conflict.

4.3 The State party considers that the complainant has not established satisfactorily that the Sri Lankan authorities were aware of his participation in LTTE. The State party does not accept as evidence the letter from the commanding officer summoning the complainant to report to the army camp; the State party's Royal Military and Border Police was unable to establish whether the letter in question was genuine. The State party also points out that the letter was handwritten and sent to the complainant more than three years after his departure from Sri Lanka, and notes that it is possible in Sri Lanka to purchase forged documents, stamps, stickers and forms.<sup>4</sup> Even if the Government has learned or would learn that the complainant was a member of LTTE, this is not a sufficient reason to assume that he will be viewed as a Tamil activist and a present risk to the State, given his insignificant role in LTTE, his escape and his forced stay with LTTE as a minor.

4.4 The State party notes that only in his last asylum application in 2014 did the complainant provide information about the death in 2006 of his cousin, who was an LTTE member. The State party found it implausible that the complainant did not know about the death of his cousin, having been in communication with his uncle. The complainant has not provided information on the position of his cousin within LTTE, or on whether he or members of his family have ever had problems in connection with his cousin's activities during or after the conflict. Therefore, the State party cannot conclude that the complainant would be at risk upon return to Sri Lanka for this reason.

4.5 The State party observes that the complainant has not shown that the Sri Lankan authorities know about the Facebook pictures taken during the LTTE sports activities and commemoration of Heroes' Day. It is doubtful that the Sri Lankan authorities could link untagged pictures of the complainant participating in a football tournament on "Martyrs' Day" with the complainant. However, even if they could establish his identity on that basis, the activities in question are too marginal for him to be considered to be an activist.

4.6 The State party submits that the complainant did not mention his scars until his third asylum application and did not explain why he had not mentioned them earlier, nor did he state that the scars were a result of torture. As there is no indication that the complainant has attracted the adverse attention of the Sri Lankan authorities, there is also no reason to conclude that he will attract such attention merely because of his scars.

4.7 Regarding the complainant's claim that without an identity card and with an emergency passport he would be detained in the airport and the authorities will find out that he applied for asylum, the State party submits that the Sri Lankan authorities are aware that many people emigrate for economic reasons. The State party also submits that every year the number of Tamil asylum seekers forcibly returned to Sri Lanka varies from a few to more than a thousand.<sup>5</sup> While it is acknowledged that some returnees have become victims of treatment contrary to the Convention, this does not necessarily lead to the conclusion that every returnee faces such a risk.

<sup>2</sup> Application No. 25904/07, judgment of 17 July 2008.

<sup>3</sup> United Kingdom, Upper Tribunal (Immigration and Asylum Chamber), *G.J. and others v. Secretary of State for the Home Department*, decision adopted on 5 July 2013.

<sup>4</sup> See [www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2014/10/02/sri-lanka-2014-10-2.html](http://www.rijksoverheid.nl/documenten-en-publicaties/ambtsberichten/2014/10/02/sri-lanka-2014-10-2.html).

<sup>5</sup> Reference is made to The Migration Observatory, "Deportations, removals and voluntary departures from the United Kingdom", 23 June 2014.

4.8 In the light of these considerations, the State party concludes that the complainant's claims are insufficiently substantiated and that he will not be subjected to treatment contrary to article 3 of the Convention upon his return to Sri Lanka.

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

5.1 On 4 September 2015, the complainant submitted his comments on the State party's observations. He claims that under the domestic procedure (section 4:6 of the Federal Administrative Law Act) successive applications for asylum are possible only when new facts or information appears which did not exist at the time of the first application. Therefore, it is very difficult for asylum seekers to have new evidence examined in subsequent asylum applications.

5.2 He states that at his second asylum procedure he submitted the original letter by the commanding officer and that its authenticity should have been examined by the Embassy of the Netherlands in Colombo. As for the State party's doubts as to why he was contacted three years after leaving the country, the complainant stated in his letter to the Council of State dated 19 September 2012 that the letter of the commanding officer was issued in accordance with the policy of the Sri Lankan Government at that time to search and persecute young Tamils in particular on suspicion of LTTE involvement. He also states that he has submitted many documents and supporting material to prove that the authorities were looking for him, including a letter dated 28 November 2011 from a friend in Sri Lanka, the death certificate of his cousin and the autopsy report and his picture with other LTTE members taken in Sri Lanka, and that he was involved in LTTE activities abroad, in support of which he has submitted photographs and medals from the LTTE-supported sports events in the Netherlands.

5.3 Concerning the participation of his cousin in LTTE and his death, the complainant states that he did not know about the death because the two families lived in different areas, one controlled by the army and the other by LTTE, and had no means of communicating during the conflict. He states that the position of his cousin in LTTE is irrelevant; it is sufficient that he was an LTTE combatant, which in itself is enough to make the Sri Lankan authorities suspicious. He also states that according to the reports submitted to the State party, Tamils from the north and the east who have had any link to LTTE risk arrest, detention and torture upon return.

