



International Covenant on Civil and Political Rights

Distr.: General
25 May 2016

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2314/2013*, **

<i>Communication submitted by:</i>	Y (represented by counsel Arash Banakar)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	6 December 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 9 December 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	22 March 2016
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to life; torture, cruel, inhuman or degrading treatment or punishment; and arbitrary detention
<i>Articles of the Covenant:</i>	6 (1), 7 and 9 (1)
<i>Articles of the Optional Protocol:</i>	2

* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ladhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.
Individual opinion by Committee member Dheerujlall Seetulsingh (dissenting) is appended to the present Views.



1.1. The author of the communication, Y, is a Sri Lankan national, born on 25 July 1986 and residing in Canada. He is subject to deportation to Sri Lanka, following the rejection of his application for refugee status in Canada. He claims that, by forcibly deporting him to Sri Lanka, Canada would violate his rights under articles 6 (1), 7 and 9 (1) of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol entered into force for Canada on 19 May 1976.

1.2 On 9 December 2013, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to deport the author to Sri Lanka while his case was under consideration by the Committee.

Factual background

2.1 Y is an ethnic Tamil and Hindu by faith from the Northern Province of Sri Lanka (Jaffna). He claims that, during the civil war in Sri Lanka, he was assaulted on several occasions as a result of his activities as a newspaper photographer documenting public events and celebrations and the human tragedies that were occurring daily for the Tamil people, such as abductions, death threats, shootings and white van kidnappings. He indicates that, from October 2006, he took photographs for the *Uthayan* newspaper in the Valikamam district (west area)¹ and that he also sold photographs to the *Namathi Eelandu* newspaper. This activity drew the attention of the government authorities, including the Eelam People's Democratic Party. The author alleges that he was first arrested in February 2007 at a demonstration held in protest against abductions and killings. His camera was taken and he was locked up in an army camp in Uduvil. He states that he was interrogated regarding his connections to the Liberation Tigers of Tamil Eelam and journalism work, warned to not get involved in sensitive events and told that he should only photograph public events like opening ceremonies. During this detention, the author was savagely assaulted, hit and kicked. His right arm was fractured and he fainted because of the pain he was suffering. On an unknown date, the author was left on a road.

2.2 The author continued to take photographs of acts of brutality in the area. These photographs were published under aliases. On 19 December 2007, he was stopped by three men on his way back home. They took him by force to an army camp, where he was threatened with a gun in his head.² The author was held there for six days, during which time he was interrogated and threatened. He was then released with the help of his mother.³ In 2008, he applied for a pass to leave the country but that application was rejected. He therefore continued to work but was in constant fear. In September 2009, his home was raided and he was forced to report to the police once a week. The author claims that, every time he reported to the police station, he was harassed and threatened by the police and members of the Eelam People's Democratic Party present there. The obligation to report to the police every week ended in April 2011. In May 2011, men in plain clothes attempted to abduct him at his home but stopped when neighbors intervened. The men told him to stop working for the newspaper. Fearing for his life, the author left Sri Lanka in July 2011.

¹ The date when the author ended his work with *Uthayan* newspaper is not specified. However, he provides a copy of a one-year press identity card under his name issued on 1 January 2011 by the "New Uthayan Publication".

² The author indicates that he believes that the men were members of the Eelam People's Democratic Party.

³ No further information is provided on that issue.

2.3 The author arrived in Canada on 17 October 2011 and filed an asylum claim.⁴ On 12 February 2013, the Immigration Refugee Board dismissed his asylum request. The Board considered that the author was not credible in various aspects of his account. First, he could not establish that he had been a journalist or a professional photographer, could not demonstrate that he had earned the photography awards he claimed he had won and could not respond to questions related to basic knowledge of photography, which had a negative impact on his bona fides. For example, the author was not able to respond to a question on how to take a photograph with low light. Although the Immigration Refugee Board acknowledges that there were problems of translation owing to the technical terms used in these questions, it concludes that the author's answers did not support his allegation of being a professional photographer. Second, the Board found that it was probable that the author had not been living in Sri Lanka at the end of the civil war, as he could not give a detailed account of the events that had occurred in the country during this period, including the presidential and legislative elections of 2010. The Board considered that, if he had been a photographer, he should be aware of those events.⁵ Third, the author could not identify any specific problem he had with the Eelam People's Democratic Party, as he only claimed that Party members did not like that he took photographs for the newspaper. Although the Board recognized that being a journalist was a very dangerous profession in Jaffna, the author was at best a photographer of dead people in one area of Jaffna who did not question government policies or actions. Therefore, the Board expected the author to demonstrate his allegations with corroborative evidence, such as a documental proof that he had worked for the *Uthayan*, including a letter from the newspaper as his employer, bills from the newspaper paying his salary or published photographs under his name, which he had not provided. The Board did not give weight to the author's press identity card, considering that these documents are often forged in Sri Lanka.⁶

2.4 The Immigration Refugee Board also stated that, even if it considered the author's allegations to be true, he would not be granted refugee status, as he could not establish that his work was of a profile that could attract the attention of the Government. The Board quoted reports indicating that only journalists perceived by the Government of Sri Lanka as active or in an influential position would be at risk of being persecuted if returned there,⁷ which was not the author's case. Furthermore, being a Tamil from Jaffna and failed asylum seeker would not constitute a basis to grant him refugee status, as reports indicated that, after the end of the hostilities, the Sri Lankans originating from the north of the country were no longer in need of protection⁸ and, by then, thousands of failed asylum seekers had been returned in "generally safe conditions".⁹

⁴ The complaint indicates that the author was detained in the United States of America before arriving in Canada. When he arrived, the Canadian Border Service Agency seized from him documents confirming his identity as a Tamil male from the Northern Province of Sri Lanka (his national identity card and his birth certificate); the originals of these documents were returned to him.

