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Committee against Torture
Thirty-fourth session
(2 – 20 May 2005)

DECISION

Communication No. 211/2002

Submitted by:	Mr. P. A. C. (represented by counsel, Mr. Chandrani Buddhipala)
Alleged victim:	The complainant
State party:	Australia
Date of the complaint:	7 June 2002
Date of present decision:	3 May 2005

[ANNEX]

* Made public by decision of the Committee against Torture.

** Re-issued for technical reasons.

ANNEX

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-fourth session

Concerning

Communication No. 211/2002

Submitted by:	Mr. P. A. C. (represented by counsel, Mr. Chandrani Buddhipala)
Alleged victim:	The complainant
State party:	Australia
Date of the complaint:	7 June 2002

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 3 May 2005,

Having concluded its consideration of complaint No. 211/2002, submitted to the Committee against Torture by Mr. P. A. C. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, her counsel and the State party,

Adopts the following:

Decision of the Committee against Torture under article 22 of the Convention

1.1 The complainant is Mr. P. A. C., a Sri Lankan national of Tamil ethnic origin born on 15 March 1976 and, at the time of submission of the complaint, detained in immigration detention awaiting removal from Australia to Sri Lanka. He claimed that his expulsion to Sri Lanka would constitute a violation by Australia of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

The facts as presented

2.1 The complainant contends that, in 1990, aged 14, he and 14 other boys were recruited by the Tamil National Army, which was working with the Indian Army, but subsequently escaped. Thereafter, his father sent him to an area controlled by the Liberation Tigers of Tamil Elam (LTTE). When asked to join the LTTE, he declined and offered to assist in other ways such as building bunkers and distributing food. He was thereupon forced to undertake 3 months training with the LTTE assisting those wounded on the battlefield. In 1995, when the Sri Lankan Army attacked Jaffna, his father took him to safety in Colombo, where he stayed with a friend. Without providing further detail, he states that he was physically abused at a Colombo police station. He then learned that his father had been detained in Jaffna by the LTTE and later killed. Following the father's disappearance, he fled to Taipei but was forced to return to Sri Lanka (no details are provided). After his return, he claimed that he had learnt that the Sri Lankan authorities were in search of him, and he fled to Australia.

2.2 The complainant entered Australia on a three month tourist visa on 11 October 1995 and lodged an application for a protection visa on 12 December 1995. Following interviews, the delegate of the Department of Immigration rejected the claim on 19 November 1997, regarding the complainant as not credible on account of a variety of inconsistencies between his application and his interview testimony. The complainant concedes "certain minor inconsistencies" but argues that they "are not significantly relevant", and that he was misled by another person who advised him not to disclose everything. On 12 December 1997, he applied for review of the decision.

2.3 On 28 September 1999, the Refugee Review Tribunal, following a hearing at which the complainant appeared with interpretation, affirmed the decision not to grant a protection visa. The Tribunal stated that it "does not attach importance to minor inconsistencies of detail arising from the [complainant's] original submission. The Tribunal has, however, carefully considered more serious inconsistencies and difficulties with the [complainant's] evidence which are addressed as they arise in this decision. Apart from a number of lesser discrepancies, there were major difficulties with key claims." After addressing these issues in turn, the Tribunal found that: "The extent of implausibilities, inconsistencies and other difficulties with the Applicant's evidence are such that, considering them all together, the Tribunal is satisfied that the [complainant's] claims have been fabricated."

2.4 On 25 October 1999, the complainant requested the Minister of Immigration under section 417 of the *Migration* Act 1958 to substitute, in the public interest, a more favourable decision for that of the RRT. On 8 January 2000, this was rejected. On 15 February 2002, a second request under section 417 was filed and, on 29 March 2003, rejected. On 2 May 2000, the complainant was detained in immigration detention for purposes of removal. On 10 May 2000, a third request under section 417 was filed, which was later rejected on 24 November 2000. The same day, he lodged a second application for a protection visa on the grounds that the original application was invalid. On 22 May 2000, the Department determined that the original application had been validly made.

