



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3212/2018^{*,**}

<i>Communication submitted by:</i>	Thileepan Gnaneswaran (represented by counsel, Umesh Perinpanayagam)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	16 July 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 17 July 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	27 October 2021
<i>Subject matter:</i>	Deportation of a husband/father to Sri Lanka
<i>Procedural issues:</i>	Lack of substantiation; interim measures
<i>Substantive issues:</i>	Torture; cruel, inhuman or degrading treatment or punishment; family rights; separation of children from parents
<i>Articles of the Covenant:</i>	7; and article 17 in conjunction with article 23;
<i>Articles of the Optional Protocol:</i>	2

1.1 The author of the communication is Thileepan Gnaneswaran, a national of Sri Lanka born in 1988. He claims that the State party has violated his rights under article 7 and article 17 in conjunction with article 23 of the Covenant. The Optional Protocol entered into force for Australia on 25 December 1991. The author is represented by counsel.

1.2 On 17 July 2018, pursuant to rule 92 of its rules of procedure (now rule 94), the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party to refrain from deporting the author to Sri Lanka while his case was under consideration by the Committee. On 3 August 2018, the State party informed the Committee that at the time the interim measures request was received, the author was no longer under its jurisdiction or control because he had already been deported

* Adopted by the Committee at its 133rd session (11 October - 5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gomez Martinez, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu, and Gentian Zyberi.

to Sri Lanka.¹ The State party was therefore unable to implement the Committee's request for interim measures.

The facts as submitted by the author

2.1 The author is of Tamil ethnicity and was born in 1988 in Vavuniya, Sri Lanka. He submits that his father was a member of Liberation Tigers of Tamil Eelam and was killed by the Sri Lankan authorities on an unspecified date. He further asserts that one of his brothers also suffered violent death on an unspecified date. In addition, another of his brothers was detained, interrogated and beaten up by the Sri Lankan authorities on the grounds of his perceived affiliation with Liberation Tigers of Tamil Eelam.² His brother was later released, but he had to regularly report to the police.

2.2 In 2006, the author's mother arranged for his travel to Malaysia because it was dangerous for him to stay in Sri Lanka. In 2008, the author was expelled from Malaysia because of his unlawful stay. On an unspecified date after his return to Sri Lanka, the authorities came to his home as they wanted to know where he had been, as well as the whereabouts of his brother, who, in the meantime, went missing. He was requested to report to the police station where he was beaten so severely that he needed to be hospitalized.

2.3 The author notes that between 2010 and 2011 he was interrogated by the authorities on several occasions. In 2012, a group of men came to his home and took him to the Criminal Investigation Department office where he was beaten and his fingernails were pierced to force him to falsely confess that he supported the Liberation Tigers of Tamil Eelam. A few days later, he was blindfolded and driven to an unknown location where he was left on the side of the road. Two days after he had been released, he left Sri Lanka with the help of a friend.

2.4 The author arrived in Australia in June 2012 as an irregular maritime arrival. He lodged an application for a protection visa on 2 November 2012.

2.5 The author also submits that while he was in Australia, Criminal Investigation Department officers of Sri Lanka went to his home to inquire about his whereabouts on multiple occasions.

2.6 The author's wife was also born in Sri Lanka and arrived in Australia in September 2012. Owing to a legislative change, which applied to asylum seekers who arrived by boat after 13 August 2012, she was able to apply for a temporary protection visa only. That visa does not allow for family reunification unless the other member of the family unit holds a protection visa of the same class as that applied for by the primary asylum seeker.³

2.7 On 11 January 2013, the author's protection visa application was refused. The author made an application for merits review to the Refugee Review Tribunal on 16 January 2013. On 9 September 2013, the Refugee Review Tribunal affirmed the decision of the Department of Immigration and Border Protection not to grant the author a protection visa. On 17 March 2016, the Federal Circuit Court dismissed the author's application for judicial review. On 22 May 2017, the author's application for leave to appeal to the Federal Court of Australia was rejected. On 12 October 2017, the High Court of Australia denied the author's request for leave to appeal.

2.8 The author married his wife on 8 September 2016. His wife lodged an application for a Safe Haven Enterprise visa on 27 March 2017. Their daughter was born on 31 September 2017.

