



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. 981/2020**, ***

<i>Communication submitted by:</i>	S.M. (represented by counsel, Daniel Taylor, Solicitor and Migration Agent)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	5 June 2019 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 24 January 2020 (not issued in document form)
<i>Date of adoption of decision:</i>	5 May 2023
<i>Subject matter:</i>	Deportation to Sri Lanka of a former member of the Liberation Tigers of Tamil Eelam (LTTE)
<i>Procedural issue:</i>	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. The complainant is S.M., a national of Sri Lanka born in 1994. He claims that the State party would violate his rights under article 3 of the Convention if it removed him to Sri Lanka. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 28 January 1993. The complainant is represented by counsel, Daniel Taylor.

Facts as submitted by the complainant

2.1 The complainant is of Tamil ethnicity and originates from Batticaloa in the Eastern Province of Sri Lanka. He arrived in Australia on 25 September 2012 by boat as an illegal maritime arrival and was granted a temporary humanitarian stay visa on 7 February 2013. He applied for a protection (Safe Haven Enterprise) visa on 23 October 2015. He alleges that he was a member of the Liberation Tigers of Tamil Eelam (LTTE) youth wing and the son of a prominent LTTE supporter. His father supported LTTE; the family was forcibly displaced

* Reissued for technical reasons on 13 July 2023.

** Adopted by the Committee at its seventy-sixth session (17 April–12 May 2023).

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



and lived in a camp for internally displaced persons during the Sri Lankan civil conflict, where he was first subjected to questioning as a young teenager. When the complainant was 14 years old, his father was released, subject to reporting conditions. He was taken for interrogation by Sinhalese authorities on five or six occasions between 2008 and 2012. The complainant claims that, on such occasions, unidentified persons would come to the family home and take his father. On one occasion, his father was tortured and returned home with a broken arm. Around 2011, the complainant moved to Colombo, where he worked for six months. On his return journey to Batticaloa, the bus was stopped by army officers at a checkpoint. The complainant and some other passengers were asked to get off the bus and the complainant was the only one picked by a “Thaliyathi”.¹ The officers took his identity documents and took him to an office, where he was questioned about his stay in Colombo. They took a photo of him and threatened to go to his house. The complainant alleges that when he returned to Batticaloa, army officers came to his house and questioned him about his reasons for leaving his hometown. They asked him to report to the army camp. The complainant and his mother went to the army camp, where the officers interrogated him about his father’s whereabouts. They raised a rifle and made a mock attack on him with the gun. He was told to report once a week to the camp and threatened that he would be disappeared if he failed to do so. He fled Sri Lanka by boat shortly after that incident.

2.2 As already mentioned, the complainant arrived in Australia on 25 September 2012 by boat and was granted a temporary humanitarian stay visa on 7 February 2013. He applied for a protection visa (Safe Haven Enterprise) on 23 October 2015. On 20 June 2016, a delegate of the Minister for Immigration and Border Protection rejected his application on the ground that the essential claims were not credible owing to inconsistencies and discrepancies. The delegate accepted that the complainant may have provided minor assistance to LTTE, because everyone living under LTTE control was required to have some level of involvement with the organization. However, the delegate did not accept that the applicant’s father was of concern to the authorities, nor did he accept that the complainant had been repeatedly questioned or detained, or that the family was of adverse interest either to the Sri Lankan authorities or to the Karuna group because of his father’s LTTE association. The delegate also did not accept that the complainant had been identified at a checkpoint or that he would face persecution or significant harm if returned to Sri Lanka, although he might face penalties applied under the law relating to illegal departure.

2.3 Upon review before the Immigration Assessment Authority, the complainant submitted evidence, including two receipts dated 1997 and 1998, purportedly issued by LTTE to the complainant’s father apparently for goods or services provided; a statement by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,² referring to the use of torture and other cruel, inhuman or degrading treatment or punishment in Sri Lanka; and additional information about the reporting conditions which were allegedly imposed on him prior to his departure. These were considered clarification of information already provided.

2.4 In its assessment, the Immigration Assessment Authority accepted that the complainant’s father had provided support to LTTE and that, by extension, his family could have been suspected of being supporters of LTTE; that Colonel Karuna could have been aware of the level of assistance that his father had provided to LTTE, and based on the country information about cooperation between Colonel Karuna and his breakaway group and the Sri Lankan authorities, the Colonel may have passed on what he knew about the complainant’s father to the authorities. Based on the information in the country information report on Sri Lanka of the Department of Foreign Affairs and Trade, the Immigration Assessment Authority accepted that the information provided by the complainant was consistent with the situation in the country. In particular, it accepted that the complainant’s father had been subjected to harassment, monitoring, questioning and brief detentions of up

¹ A Tamil working under the direction of Colonel Karuna’s group, who wears a face mask and selects Tamils for investigation at checkpoints or in round-ups.