⁵ The Immigration Refugee Board questions that the author had lived in Sri Lanka between the end of 2007 and the beginning of 2008, as his passport dates from 2007, and he left school in 2007 owing to his "parents' wishes". The Board considers that this denotes a preparation to leave the country.

⁶ See above, footnote 1.

⁷ See United Kingdom of Great Britain and Northern Ireland Home Office, operational guidance note on Sri Lanka (April 2012), available from www.gov.uk/government/uploads/system/uploads/attachment_data/file/310200/Sri_Lanka_operational_guidance_2013.pdf

⁸ The State party quotes the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka, available from http://unhcr.org.ua/attachments/article/349/LKA_EG_Dec%202012.pdf.

⁹ The State party quotes the operational guidance note on Sri Lanka (see note 7 above).

2.5 The author submits that he has exhausted all available domestic remedies, as the only remedy open to him was the appeal to the Federal Court, which, on 29 July 2013, denied his permission to commence a judicial review of the decision of the Immigration Refugee Board. He also claims that, at the time he submitted his complaint to the Committee, he was ineligible to file applications for a pre-removal risk assessment and for permanent residence on humanitarian and compassionate grounds, under a legislative provision barring such applications within one year of a negative asylum decision.¹⁰

2.6 On 12 February 2014, the author became eligible for a pre-removal risk assessment. He submitted his application on 19 March 2014, which was rejected on 17 April 2014. The pre-removal risk assessment officer considered that the author had repeated many of the allegations made before the Immigration Refugee Board. He also rejected most of the evidence presented by the author, considering that some of it had already been presented to the Board, or that it had predated the decision of the Board, or that no satisfactory explanation for a late submission had been given, or that it was irrelevant, and could therefore not be taken into account in the context of a pre-removal risk assessment. In that connection, the State party refers to: (a) a medical certificate dated 12 March 2007 that indicates that the author had received treatment in a hospital in Jaffna, following an attack that had resulted in injuries and a fractured arm; (b) photographs of the author's injuries; (c) an affidavit from the author's mother dated 23 November 2012 confirming the incidents he claimed as basis for his asylum request; and (d) an undated letter from Ms. S. stating that she knew the author from his school days and that he was an honest man with no links to anti-social or anti-Government activities and who used to work as a media photographer. Only two new pieces of evidence were accepted: a letter dated 20 May 2013 signed by the Chief Editor of the *Uthayan*, certifying that the author had worked for the newspaper as a photojournalist from October 2006 to May 2011, and a letter from the Human Rights Commission of Sri Lanka dated 6 December 2013, regarding a complaint made by the author's mother on 27 September 2013, according to which soldiers and "boys with weapons" had come to her house the day before and had asked about the author's whereabouts. The letter states that it is not advisable for the author to return to Sri Lanka as he would be "definitely identified by the security forces and taken to serious task".

2.7 The pre-removal risk assessment officer considered that the country conditions had not significantly changed after the decision of the Board and that only perceived critics or opponents to the Government would face a risk if returned. The question for the officer was therefore whether the author had demonstrated that he personally was an actual or perceived critic of the Government. The officer concluded that the evidence submitted did not demonstrate such a profile. He considered that the letter from the *Uthayan* was not reliable because the author did not plausibly explain why he was not able to get it before. The officer also considered that, even if the letter was genuine, it did not establish the author's allegations of risk, as it did not indicate that the author would be perceived as a critic or opponent to the Government who would be exposed to a real risk in Sri Lanka. As for the letter from the Human Rights Commission of Sri Lanka, the officer doubted that it was genuine because its tone was not professional and it failed to establish that the author would be at risk if returned. Finally, the officer reiterated the assessment of the Immigration Refugee Board that being a Tamil male from northern Sri Lanka was no longer a risk factor. On 19 June 2014, the author applied to the Federal Court for leave to commence a judicial review of the negative decision concerning the pre-removal risk assessment. The Court dismissed the application without reason on 7 October 2014.

¹⁰ The author cites the Canada Immigration and Refugee Protection Act, subsection 25 (1.2) (c) and article 112 (2) (c). The decision of the Immigration Refugee Board was issued on 12 February 2013 and the complaint was presented to the Committee on 6 December 2013.

2.8 After the pre-removal risk assessment application was rejected, the author was advised by the Canada Border Service Agency to apply for a new passport. He went to the Sri Lanka High Commission in Ottawa and requested a new passport, but his request was rejected because the High Commission does not provide documents to persons holding certain types of work permits linked to asylum proceedings, as the author had. He was informed that only the Canada Border Service Agency could request a passport for persons in such a situation. On 15 October 2013, the author met with representatives of the Agency and was informed that it would apply for a travel document on his behalf before the Sri Lankan authorities.

The complaint

3.1 The author submits that, by forcibly returning him to Sri Lanka, the Canadian authorities would violate his rights under articles 6 (1), 7 and 9 (1) of the Covenant.¹¹ He asserts that he would be subjected to mistreatment on the basis of his profile, characterized by the following features: (a) he is an ethnic Tamil from Jaffna; (b) he is a failed asylum seeker; (c) he was a journalist photographer for the *Uthayan*, which is perceived to be critical of the Government and has been repeatedly targeted for this reason; (d) he was assaulted during several incidents during the Sri Lankan civil war; (e) he would be forcibly removed to Sri Lanka with a travel document issued by the Sri Lanka High Commission at the request of the Canadian authorities.

