



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3129/2018\*. \*\*

<i>Communication submitted by:</i>	V.K. (represented by counsel, Andrew Black)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	15 February 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 27 February 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	28 March 2024
<i>Subject matter:</i>	Deportation to Sri Lanka (non-refoulement)
<i>Procedural issue:</i>	Admissibility – substantiation of claims
<i>Substantive issues:</i>	Right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; arbitrary detention; right to privacy
<i>Articles of the Covenant:</i>	6, 7, 9 (1) and 17
<i>Articles of the Optional Protocol:</i>	2 and 5 (2)

1.1 The author of the communication is V.K., a citizen of Sri Lanka born on 10 April 1981. The author fears that if he were to be removed to Sri Lanka, he would be harmed by the Sri Lankan authorities as a former member of the Liberation Tigers of Tamil Eelam (LTTE). The authorities have rejected the author's application for a protection visa and have advised him that he is expected to return to Sri Lanka.<sup>1</sup> The author claims to face irreparable harm due to a potential violation of articles 6 and 7 of the Covenant by Australia, if it were to remove him to Sri Lanka. He also fears that, as a former member of LTTE, he will be subjected to arbitrary arrest and detention upon return to Sri Lanka, in violation of articles 9 and 17 of the Covenant, if he were removed. The Optional Protocol entered into force for the State party on 25 December 1991. The author is represented by counsel.<sup>2</sup>

\* Adopted by the Committee at its 140th session (4–28 March 2024).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

<sup>1</sup> No exact date of deportation has been provided.

<sup>2</sup> On 9 September 2022, the author changed counsel.



1.2 On 27 February 2018, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the State party to refrain from deporting the author while his communication was being considered. On 18 March 2020, the State party requested that the interim measures be lifted. It reiterated this request on 6 July 2023 and 4 August 2023.

### **Facts as submitted by the author**

2.1 The author is a citizen of Sri Lanka, of Tamil ethnicity. He arrived in Australia by boat on 22 July 2012, as an illegal maritime arrival, and applied for a protection visa on 10 January 2013. In his application, he claimed that he would be killed by the Sri Lankan army if he were returned to Sri Lanka. His village was situated in an area controlled by LTTE during the war in Sri Lanka. He mentioned that one of his brothers had joined LTTE in 1998 or 1999 and had later become an intelligence officer for the organization. The author's brother was subsequently killed in a shelling on 6 March 2009. The author claimed that he had worked at a hospital in an LTTE-controlled area from 2006 to 2008, and that the majority of patients in the hospital were members of LTTE. In April 2009, the army took over the LTTE area and held him together with LTTE members, while separating the civilians into a separate group. He believed that the army had separated the two groups to directly attack the LTTE group. However, the author declared that he had been able to convince the army to allow him to join the civilian group.

2.2 On 18 March 2014, his visa application was refused, primarily owing to the author's lack of credibility. The delegate of the Minister for Immigration and Border Protection found that the author's written and verbal claims were inconsistent and had been "embellished and/or contrived". On that basis, the delegate refused to grant the protection visa, concluding that the author's claims of prior harm and future risk of harm were unfounded. The author applied to the Administrative Appeals Tribunal for a review of this decision, providing more details about his support of LTTE and his time as a medic treating injured LTTE members.

2.3 On 24 July 2015, the Tribunal upheld the decision and found again that the author was not credible and had embellished and exaggerated his claims about his and his brother's LTTE association. The Tribunal found that the author had fabricated his claims of escape from LTTE lines, of his work at the hospital and of his family being monitored and his brother being killed. It did not accept that the author had been, was or would be of interest to the authorities because of his LTTE involvement, his work at the hospital or his brother's membership of LTTE. As such, the Tribunal found that he was not considered of interest to the Sri Lankan authorities and would not suffer harm if returned to Sri Lanka.

2.4 In his submission to the Committee, dated 5 February 2018, the author provided additional explanations as to why he feared returning to Sri Lanka. He did not disclose the details of his involvement in LTTE when he first arrived in Australia and applied for protection. He raised those claims directly with the Minister for Immigration and Border Protection and asserts that the authorities have not assessed his further claims and evidence. While regretting not having disclosed all the information regarding his LTTE involvement to the State party's authorities, which thus did not assess them, the author mentions that he did not undergo the rehabilitation programme in Sri Lanka for former LTTE members for his 16 years of LTTE membership. In addition, he submits that former fighters who have completed their rehabilitation have been rearrested because the Sri Lankan authorities believe that LTTE still exists. He therefore fears that the Sri Lankan authorities will target him. He has also heard that other medical cadres have not been released or disappeared after the war.

