



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA

IAA reference: IAA18/04833

Date and time of decision: 30 November 2018 20:39:00

A Harrison, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. On 16 March 2017, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). He claimed to be from Sri Lanka, to have lived most of his life in [Country 1], but to have no right to return to [Country 1]. He claimed to fear persecution in Sri Lanka for reasons of his homosexuality, his father's past involvement with the Liberation Tigers of Tamil Eelam (LTTE) and he will be perceived to have supported the LTTE, as a Tamil male from the north, his long absence from Sri Lanka, and as a returning asylum seeker from a wealthy country.
2. On 24 April 2018, a delegate of the Minister for Immigration refused to grant the applicant a SHEV because the delegate found he was not a person in respect of whom Australia has protection obligations.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 17 May 2018, the IAA received a submission on behalf of the applicant. All of it addresses the delegate's decision and findings; it is not new information, and I have had regard to it.
5. I have considered two new country information reports: a report by the Australian Department of Foreign Affairs and Trade (DFAT) on Sri Lanka published on 23 May 2018,<sup>1</sup> a month after the delegate's decision which updates the DFAT report on Sri Lanka dated 24 January 2017 which was before, and relied upon by, the delegate. The report has been specifically prepared for the purpose of assisting in determining protection obligations; and a report by the UK Home Office published on 1 October 2018,<sup>2</sup> about five months after the delegate's decision. This report provides an assessment of the general situation in Sri Lanka for gay men, lesbians, bisexuals, trans and intersex persons (LGBTI persons), as well as those perceived as such, to assist with the assessment of claims to fear persecution or serious harm by the state and/or non-state actors because of the person's actual or perceived sexual orientation and/or gender identity or expression. In addition to being recent country information, there is no other in-depth and subject specific report before me in relation to the treatment of LGBTI persons in Sri Lanka to consider the applicant's claims against. I am satisfied there are exceptional circumstances to justify considering this new information.
6. On 30 October 2018, I invited the applicant to provide any comments in writing on the two new country information reports. On 12 November 2018, the applicant provided a written response to my invitation to comment. In summary, the applicant reiterated the information contained in his 17 May 2018 submission to the IAA, and provided a five page statutory declaration and responded to the information contained in the two new reports. Most of the response is not new information, and I have had regard to it. The applicant argued the information in the two new reports supports his claimed fear of persecution if returned to Sri Lanka as a homosexual Tamil man, and as a Tamil man who left the country at about [age] year of age and has never returned to Sri Lanka, and he gave reasons why this would be the case

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<sup>1</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>2</sup> UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

based on his existing claims for protection. In particular, in paragraphs 18 to 35 of the applicant's statutory declaration he explains why the DFAT and UK Home Office information reinforces his fears, and claims there is no way he could form openly gay relationships with other men, he would be at risk of being homeless, jobless and struggling to survive if he was perceived as homosexual or disclosed his sexual identity, he claims the police are the worst offenders, and he would never seek protection from the authorities. The applicant's response is an elaboration on his existing claims, and argument based on new country information, and I have had regard to it.

7. The only new information from the applicant is the brief reference to recent political changes in Sri Lanka with Mahinda Rajapakse becoming the Prime Minister. The applicant stated that his parents remain afraid to return even now, not only because of their fears from the past but also due to the recent political changes. The applicant stated Rajapakse was the President of Sri Lanka during most of the war and responsible for the human rights abuses against Tamils. Most Tamils do not believe that things have changed in Sri Lanka since the war ended and with Mahinda's return, they believe that the situation will only get worse. While the applicant's opinion on this matter is relevant, I am not satisfied this new information from the applicant is significant. I am not satisfied there are exceptional circumstances to justify considering this new information from the applicant. I am not satisfied s.473DD(a) is met.

