

The Kalideres Nine

by David Matas

A shipload of 124 Sri Lankan Tamil refugees left Andrapradesh, Tamil Nadu, India in March 2014 destined for Australia. The passengers on the ship had at various times years earlier fled to India from the civil war in Sri Lanka and the persecution of the Colombo government. India, though home to a large indigenous Tamil population, refuses to resettle and integrate Sri Lankan Tamil refugees. Many are kept in refugee camps. They have no status in India. The ship passengers left to a destination where they hoped to be able to lead normal lives.

While passing along the west coast of Sumatra Island, Indonesia, the ship, on March 28th, ran out of fuel. After a few days sitting stranded off the Indonesian coast, at Agam Beach, Mukomuko, the passengers accepted evacuation¹. The single males, nine in all, were detained. The rest, 115, all families, were released.

The nine have remained detained since the initial evacuation. They were at first transferred from Mukomuko to Bengkulu on April 4th. They were transferred to the Immigration Detention Centre at Kalideres on May 3rd. Kalideres is near the Jakarta airport. They remain at Kalideres today.

The nine form part of a corpus of 37 Sri Lankan asylum seeker detainees, detained by the end of December 2013 in various immigration detention centres throughout Indonesia. The nine are the only Sri Lankans detained in Kalideres. There are five Sri Lankans in Denpasar, eight in Medan, one in Pekanbaru, eight in Tanjung Pinang, and six in Bangil².

¹ "Sri Lankan immigrants refuse to return to their country" Sunday, March 31 2013, Mukomuko, Bengkulu (ANTARA News)

² UNHCR Representation in Indonesia, Fact Sheet & Statistical Information, December 2013

I came to Jakarta from February 12 to 16 and met with the UNHCR, the International Organization for Migration (IOM), the Ministry of Foreign Affairs and the Jesuit Refugee Service (JRS). I also went to Kalideres to try to meet with the detained nine the day before I was scheduled to leave Indonesia, but was denied access, even though I am a lawyer and had authorizations signed by the nine indicating that I was representing them. The reason given was that the day I came was Saturday and I should have come Monday to Friday.

Three of the nine have received UNHCR decisions and been refused. Their refusals are under appeal. While each case has its individual circumstances, in general, the refusals were based on the fact that the asylum seekers had spent many years in India, had not developed or maintained ties with the LTTE, and had not been active in Sri Lankan politics.

A. Indonesian detention

Indonesia has a policy of universal detention of illegal immigrants, including asylum seekers, with exceptions³. Families fall within the exceptions. Single males do not.

Another exception is asylum seekers who have been recognized by the Office of the United Nations High Commissioner for Refugees (UNHCR) as refugees. Rejected asylum seekers remain detained.

In theory, Indonesia deports illegal immigrants. In practice that does not happen, because the Government of Indonesia does not fund deportation. Any illegal immigrant in detention subject to deportation can be removed, provided that the illegal immigrant funds his own deportation. Rejected asylum seekers in genuine fear of persecution on return will not do that.

Sri Lankan Tamil refugees rejected as asylum seekers in Indonesia are returnable to Sri

³ David Matas "Indonesia and Malaysia Mission Report" 29 January 2012

Lanka. They are not returnable to India, even if they came from there, because they have no status there.

One can hope that this population of nine at Kalideres will all eventually be recognized as Convention refugees, allowing for their release from detention, that the six not determined will be accepted and the three already rejected will win their appeals. However, there is no certainty of that. The question then becomes how this population can avoid indefinite arbitrary detention.

Both Australia and New Zealand have expressed concern to the Government of Indonesia about its territory and its territorial waters being used as a staging point for illegal migration to those two countries. Indonesia has reacted with its universal detention policy.

The UNHCR 2012 Guidelines on Detention⁴ reflect the current state of international law on detention of asylum seekers. The Guidelines state that there must be individual case by case assessment about the necessity of detention. A blanket detention policy for asylum cases is improper. Factors to guide release decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behaviour of compliance and character, the risk of absconding and the articulation of a willingness and understanding of the need to comply.

The expectation that an asylum seeker in Indonesia, if released, would get on a boat and head off to Australia or New Zealand is a legitimate factor to consider when determining, in all the circumstances of the case, whether or not to release the asylum seeker. The fact that the particular nine which are the subject of this report were part of a group on a ship evacuated in Indonesian territorial waters on its way to Australia is a fact relevant to

⁴ "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention"

assessing whether any or all of the nine, if released, would abscond by attempting to resume their journey to Australia.

However, what is legitimate as a consideration is not legitimate as a blanket rule. Turning a consideration into a rule amounts to fettering discretion.

Moreover, circumstances have changed considerably since the nine were originally detained. At the time of the original detention in April 2013, Australia was processing maritime arrival asylum seekers for refugee determination and potential resettlement in Australia. That is no longer the case.

Australia and Papua New Guinea on July 19, 2013 signed an agreement which provided that any unauthorized maritime arrival entering Australian waters would be liable for transfer to Papua New Guinea for processing and resettlement in Papua New Guinea and in any other participating regional states⁵. Australia and Nauru signed a similar agreement announced August 6, 2013⁶.