2.5 The author submits that Sri Lankan police have frequently visited his family to enquire about his whereabouts, even after he fled the country.<sup>3</sup> He also claims that the police have issued an arrest warrant in his name, with a requirement that he report to them. On 3 August 2017, members of the Criminal Investigation Department visited his mother's house to give her a warrant advising that there was an investigation against the author, and to advise his

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<sup>3</sup> He claims that his family was visited by members of the Criminal Investigation Department.

brother that he needed to report to them on 10 August 2017.<sup>4</sup> On that day, the author's brother, father and mother went to the Criminal Investigation Department, as requested. The police officers asked them where the author was residing, and the family replied that the author was residing in India. However, the officers responded that they had no information that the author was residing in India and believed that he was still in Sri Lanka. They advised his family to hand him over "for a just punishment". The officers also warned the author's family that if they did not disclose his whereabouts and he was caught, his life would be in danger. The members of the Criminal Investigation Department then visited the author's family again on 4 and 11 October 2017 and towards the end of November 2017 to enquire about his whereabouts.

2.6 The author believes that the Sri Lankan authorities seek to obtain information from him about LTTE and will therefore arrest and harm him upon his return to the country. He affirms that former LTTE combatants are closely monitored by the authorities for this reason.

2.7 Furthermore, the author declares that, while working as a medical cadre, he treated different LTTE leaders,<sup>5</sup> which puts him at imminent risk of harm upon return to Sri Lanka. Given that his family has already been questioned by the Criminal Investigation Department, he believes that he will be arrested at the airport and harmed.

2.8 Finally, the author submits that he is residing unlawfully in Australia and has been advised to depart voluntarily or be deported. He was a member of LTTE and a medical cadre, has not been rehabilitated, his family has repeatedly been monitored by the authorities in Sri Lanka and questioned about his whereabouts and a warrant has been issued for him to report to the authorities.

### Complaint

3.1 The author submits that there are compelling circumstances to register his complaint under articles 6 and 7 of the Covenant, as his rights thereunder will be imminently breached by the State party for the following reasons: (a) he is currently residing unlawfully in Australia and has been advised by the authorities to make arrangements to depart, or he will be detained and deported; (b) he was a member of LTTE and a medical cadre (photographs and witnesses provided) and has not been rehabilitated; (c) his family has been repeatedly monitored and questioned by the authorities in Sri Lanka about his whereabouts and a warrant has been issued for him to report to the authorities; and (d) he has exhausted all domestic remedies to have the above claims assessed by the State party's authorities.

3.2 The author also refers to the Human Rights Watch report of 29 January 2018, entitled *Locked Up Without Evidence: Abuses under Sri Lanka's Prevention of Terrorism Act*, which demonstrates that there is clear evidence that known former LTTE supporters and members, like him, continue to face torture and persecution by the Sri Lankan authorities, in particular under the Prevention of Terrorism Act.

3.3 The author cannot go back to Sri Lanka, as he fears that he will be harmed and killed there because of his role in LTTE. He believes that he will be arbitrarily arrested, detained under the Prevention of Terrorism Act, interrogated, persecuted, tortured and/or killed, in violation of articles 6 and 7 of the Covenant.

3.4 The author submits that there is a real risk that he will be subjected to arbitrary arrest and detention upon return to Sri Lanka as a former member of LTTE, in violation of articles 9 and 17 of the Covenant, if he were removed. However, he acknowledges that those articles do not have non-refoulement obligations attached to them.

<sup>4</sup> The author provides a copy (in Sinhalese, with an English translation) of a document issued by the Sri Lanka police (Terrorism Investigation Division in Colombo), addressed to the police station in Kilinochchi, dated 3 August 2017, stating that several messages had been sent to the author, informing him about an investigation against him. The document also stated that, as the author had not reported to the office, his brother was requested to come to the Terrorism Investigation Division, Colombo, at 9 a.m. on 10 August 2017.

<sup>5</sup> He gives the names of the persons he treated.

**State party's observations on admissibility and the merits**

4.1 On 24 August 2018, the State party submitted its observations, objecting first to the admissibility of the communication as the author's claims are manifestly ill-founded. Alternatively, his claims should be considered without merit.

