



**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. 605/2014\*,\*\***

<i>Submitted by:</i>	G.R. (represented by counsel, John Phillip Sweeney)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of communication:</i>	23 May 2014 (initial submission)
<i>Date of decision:</i>	13 May 2016
<i>Subject matter:</i>	Forcible return of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture
<i>Procedural issues:</i>	Level of substantiation of claims; inadmissibility <i>ratione materiae</i> ; incompatibility with the Convention
<i>Substantive issues:</i>	Risk of torture of the complainant upon forcible return to Sri Lanka
<i>Article of the Covenant:</i>	3

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\* Adopted by the Committee at its fifty-seventh session (18 April-13 May 2016).

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



1.1 The complainant, G.R., is a national of Sri Lanka born on 2 October 1991. He sought asylum in Australia, his application was rejected and he is awaiting forced removal to Sri Lanka. He claims that if removed, he would be at risk of being subjected to torture, harassment and interrogation by the Criminal Investigation Department, the Sri Lankan army or associated paramilitary groups as he is suspected of being a member and supporter of the Liberation Tigers of Tamil Eelam. His removal would thus be in violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant requested the granting of interim measures to halt his imminent forced removal to Sri Lanka while his complaint was under consideration by the Committee. Australia recognized the competence of the Committee against Torture, pursuant to article 22 of the Convention, on 28 January 1993. The complainant is represented by counsel, John Phillip Sweeney (Edmund Rice Centre).

1.2 On 27 May 2014, pursuant to rule 114, paragraph 1, of its rules of procedure (see CAT/C/3/Rev.6), the Committee, acting through its Rapporteur on new complaints and interim measures, granted provisional interim measures and requested the State party to refrain from returning the complainant to Sri Lanka while his complaint was under consideration by the Committee; that request could be reviewed in the light of information and observations submitted by the State party and further comments from the complainant. On 16 April 2015, the State party requested that the Committee lift the interim measures. While reaffirming that it considers each interim measures request on its merits in good faith through comprehensive domestic proceedings, the State party claimed that there were no substantial grounds for believing that the author faced a real risk of irreparable harm if returned to Sri Lanka and assessed the interim measures request to be unwarranted. On 1 May 2015, the Committee decided to maintain provisional interim measures. On 29 May 2015, the complainant submitted that, as of that day, he was placed in immigration detention pending his removal to Sri Lanka.<sup>1</sup> Also on 29 May 2015, the State party again requested that the Committee lift the interim measures. On 18 August 2015, the Committee decided to reiterate its request for interim measures.

### **Facts as presented by the complainant**

2.1 The complainant, of Tamil and Sinhalese ethnicity,<sup>2</sup> is a native of Trincomalee who has also lived in Jaffna (Northern Province of Sri Lanka).<sup>3</sup> In 2005, one of the complainant's uncles was killed by the Sri Lankan army, due to suspected links with the Liberation Tigers of Tamil Eelam. In 2006, another of his uncles was killed by the paramilitary Karuna group, having been suspected of storing weapons for the Liberation Tigers of Tamil Eelam. The Karuna group subsequently interrogated the complainant about his uncle, and about whether the complainant was involved with the Liberation Tigers of Tamil Eelam. In 2008, a third uncle was killed, by either the Sri Lankan army or the Karuna group, on suspicion of being a former member and/or supporter of the Liberation Tigers of Tamil Eelam. Subsequently, the complainant was arrested and interrogated.<sup>4</sup> He was reportedly beaten and threatened with death if he did not tell the interrogators, who were

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<sup>1</sup> According to the information provided by the State party, the complainant remains in detention.

<sup>2</sup> His mother is Tamil and his father is Sinhalese, which was an issue discussed at length by the authorities of the State party, although the complainant indicated that he identified himself as a Tamil (due to his language and the fact that he lived in a Tamil-dominated area).

<sup>3</sup> The complainant submits that according to the Office of the United Nations High Commissioner for Refugees (UNHCR), anyone who has lived in that part of the country necessarily had links with the Liberation Tigers of Tamil Eelam prior to 2009. The stay in Jaffna is allegedly particularly dangerous for the complainant since it heightens the risk that he will be identified as having links with the Liberation Tigers of Tamil Eelam, and/or as being likely to hold anti-government views because of the lack of investigation into war crimes accusations.

<sup>4</sup> The complainant does not provide further details as to the timing of the incident.

unknown to him, about his cousin. He said that he did not know anything about the whereabouts of his cousin.

2.2 On 28 June 2012, the complainant arrived in Australia from Sri Lanka by boat. He was detained upon arrival. On 16 October 2012, the former immigration minister intervened in the author's case under section 195A of the Migration Act 1958, allowing him to be released from immigration detention and granting him a bridging (general) visa while his application for a protection visa was being considered by the Department of Immigration and Border Protection. Further bridging visas have been issued since.<sup>5</sup> On 12 November 2012, the complainant made an application to the Department of Immigration and Border Protection for a protection visa, which was rejected on 18 February 2013 as the complainant was not perceived to be a refugee to whom the State party owed protection obligations. The complainant appealed the decision of the Department to the Refugee Review Tribunal, which upheld the decision on 7 June 2013.

