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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 749/2016*, **, ***

Communication submitted by:	X (represented by counsel, John Phillip Sweeney)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	22 April 2016 (initial submission)
Document references:	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 10 May 2016
Date of present decision:	3 May 2019
Subject matter:	Deportation to Sri Lanka
Procedural issues:	Lack of substantiation of claims; non-exhaustion of domestic remedies
Substantive issues:	Risk to life and risk of torture or ill-treatment in the event of deportation to country of origin
Article of the Convention:	3

1.1 The complainant is X, a national of Sri Lanka. His request for asylum was rejected by Australia. He claims that his deportation to Sri Lanka would constitute a violation by Australia of article 3 of the Convention. The complainant is represented by counsel.

1.2 On 10 May 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, rejected the complainant's request for interim measures.

The facts as submitted by the complainant

2.1 The complainant was born in Sri Lanka. He worked in Saudi Arabia from 1993 to 2001. In 2001 he returned to Sri Lanka to work as a private gem trader. In 2003, the complainant again departed Sri Lanka to work in Japan. He returned to Sri Lanka in 2006 to establish his own company and secured licences as a gem dealer in 2008, 2009, 2010 and 2011.

* Adopted by the Committee at its sixty-sixth session (23 April–17 May 2019).

** The following members of the Committee participated in the examination of the communication: Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

*** An individual opinion by Committee member Abdelwahab Hani (dissenting) is annexed to the present decision.

2.2 Upon his return to Sri Lanka, the complainant lived as a pious Muslim and was a supporter of the United National Party at several elections. He was asked to run as a candidate for the Party in the 2010 parliamentary elections for one of the districts in the Western Province.

2.3 Concurrently, because of his popularity and because the majority of people in his village were Muslim United National Party supporters, he was also asked to run by the United People's Freedom Party Alliance. The latter party expected the complainant to use his popularity among his community to win the election. The complainant refused to participate in the election as a candidate for that party and received threats from the sitting Member of Parliament for Kalutara District, Y, an Alliance Party member, that he would be killed if he ran for the United National Party. As a result, the complainant decided to run as an independent.

2.4 At around 9 a.m. on 7 April 2010, the day before the elections, the complainant was kidnapped and held at the house of a powerful supporter of Y until the end of the elections. Upon his release the complainant went into hiding and stayed with one of his wife's relatives in Colombo.

2.5 The complainant claims that on 2 October 2011, he assisted his friend M with his campaign for the mayoral elections, scheduled for 8 October 2011. When Y learned that the complainant was helping the opposing party during the campaign, he assaulted him and locked him in the United People's Freedom Party Alliance office for three days. The complainant claims that during these days he was tied to a concrete post and tortured, his hands were burned and he was not given any food. As a consequence, he started to vomit blood. After his release, he was treated at the National Hospital in Colombo for three days. The complainant submits that he was constantly threatened in the following days by Y, who visited his relatives' houses and the complainant's own house and asked to see him. Fearing that he would be killed, and because of the ongoing threats from Y and Alliance members, the complainant decided to leave Sri Lanka for Australia.

2.6 On 13 October 2011, the complainant applied for a short stay visa for the purpose of participating in an exhibition in Sydney from 24 to 28 October 2011, for which he had been nominated by the Information and Communication Technology Agency of Sri Lanka in association with the Sri Lanka Consulate General in Sydney and Melbourne. He entered Australia on 23 October 2011.

2.7 On 22 November 2011, the complainant started a protection visa application and was granted an associated bridging visa. In his protection visa application he stated that he feared being killed by supporters of United People's Freedom Party Alliance member Y because he did not support him in the 2010 parliamentary elections and because he had observed the complainant publicly supporting a United National Party candidate at the subsequent local government elections in Colombo, at which time he was abducted in retaliation, beaten, threatened and released three days later.