2.9 On 13 November 2017, the author made a request for Ministerial intervention, in which he claimed that he should not be returned to Sri Lanka prior to the determination of his wife's visa application submitted on her own behalf and on behalf of their child. On 15 July 2018, the author made yet another request for Ministerial intervention, in which he

¹ The State party asserts that the author was returned to Sri Lanka on 17 July 2018, at approximately 11.15 am (Australian Eastern Standard Time) and the Committee's request for interim measures arrived, via e-mail, at 6.58 pm (Australian Eastern Standard Time) on the same day.

² The date of this incident is unspecified in the complaint.

³ Migration Act 1958, s. 36.

informed the authorities that his wife and child had been granted a Safe Haven Enterprise visa on 10 July 2018, and requested that he be able to remain in Australia with them. On each occasion, the Department of Immigration and Border Protection considered the author's situation and determined that his claims did not meet the guidelines for Ministerial intervention and therefore finalized the requests for Ministerial intervention without referral.⁴

2.10 On 13 July 2018, the author was issued a deportation notice for 16 July 2018.

Complaint

3.1 The author claims, at the submission of his complaint, that his deportation to Sri Lanka would amount to a violation of his rights under article 7 of the Covenant. He alleges that as a Tamil man with perceived links to the LTTE and his detention history with the Criminal Investigation Department and the ill-treatment he and his family had suffered in the past are of strong indication that if returned, he would face risks of torture at the hands of the Sri Lankan authorities.⁵

3.2 The author further claims that his removal would constitute a violation of article 17 in conjunction with article 23 (1) of the Covenant. He refers to *A.B. v. Canada*, in which the Committee reiterated its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would involve interference in that person's family life.⁶ He further refers to the Committee's general comment No. 16 (1988) on the right to privacy and general comment No. 19 (1990) on the family, which establish that the concept of the family is to be interpreted broadly and that the separation of a person from his family by means of expulsion can amount to arbitrary interference with the family and a violation of article 17 if the separation of the author from his family and its effects on him would be disproportionate to the objectives of the removal. The author notes that there are no legitimate grounds for his removal because he has not been deemed to pose any risk or threat to the Australian community, nor to have a bad character. He underlines that he and his wife were unable to apply for the same type of protection visa and for this reason, they could not be treated as a family unit for the purpose of both being granted a protection visa. In any event, given that the author had already been denied asylum before his wife applied for a Safe Haven Enterprise visa, he was prevented from making a new application for a protection visa under the relevant laws.⁷

State party's observations on admissibility and the merits

4.1 On 31 July 2019, the State party submitted its observations on admissibility and the merits. As to the issue of admissibility, the State party argues that the author's claims under article 7 of the Covenant are manifestly ill-founded and should therefore be declared inadmissible pursuant to article 3 of the Optional Protocol and rule 99 (b) of the Committee's rules of procedure. The State party submits that should these claims nonetheless be deemed admissible, they are without merit as demonstrated by the findings contained in the domestic decisions. The State party further submits that the author's claims under article 17 in conjunction with article 23 (1) of the Covenant are without merit, as the author has been removed from Australia in accordance with its laws, which does not constitute arbitrary or unlawful interference with his family life.

4.2 Regarding the alleged violation of article 7 of the Covenant, the State party submits that the author's claims have been thoroughly considered in a series of domestic decision-making processes and have been found not to engage its non-refoulement obligations under the Covenant. The State party recalls the Committee's jurisprudence, which establishes that it is generally for the courts of the States parties to the Covenant to evaluate the facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.

⁴ The decision, in response to his request dated 15 July 2018, was delivered after the submission of the present complaint to the Committee, on 19 July 2018.

⁵ At the time of the submission of the complaint, the author was not yet deported to Sri Lanka.

⁶ *A.B. v. Canada* (CCPR/C/117/D/2387/2014), para 8.6.

⁷ The author refers to s 48A of the Migration Act 1958.