2.5 On 22 August 2000, the second application for a protection visa was rejected as the complainant had not established a real fear of persecution if returned to Sri Lanka. On 24 August 2000, he applied to the RRT to appeal the refusal. On 30 October 2000, the RRT cancelled the decision to refuse the second application for a

protection visa, on the ground that the second application was invalid and that the RRT thus had no jurisdiction. On 8 November 2000, a fourth request under section 417 was made, which was later rejected on 11 December 2001. On 7 March 2001, the Federal Court dismissed an appeal against the RRT's decision. On 16 August 2001, the Full Federal Court dismissed an appeal against the Federal Court's decision. On 7 December 2001 and 19 February 2002, fifth and sixth requests under section 417 were made, which were later rejected on 22 May 2002. On 28 February 2002, the complainant withdrew an application to the High Court for leave to appeal the Full Federal Court's decision.

2.6 On 7 June 2002, the complainant lodged the present complaint to the Committee, requesting interim measures to stay his removal. On 10 June, the Committee declined the request but registered and transmitted the complaint to the State party for comment. On 13 June 2002, the complainant was removed to Sri Lanka.

The complaint

3.1 The complainant contended that his return would violate article 3, and that he should be returned only if it could be demonstrated beyond reasonable doubt that the claim was false. He argued that the inconsistencies in his evidence were not such as to make his testimony unreliable. He contends that the "RRT has used a "very high standard of proof as such as beyond reasonable doubt when the standard of proof of refugee cases is the lowest. It has not carefully considered whether there is a 'real chance' of the [complainant] being persecuted if he returns to Sri Lanka. It is apparent from the RRT decision that the Tribunal has acted biasly [sic] and decided his case against the weight of evidence." The complainant criticized the reliability of country information before the RRT. He finally contended that the second RRT decision finding no jurisdiction was "grossly unreasonable" when the Department had accepted receiving his second application and interviewed him. The complainant argued that there were substantial grounds of fearing exposure to torture, contending that the existence of systematic human rights violations in a country sufficiently shows such grounds.[1]

The State party's observations on admissibility and merits

4.1 By submission of 17 November 2002, the State party contests the admissibility and merits of the complaint. On the claim that the decision to remove him to Sri Lanka would violate article 3 of the Convention, the State party submits that his evidence lacked credibility and that the communication should be held inadmissible as incompatible with article 22, paragraph 2, of the Convention and Rule 107, paragraph 1(d), of the Committee's Rules of Procedure. Alternatively, the evidence is not sufficient to establish a real, foreseeable and personal risk of being subjected to torture and the communication should be dismissed for lack of merit.

4.2 The State party submits that *refoulement* cases, by their very nature, are about events outside the State party's immediate knowledge and control. In this context the credibility of the complainant's evidence assumes greater importance and goes both to

[1] In support, the complainant refers to Country Reports of the U.S. State Department of 1996 and 1997, Amnesty international reports of 1996 and 1998, and a variety of newspaper reports.

the admissibility and merit of the case. It argues that in the course of determining his entitlement to a protection visa, the complainant was provided with ample opportunity to present his case but was consistently unable to demonstrate the *bona fides* of his claim. The State party, adopting the RRT's reasons for decision, rejects his contention that the inconsistencies in his evidence were not material. It points out that after a detailed examination of all the facts and available evidence, the Tribunal concluded unequivocally that the complainant lacked credibility and that his evidence was fabricated.

4.3 The State party submits that the RRT's approach in this case to the question of credibility is consistent with the principles applied by the Committee. The latter's jurisprudence establishes the principle that complete accuracy in the application for asylum is seldom to be expected of victims of torture.[2] Nevertheless, the Committee must satisfy itself that all the facts invoked by the complainant are 'sufficiently substantiated and reliable'.[3] Similarly, while the RRT does not attach weight to minor inconsistencies, it is not required to accept on face value the claims of an applicant although it may give the benefit of the doubt to an applicant who is otherwise credible and plausible. In this case, the inconsistencies in the complainant's evidence were extensive and fundamental to his claim. The State party recalls that, while not bound to follow a domestic tribunal's findings of fact, the Committee will give considerable weight to the facts found by such a tribunal.[4] Therefore, appropriate weight should be given to the findings of the RRT taking note of the inconsistencies in the complainant's evidence before the domestic authorities.

