

**071411578 [2007] RRTA 172 (9 August 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071411578

**COUNTRY OF REFERENCE:** Sri Lanka

**TRIBUNAL MEMBER:** Jennifer Ciantar

**DATE DECISION SIGNED:** 9 August 2007

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Sri Lanka arrived in Australia and then applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant then applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of 'refugee'**

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant was granted a Temporary visa and he arrived in Australia as a holder of that visa. He departed Australia a week after arriving and he returned to Australia one week later.

On his visa application the applicant claims to have left Sri Lanka because of his race and religion. He claims to be Buddhist, Sinhalese and gay. He states that the Tamil people hate the Sinhalese. When he was in Sri Lanka he was bullied many times because he was Sinhalese. They hate him. They asked for money from him and threatened to kill him. Being gay as a Buddhist is impossible. If the government finds out that the applicant is gay he will be imprisoned for 10 years minimum, as this is the law. The government has recently imprisoned many gay people. The applicant fears he will be imprisoned if he returns as he is gay. Being gay in Sri Lanka is taboo. The applicant cannot hide his lifestyle because sooner or later people will find out and report him to the government. The applicant is middle aged and single. The applicant believes that the monks influence the government. They formed the political party and they are in government so they are very powerful. They can easily identify gay people and put them in jail. The applicant states that he cannot hide his sexual preference and sooner or later they will find out he is gay. Also, he will miss his boyfriend. The government will not protect him because of the constitution and law in Sri Lanka and the government wants to punish gay people and will not protect him.

The delegate noted that the applicant feared persecution on account of his race, Sinhalese, and his Buddhist religion. The delegate concluded that there was no information that the applicant would be at risk of persecution on account of his religion, Buddhism. The delegate concludes that notwithstanding the deteriorating human rights situation in Sri Lanka the delegate was not satisfied that the risk of the applicant being persecuted on account of his race or religion was more than speculative and is not a well founded fear. The applicant has not experienced persecution in the past and he comes from an area dominated by Sinhalese. The chance of the applicant being abducted or kidnapped is not more than remote. The applicant was not satisfied that the applicant has a well founded fear on account of his race or religion.

The delegate accepted that the applicant is homosexual and that homosexuals in Sri Lanka can be classified as a particular social group. The applicant has not identified that he has experienced persecution in the past on account of his homosexuality and the delegate was not satisfied that the applicant's fears are well founded. Available information indicates that homosexuality is criminalised behaviour but the law is not enforced and societal trends towards homosexuals have changed in recent years. Gay rights groups operate openly and are able to hold public demonstrations without censure or condemnation. Although the applicant

may be at risk of harassment the delegate finds there is no evidence that the applicant would experience serious harm amounting to persecution.

The applicant provided the Tribunal with additional documents regarding the treatment of gay people in Sri Lanka and proposed anti-conversion laws. The applicant also provided a Baptism Certificate, which certifies that the applicant was baptised into the Catholic Church recently.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from Person A.

The applicant's oral evidence can be summarised as follows. After he came to Australia his temporary visa expired and he was here unlawfully for a while. The Department located him when he was employed at Organisation A. He had been in Australia for a stated purpose but he ran out of money to pay certain fees.

The applicant began his relationship with Person A in early (year). They have resided together since late last year. The applicant provided the Tribunal with his tenancy agreement in joint names. The applicant stated that he did not lodge a partner visa application as he had not thought of this but he also said that he and Person A had not been residing together for 12 months.

The Tribunal noted that on his claim the applicant had stated that he was a Buddhist but he has recently provided evidence that he has converted to Catholicism, and his religion would be problematic. The applicant stated that there have been bashings, churches have been bombed and Buddhist monks who are powerful and support the government, threaten Christians, especially gay Christians. The applicant stated that he studied Catholicism from late (year) and he was baptised recently. The applicant's partner and partner's parents are Catholics. The applicant has found Catholics to be more accepting of gay people and God will forgive them. The Tribunal commented that the Catholic Church is not explicitly supportive of gay people. The applicant stated that his experience has been positive. His sponsor for the conversion was his partner's family member. He and his partner attend church every weekend with his partner's family. The applicant's partner's family live in Sydney.

