



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2487/2014*:**

<i>Submitted by:</i>	N.D.J.M.D (represented by counsel Mr. Joseph W. Allen)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Canada
<i>Date of communication:</i>	27 November 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and rule 97, of the Committee's rules of procedure, transmitted to the State party on 2 December 2014 (not issued in a document form)
<i>Date of adoption of Views:</i>	8 November 2017
<i>Subject matter:</i>	Removal to Sri Lanka
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies/insufficient substantiation of claims
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment
<i>Articles of the Covenant:</i>	6 (1), 7, 9 (1)
<i>Articles of the Optional Protocol:</i>	2, 3 and 5

* Adopted by the Committee at its 121st session (16 October-10 November 2017).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelic, Bamariam Koita, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Marcia V. J. Kran, member of the Committee, did not participate in the examination of the present communication.

1.1 The author is Mr. N.D.J.M.D, a national of Sri Lanka born on 17 February 1982 and currently residing in Canada. The author is subject to removal to Sri Lanka, following the rejection of his application for refugee status in Canada. The removal to Sri Lanka was scheduled for 5 December 2014. The author claimed that his rights under articles 6 (1), 7 and 9 (1) of the International Covenant on Civil and Political Rights (The Covenant) would be violated if Canada proceeded with his forcible removal. The Optional Protocol to the Covenant entered into force for the State party on 19 August 1976. The author is represented by counsel, Mr. Joseph W. Allen.

1.2 On 2 December 2014, pursuant to rules 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from removing the author to Sri Lanka, while his case was under consideration by the Committee.

1.3 On 3 July 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the State party's request to lift the interim measures.

The facts as presented by the author

2.1 The author indicates that he used to work as a cook and a ship sailor in Sri Lanka. On 30 May 2011, he was present in a demonstration in the 'Trade Zone' area, along with his girlfriend and his cousin R. C. who were working in that area. The police suddenly started shooting at the demonstrators. The author witnessed his cousin's death during the shootout.¹ The author arranged an ambulance to take his cousin to hospital but it was too late and he died.²

2.2 The author provided eye witness evidence to the Trade Union leaders of the Free Trade Zone companies, who had decided to take legal action against the police for the deadly attack. The catholic priest of the area also made a complaint to the (Asian) Human Rights Commission.³

2.3 On 10 June 2011, the author started receiving threats by telephone telling him to stop his 'activities against the government and the police'. He ignored these threats as he wanted to bring his cousin's murderers to justice.

2.4 On 28 June 2011, four men forcibly entered the author's home, beat him, tied him and blind-folded him. They took the author to another location and questioned him about the information he had given to the Trade Union lawyers. During his detention, the author was verbally abused and beaten until he lost consciousness. When he regained consciousness, the author found that he was in a three wheeler taxi. A taxi driver had found him on the side of a road and drove him to his home.

2.5 The following day, the author's parents took him to the Negombo Hospital. They were told that the author should have filed a complaint to the police prior to coming to the hospital. Therefore, the author decided to visit an indigenous medical doctor.⁴

¹ Sri Lanka : A life lost in Protest Against Pension Bill, Global Issues, 10 June 2011, <http://www.globalissues.org/news/2011/06/10/10028>.

² Author's statement filed with his pre-removal risk assessment, 20 September 2012.

³ Idem.

⁴ Handwritten medical certificate (brief note), stating that the author was treated from 1 to 7 July 2011 « for his physical injuries due to swelling ».

2.6 The author's father hired a lawyer to represent his son. When the lawyer took contact with the Sri Lankan police, he was told by the police that the author's life would be in danger should he stay in Sri Lanka. The author's father decided to send him to Kandi so that he could stay at the place of some family members. He then paid a 'private ship' to take the author to Algeria, where he joined a ship sailing to Canada.

2.7 On 27 November 2011, the author arrived to Canada and on 1 December 2011 he left the ship with the intention to make a refugee claim. He waited for the ship to leave the port, fearing that he would be forced to return on it. On 16 December 2011, he submitted a refugee protection claim. However, the captain of the ship had already notified the Canadian authorities of the author's absence and 'an exclusion order' was issued against him *in absentia* on 13 December 2011, making him ineligible to claim refugee protection.⁵ On 6 March 2012, the author was notified by a Canada Border Services Agency officer that his refugee claim was inadmissible.

2.8 The author filed an application for leave, seeking judicial review at the Federal Court of the CBSA officer's decision. On 20 September 2012, the leave application was granted and a hearing was scheduled for 11 December 2012.

2.9 On 3 January 2013, the Federal Court allowed the application for judicial review, setting aside the exclusion order and sending the matter back for re-examination by a different CBSA officer. The decision was appealed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness of Canada. On 10 January 2014, the Federal Court of Appeal dismissed the author's judicial review application and set aside the January 2013 decision of the Federal Court.

2.10 On 12 March 2014, the author filed an application for leave to appeal the decision of the Federal Court of Appeal before the Supreme Court of Canada. On 12 June 2014, his request was dismissed.

2.11 On 29 August 2014, the author's Pre-removal risk assessment (PRRA) application was dismissed. The author complains that his application was examined solely through written submissions and that the officer analysing his application did not assess his credibility and story in person. The evaluation of fear was made by an officer of Citizenship and Immigration Canada and not by a board member of the Immigration and Refugee Board. The author explains that the officer who rendered the negative decision referred to the absence of original documents. The author had some of the documents in original and he submits that he could have presented them had he been given an opportunity to participate in an oral examination of his application.

