



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

Distr.: General
20 September 2016

Original: English

Committee against Torture

**Decision adopted by the Committee under article 22 of the
Convention, concerning communication No. 609/2014*, ****

<i>Communication submitted by:</i>	R. K. (represented by counsel, John Phillip Sweeney)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	6 May 2014 (initial submission)
<i>Date of adoption of decision:</i>	11 August 2016
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Substantive issue:</i>	Non-refoulement; risk of torture upon return to country of origin
<i>Procedural issues:</i>	Non-substantiation of claims; incompatibility with the Convention
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is R.K., a Sri Lankan national of Tamil origin born in 1982. He claims that his removal to Sri Lanka would constitute a violation by Australia of his rights under article 3 of the Convention. The complainant is represented by counsel, John Phillip Sweeney.

1.2 On 6 June 2014, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to expel the complainant while the complaint was being considered. On 16 July 2015, the Committee, acting through the same Rapporteur, denied the request of the State party to lift interim measures.

* Adopted by the Committee at its fifty-eighth session (25 July-12 August 2016).

** The following members of the Committee participated in the consideration of the present communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Kening Zhang.



Facts as presented by the complainant

2.1 The complainant comes from a farming family in Trincomalee District. Part of his family's land was occupied by the Sri Lanka Army at the beginning of the civil war, but the family continued to live in their house. In 2001, one of the complainant's brothers was killed. The complainant believes that he was killed by the Army on suspicion of supporting the Liberation Tigers of Tamil Eelam (LTTE). After the death of his brother, the complainant was interrogated and beaten by the Army who questioned him about his involvement with LTTE. Two months after, he moved to the city of Trincomalee to work as a tailor. In 2005, he moved to Vanni in the Northern Province, where he opened a tailor shop in 2006. For about six months in 2008, he was forced to sew uniforms for LTTE without pay. During the final stages of the war, the complainant escaped and hid in a bunker in the Vanni area for a few months. He sustained an injury in the head owing to heavy shelling in the area and was taken to the Kurunegala hospital by Army officers. He was later transferred to the Vavuniya hospital. Warned by the hospital staff that the Army was taking young Tamils to their camps upon discharge, he escaped to Colombo. In June 2009, he went to India with a valid passport and a three-month visa. His other brother had been living in India since 2007.

2.2 On 4 November 2010, the complainant arrived in Australia by boat and on 14 January 2011, he sought asylum. He requested protection on the basis of fear of being arrested, interrogated, imprisoned and beaten or killed by the Sri Lanka Army, the Criminal Investigation Department, the police or political groups supporting the Government in identifying LTTE supporters. He believed that, because he was a young, single Tamil man from the Trincomalee area, had a scar and had admitted to assisting LTTE, he would be harmed on suspicion that he was involved in the fighting. He states that after considering relevant country information and his statement,¹ the Department of Immigration and Citizenship rejected his protection visa application on 20 April 2011. It found that he did not have any political profile in Sri Lanka or any LTTE affiliation that would bring him to the attention of the authorities. Also, given that, in 2009, he left Sri Lanka legally, it had no reason to believe that he would experience any difficulties on his return or be exposed to the risk of harm as a failed asylum seeker.

2.3 On 6 May 2011, the complainant requested an independent merits review of the refugee status assessment of the Department of Immigration and Citizenship. On 23 July 2012, the reviewer rejected his protection visa application based mainly on the grounds that his statements lacked credibility. The complainant stated in his initial interview that the boat on which he arrived in Australia had come from Sri Lanka, when in fact it had come from India. In his statutory declaration, he stated that he had been beaten by the Army, although he had not mentioned that in the entry interview and he altered his statement during the independent merits review interview. He was not consistent in his claim regarding who shot his brother and did not provide any credible evidence as to how he learned that he was shot by the Army. He changed his statement regarding making uniforms or civilian clothes for LTTE in 2008 as well as regarding whether his brother was living in a refugee camp in India. The complainant's claims that he is a suspected LTTE supporter were dismissed by the interviewer as contradicting his claim that the Army, who was based on part of his family's land, knew that his family was not helping LTTE. The reviewer

