



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

Distr.: General
12 August 2016

Original: English

Committee against Torture

**Decision adopted by the Committee under article 22 of the
Convention, concerning communication No. 628/2014*, ****

<i>Communication submitted by:</i>	J. N. (represented by counsel Michala Bendixen)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Denmark
<i>Date of complaint:</i>	15 September 2014 (initial submission)
<i>Date of present decision:</i>	13 May 2016
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Substantive issue:</i>	Non-refoulement
<i>Procedural issue:</i>	Lack of substantiation
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is J.N., a national of Sri Lanka born in 1960. His request for asylum in Denmark was rejected and, at the time of submission of the complaint, he was in detention awaiting deportation to Sri Lanka. He claims that his deportation would be contrary to article 3 of the Convention, as he would be at risk of being subjected to torture in Sri Lanka. No date has been set for his deportation. The complainant is represented by counsel.

1.2 On 17 September 2014, in application of rule 114, paragraph 1, of its rules of procedure, the Committee requested the State party not to deport the complainant to Sri Lanka while the communication was being considered by the Committee.

* 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, Sapana Pradhan-Malla, Ana Racu, Claude Heller Rouassant and Kening Zhang. Pursuant to rule 109 of the Committee's rules of procedure, Jens Modvig did not participate in the consideration of the present communication.



Facts as presented by the complainant

2.1 The complainant was born in Jaffna, Sri Lanka. He is married and has two sons and two daughters. His brother lives in Norway, where he was granted asylum based on his connections with the Liberation Tigers of Tamil Eelam (LTTE). In the past, the complainant helped the Sea Tigers (part of LTTE), using his boat in connection with fighting. However, the main reason for the complainant's asylum claim is a conflict with the Eelam People's Democratic Party (EPDP) in connection with his son V. Both his sons were forced to train with LTTE for a period of 15 days in 2004 in return for support provided after the tsunami. In 2008, EPDP found out about this, took his son V. for interrogation and tortured him. V. was released in very bad shape and could hardly walk. After his son was treated in a hospital, the complainant brought him to a camp run by the Human Rights Commission of Sri Lanka. The complainant visited V. in the camp 15 days later, but thereafter lost all contact with him. A couple of months later, in March 2008, the complainant was summoned to a meeting in the EPDP camp, where he was interrogated about his son and beaten 10 times on different parts of his body. He was released because he promised to turn his son over to EPDP. After this, EPDP searched his house three or four times, the final time on 2 October 2008. EPDP requested that the complainant bring V. to them by 31 October 2008 and threatened that the complainant would be executed if he did not do so.

2.2 On 11 November 2008, the complainant left Sri Lanka illegally with the help of an agent. He has never had a passport issued by the authorities. He arrived in Denmark on 16 November and applied for asylum in Aarhus on the same day on the grounds of having a conflict with EPDP. On 10 February 2010, his asylum request was rejected by the Danish Immigration Service. On 8 June 2010, the Refugee Appeals Board had a hearing but postponed the decision, as it was awaiting information from the International Committee of the Red Cross and the Human Rights Commission in Sri Lanka. On 13 March 2012, the Refugee Appeals Board rejected the appeal and ordered the complainant to leave the country within two weeks. On 11 April 2012, the complainant requested the immigration authorities to reconsider his case, but on 11 May 2012 the Refugee Appeals Board informed him that his request would not suspend his deportation and that the time frame for the Board's reply was 9-10 months. After this, the complainant left Denmark and lived in France for 14 months and in Switzerland for 8 months. He returned to Denmark in May 2014. On 4 September 2014, he was summoned to a meeting with the Danish Immigration police and placed in immigration detention while his deportation was being prepared. The complainant asserts that the Refugee Appeals Board did not consider his request for reconsideration of his case, as he was not in Denmark at that time.

2.3 After the final rejection from the Refugee Appeals Board, the complainant established contact with his wife, who had to change her place of residence in Sri Lanka. He has also learned that his son V. had been sent from the Human Rights Commission camp to a refugee camp in India.

The complaint

3. The complainant claims that, if returned to Sri Lanka, he would face a risk of torture, inhuman or degrading treatment by EPDP, who has threatened him with death. He alleges that he would be at risk of torture by the authorities. As a Tamil returning from abroad, he would automatically be suspected of being connected with LTTE. He refers to media and governmental reports to substantiate the risk faced by returning Tamils in Sri Lanka, and the murders, abductions and extortion by EPDP in Jaffna, which are often covered up or supported by public security forces.