2.12 On 26 November 2014, the author filed an application for leave before the Federal Court to seek judicial review of the negative PRRA decision and requested a judicial stay of his removal. The author informs that the Federal Court had not yet rendered a decision on these requests by the time the complaint was submitted to the Committee, but that he could be removed anytime. Domestic remedies were later exhausted.⁶

The complaint

3.1 The author claims that his deportation to Sri Lanka would constitute a violation of his rights under articles 6 (1), 7 and 9 (1) of the Covenant. He contends that he faces a great danger should he be sent back to Sri Lanka. Referring to various public reports and

⁵ The State party explains that, according to section 223 of the IRPR, an exclusion order is a type of removal order, and that such order was issued in the present case pursuant to subsection 44(2) of the IRPA and subparagraph 228(1)(c)(v) of the IRPR.

⁶ See paras. 4.6, 5.1, 6.1, 6.4, 8.1 and 8.2.

guidelines, the author submits that the situation in Sri Lanka is extremely dangerous for individuals showing any kind of opposition to governmental authorities.⁷ Having testified against the Sri Lankan police, he has already been targeted and beaten until he lost consciousness. As the only eye witness of his cousin's murder, the author testified with the purpose of filing a complaint against the police, following which he has been persecuted. In addition, the author submits that his family has continued to receive telephone calls even after his departure, threatening to kill him if he was ever to be seen in the area.

3.2 According to the author, a 2012 public report "corroborated his actions" when stating: "in Sri Lanka, doctors often refuse to treat the victims of torture, who then fearing other ill-treatment, are reluctant to go to public hospitals. That is why many of them consult private doctors. In Sri Lanka it is rare for victims of torture to lodge a complaint, because that would require a certificate issued by State doctors. Those who do so are put under pressure by the public prosecutors, who make every effort to get them to withdraw their complaint".⁸ The same report states that "according to what has been said by a number of observers, persons returning to Sri Lanka are regarded as traitors who have discredited Sri Lanka abroad, who are therefore a group at risk. There is no evidence that all returnees are abducted, arrested and tortured in a systematic way, but a number of reports document cases and show the risk."⁹

3.3 Finally, the author submits that the CBSA officer decided that his refugee claim was inadmissible while he had explained his situation and the reasons why he only claimed refugee protection twenty days after his arrival in Canada. He submits that he was never given an opportunity to explain his fear of persecution during an oral hearing, and that his story and the credibility of his claims were therefore never evaluated in person. The author states that the CBSA erred in issuing an exclusion order against him so quickly and in absentia, thereby breaching the principle of natural justice given the serious consequences of the removal order on his ability to claim refugee protection.

State Party's observations

4.1 On 6 November 2015, the State Party submitted its observations on the admissibility and merits of the communication. The State party argues that the author's communication is inadmissible for non-exhaustion of effective and available domestic remedies and for non-substantiation. Concerning the author's allegations under article 9 (1) of the Covenant, the State party submits that they are incompatible *ratione materiae*.

4.2 The State party submits that the author has not exhausted all available domestic remedies as he failed to make an application for permanent residence on humanitarian and compassionate grounds, and he did not provide any explanation for his failure to do so, while this remedy offered him a reasonable prospect of redress.

4.3 The State party explains that the humanitarian and compassionate application and process is an important domestic remedy and regrets the views of the Committee in some recent cases, in which it has determined that the humanitarian and compassionate application as an ineffective remedy that does not need to be exhausted for the purposes of admissibility. It argues that the humanitarian and compassionate process is a fair administrative procedure, subject to judicial review, that can result in an applicant being allowed to remain in Canada. The author has not raised any objections to the humanitarian and compassionate process and

⁷ Amnesty International Annual Report for Sri Lanka, 2013 : <http://www.amnesty.org/en/region/sri-lanka/report-2013>; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012.

⁸ 2012 country report on Sri Lanka by "Fluchtlingshilfe", pp. 10-11 : <http://www.refworld.org/pdfid/5243f5dfa.pdf>.

⁹ *Idem*, p. 19.

has not provided any evidence to substantiate that it would be ineffective or unfair in his particular case.

4.4 Concerning the author's allegation that his removal to Sri Lanka would violate the State party's obligations under article 9(1) of the Covenant, the State party submits that the author does not specify how his rights under this article would be violated. It also considers that his allegations are incompatible with the scope of the State party's obligations under article 9(1), which does not impose an obligation on States parties to refrain from removing individuals who face a real risk of arbitrary detention in the receiving State.

4.5 The State party also submits that the author has not substantiated, on even a *prima facie* basis, his allegations of a real risk of irreparable harm upon return to Sri Lanka. It notes that the author alleges that he would face a risk of irreparable harm in Sri Lanka on two basis: (a) for being the witness of human rights violations by the Sri Lankan authorities because, in 2011, he witnessed and provided information about the murder, by Sri Lankan police, of R.C., his cousin; and (b) for returning to Sri Lanka after a long time abroad, therefore being considered as a traitor who has discredited Sri Lanka. In support of his claims, the author relies on risk profiles set out in two reports.¹⁰

4.6 The State party states that the author's claims have been rejected by the competent authorities. After reviewing the author's PRRA application and supporting evidence, the PRRA Officer concluded that the author had not provided sufficient evidence to corroborate his allegations of risk. The PRRA Officer found that there was insufficient evidence linking the author to Mr. R. C. and corroborating his participation in the demonstration during which Mr. R.C. was killed, or his involvement in the legal actions which followed. The State party informs that the Federal Court upheld the PRRA Officer's decision after a thorough review of the author's evidence and arguments.

