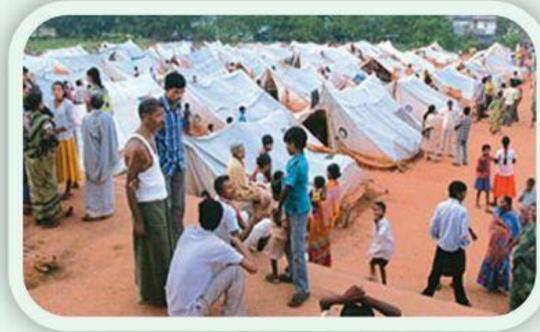




Human Rights Defense International

SYMPOSIUM



**WHAT WOULD HAPPEN TO
SRI LANKAN TAMIL REFUGEES IN INDIA?**

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India as a durable solution for Sri Lankan Tamil refugees

(Presentation to Human Rights Defense International, Supreme Court of India, New Delhi, 09 February 2017)

by David Matas



Refugees have three durable solutions – repatriation, resettlement and local integration. Today I want to talk about one of these solutions only, for one population only, in one country only. I want to talk about local integration for Sri Lankan Tamil refugees in India.

By talking about local integration for this population, I do not mean to advocate this durable solution over others. There is not I suggest, for the Sri Lankan Tamil refugee population, or for any refugee population, only one durable solution. It is wrong to suggest that one solution fits all. For some, repatriation is a solution. For others, resettlement is the best solution. For still others, the solution would be local integration. Which is the best solution for each refugee has to be determined on a case by case basis, in light of the particular circumstances of that refugee.

All solutions have to be explored, including local integration. All solutions should be made workable. Right now this is not the case. Local integration is not now a functioning durable solution for Sri Lankan Tamil refugees in India. Yet, it should be.

According to figures gathered in 2014, there are in Tamil Nadu over 100,000 refugees who have fled the war in Sri Lanka and its concomitant persecution. There are 65,548 in 111 camps spread throughout the state. 34,600 are registered refugees living outside the camps.

Almost 30,000 of this refugee population are up country or hill Tamils, Tamils of Indian origin whose ancestors went during British rule to work the tea plantations. These people are, for the most part, stateless. Sri Lanka denied citizenship to the up country Tamils on independence. Negotiations between India and Sri Lanka ended up giving citizenship to some up country Tamils but many were still left with citizenship in neither country.

A 2014 survey¹ showed that 67% of the camp refugees want to stay in India, and 23% want to return. 4% want to resettle to a third country. The remaining 6% of those surveyed did not answer the question about preferred durable solution.

¹ Professor K.M. Parivelan, Tata Institute of Social Sciences, Mumbai "Exploring durable solutions for Sri Lankan Tamil refugees in India: a pilot study among camp & non-camp refugees in Tamil Nadu"

The percentage of Tamils of Indian origin who want to stay India, as one might expect, is much higher than for Tamils of Sri Lankan origin, 77.5% for the Indian origin Tamils as opposed to 60.5% of the Sri Lankan origin Tamils. There is right now no active move to push either set of refugees back to Sri Lanka.

The camps are state government institutions. The government provides subsidised living for those in the camps. Residents are given money - a cash dole, accommodations, and the opportunity to buy food at reduced rates.

Sri Lankan Tamil refugees are given identity papers which describe them as refugees. This is so even though there has been no refugee determination.

Sri Lankan Tamil refugees are not forced to stay in the camps, but they have a financial incentive to do so. Those outside the camps do not get the financial benefits of those in the camps.

Once refugees submit themselves to camp life, they are subject to its strictures. If they break the rules of the camp, they can have their benefits reduced or they can be expelled from the camp.

Refugees may and often do extend their living quarters by building rooms adjacent to accommodation allocated to them. These constructions, on land not theirs, can be demolished by the Government authorities at any time and sometimes are.

Refugees can be transferred from one camp to another. Refugees may request or oppose transfer, but the ultimate decision is that of the Government. Transfers can and do occur without request and can be and are denied, despite requests.

Refugees who live in the camps can move out of the camps, or move to another camp,

with permission. Sri Lankan Tamils move both from the camps to the cities and vice versa. The reason a person would move from the city to a camp is financial. In the city, the refugees pay rent. In the camp, the land is free.

Camp life means mostly living in remote, rural areas. The Gummindipoondi camp which I visited in 2015 adjoins a town of about 33,000; it is situated at 50 kilometres from Chennai. It had, when I was there, 3,000 refugees. Camp residents can work in the town; the children can go to school in the town school.

Sri Lankan Tamil refugees can access private sector jobs but not government jobs. This is a substantial limitation, given the size of the public sector. As well, government jobs tend to be more stable and better paying than private sector jobs.