² Office of the United Nations High Commissioner for Human Rights, “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”, statement, 10 May 2016.

to one day from 2008 onwards, and that, on at least one occasion, he had been subjected to torture or physical assault and his arm was broken. However, the complainant stated during the interview that the authorities' interest in his father seemed to have diminished, and that he did not claim that he, himself, had been harmed or threatened by Colonel Karuna or his group, nor did he specifically mention any issues or fears in that regard. As regards the complainant's alleged activities with LTTE as a teenager, the Immigration Assessment Authority accepted that his involvement with LTTE was minor, and did not consider that it would cause him to be viewed as a person of concern.

2.5 With respect to the alleged bus incident and the reporting requirements that were allegedly imposed on him, the Immigration Assessment Authority had serious doubts about the credibility of those claims owing to several inconsistencies. The Authority concluded that, given his young age during the conflict and the low level, if any, of his own involvement with LTTE, the complainant would not face an escalated risk of harm upon return. Thus, it considered that, although he might face some questioning from the security forces, it would not amount to any form of serious harm. Finally, with regard to his illegal departure and return as a failed asylum-seeker, although the Authority accepted that he would be charged in Sri Lanka because of his illegal departure, it found that there were no substantial grounds for believing that there was a real risk that the complainant would suffer significant harm if returned to Sri Lanka. Thus, it confirmed the decision of the delegate of the Minister for Immigration and Border Protection.

2.6 The complainant's application for review by the Immigration Assessment Authority was refused on 8 August 2016, and his appeal to the Federal Circuit Court was dismissed on 19 December 2016. On 4 December 2017, the complainant filed an application with the Federal Court of Australia for a judicial review of the decision of the Federal Circuit Court. The complainant claimed that the Authority had misapprehended or misapplied the test for serious harm. He alleged that the Authority considered the concept of serious harm as necessarily entailing the physical assault, and that it did not consider temporary detention and harassment as serious harm. However, the Federal Court determined that the Immigration Assessment Authority had undertaken an evaluative assessment of any potential harassment, and had implicitly decided that there was no real chance of actual physical assault, and it had not erroneously assume that detention would not amount to serious harm in itself. The Federal Court found that the Immigration Assessment Authority had come to a qualified conclusion that the complainant would not be subject to serious harm. While accepting that there was a proper basis for the complainant's fear that the past harassment, which had been directed at him personally, might resume, it did not necessarily mean that the only conclusion available was that the anticipated harm would amount to serious harm. The complainant's appeal was dismissed on 18 January 2019.³

Complaint

3.1 The complainant submits that he risks being exposed to torture in Sri Lanka if he is returned. He believes that his removal is imminent, given the number of Tamils returned to Sri Lanka prior to the submission of the present communication, and claims that, while there is no arrest warrant against him, he will likely be charged and detained upon arrival according to the official procedure, given that he was a member of the LTTE youth wing and is the son of a prominent LTTE supporter.

3.2 The complainant alleges that, in the domestic proceedings, the State party authorities did not properly assess the risk that he would face if he were returned to Sri Lanka as an individual who had violated the army's reporting conditions and fled the country illegally. In particular, the complainant alleges that the State party's authorities did not understand that the internally displaced persons camp was an internment camp; therefore, it rejected his claim, believing it to be based on the reporting conditions. The complainant alleges that the domestic authorities misunderstood his claims for protection, as it did not know how the Sri Lankan security forces operated when they investigated an individual. He claims that he would face a real risk of being tortured if returned to Sri Lanka as he had previously been threatened

³ Federal Court of Australia, *CJD16 v. Minister for Immigration and Border Protection*, 2019, FCA 20, Reasons for Judgment (provided by the State party).

with violence and disappearance, and he violated the army's reporting conditions and fled Sri Lanka illegally.