3.2 The author asserts that the Immigration Refugee Board was unreasonable and procedurally unfair in finding that he had not established that he had been a journalist photographer for the *Uthayan* or another newspaper because he had an unsatisfactory knowledge of cameras and photography. The author states that the Board member who had asked the questions on this issue was using terms that the interpreter could not translate into Tamil. He indicates that the Board acknowledged these interpretation problems in its decision and that he could have replied to the questions if he had understood them. The author also maintains that the Board had made an error when questioning his credibility. As he claimed before the Board, his photos had been published under different aliases for security reasons and he did not have any receipts from the newspaper because, according to the practice of the newspaper, he was paid in cash. He further submits that he had not been able to get a letter from the newspaper before the hearing before the Board because the head of the photography department was no longer working there. The author explained to the Board that he had tried unsuccessfully to call the newspaper and that his sister and mother had gone to the offices of the *Uthayan* to ask for a work certificate, but two policemen had not let them in. He provided a letter from one of his former colleagues from the *Uthayan* confirming that he had worked there, but that had not been mentioned in the decision of the Board.¹²

3.3 The author considers as insufficient the argument of the Immigration Refugee Board that his press credentials had been forged because such documents are often forged in Sri Lanka. He states that even the Board's jurisprudence recognizes that evidence of the widespread availability of fraudulent documents is not, by itself, sufficient grounds on

¹¹ The author also refers to article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention relating to the Status of Refugees.

¹² The letter is signed by N. R., who states that he worked as a photographer for the *Uthayan* newspaper from 2004 to the first half of 2007 and that the author had joined his team by the end of 2006. The letter is not dated but indicates that it was issued at the request of the author and confirms the author's account of his arrest by the army during a demonstration in 2007.

which to reject documents.¹³ He also contests the conclusion of the Board that he did not have the profile of someone who would be targeted by the Eelam People's Democratic Party or the police if returned to Sri Lanka. He states that the Board failed to take into account the fact that he had been targeted because he worked for a newspaper that is perceived to be critical of the Government and that has been repeatedly targeted for that reason, dismissing in this regard the author's claims duly supported with evidence.¹⁴

3.4 The author maintains that, despite the civil war having come to an end, arbitrary arrests and detention, kidnapping, extortion, torture and murder continue to be widespread in Sri Lanka, and persons with his profile continue to be targeted.¹⁵ He specifically cites reports from Reporters Without Borders¹⁶ and press articles stating that media workers are at serious risk of being attacked or killed in Sri Lanka.¹⁷ The author asserts that these acts go unpunished and that the mere existence of a democratic government and legal system cannot be viewed as providing any protection. The author further asserts that Tamil males who are deported to Sri Lanka are at a particularly high risk of persecution.¹⁸ He further submits that the risk of his being detained upon arrival and subjected to ill-treatment or torture is even greater given the way the Canadian authorities have dealt with his case, that is, by the fact that the Canada Border Services Agency contacted the Sri Lanka High Commission in Ottawa to arrange for him to obtain a travel document.

3.5 The author states that his application to commence a judicial review of the negative decision of the Immigration Refugee Board was denied without reason and with no possibility for appeal. The author therefore maintains that he was never given a fair opportunity to contest the merits of the decision of the Board and to provide all the relevant

¹³ The author quotes and provides a legal document of the Immigration Refugee Board, namely, an assessment of credibility in claims for refugee protection, dated 31 January 2004, p. 71.

¹⁴ The author mentions several attacks to the *Uthayan* newspaper. In May 2006, armed men entered the newspaper's offices and opened fire, killing two people and injuring others; in June and July 2009, staff were threatened; in March 2011, a police officer claiming to be from the Eelam People's Democratic Party went to the newspaper's offices and intimidated staff; in May 2011, a member of staff was attacked; and in July 2011, the Chief news editor was attacked. The author provided copies of press articles supporting these affirmations.

¹⁵ The author cites, inter alia, Amnesty International, "Media briefing: human rights in Sri Lanka" (5 November 2013); Immigration Refugee Board of Canada, "Sri Lanka: Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; information on specific asylum cases" (12 February 2013); UNHCR, Eligibility Guidelines (see note 8 above); International Crisis Group, "Sri Lanka's Potemkin Peace: Democracy Under Fire", Asia report No. 253 (13 November 2013); Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK" (13 September 2012); Human Rights Watch, "UK: Suspend Deportations of Tamils to Sri Lanka - Further Reports of Torture of Returnees Highlight Extent of Problem" (29 May 2012).

¹⁶ Reporters Without Borders, "Detention of IFJ Directors reflects dreadful state of media freedom in Sri Lanka" (4 November 2013).

¹⁷ The author provides a copy of two press articles dated 13 April 2013 indicating that the *Uthayan* printing press was burned by an unidentified group of armed men, allegedly belonging to the Sri Lankan military intelligence (Lankasri News, "Uthayan printing press torched" and Tamilnet, "Armed squad attacks Tamil paper office in Jaffna setting ablaze press machines"). He also refers to Tamilnet, "Attacks on media escalate in Jaffna, newspapers burnt by alleged SL military squad" (7 February 2013) and Lankasri News, "Vampuri newspaper journalist attacked" (9 March 2013).

¹⁸ The author cites, among others, National Post, "Suspected organizer of MV Sun Sea human smuggling operation believed killed in Sri Lanka" (8 October 2013); CTV News, "Second migrant deported by Canada jailed in Sri Lanka" (10 October 2013); Tamilnet, "Tamil from Australia tortured, abused by Sri Lankan forces during visit to island" (25 April 2013). The author also refers to reports on human rights violations in Sri Lanka.

documentation to support his claims, and that he could not file a pre-removal risk assessment application owing to statutory time limitation restrictions.