4.7 The State party recalls the Committee's consistent jurisprudence that "important weight should be given to the assessment conducted by the State party" and submits that the Committee should therefore follow the findings of the PRRA Officer and the Federal Court.¹¹ The State party adds that the author has not provided evidence to demonstrate that the conduct of the proceeding at issue or the evaluation of the facts and evidence was manifestly arbitrary or amounted to a denial of justice.

4.8 The State party considers that, throughout the years, the author's accounts of his experience prior to his departure in 2011 contain numerous inconsistencies and that the Committee should therefore not rely on them, or should consider that the author's allegations are insufficiently substantiated. In this connection, the State party argues that the letters and news articles provided by the author do not support his claims: none of the letters mention that the author was present at the Katunayake Free Trade Zone demonstration or that he witnessed Mr. R. C.'s death, or provided evidence in that regard. Nor do they mention Mr. R. C. by name. Similarly, none of the news articles mention the author, not even the article of the World Socialist Web Site dated 23 June 2011, which provides detailed information about a judicial inquiry and a police investigation that were taking place at the time the article was published, and which includes the names of a number of people who participated in the demonstration and who provided testimony to the Negombo Magistrate Court in charge of the investigation.¹²

4.9 The State party also submits that in his May 2012 affidavit, which constitutes the author's first statement to the State party's authorities about what happened to him in Sri Lanka, the

¹⁰ See above para. 3.2.

¹¹ See e.g. *X. v. Denmark*, HRC Communication No. 2007/2010 (2014) at para. 9.3.

¹² W.A. Sunil and Ruwan Liyanage, *Sri Lankan court examines police shooting of FTZ worker*, World Socialist Web Site 23 June 2011..

author did not mention that he had been present at the Katunayake Free Trade Zone demonstration, and that he had witnessed his cousin's murder, or that he had provided evidence about the murder. Instead, the author stated that he and others signed a petition which they gave to their priest to file with the Asian Human Rights Commission as part of a protest against the police who killed his "close family member", after which he and other petitioners were targeted by government goons and the police. The author did not identify the "close family member" as R.C. or as his cousin.

4.10 Regarding the author's claim that he witnessed Mr. R.C.'s death during the police shootout, and that he arranged for an ambulance to take Mr. R.C. to the hospital but that it was too late and that he therefore died, the State party submits that, in the 23 June 2011 article, it is reported that an individual named S.F. and another colleague took Mr. R.C. to the factory, and that the police came and took him away in a jeep. Mr. R.C. was apparently left untreated and bled for 2 hours in police custody before being taken to the hospital where he died two days later. Another World Socialist Web Site article, dated 6 June 2011, reports these same details.¹³

4.11 Concerning the author's claim that he was "the only eye witness" of Mr. R.C.'s murder, the State party submits that, in the personal narrative he provided as part of his PRRA application in 2012, he described himself as "one of the few eye witnesses". In the State party's view, even if the author was a witness to Mr. R.C.'s murder, he was not the only eye witness: at the very least, the victim's girlfriend was also a witness, as were S. F. and his colleague, and the other people mentioned in the 23 June 2011 article. Given the large number of people that were reportedly at the demonstration, the State party submits that there were probably many witnesses to the shooting. Referring to an article dated 4 July 2012 in *The Island*, the State party informs that, apparently, 270 demonstrators were hospitalized and 11 fundamental rights actions have been filed in Sri Lanka's Supreme Court against the police.¹⁴

4.12 The State party indicates that the author has never provided copies of the evidence he allegedly provided to the Trade Union leader who had decided to take legal action against the police force. The State party argues that the author does not seem to have any involvement in the judicial inquiry or the police investigation, which started while the author was still in Sri Lanka.¹⁵ The State party highlights that there is no mention, in the author's May 2012 affidavit, of him providing evidence to Trade Union lawyers or testimony in support of a complaint.

4.13 Regarding the author's claim that on 10 June 2011, he started to receive threatening telephone calls at home, the State party notes that, in the personal narrative he submitted as part of his PRRA application, the author only stated that his mother had received one threatening phone call on 10 June 2011, but that he made no reference to threatening calls that he would have received. Additionally, the author's May 2012 affidavit does not mention any threatening phone calls.

4.14 The State party maintains that the author provided inconsistent information in regard to the medical treatment he received the day after he was abducted and beaten. In his submission to the Committee, he informs that his parents took him to Negombo Hospital, which refused

¹³ World Socialist Web Site, "Thousands attend funeral of slain Sri Lankan FTZ worker" (6 June 2011) at paras. 3 & 5.

¹⁴ Lal Günasekera, *Report on Katunayake police shooting still not released – Unionists*, *The Island* (4 July 2012); *The Sunday Times*, "Police brutality mindless, indiscriminate and excessive: Petitioners" (11 March 2012) at para. 3-4: this article reports that around 14 petitioners have filed fundamental rights actions as a result of injuries they sustained during the demonstration and that the injured petitioners included workers participating in the demonstration and bystanders, many of them being mentioned by name.