#### **Applicant's claims for protection**

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8. The applicant's claims can be summarised as follows:
  - He is a Sri Lankan Tamil from [Town 1], Northern Province. He does not have [Country 1] citizenship or a right to enter and reside in [Country 1]. His parents see themselves as stateless. He does not have Sri Lankan citizenship.
  - His mother and father were born in Sri Lanka and even though they have Sri Lankan birth certificates they have never had a Sri Lankan National Identity Card or Sri Lankan passport. His grandparents were born in [Country 1] and brought to Sri Lanka as labourers and became stateless. His grandfather had no rights or Sri Lankan citizenship.
  - Due to the communal riots in July 1983, his family were attacked by the Sinhalese mobs. They were displaced from [Town 2] and resettled in [Town 1].
  - The LTTE offered his father a job, so he joined them and worked for the LTTE [specified section]. There was heavy fighting between the LTTE and the Sri Lankan armed forces. His father was arrested and seriously assaulted by the military. He was released after about two to three days.
  - His father then took the family to [Country 1] by boat where they lived as refugees in several Sri Lankan refugee camps. He was [age] year old at the time. They have never returned to Sri Lanka because of his father's involvement with the LTTE.
  - He was sexually abused as a child for two years by [number] older [relatives] while living in the refugee camp in [Country 1].
  - As a young adult he was caught having sexual relations with a male friend in the [place] and was warned to stop.
  - He and his friend were caught again being sexually intimate while at home. The neighbours were angry and yelled at them, and threatened to tell people.

- He left the refugee camp and went to [City 3]. His parents were told what he had done and were humiliated. A month later, he left [Country 1] illegally by boat to Australia.
- He is homosexual. He could not live freely as a homosexual person in Sri Lanka without being physically attacked or killed by violent people in society who do not accept him. The Sri Lankan authorities would arrest him and torture him in prison because of his homosexuality. He cannot openly express his sexuality and have homosexual relationships in Sri Lanka because it is seen as shameful and he will be attacked or killed.
- His personal details were published on the Department of Immigration's website as a result of a data breach, and the Sri Lankan authorities may already know he is in Australia.
- If returned to Sri Lanka as a failed asylum seeker, they will have all the details about him, he will be questioned about his long absence, about his father's involvement in the LTTE, he may be arrested on suspicion that as a young Tamil male from the north he has returned to reform the LTTE or take up activities for Tamil people, and he is financially able to do so given he has lived in Australia. He will be harmed by the Criminal Investigation Department (CID) and the Sri Lankan Army (SLA) for perceived LTTE support because of his father's involvement.
- He has no family in Sri Lanka, no housing or employment prospects. He only speaks Tamil and will be forced to return to the north given it is a Tamil area. He will not get protection from the police. He will not be safe anywhere in Sri Lanka. The CID will monitor him and find him.

### **Factual findings**

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9. I accept the applicant is a Sri Lankan Tamil and he was born in [City 1] and lived in [Town 1], Northern Province, Sri Lanka, until the age of [age] when his family moved to the southern [Country 1] state of [State 1]. I accept the applicant's claimed identity based on his identity documentation, which includes copies of his birth certificate and that of his father and mother.
10. According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2011, there were 69,000 Sri Lankan refugees living in 112 camps and a further 32,000 persons residing outside camps in the southern state of Tamil Nadu, India.<sup>3</sup> According to DFAT, Sri Lankan Tamils living in have no pathway to Indian citizenship.<sup>4</sup>
11. I accept that from 1990 until 2013 the applicant lived in refugee camps in [State 1]. The applicant gave documentation which indicates his residence in refugee camps in [State 1] with his family from 1990, and his education in [State 1], and [City 2] in Southern [Country 1]. The applicant claimed his grandparents were born in [Country 1] and brought to Sri Lanka as labourers, to work in [specified workplaces], they became stateless, and his grandfather had no right to Sri Lankan citizenship. However, the birth certificates the applicant gave for his parents indicate his grandparents were born in Sri Lanka, and their ethnicity is recorded as [Country 1] Tamil. Given country information about Sri Lankan Tamils not having a pathway to [Country 1] citizenship, and the applicant's parent's birth certificates recording that they were born in Sri Lanka and so were their parents, I am prepared to accept the applicant does not have a legal right to [Country 1] citizenship, and he does not otherwise have a right to enter and reside in [Country 1]. However, the evidence before me does not indicate the applicant is stateless or

<sup>3</sup> UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

<sup>4</sup> [Source deleted].

that he does not have a nationality.<sup>5</sup> I am satisfied the applicant is a Sri Lankan national, based on his birth certificate and the birth certificates for his parents, and that Sri Lanka is the applicant's receiving country.