2.3 On 23 October 2013, the complainant applied for a judicial review of the Refugee Review Tribunal's decision to the Federal Circuit Court of Australia, which dismissed the application on 17 December 2013. On 30 January 2014, the complainant made an application to the Minister for Immigration and Border Protection to request ministerial intervention under the Migration Act 1958, which allows the Minister to grant a visa to an unsuccessful applicant if it is in the public interest to do so. However, the complainant's request for ministerial intervention was refused on 26 March 2014. That decision could not be appealed further.

2.4 After the author had left Sri Lanka for Australia, the authorities visited his aunt, with whom he had been living, and questioned her about his whereabouts. The author claims to be a member of the Facebook group "Cool Tamils", in which prominent members of the Liberation Tigers of Tamil Eelam regularly make posts praising Liberation Tigers of Tamil Eelam activities and attempt to mobilize support against the Government of Sri Lanka. Nonetheless, the complainant does not claim that he is involved with the Liberation Tigers of Tamil Eelam. He left Sri Lanka as he knows he cannot get any protection from the authorities and he claims that there is no protection for Tamils in general in Sri Lanka.

2.5 The complainant claims that he has exhausted all available domestic remedies in Australia. He maintains that he should not be required to pursue further remedies in higher Australian courts as such litigation would take a long time to be finalized. The complainant also claims that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

### **The complaint**

3.1 The complainant alleges that the State party, by forcibly removing him to Sri Lanka, would violate his rights under articles 1 and 3 of the Convention. He submits that he is at real risk of being tortured and of suffering cruel, inhuman or degrading treatment or punishment in Sri Lanka, particularly at the hands of the Criminal Investigation Department, the Sri Lankan army or associated paramilitary groups, as he is suspected of being a member and supporter of the Liberation Tigers of Tamil Eelam. He bases his fear of being suspected of having links with the Liberation Tigers of Tamil Eelam on the fact that he is a young Tamil who has lived much of his life in the north-east of Sri Lanka.

3.2 In particular, he fears that he would be persecuted, harassed or abducted if returned to the north-east of Sri Lanka, since members of his family have been killed because of

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<sup>5</sup> The first bridging visa was valid until 9 January 2015.

their perceived links to the Liberation Tigers of Tamil Eelam. The complainant has personally been questioned by “white van” people.<sup>6</sup>

3.3 The complainant claims that as he left Sri Lanka unlawfully, if he is forcibly returned he risks: (a) being detained at the Negombo Remand Unit for contravening section 45 (1) (b) of the country’s Immigrants and Emigrants Act; and (b) being charged with illegal departure and facing a long period of imprisonment. He also claims that conditions in the Negombo Remand Unit are well documented as being “cramped, unsanitary and unhygienic”, that there is little chance to exercise and that there is overcrowding to the extent that the prisoners have to take turns to sleep. Regardless of the length of time spent on remand, his detention would constitute inhuman and degrading treatment.

3.4 The complainant submits that returned failed asylum seekers who illegally departed Sri Lanka are immediately detected and taken into custody by the Sri Lankan authorities upon arrival at Colombo Airport.

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

4.1 On 9 December 2014, the State party submitted its observations on the admissibility and merits of the complaint. It asserts that the complainant’s allegations are manifestly unfounded and therefore inadmissible as the complainant failed to establish a prima facie case for the purpose of admissibility. Should the Committee find that any of the allegations are admissible, the State party submits that these should be dismissed by the Committee for lack of merits. The State party argues that the complainant’s allegations have not been supported by evidence that there are substantial grounds for believing that he would be in danger of being tortured if returned to Sri Lanka. The State party adds that the non-refoulement obligation is confined to torture and does not extend to cruel, inhuman or degrading treatment or punishment.<sup>7</sup>

4.2 In order to show that a State party would be in breach of its non-refoulement obligation under article 3 of the Convention, an individual must be found to be at a foreseeable, real and personal risk of being subjected to torture should he or she be returned.<sup>8</sup> The State party submits that the complainant’s claim concerning inhumane treatment on returning to Sri Lanka, at the Negombo Remand Unit, should be ruled inadmissible pursuant to article 22 (2) of the Convention as incompatible with the provisions of the Convention.

4.3 In the State party’s view, the complainant has not provided any relevant new evidence in his submissions to the Committee that has not already been considered through robust and comprehensive domestic administrative and judicial processes which did not consider his claims to be credible. The State party requested the Committee to “give considerable weight to findings of fact” that were made by organs of a State party, which found that the State party did not owe the complainant protection under the Convention.

4.4 The State party submits that the complainant has failed to establish a prima facie case for the purpose of admissibility. It indicates that the complainant’s claims have been considered during the application for a protection visa, the external merits review by the Refugee Review Tribunal, the judicial review by the Federal Circuit Court of Australia and

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<sup>6</sup> “White van” people is a term generally used to refer to members of the Criminal Investigation Department or to its aids or affiliates.