4.3 The State party provides thorough information on the holdings adopted by its domestic authorities. With regard to the proceedings before the Department of Immigration and Border Protection, the State party notes that while the decision-maker accepted that the author's father and brother were deceased, he did not accept that they had been killed in 2000 and in the manner described in the author's written or oral statements.⁸ The decision-maker also rejected the author's claims concerning past mistreatment by Sri Lankan authorities as inconsistent and unconvincing. Aside from the inconsistencies, the decision-maker also concluded that the author's allegation that he was of interest to Sri Lankan authorities was undermined by the author's own evidence that upon returning to Sri Lanka from Malaysia in 2008, he was immigration cleared within one hour and permitted to leave the airport without incident. The decision-maker further held that the author fabricated his claim that officers of the Criminal Investigation Department visited his mother in Sri Lanka in September 2012, while the author was residing in Australia. Furthermore, based on the available information, the decision-maker concluded that the risk of harm to the author on account of him being returned as a failed asylum seeker was remote. In the appeals procedure, the Refugee Review Tribunal shared the Department's concerns over the author's credibility and confirmed the first-instance decision.

4.4 Regarding the alleged violation of articles 17 and 23 (1) of the Covenant, the State party submits that not all interference with family life is unlawful and that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. The fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, is not sufficient alone to consider a proposed deportation of one or both parents arbitrary. Relying on the Committee's jurisprudence,⁹ the State party argues that under the Covenant, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. The State party further notes that the requirement to provide for protection of the family is subject to reasonable measures, consistent with the State Party's right to control the entry of non-citizens into its territory. In respect of the author's requests for ministerial intervention, the State party notes that the Department of Immigration and Border Protection considered the author's situation and determined that his claims did not meet the guidelines for Ministerial intervention and therefore finalized the requests for Ministerial intervention without referral. The State party accepts that family reunification in the author's case is not possible in Australia or Sri Lanka in the foreseeable future, having regard to the operation of Australia's immigration laws, combined with the State party's recognition that the author's wife is unable to safely return to Sri Lanka in the immediate future. It submits, however, that the interference with the author's right to family in the present case is lawful and non-arbitrary because it was taken in accordance with Australia's immigration laws in pursuit of the legitimate aim of managing Australia's borders and its humanitarian and migration programs. The State party therefore concludes that the author's claims are without merit.

Authors' comments on the State party's observations

5.1 On 1 November 2019, the author submitted his comments on the State party's observations.

5.2 The author informs the Committee that he wishes to withdraw his complaint inasmuch as it concerns the alleged violation of article 7 of the Covenant and submits his comments only in relation to articles 17 and 23 (1) of the Covenant.

5.3 The author underlines that the State party did not contest the admissibility of his complaint under articles 17 and 23 (1) of the Covenant and that there has been an interference with his rights under these articles. Relying on the Committee's jurisprudence, he submits that the State party's recollection of the Committee's guiding principles, as it appears in its observations, is incomplete.¹⁰ He further reiterates that he had been unable to join his wife's

⁸ The author provided supporting documents that were inconsistent with statements made in his written account concerning the date of death of his relatives and the cause of their death.

⁹ The State party refers to *Winata v. Australia* (CCPR/C/72/D/930/2000), para. 7.3.

¹⁰ The author refers to *Winata v. Australia* and *A.B. v. Canada* and supplements the citation made by the State party concerning para. 7.3 and para. 8.7 of these decisions, respectively.

asylum application because they arrived in Australia on a different date and as a result, they were prevented from engaging the same type of visa application, which constitutes arbitrariness. Furthermore, the author argues that his removal was not proportionate to the aims pursued. He explains that the suffering and hardship he and his family have had to endure as a result of their long term separation that pursues the State party's immigration policies, impose an excessive burden on them, which cannot be justified by the mere rejection of the author's protection visa.

5.4 Regarding the State party's non-compliance with the Committee's request for interim measures, the author submits that he informed the State party's competent authorities about the submission of his complaint to the Committee and that he had requested interim measures. He further notes that the United Nations High Commissioner for Refugees also made appeals to the State authorities not to deport him, as this would contravene the basic right of family unity, as well as the fundamental principle of the best interests of the child. With regard to the State party's argument that once the author was deported, it no longer exercised jurisdiction or control over him, the author notes that at least during the period of his travel from Australia to Sri Lanka and the period that followed immediately thereafter, the State party still exercised effective control. In any event, the author notes that the State party has good bilateral relations with Sri Lanka especially in immigration matters, so it does have the means to reunite the author with his family in compliance with article 2 of the Convention.