¹⁵ *Supra*, 23 June 2011 article.

to treat him and that, as a result, his parents took him to the Keraminiya clinic. According to the document which the author refers to as a medical note, he received treatment from 1 July to 7 July 2011 for physical injuries due to swelling. However, in his May 2012 affidavit, the author swore that after the 28 June 2011 attack, he was hospitalized overnight and that there is no mention of the hospital refusing to treat him or of that he had to go to the Keraminiya clinic for treatment.

4.15 The State party also submits that the author has provided inconsistent information regarding how he obtained employment on the ship that took him to Canada. In his submission to the Committee, he claims that his father took him to family members in Kandi and then paid a private ship to take him to Algeria where he joined a ship sailing to Canada. According to his PRRA application form, the author flew from Sri Lanka to Algeria on 11 July 2011, in possession of a valid Sri Lankan passport and other identification documents. Based on his Seafarer Record Book, the author arranged his employment with the M/V Lake Ontario on 13 June 2011 in Colombo. According to the employment contract he signed on 8 July 2011, the author agreed to take up his position with the M/V Lake Ontario on 11 July 2011. The State party informs that while a PRRA application is not a sworn document, the author signed a declaration attesting that the information on the form and in support of his application is "truthful, complete and correct".

4.16 Even if the Committee were to accept the author's account as true, which the State party urges it not to do, the author has not provided sufficient evidence to substantiate that the alleged perpetrators of the incidents on 10 and 28 June 2011 were Sri Lankan government officials or the police: he never identifies them, but only refers to them as "the caller" and "four men". Additionally, the author never claims that he fears persecution by the Sri Lankan authorities but merely states that "he is facing a great risk of danger should he be sent back to Sri Lanka which is evident from the flagrant violation of fundamental human rights still occurring in Sri Lanka today [...]".

4.17 The State party considers that the author intends the Committee to infer that his alleged persecutors were either Sri Lankan authorities or acting on their behalf, but does not provide any evidence in that regard. According to the State party, the threat that the author allegedly faced in 2011 was perpetrated by local actors. It is therefore likely that upon his return to Sri Lanka, the author would have a viable Internal Flight Alternative, as demonstrated by the fact that the author was able to stay in Kandy, Sri Lanka, for a number of weeks without incident prior to leaving for Algeria, and that his parents and sisters have relocated. The State party further submits that, based on the 2012 UHCHR Eligibility Guidelines and the new legislation designed to protect witnesses of human rights violations, the author would be able to access State protection from any local non-State entities who may seek him out upon return.¹⁶

4.18 The State party further submits that, according to the 2012 UHCHR Eligibility Guidelines, not all persons who may have characteristics consistent with risk profiles are entitled to international protection.¹⁷ The majority of examples cited in the Guidelines refers

¹⁶ United Nations High Commissioner for Refugees ("UNHCR"), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Sri Lanka*, HCR/EG/LKA/12/04 (21 December 2012), online: <http://goo.gl/t3Xm9n>.

¹⁷ The 2012 UNHCR Eligibility Guidelines specifically recognize that "certain witnesses of human rights violations and victims of human rights violations seeking justice", category with which the author appears to identify, may require international refugee protection depending on the individual circumstances of their cases. According to the 2012 UNHCR Eligibility Guidelines this category involve persons seeking justice after mistreatment by the police, given that there have been allegations that such people have reportedly been harassed and received threats, in an attempt to make them withdraw their cases. Depending on the individual circumstances of a given case, persons with this

to individuals who were victimized by Sri Lankan authorities and who sought redress for their victimization or were witnesses who testified before the Lessons Learnt and Reconciliation Commission. The Guidelines also state that both perceived political opinion and race are important additional characteristics to be taken into account.¹⁸

4.19 The State party submits that this is consistent with the findings of the UKUT in *GJ and others* that the focus of the Sri Lankan government has changed since the civil war ended and is now on those individuals who put the stability and unity of Sri Lanka at risk, in particular members of the LTTE or similar Tamil separatist organisation.¹⁹ The “perceived political opinion” in the 2012 Eligibility Guidelines refers to political opinions supporting the destabilization of Sri Lanka or separatism. The author therefore does not fall within the definition of “witness to human rights violations” as understood in the 2012 Eligibility Guidelines.

4.20 In addition, the State party submits that on 19 February 2015, the Sri Lankan government enacted legislation designed to provide witnesses and victims with protection and assistance.²⁰ It further argues that the situation in Sri Lanka has improved since 2015, given that President Maithripala Sirisena has undertaken to work towards reconciliation of all ethnicities and religions according to the recommendations of the Lessons Learnt and Reconciliation Commission. Since the new government came to office, journalists, media professionals and human rights activists have more freedom to express themselves and talk in public in a safe working environment.

4.21 The State party sustains that, according to the press articles referred to by the author, the actions of the police which resulted in the death of Mr. R.C. were widely publicized and severely criticized. It considers that the mere fact that the author may have witnessed and provided information about the murder of Mr. R.C. in 2011 is not sufficient to demonstrate that he would be at a real and personal risk of irreparable harm upon his return to Sri Lanka.

