

**Comments on the Operational Guidance Note on Sri Lanka (August 2009),  
prepared for Still Human Still Here by Tony Paterson (Solicitor, A. J. Paterson)**

1. This document has been prepared by members of the Still Human, Still Here campaign. It is being published, along with the COI referred to within it, to help legal practitioners representing asylum seekers. It is meant to be used as a guide to some of the COI available. It was prepared 25 March 2010. There is, however, no guarantee that the COI referred is comprehensive and it should not be a substitute for case specific COI research.
2. **THIS DOCUMENT IS A GUIDE FOR LEGAL PRACTITIONERS OF RELEVANT COI, WITH REFERENCE TO THE OPERATIONAL GUIDANCE NOTE ON SRI LANKA ISSUED IN AUGUST 2009. THIS DOCUMENT SHOULD NOT BE SUBMITTED TO UKBA, THE TRIBUNAL OR IN PROCEEDINGS. LEGAL PRACTITIONERS ARE WELCOME TO SUBMIT THE COI REFERED TO IN THIS DOCUMENT.**
3. The principle concerns that we have with the existing Sri Lankan OGN relate to inconsistencies between evidence provided in the body of the text and the conclusion drawn at the end of some sections, particularly in relation to risk from the Sri Lankan authorities and associated paramilitary groups.
4. Since the August 2009 OGN was issued concerns have been raised regarding a deterioration in the general human rights situation, as reflected in the European Union's decision to suspend Sri Lanka's preferential trade benefits because of concerns over the country's human rights record<sup>1</sup> and the FCO's decision to add Sri Lanka to its countries of concern.<sup>2</sup>
5. The specific issues that we address in this paper remain areas of serious concern as evidenced in recent reports, some of which are cited in the February 2010 Country of Origin Information Report.

**Risk from the Sri Lankan authorities**

6. In the conclusion of the section on fear of persecution by the Sri Lankan authorities (3.7.24), the OGN accepts that that "young Tamil men who are suspected of being LTTE members or supporters appear to be the primary target of arrests", but then goes on to assert that as most detainees are reportedly released quickly it can be said that "generally the authorities in Sri Lanka are not concerned with those individuals with past low-level support for the LTTE."

<sup>1</sup> BBC News, *EU punishes Sri Lanka for rights abuses*, 16 February 2010.

<http://news.bbc.co.uk/1/hi/world/europe/>

<sup>2</sup> FCO, *Annual Report on Human Rights*, March 2010 ([The Foreign and Commonwealth Office's latest Human Rights Annual Report \(March 2010\)](#))

7. This does not adequately reflect other information in the OGN which indicates that those who are merely suspected of being LTTE sympathizers, let alone those who were actually involved in past low level support for the LTTE, are at risk of long term detention, disappearance and torture. For example the following paragraphs refer to COIS information which notes that:

3.7.3 Security forces in Colombo “arrested an increasing number of Tamils under emergency regulations in cordon and search operations and that over 1,000 Tamils were in detention without charge, some for several years.”

3.7.6 The “armed forces and their paramilitary allies have arrested **LTTE sympathizers** (emphasis added) and not turned them over to the police, blurring the line between arrest and abductions” and “...security forces and paramilitaries often tortured and killed those arrested rather than follow legal safeguards.”

3.7.7 “The vast majority of victims of enforced disappearances were young male ethnic Tamils on account of their **alleged membership** (emphasis added) or affiliation to the LTTE” and “... in the great majority of cases of reported disappearances/abductions, the evidence showed the involvement of the government security forces (army, navy and police) who were facilitated by emergency regulations.”

3.7.8 The pro-government paramilitary EPDP worked with government security forces to “identify, abduct, and kill **alleged LTTE sympathizers** (emphasis added) or operatives.”