¹ Reference is made to, inter alia, Office of the United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 5 July 2010; Denmark, Danish Immigration Service, "Human rights and security issues concerning Tamils in Sri Lanka", October 2010; Australia, Department of Foreign Affairs and Trade, "Sri Lanka: treatment of Tamils", Country Information Report No. 10/58, 21 September 2010 (CX249694).

observed that the complainant was free to leave the hospital, although he had been taken there by the Army and his injury had been “closely” examined by the Criminal Investigation Department. It also observed that the complainant was able to leave the country from the airport with a valid passport, which would not have been possible had he been a suspected LTTE supporter. Regarding the complainant’s claim that, being a young Tamil man is, in itself, sufficient to link him to LTTE, the reviewer relied on the UNHCR 2010 Eligibility Guidelines, which indicated that Sri Lankans originating from the north of the country were no longer in need of protection solely on the basis of indiscriminate harm. When considering the complainant’s claim that he would be detained and tortured at the airport as a failed asylum seeker, the reviewer concluded that, since the complainant did not have a criminal record nor any connection with LTTE, he would be of no interest to the Criminal Investigation Department or the State Intelligence Service.² Since he was in possession of a national passport, the immigration authorities would be able to confirm that the complainant was entitled to enter the country. The reviewer also took into account that the situation of the complainant’s family in Trincomalee was stable and that he would be able to benefit from their support upon return.

2.4 On 20 September 2012, the complainant filed an application with the Federal Circuit Court for judicial review of the independent merits review recommendation of 23 July 2012. At the hearing, the non-governmental organization (NGO) representing the complainant sought an adjournment since he did not have legal counsel. The request was rejected by the Court, which pointed out that, on 14 November 2012, it had provided the complainant with contact details, in his language, of legal providers and translators/interpreters, and the fact that he only contacted the NGO on 28 April 2013, without any valid reason, showed a lack of due diligence on his part. The Court also gave the complainant until 30 January 2013 to file any amended application and additional evidence. On 14 May 2013, the Court found that there was no misinterpretation of the evidence given by the complainant at the first and the second interview such that he was deprived of an opportunity to present his case. The complaints about the findings of the reviewer required a review that was outside the jurisdiction of the Circuit Court. In addressing the claim about the alleged failure of the reviewer to consider the complainant’s psychosocial report, the Court observed that the reviewer had noted that the psychosocial report dated 30 January 2012 was not a medical assessment of the complainant’s condition. It therefore concluded that the reviewer had considered the report but did not find it compelling. The Court also observed that it could not be suggested that the complainant’s mental state had deprived him of a meaningful opportunity to participate in the hearing.

2.5 On 16 August 2013, the complainant appealed to the Federal Court of Australia claiming that the conclusion of the independent merits review that he was not in need of protection was neither logical nor rational and that there was a jurisdictional error in the decision of the Federal Circuit Court. The complainant also requested an adjournment of the hearing until he obtained legal representation. On 26 August 2013, the Federal Court dismissed the appeal, stating that neither the review of the reasons for the decision of the independent merits review nor those for the Federal Circuit Court judgement disclosed any appealable error. The request for adjournment was rejected on the grounds that there was nothing in the complainant’s statement to support his appeal.

² The Refugee Review Tribunal relied on, inter alia, the following country reports: Australia, Department of Foreign Affairs and Trade, “Sri Lanka: treatment of Tamils”, Country Information Report No. 10/58, 21 September 2010 (CX249694); Canada, Immigration and Refugee Board, *Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants*, 22 August 2011 (LKA103815); and Denmark, Danish Immigration Service, “Human rights and security issues concerning Tamils in Sri Lanka”, October 2010.

2.6 On 20 September 2013, the NGO “RISE”, representing the complainant, submitted a request for ministerial intervention to the Minister for Immigration and Citizenship, which was rejected on 28 April 2014.

