

## **Update: Sri Lankan Tamil Refugees in Malaysia September 2014**

by David Matas

A delegation of the NGO International Tamil Refugee Advocacy Network (I-TRAN), consisting of Anne George from New Zealand, Arasa Ratnakanthan (Kanthan) from Australia and Sam Ratna and me from Canada came to Kuala Lumpur, Malaysia from 3 to 6 September, 2014. We met with the Office of the United Nations High Commissioner for Refugees (UNHCR), Sri Lankan Tamil Refugees Organization of Malaysia (STORM) and a sequence of individual Sri Lankan Tamil refugees in Kuala Lumpur.

Sam Ratna and I had been to Kuala Lumpur in January 2012 and had similar meetings. We found that in the intervening two and a half years much had changed, not so much with the Government of Malaysia, which if anything, is less helpful than they were before, nor with the UNHCR, which faces much the same problems, as with the Sri Lankan Tamil refugee community itself, which has managed to energize its resourcefulness to address better than before its local integration problems.

There are some 30,000 Sri Lankan Tamils in Malaysia. Of these 30,000 about 4,500 are registered with the Office of the United Nations High Commissioner for Refugees. There is a further 2,500 who have pending appointments, awaiting registration. Estimates of the local Malaysian Tamil population vary between one million and one million seven hundred thousand out of a total population of Malaysian population of thirty million.

This large local Tamil population impacts on the refugee population in two different respects. One is that it is easier for Tamil refugees to find work, albeit without proper work permits, than for many other refugees who do not speak any of the local languages. The employers of Tamil refugees are largely local Tamils. Second, Tamil refugees do not look obviously foreign, meaning that they are less likely to be questioned by the police for their documentation than other refugees.

According to the UNHCR, there are about 30 Sri Lankan Tamils in detention at any time, usually for absence of documentation, which for refugees or those in the process of refugee determination can be quickly resolved. The UNHCR attempts to seek the release of refugees or refugee claimants once it knows of their detention.

STROM estimates the detention population to be considerably higher at any one time. STROM estimates are likely to be more accurate, since information about detention of Tamil refugees would normally come to STROM before it comes to the UNHCR. If the person is released through STROM intervention before the UNHCR is alerted, the UNHCR may never know of the detention.

STROM issues identity cards for those who are either recognized by the UNHCR or in process of making a claim, including an appeal from rejection. The cards have to be renewed once a year. The price is 30 Malaysian dollars or ringats each year.

The STROM identity cards fill a vacuum in the identity card system. They represent one improvement in the system of adaption of the local Sri Lankan Tamil refugee community to their Malaysian situation. During the period between first contact with the UNHCR office and registration, the STROM identity cards may be the only identification that refugee claimants have.

The issuance of identity cards by refugee community organizations is not unique to STROM and the Tamil Sri Lankan refugee community. There is anecdotal information that the issuance of these cards has led to abuse, with issuers charging too much or making representations about the need and value of the cards which may not be accurate. While none of this information relates to STROM issued cards, the fact remains that privately issued identity cards create a potential for abuse and are not a complete replacement for UNHCR issued identity cards.

The period between first contact with the UNHCR office and registration is now taking up to two years. Those who come to the UNHCR offices today receive appointments for registration interviews in 2016. Registration is different from determination. For determination, there is a substantive decision to be made and an interview on the basis of the claim. Registration is essentially a formality and should not take two years. When we visited the UNHCR, we were told that the local office is attempting to reorganize its resources in order to speed up registration.

The huge delay in appointments for registration creates a time gap where privately issued identity cards become necessary. Acceleration of registration, amongst other benefits, would obviate or temper the need for privately issued identity cards.

Another area of movement is education. Sri Lankan Tamil refugees still can not get access to the public Tamil schools. Instead, they have developed a number of their own schools. One of these is run by STROM, in its first year of full time operation. The schools are partly financed by the UNHCR. They run from kindergarten to A levels. Malaysia should admit these students to its public education system. However, the system of private parallel education which has sprung up is a next best alternative.