12. The applicant's claims relating to what happened to his family in Sri Lanka are based on what he says his parents told him, and his father told him why he could not return to Sri Lanka while the applicant was in immigration detention in Australia. I have accepted the applicant and his family lived in refugee camps in [State 1] from 1990. I am prepared to accept the applicant's family were displaced from [Town 2] and resettled in [Town 1]. I am also prepared to accept the LTTE helped the applicant's family and offered his father a job, so he joined them and worked for the LTTE [specified section]; and the applicant's father was arrested and assaulted by the Sri Lankan military, and released after about two to three days. During the SHEV interview, the applicant said that in 1990, his father went to visit a relative in [City 1], and was arrested and he claimed he was tortured, thrown somewhere, and helped by some people to reach home. The applicant said his father was too scared to give him a lot of detail, but his father was suspected of being LTTE and released after three days. When he was released he was warned not to have any connections with the LTTE or he would be killed. Based on the applicant's evidence, I am satisfied the applicant's father was an employee of the LTTE in [a specified section] in the 1980s, and was not an LTTE combatant. I am satisfied that while the applicant's father was detained by the Sri Lankan military for three days and mistreated in 1990 based on perceived LTTE involvement, he was released with a warning not to get involved with the LTTE, indicating he was not considered a significant player and was not of ongoing interest.
13. I am prepared to accept the applicant and his family never returned to Sri Lanka. The applicant claimed he has no family members living in Sri Lanka, and his family do not have any remaining contacts with people in Sri Lanka. The applicant claimed during the SHEV interview that his mother had [number] siblings, and only had contact with [number], and those [number of] siblings went to [Country 1] at the same time as his family, as did his father's [number] siblings. The applicant claimed not to have any knowledge of his mother's other siblings. The applicant's evidence relating to his mother's siblings was not convincing. However, I am prepared to accept the applicant does not have close contact with any relatives living in Sri Lanka.
14. I accept the applicant was sexually abused as a child for two years in [Country 1] in the refugee camp by [number] older [relatives]. The applicant detailed this claim in his SHEV application, and while he was not questioned about it during the SHEV interview, this claim was briefly discussed in the context of the applicant's claim to have realised he is homosexual.
15. I accept that as a young adult the applicant was caught by other men while he was having sexual relations with a male friend in [a location] and he was warned to stop. I also accept the applicant was caught again being sexually intimate with his friend, this time at home and by his neighbours and they got angry and started yelling saying "what are you doing", and "we will tell people", then they left. The applicant has consistently and convincingly recounted these events. The applicant spoke in the SHEV interview about his friend who he said he was very close with for [number] years, and about their mutual attraction and sexual intimacy. The applicant described the incident when he claimed he and his friend were caught by neighbours while being sexually intimate, and the neighbours started shouting at them. The applicant claimed he was scared they would gather and hit him and kill him, which is when he left the refugee camp, without permission and went to a friend's place outside of the camp, and left

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<sup>5</sup> See also information about stateless persons in: US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

the next day by bus for [City 3]. However, based on the applicant's evidence I am not satisfied his neighbours in the refugee camp, who shouted at him and his friend when they caught them during a moment of sexual intimacy were intent on assaulting and killing the applicant.