At the time of the announcement of the second agreement, the then Australian Prime Minister Kevin Rudd stated that unauthorised maritime arrivals to Australia would from that date be sent either to Papua New Guinea or Nauru for assessment of their refugee claims. They would not be settled in Australia.

This policy of comprehensive removal of maritime arrival asylum seekers to Papua New Guinea or Nauru has had an impact on asylum claims in Indonesia. Before the policy was put in place, the UNHCR experienced a substantial no show rate for scheduled interviews of

⁵ "Regional resettlement arrangement between Australia and Papua New Guinea"

⁶ Media Release, Australian Prime Minister, Australian Minister for Immigration, "Regional Resettlement Arrangement with Nauru"

asylum seekers not in detention. While asylum seekers who do not show up for interview do not give, in general, an explanation why they do not show up, one plausible explanation for the substantial no show rate is that those scheduled for interview in Indonesia had left Indonesia and moved onwards to Australia.

After the August 2013 Australian maritime arrival policy was put in place, the Indonesian asylum seeker no show rate for interviews decreased markedly. The UNHCR no show rate for asylum seekers was 68% in March 2013, 45% in May, 26% in August, 7% in September and October, 10% in November and 9% in December. This decrease has three explanations. One is the change in the Australian policy.

A second explanation is acceptance rate variation. Australia, at least for Sri Lankans, has a much lower acceptance rate than the UNHCR. The Sri Lankan grant rate for the program year July 1, 2012 to June 30, 2013 was 46.2% ⁷

The recognition rate for Sri Lankans by the UNHCR, accumulating both first instance and appeal decisions, was 35.4% for 2011, 46.9% for 2012 and 71.3% for 2013. The significant increase for 2013 reflects the changed UNHCR guidelines for Sri Lanka which came out in December 2012.

The Australian acceptance rate for Sri Lankans is then about 25% lower than the UNHCR acceptance rate. This differential in acceptance rates has also discouraged onward movement to Australia.

The third explanation is the substantial resettlement the UNHCR is able to arrange of recognized refugees from Indonesia to traditional resettlement countries - New Zealand, the

⁷ "Asylum Trends Australia 2012-13" Department of Immigration and Border Protection, Government of Australia

United States, Sweden, Canada and Australia. Sri Lanka Tamil refugees are not resettled from India; but they are resettled from Indonesia. For refugees nationals of all countries, the UNHCR resettled 898 individuals in 2013. 78 of those 898 were Sri Lankans. A further 996 all told during that year were submitted for resettlement consideration.

As of December 31, 2013, the UNHCR had an active case load of 286 Sri Lankan recognized refugees awaiting resettlement. There were also 540 registered Sri Lankan asylum seekers awaiting determination.

One can be fairly confident in these circumstances that released Sri Lankan Tamil asylum seekers would not attempt a maritime arrival to Australia, since all that this arrival would achieve would be relocation to Papua New Guinea or Nauru. Moreover, a favourable refugee status determination in Indonesia would likely lead to resettlement in traditional resettlement countries. A favourable refugee status determination in Papua New Guinea or Nauru would likely lead to resettlement in Papua New Guinea or Nauru since that is the nature of the arrangement that Australia has made with those countries - not just local determinations, but also local resettlement.

There were no individual assessments for detention of the nine when they were intercepted in March 2013. Even if one can speculate that such individual assessments might have led then to their detention, in light of the fact that they were evacuated on the way to Australia, it is impossible to engage in that same speculative assessment now. Now, the factors in favour of release are considerably stronger. Without predicting with certainty what individual assessments would produce, one can say with confidence that the continued detention of the detained nine, if there were individual assessments today, is by no means guaranteed.

Indonesia needs some form of individualized detention flight assessment for all asylum

seekers. A person should not be detained indefinitely. Yet, for Indonesia, there is no release provision, once detained, other than recognition. Indonesia could legitimately detain those who are flight risks and those who are public dangers. However, the current system allows for indefinite detention for even those who are not flight risks and not public dangers.

B. The UN Working Group on Arbitrary Detention

Indonesia is not a state party to the Refugee Convention and not bound by its obligations. However, it is a state party to the International Covenant on Civil and Political Rights and bound by its provision prohibiting arbitrary detention⁸.

The United Nations Working Group on Arbitrary Detention states on its website that

"it acts on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and/or bring to their attention these cases. The Working Group also considers individual complaints. It is the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints. This means that its actions are based on the right of petition of individuals anywhere in the world. The following procedures are the main procedures followed by the Working Group:

I. Investigation of individual cases

The Working Group acts on information submitted by communications sent to it by the individuals directly concerned, their families, their representatives or non-governmental organizations for the protection of human rights, from Governments and inter-governmental organizations regarding alleged cases of arbitrary detention.

The communication is forwarded to the Government concerned through diplomatic

⁸ Article 9

channels with an invitation to communicate to the Working Group within 90 days its comments and observations on the allegations made, both as regards the facts and the applicable legislation and concerning the progress and outcome of any investigations that may have been ordered.