3.3 The offence of illegal departure from Sri Lanka carries a jail term of up to five years' imprisonment. The complainant claims that the 2018 report provided by the Department of Foreign Affairs and Trade had an unrealistic assessment of the actual penalties, and that the Authority relied on false information. The complainant claims that the report indicates that only those who are voluntary returnees are likely to be released on bail. However, since he violated the army's reporting obligations and would not be a voluntary returnee, he would face a real risk of being detained and tortured upon return. The complainant also claims that he would be at real risk of being tortured owing to his alleged anti-government and pro-LTTE political opinion.

State party's observations on admissibility and the merits

4.1 By note verbale of 5 August 2020, the State party submitted its observations on admissibility and the merits. With reference to rule 113 (a) of the Committee's rules of procedure, the State party submits that the complaint is inadmissible *ratione materiae*, because the alleged treatment by the Sri Lanka army do not amount to torture within the meaning of article 3 of the Convention and therefore do not engage the State's party non-refoulement obligations under article 3.

4.2 The State party also submits that the complaint is inadmissible as manifestly unfounded under article 22 (2) of the Convention and rule 113 (b) of the Committee's rules of procedure, as the communication lacks sufficient documentary or other pertinent evidence to support the allegations.⁴ It is for the complainant to provide exhaustive arguments to support the alleged violation of article 3. The State party acknowledges that complete accuracy is seldom to be expected of victims of torture;⁵ however, this factor is taken into consideration by domestic decision makers, including weighing some inconsistencies between the complainant's entry interview and later claims, as well as the fact that the complainant was only 18 years old when he arrived in the State party, and the fact that it is common for Tamils not to mention any association with LTTE for fear of an adverse outcome. In the present case, the complainant's claims are not sufficiently supported by evidence that he is a person who would be of interest to the Sri Lankan authorities, if returned, or that he would be personally at risk of torture. The State party submits that the issues raised by the complainant were thoroughly considered in robust domestic processes, including by the High Court of Australia, which considered and refused the complainant's application for special leave to appeal the Federal Court's decision. The complainant's claims were also assessed during the Ministerial intervention process.

4.3 The State party recalls that the Committee gives considerable weight to findings of fact made by the organs of a State party.⁶ It requests that the Committee accept that its authorities have thoroughly assessed the complainant's claims. The merits of the claim were thoroughly considered as part of the complainant's protection (Safe Haven Enterprise) visa application process, including the merits review by the Immigration Assessment Authority and as part of the consideration of the complainant's three requests for Ministerial intervention under section 48B of the Migration Act. The decision of the Immigration Assessment Authority was subsequently upheld as having been lawfully made by the Federal Circuit Court, the Federal Court of Australia and the High Court of Australia.

4.4 The State party observes that some of the claims made by the complainant in his protection visa application are different from the claims made in his submissions to the Committee. With regard to his claim that he would be at risk of harm owing to his family's association with LTTE, the delegate did not find it credible that the complainant's father would have provided significant support to LTTE. This was because country information indicated that if the complainant's father had provided significant assistance to LTTE, following the conflict in 2009, the father would have been detained and sent to rehabilitation

⁴ *R.S. v. Denmark* (CAT/C/32/D/225/2003), para. 6.2.

⁵ *Alan v. Switzerland* (CAT/C/16/D/21/1995), para. 11.3.

⁶ Committee against Torture, general comment No. 4 (2017), para. 50.

for having assisted LTTE.⁷ The complainant had also claimed in the domestic proceedings that his brother had been sent to Qatar for safety. However, the complainant's brother has since returned to Sri Lanka, and departed and returned legally, without any adverse attention from the authorities. The delegate concluded that the complainant's brother would not have returned to Sri Lanka if his father was a well-known LTTE supporter who had been interrogated and physically assaulted.

4.5 The delegate also considered the complainant's claim that he had participated in activities supporting LTTE, that he had been part of a student organization and had assisted his father in LTTE activities and attended LTTE meetings. However, those activities included minor work such as lighting lamps and making flower garlands. As regards the complainant's claim that he was questioned on a number of occasions by the Criminal Investigation Department and the Sri Lankan Army at Thandiadi Camp, the delegate did not find this claim credible, given the finding that the complainant's father was not of interest to Sri Lankan authorities. Regarding the complainant's claim that, in 2012, when he was traveling by bus from Colombo to his hometown, he was selected for questioning, the delegate found that it was plausible that the complainant may have been briefly questioned at a checkpoint, but the delegate concluded that, had the complainant had any significant involvement with LTTE, he would not have been released, which indicated that the Lankan authorities had determined that the complainant was not of significant interest to them. Finally, the delegate considered that, during the interview, the complainant did not claim to be afraid of being harmed by Colonel Karuna's group on return to Sri Lanka. Therefore, the delegate concluded that the complainant did not have a profile of interest to the Sri Lankan authorities and, in view of the improved situation in the country, the complainant did not have a well-founded fear of persecution in Sri Lanka now or in the reasonably foreseeable future by reason of his race and political opinions or the political opinions attributed to him.⁸