<sup>7</sup> See the Committee’s general comment No. 1 on implementation of article 3 of the Convention in the context of article 22, para. 3.

<sup>8</sup> See communication No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003, para. 7.3.

in a request for ministerial intervention.<sup>9</sup> On 18 February 2013, the primary decision maker considered the position of failed asylum seekers who had returned to Sri Lanka. It concluded that while returnees may face investigation at the airport, which takes place regardless of ethnicity and for the purposes of identifying persons with a criminal or adverse security profile, they are safe if they are not connected to any activities of opposition to the Government. As the complainant had not claimed to be engaged in and was not suspected of being engaged in such activity, it was found that the chance of harm befalling him on returning to Sri Lanka was remote. Although the complainant's allegations that two of his uncles had been killed in 2005 and 2006 and that he had been interviewed by "white van" people about his relationship with one of those uncles were accepted, his claims that he was interrogated in 2008 in connection with another relative's death were not found to be credible due to inconsistencies in his testimony. Nor was it accepted that people had come to look for him in 2011, given that the complainant did not raise this claim in his initial interview or statutory declaration. It was considered that the mere fact of being a Tamil was no longer a basis for persecution in Sri Lanka, that the author could not be said to have been persecuted and that he had never been accused of having any involvement with the Liberation Tigers of Tamil Eelam.

4.5 The primary decision maker found only a remote chance that the complainant would be subjected to serious harm by government authorities or associated paramilitary groups and that this would amount to persecution due to his race and imputed political opinion. It did not find substantial grounds for believing that, as a necessary and foreseeable consequence of the complainant being removed from Australia, there is a real risk that he would suffer significant harm, against which he is owed protection under section 36 (2) (aa) of the Migration Act 1958.

4.6 On 7 June 2013, the Refugee Review Tribunal, carrying out an external merits review, affirmed the primary decision maker's decision not to grant the complainant a protection visa. It accepted that upon returning to Sri Lanka the complainant would go through a process put in place by the domestic authorities, and that he would be subject to a fine but not a custodial sentence for departing illegally. The Tribunal was not satisfied that being an illegal returnee or a failed Tamil asylum seeker, singularly or in combination with his personal and family profile, would give rise to differential treatment or a real chance of serious harm upon return. The State party submits that there have been no reports of torture or other forms of deliberate mistreatment at the Negombo Remand Unit. The Tribunal also noted that the author has lived, worked and travelled in Sri Lanka without harm, at least since the end of the war, and that he was not a particular target for abduction or harm at the time he left Sri Lanka in 2012. The Tribunal also noted evidence that the author's family members continued to live in Trincomalee without suffering harm. The Tribunal was not satisfied that the complainant's connection with relatives killed during the civil war has in the past, does at present or will in the reasonably foreseeable future impute to him any links with the Liberation Tigers of Tamil Eelam that would singularly, or cumulatively, give rise to a real chance of serious harm in Sri Lanka. Furthermore, it did not accept the complainant's claim that he was harmed during the interview conducted in 2006 or that he was interrogated in 2008. Finally, on the basis of reports from UNHCR, the Tribunal noted that there was no longer a need to presume that an applicant required protection simply because he or she was a Tamil.<sup>10</sup> The Tribunal concluded that the complainant did not face a real chance of harm in the reasonably foreseeable future in connection with his Tamil race.

4.7 On 17 December 2013, the Federal Circuit Court dismissed the complainant's application for a judicial review of the Refugee Review Tribunal's decision. The Court

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<sup>9</sup> The author provided copies of each decision in his submissions dated 23 May 2014.

<sup>10</sup> UNHCR, "UNHCR eligibility guidelines for assessing the international protection needs of asylum seekers from Sri Lanka", 5 July 2010 and 21 December 2012.

noted that the author was not able to substantiate an alleged failure by the Tribunal in assessing the issue of complementary protection and noted that the Tribunal was plainly aware of the distinction between the test for protection under the Convention relating to the Status of Refugees, of 1951, and the test for protection under the complementary protection framework. It noted that the complainant's assertion that the Tribunal had denied him an opportunity to address the "white van" abductions claims was not supported, as the complainant had had the opportunity to comment thereon. The Court also noted that the Tribunal had addressed the complainant's claim that he feared harm because he was a Tamil who was born in the north-east of Sri Lanka and was among the most likely to be suspected of having links with the Liberation Tigers of Tamil Eelam. Finally, the Court rejected the complainant's attempt to combine the individual elements of his claims in regard to his affiliation to particular social groups to demonstrate a real risk for him (e.g. "he was born in Trincomalee" or "he is a Hindu") and concluded that the complainant's grounds of appeal were not substantiated.

