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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

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The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 January 2020]

* Issued as received, in the language(s) of submission only.



The arbitrary detention of Sri Lankan Tamils Refugees in Australia

Australia's detention of refugees, in light of international human rights law, is marked by systemic violations of obligations under the *International Covenant on Civil and Political Rights* (ICCPR). These violations are profoundly notable in the treatment of Tamil refugees, amongst others, who fled to Australia in significant numbers during and after the Sri Lankan civil war. Without limiting the wide-reaching implications of the Australian government's treatment of other refugees, this paper focuses on three specific Tamil refugees who are currently, or were, in detention: – Premakumar Subramaniam (Kumar), Sivaguru Navanitharasa (Sivaguru) and Loganathan Janarupan (Loganathan) (collectively, the Refugees).

The Refugees

In summary, the Refugees are Sri Lankan born Tamils, who were subject to persecution and human rights abuses in Sri Lanka, and have been, or were, detained in Australian immigration detention centres for over 10 years. The Refugees are three of approximately 1600 Sri Lankan Tamils that travelled irregularly to claim refuge in Australia between the period mid-2009 and mid-2012. Like other Sri Lankan Tamils who fled, under similar circumstances, to Australia during that period, neither of the Refugees have been accorded permanent protection or have been resettled to a third party nation. Sivaguru and Loganathan remain, to date, in detention.

In addition to the struggles of detention and their status as a refugee, each of these individuals face added burdens that are affecting their mental and physical wellbeing:

- Kumar is legally blind and suffers from schizophrenia,
- Sivaguru suffers from leukaemia, post-traumatic stress disorder and depression, and
- Loganathan suffers from psychological fatigue from detention.

Noting Kumar has been released on 6 January 2020 into community detention and that he may receive appropriate treatment for his illnesses in these circumstances, Sivaguru and Loganathan will continue to have their illnesses inadequately addressed.

Arrest and detention

The Refugees arrived in Australia in 2009 and 2010, seeking asylum from persecuting forces in Sri Lanka. On arrival, the Refugees were mandatorily detained in immigration detention centres as 'offshore entry persons', and later determined as refugees by the Department of Home Affairs (as it is now known) (Department).

After being legally identified as refugees, they were each subjected to a security assessment by the Australian Security Intelligence Organisation (ASIO). For each refugee, the ASIO issued an adverse security assessment. These adverse assessments were due to their previous membership of the Liberation Tigers of Tamil Eelam (LTTE), a group formed in response to discrimination and suppression by the Sri Lankan government of the minority Tamil community, who fought for independence in the North and East parts of Sri Lanka. Given the LTTE has never committed acts of aggression in Australia, there is no reasonable justification for considering these individuals, who were former members of the LTTE, as a threat to the national security of Australia.

As a result of the ASIO's adverse security assessments, the Refugees became ineligible for the grant of a protection visa. Irrespective of this, the Refugees continued to be held in immigration detention, supposedly pending their removal from Australia in the absence of a valid visa. However, as the Department had already determined these individuals to be refugees and therefore persons to whom Australia owed protection obligations, the Refugees could not be returned to Sri Lanka - their country of origin. Moreover, the Australian government had not excluded the Refugees under article 1F of the *Convention Relating to*

the Status of Refugees (the Convention), nor did the government rely on the non-refoulement exception in sub-article 33(2) of the Convention. Further, to compound the complexities of these matters, the Australian government had not identified other third-party nations to which removal was possible. The ultimate product being that the Refugees, save as to Kumar who has been released in January 2020, have been arbitrarily held in detention for an indefinite period – presently at over 10 years in detention - a finding that has been supported by the UN's Working Group on Arbitrary Detention (Working Group) (at least to the extent of the former detention of Kumar).