State party's additional observations

6.1 On 20 October 2020, the State party submitted additional observations on the merits of the complaint.

6.2 Regarding the author's claims under article 17 in conjunction with article 23 (1) of the Covenant, the State party reiterates its position as explained in its initial observations. It further contests the author's allegation that it exercises effective control over territory in Sri Lanka in respect of the author for the purposes of the extraterritorial application of its Covenant obligations. It argues that where a State does not have effective control over the territory in which a person is located, that State will only have effective control over an individual if its officials detain or otherwise take physical custody of him. Therefore, the author was no longer under the State party's effective control once he disembarked the aircraft. As regards the author's claim that he had informed the State authorities of the submission of his complaint to the Committee, in which he requested interim measures, the State party submits that a request for interim measures can have no effect until such time as it has been issued by the Committee.

Issues and proceedings before the Committee

The Committee's request for interim measures

7.1 The Committee notes the State party's submission that it was unable to implement the Committee's request for interim measures because the author had been returned to Sri Lanka on 17 July 2018, prior to the State party having received the Committee's request for interim measures.

7.2 The Committee notes that the adoption of interim measures pursuant to now rule 94 of its rules of procedure (former rule 92), in accordance with article 1 of the Optional Protocol, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measure requested by the Committee with a view to preventing irreparable harm undermines the protection of the rights enshrined in the Covenant. As indicated in paragraph 19 of the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol.¹¹

7.3 In the present case, the Committee notes the information provided by the author, according to which he was issued, on 13 July 2018, a deportation notice for 16 July 2018

¹¹ *B.A. et al v Austria* (CCPR/C/127/D/2956/2017), paras. 9.1 and 9.2.

(para 2.10). The Committee further notes that the author's complaint was submitted on 16 July 2018 and that on 17 July 2018 the Committee requested the State party to refrain from deporting the author to Sri Lanka while his case was under consideration (para 1.2). The Committee, on the other hand, also takes note of the information provided by the State party, on 3 August 2018, that the author's deportation had already taken place at 11.15 am (Australian Eastern Standard Time) on 17 July 2018, prior to the time of notification of the Committee's request for interim measures (6.58 pm on the same day) and therefore it could not implement the Committee's request for interim measures (para 1.2). In this regard, the Committee notes the State party does not contest that it had been informed by the author of the present communication of his request for interim measures (paras 5.4, 6.2), before the Committee's decision on this request. While observing that a request for interim measures can have no effect until such time as a formal decision relating to it has been issued by the Committee, the Committee considers that it would be desirable for States parties to take all possible measures to halt deportations in such exceptional circumstances until a decision is reached by the Committee. In the present case, however, although the Committee regrets the course of events, it is unable to conclude that the State party breached its obligations under the Optional Protocol by not respecting the request for interim measures and deporting the author before the Committee issued its decision on this request.

Consideration of admissibility

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

8.2 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.

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

8.4 Furthermore, the Committee notes that the author, in his comments dated 1 November 2019, has withdrawn his allegations of a violation of article 7 of the Covenant. Accordingly, the Committee will not examine this part of the author's communication.

8.5 In the absence of any other challenges to the admissibility of the communication, the Committee declares the communication admissible insofar as it concerns the author's claims under article 17 in conjunction with article 23 (1) of the Covenant, and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

9.2 The Committee observes, and both the author (para 3.2) and the State party agree (para 4.4), that to separate the author from his wife and their child may indeed give rise to issues under article 17, read in conjunction with article 23 (1), of the Covenant. The Committee reiterates its jurisprudence according to which there may be cases in which a State party's refusal to allow one member of the family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹²

9.3 In the present case, the Committee considers that to issue a deportation order against the author but not his wife and their minor child constitutes, as referred to earlier, interference

¹² See e.g. *Byahuranga v. Denmark* (CCPR/C/82/D/1222/2003), para. 11.5; *Winata v. Australia* (CCPR/C/72/D/930/2000), para. 7.1; *Madafferi v. Australia* (CCPR/C/81/D/1011/2001), para. 9.7; and *Noureddine Maalem and Guldez Maalem v. Uzbekistan* (CCPR/C/123/D/2371/2014), para. 11.2

with the author's family, within the meaning of article 17 of the Covenant, which has not been contested by the State party. The Committee has therefore to determine whether such interference in the author's family life is arbitrary or unlawful pursuant to article 17 (1) of the Covenant, and thus whether insufficient protection has been afforded to his family by the State in accordance with article 23 (1) of the Covenant.