The Tribunal asked the applicant what problems he fears if he returns to Sri Lanka. The applicant stated that his parents are Buddhists and they abandoned him when they found out that he was gay. This was in (year). In (year) the applicant found out from a friend that his father had died and the applicant returned to Sri Lanka to attend his father's funeral. However, the applicant's family shouted at him and would not allow him to attend the funeral. The applicant believes that his family does not like him.

The applicant stated that he decided he was gay when he was about (age) and he had a boyfriend at this time; the relationship lasted 8 or 9 years but was conducted in secret. The applicant did not suffer any consequences as a result of this relationship. However, in (year), the applicant's parents found out that he had slept with someone and they threatened him. The applicant had to move to his relative's home for about eight months prior to coming to Australia. His relative did not really accept that the applicant was gay but supported him as no one else would. The applicant tried to keep his sexuality a secret. The applicant stated that gay people can be jailed in Sri Lanka. The Tribunal commented that country information indicates that although homosexuality is illegal in Sri Lanka, the law has not been enforced since the 1950s. The applicant stated that he recalls that a foreigner was jailed for having

relationships with boys but he could not find a record of this on the Internet. The applicant is aware that many gay persons are abandoned by their families and they have to live alone in Colombo and pretend to be heterosexual. The applicant stated that it is difficult to find employment if people know the person is gay.

The applicant stated that he has heard of gay people being bashed by the police and put in the lock-up. The Tribunal commented that the applicant seems to primarily fear social isolation but this might not amount to persecution or serious harm. The applicant reiterated that in Sri Lanka the Buddhist culture predominates and Buddhist monks influence the government and they do not accept gay people. The applicant believes that if he returns to Sri Lanka he will not have a life. Everyone knows that he is gay because when he returned for the funeral his family shouted at him and he could not face them now. The Tribunal asked the applicant if he could not relocate to Colombo. The applicant stated that everyone knows everyone and he would still be unable to find employment in Colombo. The applicant stated that he has not had any communication with his family in recent years. He tried to call them but they cut him off.

The Tribunal asked the applicant what problems Catholic people experience in Sri Lanka. The applicant stated that Buddhists attack the Catholic Church and his family are Buddhists. The applicant believes there are plenty of extremist groups in Sri Lanka. The Tribunal asked the applicant how his nationality is a problem for him, as he claims in his application form. The applicant stated that he worked in the northern area of the country and Tamil people disliked Sinhalese people. He worked in a settlement area that was attacked and many Sinhalese people were attacked. This is the area where the applicant was employed. One of the applicant's colleagues was killed at work. The applicant stated then identified the type of work that he did.

The applicant stated that he had not personally had problems but other gay persons did as even though they had met secretly, the police still located them. The applicant stated that emergency laws are passed every three months and the police have become increasingly powerful and they can jail people without evidence. The applicant stays in contact with three school friends who are not gay, and they have told him that people disappear for political reasons.

The applicant stated that all his family are members of a political party which is in opposition to the Buddhist monks and the extremists. It is known that his family votes for this party. Once when the applicant was very young his father was transferred to another area and the opposing party once threw stones at the applicant's house.

The applicant stated that the main reason he fears persecution now is because he is gay and a Christian. The applicant also stated that currently he is not employed and he helps support his partner's relative.

The witness told the Tribunal that he met the applicant perhaps in (year) and they have lived together since late last year. The applicant converted to Catholicism recently. The witness is financially supporting the applicant. The applicant has told the witness that he is frightened about returning home as he is scared of being jailed. Sri Lanka is not a good country for gay people and the applicant's family has abandoned him. The witness stated that he has had failed relationships in the past and he has very strong feelings for the applicant.

## INFORMATION FROM OTHER SOURCES

### **US Department of State 2006, *Country Reports on Human Rights Practices 2005 – Sri Lanka*, 8 March, Section 5 Other Societal Abuses and Discrimination**

INTERNET: <http://www.state.gov/g/drl/rls/hrrpt/2005/61711.htm>

RRT: \\NTSSYD\REFER\RESEARCH\usdos\2005us\_rep\html\SriLanka2005.htm

The US Department of State's *Country Report on Human Rights Practices* was published on 8 March 2006 and provides information on the events of 2005. It provides the following information on homosexual activity in Sri Lanka:

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.