16. I accept the applicant left the refugee camp and went to [City 3], [Country 1]. In the SHEV interview, the applicant said this happened in mid-April 2013. The applicant said he had no possessions with him, not even a change of clothes or any money. The applicant described going to [City 3] where he stayed for a month, and being assisted to leave [Country 1] by a wealthy friend who is an [Country 1] citizen. I also accept the applicant's parents were told what he had done, and while they were humiliated, they did not reject him.
17. I am satisfied the applicant left [Country 1] in May 2013 illegally by boat, and arrived in Australia in June 2013.
18. I note the delegate did not accept the applicant was homosexual. The delegate was not convinced by the non-verbal evidence the applicant gave to support his claim, and did not accept he frequented gay clubs in [Australia], because he could not say where the clubs were or give the names of any such clubs. When questioned by the delegate, the applicant gave the names of a couple of venues, which were not known to be gay clubs. The applicant also claimed to have visited hotels and paid for sex with men. However, the answers the applicant gave during the SHEV interview about his activities in Australia do not outweigh his other evidence, and I consider the information to be immaterial. Having regard to the applicant's other evidence, which has been consistent and convincing, I accept he is homosexual.
19. I accept the applicant's personal details were published on the Department of Immigration's website and as a result the Sri Lankan authorities may already know he is in Australia. There is a copy of a letter before me from the Secretary of the Department to the applicant dated [in] March 2014, about unauthorised access of personal information, which states that the department unintentionally enabled access to some personal information about people who were in immigration detention on 31 January 2014, and this information was accessible online for a short period of time before it was removed from the department's website. The Secretary stated that the information was not visible as part of the report and was not easily accessible. However, as the applicant was in immigration detention [in] January 2014, it was stated that his personal information may have been accessed through the report. The information that was possible to access was the applicant's name, date of birth, nationality, gender, details about his detention (when he was detained, reason and where), and if he had other family members in detention. The information did not include the applicant's address (or any former address), phone numbers or any other contact information, or any information about any protection claims or health information. The delegate was satisfied that as a consequence of the department's 2014 data breach, the authorities (or pro-government proxies) in Sri Lanka may have learned of the applicant's detention in Australia [in] January 2014, and be aware he travelled to Australia as an Irregular Maritime Arrival (IMA) and deduced the applicant did so for the purpose of seeking asylum. I agree with the delegate, and I am satisfied the applicant's personal information may have been accessed by Sri Lankan authorities (or pro-government proxies), and that those inferences may have been drawn.
20. After the SHEV interview, in a letter dated 26 March 2018, the delegate put to the applicant that he had concerns that the travel history the applicant provided to the Department in his SHEV application and interview were not correct. The delegate said the applicant had consistently claimed to have resided in a particular refugee camp in [Town 3], [State 1], [Country 1] from January 1991 until April 2013, and claimed he had never had a passport and never travelled outside of [Town 3], except when he went to [City 3] on his way to Australia in

May 2013. The delegate said the applicant's social media account linked to his email account showed two photos of the applicant which indicated he was possibly at [City 3] International airport in September 2012 and that he had arrived there from an international destination; and a photo of [a beach] house which indicated he was outside the home of [Mr A] a prominent [Country 1] actor located in [City 3] ten days after the photos at the airport were taken. The applicant responded by letter dated 5 April 2018 and claimed he omitted to mention he worked as [an occupation] for a few weeks in [City 3] outside the refugee camp, and this was when the photos were taken that he posted on his Facebook account. The applicant claimed he went to the airport at the suggestion of his friend because they were both fans of the film star [Mr A], and his friend had heard that [Mr A] would be arriving at the airport that day and they might get to see him. He claimed he had never been to the airport before and they got inside the airport and were able to go to the observation deck and were able to capture the plane [Mr A] was believed to have been travelling on, and the applicant within the airport. The applicant claimed he had not arrived in [City 3] on a plane from an international destination. And while he was in [City 3] for work he visited [Mr A]'s house with his friend. When his [work] was finished he returned to the refugee camp. The applicant argued that the constructions drawn by the delegate from the photos on the applicant's Facebook account cannot be sustained.