There are some jobs which by their very nature (for instance, serving in the diplomatic corps) should be reserved for Indian nationals. But most government jobs do not fit that description.

Sri Lankan Tamil refugees also can not access medical school education and have difficulty accessing higher education generally. There has been a restricted quota and they have historically been allowed to join only art and science colleges. In 2010, admission into engineering became possible.

Some universities do not accept any foreign national applicant without a student visa and a no objection certificate from the country of origin, neither of which Sri Lankan Tamil refugees has. Those universities which accept foreign students with only Foreigner Regional Registration Offices (FRRO) issued certificates expect the students to pay foreign national fees, which are substantial and beyond the means of most Sri Lankan Tamil refugees.²

² Jesuit Refugee Service, "Legal Rights of Refugees in India"

The disqualifications and limitations of Sri Lankan Tamil refugees in Tamil Nadu was canvassed in a 2014 court case.³ In that case, a Sri Lankan Tamil refugee petitioned the Court that Tamil refugees should be entitled to driving licences, bank accounts, movable articles, educational rights and immovable properties. The application of the children of the petitioner for admission into engineering had been rejected on the basis that they were not Indian citizens.

The respondent Government of India argued that the Government of Tamil Nadu permitted camp refugees to work locally between 6.00 a.m. to 6.00 p.m. to supplement the cash dole extended to them. The Government acknowledged that the acquisition of immovable properties is impermissible for this population without prior permission of the Reserve Bank of India. They acknowledged further that opening bank accounts is permitted only to self-help group members amongst this population. The respondent Government of Tamil Nadu acknowledged that argued that a refugee cannot have a driver's license unless the 'Q' branch of the Police Department gives a report that the refugee is not involved in unlawful activities.

The Court rejected the petition on the ground that Sri Lankan Tamil refugees were entitled not have the same rights as citizens. What rights or benefits they did get were a matter of government policy.

The quality of the camps varies considerably. Some have very poor living conditions; they are makeshift slums. Others are more habitable. What they share in common is that they are government run. Even the best of them lack independent living.

While each case has to be considered individually, overall, the big obstacle to a durable solution for Sri Lankan Tamil refugees in Tamil Nadu in fact has been the Q branch. The

³ *Gnanaprakasam vs The Government Of Tamil Nadu* 8 October, 2014

Q Branch of the police criminal investigation division of Tamil Nadu, was constituted to address extremist activities. It keeps an eye on Sri Lankan Tamils both outside and inside of the camps, looking for linkages to the LTTE (Liberation Tigers of Tamil Eelam).

Seven of the twenty accused convicted of complicity in the 1991 assassination of former Indian Prime Minister Rajiv Gandhi were registered as Sri Lankan Tamil camp refugees. So, one can understand historically the Q branch suspicions. However, twenty six years have now passed since the assassination. The LTTE itself is no more, having been defeated in the civil war in 2009. Suspecting a whole population of 100,000 of association with an organization now defunct for eight years is an exaggerated, unjustified fear.

In theory, the Q branch is an intelligence component of the local police doing nothing more than collecting security information. In reality, they are running several of the refugee camps in an oppressive way. They have an inordinate influence over the day to day mechanics of what goes on in the camps.

The Q branch is not supposed to be part of the administrative structure running the camps. In practice, several of those responsible for running the camps abdicate their administrative power to the Q Branch which establishes onerous rules.

If a refugee leaves a camp for more than daytime work, in some camps, the refugee needs permission from the Q branch. Leaving the camp without permission or staying outside beyond the duration of permission granted generates Q branch suspicion and threats. The Q branch has turned refugee camps into open prisons.

Q Branch operatives do not operate according to the presumption of good faith. The Q Branch can be overly rigid and domineering in controlling the day to day lives of innocents. The general atmosphere the Q Branch generates is one of bullying, intimidation and harassment.

Why I am, a Canadian with no personal connection to Sri Lanka or Tamils, talking about this issue? Partly the reason is that, for human rights to be truly universal, promotion for respect for those rights must reach across linguistic, cultural, ethnic and geographical boundaries.

As well, I have come here because they have come there. There are as many as 500,000 Sri Lankan Tamil refugees who have come to Canada since the start of the civil war. Several of them I have seen in my refugee law practice. Some of them have come from India since the end of the civil war by desperate means.

76 Sri Lankan Tamil refugees came to Canada aboard the Merchant Vessel Ocean Lady in October 2009. 492 came aboard the Merchant Vessel Sun Sea in August 2010. The Ocean Lady came from India, with a stop on the way in Malaysia.⁴ The Sun Sea, though it originated in Thailand, had passengers from India.⁵

A durable solution for this population means citizenship. Sri Lankan Tamil refugees in India consist of two components, Tamils of Indian origin and Tamils of Sri Lankan origin. The citizenship solution is different for each.

