**Memorandum by Maynmai மேன்மை:**

**Tamil Diaspora Activists on Immigrant Rights Concerns Stemming from U.S. Supreme Court Case *Department of Homeland Security v. Thuraissigiam***

**Overview**

The June 25, 2020 United States Supreme Court decision against Mr. Vijayakumar Thuraissigiam, a Tamil asylum seeker fleeing persecution and state-sanctioned violence in Sri Lanka, highlights the need to defund law enforcement while halting deportations immediately. Through a series of authoritarian measures which undermine settled law, the Trump Administration is eviscerating protections for all asylum seekers, placing them at risk for the Administration’s political gain. In proposing and enacting these measures, the U.S. is complicit in the overseas murders of those who were seeking safety.

This memo outlines the Supreme Court Decision’s deeper context, its grave implications both domestic and international, and the demands made to counter its impact.

**Background**

***Department of Homeland Security v. Thuraissigiam*** was a U.S. Supreme Court case questioning whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which limits *habeas corpus* judicial review of the decisions of immigration officers, violates the Suspension Clause of Article One of the U.S. Constitution. In a devastating 7–2 opinion, the Court majority ruled that the law does not violate the suspension or due process clauses. Five justices ruled the law specifically did not violate the Suspension Clause, with Justices Breyer and Ginsburg filing an opinion concurring with the judgment. The dissenting opinions were filed by Justices Sotomayor and Kagan.

In the case of Mr. Thuraissigiam, despite communication barriers due to inadequate translation, the U.S. asylum officer believed Mr. Thuraissigiam’s story — however, the officer failed to understand the political context Mr. Thuraissigiam was fleeing and thus, rejected his request. This is an egregious error; it was the legal duty of the asylum officer to understand Sri Lanka’s political context. Even in their decision, Justice Breyer, joined by Justice Ginsburg, listed a number of situations in which habeas review must be available, including in the case of someone claiming an asylum officer made an egregious error.

This decision opens the door for the Trump Administration’s recent decision to implement “expedited removal” procedures for asylum seekers who do not pass initial screening. As Justices Sotomayor and Kagan wrote, the decision “flouts a century of this Court’s practice” and is of grave concern. The Supreme Court ruling that Mr. Thuraissigiam did not have the right to contest a flawed asylum decision in court has serious consequences not only for Mr. Thuraissigiam, but also for other asylum seekers regardless of nationality and background. This serves as a huge win for the Trump administration and advances authoritarianism by diminishing judicial review.

**Implications For Asylum & Dissent**

The U.S. Supreme Court decision in DHS v. Thuraissigiamsets a dangerous precedent where an asylum seeker subjected to expedited removal has no recourse against a whim decision by a U.S. asylum officer or border patrol agent. It reverses settled law, stripping judicial oversight when it is most needed. Because habeas petitions are a critical last resort, this decision impacts not only Sri Lankan Tamil asylum seekers but asylum seekers overall:

* Errors in expedited procedures and credible fear judgments violate U.S. law and blatantly violate the international prohibition against forcible return to persecution (INA section 235(b) and Refugee Protocol, art. 33). These are risks faced en masse by many asylum seekers at the U.S. southern border.
* This Supreme Court decision joins other impediments to refugee protection in the U.S., including the proposal just days prior (June 15) of a new rule that would eviscerate the asylum system. These follow the 2018 executive order that first, limited asylum claims to authorized ports of entry, and, per CBP policy since 2016, turned away asylum seekers from ports of entry, requiring them to remain in Mexico while their cases undergo review and adjudication. Per the Southern Policy Law Center, “Asylum seekers are not safe in Mexico. Mexican authorities regularly detain asylum seekers and subject them to refoulement — deportation to countries where they face persecution — in violation of international law.”[[1]](#footnote-1)

The SCOTUS decision comes after the Trump administration proposed new federal regulations on June 15, 2020 redefining persecution and effectively ending asylum in the U.S. for thousands. Five devastating implications are listed below.