4.2 As to the facts, the author, a citizen of Sri Lanka, of Tamil ethnicity, arrived in Australia on 22 July 2012 by boat, without a valid visa. The author was held in immigration detention until 23 October 2012, when he was granted a Bridging E visa. That visa expired on 4 December 2012, and further visas were granted to allow him to reside lawfully in the community while his application for a protection visa was in process.<sup>6</sup> On 10 January 2013, the author lodged an application for a protection visa, which was refused on 18 March 2014. On 24 July 2015, the Refugee Review Tribunal affirmed the decision not to grant the author a protection visa. The author's applications to the Federal Circuit Court and the Federal Court of Australia to appeal those outcomes were dismissed on 12 October 2016 and 15 May 2017, respectively.

4.3 On 6 July 2017, the author submitted a request under section 417 of the Migration Act 1958. On 7 July 2017, the request was found not to meet the guidelines for referral to the Minister for Immigration and Border Protection. On 25 September 2017, the author submitted a request under section 48B of the Migration Act. On 6 October 2017, the request was found not to meet the guidelines for referral to the Minister. At the author's request, the Department of Home Affairs provided reasons for that assessment on 23 October 2017.

4.4 As regards the claims of non-refoulement, the related obligations only arise where the level of risk of being subjected to the death penalty, torture or other ill-treatment in the country to which the person would be removed is satisfied in the particular circumstances of each case. The Committee has considered that the risk of such treatment must be real and a foreseeable consequence of removal. Accordingly, the author's claims under articles 6 and 7 are insufficiently substantiated and should therefore be found to be inadmissible. The author has not established through sufficient evidence that he is a victim of a violation by the State party of any of the rights set forth in the Covenant. The claims in the author's communication have been considered through the State party's comprehensive domestic administrative and judicial processes, described above. The domestic authorities determined that the author's claims were not credible and did not engage non-refoulement obligations. In particular, the author's claims have been assessed under the complementary protection provision in paragraph 36 (2) (aa) of the Migration Act, which reflects non-refoulement obligations. The evidence provided by the author to the Committee, with the exception of the document described in para. 4.5 below, has been considered under these comprehensive domestic processes. The Committee has stated 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. In the present case, no such error was identified. The author has not demonstrated that the factual conclusions of the domestic decision makers are manifestly unreasonable.

4.5 The only new evidence that the author provided to the Committee is a letter of support dated 5 July 2017, allegedly from a doctor, Dr. Varmanan Tharmaratnam, who lived and worked with the author and was a member of LTTE. The letter states that Dr. Tharmaratnam lived in the same camp as the author in Kilinochchi between 2006 and May 2009 and that the author worked in the dental department. Dr. Tharmaratnam says that he met the author again in March 2009, when he was treated for chickenpox. The information in that letter is inconsistent with the author's own claims, contained in an annex to his submission, that between 2006 and 2009 he was working as a medic on the front line and in various hospitals, and that he was treated for chickenpox after 22 May 2009. In the light of the findings by domestic authorities that the author's claims do not engage non-refoulement obligations and that the author is not a credible witness, this evidence alone is insufficient to alter those findings. Alternatively, the author's claims are without merit, as demonstrated by the findings of domestic authorities concerning such claims.

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<sup>6</sup> The last of his Bridging E visas expired on 1 March 2016. The author was at that time residing unlawfully in the community.

4.6 The author acknowledges that articles 9 and 17 of the Covenant do not contain non-refoulement obligations. The State party agrees that it only has obligations under articles 9 and 17 of the Covenant for acts that take place in its territory. Given that the State party does not have non-refoulement obligations under articles 9 and 17 of the Covenant in relation to acts that may or may not take place in Sri Lanka upon the author's return, it respectfully submits it has no claim to answer with respect to these allegations. The author's claims under articles 9 and 17 should be found inadmissible as these allegations do not relate to a right set forth in the Covenant that is engaged by the facts that relate to the State party and are insufficiently substantiated. Should the Committee find that the allegations are admissible, the State party submits that these claims are without merit.