4.22 Regarding the author’s claim that he will be at risk of irreparable harm if he is returned to Sri Lanka because he will be regarded as a traitor who discredited Sri Lanka abroad, the State party submits that the Flüchtlingshilfe report on which he relies points out that “there is admittedly no evidence that all returnees are abducted, arrested and tortured in a systematic way”.²¹

4.23 The State party argues that while objective reports indicate that many returnees undergo security screening by immigration officials or members of the State Intelligence Service upon returning to Sri Lanka, in the absence of significant links to the LTTE, other groups acting in opposition to the government, outstanding court orders or arrest warrants, or otherwise being on a “stop” or “watch” list, such verifications would not normally create a real and personal risk of irreparable damage.²² According to the information provided by the author, the Sri Lankan authorities did not attempt to prevent him from leaving the country in 2011

profile are likely to be in need of international refugee protection “on account of their (perceived) political opinion”.

¹⁸ 2012 UNHCR Eligibility Guidelines, page 32, last paragraph.

¹⁹ *GJ and others* (post-civil war: returnees) Sri Lanka CG, [2013] UKUT 00319 (IAC) at subs. 356(2) and (3), online: <http://goo.gl/4e1Lmb>. (“*GJ and others*”).

²⁰ Jurist, “Sri Lanka parliament enacts witness protection law”, 20 February 2015, online: <http://jurist.org/paperchase/2015/02/sri-lanka-enacts-witness-protection-law.php> accessed on 7 October 2015

²¹ Sri Lanka : Current Situation, Flüchtlingshilfe, Bern, 15 November 2012, p. 19

²² 2012 Eligibility Guidelines, *supra*, at page 5 ; *X v. the State Secretary for Security and Justice*, Case Number 201400058/1/V2 (20 June 2014), unofficial translation by UNHCR from original Dutch, online: <http://www.refworld.org/docid/53d89aa44.html>.; Australia Refugee Review Tribunal, RRT Case No. 1304427, [2013] RRTA 689 (11 October 2013) at para. 47.

and he left with a valid passport. There is no indication either that the author is the subject of a court order or arrest warrant, or is otherwise on a “stop” or “watch” list.

Author’s comments on the State Party’s observations

5.1 On 25 January 2016, the author submitted his comments on the observations of the State party. He informs that on 9 December 2015, he filed an application for permanent residence in Canada based on humanitarian and compassionate grounds. He also informs that his application for a judicial stay before the Federal Court was discontinued through a motion dated 4 December 2014 following the Committee’s request to the State party to refrain from deporting the author to Sri Lanka while his case is under consideration.

5.2 Concerning the State party’s submission that the author’s allegations under article 9(1) do not fall within the scope of the Covenant, the author argues that the State party has the obligation not to deport or remove an individual to a country or region where he or she would face a real risk of irreparable harm

5.3 The author submits the he was not able to claim refugee protection before arriving in the State party. He explains that, as mentioned in his affidavit of May 2012, the ship on which he was working was docked for very short periods of time prior to their arrival in Canada and that, due to his work on the ship, he was not able to leave the vessel until they arrived in Canada.

5.4 Regarding the State party’s submission that the PRRA officer determined that insufficient evidence was provided to demonstrate that the author had been detained and tortured by Sri Lankan authorities, he explains that he had no way of demonstrating this fact through documentary evidence. He states that the Sri Lankan authorities would clearly not issue any documentation regarding unlawful detention or torture of civilians by State party’s authorities. The author states that he is “unsure” how the State party could expect him to demonstrate this matter, other than thorough direct questioning, where his testimony could be properly evaluated, as it is the case during refugee hearings, especially on issues central to the decision made.²³

5.5 The author also refers to the Committee’s Views in *Choudary v. Canada*, in which it observed that “because of his apparent failure to establish his identity at the initial stage of the procedure, the author was not given any further opportunity, in the framework of the Immigration and Refugee Board to have his refugee claim assessed, even though his identity was later confirmed. While the author’s claim that he faced a risk of being tortured and of suffering threats to his life was assessed during the PRRA procedure, [the Committee considered that] such limited assessment could not replace the thorough assessment that should have been performed by the Immigration and Refugee Board. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee [considered] that further analysis should have been carried out in this case”.²⁴

5.6 As to the State party’s argument that the author would benefit from State protection given that the Sri Lankan government recently enacted legislation to provide protection and assistance to witnesses and victims of crime, the author argues that the passing of a new legislation does not demonstrate its effectiveness. Even if the Sri Lankan government had the

²³ Article 167 of the Immigration and Refugee Protection Regulations: “For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:
(a) whether there is evidence that raises a serious issue of the applicant’s credibility and is related to the factors set out in sections 96 and 97 of the Act;
(b) whether the evidence is central to the decision with respect to the application for protection; and
(c) whether the evidence, if accepted, would justify allowing the application for protection.

²⁴ See communication No. 1898/2009, *Choudary v. Canada*, adopted on 28 October 2013, para. 9.6

best intentions, the enacted legislation does not guarantee the independence of the new authority responsible for its implementation.

5.7 Finally, the author informs that he is attempting to obtain documentary evidence from Sri Lanka to corroborate his claims.

Additional observations by the State party on the admissibility and the merits

6.1 On 18 August 2016, the State party submitted additional observations on the admissibility and merits of the communication, and reiterated its request to lift the interim measures. The State party informs that on 15 July 2016, the author's application for permanent residence in Canada based on humanitarian and compassionate grounds was denied after careful consideration. In doing so, the H&C Officer commended the author for the efforts he made to establish himself in Canada but noted that his establishment does not go beyond what would be expected of someone who has been in the country for almost five years.