8. This would indicate that there is a significant risk to Tamils who are merely suspected of being LTTE sympathizers as well as those who have been low level supporters of the LTTE in the past.
9. This is supported by the Tribunal in *CG [2007] UKAIT 00076 LP* where it found that, while Tamils are not per se at risk of serious harm from the Sri Lankan authorities, a number of factors “may make a person’s return to Sri Lanka a matter which would cause the UK to be in breach of the Convention”. *LP* identified a total of 12 risk criteria which should be considered individually and cumulatively in the light of the facts of each case. These included but were not limited to:

- Having relatives in the LTTE;
- Having been asked by the security forces to become an informer;
- Having signed an enforced false confession;
- Having prominent scarring;
- Lacking an ID card or other documentation;
- Returning from London or other centre of LTTE fundraising;
- Bail jumping and/or escaping from custody;
- Having a previous criminal record and/or outstanding arrest warrant;
- Having made an asylum claim abroad;
- Illegal departure from Sri Lanka;

- Having a previous record as a suspected or actual LTTE member or supporter;
  - Being of Tamil ethnicity.
10. The caselaw section (3.7.23) makes no mention of the last category (being of Tamil ethnicity) and does not include “or supporter” from the category above, which crucially and incorrectly narrows the group at risk. Even more surprising, this key finding from *LP* is excluded from the conclusion section on fear of persecution by the Sri Lankan authorities.
11. Subsequent caselaw has stressed the continued relevance of the risk categories identified in *LP*. Indeed, *TK* stresses in the first paragraph that the risk categories identified in *LP* “remain valid” and that the risk of adverse treatment requires “an examination of the strength of her claim to be at real risk of serious harm as a result of an accumulation of the risk factors identified in *LP* (which we have found to have continuing efficacy) in the context of the evidence as a whole.”<sup>3</sup>
12. Recent reports indicate that these concerns continue to be extremely relevant. The US State Department’s latest assessment of the human rights situation in Sri Lanka notes:
- “The government's respect for human rights declined as the armed conflict reached its conclusion. Outside of the conflict zone, the overwhelming majority of victims of human rights violations, such as extrajudicial killings and disappearances, were young male Tamils, while Tamils were estimated to be only 16 percent of the overall population. Credible reports cited unlawful killings by paramilitaries and others believed to be working with the awareness and assistance of the government, assassinations by unknown perpetrators, politically motivated killings, and disappearances. The government was credibly accused of arbitrary arrests and detentions, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of freedom of movement, harassment of journalists and lawyers critical of the government, and discrimination against minorities.”<sup>4</sup>
13. The OGN’s conclusion section (3.7.25) goes on to state that only those individuals who are wanted for serious offences would be of interest to the authorities and that these cases “will be exceptional, and will normally be high-profile members of the LTTE who are still active and influential, and wanted by the authorities.” This is not consistent with the information highlighted above.
14. Furthermore, the OGN states in the next sentence that even where individuals may face prosecution on return “...there is no evidence to suggest that they would not be treated fairly and properly under Sri Lankan law”. This conclusion is in stark opposition to numerous other statements from the OGN, for example:

<sup>3</sup> TK (Tamils – *LP* updated) Sri Lanka CG (2009) UKAIT 00049, paragraph 160.

<sup>4</sup> US State Department of State, 2009, *Human Rights Report: Sri Lanka*, 11 March 2010, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm> )

- “Those detained may be held for up to 18 months without trial” (3.7.24)
- Impunity, particularly for cases of police torture, remains a serious problem in Sri Lanka.” (3.7.12)
- “The UN Special Rapporteur reported that torture was widely practiced and that there were consistent and credible allegations of ill-treatment by the police during inquiries in order to extract confessions...” (3.7.12)
- The UN Special Rapporteur ...noted that the police used threats of violence and fabrication of criminal cases to prevent the victims of torture by police officers from filing complaints.’ (3.7.12)
- ‘Furthermore, he [the UN Special Rapporteur] advised that detainees reported that magistrates did not provide them with an opportunity to complain about police torture while the perpetrators often accompanied the victims to courts and remained present during medical examinations’ (3.7.12)
- ‘Human rights organisations and NGOs have criticised Sri Lanka’s law enforcement agencies *and judicial system* (emphasis added) for failing to eliminate human rights violations reportedly carried out by the police and armed forces.’ (3.7.13)
- “Reportedly, the government provided protection, intelligence, and military training to TMVP and EPDP cadres who committed extra judicial killings, abductions, extortion and torture.” (3.7.9)
- “... the Government cannot be said to be ensuring that there are adequate means of redress or protection against torture in police custody. ...As a result there cannot be said to be sufficiency of protection for those who can show that they face a serious risk from police action in Sri Lanka.” (3.7.16)

15. None of the above are compatible with receiving fair and proper treatment under Sri Lankan law. Once again information in the body of the OGN is not reflected in conclusion sections.