4.8 On 30 January 2014, the complainant, through his legal representative, made a request for ministerial intervention under sections 417 and 48B of the Migration Act 1958. During the protection application process, the complainant provided generalized reports on Sri Lanka in relation to the arbitrary deprivation of life, torture and cruel or inhuman treatment or punishment. The complainant also stated, for the first time, that he was a member of a Facebook group called "Cool Tamils", in which prominent members of the Liberation Tigers of Tamil Eelam regularly make posts praising Liberation Tigers of Tamil Eelam activities and attempt to mobilize support against the Government of Sri Lanka. The ministerial intervention proceedings concluded that as the complainant did not have an existing profile with the Sri Lankan authorities that would place him at risk, it was highly unlikely that membership of a Facebook group alone would attract adverse attention resulting in serious or significant harm. The complainant's claims did not meet the criteria for ministerial intervention, and the Assistant Minister for Immigration and Border Protection declined to exercise her powers as there were no substantial grounds for believing that the complainant was at a foreseeable, real and personal risk of torture if returned to Sri Lanka. Given the complainant's reliance on general in-country information, and taking into account extensive country information in relation to Sri Lanka, particularly in regard to the return of failed asylum seekers, the State party concluded that the complainant did not demonstrate that he would be personally at risk.<sup>11</sup>

4.9 Finally, the State party claims that the complainant's submissions to the Committee do not establish the existence of additional grounds to show that he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka. The complainant's reliance on further generalized information does not assist him in establishing that personal risk. Therefore, the State party concludes that the complainant's claims are inadmissible and/or without merit.

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

5. On 8 May 2015, the complainant submitted that the State party had begun proceedings to remove him. He had been granted a new bridging visa for six weeks and had been ordered to report to the Department of Immigration and Border Protection every two weeks and make an appointment with the International Organization for Migration to make arrangements for his return to Sri Lanka. The complainant claimed that he had been told by the case officer that interim measures put in place by the Committee were not relevant and that he would be detained in case of non-compliance. He also indicated that the State party had removed other persons despite requests for interim measures to halt their deportations.

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<sup>11</sup> See, for example, communication No. 83/1997, *G.R.B. v. Sweden*, decision adopted on 15 May 1998, para. 6.3.

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

6.1 On 15 May 2015, the complainant contested the State party's assertions of his lack of credibility. He reiterated his real fear of suffering inhuman treatment if he were to be removed to Sri Lanka, as his close family members had been targeted by the Sri Lankan police and navy and by gunmen suspected of being members of the Karuna group.

6.2 In an annex to his comments, the complainant submitted a death certificate<sup>12</sup> and post-mortem report in respect of Mr. S.K, and a statutory declaration describing his relationship to Mr. K. While the Refugee Review Tribunal had referred to Mr. K. as a "distant relative", he was in fact a close friend of the complainant who then married into the complainant's extended family. He adds that Mr. K. was known by the Sri Lankan security forces to be a member of the Liberation Tigers of Tamil Eelam due to his travels during the ceasefire between 2002 and 2006. The complainant was known to have travelled with him on two journeys to the area that was at that time controlled by the Liberation Tigers of Tamil Eelam. During the second journey, the complainant's name and identification documents were specifically noted by an officer at the Vavuniya checkpoint as someone travelling with Mr. K. The complainant was threatened at that point. Although the officials at the checkpoint only took down the complainant's name and identification number, when he reported to the Jamalija office of the Criminal Investigation Department, after he had been looked for by two men in civilian clothes in his mother's house, he was shouted at and threatened that after the ceasefire of 2002 came to an end he would be looked for again. The threat was designed to make him confess on the question of whether Mr. K. had met with Liberation Tigers of Tamil Eelam members during their trips to Kilinochchi.

6.3 The complainant maintains that the circumstances of Mr. K.'s death are suspicious. He was allegedly shot by the police after a magistrate had ordered his release from prison. It is very unlikely that, once the order for his release came, Mr. K. would have attempted, as the police claimed, to escape, entirely unnecessarily and risking his life to do so. After the killing of Mr. K, the complainant and his relatives were told that the body would be released to them at the cemetery. Although the coffin was sealed, the complainant and his relatives broke the seal, opened the coffin, and saw his mutilated body with some of the internal organs placed to one side inside the coffin. That same night, the complainant was taken by the Criminal Investigation Department for interrogation about the trips that he had made with Mr. K. to areas controlled by the Liberation Tigers of Tamil Eelam and about the nature of their relationship. He was also questioned about why he had broken the seal on the coffin and explained that he wanted to make sure that the family was burying Mr. K. He claims that he was beaten with a plastic chair and kicked during one or two hours of interrogation. Nothing else happened to the complainant until October 2011, when two men in civilian clothes came in a white van to his mother's house to look for him, in vain. As the complainant felt insecure in early 2012, he started moving around and staying in different houses. Thereafter, his mother-in-law organized for him to take a boat from Mannar to India and from there to Australia.<sup>13</sup> The complainant adds that the Refugee Review Tribunal found that the evidence concerning his treatment after the 2008 killing of Mr. K. was contradictory, in large part because he did not discuss this in the entry interview. He considers this finding to be completely unrealistic, as many asylum seekers, especially those who are young and have come by boat, are very frightened of immigration officers carrying out the entry interviews and do not trust them. The complainant had considered his experience with the murder of his family members to be a sufficient explanation of his difficulties. In addition, he claims that the agents who organized the boats told people what they should say and should not say. Such instructions were usually followed in entry interviews, until such time as the asylum seeker could eventually gain trust in the country's

<sup>12</sup> Indicating the date of death of Mr. K. as 12 June 2008.