4.4 The State party submits that its obligations under article 3 of the Convention were taken into account before making the decision that the complainant was to be removed from Australia. Under section 417 of the *Migration* Act, the Minister for Immigration has a discretionary power to substitute a more favourable decision. All cases subject to an adverse decision by the RRT are automatically referred for assessment under Ministerial Guidelines on stay in Australia on humanitarian grounds. The Guidelines incorporate the obligation of *non-refoulement* under article 3 of the Convention. It was determined that the complainant did not to meet the requirements of the Guidelines. The complainant also requested the Minister to exercise his discretion under section 417 on six separate occasions. The Minister generally does not consider repeat requests under section 417 in the absence of new information. A number of requests were considered not to meet the requirements of the Guidelines and not referred to the Minister. In the case of those requests referred to Minister, he declined to consider an exercise of his discretion under section 417.

4.5 The State party points out, on this claim, that the complainant was unable to substantiate his claim for protection despite the opportunity to file two separate applications for a protection visa. The first RRT decision found that the complainant's evidence lacked credibility and that some evidence was fabricated. His claim was also separately assessed against the Guidelines for stay in Australian on

[2] Kisoki v Sweden, Communication No 41/1996, Views adopted on 8 May 1996, at 9.3; Tala v Sweden, Communication No 43/1996, Views adopted on 15 November 1996, at 10.3.
[3] Aemei v Switzerland, Communication No 34/1995, Views adopted on 9 May 1997, at 9.6.
[4] General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 November 1997, at 2.

humanitarian grounds, which incorporates article 3 of the Convention. He did not provide the Committee with any new or additional evidence or sufficiently substantiate that the evidence is reliable for the purposes of article 22 of the Convention. Nor did he present any cogent or convincing argument that there is real and foreseeable risk of being subjected to torture by Sri Lankan security forces upon return to Sri Lanka.

4.6 On the claim that there is a consistent pattern of gross violations of human rights in Sri Lanka and that, on this basis alone, there are substantial grounds for believing that the applicant would be in danger of being subject to torture, the State party replies that the complainant incorrectly applied article 3, paragraph 2. It refers to the Committee's case law that the existence of a consistent pattern of gross violations of human rights is not sufficient on its own to meet the requirements of article 3. While the existence of such conditions may strengthen a complainant's claim, the Committee's jurisprudence establishes that the complainant must adduce additional evidence to show that there is something in his or her personal circumstances which contributes to a personal risk of torture if returned.[5]

4.7 Accordingly, evidence of a pattern of gross violations of human rights which affects the whole population in the State concerned is insufficient on its own to establish substantial grounds. Nor is evidence of civil strife or the breakdown of law and order necessarily sufficient to show substantial grounds that the particular individual is at risk of being subjected to torture. The State party thus concludes that to the extent that the complainant relies on the incorrect test the communication should be ruled inadmissible *ratione materiae* as incompatible with article 22, paragraph 2, of the Convention and Rule 107, paragraph 1(d), of the Committee's Rules of Procedure.

4.8 With respect to the current country situation, the State party accepts that in deciding whether to return a person, it must take into account all relevant factors, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights pursuant to article 3, paragraph 2. It notes that the complainant refers to several reports as evidence that there is a widespread pattern of gross violations of human rights in Sri Lanka and argues that this situation has not changed since his departure in 1995, but argues that this material is of little value in an assessment of the current country situation since the majority of references date from 1997, 1998 and 1999. A single reference to the "Tamil Guardian" of 22 May 2002 concerns the peace agreement and provides no detailed reporting on the conduct of security forces.

4.9 The State party provides copies of relevant country situation reports. The State party concluded, having examined the reports on the internal situation within Sri Lanka, that while some risk of ill-treatment does exist due to the difficult law and order situation in some regions of Sri Lanka, the evidence does not support the view that the risk to the complainant is such as to elevate his personal risk above that

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[5] X, Y & Z v Sweden, Communication No 61/1996, Views adopted on 6 May 1998, at 11.1; Kisoki v Sweden, supra, at 9.2; Khan v Canada, Communication No 15/1994, Views adopted on 15 November 1994, at 12.2; X v Switzerland, Communication No 27/1995, Views adopted on 28 April 1997, at 10.3; Aemei v Switzerland,supra, at 9.3 and 9.4; Tapia Paez v Sweden, Communication No 39/1996, Views adopted on 8 May 1997, at 14.2; Tala v Sweden, supra, at 10.1. See also Vilvarajah et al. v United Kingdom, 14 EHRR 248 (judgment of 30 October 1991), at 112.

experienced by the population at large. To the extent that the complainant relies upon the current country situation, there is insufficient evidence that the risk is a real and foreseeable risk that is personal to him. Accordingly, this aspect of the communication should be dismissed for lack of merit.

