



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. 1021/2020* **

<i>Communication submitted by:</i>	N.J. (represented by counsel, Noeline Harendran)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	3 December 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 30 July 2020 (not issued in document form)
<i>Date of adoption of decision:</i>	19 April 2024
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Risk of torture, if deported to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1 The complainant is N.J., a national of Sri Lanka born in 1990. At the time of submission of the complaint, his request for asylum in Australia had been rejected and he was facing deportation to Sri Lanka. 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, Noeline Harendran.

1.2 On 30 July 2020, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to issue a request for interim measures under rule 114 of the Committee's rules of procedure.

Factual background

2.1 The complainant is an ethnic Tamil. He arrived in Australia by boat on 4 June 2013. He applied for a protection visa on 22 November 2016 and attended an interview with the Department of Immigration and Border Protection on 3 March 2017. He alleged that his close relatives were members of a political division of the Liberation Tigers of Tamil Eelam (LTTE) and that the whereabouts of one of his relatives who had taken up arms against government

* Adopted by the Committee at its seventy-ninth session (15 April–10 May 2024).

** The following members of the Committee participated in the examination of the communication: Todd Buchwald, Jorge Contesse, Claude Heller, Erdogan Iscan, Peter Vedel Kessing, Liu Huawen, Maeda Naoko, Ana Racu, Abderrazak Rouwane and Bakhtiyar Tuzmukhamedov.



forces were unknown. He claimed that another of his relatives had been abducted by LTTE in 2009 and that following that abduction, the Criminal Investigation Department of the Sri Lanka Police had detained, interrogated and tortured him for one day on account of his imputed support for LTTE, owing to his family background. He was released after one day, but was required to report back on a daily basis. Every time he went to report back, the Criminal Investigation Department officers tortured him, leaving him with scars all over his body. He claimed that he had been working for an international non-governmental organization (NGO), clearing landmines, prior to being arrested by the Criminal Investigation Department. Upon being arrested, his employment ceased and the Criminal Investigation Department accused him of hiding weapons. They threatened to shoot him if he did not reveal the location of the weapons. Following that threat, he moved to another village, where he remained from March 2009 until January 2013. Members of the Criminal Investigation Department went to his new house in search of him in January 2013, but he was not at home. As a result, he fled to Colombo with his wife, who he had married in March 2009, and his two stepsons, and departed for Australia.

2.2 On 20 March 2017, the Delegate of the Minister for Immigration and Border Protection rejected the complainant's application for a protection visa. The Delegate accepted that the complainant had not been personally associated with LTTE or engaged in their activities in any way. Nevertheless, the Delegate noted that, while the complainant claimed that he had been detained and tortured by the Criminal Investigation Department in 2009 on suspicion of LTTE involvement owing to his family links, he had been released after one day without charge on condition that he report back to the Department on a daily basis. There was no court case pending against him and he had remained in Sri Lanka for nearly four years without incident. As a result, the Delegate found that neither the complainant's or his family's past circumstances would lead to him being specifically targeted on his return to Sri Lanka as an LTTE member or supporter.

2.3 The Delegate considered that, as the complainant had married in his new village of residence in March 2009, worked for an NGO,¹ and his stepsons had attended school without incident, it did not appear that he was of interest to the Criminal Investigation Department at that time, meaning that he would not be of interest if he returned. The Delegate did not accept, as the complainant had claimed, that members of the Criminal Investigation Department were looking for the complainant in 2012 in his village of origin because he had failed to report to its office as required and that, by showing people his photograph, they had found out that the complainant was living in another village. Instead, the Delegate believed that, since the Criminal Investigation Department had a nationwide surveillance and intelligence network, it would have been well aware of his relocation, especially given that he had registered with the new village officer in 2009 in order to be a recognized resident of the area, get married and send his stepsons to school. As such, members of the Criminal Investigation Department would not have looked for him in his village of origin in 2012 because they would have known he was living in another village. Furthermore, the complainant also worked for an NGO from December 2012 until January 2013 without incident, indicating that he was not in hiding.

2.4 The Delegate accepted that the complainant had departed Sri Lanka illegally in 2013 and had been a passenger on a people-smuggling vessel. The Delegate found that it is an offence under the Immigrants and Emigrants Act (1949) of Sri Lanka to depart the country other than at an approved port of departure, and that this law is of general application and does not discriminate against any particular sector of society. The Delegate also found that, while detention is a possibility for the duration of questioning by authorities at the airport for up to 24 hours, and individuals who are subsequently charged may be held at a nearby prison for a few days if they are returned on a weekend or public holiday when a magistrate is not available, a fine is the typical outcome for those who left Sri Lanka illegally on a people-smuggling boat. The Delegate also noted that there is provision for fines to be paid in instalments in case of financial difficulty.

2.5 The Department of Home Affairs referred the Delegate's decision to refuse the complainant a Safe Haven Enterprise Visa to the Immigration Assessment Authority for

¹ A local branch of the same NGO for which he had worked until 2009.

merits review. The complainant produced some new information, such as photographs of his scars and an Australian doctor's report relating to past injuries, which he had not included in his application for a Safe Haven Enterprise Visa. On 16 October 2017, the Immigration Assessment Authority affirmed the Delegate's decision not to grant the complainant a Safe Haven Enterprise Visa. While the Immigration Assessment Authority accepted that the complainant had been an LTTE supporter during the civil war, it considered his involvement to have been low level. It also did not consider it credible that the Criminal Investigation Department would resume interest in him in late 2012 or early 2013 because he had breached his reporting requirement prior to the end of the civil war in May 2009.