Both the Constitution of India and the Citizenship Act of India allow for citizenship for persons of Indian origin. The Constitution of India provides for citizenship of persons one of whose parents or grandparents was born in India where the person is born abroad, is living abroad and is registered with an Indian consulate.⁶

The Citizenship Act of India has provisions for citizenship of a child born in India. The status of the child depends on the date of birth. A child born before July 1, 1987 is a

⁴ <http://www.nationalpost.com/m/news/blog.html?b=news.nationalpost.com/tag/on-the-smugglers-trail>

⁵ <http://news.nationalpost.com/news/canada/sun-sea>

⁶ Article 8

citizen by birth. A child born on or after that date but before December 3, 2004, the commencement date of the Citizenship Amendment Act of 2003,⁷ is a citizen if either of the parents was a citizen of India at the time of the birth of the child. A child born in India on or after December 3, 2004 is not a citizen if one of the parents is an illegal migrant, which presumably Sri Lankan Tamil refugees are considered to be.⁸

The Act provides for citizenship by descent again, with variations by date of birth. A person born before December 10th 1992 outside of India of an Indian father becomes a citizen of India on birth. On or after December 10, 1992, either parents as citizens of India will do.⁹ If a father before December 10, 1992 or either parent on or after that date is a citizen by descent, the birth has to be registered at an Indian consulate abroad, something I assume did not happen with most up country Tamils.

The Act further allows for citizenship by registration by persons of Indian origin ordinarily resident in India for seven years. A person can also apply for citizenship even if not a person of Indian origin if the person is married to an Indian citizen and has been ordinarily resident in India for seven years. However, illegal migrants are excluded from both these provisions.¹⁰ A person is defined to be a person of Indian origin if the person or either parent was born in undivided India.¹¹

The Act allows for citizenship by naturalization of a person who has resided in India twelve years and renounces the citizenship of any other country of which the person has been a citizen. This provision too is not available for illegal migrants.¹²

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262267/ch14annexh.pdf

⁸ Section 3

⁹ Section 4

¹⁰ Section 5

¹¹ Explanation 2

¹² Section 6 and the Third Schedule

The Act has a form of dual nationality for persons of Indian origin titled "overseas citizen of India". Indian origin Sri Lankan Tamils are potentially eligible for this status. But, as the name implies, they have to be overseas, not in India. As well, these overseas citizens do not have full citizen rights. In particular, they are not granted equality of opportunity in matters of public employment.¹³

According to media reports, a Central government circular states that Sri Lankan refugees are not entitled for Indian citizenship; there are instructions from the Government of India "not to entertain applications of Sri Lankan refugees for the grant of Indian citizenship". I have seen only media reports of this circular and these instructions, but not the circular and instructions themselves. Why they exist I can only speculate.

It may be that the Government of India, before the current legislation prevented illegal migrants from becoming citizens, did not want these refugees to take advantage of their illegal status in India to become citizens. Then Prime Minister Jawaharlal Nehru in 1959 stated in Parliament that refugees should return to their homeland once normalcy returns there.¹⁴ It may be that this policy has prevailed.

There is one more piece in this citizenship puzzle, a bill currently before Parliament, an amendment to the Citizenship Act proposed by Shri Rajnath Singh, Minister of Home Affairs, Government of India to the Parliament of India in July 2016. The Bill provides that minority communities from Bangladesh, Afghanistan and Pakistan would not be treated as illegal migrants for the purpose of the Citizenship Act. It further provides that the naturalization period after which they could apply for citizenship would be seven years residence and not twelve.

¹³ Section 7B(2)(a).

¹⁴ V. Suryanarayan and Geeta Ramaseshan "Citizenship without bias" The Hindu, August 25, 2016

<http://www.thehindu.com/opinion/op-ed/Citizenship-without-bias/article14587201.ece>

As noted above, avenues to citizenship by birth, marriage, prolonged presence and Indian origin are closed off to illegal migrants. This illegal migrant disability, for these populations, would, by this Bill once enacted, be removed.

Sri Lankan Tamils are a minority community in Sri Lanka. The majority is Sinhalese. Why Sri Lankan Tamils were excluded from this Bill we are again left to speculate.

Bangladesh, Afghanistan and Pakistan are all majority Muslim countries. Sri Lanka is not and some of the Sri Lankan Tamil refugees are Muslim. That however is not a valid basis for distinguishing this minority population from the others.

Bangladesh and Pakistan were part of the old India, undivided India. But Afghanistan was not. Sri Lanka is, at least, a neighbouring country, which Afghanistan is not.