5.4 The complainant states that although he was not identified in the Facebook pictures, his face was distinguishable, and since the Sri Lankan authorities would receive information in advance about his arrival from the Embassy of the Netherlands, he would be identified by the photograph in his temporary passport. He states that the reports submitted by him to the State party authorities indicate that the Sri Lankan Government closely monitors all protests and other political activities abroad. His participation in the sports activities, in combination with other factors indicated by him, would be enough for the authorities to suspect him of LTTE involvement abroad.

5.5 The complainant claims it is irrelevant that he mentioned his scars only during the third asylum procedure, and that they are not a result of torture. They are, however, a risk factor, and Sri Lankan authorities will treat them as an indicator of LTTE involvement.

5.6 Concerning the lack of an identity card, the complainant states that people who leave Sri Lanka are branded "unpatriotic". This seems to be one reason why returning asylum seekers are viewed negatively, sometimes treated like traitors and seen as a potential threat.

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

6.1 On 25 November 2015, the complainant informed the Committee that the High Administrative Court had rejected his request for access to the asylum-seeker benefits (shelter, livelihood assistance and health-care insurance) available to people awaiting the outcome of proceedings in connection with their applications for asylum or a residence permit, or on the basis of a court decision. Such access is granted to people whose request for interim measures is granted by the European Court of Human Rights. In the complainant's case, the State party's authorities found that the Committee's request for

interim measures is not equivalent to a court order. The complainant argues that denial of access to asylum-seeker benefits in his case is equivalent to failure by the State party to comply in good faith with article 22 of the Convention by differentiating the treatment of asylum seekers. Currently, the complainant has to depend on assistance from his friends.

6.2 On 10 November 2015, the complainant was taken by ambulance to a hospital having swallowed 14 miratazapine tablets and 2 Panadols, allegedly because he was due to be discharged from the reception centre.

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

7.1 On 25 January 2016, the State party submitted additional observations and reiterated its previous position. With reference to section 4:6 of the Federal Administrative Law Act, the State party explains that this provision aims at preventing repeated applications and ensuring decision-making within a reasonable time. If a new asylum application is submitted after the previous one has been rejected on the merits, section 4:6 compels the asylum seeker to present new facts or altered circumstances, which will be examined in the light of the previous application. Asylum seekers have ample opportunity to present all the information and relevant documents in their first application or, if they do not have the documents, to inform the authorities about their existence. They can also present relevant facts, with certain restrictions, to the courts at the appeal stage. There are also sufficient due diligence safeguards and legal remedies available to ensure that the subsequent asylum applications are duly considered through an interview and appeal process.

7.2 The State party refers to the judgments of the European Court of Human Rights in which the Court established that the Sri Lankan authorities are interested in high-profile members of LTTE or other separatist groups who pose a threat to the unity of the Sri Lankan State through their separatist work in the diaspora.<sup>6</sup> The State party notes that this does not apply to the complainant, who does not have any special profile with respect to LTTE or family members with important roles within LTTE, and who has never encountered any problems with the Sri Lankan authorities.

7.3 As to the complainant's request for shelter, the State party submits that it falls outside the scope of the Committee's competence, since the Convention has no provision guaranteeing the right to shelter for asylum seekers. It would be going too far to deduce the right to shelter from the Committee's request not to return the complainant to Sri Lanka. The complainant complained under article 3 of the Convention in order to prevent irreparable harm from occurring should he be returned to Sri Lanka, and the State party complied with the Committee's request for interim measures. It is thus complying in good faith with article 22 of the Convention. Providing shelter is not an obligation in that respect.

7.4 The State party also submits that neither the documents submitted by the complainant nor any other evidence indicate that the manner in which the State party is complying with the interim measures request has resulted in the complainant being denied access to medical care, necessary or otherwise.

#### **Additional comments by the complainant**

8.1 On 24 February 2016, the complainant provided additional comments. He refers to a report of the International Truth and Justice Project Sri Lanka,<sup>7</sup> in which the organization states that it is not safe to return to Sri Lanka for Tamils who had any connection with LTTE, even low-level cadres. It states that the Sri Lankan intelligence service takes pictures at LTTE events abroad and then shows them to detainees, to show them that attending such events is a risk for Tamils returning to Sri Lanka.

8.2 Regarding the application of section 4:6 of the Federal Administrative Law Act, the complainant states that his Facebook pictures were not accepted during the third asylum

<sup>6</sup> Reference is made to European Court of Human Rights, *N.A. v. United Kingdom* (application No. 25904/07), judgment of 17 July 2008; *T.N. v. Denmark* (application No. 20594/08), judgment of 20 January 2011; and *E.G. v. United Kingdom* (application No. 41178/08) judgment of 31 March 2011.

<sup>7</sup> *Silenced: Survivors of Torture and Sexual Violence in 2015*, January 2016, available from <http://www.itjpsl.com/assets/Silenced-jan-2016.pdf>.

procedure because they were not dated, but during the fourth procedure, when he submitted evidence that the pictures were dated September/October 2013, they were not accepted either.

8.3 Concerning the request for shelter, the complainant submits that making him stay for a prolonged period in the country without access to reception facilities exposes him to inhuman and degrading treatment. He argues that the complaint procedure of the Committee cannot be effective when he is obliged to live in miserable conditions in the Netherlands.