### **UK Home Office 2005, *Country of Origin Information Report – Sri Lanka*, October**

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The UK Home Office *Country of Origin Information Report* was published in October 2005, and includes references to a number of sources, including *Agence France Presse*, *BBC News*, International Lesbian and Gay Association and the US Department of State. Please note that the sources referred to are dated 31 July 2000, 4 September 2000, 28 February 2005 and 20 May 2005. The UK Home Office provides the following information on homosexuality in Sri Lanka:

6.245 The USSD 2004 noted that:

“Penal Code Section 365a criminalizes homosexual activity between men and between women; however, it 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 from, and assaulted gay men in Colombo and other areas. There was no official discrimination against those who provided HIV prevention services or against high-risk groups likely to spread HIV/AIDS; however, there was some societal discrimination against these groups.” [2d] (Section 5)

6.246 As recorded in the International Lesbian and Gay Association (ILGA) World Legal Survey website “Homosexual acts between men, regardless of age, are prohibited under Section 365a of the Penal Code with a penalty of up to 10 years imprisonment.” [29] As reported in an AFP news release dated 4 September 2000 (reported in the website of Aegis, the AIDS Education Global information System):

“The government agreed [in 1995] to revoke the 1883 Penal Code which outlawed sexual relations between men, but instead of decriminalising homosexuality, the authorities roped women in under the archaic laws. The Victorian laws introduced under British colonial rulers did not acknowledge that women could have sex with each other and therefore lesbians could not be prosecuted. However, with the government substituting the word ‘males’ with the gender-neutral ‘persons’ in the 1995 amendment to the penal code, women too face anti-homosexual regulations.” [62]

6.247 As reported in one BBC News article dated 20 May 2005:

“Companions on a Journey is a drop-in centre in Colombo that’s become a lifeline for Sri Lanka’s gay community.... When he [Sherman de Rose, the founder of Companions on a Journey] started the group last year, he used to receive death threats. It got so bad, he says, he had to leave the country for a while until religious groups, political leaders, and some sections of the media, the most vehement opponents to his organisation, calmed down. ‘But attitudes have begun to change,’ he says.... One of the most difficult things for gay men and women in Sri Lanka is simply coming to terms with their homosexuality. Given the social intolerance, it is very difficult, Sherman says.... Companions now have two more drop-in centres in Sri Lanka, one in Kandy and one in Anuradhapura. They put out a monthly newsletter and every full moon they organise a big party... Working with a network of lawyers, they are trying to persuade lawmakers to change Sri Lanka’s criminal code, which outlaws homosexuality. ‘There is still a lot of opposition,’ he says, ‘and we still aren’t even close to Europe or the United States when it comes to gay rights.’” [9fi]

**UK HOME OFFICE 2007, ‘COUNTRY OF ORIGIN INFORMATION REPORT: SRI LANKA’, UK HOME OFFICE WEBSITE, 11 MAY [HTTP://WWW.HOMEOFFICE.GOV.UK/RDS/PDFS07/SRI-LANKA-110507.DOC](http://www.homeoffice.gov.uk/rds/pdfs07/sri-lanka-110507.doc) - CHRISTIANS**

- 19.16 As stated in the USSD Religious Freedom Report 2006, 8 per cent of the population is Christian and Christians tend to be concentrated in the west of the country. “Almost 80 percent of Christians were Catholics, with Anglican and other mainstream Protestant churches also present in the cities. Seventh-day Adventists, Jehovah’s Witnesses, Methodists, Baptists, Dutch Reformed, Pentecostal, and the Assemblies of God were also present. Evangelical Christian groups have grown in recent years, although membership was still small.” [2a] (Section I)
- 19.17 “There was some harassment of Christians and attacks on their property and places of worship by Buddhist extremists opposed to conversion. The police investigated many of these incidents when complaints were made, but were occasionally reluctant to pursue criminal charges against the suspected perpetrators, some of whom were Buddhist monks. Law enforcement officials believed that a majority of the attacks were conducted by a small number of extremist Buddhists. By early 2005, several alleged attackers had been arrested. At the height of the attacks on Christian churches in 2005, several government leaders, including then-President Kumaratunga and then-minister of Christian affairs, publicly denounced the attacks.” (USSD, International Religious Freedom Report 2006) [2a] (Section II)
- 19.18 “During the period covered by this report, Christians, both of mainstream denominations and evangelical groups, sometimes encountered harassment and physical attacks by some local Buddhists who believed they were threatened by these groups. Some Christian groups occasionally complained that the Government tacitly condoned harassment and violence aimed at them. In some cases, the police response was inadequate, and local police officials reportedly were reluctant to take legal action against individuals involved in the attacks.” (USSD, International Religious Freedom Report 2006) [2a] (Section III)
- 19.19 “The National Christian Evangelical Alliance of Sri Lanka stated that during the reporting period, there were approximately seventy-five attacks on Christian churches, organizations, religious leaders, or congregants, 90 percent of which were reported to the police. The U.S. Embassy confirmed some of these attacks. Allegations by Buddhist extremists of Christian involvement in ‘unethical’ or forced conversions continued to be a source of tension between the two communities. Christians denied