4.7 During the consideration of the author's application for a protection visa, submitted on 10 January 2013, the domestic authorities concluded that the author did not meet the criteria for granting the visa. The authorities had serious doubts as to the veracity of the author's claims and found that the author was not generally credible. The author did not have a profile with the Sri Lankan authorities and, as he had returned to Sri Lanka during the previous three years, he did not have a strong fear for his personal safety in Sri Lanka. The Sri Lankan authorities had no significant interest in the author or his family. The State party's authorities accepted that the author's brother had been involved in LTTE but was not satisfied that he had held a leadership position in the Intelligence Division or any other section of LTTE. The State party's authorities did not accept that the author was a person of interest to the authorities due to his brother's past involvement in LTTE. After questioning the author's medical knowledge, the decision maker found that he was unable to answer basic questions that related directly to some of the patient care activities that he had stated he was doing at the hospital. Accordingly, the authorities did not accept that the author's role at the hospital had raised his profile as an LTTE member or sympathizer, leading to him being targeted by the Criminal Investigation Department. Accordingly, they determined that there were no substantial grounds for believing that there was a real risk that the author would be subject to significant harm as a foreseeable consequence of his removal to Sri Lanka or that Australia had protection obligations to the author under the Convention relating to the Status of Refugees, namely that there was no real chance the author would be persecuted. Therefore, the authorities refused the author's application for a protection visa.

4.8 The Refugee Review Tribunal reviewed country information and considered the claims by the author as contained in his submissions to the Committee, except the claims related to his LTTE membership, which the author had not yet made. The Tribunal found that the author was not a witness of truth and had embellished and fabricated his claims in most respects. The Tribunal did not accept that the author's brother was a high-ranking LTTE official or intelligence officer. The Tribunal also expressed doubt that the author had provided support to LTTE by delivering medical supplies or information and noted that the author had not mentioned that claim in his initial statement or application. The Tribunal did not accept that working in the hospital, caring for LTTE members or any work associated with that put the author at risk. Having found that there were no substantial grounds for believing that, as a foreseeable consequence of his removal to Sri Lanka, there was a real risk that the author would suffer significant or serious harm, the Tribunal affirmed the Department's decision to refuse to grant the author a protection visa.

4.9 On 28 August 2015, the author lodged an application to appeal the Refugee Review Tribunal's decision with the Federal Circuit Court. He claimed that there had been a breach of procedural fairness by the Tribunal and that the conclusion reached by the Tribunal was not reasonably based on the evidence. The Federal Circuit Court dismissed the application on 12 October 2016, holding that neither ground of appeal had been established.

4.10 On 2 November 2016, the author lodged an appeal of the Federal Circuit Court's decision with the Federal Court of Appeal. The author was represented by counsel at the hearing. On 15 May 2017, the Federal Court of Appeal dismissed the appeal, finding that all the grounds of appeal made by the author were rejected as not substantiated.

4.11 On 6 July 2017, the author made a request for ministerial intervention under section 417 of the Migration Act. In the request, the author reiterated his claims. He also claimed for the first time to have been a member of LTTE. The author said that he had joined LTTE in 1995, served as a paramedic in field hospitals and been injured in battle-related incidents in

1996, 1997, 2000 and 2004. The author's request was considered against the relevant guidelines and was determined not to meet the guidelines for referral to the Minister. The request was inappropriate, as in it the author had reiterated his non-refoulement claims, which should have been made in a request for ministerial intervention under the section 48B mandate. On 7 July 2017, the author was notified of the negative outcome.

4.12 On 25 September 2017, the author made a request for ministerial intervention under section 48B of the Migration Act, expanding on his previous claims that he had been a member of LTTE. He stated that he had trained as a medical cadre, served as part of medical units on the front line during the Sri Lankan civil war and sustained injuries during his service with LTTE that required ongoing treatment. While explaining the delay in making those claims, the author stated that he had been afraid to disclose the information as he believed that he would be indefinitely detained or would not receive security clearance. He also claimed that, because of his past trauma and injuries, he had been unable to disclose the information. The author attached a report from the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors in support of that explanation. The departmental officer had significant concerns regarding the timeliness and genuineness of the new claims made by the author. The officer also relied on the Refugee Review Tribunal's findings, in particular with regard to credibility, in considering that the author's new claims were not plausible. The officer further considered there was no evidence to indicate that the author would be denied medical treatment if required upon his return to Sri Lanka. As regards the author's new allegation about his LTTE membership, that information had been known to the author during the protection visa and Refugee Review Tribunal processes. The officer considered that the author, having previously disclosed that he had aided LTTE, was inconsistent in terms of his alleged fear of disclosing his LTTE membership on the basis that it could render a negative decision on security clearance. The officer concluded that the new information contained in the request was not likely to result in a finding that the State party's non-refoulement obligations were engaged. On 9 October 2017, the author was notified that his claims did not meet the guidelines for referral to the Minister under section 48B of the Migration Act.