State party's observations on admissibility and merits

4.1 On 19 December 2014, the State party submitted its observations on the admissibility and merits of the communication. It considers that the communication should be declared inadmissible because: (a) the author has failed to exhaust all available domestic remedies; (b) his allegation that his removal to Sri Lanka would violate article 9 (1) of the Covenant is incompatible with the scope of this provision, in contravention of article 3 of the Optional Protocol and rule 96 (d) of the Committee's rules of procedure; (c) the author's allegations under two international instruments other than the Covenant are incompatible with article 3 of the Optional Protocol and rule 96 (d); and (d) the author's claims are ill founded. The State party also considers that it is generally for domestic authorities to evaluate facts and evidence and indicates that the author has not provided any evidence to the Committee that has not been provided to the Canadian authorities during the asylum proceedings.

4.2 The State party considers that the author has not exhausted domestic remedies, as he did not apply for permanent residence on humanitarian and compassionate grounds, despite the fact it became available to the author on 12 February 2014. The State party submits that humanitarian and compassionate grounds is an effective remedy that offers a reasonable prospect of redress, as it is a broad and discretionary review by a decision-maker who can determine whether a person can be granted permanent residence in cases where the applicant would suffer unusual and undeserved hardship because of the need to apply for a permanent visa outside Canada. These decisions are reviewable, with leave, by the Federal Court. The State party indicates that the author could have used this recourse to demonstrate his family ties in Canada — he has an uncle there —, and to describe hardships he could experience if removed to Sri Lanka.¹⁹ The State party indicates that, although the humanitarian and compassionate grounds would not lead to an automatic stay of removal, the author could apply to the Federal Court for a judicial stay of removal pending the outcome of the assessment of his request.²⁰ The State party regrets the Views recently adopted by the Committee, in which the Committee has considered that applications made on humanitarian and compassionate grounds are not remedies that should be exhausted for admissibility purposes.²¹

4.3 The State party submits that the author's claim that article 9 (1) of the Covenant would be violated if he is removed to Sri Lanka is inadmissible, as it is incompatible with the article's scope. It argues that article 9 (1) does not impose an obligation on States to refrain from removing individuals who face a real risk of arbitrary detention in the receiving State. Therefore, even if the author demonstrates that he would be subjected to detention contrary to article 9 (1) in Sri Lanka — which is denied —, the responsibility of

¹⁹ The State Party indicates that, following a legislative reform in 2010, applications made on humanitarian and compassionate grounds are no longer based on the kinds of risks that are already assessed within the Immigration Refugee Board and pre-removal risk assessment processes. See the Immigration and Refugee Protection Act, section 25 (1.3).

²⁰ The State Party quotes communication No. 1578/2007, *Dastgir v. Canada*, Views adopted on 30 October 2008, in which the Committee considered that an application made on humanitarian and compassionate grounds was among the domestic remedies available to bring effective relief to the authors.

²¹ The State party cites, among others, communication No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, and Committee against Torture communication No. 520/2012, *W.G.D. v. Canada*, decision adopted on 26 November 2014.

Canada would not be engaged.²² The State party argues that that it is not aware of any decision of the Committee according to which the removal of a person could violate any right contained in the Covenant, different from those established in articles 6 and 7, and therefore considers that the Committee should hold the author's allegation under article 9 (1) inadmissible.²³

4.4 The State party further argues that the communication should be declared inadmissible because the author's allegations are manifestly unfounded. It submits that it is generally for the domestic authorities to evaluate facts and evidence, unless it can be ascertained that the conduct of the proceedings at issue or the evaluation of the facts and evidence are manifestly arbitrary or amounted to a denial of justice,²⁴ which is not the case in the present communication. All the evidence presented to the Committee was previously reviewed by the domestic authorities, and the author did not present any new evidence or facts to the Committee that could demonstrate that he would be at real risk if returned to Sri Lanka. The State party considers that the Committee should give weight to the decisions of domestic authorities, in particular the Immigration Refugee Board, which considered that the author had failed to substantiate most of his allegations regarding his past experiences in Sri Lanka.

4.5 The State party indicates that the most plausible view of the author's account is that he did some photography work for the *Uthayan* for several months beginning late 2006. The author may also have been mistreated by soldiers of the Sri Lankan Army in February 2007. However, he was unable to provide any proof of his work as a professional photographer. The State party considers that none of the submitted documents provided reliable evidence of his work for the *Uthayan* between 2006 and 2011. Regarding the press credentials issued by the *Uthayan* dated 1 January 2011, the State party submits that it is likely a forgery and that it is not consistent with the author's claims that he worked through an intermediary. Regarding the photographs of the author receiving an award in 2006, the State party submits that they do not demonstrate that the author was granted an award for his work as a photographer. As to the letter dated 20 May 2015 signed by the Chief Editor of the of the *Uthayan* indicating that the author had worked for the newspaper as a photojournalist from 8 October 2006 to 3 May 2011, the State party considers it is not a reliable document because, given that the author allegedly worked under an alias and through an intermediary, it is unlikely that the Chief Editor would know him, and the letter does not provide any explanation in that regard. In addition, the author did not give a plausible explanation as to why the letter was not provided to the Canadian authorities at

²² The State party notes that the Committee has considered on an exceptional basis that the Covenant has an extraterritorial application. It quotes general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which states that article 2 of the Covenant entails an obligation not to remove a person where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant in the receiving State (see CCPR/C/21/Rev.1/Add. 13, para. 12). It also quotes general comment No. 35 (2014) on article 9, which establishes that returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person, such as prolonged arbitrary detention, may amount to inhuman treatment prohibited by article 7 of the Covenant (see CCPR/C/GC/35, para. 57).