State party's observations on the merits

4.1 On 17 March 2015, the State party submitted, firstly, that the communication was inadmissible and without merit. Secondly, it described the structure and composition of the Refugee Appeals Board. The activities of the Board are based on section 53a of the Aliens Act. Decisions of the Danish Immigration Service refusing asylum are automatically appealed to the Board unless the Service has considered the application to be manifestly unfounded. Appeal to the Board stays the execution of a deportation order. The Board is an independent, quasi-judicial body and is considered a court within the meaning of article 39 of Council of the European Union Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Under the Danish Aliens Act, Board members are independent and cannot seek direction from the appointing or nominating authority. Board decisions are final. Aliens may, however, bring an appeal before the ordinary courts, which have the authority to adjudicate any matter concerning limits to the competence of a public authority. As established by the Supreme Court, the ordinary courts' review of decisions made by the Refugee Appeals Board is limited to a review on points of law, including any inadequacy in the basis for the relevant decision and the unlawful exercise of discretion, whereas the Board's assessment of evidence is not subject to review.

4.2 The State party indicates that a residence permit can be granted to an alien if his or her circumstances fall within the provisions of the 1951 Convention relating to the Status of Refugees. Article 1 (A) of the 1951 Convention is incorporated into Danish law. A residence permit will further be issued to an alien upon application if he or she is at risk of facing the death penalty or being subjected to torture or other serious ill-treatment or punishment in the event of return to his or her country of origin (protection status). Section 7 (2) of the Aliens Act is very similar to article 3 of the European Convention on Human Rights and, according to the explanatory notes on that section, the immigration authorities must comply with the case law of the European Court of Human Rights and the State party's international obligations when applying this provision. In practice, the Refugee Appeals Board will generally consider the conditions for issuing a residence permit to be met when there are specific and individual factors substantiating that the asylum seeker will be exposed to a real risk of the death penalty or ill-treatment upon return. Furthermore, pursuant to section 31 (1) of the Aliens Act, an alien may not be returned to a country where he will be at risk of facing the death penalty or of being subjected to serious ill-treatment, or where the alien will not be protected against being sent on to such a country (the principle of non-refoulement). This obligation is absolute and protects all aliens. In this connection, the State party notes that the Refugee Appeals Board and the Danish Immigration Service have jointly drafted a number of memorandums describing in detail the legal protection of asylum seekers afforded by international law, in particular the 1951 Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

4.3 The Refugee Appeals Board assigns counsel free of charge in all cases, and all the case materials and documents are sent to counsel well in advance of the hearing. Proceedings before the Board are oral and, inter alia, an asylum seeker, his or her counsel and an interpreter are present. At the hearing, an asylum seeker is allowed to make a statement and answer questions. After the closing statements of the counsel and the representative of the Danish Immigration Service, an asylum seeker can make a final statement. The Board's decision will normally be served on an asylum seeker immediately after the hearing and, at the same time, the person chairing the hearing will briefly explain the reasoning behind the decision. The State party notes that decisions are based on an individual and specific assessment of the relevant case and that an asylum seeker's statements regarding his or her grounds for asylum are assessed in the light of all relevant

evidence, including background information on the respective country of origin. Background reports are obtained from various sources, including the Danish Refugee Council, other Governments, the Office of the United Nations High Commissioner for Refugees, Amnesty International and Human Rights Watch.

4.4 In the light of the above, the State party notes that an asylum seeker must provide all required information in order to be able to decide whether he or she falls within section 7 of the Aliens Act. It is thus incumbent upon an asylum seeker to substantiate that the conditions for granting asylum are met. The Board may also hear from witnesses. If an asylum seeker's statements throughout the proceedings appear coherent and consistent, the Board will normally consider them as fact; if the statements are inconsistent, the Board will seek clarifications. However, inconsistent statements about crucial parts of an asylum seeker's grounds for seeking asylum may weaken his or her credibility. In line with the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, the Refugee Appeals Board will generally be less demanding when it comes to the burden of proof in cases involving minor asylum seekers or asylum seekers with a mental disorder or impairment. In addition, if there are doubts as to the credibility of an asylum seeker's story, the Board will always assess to what extent the principle of the benefit of the doubt could be applied.