<sup>13</sup> See paras. 18-25 of the statutory declaration (annex B).

asylum procedures. Out of fear, the complainant spoke only of Mr. K.'s supposed connections to the Liberation Tigers of Tamil Eelam instead of his knowledge that Mr. K. was indeed a member. The complainant holds that the Liberation Tigers of Tamil Eelam are considered to be terrorists by the Sri Lankan authorities, as well as by Australia. Therefore, the complainant feared imprisonment<sup>14</sup> in Australia for his perceived connections to the Liberation Tigers of Tamil Eelam, as there were a number of Sri Lankan asylum seekers being held in detention in Australia on account of a negative security assessment of them by the Australian Security Intelligence Organisation.

6.4 He also argues that while the Refugee Review Tribunal judgement considered that his treatment, if returned to Sri Lanka, would not constitute "serious harm", which is a term used in the Migration Act 1958 based on the Convention relating to the Status of Refugees, his current complaint concerns non-refoulement under the Convention against Torture.

6.5 In addition, he claims that the conditions in Negombo Prison are deliberately substandard as part of the punishment, thereby amounting to inhumane treatment. While the State party points out the absence of reports of mistreatment in the prison's remand unit, the complainant considers that the conditions themselves constitute ill-treatment. He maintains that the treatment by the Government of Sri Lanka of failed asylum seekers has refoulement implications. In that regard, the complainant refers to the judgement of the Federal Court in *WZAPN v. Minister for Immigration and Border Protection* [2014] FCA 947,<sup>15</sup> wherein it was stated that even small threats to life or threats to liberty of small duration continued to constitute violations of the right to life and of personal liberty. The State party reportedly appealed to the High Court of Australia against that judgement, which concerns the Sri Lankan cases, but the decision had not been taken by the time of submission.

6.6 The complainant, if he were to be returned, would not only be considered as a failed asylum seeker who had left the country illegally but also as a young Tamil man from the north-east of Sri Lanka whose family has significant links to the Liberation Tigers of Tamil Eelam sufficient to attract attention and suspicion from the Criminal Investigation Department. He submits that other young men recently removed to Sri Lanka by Australia have suffered torture at the hands of the Criminal Investigation Department, which was interested in their putative links with the Liberation Tigers of Tamil Eelam.<sup>16</sup>

6.7 As regards the conclusion of the Refugee Review Tribunal that there is no longer a need to presume that an applicant requires protection simply because he or she is a Tamil, based on the UNHCR eligibility guidelines, the complainant contests the assertion by the Tribunal that the sole reason for which he could be harmed is being Tamil. He claims that other accumulating elements of his situation, as a young male from the north-east, with family connections to the Liberation Tigers of Tamil Eelam and suspicions having already been expressed about his own involvement with the group, and being a failed asylum seeker in Australia, were ignored by the Tribunal.

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<sup>14</sup> The complainant most probably means detention rather than imprisonment.

<sup>15</sup> See <http://www.refworld.org/docid/5480616c4.html>.

<sup>16</sup> A recent report on the subject produced by the Edmund Rice Centre was attached to the complainant's submission (annex C). The second person mentioned in the report was cited, with his own statement and evidence, in complaint no. 649/2015, which was also made by the complainant's counsel and is currently before the Committee. In that complaint, a declaration and medical records of the young man was provided who states how he had been questioned and beaten by the Criminal Investigation Department in Sri Lanka about who he knew in the Liberation Tigers of Tamil Eelam. The other young man complained of mistreatment at the airport before he was taken to Negombo, in the form of unrelenting interrogation, being stripped naked, being threatened at pistol point and being beaten. The complainant nonetheless accepted that those incidents did not take place in the remand unit of Negombo Prison.

6.8 The complainant submits that he learned for the first time through the State party's submission that the claims he made with respect to his membership of the Facebook group "Cool Tamils", in which prominent members of the Liberation Tigers of Tamil Eelam regularly make posts praising Liberation Tigers of Tamil Eelam activities and attempt to mobilize support against the Government of Sri Lanka were dismissed for lack of evidence during the ministerial intervention process. He admits that the Minister's power to intervene is not compellable by law and that there is no duty established in law to explain why any application might be rejected. Nevertheless, he claims that given the Sri Lankan Government's recent history of attempting to extirpate any remaining "rump" of the Liberation Tigers of Tamil Eelam, the presumption should be that the Sri Lankan Government in fact monitors such pages, as it is an easy matter to do so. The complainant reiterates that the State party demonstrated that it was preparing for his removal as his bridging visa was due to expire on 28 May 2015. The immigration officer reportedly told the complainant that if he did not provide evidence of preparing his imminent departure from Australia, he would be detained.