²³ Reference is made to communication No. 1881/2009, *Shakeel v. Canada*, Views adopted on 24 July 2013 and to the European Court of Human Rights jurisprudence, in particular regarding the views of the Court on the territorial applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Application No. 14038/88, *Soering v. the United Kingdom*, 7 July 1989, para. 86.

²⁴ Reference is made to several communications of the Committee, including No. 1455/2006, *Kaur v. Canada*, decision adopted on 30 October 2008.

the first stage of the asylum proceedings. It is further submitted that the letter is likely a forgery prepared to address the author's lack of credibility and corroboration issues that had been identified by the Immigration Refugee Board. As regards the letter from N.R. dated 21 November 2012 indicating that he had worked with the author for the *Uthayan* between late 2006 and August 2007, the State party considers that it may be genuine but submits that it would only demonstrate that the author had worked for the newspaper for a few months between 2006 and 2007, but not beyond mid-2007. As regards the affidavit signed by the author's mother dated 23 November 2012 confirming most of the author's claims, the State party considers that this document is not reliable, as it does not provide any independent substantiation and no plausible explanation regarding the reasons why it was provided at the later stage of the asylum proceedings. The State party submits that it is likely a forgery prepared to support the author's claims, following what he stated in his personal information form. The State party finally submits that the undated letter by Ms. S. stating that she knew the author and that he was a photojournalist is also likely a forgery prepared to support the author's claims.

4.6 The State party acknowledges that the author appears to have suffered some injuries in February 2007,²⁵ possibly inflicted by soldiers of the Sri Lankan Army. However, it considers that nothing demonstrates that these injuries were the result of the author's work as photographer for the newspaper and, even if the injuries were serious, they did not amount to torture. In addition, the State party submits that the author did not substantiate his allegations of harassment, detention and mistreatment by various State officials or associated groups from December 2007 to July 2011, as he did not provide any supporting evidence, such as a medical certificate or documents proving that he had to report every week to the police station for over 18 months. The State party considers that the author's account relating to this period lacks details, as he only mentioned that he had to live in different places owing to security reasons. The State party considers that doubts can be raised as to the actual stay of the author in Jaffna — or Sri Lanka — after 2007 or 2008 at the latest.

4.7 The State party submits that it does not dispute that journalists currently working in Sri Lanka are in danger,²⁶ including those working for the *Uthayan*. However, it considers that the author has not substantiated that his locally focused work for this newspaper could attract the attention of the national authorities, in particular if he published his photographs under an alias. In addition, the background material consulted by the State party does not suggest that individuals who have worked in the past for the *Uthayan* would be at risk if returned to Sri Lanka, as the country reports state that only journalists currently working in Sri Lanka are in danger. Therefore, the author would not face a real risk, as he allegedly contributed to the newspaper years ago. The State party also affirms that the author did not provide any evidence that he would still be sought by the authorities because of his work with the newspaper, and considers that the letter by the Human Rights Commission of Sri Lanka stating that soldiers of the Sri Lankan Army came to the author's home asking for his whereabouts in September 2013 is a mere recitation of information allegedly provided to the Commission by the author's mother.

²⁵ As stated by the medical certificate provided by the author and as confirmed by Mr. N.R. in his letter.

²⁶ The State party cites several sources, including the concluding observations of the Committee against Torture on Sri Lanka (CAT/C/LKA/CO/3-4); UNHCR, Eligibility Guidelines (see note 8 above); United States Department of State, Country Reports on Human Rights Practices for 2013: Sri Lanka (27 February 2014), available from www.state.gov/j/drl/rls/hrrpt/2013/sca/220404.htm; Human Rights Watch, "World Report 2014 – Sri Lanka", available from www.hrw.org/world-report/2014/country-chapters/sri-lanka; operational guidance note on Sri Lanka (see note 7 above); United Kingdom Immigration and Asylum Chamber, GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), available from www.refworld.org/pdfid/51da951c4.pdf.

4.8 The State party also considers that the author has not substantiated his allegation that he would be at risk if forcibly returned to Sri Lanka owing to his profile as a young Tamil from the North and a failed asylum seeker, and that such a profile would lead the authorities to believe that he had or has connections with the Liberation Tigers of Tamil Eelam. The State party notes that the author has never claimed to have any ties to that group and states that the mere fact of being a Tamil from the North would not expose him to a real risk.²⁷ Furthermore, the only consequence of being a failed asylum seeker may only be that he is subject to additional questioning.²⁸ The State party states that the author would not be suspected of having significant connections to the Liberation Tigers of Tamil Eelam, as he has never claimed so, and the only time that he has mentioned it was during his detention in February 2007 by the Sri Lankan Army. On that occasion, the soldiers allegedly asked him if he had any connections to the Liberation Tigers of Tamil Eelam, which he denied. The State party states that, even if this account was accepted as credible, nothing indicates that the Sri Lankan authorities would seriously consider that the author had links to the group. Therefore, the State party's considers that the claim on this matter is prospective only.

4.9 Regarding the author's claim that the fact that his travel document was issued by the Sri Lankan authorities at the request of the Canadian authorities exposes him to a further risk, the State party refers to country reports, according to which the issuance of such documents is not a risk factor. According to such reports, once Sri Lankan authorities receive the request to issue the travel document, they may review their records to assess if the person in question has any current links to the Liberation Tigers of Tamil Eelam, but they only focus on those individuals who pose a real risk to the unitary Sri Lankan State or the Government.²⁹ As the author does not fall under these categories, he would not be subjected to additional scrutiny. Regarding the author's claim that he would be targeted by members of the Eelam People's Democratic Party if returned to Sri Lanka, the State party indicates that, after the end of the conflict, paramilitary groups, including the Party, have turned into criminal gangs whose main tool is extortion.³⁰ As the Party seems to focus its operations in the North of Sri Lanka, the State party considers that, in the event that he was harassed or extorted by the Party, the author could move to another part of the country, such as Colombo.