4.13 The State party reiterates that the author's claims were not credible and did not engage its non-refoulement obligations, including those under articles 6 and 7 of the Covenant (paras. 4.3 and 4.7 above). The author's submissions do not include any new evidence or claims that have not already been considered by the domestic authorities.

4.14 The State party has also referred to the country information report on Sri Lanka of the Department of Foreign Affairs and Trade of Australia, which states that low-profile LTTE members who come to the attention of Sri Lankan authorities would be detained and may be sent to the remaining rehabilitation centre but that the "rehabilitation programme is expected to conclude". The report also states that the Department was not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia. Even if it were to be accepted that the author was credible and that he was a low-profile LTTE member, the findings by domestic decision makers that the author's claims do not engage the State party's non-refoulement obligations would be unlikely to be altered.

4.15 Finally, given that the State party does not have obligations under articles 9 and 17 of the Covenant in relation to acts that may or may not take place in Sri Lanka upon the author's return, the State party respectfully reiterates that it has no claim to answer.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 On 19 December 2018, the author submitted his comments on the State party's observations, reiterating that, if he were removed to Sri Lanka, he would be harmed by the Sri Lankan authorities as a former member of LTTE.

5.2 The author submits that he has raised the latter claims directly with the Minister for Immigration and Border Protection, but that the State party has not assessed them properly. By refusing to allow the author to apply for a new protection visa and taking steps to deport

him, the State party has violated the author's rights under articles 6 and 7 of the Covenant<sup>7</sup> and would violate them further if it removed him to Sri Lanka. The author submits that there is a real risk that he will be subjected to arbitrary arrest, detention, persecution or death upon return to Sri Lanka, due to his high profile as a former member of LTTE.<sup>8</sup> He adds that former and suspected members of LTTE and their families are subject to questioning and monitoring by the Sri Lankan authorities upon their release from rehabilitation and detention.

5.3 The author accepts the State party's objections to his allegations under articles 9 and 17 and he does not intend to pursue these claims further, as these grounds do not have non-refoulement obligations attached to them.

5.4 Furthermore, the author submits that he has provided sufficient evidence to establish a prima facie case. In its observations, the State party has not recognized that the documents that the author provided to the Committee, namely the photograph of the author receiving an award from the LTTE leader, Velupillai Prabhakaran, in 2004, the photograph of the author's injuries sustained while serving LTTE in the Sri Lankan civil war and the medical report prepared by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, were not assessed by the domestic administrative and judicial processes. This new evidence, which has not been considered by the State party, attests to a real risk of persecution for the author, if he were to be removed, and should have triggered the non-refoulement obligation by the State party. In that regard, the State party has mistakenly stated that the only new evidence that the author provided is a letter of support dated 5 July 2017 from Dr. Tharmaratnam, omitting the other pieces of evidence included.

5.5 In the context of his request for ministerial review, the author submits that he convincingly explained why that new evidence had not been submitted to the Minister's delegate or the Refugee Review Tribunal. First, the author believed at the time that LTTE had been listed as terrorist organization by the State party and feared that, as a result, that he would be returned to Sri Lanka. Second, the author had genuine fears that if he fully disclosed his membership of LTTE and the significant role he had played therein, he would be placed in detention in the State party. Third, the author spent 16 years of his life involved in LTTE and the related trauma made it difficult to fully disclose all those details. The author refutes the State party's claims that there were inconsistencies between the evidence provided in the documents relating to his treatment for chickenpox. In both documents it is stated that the author was treated for chickenpox in early 2009, not after 22 May 2009.

5.6 The new claims made and the further evidence provided relate to the author previously being a member of LTTE and trained as a medical cadre serving as part of medical units on the front line during the Sri Lankan civil war. They include information on his injuries sustained during his service with LTTE, which had not been considered previously by the delegate or the Tribunal. The author explained that he had been advised by other asylum-seekers at the time not to disclose information about the extent of his LTTE involvement to the State party. In his submission, the author explained why he did not provide the full circumstances of his case at the primary and secondary stages; his stated reasons should dispel any doubts about his credibility. He reiterates that this new evidence was not considered when his application for a protection visa was denied.