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

7.1 On 29 May 2015, the State party submitted that the need for interim measures was not justified and that the complainant did not face any prospect of irreparable harm should he be removed to Sri Lanka. It referred to its preceding request to lift the interim measures, dated 16 April 2015, which was denied by the Committee on 1 May 2015.

7.2 The State party reiterated that it considers each request for interim measures in good faith, on its merits, through an established process. The assessment of interim measures requests includes consideration of whether the author's claims engage the State party's non-refoulement obligations. Having carefully considered the information provided by the complainant, the State party determined that there were no substantial grounds for believing that he faced a real risk of irreparable harm if returned to Sri Lanka. Consequently, it assessed the interim measures request to be unwarranted.

7.3 The State party outlined its comprehensive domestic processes, which have consistently determined that the State party's non-refoulement obligations, including under article 3 of the Convention against Torture, are not engaged with respect to the complainant, and noted that no new and credible information was provided in that regard. The national proceedings included consideration by the Refugee Review Tribunal, a judicial review by the Federal Circuit Court, and a request to the Minister for Immigration and Border Protection to use his discretionary and non-compellable power under sections 48B and 417 of the Migration Act 1958 to intervene in favour of an unsuccessful visa application if he considers it in the public interest to do so.

7.4 In light of the assessment by the State party in response to the interim measures request that there are not substantial grounds for believing that there is a real risk of irreparable harm to the author if returned to Sri Lanka, the State party respectfully requested that the Committee lift the interim measures request. On 18 August 2015, the Committee decided to maintain its request for interim measures.

7.5 On 23 December 2015, the State party submitted a response to the complainant's submission of 15 May 2015, indicating that the Department of Immigration and Border Protection assessed the credibility of the complainant's claims with respect to his association with Mr. K. and determined that the author's relationship with Mr. K. did not raise a real risk of torture should the author be returned to Sri Lanka. The Department has assessed that the post-mortem report does not support the author's claims, as it does not contain any information that links the author to the Liberation Tigers of Tamil Eelam or to the person who is referred to in the post-mortem report. The description of the wounds in the post-mortem report is not consistent with the author's claims that the body was

mutilated and there is no reason to believe that the body was taken for a post-mortem examination and then mutilated the way that the author describes. Moreover, the Department assessed that the post-mortem report appeared to be fraudulent. Therefore, the Department has given no weight to the allegations that the author will be tortured on return to Sri Lanka.

7.6 The Department of Immigration and Border Protection has also assessed the statutory declaration presented as evidence to the effect that the author has a relationship with a person, Mr. K., who was a Liberation Tigers of Tamil Eelam member and was killed by the police after his release from detention. The complainant's claim that he faces a real risk of torture on returning to Sri Lanka because of his relationship with the Liberation Tigers of Tamil Eelam member was not considered credible. Moreover, the Department has not accepted the complainant's explanations that he did not provide his statutory declaration earlier because he feared a prolonged period in detention in the State party because of his relationship with Mr. K. The State party notes that the complainant provided the information about the two dead uncles but not about Mr. K. When seeking a judicial review in the Federal Circuit Court, the complainant did not raise any concerns that his links with a member of the Liberation Tigers of Tamil Eelam had not been adequately considered. The Department considered that this omission raised doubts as to the credibility of the complainant's claims that he had a close link with Mr. K. and that Mr. K. was a member of the Liberation Tigers of Tamil Eelam as stated in the statutory declaration. Regarding the claim that the complainant met Mr. K., who was an employee of the author's uncle, and that they went together to Kilinochchi (the headquarters of the Liberation Tigers of Tamil Eelam), the Department has assessed this as implausible. It was considered improbable that the complainant would consent, or that he would have his family's consent, to travel to such a volatile region.<sup>17</sup> It was also questionable that the family would have accepted the risk that the author might be recruited by the Liberation Tigers of Tamil Eelam<sup>18</sup> or might be perceived by the authorities, on returning to the government-held area, as being a member of the group.<sup>19</sup> Although the Department acknowledged that there was a formal ceasefire in place during 2006, there was reportedly ongoing violence in January and June 2006 in Trincomalee, Vavuniya and Kilinochchi and throughout Sri Lanka. The State party points out that according to UNHCR, the Sri Lankan authorities returned to pre-ceasefire security arrangements and many checkpoints were reinstated on the main roads after April 2006 and in the towns in the north and the east, making it particularly difficult for Tamils to travel in government-controlled areas. In August 2006, the violence had increased again to the point that the A9 road linking Vavuniya and Kilinochchi was closed because of the heightened security risk.<sup>20</sup>

7.7 The State party also submits that while Mr. K. may have been a member of the Liberation Tigers of Tamil Eelam, there is no evidence to substantiate the complainant's claims that the Sri Lankan army authorities at checkpoints were aware of that membership during the alleged travel by the complainant and Mr. K. to Kilinochchi. It is also argued that, irrespective of the ceasefire, if the Criminal Investigation Department had knowledge

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<sup>17</sup> The complainant was a minor (aged 15) at the time.