this charge, responding that people undergo conversion of their own free will. There were reports that members of some evangelical groups made disparaging comments about Buddhism while evangelizing. Some groups also alleged that Christians engaged in aggressive proselytism and took advantage of societal ills such as general poverty, war, and lack of education. Christians countered that their relief efforts were in earnest and were not targeted at converting aid beneficiaries.” (USSD, *International Religious Freedom Report 2006*) [2a] (Section III)

19.20 The CSW (Christian Solidarity Worldwide) Sri Lanka Visit Report - May 2006 Friday 26 May - Friday 2 June 2006 (dated 26 May 2006) noted:

“Hopes that proposed anti-conversion legislation in Sri Lanka had been shelved and that anti-Christian violence had dissipated have unfortunately proven false. A revised anti-conversion bill has passed its second reading and is currently being considered by a Standing Committee in Parliament, before a final reading and vote. In the first half of 2006, a total of 30 incidents of violence against Christians have been reported by the National Christian Evangelical Alliance of Sri Lanka. In recent months, pastors in southern Sri Lanka, in the area around Galle, have received death threats. There are also allegations that there is a hit list containing the names of several pastors as targets, although the evidence for this is anecdotal and verbal, and no copy of such a list has been made available.” [12] (Executive Summary)

19.21 “In 2005, the number of incidents of violence against Christians fell significantly. However, this year there has been a rise in violence, with a total of 30 reported incidents in the first five months, and an increasing number of threats made. In a meeting with approximately 50-60 pastors of different denominations, including Anglican, Methodist, Dutch Reformed, Assemblies of God, Foursquare Gospel Church and other evangelical groups, including pastors from LTTE-controlled areas, 20-25 pastors said that they or their church members had suffered physical persecution, including arson, assault and destruction of homes and church buildings.” [12] (CSW Sri Lanka visit report dated 26 May 2006) (Violence, Threats and Intimidation: Interviews with Victims)

## FINDINGS AND REASONS

The applicant arrived on a validly issued Sri Lankan passport in his own name. The Tribunal accepts that he is a national of Sri Lanka and is outside his country of nationality.

The Tribunal accepts that the applicant is homosexual and Catholic and Sinhalese. The applicant is claiming that he will be persecuted because of his sexual orientation, his religion and his race. The Tribunal first considered whether homosexual men in Sri Lanka constitute a "particular social group" within the meaning of the Convention.

The meaning of the expression “for reasons of ... membership of a particular social group” was considered by the High Court in *Applicant A’s* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...

Whether a supposed group is a “particular social group” in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious

norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

Whether a group is a "particular social group" in the relevant sense in a particular society depends on the circumstances. The Tribunal accepts the independent evidence cited above that notwithstanding the fact that there is a degree of discreet male to male sexual activity in Sri Lanka and to a certain extent this is tolerated in young unmarried men, homosexuality in Sri Lanka is not condoned. The Tribunal also accepts that homosexuals in Sri Lanka are seen as bringing shame on the family and the community. The Tribunal notes there is an organised gay movement in Sri Lanka and homosexuals in Sri Lanka are perceived to have attributes that unite them as a group, namely "shameful" homosexual activities, and distinguish them from society as a whole. They identify as a group and meet in certain places.

