

Immigration and Refugee Board of  
Canada

**Refugee Protection Division**



Commission de l'immigration et du statut  
de réfugié du Canada

**Section de la protection des réfugiés**

**RPD File # / No. dossier SPR VA5-02751**

Private Proceeding  
Huis clos

**Claimant(s)**

**Demandeur(s) d'asile**

XXXXX XXXXX XXXXX XXXXX

**Date(s) of Hearing**

**Date(s) d'audience**

January 9, 2007

**Place of Hearing**

**Lieu de l'audience**

Vancouver, B.C.

**Date of Decision**

**Date de la décision**

February 16, 2007

**Panel**

**Tribunal**

Michael A. Ross

**Claimant's Counsel**

**Conseil du demandeur d'asile**

Roger Bhatti  
Barrister & Solicitor

**Refugee Protection Officer**

**Agent de la protection des réfugiés**

Nil

**Designated Representative**

**Représentant désigné**

Nil

**Minister's Counsel**

**Conseil du ministre**

Nil

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The claimant, XXXXX XXXXX XXXXX XXXXX alleges that he is a citizen of Sri Lanka. He claims to have a well-founded fear of persecution from society and the police by reason of his membership in a particular social group – homosexuals. In addition, he claims to be a person in need of protection because he would be subjected personally to a danger of torture or to a risk to his life or to cruel and unusual treatment or punishment in Sri Lanka.

## ALLEGATIONS

The following is a synopsis of the claimant's story taken from his Personal Information Form (PIF)<sup>1</sup> and supplemented by the evidence at the hearing.

The claimant discovered that he was gay when he was 14 years of age. In 2003, when he was 21 years of age, he became involved with another young Muslim man named XXXXX. From June 2003 onward they were intimate. In early XXXXX, 2005 he and XXXXX were attending a gay beach party at XXXXX XXXXX. The police busted the party and arrested several participants including the claimant and XXXXX. They were taken to the police station where they were robbed. The claimant was hit on the head with a baton when he objected to their treatment. Some of the detained – although not the claimant – were forced to perform sexual acts on the policemen. The claimant sought medical treatment for his head injury when he was released the following day.<sup>2</sup>

As a result of this experience the claimant and XXXXX no longer went to the Beach. The police began blackmailing XXXXX. When XXXXX complained to the police chief he was detained overnight and the police informed his parents that XXXXX was gay. XXXXX father told the claimant's father. Each father was angry with his son and each father accused the other's son of having seduced his child.

XXXXX father began calling the claimant on his cell phone and threatening to kill him. Meanwhile, someone told the claimant's employer of five years that his employee was gay. The

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 6.

claimant was dismissed for “unprofessional conduct”.<sup>3</sup> At the same time his parents, convinced that he was straight but seduced by XXXXX, attempted to set up a marriage for him.

Depressed, the claimant fled to Canada where he claimed for protection.

## **Identity**

The claimant’s identity as a national of Sri Lanka is established by a copy of his birth certificate.<sup>4</sup>

## **DETERMINATION**

I find that the claimant is a Convention refugee, as he has a well-founded fear of persecution for a Convention ground in Sri Lanka. In arriving at this determination the panel has considered all the evidence submitted, his testimony at the hearing, and counsel’s submissions. My reasons follow.

## **ANALYSIS**

### **Credibility**

The panel found the claimant to be a very credible witness. There were no contradictions in his evidence, he did not exaggerate, and he answered questions with the sort of detail one would expect of someone who had actually lived the events.

His experience is backed up by comments made in the DOS 2005 Report<sup>5</sup> under the Section: Other Societal Abuses and Discrimination:

The law criminalizes homosexual activity between men and between women, but the law was not enforced. NGOs working on lesbian, gay, bisexual, and transgender issues did not register with the government. During the year human rights organizations reported that police harassed, extorted money or sexual favors from, and assaulted gay men in Colombo and other areas.

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<sup>3</sup> *Ibid.*

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 3, US *Country Reports on Human Rights Practices for 2005* “Sri Lanka”, Washington, D.C.

## Nexus

The panel finds that what the claimant fears constitutes persecution and that the persecution is linked to the Convention ground of membership in a particular social group – homosexuals.

## Persecution versus Discrimination

The central issue in this case, given the claimant's credibility, is whether what he would face upon return to Sri Lanka would constitute discrimination or persecution. While not conclusive, what the claimant has faced in the past provides a guide to what he might face should he return – although with one significant exception.

While in Sri Lanka the claimant was robbed and beaten by the police because he was gay. Other gays of his acquaintance had experienced the same treatment. For the claimant this was a single incident although documentary evidence suggests, as does the police blackmail of XXXXX, that it is not an uncommon happenstance.<sup>6</sup> As homosexuality is still against the law – in spite of many years' opposition from many quarters to it – and although the law is not enforced, it appears to have provided the police with a handy blackmail tool, especially given society's general abhorrence of homosexuality.<sup>7</sup>

The claimant's life was threatened by XXXXX father although no actual harm came to him. As noted, the documents confirm a general intolerance towards homosexuals in Sri Lanka. This fact is buttressed by the claimant's dismissal from a job he had held for five years and one in which he had been highly regarded.