* **Disproportionate impact on Black and Indigenous migrants:** These shifting dynamics negatively impact most asylum seekers regardless of nationality and background, however, the circumstances surrounding unjust asylum rejections disproportionately impact Afro-descendant, Indigenous, Latinx migrants who make up a significant proportion of U.S. asylum seekers. Haitian, Somalian, Mexican, and Central American Asylum Seekers face high asylum denial rates. Indigenous Asylum Seekers from Central America often lack proper translation and understanding of political context in their asylum processes. Indigenous and Black migrants face disproportionate burdens of detention and deportation due to existing structures of racial discrimination inherent in American policing and carceral systems. Additionally, Indigenous and Afro-descendant migrants often originate from countries the U.S. has favorable, exploitative, and/or extractive diplomatic ties with, limiting the willingness to accept migrant fears of persecution as credible. These underlying realities coalesce in such a way that the now normalized characteristics of Mr. Thuraisiggiam’s unfair treatment - from language injustice to inadequate knowledge of political context - will be exacerbated for Indigenous and Afro-descendant migrants.
* **Insurmountable barriers built into the June 15 proposal:** The proposed rule builds on years of executive orders and regulations undermining principles of refugee protection and asylum. Under this proposal, which would change long-established definitions and standards, individuals will be sent back to persecution and harm, while non-refugees entitled to protection will be sent to places where they will face threat of torture and death. Per Human Rights Watch, the proposal “appears designed to create insurmountable procedural barriers, evidentiary burdens, and qualification standards” to target three groups: Central Americans fleeing gang violence; women fleeing domestic abuse; and lesbian, gay, bisexual and transgender (LGBT) people. That said, this regulation would set bars that would make it exceedingly difficult for all categories of people who qualify for and deserve asylum to be recognized as refugees and protected.”[[2]](#footnote-2)
* **Increasing denial rates due to inadequate officer knowledge:** Asylum seekers like Mr. Thuraisiggiam are often denied due to issues such as insufficient language interpretation for their cases and U.S. asylum officers’ inadequate knowledge of the political contexts they are fleeing. Recently, the problems of inadequate officer knowledge and sensitivity have only gotten worse, as the Administration has begun assigning border patrol agents to do the initial asylum screening interviews previously done exclusively by asylum officers. As expected, denial rates are dramatically higher when border patrol agents screen for asylum, which only further underscores the harm caused by SCOTUS eliminating judicial review protections.
* **Unprecedented increase in “expedited removals”:** Worse still, unprecedented numbers of people may soon face the threat of “expedited removal,” putting them on the same potential path as Mr. Thuraissigiam. Under a federal rule that took effect in late June 2020, ICE plans to exercise expedited removal nationwide, effectively allowing for deportation without a hearing unless someone passes the same initial screening interview where Mr. Thuraissigiam was denied his chance to seek asylum. ICE is intending to use expedited removal on anyone who can’t prove they’ve been in the U.S. for at least two years—whereas before, it was only applied to people very near the border who had very recently crossed.
* **Denial of basic rights and impact on American dissent:** In their decision, the Supreme Court majority looked to Congress’ passage of a 1996 act to justify its ruling denying migrants a right to be heard in federal court. Immediately, on June 26, Trump signed the executive order sending the Department of Homeland Security and other federal agencies to arrest protestors in cities across the U.S. The connection between a denial of basic rights to noncitizens and the next-day denial of basic rights to citizens is obvious and already in motion. Since the executive order, reports confirm that demonstrators such as in Portland, Oregon have been subject to federal agents employing violent and constitutionally dubious tactics such as firing munitions into crowds and kidnapping protestors via unmarked vans.

**Cultural & Political Context to the Case**

Due to the 1996 law targeting those detained close to the border, Mr. Thuraissigiam's asylum request was considered under "expedited removal." Mr. Thuraissigiam is of the historically persecuted ethnic Tamil minority group. Hundreds of thousands of Tamils have fled Sri Lanka due to persecution and atrocities committed prior, during, and after the Sri Lankan Civil War. Persecuted Tamil asylum seekers are targeted for multiple and often intersecting reasons related to minority ethnic status, caste, religion, sex, and sexuality. Multiple forces enact this targeting including state, militant, chauvinist and extralegal entities. Panchamar/Dalit and caste oppressed Tamils in particular are most impacted by these actors.