21. I note the delegate's concerns about the applicant's response to his invitation to comment, which he detailed in his decision and that the delegate found the applicant's omissions and subsequent claims, further heightened his lack of credibility. I am not satisfied the applicant was at the airport in [City 3] to see [Mr A], or that he was only working for only a short period of time in [City 3] in September 2012. However, I am also not satisfied the three photos themselves provide compelling evidence the applicant travelled from an international destination and arrived at [City 3] International airport in September 2012, or that he possesses a passport. Perhaps more importantly, whether the applicant lived or stayed in [City 3] for a longer period of time than initially claimed before coming to Australia does not appear to have any material bearing on the assessment before me. There is no other evidence before me to support a finding that the applicant has travelled internationally, to or from [Country 1], before coming to Australia or that he has a passport issued by any country, including Sri Lanka or [Country 1]. I am not satisfied the applicant has a passport or that he travelled from an international destination to [City 3], [Country 1], in September 2012.

### **Refugee assessment**

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22. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

23. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted

- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

24. I accept the applicant's father was an employee of the LTTE in [a specified section] in the 1980s in the north, and was not an LTTE combatant. I am satisfied that while the applicant's father was detained by the Sri Lankan military for three days and mistreated in 1990 based on perceived LTTE involvement, he was released with a warning not to get involved with the LTTE. I accept that from 1990, at the age of [age], and until 2013 the applicant lived in refugee camps in [State 1], [Country 1]. There is no evidence before me that the applicant is actively engaged in post-conflict Tamil separatism or that he has participated in Diaspora activities.

25. I accept the applicant is a Tamil male, he is homosexual, and that Sri Lanka is his receiving country.

26. Sinhalese and Tamil are the two official languages, with Tamil used mostly in the north and east of the country, where Tamils are concentrated. However, Colombo has roughly equal populations of Sinhalese, Tamils and Muslims, and that this is the outcome of Tamils and Muslims moving from other parts of the country to access greater economic opportunities in Colombo, and internal relocation due to the conflict. DFAT has consistently reported that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). DFAT assessed in 2017 and again in 2018 that monitoring of Tamils in day-to-day life has decreased significantly under the current government. However, DFAT assesses that surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues, such as missing persons, land release and memorial events.<sup>6</sup>

27. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many returnees have difficulty finding suitable employment. DFAT assesses that reintegration issues are not due to a failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face on return.<sup>7</sup>

28. A UNHCR survey from 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. And refugees and failed asylum seekers reported social stigma from their communities upon return. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. As at May 2018, DFAT states that while the government has reportedly decreased systematic surveillance of

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<sup>6</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>7</sup> DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.<sup>8</sup>

29. In summary, reporting from both DFAT and the UK Home Office<sup>9</sup> is that a gay man cannot lawfully have sex with another man in Sri Lanka. Under section 365 of the Penal Code, 'carnal intercourse against the order of nature' or 'acts of gross indecency' can attract sentences of up to 10 years' imprisonment and a fine. In practice however, the state does not prosecute men for having sex with other men unless it involves allegations of non-consensual sex. Nevertheless police are alleged to use this, and section 399 of the Penal Code or the Vagrants Ordinance to threaten, harass, extort money and sex, arrest and detain LGBTI individuals.
30. DFAT and the UK Home Office report the Sri Lankan Constitution does not recognise the rights of LGBTI people, and there is no legislation to protect LGBTI individuals from discrimination or hate crimes. LGBTI individuals routinely experience discrimination in employment, housing and health care due to real and perceived sexual orientation or gender identity. Additionally, sexual harassment at work and hate speech and vilification of LGBTI communities by media and public officials is reported to be common. There are reports that LGBTI persons experience forced heterosexual marriage from family and members of the community, sexual, emotional and physical violence, particularly in the home environment but also in public spaces, and the level of harassment may differ from urban to rural areas.<sup>10</sup>
31. In 2018, the UK Home Office was of the opinion that current country evidence does not indicate that the incidents of harassment are generally sufficiently serious by their nature and repetition as to amount to persecution or serious harm. And in general, there is no real risk of state persecution as the authorities do not actively seek to prosecute LGBTI persons and there is no real risk of prosecution even when the authorities become aware of such behavior. And in general, the level of societal discrimination and abuse faced by LGBTI persons in Sri Lanka is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm. However, it is a very nuanced picture as reflected more generally in the information about homosexuality, and it depends on the particular factors relevant to the person which might make the treatment more serious by its nature or repetition. Elsewhere in the UK Home Office and DFAT reports, it is identified that persons more vulnerable to harm from police are transgender women, and men who have sex with men involved in sex work, and persons who are poor.
32. There is credible but limited quantitative reporting about the incidences of police targeting homosexual men for harm, and some of it is a few years old, but it is an issue that has been reinforced in reporting in 2018 by DFAT the UK Home Office. Information from 2011 to 2018 referenced by the UK Home Office consistently evidences that the situation for LGBTI persons in terms of the law, police harassment and mistreatment, has not significantly changed or improved for LGBTI persons in Sri Lanka in recent years. The UK Home Office report includes information from credible sources in 2017 and 2018 stating there remains significant social exclusion for being LGBT which is perpetuated in stigma, cultural taboos and conservative,