4.5 The State party further notes that article 1 (A) of the 1951 Convention does not list torture as one of the grounds warranting asylum; however, the fact that an asylum seeker has been subjected to torture or similar ill-treatment in his country of origin may be essential in the assessment of whether the conditions for granting him or her residence under section 7 (1) of the Aliens Act are met. In this regard, the State party notes that, according to the case law of the Refugee Appeals Board, the conditions for granting asylum or protection status cannot be considered to be satisfied in all cases in which an asylum seeker has been subjected to torture in his country of origin. This approach is also supported by the practice of the Committee.¹ When the Refugee Appeals Board considers it as fact that an asylum seeker has been subjected to torture and risks being subjected to torture in connection with persecution for reasons falling within the 1951 Convention in the event of return to his country of origin, the Board will grant residence under section 7 (1) of the Aliens Act (Convention status). In addition, the Board will find that the conditions for granting residence under section 7 (2) of the Aliens Act (protection status) are met if specific and individual factors render it probable that the asylum seeker would be at a real risk of being subjected to torture in the event of return to his or her country of origin.

4.6 When torture is invoked as one of the grounds for asylum, the Board may sometimes find it necessary to obtain further details in that regard. As part of the appeals procedure, the Board may, for example, order an examination of an asylum seeker for signs of torture. The Board normally does not order an examination if an asylum seeker's story lacked credibility throughout the proceedings and the Board had to reject a claim of torture in its entirety. In this regard, the State party refers to the Committee's decision in *Milo Otman v. Denmark*,² in which the complainant's statements on torture and the medical information provided were set aside due to the complainant's general lack of credibility. The State party also refers to *Nicmeddin Alp v. Denmark*,³ in which the Committee noted that the State party's authorities had thoroughly evaluated all the evidence presented by the complainant even though the authorities did not consider it necessary to order a medical examination, as

¹ The State party refers to communications No. 277/2005, *N.Z.S. v. Sweden*, decision adopted on 22 November 2006; and No. 466/2011 *Nicmeddin Alp v. Denmark*, decision adopted on 14 May 2014.

² See communication No. 209/2002, *M. O. v. Denmark*, decision adopted on 12 November 2003, paras. 6.4-6.6.

³ *Nicmeddin Alp v. Denmark*.

the complainant lacked credibility. In this connection, the State party also refers to the pertinent jurisprudence of the European Court of Human Rights.

4.7 The State party further notes the case of *X, Y and Z v. Sweden*,⁴ in which the Committee observed that “past torture is one of the elements to be taken into account by the Committee when examining a claim concerning article 3 of the Convention, but that the aim of the Committee’s examination of the communication is to find whether the authors would risk being subjected to torture now, if returned [to the country of origin]”. In this regard, it also notes the case of *M.C.M.V.F. v. Sweden*,⁵ in which the Committee noted that the crucial point was the situation in the country of origin at the time of the potential return of the asylum seeker to that country.

4.8 The State party further recalls the facts of the case and adds that at the national level the complainant claimed that his sons had been forced to undertake a 15-day training by LTTE in 2006, not in 2004 as stated by him before the Committee. It also notes that, contrary to what the complainant claims, the Human Rights Commission in Sri Lanka did not provide any information whatsoever. The State party further maintains that the complainant has failed to establish a prima facie case for the purpose of admissibility of his complaint under article 3 of the Convention, as it has not been sufficiently substantiated that there are substantial grounds for believing that he would be in danger of being subjected to torture if returned to Sri Lanka. The complaint is therefore manifestly unfounded and should be declared inadmissible. Should the Committee find the complaint admissible, the State party submits that the complainant has not sufficiently established that his return to Sri Lanka would constitute a violation of article 3 of the Convention.

4.9 The State party observes that no new information has been provided in the complainant’s communication to the Committee on his or his son’s problems in Sri Lanka. It notes that, according to the practice of the Refugee Appeals Board, the fact that an asylum seeker has been subjected to torture in his country of origin does not lead to the granting of asylum or protection status in all cases. The decisive factor in an assessment is whether the respective asylum seeker is at risk of torture upon return to his country of origin. In this connection, the State party observes that, in its decision of 13 March 2012, the Refugee Appeals Board essentially found the complainant’s statement as fact but, in view of the background information concerning the change in the situation in Sri Lanka after the complainant’s departure in November 2008, including the fact that EPDP had ceased to be an element of the policy of the Government of Sri Lanka, the Board found that the complainant would not risk being subjected to persecution or ill-treatment within the meaning of section 7 of the Aliens Act upon return. Even though the complainant satisfied the conditions for being granted residence under section 7 of the Aliens Act at the time of his departure in November 2008, that does not mean that he would automatically be eligible for residence under this provision at the time when the Danish Immigration Service or the Refugee Appeals Board rendered the decision, given that the conditions for residence were no longer met and had ceased to exist. In other words, the basis for the assessment of whether an alien is at risk of persecution or abuse justifying asylum is the information available at the time when the respective decision is made.