The complaint

3. The complainant claims that, because he is a suspected LTTE supporter, if he is returned to Sri Lanka, he will be arrested, interrogated, imprisoned and beaten or killed by the Sri Lanka Army, the Criminal Investigation Department, the police or political groups assisting the Government in identifying LTTE supporters. He alleges that he will attract the attention of the security forces on his arrival and they will soon discover that he evaded internment when he was hospitalized with wounds from shelling during the war and he will be suspected of LTTE links. He also claims that failed asylum seekers are immediately identified and detained by the security forces at the airport. On the basis of the above allegations, the complainant claims that the State party will violate article 3 of the Convention if he is removed to Sri Lanka.

State party’s observations on admissibility and the merits

4.1 On 12 December 2014, the State party requested the Committee to lift interim measures. It also submitted that the author had failed to establish a prima facie case for the purpose of admissibility and thus his complaint should be found inadmissible as manifestly unfounded. However, should the Committee find the case admissible, the State party maintains that the complainant’s allegations lack merit.

4.2 The State party submitted that the complainant’s claims were thoroughly considered by a series of domestic decision makers, including the Department of Immigration and Citizen, which determines refugee status, and the Refugee Review Tribunal, which carried out the independent merits review, and were subject to judicial review by the Federal Circuit Court and the Federal Court of Australia. It summarized the findings of the domestic authorities in the case and referred to the Committee’s general comment No. 1, in which it is stated that the Committee is not an appellate or judicial body and that it gives considerable weight to findings of fact that are made by organs of a State party.³

4.3 On 22 May 2015, the State party reiterated its observations of 12 December 2014 and submitted a new request to lift interim measures.

Additional information from the complainant

5.1 On 14 July 2015, the complainant submitted his comments on the State party’s observations on admissibility and the merits and the requests to lift interim measures. The complainant insisted that the interim measures be maintained and claimed that his complaint was admissible. He stated that the independent merits review was unfair in that the reviewer found him not credible on the basis of simple discrepancies and the psychological report indicating that he suffered from the post-traumatic stress disorder was not taken into account.

5.2 The complainant also stated that the fact that he was not a military trained official of LTTE did not automatically exclude him from being vulnerable and that he fell under at least two categories defined in the UNHCR 2010 Eligibility Guidelines as vulnerable: a member of an LTTE veteran’s family (*Maha Veeran*); and a supplier of LTTE as a tailor who made their uniforms.

³ See the Committee’s general comment No. 1 (1997) on the implementation of article 3 of the Convention, para. 9 (a).

5.3 The complainant also alleged that the procedure before the Federal Circuit Court and the Federal Court of Australia was flawed because he was not represented by a legal counsel and because the courts failed to take into account his mental state and to verify whether he was mentally fit to represent himself.

5.4 In addition to the information contained in his initial submission to the Committee, the complainant submitted several new documents, including two invitations dated 2002 and 2005 to the complainant's family to attend ceremonies organized by LTTE to commemorate war heroes, with the name of his second brother on it; a photograph of the complainant's eldest brother — who he alleged was an LTTE intelligence officer — with his commanding officer, taken in 2000; and an Edmund Rice Centre report published on 5 May 2015 referring to two returnees who had been subjected to torture upon their return to Sri Lanka after the State party had rejected their asylum applications.

State party's additional observations on admissibility and the merits

6.1 On 10 November 2015, the State party submitted additional observations and reiterated its position on the inadmissibility of the complaint and its lack of merit.

6.2 Addressing the complainant's allegation about the unfairness of the independent merits review, the State party submitted that this claim was reviewed by the Federal Circuit Court, which found nothing inaccurate or incorrect in the reviewer's decision and which stated that credibility findings were "a matter par excellence" for the court. Concerning the allegation about the failure of the reviewer to take into account the complainant's psychological report and his post-traumatic stress disorder, the State party noted that the psychosocial report was not considered by the reviewer to be a medical assessment and that the complainant did not provide any medical evidence in support of his claim that he was suffering from post-traumatic stress disorder. Regarding the complainant's claim about the reviewer's error in focussing on inconsistencies which he considered unimportant, the State party observed that the reviewer was conscious of the need to treat discrepancies about peripheral details with caution, but did not consider the inconsistencies in the complainant's story to be peripheral. The complainant was given the chance to comment on all the inconsistencies that the reviewer pointed out, however his answers were not found to be satisfactory.