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<sup>8</sup> DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>9</sup> DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

traditional and religious attitudes, and discrimination against LGBTI persons is widespread in Sri Lanka.<sup>11</sup>

33. Country information indicates that Sri Lankan society does not accept homosexuality, and people hide their sexuality to avoid harm and social stigma. While some people from middle and upper class backgrounds, people who are educated and urban Sri Lankans, can be open about their sexuality within family and community circles, country information does not indicate that gay men can live openly and safely in any part of the country. It has been reported that Police often target and harass gay men at the places they use to meet, such as parks, beaches and public toilets and frighten them into paying a bribe and sometimes physically assault them. For LGBTI persons living in rural Sri Lanka versus Colombo, the chance of harm and severity of it depends on the person and their particular circumstances. For a gay man, it is not the case that the north and east is more or less safe than the south and the west of the country.
34. There are no legal safeguards to prevent discrimination based on sexual orientation or gender identity. Incidents of homophobia frequently go unreported due to people wanting to protect their identity. Police often misinterpret the laws on the basis of a person's appearance or behaviour and there have been reports of police assaulting, harassing and extorting money or sexual favours from LGBTI persons, particularly in Colombo as well as other areas. The lack of anti-discrimination laws means there is no recourse to a remedy when particular laws are used against LGBTI persons in a discriminatory manner. Such discrimination is further enabled and promoted by the continued criminalisation and, therefore, stigmatisation of LGBTI persons.<sup>12</sup>
35. The UK Home Office highlighted the issue of under reporting of violent or hate crimes, stating that LGBTI persons who are the victims of violence or hate crimes will often not report these crimes to the police for fear their sexual orientation or gender identity or expression will be exposed or highlighted. This can lead to further discrimination and marginalisation and to potential prosecution under articles 365 and 365A of the Penal Code. The UK Home Office was of the opinion that in general, effective protection in individual cases is very limited.<sup>13</sup>
36. The applicant claimed that if returned to Sri Lanka he has no family, no supports, no home, no work, no social networks to help him find a home or work, and he does not speak Sinhalese. He said he was born in a former war area in [Town 1] and he has no idea where he would live. He claimed he could only live among Tamil people as he only speaks Tamil but this means returning to a former war area and he does not know how he could survive there. He claimed that in Colombo it would be even more difficult to find shelter, work and access health care and other services and survive particularly without speaking Sinhalese.
37. The applicant pointed to the 2018 DFAT report, which says homosexual people routinely experience discrimination in employment, housing and health care due to real or perceived sexual orientation, and he argued that as a homosexual and Tamil man, he is at risk of being homeless, jobless, and struggling to survive if he was perceived or disclosed his sexual identity. He argued that living in a Tamil community in which most people hold conservative attitudes would make it impossible for him to tell people he is gay or live openly as a gay man. He claimed he will face death threats, physical violence and assault, rape, as well as emotional and

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<sup>11</sup> UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

<sup>12</sup> UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

<sup>13</sup> UK Home Office, "Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression", 1 October 2018, OG9EF767954.