4.10 In the light of the information mentioned above, the State party refers to the conclusions of the European Court of Human Rights in *Ashkan Panjeheighalehei v. Denmark*,⁶ in which the Court stated that “the existence of the risk (of being subjected to

⁴ See communication No. 61/1996, *X, Y and Z v. Sweden*, Views adopted on 6 May 1998, para. 11.2.

⁵ See communication No. 237/2003, *M.C.M.V.F. v. Sweden*, decision adopted on 14 November 2005, para. 6.4.

⁶ European Court of Human Rights, *Ashkan Panjeheighalehei v. Denmark*, decision as to the

torture or to inhuman or degrading treatment) must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion [...] and should not be evaluated with the wisdom of hindsight". In this context, the State party further relies on the jurisprudence of the European Court of Human Rights⁷ and the Committee's decision in *A.A.R. v. Denmark*⁸ and asserts that, in the present case, when assessing the complainant's actual risk upon his return to Sri Lanka, the Refugee Appeals Board took into account the information on the complainant's personal circumstances, including his and his family's profiling in the light of the available background information on the conditions of Tamils in Sri Lanka. This assessment was made in accordance with the principles set out by the European Court in *N.A. v. the United Kingdom* (application No. 25904/07), in which the Court stated, inter alia, that, regardless of the deterioration of the security situation in Sri Lanka and the resulting increase in human rights violations, this did not create a general risk to all Tamils returning to Sri Lanka. The Court further concluded that an assessment of both the risk to ethnic Tamils with certain characteristics and of whether individual acts of harassment could cumulatively amount to a serious violation of human rights had to be made specifically and individually in every case.

4.11 The State party further notes five cases submitted by ethnic Tamils from Sri Lanka against Denmark,⁹ in which the European Court of Human Rights reached the conclusion that returning the applicants to Sri Lanka would not constitute a violation of the European Convention on Human Rights. The European Court maintained its conclusion from *N.A. v. the United Kingdom* that ethnic Tamils could not be considered at risk of ill-treatment if returned to Sri Lanka and found that the background material concerning the situation in Sri Lanka was not of such a nature that any returning Tamil would risk ill-treatment. The Court also stated that protection under article 3 of the European Convention would only be applicable when an applicant could establish that there were serious reasons to believe that she or he would be of sufficient interest to the authorities and would be detained and interrogated upon return on that account.

4.12 In the present case, according to its decision of 11 November 2013, the Refugee Appeals Board also assessed the matter in the light of the most recent background information on conditions in Sri Lanka at that time, including the information in the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, which lists certain groups of persons with particular connections to LTTE who may need international protection. In this connection, the State party notes that the complainant stated before the State party's authorities that he had been a member of the Sea Tigers, the naval unit of LTTE, from 1992 to 2000 and that this had not caused him any problems. Further, none of the complainant's sons had been a member of LTTE and they had received military training for only two weeks as consideration for the aid received from LTTE in connection with the tsunami in 2004. As regards his brother's situation, the complainant had stated to the authorities of Denmark that his brother had been a member of LTTE, but had experienced some problems when Indian troops arrived in Sri Lanka in 1987, and that he had then fled and subsequently been granted asylum in Norway.

admissibility of application No. 11230/07 (13 October 2009).

⁷ See European Court of Human Rights, *Cruz Varas and Others v. Sweden*, application No. 15576/89, judgment of 20 March 1991, paras. 77-82; and *Vilvarajah and Others v. the United Kingdom*, applications Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, judgment of 30 October 1991, para. 107.

⁸ Communication No. 412/2010, *A.A. v. Denmark*, decision adopted on 13 November 2012.

⁹ European Court of Human Rights, *N.S. v. Denmark* (application No. 58359/08), *P.K. v. Denmark* (application No. 54705/08), *S.S. and Others v. Denmark* (application No. 54703/08), *T.N. and S.N. v. Denmark* (application No. 36517/08) and *T.N. v. Denmark* (application No. 20594/08).