2.6 On 18 September 2018, the Federal Circuit Court of Australia dismissed the complainant's application for judicial review of the Immigration Assessment Authority decision because it found no ground for alleged jurisdictional error.

2.7 On 12 June 2019, the complainant's appeal of the Federal Circuit Court decision to the Federal Court of Australia was also dismissed on the basis that the complainant had failed to make out any grounds of his appeal.

2.8 On 13 November 2019, the High Court of Australia refused the complainant's application for special leave to appeal the Federal Court's decision on the basis that it did not find any reason to doubt the correctness of the decision of the Federal Court of Australia.

2.9 On 3 December 2019, the complainant requested the Minister for Immigration and Border Protection to intervene in his case² invoking, in particular, a new claim that had not been brought before the Delegate who had considered the application for a Safe Haven Enterprise Visa: that he was an LTTE member and was active in recruiting new members. On 26 May 2020, the Department of Home Affairs determined that the complainant's claims did not meet the requirements for Ministerial intervention. The complainant's request for such intervention was therefore not referred to the Minister. With respect to the complainant's claim that he was an active LTTE member, the Department assessed that the information was known to the complainant at the time of his entry interview, his application for a Safe Haven Enterprise Visa and his Immigration Assessment Authority review, but he had not submitted the information, citing fears that the Australian Security Intelligence Organisation would object to issuing him a visa. The Department assessed that this was not a compelling explanation for his decision to wait over two years to raise these claims through the Ministerial intervention process, which raised doubts as to their genuine nature. The Department noted that the complainant had previously been assessed as credible and his earlier claims had been accepted, while noting that the protection obligations of Australia were not engaged. The Department further assessed that the new claims were an extension of the complainant's earlier claims in an attempt to increase his chances of a positive immigration outcome and, as such, did not consider them further.

Complaint

3.1 The complainant submits that, if he is returned to Sri Lanka, he faces a real risk of being tortured and suffering cruel, inhuman and degrading treatment and punishment, in violation of article 3 of the Convention.

3.2 The complainant fears that he would be killed if he returns to Sri Lanka because one of his LTTE friends now works for the Criminal Investigation Department and is informing it about him. He claims that he has been part of LTTE for more than three years, including being involved in recruiting new members and being tortured by the Criminal Investigation Department in connection with his LTTE activities. He also invokes the human rights situation in his country since the election of the new president in 2019.

² The Minister's guidelines describe the circumstances in which the Minister may wish to consider exercising the ministerial intervention power under section 48B of the Migration Act. Notably, the Minister may wish to consider the section 48B public interest power where there are exceptional circumstances that justify considering new information or where significant changes in circumstances have occurred subsequent to a decision to refuse a protection visa.

State party's observations on admissibility and the merits

4.1 On 18 March 2021, the State party challenged the admissibility of the complaint, arguing that the claims made by the complainant are inadmissible *ratione materiae* because his allegations do not meet the threshold of torture under article 1 of the Convention. It also submits that the complainant's claims are manifestly unfounded within the meaning of rule 113 (b) of the Committee's rules of procedure, because his claims have already been considered through comprehensive domestic administrative and judicial processes.

4.2 On the merits, the State party recalls in detail the decisions issued at the domestic level. It submits that the complainant's allegations that a friend of his is informing the Criminal Investigation Department about him appear to relate to the risk the complainant faces as a result of his links to or support for LTTE. However, domestic processes have already included thorough consideration of whether the complainant is at risk of significant harm, including torture, as a result of his links to or support for LTTE and have concluded that he is not.

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

5. On 25 August 2023, the complainant submitted his comments on the State party's observations. In particular, he noted that his claims were eventually published online, along with his pseudonym, which has placed him in a precarious situation.³ He also considered that the State party's authorities have failed to carry out a free and fair assessment of his claims and have been critical of his credibility.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 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.

6.3 The Committee notes that, in the present case, the State party has contested the admissibility of the communication, stating that it is manifestly unfounded and thus inadmissible pursuant to article 22 (2) of the Convention and rule 113 (b) of the Committee's rules of procedure. The Committee notes the State party's argument that the evidence produced has already been examined by domestic authorities. 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.⁴ The Committee gives considerable weight to findings of fact made by organs of the State party concerned;⁵ however, it is not bound by such findings. It follows that the Committee will make a free assessment of the information available to it in accordance with

³ No further details were provided.

⁴ *G.K. v. Switzerland* (CAT/C/30/D/219/2002), para. 6.12; *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.

⁵ For example, *T.D. v. Switzerland* (CAT/C/46/D/375/2009), para. 7.7; and *Alp v. Denmark* (CAT/C/52/D/466/2011), para. 8.3.

article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.⁶

6.4 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 some aspects of his story were not credible, that he did not have a political profile of interest to the Sri Lankan authorities and that the level of harm resulting from his illegal departure from Sri Lanka would not amount to persecution. 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 tortured if returned to Sri Lanka. The Committee also notes that the complainant contests the assessment of his credibility made by the authorities of the State party. However, the Committee observes that the complainant provided no documentation or other evidence to substantiate his assertions and that the authorities of the State party found, after a thorough assessment of all the facts and evidence presented at different levels of jurisdiction, 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.⁷

6.5 The Committee recalls its earlier decisions 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.⁸

7. 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.

⁶ For example, *I.E. v. Switzerland* (CAT/C/62/D/683/2015), para. 7.4. See also Committee against Torture, general comment No. 4 (2017), para. 50.

⁷ *S.K. v. Australia*, para. 12.5.

⁸ *Ibid.*, para. 12.6.