2.8 The complainant's protection visa application was rejected by the delegate of the Minister for Immigration and Citizenship on 6 February 2013, who was not satisfied with the overall credibility of the complainant's claims and, consequently, did not accept them. The delegate found, therefore, that there were no substantial grounds for believing that the complainant would suffer a real risk of significant harm on return to Sri Lanka.

2.9 The complainant appealed the delegate's decision to the Refugee Review Tribunal, which upheld the original decision on 3 September 2014. On 29 September, he appealed before the Federal Circuit Court of Australia. However, on 8 March 2016, the complainant withdrew this application because the day before the hearing, a new barrister took the case and advanced the opinion that there were "no prospects of success". On 9 March, the complainant appealed to the Minister for Immigration and Border Protection to intervene on his behalf, but his request was rejected on 6 April. The complainant maintains that he has thus exhausted all available domestic remedies.

The complaint

3.1 The complainant claims that, if returned to Sri Lanka, he will be at risk of treatment in violation of article 3 of the Convention. He submits that he is fleeing the arbitrary actions of a high-ranking Sri Lankan politician and that internal relocation is not an option for a person at real risk from Sri Lankan members and "thugs" of the United People's Freedom Party Alliance. The country is small, and the political networks of this party cover the whole country.

3.2 The complainant fears that, in addition, as an involuntary returnee who has lived among the Tamil diaspora in Australia for the last five years, he will be targeted by the Sri Lankan authorities for interrogation about his activities and associates in Australia. He fears that during this process, he will be tortured and treated in an inhuman, cruel and degrading manner.

State party's observations on admissibility and the merits

4.1 On 6 October 2016, the State party submitted its observations on admissibility and the merits of the complaint, stating that the complainant's claims were inadmissible due to non-exhaustion of domestic remedies and as manifestly unfounded. If the Committee considers the complaint admissible, the State party submits that it is without merit because the author failed to support his allegations by providing sufficient evidence that he would be at present and personal risk of torture upon return to Sri Lanka.

4.2 The State party submits that the complainant has not exhausted domestic remedies under article 22 (5) (b) of the Convention and the Committee's rules of procedure (rules 97 (c) and 113 (e)). He withdrew his application to the Federal Circuit Court on 8 March 2016, allegedly acting upon the advice of his legal counsel that the case had no "reasonable prospects of success". The complainant has consequently not exhausted all domestic remedies available to him in the form of judicial review (in either the Federal Circuit Court or, potentially, the Federal Court of Australia and the High Court).

4.3 The State party submits that the complainant's claims are manifestly unfounded and he has failed to establish a prima facie case for the purpose of admissibility. It notes that the complainant's claims have been thoroughly considered by several domestic decision makers and found not to engage the country's non-refoulement obligations under the Convention. The State party argues that the claims regarding cruel, inhuman or degrading treatment or punishment raised by the complainant do not fall under the definition of torture provided in article 1 of the Convention. Therefore, they are outside of the scope of the State party's non-refoulement obligations under article 3 of the Convention and should be dismissed as inadmissible. The complainant has not provided any new claims or evidence in his submissions to the Committee that have not already been considered by the domestic administrative and judicial processes, and the State party asks the Committee to accept that these claims have been thoroughly assessed through the domestic process.

4.4 The State party refers to the Committee's statement in its general comment No. 1 (1997) on the implementation of article 3 in the context of article 22[1] that, as it is not an appellate or judicial body, it gives considerable weight to findings of fact that are made by organs of a State party. The State party asks the Committee to give such weight to the finding of its domestic processes that the claims of the complainant are without merit and should be dismissed.

4.5 On the merits of the communication, the State party summarizes each step of the process undertaken by the complainant and submits that the decisions taken in his case were based on personal interviews and available country information. The decision maker who reviewed his protection visa application did not accept that the complainant had been kidnapped on 7 April 2010. The decision maker accepted that the complainant's name was included as part of a non-aligned independent group taking part in the 2010 parliamentary elections. However, because the complainant was one of 451 candidates in his electoral

[1] Replaced by general comment No. 4 (2017).

district, the decision maker did not consider that the complainant would be targeted personally in connection with the election.