The claimant and XXXXX are both Muslim and each family beat their sons for the disgrace visited upon the family name; in the claimant's case, the family wanted to marry him to set him on the right path.

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<sup>6</sup> Exhibit 3, LKA35952.E, 27 November 2000.

<sup>7</sup> Exhibit 3, pages 1—12 .

Counsel submitted that following SS. 54 and 55 of the *UNHCR Handbook*<sup>8</sup> what the claimant had faced constituted persecution rather than discrimination.

In reviewing what the claimant had faced while in Sri Lanka, the panel concludes that the police beating and robbery was a single event, that the threats from XXXXX father were just that – threats – as nothing actually happened over the many months that presented an opportunity for harm, and that the loss of his job was the loss of one job from one employer and that there may be other employers who would not act that way. The panel finds that what the claimant actually faced while in Sri Lanka constituted discrimination insufficient to amount to persecution.

However, as noted, the enquiry does not end there. The issue to be addressed is what would happen if the claimant were returned to Sri Lanka today? Into the equation must be added the claimant's new found freedom of expression in Canada and his desire to live as openly in Sri Lanka as he does here in Canada – this is the significant exception referred to earlier.

In *Appellant S*<sup>9</sup> the Australian High Court held that for a right to be a right one must be able to practise that right openly. We do not tell claimants that they have a right to practise their religion so long as they hide it. A hidden right is not a right. What does this mean with respect to openly living as a homosexual in Sri Lanka? It is clear that coming out is a great fear for gays in Sri Lanka.<sup>10</sup> There are many suicides amongst that group and the claimant himself confessed to having had suicidal thoughts before deciding to flee to Canada.<sup>11</sup>

There has been some movement towards openness in Sri Lanka but it is limited and the law against homosexuality still remains on the books. As to what openness meant to him, the claimant talked of being able to hold his lover's hand in public or kiss him. This is not a case where a claimant wants to practise behaviour openly that would be unacceptable if practised by

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<sup>8</sup> *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, reedited Geneva, January 1992.

<sup>9</sup> *Appellant S395/2002 v MIMA and Appellant S396/2002 v MIMA* (2003) 203 ALR 112. These cases involved homosexual Bangladeshis.

<sup>10</sup> Exhibit 3, *LKA35952.E*, 27 November 2000.

<sup>11</sup> Exhibit 1, narrative, paragraph 19.

heterosexuals. That kind of openness might well call for a different approach as each society will have its “manners” and they will differ.

It is in the accumulation of factors in this case that the panel finds that if the claimant returned to Sri Lanka he would face persecution. He might face a risk from XXXXX father which, if he did, he likely would not be able to get protection from. The same would be true if he displayed some homosexual characteristics in public that caused him to be beaten up. He would face alienation from his family and society at large. He may find his employment options severely limited. If he became known as a homosexual he might face blackmail from the police.

A person’s personality can play a role in this as well. This is a young man who appears to be from a reasonably well-to-do family. He was shocked at his treatment by the police when detained – he still is. It has had a troubling effect on him even leading him to ponder suicide. Some might handle the excesses of existence with a hardier attitude than the claimant, but he is hardly to be punished for his temperament.

The panel finds that if this claimant returns to Sri Lanka there is more than a mere possibility that he would face persecution at least cumulatively.

### **State Protection**

The panel has also considered whether state protection is available to the claimant and concluded that it is not. The claimant’s experience, the experience of his gay friends and the documents all make it clear that the police are strongly homophobic and use the existence of the law to blackmail homosexuals as was the case with XXXXX.

### **Internal Flight Alternative**

Finally, the panel has considered whether a viable Internal Flight Alternative (IFA) exists for the claimant, as this issue was raised with him both before and at the hearing. The claimant lived near Colombo – the area of Sri Lanka probably most secure for gays.<sup>12</sup> If he cannot live safely there, the panel does not think he could live safely elsewhere in Sri Lanka.

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<sup>12</sup> Exhibit 3, *LKA35952.E*, 27 November 2000.

**CONCLUSION**

The Panel found the claimant to be a credible witness. As a result, the panel is of the opinion that there is more than a mere possibility that should the claimant be returned to Sri Lanka he would face persecution. For these reasons, I conclude that XXXXX XXXXX XXXXX XXXXX is a Convention refugee.

“Michael A. Ross”

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Michael A. Ross

16 February 2007

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Date

**REFUGEE PROTECTION DIVISION - PARTICULAR SOCIAL GROUP - SEXUAL ORIENTATION - HOMOSEXUALS - DISCRIMINATION - CUMULATIVE GROUNDS - PERSECUTION - STATE PROTECTION - INTERNAL FLIGHT ALTERNATIVE - MALE - POSITIVE - SRI LANKA**