16. More recent reports reinforce the information already cited in the August 2009 OGN. For example, the European Commission’s report from October 2009 concludes that:

“84. The police are unwilling or unable to investigate human rights violations. The criminal investigation system and the court system have proven inadequate at investigating human rights abuses. The NHRC is weakened, incapable of performing its role and has lost international recognition. The emergency legislation shields officials against prosecution.

85. So far as effective implementation in practice of the conventions is concerned, the evidence shows that unlawful killings, perpetrated by police, soldiers and paramilitary groups, are a major problem. While Sri Lanka has a strong record of adopting legislation to criminalize torture, in practice torture both by the police and the armed forces remains widespread. The powers of detention conferred by the emergency legislation have enabled arbitrary detention without effective possibility of review of the lawfulness of detention.

There have been a significant number of disappearances which are attributable to state agents or paramilitary factions complicit with the government; hence Sri Lanka has failed to implement its obligation to prevent disappearances by State agents and other forces for which it is responsible.”<sup>5</sup>

17. Human Rights Watch’s *World Report* 2010, released on 20 January 2010 noted that “...the overall human rights situation in the country continued to deteriorate as the government adopted increasingly repressive policies” and that “As in the past, rights violators enjoyed near-complete impunity.”<sup>6</sup>
18. The executive summary of the International Crisis Group’s (ICG) report on Sri Lanka’s judicial system notes the lack of protection for Tamil detainees: “Fear of sanction by the JSC has undermined judges’ willingness to move aggressively against the police or the military, particularly in cases involving the rights of Tamil detainees.”<sup>7</sup> In its recent report *A bitter peace*, the ICG also highlights how the security forces have become increasingly politicised:

““With the police coming under the jurisdiction of the ministry of defence, headed by Gotabhaya Rajapaksa, and with senior appointments to the police made the president – not the National Police Commission as required by the constitution – ‘the police is under the direct control of the President and his brother ... and in direct violation of the constitution. It’s a directly politicised police.’”<sup>8</sup>
19. The FCO also recognised in its Annual Report on Human Rights that “...there are credible reports that witnesses to crimes allegedly committed by the security forces have been killed or threatened to prevent them giving evidence.”
20. The final conclusion in this section (3.7.26) states that “There cannot be said to be a general sufficiency of protection available to those applicants who express fear of state officials after having made complaints to the Sri Lankan authorities...” However, the evidence provided in the OGN recognises that a broader category are at risk – namely those “who can show that they face a serious risk from police action in Sri Lanka” yet this is not reproduced in the conclusion paragraph.
21. Finally, the risk from paramilitaries working alongside the Government is a major area of concern, but information relating to the activities of these groups is inappropriately placed in the section which relates to fears from the LTTE (3.6). For example:

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<sup>5</sup> European Commission, *Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka*, 19 October 2009  
[http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc\\_145152.pdf](http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145152.pdf)

<sup>6</sup> Human Rights Watch, *World Report 2010, Sri Lanka, Events of 2009, 20 January 2010*, introduction, <http://www.hrw.org/en/node/87402>

<sup>7</sup> ICG, *Sri Lanka’s Judiciary: Politicised Courts, Compromised Rights*, Asia Report N°172, 30 June 2009, <http://www.crisisgroup.org/home/index.cfm?id=6186&l=1>

<sup>8</sup> ICG, *A Bitter Peace*, Asia Briefing N°99 11 January 2010, page 19  
<http://www.crisisgroup.org/home/index.cfm?id=6462>

“...numerous NGOs and individuals have complained that the armed forces and their paramilitary allies have arrested suspected LTTE sympathizers and not turned them over to the police, blurring the line between arrests and abductions. Other reports have alleged security forces and paramilitaries often tortured and killed those arrested rather than follow legal safeguards.” (3.6.14)

“According to UNHCR, acts of abduction and kidnapping continue to be a serious problem in Sri Lanka, particularly in the North and East of the country and in Colombo. Many of the abductions involve civilians who are suspected to be LTTE members or sympathizers.