4.10 The State party submits that any decision by the Committee to consider the communication admissible would be entirely without merit. The State party reiterates its arguments regarding the lack of substantiation of the author's claims, due to the lack of credibility, and of corroborative evidence. The State party reiterates that, at best, the author contributed with some photographs to the *Uthayan* between the end of October 2006 and 2007 and that he may have been detained and mistreated in 2007. However, he was not able to demonstrate that he was detained by soldiers of the Sri Lankan Army owing to his work for the newspaper, and that he had lived in Sri Lanka from 2007 to 2008 and in 2011. The

²⁷ The State party quotes, among others, UNHCR Eligibility Guidelines (see note 8 above), which state that "originating from an area that was previously controlled by the Liberation Tigers of Tamil Eelam does not in itself result in a need for international refugee protection in the sense of the 1951 Convention and its 1967 Protocol".

²⁸ The State party indicates that, according to the UNHCR Eligibility Guidelines (see note 8 above), the police or the military in certain areas may interview and/or detain some returning Tamil individuals within the first weeks after arrival. Ibid, pp.7 and 8. Reference is also made to United Kingdom Immigration and Asylum Chamber, GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), available from www.refworld.org/pdfid/51da951c4.pdf.

²⁹ See United Kingdom Immigration and Asylum Chamber, GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), available from www.refworld.org/pdfid/51da951c4.pdf.

³⁰ See United States Department of State, Country Reports on Human Rights Practices for 2013: Sri Lanka (27 February 2014), available from www.state.gov/j/drl/rls/hrrpt/2013/sca/220404.htm.

State party considers that, even if the Committee accepts the author's version of the facts, the communication would still be without merit, as there is no reason to believe that whatever work he did for the newspaper would put him at risk if returned now, many years after. His claims relating to his profile are not accepted either, as being a Tamil from the North and a failed asylum seeker would not in themselves put him at risk of irreparable harm because he has no suspected or real links to the Liberation Tigers of Tamil Eelam.

4.11 Finally, the State party submits that the author's allegation related to the lack of fairness of the asylum proceedings, in particular the impossibility of reviewing the merits of the decision of the Immigration Refugee Board, are out of the scope of the Covenant because it concerns the general effectiveness of asylum proceedings. In addition, these allegations are unfounded because the judicial review by the Federal Court has been recognized by the Committee as an effective domestic remedy³¹ that should therefore have been exhausted by the author.

Authors' comments on the State party's observations

5.1 On 11 January 2016, the author submitted his comments on the State party's observations. He challenges the State's party affirmation that he has not exhausted all available domestic remedies because he did not apply for an application on humanitarian and compassionate grounds. The author considers that this remedy is not relevant for purposes of admissibility because, as stated by the Committee in *Shakeel v. Canada*, an application made on humanitarian and compassionate grounds "does not shield the author from deportation, and therefore cannot be described as offering him an effective remedy".³²

5.2 Regarding the State party's allegation that the communication is manifestly unfounded, the author reiterates his arguments related to the risk that he would face if returned to Sri Lanka, namely, that: (a) he worked for the *Uthayan*, which is considered to be the "mouthpiece" of the Liberation Tigers of Tamil Eelam; (b) he is an ethnic Tamil; (c) he is 30 years old; (d) he is from the northern province of Sri Lanka; (e) he is a failed asylum seeker; and (f) he would be forcibly removed to Sri Lanka with an emergency travel document obtained through the Sri Lanka High Commission in Ottawa. The author states that he relies on his previous submissions to the Committee and adds information that became available after he submitted his complaint.

5.3 The author states that there is documentary evidence that Tamils are still suffering grave human rights violations in Sri Lanka, even though the conflict has ended. He states that it has been proven that young and middle aged Tamils, especially in the north and east, continue to suffer frequent harassment by security forces and paramilitary groups.³³ Tamils are also disproportionately affected by arbitrary detentions, extrajudicial executions, enforced disappearances, custodial rape, torture and prolonged detention without trial.³⁴ The author further states that, although being Tamil is not sufficient to demonstrate a well-founded fear of persecution, when combined with other factors, it gives a strong basis to the claim that he would be exposed to a real risk if returned to Sri Lanka.

5.4 One such other factor is that he is a failed asylum seeker. He indicates that Tamils who have been returned to Sri Lanka, forcibly or voluntary, have been subjected to ill-

³¹ The State party cites, for example, communication No. 1578/2007, *Dastgir v. Canada*, decision adopted on 30 October 2008.

³² See *Shakeel v. Canada*, (note 23 above), para. 7.4.

³³ The author cites United States Department of State, 2014 Human Rights Reports: Sri Lanka (25 June 2015), available from www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper.