4.6 With regard to the complainant's claim that he would face harassment, arbitrary detention, imprisonment and interrogation by the Sri Lankan authorities if returned to Sri Lanka, the delegate concluded that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to Sri Lanka, the complainant would face a real risk of significant harm, since no returnee who was a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. Moreover, the persons who pleaded guilty before the court had been fined and released.

4.7 The State party alleges that, in a comprehensive assessment of the complainant's claims, the Immigration Assessment Authority considered the complainant's claims singularly and cumulatively, but was not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the complainant being removed from Australia, there was a real risk that he would suffer significant harm. The Federal Circuit Court found that the Authority had made a qualitative judgment and had conducted an appropriate assessment of the level of harm that the complainant would likely confront on his return to Sri Lanka, given its assessment of his profile as a person with a history of association with LTTE. Regarding the complainant's claim that the Immigration Assessment Authority misapplied the test for serious harm, the State party alleges that the Federal Court of Australia found that the Authority "did not erroneously assume that detention could not amount to serious harm itself" and "did not assume that the infliction of physical violence was an essential characteristic of serious harm".⁹

4.8 In response to the complainant's claims concerning the reporting conditions imposed on him by the army, the State party reiterates that those claims were considered during the domestic processes, in particular by the Immigration Assessment Authority and in the context of the complainant's second request for ministerial intervention, but were not found to be credible, mainly owing to significant discrepancies between the complainant's initial claims and subsequent claims. Regarding the complainant's claims about understanding how the Sri Lankan security forces operate, the State party indicated that the Authority and the original

⁷ Record of protection visa assessment decision.

⁸ Ibid.

⁹ Federal Court of Australia, *CJD16 v. Minister for Immigration and Border Protection*, 2019, FCA 20, para. 41.

decision maker had extensively considered the country information, including information about how the authorities operated, and had found that the complainant's claims were not plausible.¹⁰ The State party submits that the complainant has not 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.

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

5.1 In his comments dated 24 July 2022, the complainant contests the State party's argument that his father would have been sent to rehabilitation if the authorities had had any serious concerns about him, and submits that extreme physical violence resulting in broken limbs and other forms of torture were the very essence of harm. The complainant recalls several sections of the Department of Foreign Affairs and Trade country information report on Sri Lanka (2021), which indicate that any low-profile former LTTE members who came to the attention of the Sri Lankan authorities now, particularly if suspected of having a combat function during the war, would likely be detained and may be sent for rehabilitation. The Government of Sri Lanka continues to assess that elements of the Tamil diaspora remain committed to a separate Tamil state and of particular interest to the authorities are those who hold leadership positions in Tamil diaspora groups, particularly groups deemed by the Government of Sri Lanka to hold radical views, and those who were formerly part of LTTE, particularly in, but not necessarily limited to, high-profile roles. The Department of Foreign Affairs and Trade assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war, but that torture is still used, including as a routine tool of policing. Because few reports of torture are verified within Sri Lanka, owing to the lack of investigative avenues, it is difficult to determine the exact prevalence of torture, but multiple domestic and international sources consider it to be common.¹¹ Regarding the findings of the Upper Tribunal of the United Kingdom of Great Britain and Northern Ireland, the complainant recalls that the authorities in Sri Lanka maintain a sophisticated network of intelligence-gathering overseas, and operate sophisticated intelligence with regard to activities within Sri Lanka and in the diaspora and it is reasonably likely that there is a single comprehensive electronic database containing information from abroad, as well as other pre-existing information gathered within Sri Lanka and relating, for example, to previous (known or suspected, personal or familial) links to LTTE and detentions.¹² He claims that it is reasonably likely that this database is accessible by any of the agencies referred to above, as well as by officials at the Sri Lanka High Commission in London, at Bandaranaike International Airport in Sri Lanka, and anywhere else within Sri Lanka.