psychological abuse. He said there is no way he could form openly gay relationships with other men without facing serious harm including physical violence or threats to his life. He claimed given he has no family in Sri Lanka and no protection, it would be easy for people to physically and sexually assault him and even kill him as a homosexual man. In any Tamil community people know about one another, and news would quickly spread about him given he would be new to any area. News would quickly spread that he is on his own, without family, that he grew up in [State 1] in a refugee camp in [Country 1] and that he has returned from Australia. In order to survive he would be forced to hide his sexual identity which he does not want to do. The applicant claimed there is no protection from the police, and he would not seek their protection because they would beat him or rape him because he is homosexual.

38. The evidence before me indicates that the chance of harm for a homosexual man depends on the circumstances of the person. In the present case, I am satisfied of the following based on the applicant's evidence: he is a Tamil male of the Hindu faith from the north of Sri Lanka; he is almost [age] years of age, and he left Sri Lanka when he was [age]; he is from what may be described as a lower class background; his highest level of completed education is Year [number], which he attained in [Country 1]; while he has undertaken some vocational training, he is not working in Australia; he does not have close contact with any family in Sri Lanka; he has no existing social support networks; and he does not have a family home to return to.
39. While country information indicates that LGBTI individuals enjoy a degree of openness within their immediate social and/or family circles provided their sexual orientation does not become known outside of these close circles, the applicant does not have existing immediate social and/or close family circles in Sri Lanka. While he may develop these over time, on return he would very likely be on his own. Based on the applicant's evidence, which indicates a degree of shyness and discretion within Australia, I am satisfied he will be discreet for reasons including social, religious or cultural reasons. I am also satisfied the applicant will conceal aspects of his sexual orientation/identity if returned to Sri Lanka because he fears he will be persecuted by the state and members of the community.
40. While it is theoretically possible the applicant may be arrested under section 365 of the Penal Code, DFAT stated that no prosecutions have occurred since independence in 1948. However, evidence from DFAT is that police allegedly use section 399 of the Penal Code or the Vagrants Ordinance to threaten, harass, extort money and sex, arrest and detain LGBTI individuals, and there is a chance of further harm such as rape and physical assault once detained.
41. The applicant claimed he does not know where he would return. I am satisfied it is not clear where he would return. During the SHEV interview, the applicant claimed that in Australia, he has paid to have sex with men, and I accept this is the case. I also accepted that as a young adult living in [Country 1], the applicant was caught by other men while he was having sexual relations with a male friend in [a location]. Based on the applicant's evidence, and considering country information, I am satisfied that in Sri Lanka the applicant will seek out sex in casual environments and in doing so, there is a real chance he will come into contact with the police.
42. I am satisfied there is a real chance the applicant will come to the attention of the police and he will face serious harm in the form of sexual and physical violence, coupled with threats of arrest and detention. I am satisfied this serious harm from police is not random, and the essential and significant reason the applicant will be targeted for serious harm by police is because he is a homosexual man. I find that regardless of where the applicant returns to in Sri Lanka there is a real chance the applicant will face serious harm from Sri Lankan authorities, in particular the police, for reasons of his homosexuality.

43. As the Sri Lankan authorities are in control of the country, I am satisfied the real chance of persecution relates to all areas of the receiving country. As the harm would be inflicted on the applicant by the Sri Lankan authorities, and I am not satisfied the state is willing to protect the applicant, effective protection measures are not available to the applicant. As the chance of harm arises from the applicant's homosexuality, and that is a characteristic that is fundamental to his identity, or an innate or immutable characteristic, and it would not be reasonable to require him to alter his sexual orientation or conceal his true sexual orientation, I find there are no reasonable steps the applicant can take to modify his behaviour so as to avoid a real chance of persecution. I am satisfied that ss.5J(2) and (3) do not apply in this case.

44. I am satisfied the applicant has a well-founded fear of persecution in Sri Lanka.

**Refugee: conclusion**

45. The applicant meets the requirements of the definition of refugee in s.5H(1).

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.