5.7 In his declaration, submitted with the original communication to the Committee, the author states that he received weapons training from LTTE, he was given an alias by the base commander, he received specialized medical training in battlefield medicine, he was trained to be involved in combat, he was wounded by an artillery shell during fighting in the Puliyankulam area and he received a special award from the LTTE leader, Mr. Prabhakaran. The crucial new evidence highlights the significant role that the author played in LTTE and demonstrates that, given his profile, the author would face a risk of being subjected to the death penalty, torture or other ill-treatment, in violation of articles 6 and 7 of the Covenant,

<sup>7</sup> Human Rights Committee, general comment No. 15 (1986), in which the Committee explains that the application of Covenant rights should also be extended to non-citizens.

<sup>8</sup> In his statutory declaration, the author states that, as a member of LTTE, he was trained as a medical cadre and served as part of medical units during the civil war and that he sustained injuries during that service. His village was situated in an area controlled by LTTE during the war. He also referred to his brother's role in the LTTE, as reflected in para. 2.1 above.

if removed to Sri Lanka. The fact that the author's family has not been targeted in the village in which they have resettled does not mean that the author would not be in danger upon return, as the risk is to the author as an individual. In addition, the State party's finding that the author may not be at risk as a result of his brother's involvement in LTTE is insignificant given the new evidence of the author's own involvement in LTTE.

5.8 The author submits that the domestic decisions at the primary and secondary stages were incorrect because the information provided was incomplete for the reasons stated above. He adds that the Minister, as part of the ministerial intervention process, does not have the scope to test the veracity of the claims, relying on the previous decision makers' findings without giving due consideration to new evidence. The merit of these claims needs to be considered and tested in a robust legal process. This is highlighted in the department officer's statement that the new information in the request was not likely to result in a finding that the non-refoulement obligations of Australia were engaged, without consideration of the explanation of the difference between providing support to LTTE and being a member of LTTE. In that context, the author submits that section 417 of the domestic ministerial intervention process is not a process that tests new evidence of the type provided by the author. Finally, the author notes that the Federal Circuit Court and the Federal Court can only consider juridical errors and, therefore, this domestic process did not consider the substance of the claims and did not consider the information that was submitted in this case. The author recalls that the new information provided in the case engages the State party's obligations under articles 6 and 7 of the Covenant, since he has established the credibility of his claims and shown that he was well beyond a low-level LTTE member.

5.9 Finally, the author refers to the 2018 Department of Foreign Affairs and Trade report, which includes assessments of the risks for former LTTE members and states that Sri Lankan authorities remain sensitive to the potential re-emergence of LTTE throughout the country. According to expert testimony provided to a hearing of the Upper Tribunal on Immigration and Asylum of the United Kingdom of Great Britain and Northern Ireland, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters.

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

6.1 On 19 June 2019, the State party submitted additional observations. As regards the claims in relation to articles 9 and 17 of the Covenant, the State party notes that the author does not intend to pursue these grounds further. As regards the author's claims in relation to articles 6 and 7 of the Covenant, the State party has determined that there is no new information in the author's comments to alter its original assessment that there are no substantial grounds for believing that the author faces a real risk of irreparable harm if returned to Sri Lanka. The author's claims should therefore be considered inadmissible or be dismissed for lack of merit.

6.2 In particular, the State party submits that the evidence referred to in the author's comments has been assessed in domestic processes, including the request for ministerial intervention under section 48B.

6.3 The State party rebuts the author's objection to section 417 of the domestic ministerial intervention process. The domestic migration processes allow for careful consideration and review of existing and new evidence. The author's new claim regarding LTTE membership was thoroughly considered by the departmental officer but was rejected due to concerns about timeliness and genuineness, together with issues of inconsistency and credibility. The author's request did not meet the guidelines as there were no unique or exceptional circumstances presented that would compel the Minister to intervene under section 417.

6.4 The author has further objected to the State party's submission that, even if it were to be accepted that the author was credible and he was an LTTE member, the findings by domestic decision makers would be unlikely to be altered. The domestic decision makers considered a range of evidence and concluded that there were no substantial grounds for believing that there was a real risk that the author would be subject to significant harm as a foreseeable consequence of his removal to Sri Lanka or that Australia had protection obligations in relation to the author. Further, the Department of Home Affairs has



reconsidered the country information provided by the author, as well as more recent country information, and found there has been no relevant adverse change to the country situation since the author's claims were last assessed.