4.10 Concerning the additional claims that (i) the first RRT decision was tainted by bias and was decided against him despite the weight of evidence in his favour, and (ii) that the second RRT decision was unreasonable, the State party submits that this aspect of the communication should be dismissed as inadmissible *ratione materiae* on the grounds that it is incompatible with article 22, paragraph 2, of the Convention and Rule 107, paragraph 1(d). Further, it argued that the complainant had failed to properly exhaust domestic remedies in relation to these two issues and this aspect of the communication should be dismissed pursuant to Rule 107, paragraph 1(f). Alternatively, this aspect of the communication should also be dismissed as lacking merit.

4.11 Firstly, the State party argues that the complainant has provided no argument or evidence to explain how the alleged procedural irregularities amount to a breach of any of the provisions of the Convention. As the Committee is not a judicial body with power to supervise domestic courts and tribunals, it is unclear on what basis the complainant asks the Committee to review the domestic procedural aspects of his claim to refugee status. Accordingly, this aspect of the communication should be dismissed as inadmissible *ratione materiae*, as incompatible with article 22, paragraph 2 of the Convention and Rule 107, paragraph 1(d).

4.12 Second, the State party contends that this aspect of the communication must be dismissed for failure to exhaust domestic remedies. The complainant did not pursue judicial review of the first RRT decision that he now impugns as both biased and flawed due to a misapplication of the law. Nor did he pursue an application for special leave to appeal to the High Court from the decision of the Full Federal Court concerning the RRT's second decision. He provided no explanation as to why his application for special leave was withdrawn. Accordingly, he has failed properly to exhaust domestic remedies in relation to these two issues.

4.13 The State party reiterates that the complainant was provided with two opportunities to pursue his application for refugee status and enjoyed ample opportunity to demonstrate the *bona fides* of his claim. He was interviewed on arrival and submitted an application for a protection visa on 12 December 1995. On 21 December 1995 he provided a more detailed statement of facts by way of statutory declaration. All information provided to the Department was considered during the assessment of his first application. He was subsequently permitted to file a second application when questions about the validity of his first application were raised. He has thus had the benefit of his application for a protection visa being assessed by two different immigration officials in two separate decision making processes. He exercised his right to independent merits review of both adverse decisions and attended hearings before the Refugee Review Tribunal that were fair and unbiased. He was provided with assistance for the purpose of his application and subsequent RRT proceedings. He also pursued judicial review of the second RRT decision. His case was also assessed taking into account the obligation of *non-refoulement* under article 3 of the Convention.

Complainant's comments on the State party's submissions

5.1 By letter of 6 January 2003, counsel for the complainant was requested to make any comments on the State party's submissions within six weeks. By letter of 30 September 2003, counsel for the complainant was requested to comment forthwith and advised that failure to do so would result in the Committee's consideration of the case on the basis of the information before it. As at the date of the Committee's consideration of the case, no reply had been received.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 Pursuant to article 22, paragraph 5(2)(b), of the Convention, the Committee is required to ascertain whether the complainant exhausted domestic remedies in respect of his claim, an issue it determines at the time of its consideration of the communication. The Committee observes that, in respect of the RRT's first decision which concentrated on his credibility, the complainant pursued no appeal to the Federal Court and has offered no explanation for his failure to do so. In respect of the RRT's second decision, the Committee observes that the complainant withdrew his application to the High Court for special leave to appeal, again without offering any reasons for this course of action. In the circumstances, the Committee must conclude that the complainant failed to exhaust available domestic remedies, as required by article 22, paragraph 5(2)(b); the communication is accordingly inadmissible on this basis.

7. Accordingly the Committee concludes:

(a) that the complaint is inadmissible, and
(b) that this decision shall be transmitted to the State party and to the complainant.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]