In this regard, the State party observes that the complainant stated that his family had had no problems when his brother left the country. In addition, the complainant did not invoke his brother's situation during the asylum proceedings. Consequently, the State party supports the assessment made by the Refugee Appeals Board that the complainant would not be a high-profile individual to the Sri Lankan authorities because of his own or other family members' connections to LTTE.

4.13 As regards the news and reports referred to by the complainant about acts of abuse committed by the Sri Lankan security forces against Tamils, the State party reiterates that the complainant and his family members are not high-profile individuals, and there is no information that the complainant's family living in Sri Lanka, including his spouse or his children, have experienced any ill-treatment since the complainant's departure. The State party also reiterates that EPDP no longer serves any military function in Sri Lanka, but rather has, to an increasing extent, taken on the characteristics of a criminal gang, committing extortion and corruption and performing violence against civilians in the Jaffna area. Accordingly, the State party maintains that the complainant has not rendered probable that he faces a real risk of being ill-treated by EPDP because of his son's training by LTTE in 2006, at the time when the Refugee Appeals Board rendered its decision, or that he faces any such risk currently.

4.14 Moreover, the State party notes inconsistencies in the complainant's story. In particular, during the interview of 24 November 2008, the complainant stated that he had travelled from the village of Inparuddy to Colombo on 31 October 2008, that he had experienced no problems during his journey, that he had in his possession a temporary ID card, which he had presented to the Sri Lankan authorities during his journey, and that he had departed from the Colombo airport on 12 November 2008 using a temporary Sri Lankan passport issued in his own name. The complainant then stated in his asylum application form of 4 December 2008, and when interviewed on 14 November 2009, that he had departed from the Colombo airport on 12 November 2008 and that he had used a passport issued in a different name. In addition, during the Board's hearing on 8 June 2010, the complainant stated that he had remained with LTTE on the Jaffna peninsula for about 20 or 21 days after the last visit of EPDP on 20 October 2008, and that he had then been accompanied by someone to Mamadu/Vavuniya, from where he had continued his journey to Colombo. Thus, the State party maintains that the complainant, who left Sri Lanka more than six years ago and is not a high-profile individual, will not be at risk of being subjected to ill-treatment in violation of article 3 of the Convention if returned to Sri Lanka.

Further submissions by the parties

5.1 On 29 June 2015, the complainant submitted that he disagrees with the State party's assertion that his complaint is inadmissible. Concerning the merits, he acknowledges that he has not presented any new information to the Committee; however, he refers to a number of reports which confirm that Tamils are still being subjected to ill-treatment in Sri Lanka.¹⁰ The complainant further notes that even if he is not a "high-profile person" in Sri Lanka, he was arrested, interrogated and beaten by EPDP, and was released only after he promised to hand over his son. He failed to do so and therefore was threatened with being killed. Consequently, he fled Sri Lanka illegally with a passport which was not issued in his

¹⁰ The complainant refers to Human Rights Watch "*We Will Teach You a Lesson*": *Sexual Violence against Tamils by Sri Lankan Security Forces* (26 February 2013); N. Sivathanan, "Tamil political prisoners in Sri Lanka" (Sri Lanka Campaign for Peace and Justice, March 2013); UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka (21 December 2012); and United Kingdom Home Office, "Operational guidance note: Sri Lanka" (July 2013).

name. For these reasons, he has a well-founded fear that he would be ill-treated upon return. The complainant further submits that the domestic authorities actually found that he was in need of protection at the time when he left Sri Lanka in 2008 and that only on account of the fact that EPDP had lost its influence in Jaffna had the authorities concluded that he no longer required protection. He also adds that EPDP is still active as a paramilitary group and exerts control in Jaffna with the tacit approval of the Sri Lankan army.¹¹

5.2 On 24 February 2016, the State party reiterated its view that the present complaint is inadmissible due to lack of substantiation and is without merit. It observes that, in his comments of 29 June 2015, the complainant confirmed that he had not provided any new information in the context of his complaint before the Committee. It further notes that it appears that the complainant claims that he left Sri Lanka illegally. In this regard, the State party notes that the complainant travelled to Colombo without experiencing any problems, that he left Colombo airport without any difficulty and that he was able to stay in Colombo prior to his departure without experiencing any problems. As regards the background information on Sri Lanka, the State party notes that the current background information does not provide any basis for reaching a different assessment of the complainant's asylum case. In this respect, the State party refers to country information and guidance on Sri Lanka of the Home Office of the United Kingdom of Great Britain and Northern Ireland,¹² in which it is stated that a Tamil's low-level membership of or participation in LTTE is not sufficient to create a real risk or a reasonable degree of likelihood that the relevant person would attract adverse attention on his return to Sri Lanka. Further, according to the thematic memorandum published by the Norwegian Country of Origin Information Centre (Landinfo) on 3 July 2015,¹³ the overall security situation in Sri Lanka has significantly improved since May 2009, although the country is still under tight military control, and Landinfo has not received any information that Tamils returning to Sri Lanka have been exposed to particular security arrangements, subjected to torture or otherwise ill-treated.