6.5 On 18 March 2020, the State party submitted a request to lift the interim measures, under which it had been requested not to remove the author to Sri Lanka while the communication was under consideration.<sup>9</sup> The State party argued that it had assessed the information provided by the author and that there were no substantial grounds for believing that the author faced a real risk of irreparable harm if returned to Sri Lanka. Therefore, it considered the interim measures request to be unwarranted. The State party further advised that the author would be removed from Australia, in accordance with section 198 of the Migration Act.

#### **Additional comments from the author**

7.1 On 20 July 2020, the author submitted comments on the State party's request to lift interim measures, asking the Committee to uphold its request for interim measures as he continued to face a risk of irreparable harm.

7.2 The author referred to the criticisms by the Government of Australia of assessments of its asylum system contained in the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,<sup>10</sup> adding that he was a Tamil asylum-seeker facing deportation. In that context, the author questioned the sincerity of the State party in implementing its international obligations. The author contests the State party's objections to the new evidence, reiterating that he worked as a medic on the front line and that that came within the remit of the dental department of the camp, as stated in Dr. Tharmaratnam's letter. A dental clinic is clearly classed a medical clinic and therefore the author's work can be considered as a medic on the front line. The author submits that the domestic decisions at both the primary and the secondary stages were incorrect because the information provided was incomplete as it did not take into account the new evidence submitted with the request for ministerial intervention. The author also submits that this new information is significant and needs to be considered, and that he should be afforded, at a minimum, the opportunity to have this crucial new evidence tested. In addition, the author reiterates his reservations about the ministerial intervention process, as well as the assessments by the Federal Circuit Court and the Federal Court, arguing that the new evidence should be considered at the primary and secondary stages of the asylum proceedings.

7.3 On 10 May 2023, the author again submitted comments that the interim measures requested were justified as he faced a risk of irreparable harm. This is substantiated by independent and credible country information annexed to the submission, elaborating upon the current human rights situation in Sri Lanka, the treatment of Tamil separatist groups in Sri Lanka and the treatment of Tamil failed asylum-seekers.

#### **State party's further observations**

8.1 On 4 August 2023, the State party provided further updates on the present case.

8.2 The State party refers to a recent domestic case law with regard to asylum,<sup>11</sup> although not related to the present communication, and recalls its preceding observations on the admissibility and the merits, including the decision made not to refer a request made by the author, pursuant to section 417 of the Migration Act, to the Minister for consideration. It notes that the guidelines for referral of decisions to the Minister applied in relation to the author's request under section 417 of the Migration Act were the guidelines considered by the High Court of Australia in *Davis v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*. As regards a request by the author for ministerial intervention under section 48B of the Migration Act, that request was not referred to the Minister in accordance with ministerial guidelines. Those guidelines were not the subject of

<sup>9</sup> See para. 1.2 above.

<sup>10</sup> [A/HRC/28/68/Add.1](#).

<sup>11</sup> High Court of Australia, *Davis v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, Case No. M32/2022 S81/2022, Judgment, 12 Apr 2023.

the decision in *Davis v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.

8.3 The State party comments on the relevance of matters considered by the High Court of Australia to the present communication. First, the orders made by the High Court in that proceeding were confined to matters of fact in that proceeding and did not have the automatic effect of overturning decisions made in different factual circumstances. Second, it remains the case that the State party's officials have carefully considered the information provided by the author and concluded that there are no substantial grounds for believing that he faces a real risk of irreparable harm if returned to Sri Lanka.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the author's statement that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

9.4 The Committee notes the author's statement that, by rejecting his request for a protection visa and the decision to remove him to Sri Lanka, the State party has violated his rights under articles 6 and 7 of the Covenant and would violate them further if it removed him to Sri Lanka. As a Tamil returnee with presumed links to LTTE, due to his alleged membership of that group, he would be at risk of arrest, detention, persecution, torture, other ill-treatment or even death by the Sri Lankan authorities. The Committee notes the State party's objection to admissibility for lack of sufficient substantiation of those claims. The author also raised claims under articles 9 (1) and 17 of the Covenant, which he finally withdrew, given the objection by the State party, due to the absence of their extraterritorial application and the lack of a non-refoulement obligation attached to them, which the author accepted.