To the question, "if Sri Lankan Tamil refugees, why not every refugee?" the answer is simple. Sri Lankan Tamil refugees share a language and culture with sixty nine million others in India who support and welcome these refugees, something few other refugee populations can claim.

To the question, "if these Sri Lankan Tamil refugees, why not others?" the answer is also simple. During the civil war and its immediate aftermath, Sri Lanka was generating an outpouring of new refugees on a regular basis. That is no longer the case. The refugee population has stabilized. We are not seeing massive new outflows the way we once were.

The notion that India might be setting some sort of precedent by granting citizenship to this population is most odd in light of what has already happened. The camp system, with its grants of housing, monthly doles, food subsidies and refugee identity papers, is already unprecedented. Yet, that did not stop the central and state government from providing this form of support. Granting citizenship in conformity with the current Government

amendment Bill and the policy of the Citizenship Act for those not illegal migrants is far less a deviation from established precedent than the camp system is.

To the question "how much is this going to cost?", the answer is surely a lot less than the present system. Maintaining 66,000 people in government run camps and subsidising their living expenses has to be more expensive than giving these people a path to citizenship and putting them on an equal plane with other Indians, whose living expenses the Government does not subsidise.

To the question "will not such an amendment harm Government of India relations with the Government of Sri Lanka", the answer has to be the manner in which the change is presented. As long as it is made clear

- a) that the change is to welcome only those who fit within the policy of the Citizenship Act and the amendment Bill,
 - b) that is to say that the addition to the amendment Bill would benefit only long stayers, persons born in India, persons of Indian origin, minorities in Sri Lanka and persons married to Indians,
 - c) that there is a substantial population within India itself which shares a cultural and linguistic affinity with the refugees and would welcome and support these refugees,
- the addition of Sri Lankan Tamils to the Bill should not be seen as an implied criticism of the Government of Sri Lanka.

The Bill represents an opportunity. Getting Parliamentary time and attention to the issue of Sri Lankan Tamil refugees would, in other circumstances be difficult. The introduction of the Bill into Parliament presents a Parliamentary forum for the plight of Sri Lankan refugees in India, through the introduction of a proposed amendment in the Bill to encompass this population. It is an opportunity which should not be missed.

Nonetheless, even if an addition to the Bill to encompass Sri Lankan Tamil refugees were to be accepted, the Bill may not be a panacea for two reasons. One is that the Bill, as

currently drafted, is constitutionally questionable. The Constitution of India provides that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”¹⁵ The guarantee applies to “any person”. It is not limited to citizens. It applies to illegal migrants.

The fact that the Bill applies only to illegal migrants from certain countries and not others would not violate this guarantee. Nor would the fact that the Bill applies to minority populations only and not majority populations. What is more problematic is the limitation of the Bill to only six listed minorities – Hindus, Sikhs, Buddhists, Jains, Parsis and Christians. Jews, Ahmadiyyas and Bahai are all persecuted minorities in Bangladesh, Pakistan and Afghanistan. Their omission from the Bill appears to deny them equal protection of the law.

Whether this constitutional concern is valid or not, it has had a practical impact on the progress of the Bill. The Bill, partly for this reason, is stuck in Parliament. The report by the Joint Committee to which the Bill has been assigned has been postponed and may continue to be postponed. It may be that Sri Lankan Tamil refugees would be better off with a separate Citizenship Act amendment than an addition to a Bill which is mired in constitutional doubt.

Second, an amendment to the Citizenship Act which opens up a path to citizenship for Sri Lankan Tamil refugees does not mean that members of this group who fit within the parameters of the law would get citizenship. Removing an obstacle to citizenship, illegal migrant status, is not the same as an entitlement to citizenship. Once the obstacle of illegal migrant status is removed, the barrier which blocked this group before the Parliament enacted the requirement that the applicant for citizenship not have illegal migrant status, the policy circular, would resurface as a problem. Both the law and the policy must change before avenues to citizenship for this group open up.

¹⁵ Article 14

I would recommend that:

- 1) the circular or instruction which states that the Government of India should not entertain applications of Sri Lankan refugees for the grant of Indian citizenship be withdrawn; and
- 2) the Bill now before Parliament to allow members of minority communities from Bangladesh, Afghanistan and Pakistan to become citizens even though they are illegal migrants be expanded to include Sri Lankans; or
- 3) a separate Bill be enacted by Parliament to allow members of Sri Lankan minority communities to become citizens even though they are illegal migrants.

A durable solution in India for Sri Lankan Tamil refugees means citizenship. Not every Sri Lankan Tamil refugee in India may want citizenship. As noted, many want to return to Sri Lanka, provided conditions are right. A few want resettlement in third countries. Indian citizenship is not a solution for all Sri Lankan Tamil refugees in India. Yet, it is surely a solution which should be available to them.

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