5.2 The complainant recalls that the State party's authorities accepted his claims that he had been threatened with murder and subjected to a mock attack with a rifle. Furthermore, the fact that he was subjected to threats of murder and a mock execution when he was a child give rise to a real risk of the threats being carried out now that he is an adult. The complainant reiterates that such threats can result in death if carried through and therefore amount to torture. The complainant argues that the deterioration in the situation in Sri Lanka and the imposition of a state of emergency give extraordinary additional powers to the authorities to detain and investigate those deemed a threat to the unity of the State. He claims that the State party's failure to assess torture as a signifier of past adverse attention and therefore indicative of an ongoing serious risk that he would be subjected to similar torture or worse in the future was a failure to adequately assess his claims. The complainant reiterates that his removal to Sri Lanka would violate article 3 of the Convention owing to the real risk that he would be subjected to torture upon return to Sri Lanka.

¹⁰ Record of the protection visa assessment decision and the Immigration Assessment Authority's decision on the merits.

¹¹ Australia, Department of Foreign Affairs and Trade, *Country Information Report: Sri Lanka* (2021), sects. 3.49, 3.54, 3.57 and 4.17.

¹² United Kingdom, Upper Tribunal, *KK and RS v. Secretary of State for the Home Department*, Sri Lanka 2021, UKUT 0130 (IAC), para. 242.

State party's additional observations

6.1 The State party submitted additional observations on 6 December 2022, in which it argues that there is no additional information in the complainant's comments to alter its assessment of his situation. In response to the complainant's claim that there is an ongoing serious risk that he would be subjected to torture upon return to Sri Lanka since he had been tortured in the past, the State party considers that the complainant's claim about the mock attack does not meet the threshold of torture and is therefore inadmissible *ratione materiae*.

6.2 The State party recalls the Committee's jurisprudence, in which it stated that "ill-treatment suffered in the past is only one element to be taken into account by the Committee, because, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned".¹³ As such, even where previous instances of torture are assumed, it does not automatically follow that the complainant would still be at risk of being subjected to torture if returned to his country of origin now.¹⁴ The State party reiterates that the complainant has not provided sufficient evidence that, on the basis of the mock attack in the past, there is a foreseeable, real and personal risk that he would be tortured if returned to 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 In accordance with article 22 (5) (b) of the Convention, the Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not contested that the complainant has exhausted all available domestic remedies. The Committee therefore finds that it is not precluded from considering the communication under article 22 (5) (b) of the Convention.

7.3 The Committee notes that the State party submits that the complaint is inadmissible *ratione materiae* insofar as the complainant claims that he would run a real risk of being subjected to cruel, inhuman or degrading treatment or punishment upon return to Sri Lanka. The Committee also notes that the complainant also claims that he would be at risk of being subjected to torture.

7.4 The Committee notes the State party's argument that the complaint is inadmissible as manifestly unfounded, as the communication lacks sufficient documentary or other pertinent evidence to support the allegations. 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.¹⁵ In the present case, the Committee observes that the State party's immigration and judicial authorities thoroughly examined the facts and evidence presented by the complainant and considered that he did not have a profile of interest to Sri Lankan authorities, that the situation in Sri Lanka had improved, and that no returnee who had been a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka. On this basis, the authorities concluded that the complainant had not established the existence of substantial grounds to show that he would face a foreseeable, real and personal risk of being torture if returned to Sri Lanka. With regard to the complainant's claim that the State party authorities did not properly assess his claim that he was threatened with murder and subjected to a mock attack

¹³ *B.N.T.K. v. Sweden* (CAT/C/64/D/641/2014), para. 8.7.

¹⁴ *Ibid.*

¹⁵ *S.K. v. Australia* (CAT/C/73/D/968/2019), para. 12.5; and *Z.S. v. Georgia* (CAT/C/70/D/915/2019), para. 7.4.

or consider the deterioration in the situation in Sri Lanka and the imposition of a state of emergency, the Committee observes that the authorities of the State party found, after a thorough assessment of all the facts and evidence presented, that the complainant had not provided sufficient evidence that he ran a foreseeable, real and personal risk of being tortured if returned to Sri Lanka. 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 defects.¹⁶

7.5 The Committee recalls its jurisprudence in which it found claims to be manifestly unfounded where the author of a communication failed to submit substantiated arguments showing that the danger of being subjected to torture was foreseeable, present, personal and real. The Committee also 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 the 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.¹⁷

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 22 (2) of the Convention;
 - (b) That the present decision shall be communicated to the complainant and to the State party.
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¹⁶ *S.K. v. Australia* (CAT/C/73/D/968/2019), para. 12.5.

¹⁷ *Ibid.*, para. 12.6.