A reply sent by the Government to the Working Group is transmitted to the source for any final comments or observations. ...

In the light of the information collected under this adversary procedure, the Working Group adopts one of the following measures in private session: ...

(e) If the Group decides that the arbitrary nature of the deprivation of liberty is established, it shall render an opinion to that effect and make recommendations to the Government.

The opinion is sent to the Government, together with the recommendations. Three weeks after this notification, the opinion is also conveyed to the source for information.

The opinions are published in an addendum to the report presented annually by the Working Group to the Human Rights Council at the Group's scheduled reporting session."

A petition by the nine to the United Nations Working Group on Arbitrary Detention is a recourse available to them. There are legitimate grounds of concern that they are arbitrarily detained.

Indonesian officials, in response to concerns about detention, have stated that their detention policy is better than that of Australia. The answer to that is neither local nor international law allows violations by others to be a justification or defense.

There have been a number of variations in the Australian detention policy for asylum seekers over the years. It would take this report too far afield to assess their legality by international

standards. Nonetheless, it is worth noting that international instances, on more than one occasion, have found the Australian policy to violate international standards⁹.

C. The UNHCR

While detention has to be laid at the doorstep of the Government of Indonesia, there is nonetheless more that the UNHCR can do to alleviate detention than it has been doing. As noted, detainees are released once recognized by the UNHCR. However, recognition can take quite some time.

Registration is pretty quick, on arrival or shortly thereafter. However, after registration the UNHCR refugee status determination interview can take up to a year. Decisions are not given at interview. There can be a delay of one or two months between interviews and decisions. That was the case for the three refused of the nine. In each case, the rejection letter was dated about a month after the interview.

The UNHCR has already interviewed all nine. For the other six, the decisions are pending. The interviews took place in the case of three of the nine the week of December 16, 2013 and in the case of the remaining six the week of January 6, 2014. One of the rejected was part of the earlier interviewed group. Two of the rejected were party of the later interviewed group.

Since the group of nine was in Kalideres from May 3, it took the UNHCR in the case of three more than seven months to interview them. It took the UNHCR for the other six more than eight months to interview them. This interview delay for persons in detention is far too long.

⁹ See for instance *F.K.A.G. et al. v. Australia*, UN Human Rights Committee Communication No. 2094/2011, 26 July 2013

Refused cases can appeal. Appeals also are done by interview. Appeals take four to six months from refusal. Again after interview there is a wait of one to two months till a decision.

If a person is refused on appeal, his case is closed. Yet, he can always ask for reconsideration, at any time, based on new evidence.

For those accepted, when I was here in January 2012, there was a delay in release until IOM arranged housing. However, now that delay is gone and the accepted get released almost immediately after acceptance because IOM has housing for them.

In the past two years, refugee populations went up causing delays, and then down. The recent decrease is caused partly by a change in Indonesian policy, removing from Iranians the possibility of visas on arrival. That change was announced July 19th and became effective August 20th.

It is also caused partly by the change in Australian policy, removing arrivals to offshore islands. This policy has been a deterrent to arrival in Indonesia as a staging point. It used to be that asylum seekers would come to Indonesia, register for status determination and then move on to Australia before their interviews.

Asylum seekers approaching the UNHCR office in Jakarta were 1,608 in September 2013, 602 in October, 354 in November and 296 in December. Again, one can see a marked decrease coincident with the change in the Australian maritime arrival policy. One can see this same trend also in particular with the Sri Lankan population. 82 Sri Lankan asylum seekers registered with the UNHCR in Indonesia in July 2013. The numbers for August were 34, for September 28, for October 30, for November 7 and for December 3.

It used to be that arrivals at the UNHCR office in Jakarta were given appointments to return on a later date for registration. Arrivals now are down so significantly that the UNHCR can register asylum seekers the moment they show up.

The UNHCR, as shown by its detention guidelines, opposes systematic detention of asylum seekers and indicates that opposition to the Government of Indonesia. However, it does not take practical steps which would alleviate the burden of detention.

The most obvious step would be to give priority to detention cases. Yet, this does not happen. Detention cases are treated no differently from other cases in scheduling of interviews. Moreover, visits to detention centres for interviews are not regularly scheduled.

Part of the reason for the current scheduling is interpreter difficulties. Tamil interpreters for Sri Lankan refugee status determinations are not available easily and quickly in Indonesia. Interpreters are brought in for claims processing from Australia. These interpreters need visas to come to Indonesia.

Nonetheless, even with the logistical difficulty in arranging interpreters, detention cases could still be given priority. If detention cases were considered before all other cases, then those recognized would get out much earlier than they do now. As well, the UNHCR should have a regular schedule of visits to detention centres, to ensure that all detainee cases are handled in a timely manner.

Recommendations:

- 1) Indonesia should engage in individualized assessments of detention cases and should release those who are neither a public danger nor a risk of flight.

2) The nine Sri Lankan asylum seekers detained in Kalideres should petition the United Nations Working Group on Arbitrary Detention that the Government of Indonesia is detaining them arbitrarily.

3) The UNHCR should schedule as a priority refugee status determination and appeal interviews of those in detention.

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