5.3 Finally, in support of its assertion that the present complaint is unfounded and without merit, the State party refers to the recent jurisprudence of the Human Rights Committee. In *P.T. v. Denmark*, the Committee noted that "important weight should be given to the assessment conducted by the State party, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice".¹⁴ Further, in *K. v. Denmark*, the Committee stated that the Danish Refugee Appeals Board "thoroughly examined each of the author's claims, and particularly analysed the alleged threats allegedly received by the author in [his country of origin], and found them to be inconsistent and implausible on several grounds. The author challenges the assessment of evidence and the factual conclusions reached by the RAB, but he does not explain why that assessment would be arbitrary or otherwise amount to a denial of justice".¹⁵ In addition, in *N. v. Denmark*, the Human Rights Committee concluded that "the author has not explained why the decision by the Refugee Appeals Board would be contrary to this standard, nor has he provided substantial grounds to support his claim that his removal to the Islamic Republic of Iran would expose him to a real risk of irreparable harm in violation of article 7 of the Covenant.

¹¹ The complainant refers to the following article: "WikiLeaks: EPDP's targeted killing method with Govt Military – Jaffna government agent reveals secrets", *Colombo Herald* (17 September 2013).

¹² "Country information and guidance: Sri Lanka—Tamil separatism" (United Kingdom Home Office, 28 August 2014).

¹³ "Sri Lanka: Sikkerhetssituasjonen, LTTE og retur til hjemlandet" (Sri Lanka: security situation, the LTTE and return to country of origin) (3 July 2015).

¹⁴ See Human Rights Committee communication No. 2272/2013, *P.T. v. Denmark*, decision adopted on 1 April 2015, para. 7.3.

¹⁵ See communication No. 2393/2014, *K. v. Denmark*, decision adopted on 16 July 2015, para. 7.5.

The Committee accordingly concludes that the author has failed to sufficiently substantiate his claim of violation of article 7 for the purposes of admissibility and finds his communication inadmissible pursuant to article 2 of the Optional Protocol.”¹⁶

5.4 On 22 March 2016, the complainant submitted that his complaint was admissible. He maintained that he had well-founded fears that he would risk being subjected to torture upon return to Sri Lanka and noted that the State party’s authorities had based the decision to deport him on “outdated and insufficient background information”, failing to reopen his asylum case when “new reports and recommendations came forward after March 2012”. The complainant further noted that the decision of the Danish Refugee Appeals Board was not subjected to further appeal, and submitted that it was based on “information which was later proved to be wrong” and thereby amounted to “denial of justice” in the complainant’s case. In this connection, the complainant submitted that his explanations before the State party’s authorities in general were considered to be consistent and credible, and that he had actually been found to be in need of protection when he left Sri Lanka in 2008.

5.5 The complainant stated that the State party’s immigration authorities had decided to reject his asylum application on the grounds that EPDP was no longer connected to the Sri Lankan authorities and that the general risk of torture of returned Tamils was at the time considered to be low. However, he argued that “many reports have later proved both [grounds] to be questionable”. Therefore, the State party’s immigration authorities should reopen his asylum case and examine his application in light of the most recent background information on Sri Lanka. The complainant maintained that there had been “no change of power” in Sri Lanka since he left the country and that “the Board” had not presented any evidence that he would not face any danger upon return. In that regard, the complainant submitted that in 2013 and 2014 the State party had granted asylum to “10 out of 16 asylum seekers from Sri Lanka”; five rejections had been based on lack of credibility, which, according to the complainant, indicated that “the Board in similar cases now acknowledges a strong need for protection”.