Here, too, the adaptation is not a complete replacement for what the Malaysian government should be doing. The Malaysian education system does not recognize the diplomas issued by these schools, even where the education meets Malaysian standards. It becomes difficult for graduates to move on from these schools to accredited educational institutions. The existence of these schools shifts the roadblock to education further down the road rather than to remove it entirely.

Ideally, Malaysia should allow Tamil Sri Lankan refugees into Malaysian Tamil schools. If the

Government is not to do that, at the very least, the Government should be prepared to recognize the education that the improvised Tamil Sri Lankan refugee schools provide.

There have been developments also in access to medical care. The UNHCR will pay half the cost of hospital care for refugees and refugee claimants. However, the coverage kicks in only after registration. Moreover, it covers only some medical and hospital costs, mostly the major catastrophic ones and not the lesser ones, even if chronic. As well, coverage runs out after six months.

The UNHCR has developed, along with a private insurance company, TUNE, a private health insurance policy for refugees. Cost is 120 Malaysian dollars a year. The policy has just become available and there is no claims experience. However, its availability is a positive development.

There are some Malaysian hospitals which refuse to treat foreigners. The UNHCR has developed a list of hospitals to avoid.

Malaysia is not a Convention signatory. It does not engage in refugee determinations and it does not locally integrate recognized refugees. It has adopted a process for regularization of status of illegal migrant workers, but the process does not include refugees or asylum seekers.

The state employee protection mechanisms do not work for employed refugees since they are working without authorization. They are vulnerable to employer abuse and, in fact, many are abused. STROM is collecting cases of employer abuse. In some cases STROM is able to settle employer abuse issues by direct intervention with the employers. The International Labour Organization (ILO) has told STROM that employee protection standards must be respected whether the employees have work authorizations or not, since these

standards are international, not just local. The ILO has indicated to STROM that the ILO will go to the Government of Malaysia once STROM has collected sufficient evidence of abuse to request regularization of status of refugee workers, arguing that the absence of that status facilitates abuse.

In theory, the only viable long term solution for refugees is resettlement. However, there are not enough a resettlement places. Moreover, Sri Lankan Tamil refugees run up against obstacles particular to their situation.

Australia has an out of region policy, not resettling refugees who are found outside their own region. This out of region policy means that Sri Lankan Tamils are not resettled, since they are considered out of region in Malaysia.

Burmese refugees benefit from group determination and group resettlement. The willingness to resettle Burmese refugees in groups comes from the resettlement countries not the UNHCR. The group resettlement has the result that Burmese refugees move out of Malaysia to traditional resettlement countries quickly in large numbers. Sri Lankan Tamil refugees move out of Malaysia slowly, after long waits, if at all.

Sri Lankan Tamil refugees also suffer from a Catch 22. If they have no actual or perceived association with the LTTE, the UNHCR, for the most part, considers them to be safe on return and their applications are denied. For the resettlement countries though, actual or perceived association with the LTTE is anathema. The exclusion clause, excluding those associated with terrorism, is applied by resettlement countries in an overly broad fashion, excluding those who have not by any stretch of the imagination, actually participated knowingly in a terrorist crime.

Within Canada, the Supreme Court of Canada has recently ruled against the overbroad

application of the Convention refugee clause excluding from protection those complicit in crimes against humanity.<sup>1</sup> The decision has obvious implications for exclusion decisions based on complicity with terrorism. However, further litigation is going to be necessary to work those implications out.

Second guessing by resettlement countries of the UNHCR refugee determinations is not restricted to LTTE cases. It covers the whole spectrum of UNHCR determinations. It is regrettably all too common for refugee resettlement countries to decide an applicant for resettlement, even one who has no LTTE actual or suspected ties, is not a refugee despite a UNHCR determination that the person is a refugee.

This is certainly true for Canada. There are persons recognized by the UNHCR as Convention refugees who apply for resettlement to Canada and then are rejected by the Canadian visa office because the visa office determines them not to be refugees. My experience, from going through a number of individual decisions, is that these rejections are poorly reasoned and not well founded.