“... in many cases documented by human rights groups there are indications of involvement by Government actors, including security forces, the army and the navy, or police.... The government generally failed to investigate such incidents” (3.6.17)

22. It is inappropriate to include this information under the threats from the LTTE section. Furthermore, when the issue is dealt with in the section on fear of the Sri Lankan authorities, some of this information is not included.

23. Recent reports indicate that the threat from paramilitaries has not diminished, for example the US State Department’s most recent report on Sri Lanka stated that:

“Human rights observers alleged that progovernment paramilitary groups and security forces participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. During the year there were no indications or public reports that civilian or military courts convicted any military, police, or paramilitary members for human rights abuses.”<sup>9</sup>

### **Fears of reprisals from the LTTE**

24. The conclusion to this section (3.6.25) says that there is “generally freedom of movement within Sri Lanka and caseowners should consider whether internal relocation is a viable option to escape the threat posed by the LTTE.” None of the detailed information describing the difficulties of internal relocations (3.6.19 – 3.6.22) is reflected in this conclusion.

25. More recent reports continue to raise protection concerns for internally displace people. The FCO notes in its Annual Report that:

“There remain significant protection concerns for both displaced and returning civilians, as well as for at least 11,500 suspected ex-combatants to whom the ICRC has no access and who themselves have no access to due legal process regarding their detention.”

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<sup>9</sup> US State Department of State, 2009, *op. cit.*

The International Crisis Group also referred to the specific risks to displaced women both in the camps and in resettlement. It noted “The large number of female-headed households among those families being resettled raises additional protection concerns given that many are returning to isolated areas patrolled by large numbers of Sri Lankan police and military.”<sup>10</sup>

26. The ICG report went on to observe that:

“There have also been regular reports from a variety of credible sources that significant numbers of women held in the camps have been raped or sexually assaulted. According to some, women have been removed from the camps with police and military assistance and then assaulted.”<sup>11</sup>

### Prison conditions

27. There is a clear inconsistency between the evidence provided in paragraph 3.9.3 of the OGN and the section conclusion at 3.9.5. The evidence cited at paragraph 3.9.3 states that:

“According to the UN Special Rapporteur, the combination of severe overcrowding and an antiquated infrastructure of certain prison facilities placed unbearable strain on services and resources which for detainees in certain prisons, for example, the Colombo remand prison **amounted to degrading treatment.**” (emphasis added)

28. In addition to the point made in the OGN itself relating to overcrowding in prisons amounting to degrading treatment, the UN Special Rapporteur also noted in his report some long term detention conditions in police stations would also breach Article 3 rights. The report states that:

“During the Special Rapporteur’s visit to various police stations he observed that detainees are locked up in basic cells, often without natural light and sufficient ventilation, and sleep on concrete floors. While he is not concerned about such conditions for criminal suspects held in police custody for up to 24 hours, **these conditions become inhuman** (emphasis added) for suspects held in these cells under the Emergency Regulations for periods of several months up to one year.”<sup>12</sup>

29. In contrast to the above, the section on prison conditions concludes in paragraph 3.9.5 with the statement:

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<sup>10</sup> The International Crisis Group (ICG), *Sri Lanka: A Bitter Peace*, 11 January 2010, page 5.

<sup>11</sup> The International Crisis Group (ICG), *Sri Lanka: A Bitter Peace*, 11 January 2010, page 5.

<sup>12</sup> United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Mission to Sri Lanka*, 26 February 2008, page 23. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/111/35/PDF/G0811135.pdf?OpenElement>

“Whilst prison conditions in Sri Lanka are poor, with acute overcrowding and lack of sanitary facilities being a particular problem, conditions are unlikely to reach the Article 3 threshold.”

### **General country situation**

30. *AN & SS* should only be cited as a country guidance case in relation to risk from the LTTE and not in relations to the general country situation (3.8.9).

### **List of Sources**

BBC News, *EU punishes Sri Lanka for rights abuses*, 16 February 2010.

<http://news.bbc.co.uk/1/hi/world/europe/>

FCO, *Annual Report on Human Rights*, March 2010 ([The Foreign and Commonwealth Office's latest Human Rights Annual Report \(March 2010\)](#))

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