6.2 The State party explains that the H&C Officer did not accept the author's claims that he would face hardship in Sri Lanka as a result of the events that took place there in May and June, 2011. The H&C Officer reiterated that the documentary evidence provided by the author, consisting of various news articles, did not support his claims that he had been the only witness of R.C.'s shooting, and that he had testified to what he had allegedly observed. As a result, the H&C Officer did not give any weight to the author's statement that he will be targeted by Sri Lankan authorities because of his alleged testimony. The H&C Officer also noted that the author had not provided any evidence to support his claim that he would be discriminated against when applying for employment in Sri Lanka as a result of being a young individual with no family or political connections, noting that the author has a significant history of previous employments in Sri Lanka.

6.3 The H&C Officer concluded that, while there would be a period of adjustment for the author to re-establish himself in Sri Lanka, he would be able to do so with the support and assistance of his family and friends. The Officer was not satisfied that the H&C considerations in relation to the author justified an exemption from the requirements of the *Immigration and Refugee Protection Act (IRPA)*.

6.4 The State party also informs that on 5 August 2016, the author applied to the Federal Court for leave to seek judicial review of the H&C decision.²⁵

6.5 The State party submits that the author has not yet specified how his rights under article 9(1) would be violated if deported to Sri Lanka, nor has he provided any evidence to demonstrate an alleged violation. The State party argues that the author has not substantiated, on even a *prima facie* basis, his allegations of a real risk of a violation of article 9(1) upon return to Sri Lanka or that the necessary and foreseeable consequence of such a violation would amount to a violation of articles 6(1) or 7 of the Covenant.

6.6 Concerning articles 6(1) and 7 of the Covenant, the State party explains that contrary to the author's assertion, the PRRA Officer did not require him to provide "direct" documentary evidence from Sri Lankan authorities to prove that he had been detained and tortured by those authorities. However, the PRRA Officer found that the author had not provided sufficient evidence to demonstrate that he had been present at the protest in the Katunayake Free Trade Zone, that he was related to R. C., that he was the only eye witness to the shooting, and that he had provided testimony in the lawsuits against the Sri Lankan authorities.

6.7 The State party submits that the author's mischaracterization of the PRRA Officer's findings is in aid of his continued attempts to have the Committee act as a fourth tribunal to

²⁵ The State party does not provide further information.

secure an oral hearing of his PRRA application. The issue of whether the author is entitled to an oral PRRA hearing has been thoroughly considered by domestic authorities, who rejected his position.²⁶ The State party considers that the author's claim that he cannot demonstrate the truth of his allegations other than through direct questioning is not well founded. It is not accurate to conclude that allegations of detention and torture (or allegations of a risk of detention and torture) can only be proven through direct questioning at an oral hearing.

6.8 The State party argues that the difficulty the author is experiencing in bringing forward sufficient, probative and credible evidence to substantiate his allegations could be due to the fact that the evidence that he has brought to the Committee's attention, or that could still be brought to the Committee's attention, does not support his allegations. For instance, had the author been involved with the 30 May 2011 incident in the manner he claims, one would expect that his name would have been noted in at least some of the news articles; that he would be able to obtain a transcript of his testimony or, at the very least, that he would be able to obtain verification by the Trade Union lawyers of his cooperation. The State party also submits that, had the author been tortured in the manner he claims, he would have been able to produce medical records to verify his injuries and the type of medical treatment he received. Instead, he provided the Committee with an undated, handwritten message on plain paper, which he claims is a medical note.

6.9 As to the author's reference to *Choudhary v. Canada*, the State party considers that it does not apply to the present case. Would the Committee consider to the contrary, the State party expresses its disagreement with the majority view and considers that it goes against the Committee's established jurisprudence, and should therefore not be followed.

6.10 Concerning the author's argument, questioning the effectiveness of the new Sri Lankan legislation designed to protect and assist witnesses and victims of crime, the State party requests the Committee to consider the issue of the new legislation in the context of Canada's larger point, which is that the political situation in Sri Lanka appears to have been improving since the January 2015 elections. The passing of witness protection legislation is an example of the potential improvement.

Author's comments to the State party's additional information

7.1 In his comments of 19 September 2016 and 24 October 2016, the author maintains that a hearing should have been held in the framework of his PRRA application, as the documentary evidence he submitted raised issues as to his credibility, which was central to the PRRA Officer's decisions, and that a positive decision would have been adopted if the referred evidence had been given sufficient probative value.²⁷

7.2 The author agrees with the State party that in certain situations, allegations of torture and persecution can be proven through documentary evidence alone. However, he explains that he has been unable to obtain such documentation, and should therefore have been given the opportunity to present his claim in person and testify to what he witnessed and suffered since his cousin's death.

7.3 The author provides a letter from Mr. N., a member of the Free Trade Zone & General Services Employees Union, stating that the author was instrumental in the legal action the Union filed against the police: "we could not find many eye witness(es) for our motion because of the threats that come through Police and unknown forces. However, (the author) came forward to help us clarify the death of our union worker. I would like to mention that

²⁶ Section 167 of the Immigration and Refugee Protection Regulations (see above footnote 36).