6.3 As for the allegation concerning unfair proceedings before the Federal Circuit Court and the Federal Court of Australia owing to the absence of legal counsel to represent him, the State party submitted that the complainant was represented by an NGO and that he did not justify his failure to contact legal representatives as was suggested by the Federal Circuit Court six months prior to the hearing. In respect of the foregoing and taking into account that the complainant's claims were considered by the independent merits review and during the post-review protection claim assessment process, the State party submits that the complainant's allegation regarding the lack of legal representation should be rejected. Concerning the allegation that the courts ignored his mental state, the State party submitted that the complainant did not present any medical evidence suggesting that he had a mental health condition that deprived him of a fair opportunity to present his case.

6.4 Regarding the additional documents submitted to the Committee, the State party observed that the complainant did not provide any explanation as to why they were not provided to the authorities at an earlier stage of the protection claim process, since they are dated 2000, 2002 and 2005. The State party also noted that the new evidence indicating that the complainant's brother was an LTTE member contradicts the statement that he gave in 2011 to the Department of Immigration and Citizenship and reiterated during the review process that his brother was shot in 2001 on suspicion of supporting LTTE, but that, in fact, he had no involvement with LTTE. In the State party's view, such inconsistency undermines the credibility of the complainant's evidence. The State party further observed

that most families in the north of Sri Lanka were expected to provide a member to LTTE and families whose relatives died in the war received invitations to the commemoration ceremonies. The State party concluded that neither the invitation to the complainant's family nor his brother's purported profile with LTTE would draw the complainant to the authorities' attention 14 years after his brother's death.

6.5 Addressing the complainant's allegation that he belonged to a vulnerable group under the UNCHR 2010 UNHCR Eligibility Guidelines because he supplied uniforms to LTTE, the State party referred to the finding of the reviewer that the complainant did not sew uniforms for LTTE. Accepting that the complainant might have sewn civilian clothing for LTTE, the reviewer concluded that this would not lead to his being at risk of torture upon return to Sri Lanka.

6.6 As for the new information regarding the complainant's eldest brother being an LTTE intelligence officer, the State party considered it implausible that the complainant would raise claims regarding a member of the family who was suspected of supporting LTTE, but not raise any claims in relation to a family member who was actually part of the LTTE intelligence unit — a profile of significance in LTTE — and that such information would be provided only after he had exhausted all domestic remedies.

6.7 The State party referred to recent country information from both governmental and non-governmental sources,⁴ according to which, only Sri Lankan nationals with family links to high profile LTTE sympathizers might come to the authorities' attention and be at risk of significant harm. The complainant did not provide the State party with any evidence that he had family links with a high-profile LTTE member or suspected member that would put him in danger of being subjected to torture in Sri Lanka.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee recalls that, in accordance with article 22 (5) (b), of the Convention, it shall not consider any complaint unless it has ascertained that the complainant 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 these grounds.

7.3 The complainant has claimed 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 submission that the complainant failed to establish a prima facie case; however, it considers that the claims submitted by the complainant are closely related to the merits of the communication and should be considered at that stage.

7.4 As the Committee finds no further obstacles to admissibility, it declares the communication admissible under article 3 of the Convention and proceeds with its consideration of the merits.

⁴ United States of America, Department of State, *2014 Country Report on Human Rights Practice*, "Sri Lanka", 25 June 2015; Amnesty International, *Amnesty International Report 2014/15*, "Sri Lanka", 25 February 2015.

Consideration of the merits

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

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

8.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. 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. 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

8.4 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.⁶ 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).⁷

8.5 The Committee notes the complainant's claims that he will be detained and tortured if returned to Sri Lanka as a failed asylum seeker and owing to his and his relatives' association with LTTE. The Committee also notes the State party's submission that the complainant failed to establish a prima facie case for the purposes of admissibility, he did not provide credible evidence and he failed 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. The State party also submitted that the complainant's claims were thoroughly reviewed by the competent domestic authorities and courts, in accordance with domestic legislation, and that the current human rights situation in Sri Lanka was taken into account.