5.6 The complainant submitted that torture and other forms of ill-treatment were still widespread in Sri Lanka and, given his background, he was at risk of being subjected to torture or other degrading treatment upon return. He added that, in its submission to the Committee, the State party had omitted important facts. According to Landinfo, in 2015 “arbitrary arrests and detention are still reported and that the Sri Lankan government still considers LTTE as ‘a security risk’”. According to Freedom from Torture, an organization based in the United Kingdom, it had gathered “evidence of 160 (torture) cases up (until) September 2014”. The complainant further provided extracts from a number of “sources”,¹⁷ demonstrating a “different picture” of Sri Lanka than the one provided by the State party. The complainant reiterated that he was not a “high profile person” in Sri Lanka, but that he had assisted the LTTE Sea Tigers. In that regard, he reiterated his story¹⁸ and submitted that he had left Sri Lanka illegally and that he had been able to leave Sri Lanka without any problems as he was not a “highly [*sic*] profile person”. In conclusion, he noted that all returnees in Sri Lanka were thoroughly questioned upon return and later detained, and that a mere suspicion of being connected to LTTE could lead to “severe torture and degrading treatment”.

5.7 On 19 April 2016, the State party submitted further observations. It referred to its previous observations and specific argumentation concerning the present case and reiterated

¹⁶ See communication No. 2426/2014, *N. v. Denmark*, decision adopted on 23 July 2015, para. 6.6.

¹⁷ Amnesty International, the Swiss Refugee Council, the authorities of Canada, the Office of the United Nations High Commissioner for Refugees and Human Rights Watch, among others.

¹⁸ See paras. 2.1 and 2.2 above.

that the complainant had failed to establish a prima facie case for the purpose of admissibility of his complaint under article 3 of Convention and that the complaint was therefore manifestly ill-founded and should be considered inadmissible. In the alternative, the State party maintained that it has not been established that there were substantial grounds for believing that the author's return to Sri Lanka would constitute a violation of article 3 of the Convention. The State party further referred to the case law of the Danish immigration authorities, which demonstrated, inter alia, the high recognition rates for asylum claims between 2013 and 2015.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim 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 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it 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 instant case, the State party has not challenged the admissibility of the complaint on this ground.

6.3 The Committee notes the State party's argument that the complaint should be held inadmissible for lack of substantiation. The Committee, however, considers that the communication has been sufficiently substantiated for the purposes of admissibility, as the allegations of a risk of torture or ill-treatment in the event of the complainant's forced removal to Sri Lanka raise issues under article 3 of the Convention. As the Committee finds no further obstacles to admissibility, it declares the present complaint admissible.

Consideration of the merits

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

7.2 In the present case, the issue before the Committee is whether the forced removal of the complainant to Sri Lanka would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of 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.¹⁹

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

7.5 The Committee notes the complainant's claim that his forcible removal 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 in Sri Lanka. The Committee also notes the complainant's claim, which the State party has accepted, that in 2008 he was detained and beaten by members of the EPDP paramilitary group, who sought information about his son's whereabouts and prior association with LTTE. The complainant also claimed that he was personally associated with the LTTE Sea Tigers from 1992 to 2000, although he did not participate in any combat.

7.6 The Committee notes that, in its decision of 13 March 2012, the State party's Refugee Appeals Board considered the complainant's claims regarding his prior abuse by members of EPDP and affiliation with the Sea Tigers to be facts. Nevertheless, the Board determined that those factors no longer gave rise to a real risk that he would be subjected to torture if returned to Sri Lanka. In this connection, the Committee observes that the Board considered that EPDP was no longer affiliated with the Government as a paramilitary force but rather had lost influence and held a status akin to that of a criminal gang, and therefore did not pose the same threat to the complainant as it might have in the past. Moreover, in the view of the State party, the complainant's prior low-level affiliation with the LTTE Sea Tigers was insufficient to create a reasonable likelihood that he would attract adverse attention upon his return to Sri Lanka. The Committee also recalls that the State party has raised concerns about several alleged inconsistencies and omissions in the complainant's claims to its asylum authorities.

7.7 In this connection, the Committee, while noting that the State party's asylum authorities have considered the complainant's allegations and have concluded that the complainant would not be at risk of being subjected to persecution or ill-treatment upon return to Sri Lanka, recalls that, while it gives considerable weight to findings of fact that are made by organs of the State party concerned, it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.²⁰

7.8 Further, as to the complainant's general claim that he risks being subjected to torture upon return to Sri Lanka, as all returning Tamils are automatically considered to be linked to LTTE, the Committee recalls that the occurrence of a consistent pattern of gross human rights violations in his or her country of origin is not sufficient in itself for concluding that a complainant runs a personal risk of torture there.²¹ In this context, the Committee refers to

¹⁹ See e.g. 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.