<sup>18</sup> "Sri Lanka continues to lead the campaign against child recruitment", report by the Government of Sri Lanka, 21 June 2006, available from <http://reliefweb.int/report/sri-lanka/sri-lanka-continues-lead-campaign-against-child-recruitment>; and "Save the Children concerned about increased violence against children in Sri Lanka", report by Save the Children, 16 June 2006, available from <http://reliefweb.int/report/sri-lanka/save-children-concerned-about-increased-violence-against-children-sri-lanka>.

<sup>19</sup> Human Rights Watch, "Return to war: human rights under siege", 5 August 2007. Available from <https://www.hrw.org/report/2007/08/05/return-war/human-rights-under-siege>.

<sup>20</sup> TamilNet, "SLA closes Vavuniya, Uyilankulam, Madhu checkpoints", 12 August 2006. Available from <http://www.tamilnet.com/art.html?artid=19203&catid=13>.

that the complainant had travelled to Kilinochchi and this had led to a suspicion that the complainant had connections with the Liberation Tigers of Tamil Eelam, it would have had the power to detain him at that time. However, the complainant was let go. The Department of Immigration and Border Protection has assessed the fact that the complainant was released as indicating that he was not a person of interest. In regard to the complainant's attempt to view the deceased body, the State party claims that there is no reasonable explanation for the author not to have disclosed pertinent information to the Refugee Review Tribunal such as the fact that he and Mr. K.'s wife had opened the coffin and found the body mutilated or not to have disclosed in the submission the fact that there was a video that put the author at risk of harm.<sup>21</sup> Consequently, the State party has not accepted these claims as a true account of events and has therefore not taken them as evidence that the complainant would be subjected to torture if returned to Sri Lanka.

7.8 Furthermore, the State party points out that the complainant claimed that after being detained and interrogated in 2008, no other adverse incidents occurred until 2011, three years after Mr. K.'s death. When asked at his protection visa interview if anything else had happened to him after he was detained in 2008, the author responded that in 2011 some people had come to his parents' place (his previous residence)<sup>22</sup> and asked where he was. However, this claim has been inconsistent throughout the assessment process. It was accepted by both the protection visa decision maker and the Refugee Review Tribunal that the author continued to live and work in the same place (or close by) from 2006 until he departed for Australia in June 2012. In addition, he provided information to the Tribunal saying that he had continued working until his departure in 2012. Consequently, his claims that people have been looking for him since 2008 are not considered to be evidence of a real and current risk of torture if returned to Sri Lanka. Although he submits that Mr. K.'s death is "highly suspicious", the author has not articulated how the suspicious circumstances surrounding Mr. K.'s death would engage the State party's non-refoulement obligations under article 3 of the Convention against Torture.

7.9. The State party does not consider the complainant's reference to *WZAPN v. Minister for Immigration and Border Protection*, and the High Court appeal, to be relevant to the State party's obligations towards the author under the Convention, as that case relates to the interpretation of provisions of domestic legislation directed at implementing the Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees. Consequently, the State party submits that these claims are inadmissible *ratione materiae*.

7.10 The State party notes that all domestic remedies have been exhausted, as High Court proceedings were dismissed on 29 October 2015.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claims contained in a complaint, 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.

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<sup>21</sup> The complainant did not tell the Tribunal that when he and some family members went to visit the coffin, they opened it and found the body mutilated. Instead, he told the Tribunal that he was at risk because a video had been taken of him when he went to visit the body of the deceased at the hospital.

<sup>22</sup> No exact date was provided in respect of this incident.

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it is precluded from considering 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.

8.3 As regards the other arguments by the State party that the complaint should be declared inadmissible, the Committee considers that these arguments are closely related to the merits of the case, and therefore declares the complaint admissible insofar as it raises issues under article 3 of the Convention. As the Committee finds no further obstacles to admissibility, it declares the present complaint admissible and proceeds to its consideration of the merits.

#### *Consideration of the merits*

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

9.2 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 would be in danger of being subjected to torture.

9.3 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 returning 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 such determination 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.<sup>23</sup>

9.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although 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 upon the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.<sup>24</sup> The Committee gives considerable weight to findings of fact that are made by organs of the State party concerned,

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<sup>23</sup> See, for example, communications No. 467/2011, *Y.B.F., S.A.Q. and Y.Y. v. Switzerland*, decision adopted on 31 May 2013, para. 7.2; No. 392/2009, *R.S.M. v. Canada*, decision adopted on 24 May 2013, para. 7.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

<sup>24</sup> See, for example, communications No. 203/2002, *A.R. v. Netherlands*, Views adopted on 14 November 2003, para. 7.3; No. 285/2006, *A.A. et al. v. Switzerland*, decision adopted on 10 November 2008, para. 7.6; No. 322/2007, *Njamba and Balikosa v. Sweden*, decision adopted on 14 May 2010, para. 9.4; No. 343/2008, *Arthur Kasombola Kalonzo v. Canada*, decision adopted on 18 May 2012, para. 9.3; and No. 414/2010, *N.T.W. v. Switzerland*, decision adopted on 16 May 2012, para. 7.3.