To Canadian visa offices, UNHCR decisions should be persuasive, but, in practice, carry little weight. A favourable UNHCR decision is viewed merely as meeting an eligibility requirement rather than as establishing a persuasive case that the person is a refugee.

These rejections are, of course, frustrating to the refugees and their sponsors. They must also be a matter of concern to the UNHCR particularly for those cases the UNHCR has identified to be in need of resettlement.

I have three proposals to deal with this situation. One is giving reasons for positive UNHCR decisions. This would require time from the UNHCR which is already in short supply.

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<sup>1</sup> *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40

However, I believe it would be worth the investment of time.

Refugee claimants, their counsel, their sponsors and their supporters would like to be able to argue to the Canadian visa offices and the Canadian courts that Canadian visa offices should depart from UNHCR decisions only when there are clear and compelling reasons to do so. Absent such clear and compelling reasons, the UNHCR decision should stand.

Making that argument though requires the existence of reasons for the UNHCR decisions. It is impossible to argue that there are or there are not clear and compelling reasons for departing from the UNHCR decisions without knowing the reasons for those decisions.

Second, I suggest that the UNHCR, as a matter of course, ask authorizations from refugee claimants who have been sponsored by Canadians or who wish to resettle in Canada authorizing the Canadian visa office to disclose refugee resettlement application personal information to the UNHCR. These authorizations would allow the UNHCR first of all to discover whether an individual found to be a refugee by the UNHCR has been found by the Canadian visa office not to be a refugee and, if rejected, why. After having found that out, and this is my third proposal, the UNHCR could and should make representations to the Canadian visa office for reconsideration either in individual cases or in a grouping of cases with common themes where, in the view of the UNHCR, the Canadian decisions depart from the Refugee Convention. The mere existence of these authorizations, even without requests for reconsideration, would have a salutary impact on visa office decisions.

Australia looms large in the region, encouraging poor practices. A multilateral process is needed, if for no other reason than to counter-balance the Australian influence.

The UNHCR has attempted to use the Bali process to this effect, to focus on protection. The Bali process though was designed to combat smuggling. It brings together representatives

of anti-smuggling enforcement units, the border police. Talking to a bunch of anti-smuggling police about refugee protection is, no doubt, for them informative. However, because those actually responsible for protection and resettlement are not in the room, the use by the UNHCR of the Bali process has gone nowhere. It has done nothing practically to enhance protection and resettlement.

Malaysia has forcibly removed to Sri Lanka a few recognized refugees, going along with Sri Lanka claims that the refugees are terrorists. Yet, there is no evidence given to the UNHCR to that effect.

If the UNHCR determinations were made in error as the result of misrepresentations by the claimants, they could be vacated. Yet, there is no basis on which to do that. There is no Malaysian court determination to that effect. The Malaysian cooperation with the Sri Lanka government in deporting recognized refugees to danger at the request of a human rights violating government means the Malaysian government, in company with the Sri Lanka government, is engaged in a violation of international law.

I have filed three petitions with the United Nations Rapporteur on Torture - about Sundaralingaraja Kushanthan, Mahadevan Kirubaharan and Selvathurai Kirupanathan. All three were arrested in Malaysia on May 15th and forcibly returned to Sri Lanka 26th May 2014, despite having been recognized as refugees by the Office of the United Nations High Commissioner for Refugees. There are compelling reasons to believe that all three have been tortured by the Sri Lanka anti-terror police.

Local integration is not an all or nothing proposition. It is rather a continuum. The Sri Lanka Tamil refugee community, because of their own initiatives and help from the UNHCR, have moved along the continuum closer to full integration than they have before. They point the way to a quasi-integration status, an adaptation of the Refugee Convention

whereby countries in the region become Convention signatories, compliant with its provisions in all but name.

While adherence to the Convention and full compliance with its terms remains a long term goal, a more immediate and practical short term goal is to improve the lot and alleviate the suffering of refugees and claimants so that integration is achieved partially, if not totally. The Sri Lankan Tamil refugee community shows the way.

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