²⁷ Section 167 of the Immigration and Refugee Protection Regulations (see above footnote 36 and para. 6.7).

without his support, we (would have been) unable to make our legal document.”. Mr. N. also states that the government has not yet issued the report which contains evidence regarding the death of R.C. The author also provides a recent online article reporting that “the Inter-Company Employees Union requested the government to issue the committee report on the death of R.C.”, and a copy of the Facebook page of the Union.²⁸

7.4 The author also provides a letter from the author’s priest who conducted the funeral services for R.C., stating that “Mr. R.S., (the author’s) cousin on mother side was shot by the Police in May 2011... (the author) was also there and he was an eye witness for this incident...this incident created a huge political misbehaviour attitude in the area [...]. Personally I know that many had their life threatened through the Government by unidentified forces and police. I would like to declare that (the author) was one of the young men who was directly tangled. I wish to confirm that this incident truly affected (the author’s) life to the point (that) he had to leave from Sri Lanka. (The author) was trying to get the necessary documents to prove that he witnessed the incident. It is really difficult because...the government itself (is) hiding a lot of the necessary evidence”.

7.5 Finally, the author disagrees with the State party’s statement that the situation in Sri Lanka seems to have improved. In this connection, he refers to a 2015/2016 country report published by Amnesty International stating that “many human rights challenges remained, including persistent use of arbitrary arrest and detention, torture and other ill-treatment, enforced disappearances and deaths in custody and a long-standing climate of impunity for these and other violations”.

State party’s further information

8.1 In its supplemental submission of 16 March 2017, the State party informs that on 18 November 2016, the Federal Court granted the author’s application for leave to seek judicial review of the decision rejecting his application for permanent residence based on humanitarian and compassionate considerations. The author provided the Federal Court with an affidavit, sworn on 2 September 2016, in support of his application for judicial review.

8.2 The State party submits that the hearing took place on 13 February 2017. On 22 February 2017, the Federal Court determined that the author’s arguments according to which the H&C Officer would have erred in his assessment of his hardship if returned to Sri Lanka and his degree of establishment in Canada were not founded in fact and law. It therefore dismissed the author’s application for judicial review. Regarding the issue of the author’s establishment in Canada, the Federal Court found that the H&C Officer’s reasoning was clear, transparent and obviously supported by the existing evidence. Regarding the issue of hardship, the Federal Court noted that the main argument advanced by the author was related to the risks and adverse country conditions he would allegedly face upon return to Sri Lanka because of the 2011 events. The Court noted that the H&C Officer had found that the author lacked credibility, given the inconsistencies and contradictions in his evidence and the lack of evidence supporting his claim that he had been involved in the lawsuits following the police attack, that he had provided a declaration to trade union lawyers, and that he had filed a police complaint after the incident.

8.3 The Federal Court found that in the affidavit filed in support of his application for leave and judicial review, the author purported to provide new explanations about his actions following the shooting of his alleged cousin, but that these explanations contradicted his previous statements. The Federal Court also found that there was no evidence on the record

²⁸ Online press article « Requests made for R.C.’s murder report », stating that the Inter-Company Employees Union has requested the government to issue the committee report on the death of R.C., dated 30 May 2016, <https://www.newsradio.lk/235861-2/>.

to support the author's allegations that he was involved in the lawsuits following the police shooting.

8.4 The State party submits that the author's allegations of risk have been thoroughly assessed by several independent and impartial State party's decision-makers, all of whom determined that he has not substantiated those allegations and lacked credibility. The State party considers that the inconsistencies and contradictions contained in the author's file provide the Committee with a strong basis to seriously question his credibility.

Author's comments on the State party's further information

9.1 In its additional comments made on 21 April 2017, the author states that the evidence submitted to the Committee on 24 October 2016 (the letters from a member of the Trade Union and from the author's priest) is critical as it demonstrates that he was instrumental in the legal action that the Trade Union filed against the police. He explains that this evidence was not taken into account by the officers during the H&C and PRRA applications. He also explains that the evidence was neither considered by the Federal Court as all new evidence that has not been previously considered by officers cannot be filed before the Federal Court during the Judicial Review.

9.2 The author reiterates that documentary evidence is difficult to obtain and explains that, as mentioned in the letter of the Trade Union, the government has not yet issued the committee report which contains evidence regarding the death of his cousin, R.C.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement. The Committee notes that the author has exhausted all available domestic remedies in compliance with the requirements of article 5 (2) (b) of the Optional Protocol.

10.3 The Committee notes the State party's argument that the author's allegations under article 9 (1) are incompatible *ratione materiae* with the Covenant. In that connection, it notes that the author has not provided any information, evidence or explanation on how his rights under article 9 (1) would be violated by the State party through his removal to Sri Lanka in a manner that would pose a substantial risk of irreparable harm such as that contemplated under articles 6 and 7 of the Covenant. The Committee concludes that this part of the communication is inadmissible pursuant to article 3 of the Optional Protocol.

10.4 The Committee notes the State party's argument that the author's allegations under articles 6 (1) and 7 are insufficiently substantiated. However, the Committee is of the view that, for purposes of admissibility, the complainant has provided sufficient information as to the risk of irreparable harm that he would allegedly face in case of return to Sri Lanka. Accordingly, the Committee declares the claim admissible.

10.5 Accordingly, the Committee declares the author's claims under articles 6 (1) and 7, to be admissible and proceeds to their consideration on the merits.