The Tribunal refers to *MMM v MIMA* (1998) 90 FCR 324 at 330 per Madgwick J and *F v MIMA* [1999] FCA 947 at [11] per Burchett J where it was accepted that homosexuals could constitute a "particular social group". See also *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 265 where McHugh J states: "If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status". In *MIMA v Gui* [1999] FCA 1496 (Heerey, Carr & Tamberlin JJ, 29 October 1999) it was observed that homosexuals in Shanghai constituted a "particular social group". Further *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 the High Court also accepted that homosexuals could constitute a particular social group.

On the basis of the independent evidence, the Tribunal is satisfied that homosexuals are a cognisable group in Sri Lankan society. They are united by a common element, their sexuality, and this is the element that sets them apart as a group from society as a whole. Further homosexual activity is proscribed by criminal law and condemned both by the religious and social leaders in that country. The Tribunal accepts that homosexuals in Sri Lanka constitute a particular social group for the purposes of the Convention.

The Tribunal must consider whether the applicant faces a real chance of persecution for reasons of his membership of this particular social group. The Tribunal refers to the country information quoted above. The Tribunal accepts the independent evidence that homosexuality in Sri Lanka is illegal, and that known homosexuals are liable to serious punishment under the Penal Code. However, it notes that no prosecutions have been launched since the 1950s. Despite this, the Tribunal accepts that homosexuals are vulnerable to physical mistreatment and harassment. The Tribunal notes the law does not appear to be vigorously enforced, but there is evidence that known homosexual men are liable to be blackmailed and subjected to physical abuse by the police.

The applicant's evidence was that when he lived in Sri Lanka he modified his behaviour by hiding his sexuality but after his family found out, he had to leave the family home and stay with a relative, and then he came to Australia. He has attempted to reconcile with his family, without success, and the Tribunal accepts that the applicant's immediate family now shuns him because of his sexuality. The applicant claims that his family's attitude is indicative of the attitude of the community towards homosexuals and if he returned to Sri Lanka, even if he relocated, he would be shunned, he would be vulnerable as a target of harassment and he would find it hard to obtain employment.

The Tribunal refers to, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (9 December 2003) where Justices McHugh and Kirby stated:

In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct.

The Tribunal accepts the applicant modified his behaviour in order to avoid being harmed for a Convention reason. The Tribunal accepts that the only way the applicant could avoid further harm would be to continue to modify his behaviour, something he is not prepared to do. Based on the country information quoted above, the Tribunal finds that the applicant faces a real chance that he will be harmed for his membership of the particular social group of homosexuals and that his fear of persecution is well-founded.

The Tribunal has given consideration to whether the harm the applicant fears emanates from a private source. The applicant primarily fears physical harm, harassment, social isolation, discrimination in employment or the threat of harm from his family or from general members of the public, which are the actions of private individuals. To be persecuted within the Convention the state must either encourage, or be powerless, or appear to be powerless, to prevent that private persecution. The definition is concerned with a fear of persecution that is officially tolerated or uncontrollable by the authorities. Although the persecution the applicant fears emanates from a private source, as the applicant is homosexual and homosexuality is illegal, he is leaving himself open to prosecution or more likely, based on the country information which indicates that police harassed, extorted money or sexual favours from homosexual men, and also assaulted homosexual men in Colombo and other areas, a risk of abuse by the authorities if he seeks their aid in obtaining protection from his attackers. The Tribunal is satisfied that the applicant would be unable to access adequate state protection and this failure of state protection would also be for reasons of a Convention reason. The Tribunal finds that the persecution is for reasons of his membership of a particular social group, namely homosexual men, and the applicant is unable to access adequate state protection from the Sri Lankan authorities. Therefore the Tribunal finds that the applicant has a well founded fear of persecution for a Convention reason.

The Tribunal accepts that the adverse attitude to homosexuality is prevalent throughout the country and that it would not be reasonable for the applicant to relocate. The Tribunal is also satisfied that the applicant does not have a legally enforceable right to enter and reside in a third country either temporarily or permanently. The Tribunal finds that the applicant has a well founded fear of persecution for a Convention reason, namely for reasons of membership of a particular social group of homosexual men in Sri Lanka and he is a refugee within the meaning of the Convention. In light of this finding, it is not necessary for the Tribunal to make findings in respect of the other claims made by the applicant.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.  
Sealing Officers ID: PRRTIR