4.6 In order to support his claim of being abducted the second time, the complainant submitted a "diagnosis ticket" from the National Hospital of Sri Lanka indicating that he had been physically assaulted and suffered an injury to the head. The decision maker concluded that the document had been fraudulently created for the purposes of supporting the complainant's claims.

4.7 Concerning the enmity of Y towards the complainant, the decision maker concluded that if Y wished to harm the complainant and was as influential and intimidating as the complainant claimed, it seemed implausible that the complainant could have had his gem dealers licence renewed on 18 January 2011. In addition, considering that the complainant's visa application had been endorsed by the Sri Lankan Government, the decision maker did not accept that the complainant had any enemies within the Government.

4.8 When considering the complainant's application for a merits review dated 25 February 2013, the Refugee Review Tribunal found some of the evidence to be vague, implausible and contradictory and found the complainant not to be a credible witness. It also noted that the complainant had left Sri Lanka on his genuine passport and was able to renew his gem dealer's licence after the first kidnapping, which was an indication that he was not of interest to the authorities. Regarding the complainant's allegations that he would be at risk of harm upon return as a failed asylum seeker, the Tribunal found that country information on this matter related only to people intercepted by the Australian authorities upon travelling to Australia and then returning to Sri Lanka, which was not the complainant's case. The complainant had obtained an Australian visa, and there was no evidence to suggest that the Sri Lankan authorities would become aware that he had sought asylum in Australia. The Tribunal dismissed the complainant's claims that he would be in danger because of his Muslim religion, in the absence of any supporting evidence in the country information. The complainant's claim that because he spoke Tamil he would be suspected of sympathizing with the Tamil cause and harmed on that basis was also found to be unsubstantiated.

Complainant's comments on the State party's observations

5.1 On 14 August 2018, the complainant submitted his comments on the State party's observations.

5.2 On the non-exhaustion of domestic remedies, the complainant claims that he did apply to the Federal Circuit Court but was given a negative opinion as to his prospects of success by his barrister. The complainant refers to section 486I of the Migration Act, which is reproduced on the application form for the Federal Circuit Court.[2] The complainant had no choice but to withdraw his application, and that prevented him from applying to any other court. He repeats that he has exhausted all domestic remedies available to him.

5.3 The complainant disagrees with the decision maker and the Tribunal's findings on the lack of credibility in his case and asks the Committee to come to its own conclusion on the matter, in view of the torture he faces upon return to Sri Lanka. He claims that the findings against him were based on poor facts, confusion about the timing of the kidnapping incidents and the nature of the documents in the case. The findings were also affected by outdated and incomplete research.

5.4 The complainant reiterates that he fears Y, who is an influential, corrupt and violent person. The complainant claims that he is facing serious legal proceedings with a possible

[2] Section 486I reads as follows:

> Lawyer's certification
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> (1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.
>
> (2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

custodial sentence for corruption, as Y would perceive the complainant to be a further threat to his already embattled status and would try to "silence" him.

Further submission of the State party

6. On 15 November 2018, the State party reiterated its position on admissibility and the merits of the case. It stated that the complainant's comments did not contain any new information to alter the State party's initial assessment.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[3]