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

#### *Consideration of admissibility*

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

9.2 The Committee recalls that in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint unless it has ascertained that all available domestic remedies have been exhausted. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint on this ground.

9.3 The Committee notes the complainant's claim that the State party has an obligation to provide him with shelter while the interim measures are in place and the case is being considered by the Committee. The Committee notes that the complainant does not provide sufficient details on his legal status after his asylum application was rejected and interim measures were granted by the Committee. It also notes that it remains unclear whether the complainant has ever raised the claim that the refusal of shelter amounts to inhuman and degrading treatment before the domestic authorities. In this light, the Committee finds this part of the complaint insufficiently substantiated for the purposes of admissibility.

9.4 The Committee notes that the complainant's claim that his forcible removal to Sri Lanka would amount to a violation by the State party of article 3 of the Convention. The Committee takes note of the State party's observation that the complainant has failed to sufficiently substantiate this claim. It notes, however, that the arguments submitted by the complainant are closely related to the merits of the case and, therefore, declares the communication admissible under article 3 of the Convention. As the Committee finds no further obstacles to admissibility, it declares the communication admissible insofar as it raises issues under article 3 of the Convention and proceeds with its consideration on 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. The Committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment perpetrated by State actors, both the military and the police, in many parts of the country since the conflict ended in

May 2009.<sup>8</sup> However, the Committee recalls that the aim of the evaluation 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.

10.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable (para. 6), the Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.<sup>9</sup> The Committee also recalls that although under the terms of its general comment No. 1, the Committee is free to assess the facts on the basis of the full set of circumstances in every case, considerable weight is given to the findings of fact that are made by organs of the State party concerned (para. 9).<sup>10</sup>

10.5 In the present case, the complainant claims that he will be detained and tortured if returned to Sri Lanka. The Committee takes note of the State party's submissions that the complainant has failed to provide credible evidence and to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to Sri Lanka; and that his claims have been thoroughly reviewed by the competent domestic authorities and courts, in accordance with domestic legislation and taking into account the current human rights situation in Sri Lanka.

10.6 The Committee refers to its consideration of the fifth periodic report of Sri Lanka,<sup>11</sup> during which it voiced serious concerns about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the police, had continued in many parts of the country after the conflict with LTTE had ended in May 2009.<sup>12</sup> The Committee has also expressed concern at the reprisals against victims and witnesses of acts of torture and at the acts of abduction and torture in unacknowledged detention facilities, and inquired whether a prompt, impartial and effective investigation of any such acts has been undertaken.<sup>13</sup>

10.7 In the present communication, the Committee notes the complainant's claims that he was registered with LTTE, received military training and participated in a fight against the Sri Lankan army, after which he escaped and soon after left the country; that he participated in sports activities organized by LTTE in the Netherlands, pictures of which were posted on Facebook; and that his cousin was killed in 2006 because of his alleged affiliation with LTTE. The Committee also notes the claims that the complainant is a young Tamil male from the north of Sri Lanka, a failed asylum seeker with visible scars who would be forcibly returned to Sri Lanka on an emergency passport. At the same time, the Committee notes that there is nothing in the communication to indicate that the complainant or members of his family played any significant role in LTTE or had problems with the Sri Lankan authorities at any point in time. Moreover, the complainant has escaped from LTTE and has not participated in any political protests organized by LTTE abroad. He claims to have received a summons by a commanding officer in the army in 2012 and that the authorities were asking about him; however, the Committee notes that since 2012, the complainant has not reported any follow-up by the army on his failure to report to the camp or any subsequent inquiries about him.

<sup>8</sup> See CAT/C/LKA/CO/3-4, para. 6.

<sup>9</sup> See also communication No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003, para. 7.3.

<sup>10</sup> See, for example, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

<sup>11</sup> See CAT/C/SR.1472 and 1475.

<sup>12</sup> See CAT/C/LKA/CO/3-4, para. 6.

See CAT/C/SR.1472, paras. 36 and 42 and CAT/C/SR.1475, paras. 10 and 27.

10.8 Regarding the death of the complainant's cousin, the Committee notes that the complainant has provided no information as to the specific role of his cousin within LTTE and no details of how he was killed, and, most importantly, whether any member of the cousin's family, or the complainant himself before leaving the country, had any problems because of his cousin's LTTE activities. As for his participation in the LTTE-organized sports activities in the Netherlands, the Committee notes that even if the Sri Lankan authorities will be able to identify him from untagged Facebook pictures, those events were of a non-political nature and do not of themselves make of the complainant a significant LTTE supporter. In the light of the foregoing, the Committee concludes that even if the complainant is checked at the airport on account of the emergency passport or his scars, there is no evidence that he has the profile of an LTTE supporter which would put him in personal risk of torture by the authorities.

10.9 The Committee recalls that according to its general comment No. 1, the burden of presenting an arguable case lies with the complainant. In the Committee's opinion, in the present case, the complainant has not discharged this burden of proof.<sup>14</sup>

11. On the basis of the above, and in the light of the material before it, the Committee considers that the complainant has not provided sufficient evidence to enable it to conclude that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.

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

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<sup>14</sup> See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.