²⁰ *Ibid.*

²¹ See for example communications No. 426/2010, *R.D. v. Switzerland*, decision adopted on

its concluding observations following its 2011 examination of the combined third and fourth periodic reports of Sri Lanka, in which it expressed serious concern about reports suggesting that torture and ill-treatment perpetrated by State actors in Sri Lanka, both the military and the police, had continued in many parts of the country after the conflict with LTTE ended in May 2009.²² The Committee also refers to its concluding observations following its 2013 examination of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, in which the Committee noted evidence that some Sri Lankan Tamils had been victims of torture and ill-treatment following their forced or voluntary removal from the State party to Sri Lanka.²³ The Committee further refers to the preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment following the official joint visit with the Special Rapporteur on the independence of judges and lawyers to Sri Lanka from 29 April to 7 May 2016, wherein it was noted that “torture is a common practice” and that the “current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General’s Office and judiciary perpetuate the real risk that the practice of torture will continue”.²⁴

7.9 The Committee further notes that a credible report published by a non-governmental organization in 2015 documented 55 cases in which individuals who had returned to Sri Lanka from the United Kingdom during the 2009-2015 period had alleged that they were subsequently detained and tortured by the Sri Lankan authorities, and notes that in 54 of the 55 cases a past connection with LTTE, either low level or high level, and either directly or through a family member or acquaintance, appeared to have been at least a contributory factor in their detention.²⁵ The report also notes that the fact that the victims had returned from abroad might have particularly attracted the attention of the authorities. This report is consistent with other non-governmental reports published in recent years, including one documenting 40 cases in which individuals connected or perceived as having been connected to LTTE were subjected to abduction, arbitrary detention, torture, rape and sexual violence by Sri Lankan authorities between 2009 and 2014 for the purpose of extracting confessions and/or information about LTTE and to punish the victims for their involvement with the organization.²⁶ In addition, according to the latter report, EPDP remains involved in cases of torture perpetrated by the authorities, often brokering the release of persons detained by the authorities in exchange for money.²⁷ The Committee considers that all the above shows that Sri Lankans of Tamil ethnicity with a prior personal or familial connection to LTTE facing forcible return to Sri Lanka may be at risk of torture.

8 November 2013, para. 9.2; and No. 591/2014, *K. v. Australia*, decision adopted on 25 November 2015, para. 10.11.

²² See CAT/C/LKA/CO/3-4, para. 6.

²³ See CAT/C/GBR/CO/5, para. 20.

²⁴ 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 from 29 April to 7 May 2016 (Colombo, 7 May 2016). Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E.

²⁵ Freedom from Torture, “Tainted peace: torture in Sri Lanka since May 2009” (August 2015), available from www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf.

²⁶ Yasmin Sooka, The Bar Human Rights Committee of England and Wales and the International Truth and Justice Project (Sri Lanka), “An unfinished war: torture and sexual violence in Sri Lanka—2009-2014” (March 2014), available from www.barhumanrights.org.uk/unfinished-war-torture-and-sexual-violence-sri-lanka-2009-2014.

²⁷ *Ibid.*, p. 31.

7.10 In the present case, the complainant has alleged—and this remained unrefuted by the State party—that he has both a prior personal and a prior family connection to LTTE, and that he previously was detained and tortured by a paramilitary group associated with the Sri Lankan authorities because of the perceived LTTE family connection. Accordingly, the Committee finds that, taking into account all the factors in this particular case read as a whole, and in the light of the reports regarding the current human rights situation in Sri Lanka, which do not appear to have been sufficiently taken into account by the State party's authorities, including in the context of the present communication, and given the complainant's previous ill-treatment in Sri Lanka in 2008, there are substantial grounds for believing that the complainant would face a real, personal and substantial risk of being subjected to torture in the event of forcible return to Sri Lanka.

8. The Committee, acting under article 22 (7) of the Convention, concludes that there are substantial grounds for believing that the complainant would face a foreseeable, real and personal risk of being subjected to torture by the authorities if returned to Sri Lanka. The Committee therefore decides that the deportation of the complainant to Sri Lanka would amount to a breach of article 3 of the Convention by the State party.

9. The Committee is of the view that the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the complainant to Sri Lanka or to any other country where there is a real risk of him being expelled or returned to Sri Lanka. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken in response thereto.