⁵ See communication No. 550/2013, *S.K. and others v. Sweden*, decision adopted on 8 May 2015, para. 7.3.

⁶ See communication No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003, para. 7.3.

⁷ See communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

8.6 The Committee recalls that the occurrence of a consistent pattern of gross human rights violations in his or her country of origin is not in itself a sufficient basis for it to conclude that an individual runs a personal risk of being subjected to torture upon return.⁸ In this context, the Committee refers to its concluding observations on the combined third and fourth periodic reports of Sri Lanka, in which it expressed serious concern about reports suggesting that torture and ill-treatment perpetrated by State actors in Sri Lanka, both the military and the police, had continued in many parts of the country after the conflict with LTTE that ended in May 2009.⁹ The Committee also refers to its concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, in which it noted evidence that some Sri Lankan Tamils had been victims of torture and ill-treatment following their forced or voluntary removal from the State party to Sri Lanka.¹⁰ The Committee further refers to the preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment on his official joint visit to Sri Lanka with the Special Rapporteur on the independence of judges and lawyers, from 29 April to 7 May 2016, in which it is noted that “torture is a common practice” and that the “current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General’s Office and judiciary perpetuate the real risk that the practice of torture will continue.”¹¹ The Committee also takes note of credible reports published by NGOs concerning the treatment by the Sri Lankan authorities of individuals returned to Sri Lanka.¹² The Committee considers that all of the above-mentioned reports show that Sri Lankans of Tamil ethnicity with a prior personal or familial connection to LTTE and facing forcible return to Sri Lanka may face a risk of torture.¹³

8.7 In the present communication, the Committee notes the complainant’s claim that one of his brothers was killed in 2001 because of his alleged affiliation with LTTE and that he himself is a suspected LTTE supporter because he made clothes for LTTE. At the same time, the Committee notes that the complainant has not submitted any concrete information about his brother’s role in LTTE nor any report of any harassment that he or his family members experienced on account of his brother’s affiliation with LTTE, especially taking into account that the Sri Lanka Army was based on part of their land since the beginning of the conflict. The Committee also notes that, since 2001, when his brother was killed, the complainant continued to live in Sri Lanka for eight years before leaving for India from the airport with a valid passport and visa. Furthermore, nothing on file suggests that the complainant had ever been arrested, tortured or persecuted by the authorities or that they have looked for him before or after his departure in 2009. The complainant’s relatives still live in their family house in Trincomalee and the complainant has not reported any problems that they might have encountered after he left the country. The complainant has

⁸ See for example, communications No. 426/2010, *R.D. v. Switzerland*, decision of 8 November 2013, para. 9.2; No. 591/2014, *K. v. Australia*, decision of 25 November 2015, para.10.11.

⁹ See CAT/C/LKA/CO/3-4, para. 6.

¹⁰ See CAT/C/GBR/CO/5, para. 20.

¹¹ See Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez, on the official joint visit to Sri Lanka, 29 April to 7 May 2016 (Colombo, 7 May 2016).

¹² See Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009*, August 2015, available at www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf; and Yasmin Sooka, The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, Sri Lanka, *An Unfinished War, Torture and Sexual Violence in Sri Lanka 2009-2014*, March 2014, available at www.barhumanrights.org.uk/sites/default/files/documents/news/an_unfinihsed_war_torture_and_sexual_violence_in_sri_lanka_2009-2014_0.pdf.

¹³ See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

not adduced reasons as to why the authorities would start being interested in him 15 years after the death of his brother. The Committee therefore concludes that the complainant has not provided evidence of any connection with LTTE that would put him at personal risk of torture in Sri Lanka.

8.8 The Committee recalls that, according to its general comment No. 1, the burden of presenting an arguable case lies with the complainant (para. 5). In the Committee's opinion, in the present case, the complainant has not discharged this burden of proof.¹⁴

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

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