In Sri Lanka, Mr. Thuraissigiam was abducted in a van, beaten, and tortured before he escaped. Such van abductions by the Sri Lankan state are well-documented abuses against Tamils and dissenters, contributing to Sri Lanka’s overwhelming number of disappearances before, during, and after the war. Despite only having a population comparable to metropolitan New York City, according to Amnesty International, “Sri Lanka has one of the world’s highest number of enforced disappearances, with a backlog of between 60,000 and 100,000.”[[3]](#footnote-3)

Even though the Sri Lankan Civil War came to an end in 2009, targeted persecution of ethnic, caste, sex, sexuality, and religiously oppressed peoples persists. Decades of persisting violence have been devastating for the island nation. Human rights defenders and victims of past abuses remain subject to threats, intimidation, surveillance, and torture facilitated by Sri Lanka’s draconian Prevention of Terrorism Act. Recently, Human Rights Watch (HRW) stated that “respect for fundamental human rights in Sri Lanka fell in serious jeopardy following Gotabaya Rajapaksa’s election as president in November 2019.”[[4]](#footnote-4)

In January 2020, President Rajapaksa callously stated that people who disappeared during the Sri Lankan Civil War are dead. This coded language implied that investigations into missing persons are not necessary, taking Sri Lanka many steps backward in achieving justice and healing while atoning for prior atrocities. Furthermore, he mobilized his right-wing majoritarian base of support, who view ethnic, linguistic, and religious parity and co-existence as threats to Sri Lanka’s national sovereignty and proclaimed identity as a Sinhala-majority Buddhist nation. On August 5, 2020 the Rajapaksas’ political party achieved a landslide victory in Sri Lanka’s parliamentary elections, securing the majority needed to fulfill a campaign promise to amend the constitution in such a way that strengthens executive power. These recent developments risk permanently entrenching dynastic and authoritarian governance on the island.

While the U.S. often recognizes genuine concerns of Tamils fleeing Sri Lanka, Tamils have historically faced obstacles seeking asylum in the US. These obstacles include inadequate language interpretation, a system unfamiliar with Sri Lanka’s political context, and strict immigration policies that favor the U.S. government’s supportive relationship with the Government of Sri Lanka. These barriers have resulted in a much smaller and more dispersed U.S. Tamil population than in Canada or Europe. In Canada, Europe, and other regions, such unjust asylum decisions have been met by significant local community responses. However, for Tamils seeking refuge in the United States, an anemic local support system provides an easy win for an administration seeking to eviscerate the asylum system.

The SCOTUS decision recognized Mr. Thuraissigiam’s need of protection even though they did not permit any relief, underscoring that the final outcome of the case will be catastrophic for many people fleeing persecution.

**Demands: Halt Deportations, Defund, Invest**

Within the current hostile political environment targeting immigrants, we cannot trust ICE, CBP, the courts, or the asylum system to uphold the ethical responsibility articulated in the 1980 Refugee Act to ensure the safety of people fleeing persecution.

**The only ethical option within this context is to free all people from detention, halt all deportations, and defund law enforcement.**

By taking steps to defund law enforcement agencies (including but not limited to ICE, DHS, and CBP), Congress can help ameliorate the unjust targeting of migrant communities and funds can be reallocated towards initiatives ensuring greater safety for all people enduring and escaping violence.

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1. “CBP Turnbacks of Asylum Seekers at U.S. Ports of Entry,” Southern Poverty Law Center, Fall 2018, [link](https://www.splcenter.org/sites/default/files/cjr_poe_denial_fact_sheet.pdf) [↑](#footnote-ref-1)
2. Lauren Alder Reid, “Comment on proposed changes to procedures for asylum and withholding of removal; credible fear and reasonable fear,” Human Rights Watch, 7/15/20, [link](https://www.hrw.org/news/2020/07/15/comment-proposed-changes-procedures-asylum-and-withholding-removal-credible-fear) [↑](#footnote-ref-2)
3. “Sri Lanka: Fulfil the demands of the families of the disappeared,” Amnesty International, 2/14/20, accessed 8/5/20, [link](https://www.amnesty.org/en/latest/news/2020/02/sldisappearedfeb142020/#:~:text=Sri%20Lanka%20has%20one%20of,those%20suspected%20of%20criminal%20responsibility) [↑](#footnote-ref-3)
4. “Sri Lanka,” Human Rights Watched, accessed 8/5/20, [link](https://www.hrw.org/asia/sri-lanka) [↑](#footnote-ref-4)