³⁴ *Ibid.*

treatment and torture.³⁵ The author quotes a report from a non-governmental organization that has documented cases of torture in Sri Lanka, even after the conflict ended. According to the report, the forms of torture used included blunt force trauma, burning, sexual torture, suffocation and asphyxiation, restraint, hanging, suspension and psychological torture. In total, 96 per cent of the cases of such forms of torture involved Tamils who had a real or perceived connection to the Liberation Tigers of Tamil Eelam. The report concludes that people of Tamil ethnicity, even with minimal or merely suspected links to the group, have been detained and tortured.³⁶

5.5 The author also refers to the “screening process” of returned Tamils at the airport where the Criminal Investigation Department has a 24-hour presence. According to the background material referred to, the Sri Lanka High Commissions abroad send the details of those being removed to Colombo.³⁷ Suspicious individuals are first interrogated at the airport, where officials do not hesitate to use violence. Once it is discovered that the individual has applied for asylum, he or she would be considered a traitor and even if released, he or she will be under surveillance and can be arrested at any time. Those who are suspected to have links to the Liberation Tigers of Tamil Eelam or the media are at high risk of being imprisoned. Tamils from the north and east and persons between the ages of 20 and 40 undergo even more checks.³⁸ It has been proven that many Tamils have been arrested after returning from abroad and that arrests are most often accompanied by torture. Therefore, the author considers that he would face a real risk in violation of articles 6 (1), 7 and 9 (1) of the Covenant in case of return to Sri Lanka.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 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.

³⁵ See Asylum Research Consultancy, Sri Lanka COI Query Response (19 August 2014), available from <http://www.refworld.org/docid/542e89fc4.html>. The report states that the United Kingdom Bar Human Rights Committee of England and Wales and the International Truth and Justice Project on Torture and Sexual Violence in Sri Lanka 2009-2014, which is based on 40 sworn statements from witnesses, supported by medical and psychiatric records in 32 cases, found that “some witnesses whose previous asylum applications were unsuccessful reported being abducted upon their return to Sri Lanka by the security forces, who knew of their failed asylum applications. Once in detention, they were subsequently repeatedly tortured and sexually assaulted until (...) bribes could be used to procure release and they managed to leave the country again”.

³⁶ Freedom from Torture, submission to the Committee (October 2014), p. 7. See http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT_CCPR_CSS_LKA_18229_E.pdf.

³⁷ See Asylum Research Consultancy, Sri Lanka COI Query Response (19 August 2014), available from <http://www.refworld.org/docid/542e89fc4.html>.

³⁸ The author quotes a report by the Swiss Refugee Council, entitled “Sri Lanka: dangers liés au renvoi des personnes d’origine tamoule” (June 2015). Available in French from www.osar.ch/assets/herkunftslander/asien-pazifik/sri-lanka/150616-lka-rueckfuehrungtamilischerpersonen-f.pdf.

6.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to them.³⁹ The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. The Committee also notes the State party's argument that the author has not exhausted all domestic remedies, as he did not apply for an application made on humanitarian and compassionate grounds, which became available to him in February 2014. However, the Committee notes that the application does not shield the author from deportation to Sri Lanka and therefore cannot be described as offering him an effective remedy.⁴⁰ Therefore, the Committee considers that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee further takes note of the State party's argument that the author's claims under articles 6 (1) and 7 of the Covenant should be declared inadmissible as manifestly ill-founded. The Committee notes that the author has explained the reasons why he fears to be returned to Sri Lanka, based on the events prior to his departure from Sri Lanka, his profile as Tamil and failed asylum seeker. The Committee considers that, for the purposes of admissibility, the author has provided sufficient details and documentary evidence regarding his personal risk of facing death, ill-treatment or torture and finds this part of the communication admissible.

6.5 With regard to the author's claims under article 9(1) of the Covenant, the Committee notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of this provision and that these claims are therefore inadmissible because they are incompatible with the scope of this provision. The Committee considers that the author has not clearly articulated how his removal to Sri Lanka would violate the State's obligations under this article. Accordingly, the Committee finds that the author failed to substantiate, for the purposes of admissibility, his allegations under articles 9 (1) and declares this part of the communication inadmissible under article 2 of the Optional Protocol.⁴¹

6.6 The Committee therefore declares the communication admissible insofar as it appears to raise issues under articles 6 (1) and 7 of the Covenant and proceeds to their consideration on the merits.

Consideration on the merits

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

7.2 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk

³⁹ See *Warsame v. Canada* (note 21 above), para. 7.4; and communication No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5.

⁴⁰ See communications No. 2366/2014, *X v. Canada*, Views adopted on 5 November 2015, para. 8.3, No.1898/2009, *Choudhary v. Canada*, Views adopted on 28 October 2013, para. 8.3; and *Warsame v. Canada* (note 21 above).

⁴¹ See communications No. 2280/2013, *Y v. Canada*, Views adopted on 22 July 2015, para. 6.5, and *X v. Canada* (note 40 above).

of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant.⁴² The Committee has also indicated that the risk must be personal⁴³ and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.⁴⁴

7.3 The Committee recalls its jurisprudence that significant weight should be given to the assessment conducted by the State party and that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.⁴⁵

7.4 The Committee notes the author's allegation that the State party failed to take into account that the risk he would face if removed to Sri Lanka is the result of a combination of factors that cannot be considered in an isolated manner. He is a Tamil from the north and a failed asylum seeker who used to work for a newspaper perceived as supporter of the Liberation Tigers of Tamil Eelam and critic of the Government and had been victim of several violations of his rights in the past, owing to his work as a photojournalist. The Committee notes that the author's claims mainly rely on the assessment of evidence by the State authorities, arguing that it was not adequately taken into account.

7.5 In this regard, the Committee notes that the State party does not dispute that the author is a Tamil from the north who would be returned to Sri Lanka with an emergency document issued upon request of the Canadian authorities. The Committee further notes that the State party does not dispute that journalists currently working in Sri Lanka are in danger, including those working for the *Uthayan* (see para. 4.7).⁴⁶ However, the State party contends that the author did not demonstrate that he worked for the *Uthayan* from 2007 to 2008 and in 2011 and that, even if the Committee accepted the author's account regarding his work for the newspaper, he did not prove that his locally focused work could attract the attention of the national authorities, years after he had published his photographs under an alias. The Committee notes that the Canadian domestic authorities did not accept as reliable evidence several documents submitted by the author to the Immigration Refugee Board,⁴⁷ and evidence submitted to the pre-removal risk assessment officer,⁴⁸ aimed at establishing

⁴² See general comment No. 31 (2004), para. 12.