9.4 The Committee recalls its jurisprudence that it is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances.¹³ The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law,¹⁴ as well as elements of reasonableness, necessity and proportionality.¹⁵ The Committee also recalls that, in cases in which one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether the specific interference with family life can be objectively justified must be considered, on the one hand, in the light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.¹⁶

9.5 In the present case, the Committee observes that the author's removal pursued a legitimate objective, which is the enforcement of the State party's immigration laws. It notes, however, that it remains uncontested by the State party that after the author's protection visa application was refused (by a decision of January 2013, later confirmed by several court decisions up to the High Court of Australia decision of October 2017), there have been some important changes in the author's circumstances, namely his marriage (in September 2016), the birth of his daughter (in September 2017) and later, the granting of a Safe Haven Enterprise visa to his family members (in July 2018). Therefore, the only remedy available to the author, in which he could bring these new circumstances to the attention of the authorities and his ensuing claims, was to submit a request for Ministerial intervention (para 2.9). The Committee notes, however, that the refusal letters by the Department of Immigration and Border Protection contain no specific reasons for the decision not to refer the author's requests to the Minister but only a general remark to the fact that his claims did not meet the requirements under the guidelines for Ministerial intervention. The Committee finds the lack of reasoning in those decisions to be of particular concern in view of the fact that the State party has indeed acknowledged that family reunification in the author's case is not possible neither in Australia nor in Sri Lanka in the foreseeable future, having regard to the operation of Australia's immigration laws, combined with the State party's recognition that the author's wife is unable to safely return to Sri Lanka in the immediate future (para 4.4).¹⁷ The Committee further notes the absence of any additional explanation regarding the reasonableness, necessity and proportionality of the measure of the author's removal taken by the State party, besides a general reference to the fact the interference with the author's right to family is lawful and non-arbitrary solely because it was taken in accordance with Australia's immigration laws in pursuit of the legitimate aim of managing Australia's borders and its humanitarian and migration programs. In view of the foregoing the Committee considers that there does not appear to have been an individual assessment of the author's claims, in particular regarding the reasonableness, necessity and proportionality between the means employed and the alleged legitimate aims sought.

¹³ *Winata v. Australia* (CCPR/C/72/D/930/2000), para. 7.3

¹⁴ See *Ilyasov v. Kazakhstan* (CCPR/C/111/D/2009/2010), para. 7.4.

¹⁵ See general comment No. 35 (2014) on liberty and security of person, para. 12.

¹⁶ See *Madafferri v. Australia*, para. 9.8; and *D.T. v. Canada* (CCPR/C/117/D/2081/2011), para. 7.6.; *Noureddine Maalem and Guldez Maalem v. Uzbekistan* (CCPR/C/123/D/2371/2014), para. 11.4.

¹⁷ In contrast, see e.g. *B.D.K. v. Canada* (CCPR/C/125/D/3041/2017), para 8.

9.6 Under the circumstances of the present case, the Committee is of the view that the State party's interference with the author's family life and the ensuing insufficient protection afforded to the family generated excessive hardship for the author, his wife and their minor child. The issuance of an expulsion order against the author in the circumstances of his case presented him with no prospect for reunification in the foreseeable future either in Australia or in Sri Lanka, which has inevitably led to the breaking up of the family unit.

9.7 The Committee therefore considers that the expulsion order issued against the author, although pursuing a legitimate aim, constituted disproportionate interference with his family life, which cannot be justified by the abstract reasons invoked by the State party to remove him to Sri Lanka.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 17, read in conjunction with article 23 (1), of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to proceed to a review of the author's case taking into account the State party's obligations under the Covenant and the Committee's present Views, to arrange for the author's return to Australia, if he so wishes, and to provide adequate compensation.¹⁸ The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official language of the State party.

¹⁸ *A.H. v. Denmark* (CCPR/C/114/D/2370/2014), para. 10.; *X. v. Sweden* (CCPR/C/103/D/1833/2008), para. 11.