7.3 The Committee takes note of the State party's observation that the complainant has failed to exhaust the available domestic remedies because he did not appeal the decision of the Refugee Review Tribunal to the Federal Circuit Court and then, potentially, to the Federal Court and the High Court of Australia. The Committee also notes the complainant's response that a barrister involved in his case considered that an appeal to the Federal Circuit Court would not have a reasonable prospect of success and that, in the light of section 486I of the Migration Act, he had to withdraw his appeal. Referring to its jurisprudence, the Committee notes that there is nothing in section 486I of the Migration Act to suggest that an appeal submitted in good faith will not be considered.[4] In the present case, it was the personal conclusion of the lawyer rather than the lack of effectiveness of the remedy that prevented the complainant from exhausting domestic remedies. The Committee recalls its consistent jurisprudence that mere doubt about the effectiveness of a remedy does not dispense with the obligation to exhaust it.[5] The complainant does not provide information on whether he tried to find a different lawyer to defend his case, including a State-appointed lawyer, or whether he could have presented his appeal himself, without counsel, instead of withdrawing it. The Committee notes that the information provided by the parties does not indicate that the complainant was represented by a State-appointed lawyer, and recalls its jurisprudence that errors made by a privately retained lawyer cannot normally be attributed to the State party.[6] In these circumstances, the Committee finds that the complainant has failed to exhaust domestic remedies available to him, as required by article 22 (5) (b) of the Convention, in that there were remedies, both available and effective, which the complainant has not exhausted.

7.4 In the light of this finding, the Committee does not deem it necessary to examine any other grounds of inadmissibility.

[3] See, for example, *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also the Committee's general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 34.

[4] See, for example, *T.T.P. v. Australia* (CAT/C/65/D/756/2016), para. 6.3.

[5] See, for example, *Shodeinde v. Canada* (CAT/C/63/D/621/2014), para 6.7; and *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.5.

[6] See, for example, *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.5; and *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

Annex

[Original: French]

Individual (dissenting) opinion of Abdelwahab Hani

1. With regard to the non-exhaustion of domestic remedies, the complainant states in paragraph 2.9 that he appealed to the Refugee Review Tribunal, which upheld the Minister's decision on 3 September 2014. On 29 September 2014, he appealed before the Federal Circuit Court of Australia. On 8 March 2016, however, he withdrew this application because the day before the hearing, a new barrister who advanced the opinion that there were no prospects of success had taken the case. On 9 March 2016, the complainant appealed to the Minister for Immigration and Border Protection to intervene on his behalf, but his request was rejected on 6 April 2016. The complainant maintains that he has thus exhausted all available domestic remedies.

2. The State party notes in paragraph 4.2 that the complainant was allegedly acting on the advice of his legal counsel that the case had no reasonable prospects of success.

3. In paragraph 5.2, the complainant explains that he did apply to the Federal Circuit Court but was given a negative opinion as to his prospects of success by his barrister. He also refers to section 486I of the Immigration Act, which states:

> (1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success;
>
> (2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

4. The complainant thus had no choice but to withdraw his application. Given the negative opinion of his lawyer, who, under section 486I of the Immigration Act, could neither introduce nor plead the complainant's case without incurring penalties, he was prevented from applying to any other court.

5. It is likely that the lawyer's conclusion is not, as stated by the Committee in paragraph 7.3, a "personal conclusion" but an obstacle that prevented the complainant from exhausting this domestic remedy, as the lawyer was not allowed to commence litigation without certifying in writing that there were reasonable grounds for believing that the complainant's case had a reasonable prospect of success.

6. Section 486I of the Migration Act establishes admissibility requirements for the commencement of litigation that must be met by counsel, on pain of the large dissuasive penalties enumerated in part 8B of the Act, including sections 486E and 486F, on costs orders where proceedings have no reasonable prospect of success. This part of the Act, introduced by the 2005 reform, is specific to migration litigation. It must be considered an obstacle to the commencement of migration litigation, not an integral part of the general ethical rules applicable to the legal profession.

7. The failure to lodge this appeal or the withdrawal of the application by the new lawyer cannot be put down to a mere personal opinion or error of judgment on the lawyer's part.

8. The State party does not explain how this obstacle incorporated into the law is compatible, in this case, with requirements for an available and effective remedy.

9. This obstacle compromises both the right to counsel and the effectiveness of the remedy in question. In its jurisprudence, the Committee has expressed the view that domestic remedies should be available and effective and that they should be accessible in practice without obstacles of any nature, as stated in paragraph 35 of its general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22.

10. In these circumstances, the Committee should have rejected the State party's argument that domestic remedies had not been exhausted and considered the complaint admissible.