⁴³ See, inter alia, *Y v. Canada* (note 41 above), para. 7.2; communication No. 2272/2013, *P.T. v. Denmark*, Views adopted on 1 April 2015, para. 7.2; and No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2.

⁴⁴ See *Y v. Canada* (note 41 above), para. 7.2, *X v. Denmark*, para. 9.2; communication No. 1833/2008, *X v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

⁴⁵ See, inter alia, *Y v. Canada* (note 41 above), para. 7.5; communication No. 2258/2013, *Rasappu v. Canada*, Views adopted on 4 November 2015, para. 7.3; and *X v. Canada* (note 40 above), para. 9.3.

⁴⁶ *Uthayan*, founded in 1985, has been the target of several attacks throughout its history, including two attacks in April 2013. Six of its journalists have been killed in connection with their work. According to the World Press Freedom Index 2014 of Reporters without Borders, "*Uthayan* does not hesitate to criticize the Government's authoritarian methods and continues to pay a high price for not kowtowing to either the military or the Government". Wouldn't be better to leave the source?

⁴⁷ Including the press credentials dated 1 January 2011, photographs showing the author receiving a photography award in 2006, a letter by Mr. N.R. stating that he worked with the author for *Uthayan* between the end of 2006 and 2007.

⁴⁸ The pre-removal risk assessment officer did not accept as reliable an affidavit signed by the author's mother dated 23 November 2012 confirming most of his claims, an undated letter by Ms. S indicating that he had been a photojournalist, a letter dated 3 May 2013 signed by the Chief Editor of *Uthayan* confirming that the author had worked for the newspaper between October 2006 and May 2011, and a

that the author had worked for the *Uthayan* for several years, during which time he had been repeatedly attacked because of his work.

7.6 The Committee takes note that the State party's authorities, after examining the evidence provided for by the author and reports by States and non-governmental organizations providing information on the situation of Tamils in Sri Lanka at the time of the examination of his request, refused his application since they considered that that the author had failed to substantiate the real risk he would be exposed to if removed to Sri Lanka, because he failed to provide reliable evidence to corroborate his account and because being a Tamil from the north and a failed asylum seeker would not, by itself, expose him to a real and personal risk. The Committee considers that the author has not identified any irregularity in the decision-making process or any risk factor that the State party authorities failed to properly take into account. The Committee considers that, while the author disagrees with the factual conclusions of the State party's authorities, he has failed to show that they were arbitrary or manifestly erroneous or amounted to a denial of justice. In the light of the above, the Committee cannot conclude that the information before it shows that the author would face a personal and real risk of treatment contrary to articles 6 (1) or 7 of the Covenant if he were returned to Sri Lanka.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's removal to Sri Lanka would not violate his rights under articles 6 (1) and 7 of the Covenant.

letter by the Sri Lanka Human Rights Commission on a complaint made by the author's mother indicating that SLA officers had come to her home on 27 September 2013 and had asked about her son's whereabouts.

Appendix

Individual opinion of Committee member Dheerujall Seetulsingh (dissenting)

1. The State party asserts most forcefully in paragraph 4.2, as set out in the Views of the majority, that the author has not exhausted local remedies and that he still has the opportunity of obtaining an effective remedy under humanitarian and compassionate grounds. The State party enlarges the scope of remedies regarding applications for refugee status by calling the humanitarian and compassionate application “an effective remedy that offers a reasonable prospect of redress ... in cases where an applicant would suffer an unusual and undeserved hardship”.
2. The State party goes as far as to regret that the Human Rights Committee has in the past adopted Views that humanitarian and compassionate applications “are not remedies that should be exhausted for admissibility purposes”. The stand taken by the majority of the Committee at para. 6.3 in its Views is that the humanitarian and compassionate application “does not shield the author from deportation to Sri Lanka and therefore cannot be described as offering him an effective remedy”.
3. In this particular case, where the majority finds a non-violation, the stand taken by the majority weakens the chances of the author in a prospective humanitarian and compassionate application. It is true that the author himself, because of the previous Views of the Committee, claims that he has exhausted local remedies so as to render his communication admissible under the Optional Protocol. However, in the general context of Canadian law and the rules of procedure in relation to applications for permanent residence and in the particular circumstances of the present case, where the State party is taking a very open, generous and liberal stand, the author’s Communication should have been considered inadmissible, thereby enabling the author to make a humanitarian and compassionate application.
4. Our Committee is a Human Rights Committee and not a Court of Appeal or a quasi-judicial body. It need not in all circumstances always be bound by previous Views. It has the discretion and the flexibility to vary its findings, basing itself on the specific circumstances of each case and a constantly changing situation, especially as regards applications for refugee status, while reinforcing the rights to protection enshrined in the Covenant and adhering strictly to the principles applicable under the Optional Protocol as to exhaustion of local remedies. At paragraph 4.2, the State party takes the stand that it would not object to an application by the author for a judicial stay of removal pending the outcome of the assessment of a humanitarian and compassionate application, if any. The State party even mentions the grounds the author may rely upon, that is, a demonstration of his family ties in Canada and the hardship he may suffer in Sri Lanka.
5. I am of the view that the State party, having demonstrated clearly its willingness to do so, should allow the author to make a humanitarian and compassionate application if he wishes to proceed with such an application.