Consideration of the merits

11.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

11.2 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by article 7 of the Covenant.²⁹ The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.³⁰ Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.³¹

11.3 The Committee recalls its jurisprudence 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, and that it is generally for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.³²

11.4 The Committee notes the author's contention that his removal to Sri Lanka would expose him to a risk of irreparable harm, in violation of articles 6 (1) and 7 of the Covenant because (a) he provided eye witness evidence to the Trade Union leaders in the framework of a legal action against the police who, on 30 May 2011, during a demonstration in the "Trade Zone" area, shot at the demonstrators and killed his cousin R.C; (b) as a result of his testimony against the police, he received threatening phone calls and he was beaten until he lost conscious by four men who forcibly entered his home; (c) his family has continued receiving phone calls after his departure; and (d) as a person returning to Sri Lanka, he would be perceived as a traitor who has discredited Sri Lanka abroad.

11.5 The Committee also notes the State party's argument that the author's allegations of risk have been thoroughly assessed by several independent and impartial State party's decision-makers who determined that the author has not substantiated those allegations. The Committee particularly notes the PRRA Officer's conclusion that the author had not provided sufficient evidence to corroborate his allegations of risk. The Committee also notes the State party's observations that the author's name does not appear in any of the news articles related to the killing of Mr. R.C and judicial inquiry and that he did not provide evidence to substantiate that the alleged perpetrator of the incidents on 10 and 28 June 2011 were Sri Lankan government officials or police, and that he did not provide evidence to the Trade Union Leaders who took legal action against the police.

11.6 In that connection, the Committee notes that, on 24 October 2016, the author provided to the Committee a letter from a member of the Free Trade Zone & and General Services Employees Union stating that the author's testimony as eye witness on the killing of R.C. was key for the legal action filed by the Union against the police. He also provided a letter from the priest who conducted the funeral services for Mr. R.C. confirming that he was an eye witness to the killing of Mr. R.C. and that "many had their life threatened through the Government by unidentified forces and police" [...]. The Committee notes that this evidence was not made available to the PRRA and H&C officers as it was obtained after the two processes were terminated. It also notes the author's explanation that this evidence was not

²⁹ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

³⁰ Communications No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 9.2, and No. 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

³¹ *Ibid.*

³² See communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4, and No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

considered by the Federal Court as no new evidence not previously considered by officers can be filed during the Judicial Review.

11.7 The Committee notes that, while the letters give indications that the author witnessed the killing of his cousin R.C. by the police and that he provided testimony to the Union for their legal action against the police, they do not provide any information as to the assault that the author has allegedly suffered following his presence as a witness on the crime scene of his cousin's death, or that he would be at risk of irreparable harm if returned to Sri Lanka. The Committee also observes that the author has provided a medical note, according to which he was medically treated from 1 to 7 July 2011 « for his physical injuries due to swelling». However, the Committee considers that this document does not demonstrate that the injuries would have been provoked by the alleged attack to the author by four unknown men on 28 June 2011. The Committee therefore considers that the author has failed to provide conclusive evidence to substantiate his allegations of risk.

11.8 The Committee further notes the assessment of State party's authorities that the author lacked credibility as he provided inconsistent and contradictory evidence. It particularly notes the State party's submission that in his May 2012 affidavit, the author did not mention having been present at the Karunyake Free Trade Zone demonstration, having witnessed his cousin's murder, or having provided evidence about the murder. The Committee also notes the State party's argument that the author's claim that he witnessed Mr. R.C.'s death during the police shootout and that he arranged for an ambulance to take him to hospital but that it was too late and he died, is not consistent with the information reported in the media: the press articles submitted by the author indicate that the police took Mr. R.C. away in a jeep, but that he was left untreated and bled for 2 hours in police custody before being taken to the hospital where he died two days later.

11.9 The Committee also notes that the author's statement is neither consistent with the information provided by the Asian Human Rights Commission in the framework of an Urgent Appeal Case concerning the killing of Mr. R.C., which states that "after the shooting the injured workers were brought to the Kesselwatte Police Station. They, with (R.C.) amongst them, were kept in the police compound without being afforded medical assistance. The denial of medical assistance to an injured prisoner or suspect constitutes torture under the laws of the country. (R.C.) underwent several surgeries in an attempt to save his life but by 7.30pm of 1 June 2011 he succumbed to his injuries."³³

11.10 Regarding the author's claim that he is under risk upon return to Sri Lanka as he would be perceived as a traitor who has discredited the country abroad, the Committee, while not underestimating the concerns that may legitimately be expressed with respect to the human rights situation in Sri Lanka notes that, during the internal procedures, the State party's authorities also considered this possible risk and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the author's claims.

11.11 In the light of the above, the Committee cannot conclude that the information before it shows that the author will face a real risk of treatment contrary to articles 6 (1) and 7 of the Covenant if he were removed to Sri Lanka.

12. The Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the removal of the author to Sri Lanka, would not violate his rights under articles 6 (1) and 7 of the Covenant.

³³ Asian Human Rights Commission, Sri Lanka: Denial of prosecuting the police officers responsible for killing of FTZ worker destroys faith in the country's legal system, Urgent Appeal Case: AHRC-UAC-184-2011, 30 September 2011, available on line at: <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-184-2011/?searchterm=roshanchanaka>