9.5 The Committee recalls that, in paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, it referred to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there were substantial grounds for believing that there was a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. The Committee has 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. All relevant facts and circumstances must be considered, including the general human rights situation in authors' countries of origin. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in question in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>12</sup>

9.6 In the present case, the Committee notes, on the one hand, the author's allegation that the State party's decisions in the first and second instance failed to adequately take into account the author's affiliation with LTTE, the fact that the author's family had been visited regularly by Criminal Investigation Department members enquiring about the author's whereabouts, that the author's brother had been a high-level intelligence cadre of LTTE and that a warrant had been issued for the author's arrest, amounting to inadequate assessment of evidence by the State party's authorities.

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<sup>12</sup> *S.T. v. Australia* (CCPR/C/138/D/3685/2019), para. 8.5.

9.7 On the other hand, the Committee notes the State party's argument that the author's claims were thoroughly considered by robust domestic processes and that the domestic authorities and courts established that the author's claims were not credible owing to several major inconsistencies in his statements, with respect to his alleged involvement with LTTE and to events in Sri Lanka before he left the country. In particular, the State party argues that the author raised his claims about the LTTE membership in the final stages of the domestic proceedings, in the request for intervention by the Minister for Immigration. The State party also argues that the author's claims escalated from him being an affiliate of LTTE, to being an LTTE member, to being an LTTE high-level cadre working as an LTTE medic at the hospital and on the front line, where he was injured. The State party further argues that those assertions should have been made by the author in the first and second instances, as the information was available at that time. While the author provided an explanation for the late assertions of the new facts and evidence, namely his security concerns and in an attempt to avoid detention, the Minister's delegate did not consider those new claims and evidence to be timely, genuine or credible, referring to the preceding credibility concerns, namely that the author did not have a profile with the Sri Lankan authorities as he had returned to Sri Lanka during the previous three years, his brother was not perceived as having held leadership positions in LTTE, and his lack of medical knowledge. In that context, the Committee notes that the State party has held that the escalating claims were aimed at reopening the domestic decisions taken and that, even if the author had been a low-profile member of LTTE, he would not be at a real and personal risk of irreparable harm in the context of articles 6 and 7 of the Convention, since he had repeatedly returned to Sri Lanka and did not attract the adverse attention of the authorities. As to the country information, the State party argues that the additional country information referred to by the author is not specific to the author's own circumstances and does not establish that he is personally at a real risk of torture.

9.8 The Committee notes from the documents submitted by the author that the domestic authorities considered his statements not to be credible, on the basis of inconsistencies in accounts regarding his involvement in LTTE, his role as medical staff in the LTTE context – given his lack of medical knowledge – or the likelihood of him attracting the attention of the authorities due to his brother's alleged leadership roles in LTTE, which were not perceived as genuine. Furthermore, there has been no or insufficient evidence about the author being detained or questioned in the past by the Sri Lankan army or the Criminal Investigation Department, and the author presented late claims of his LTTE membership, which the authorities perceived as not credible and not meeting the burden of proof. The Committee considers that the author had several opportunities to raise his claims before the first and second instances authorities, with the assistance of his legal representative, in particular during an interview regarding his protection visa application and an oral hearing before the Refugee Review Tribunal.

9.9 The Committee considers that the information at its disposal allows it to establish that the State party's authorities took into account all the elements available, including the human rights situation in Sri Lanka and the statements and evidence provided by the author in support of his allegations, when evaluating the risk that he might face, and found that the author's statements did not reflect his own past experience in Sri Lanka. The State party's authorities also considered that the alleged risks were not genuine, and hence not personal and real, as the author was not perceived as an affiliate or member of the LTTE and he had not attracted the adverse attention of the authorities in the past. The Committee finds that, while the author disagrees with the conclusions of the State party's authorities regarding the assessment of the facts and the credibility of his claims, the facts before the Committee do not allow it to conclude that the assessment by the State party's authorities was clearly arbitrary or amounted to a manifest error or a denial of justice. Accordingly, the Committee concludes that the author has failed to substantiate, for the purposes of admissibility, that he would face a personal and real risk of treatment contrary to articles 6 or 7 of the Covenant, if returned to Sri Lanka, and that his claims are inadmissible, in accordance with article 2 of the Optional Protocol.

10. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
  - (b) That the present decision shall be transmitted to the State party and to the author.
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