while at the same time it is not bound by such findings and instead has the power, by virtue of article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.<sup>25</sup>

9.5 The Committee notes the complainant's claim that his forcible removal to Sri Lanka would amount to a violation of his rights under article 3 of the Convention, as he would be exposed to a risk of being tortured and suffering cruel, inhuman or degrading treatment or punishment, particularly at the hands of the Criminal Investigation Department, the Sri Lankan army or associated paramilitary groups, as he is suspected of being a member and supporter of the Liberation Tigers of Tamil Eelam. The Committee also notes the State party's allegations that the complainant has not provided any relevant new evidence to the Committee that had not already been considered through robust and comprehensive domestic administrative and judicial processes. In that regard, the Committee notes the State party's submission that the migration authorities questioned the credibility of the complainant's statements due to inconsistencies in his testimony, including with regard to his claims that he was harmed during the interview conducted in 2006, that he travelled with Mr. K. to Kilinochchi, that he was interrogated in 2008 in connection with another relative's death and that he was looked for in 2011. The Committee further notes the State party's submission that the author had lived, worked and travelled in Sri Lanka without harm, persecution or abduction at least from the end of the war until his departure in June 2012, and that he had never been accused of having any involvement with the Liberation Tigers of Tamil Eelam. The Committee notes that the State party considered as evidence that the author's family members continue to live in Trincomalee without problems, and also that it was not satisfied that the complainant's connection with relatives killed during the civil war, including Mr. K., would in the reasonably foreseeable future impute to him any links to the Liberation Tigers of Tamil Eelam which would give rise to a real and personal risk of serious harm in Sri Lanka. Moreover, the Committee takes into account the State party's assertions that the post-mortem report does not support the author's claims, since it does not contain any information to link the person referred to or the author to the Liberation Tigers of Tamil Eelam, while the State party's doubts about the genuineness of the post-mortem report remain undisputed.<sup>26</sup>

9.6 The Committee also notes the complainant's claim that he is a member of a Facebook group called "Cool Tamils". However, the ministerial intervention proceedings concluded that as the complainant was not perceived as an active Liberation Tigers of Tamil Eelam affiliate by the Sri Lankan authorities, it was highly unlikely that membership of a Facebook group alone would attract adverse attention resulting in serious or significant harm. In this connection, the Committee notes that the ministerial intervention was declined, as there were no substantial grounds for believing that the complainant was at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

9.7 Furthermore, the Committee notes the complainant's claim that as he left Sri Lanka unlawfully, he fears being arrested by the Sri Lankan authorities upon arrival at Colombo Airport, being subsequently detained in inhumane and degrading conditions at the Negombo Remand Unit and facing charges and eventual imprisonment as an illegal returnee or failed asylum seeker. The Committee notes that the State party accepted that the complainant would go through a process upon returning to Sri Lanka and that he would be subjected to a fine but not a custodial sentence for departing illegally. The Committee also notes the State party's claims that there were no reports of torture or other forms of deliberate mistreatment at the Negombo Remand Unit, which were not disputed by the complainant. In this connection, the Committee notes the complainant's reliance on general

<sup>25</sup> See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010.

<sup>26</sup> See para. 7.5, in which it is noted that the Department of Immigration and Border Protection assessed the post-mortem report as appearing to be fraudulent.

information, including on the situation in the Negombo Remand Unit, without demonstrating a personal risk, while the State party asserts that the current situation in Sri Lanka does not in itself suffice to establish that a forcible removal of the complainant would entail a violation of his rights under article 3 of the Convention.

9.8 The Committee recalls paragraph 5 of its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, according to which the burden of presenting an arguable case lies with the author of a complaint, and considers that the complainant has not discharged this burden of proof.<sup>27</sup>

9.9 In regard to the complainant's claim that the migration authorities have not properly investigated his allegations of a risk of torture upon return, the Committee notes that the complainant disagrees with the factual conclusions of the State party's authorities. Nonetheless, his claims do not establish that the evaluation of his asylum application by the Australian authorities was clearly arbitrary or amounted to a denial of justice. In this regard, the Committee notes that the State party's migration authorities have conducted a comprehensive and thorough examination of the evidence in the case, and considers that the complainant has not sufficiently substantiated his claims that the State party's authorities have failed to duly assess the risk he would allegedly face in case of his return to Sri Lanka.

10. Consequently, the Committee considers that, in the particular circumstances of the present case, the evidence and circumstances invoked by the complainant have not adduced sufficient grounds for believing that he would face a real, foreseeable, personal and present risk of being subjected to torture in case of his removal to Sri Lanka. The Committee thus considers that the material on the file does not enable it to conclude that the return of the author would constitute a violation of article 3 of the Convention.

11. 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.

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<sup>27</sup> See communications No. 429/2010, *M.S. v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6; and No. 455/2011, *X.Q.L. v. Australia*, decision adopted on 2 May 2014, para. 9.4.