Deprivation of liberty

All countries are challenged by the exercise of arbitrary detention, and it knows no boundaries. As such; the Working Group was established by resolution 1991/42 of the former Commission on Human Rights in order to 'guarantee protection of the right of life and physical integrity, religious intolerance, and other rights' against such exercise of power. Its mandate was clarified and extended by the Commission's resolution 1997/50.

What is meant by 'deprivation of liberty'?

Generally, international human rights law aims to *inter alia* protect the right to personal liberty, insofar that no individual shall be arbitrarily deprived of their liberty. Although the Working Group recognises there can be legitimate deprivation of liberty, its objective extends to deprivation of liberty in all its forms, including detention before, during or after trial, and deprivation in the absence of any kind of trial.

When does deprivation of liberty become arbitrary?

Unfortunately, international human rights instruments do not extensively provide guidance on this question:

- Article 9 of the *Universal Declaration of Human Rights* states that 'no one shall be subjected to arbitrary arrest, detention or exile'
- Sub-article 9(1) of the ICCPR merely provides that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

In light of the above, the Working Group, in order to effectively carry out its objectives, adopted criteria to apprehend whether an individual case is, in fact, one of arbitrary deprivation of liberty. These criteria are divided into five categories that can be found in the *Revised Fact Sheet No. 26* published by the Working Group.

Opinion No. 1/2019 of the Working Group

On 12 June 2019, the Working Group issued an advanced edited version of an opinion concerning the former detention of Kumar by Australia (note: this opinion does not consider the detention of Sivaguru and Loganathan). In their opinion, which has been widely received by the media community, the Working Group found that:

The deprivation of liberty of Premakumar Subramaniam, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V. [emphasis added].

The above findings in The Working Group's conclusion appears to be consistent with the UN Human Rights Committee decision of 18 April 2016 concerning communication No. 2233/2013. In this decision, which relates to five refugees detained by Australia, inclusive of three Sri Lankan Tamil refugees, the UN Human Rights Committee found the treatment and

detention of these refugees by the Australian government was arbitrary and in contravention of article 9 of the ICCPR.

Having regard to the above, and the comparable circumstances of the detention of Sivaguru and Loganathan to Kumar's prior detention, it is reasonable to infer that the Working Group would make similar findings as published in Opinion No. 1/2019 in respect of the detention of Sivaguru and Loganathan by the Australia government.

Recommendations

In accordance with the Working Group opinion and the UN Human Rights Committee decision, it would be appropriate for the Australia government to:

- take steps necessary to remedy the situation of the Refugees without delay. This includes grant of a visa, release from immigration detention for Sivaguru and Loganathan, and compensation / reparations.
- undertake an impartial and independent investigation of the circumstances surrounding the arbitrary detention of the Refugees, and take proper equitable action against those responsible for the violation of the Refugees' rights.
- consider law reform so that the nation's migration laws conform with those international law instruments committed to by Australia as a state party, particularly article 9 of the ICCPR. This is to ensure Australia, as a relevant state party, takes steps to prevent similar violations from occurring in the future.

For reference, the recommendations are numbered in priority of action. That is, immediate action should be initiated towards rectifying the situation of the Refugees.

Conclusion

This report comments on a real-life case study of Australia's indefinite detention of refugees on security grounds, with specific consideration given to three Sri Lankan Tamil refugees – Kumar, Sivaguru and Loganathan. The present domestic legal system generally denies, and has denied, refugees of the ability to be released into the community, or third party nations, following adverse security assessments that may be questionable on their merits. The result appears to be that Sivaguru and Loganathan, amongst others, are trapped in indefinite detention, borne by systemic violations of Australia's obligations under the ICCPR. Where there is a clear exercise of arbitrary detention, the international community should resolve and press the Australian government to release refugees, including Sivaguru and Loganathan, and reform its present domestic legal processes to conform to its obligations under the ICCPR. Such action would ultimately spare innocent refugees, such as Kumar, Sivaguru and Loganathan, and prevent the deterioration of mental and physical health that accompanies sustained periods of detention.
