

1500142 (Refugee) [2016] AATA 3781 (27 April 2016)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1500142
<b>COUNTRY OF REFERENCE:</b>	Mexico
<b>MEMBER:</b>	Antoinette Younes
<b>DATE:</b>	27 April 2016
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 27 April 2016 at 12:55pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Mexico, applied for the visa [in] June 2014 and the delegate refused to grant the visa [in] December 2014.
3. The applicant appeared before the Tribunal on 7 April 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner.

### RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 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).
6. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
7. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

### CLAIMS AND EVIDENCE

8. In the application for a protection visa, the applicant indicated that he left Mexico to visit Australia and later to study. He indicated that he primarily relies on *sur place* events that occurred subsequent to the applicant's return to Australia in 2008. Family members have been threatened in Mexico and the authorities, including the army and the police, are complicit in corruption. In support of the application for a protection visa, the applicant's representative provided submissions dated [June] 2014 and [August] 2014, claiming that:
  - a. The applicant arrived in Australia on a [temporary] visa in February. He returned to Mexico for a short period in 2008. Both he and various members of his family

have resided in [City 1] in the province of Tamaulipas. [City 1] is a port city on the east coast of Mexico. Since 2008, there has been severe dislocation of the Mexican society as a result of drug cartels in conflict. The main gangs are the Cartel Del Golfo opposed to the Los Zetas.

- b. The applicant has made “*extraordinary claims*” premised upon what amounts to the collapse of the state of Mexico. Attached country information indicates that there is the corrosion of civilisation in Mexico. The information identifies the mass exodus of [City 1] middle-class and the introduction of ultraviolent drug cartels. The city has become increasingly deserted and large trees have taken over major buildings. It is a city run by gangs including former elite paratroopers and police. There have been mass closures of businesses and the historic centre of [City 1] has been compared to New Orleans.
  - c. The applicant’s family has been affected. His [father] and family can be identified as falling within a distinct social group, namely, the working middle-class who earn income. The applicant’s family lives in a manner where their lives are dictated by fear and an increase in the arbitrary death or kidnappings await them.
  - d. The applicant’s [sister] is married to [Mr A] who has been kidnapped and faced further attacks. He was taken in 2011 and his car was surrounded when his children were inside but luckily the children were not involved. [Mr A’s] family are involved in [a business] and a large ransom was paid but a few days later, the kidnappers wanted more which was again paid. The family was so traumatised that [Mr A] and [the applicant’s sister] fled to Ciudad, [City 2] and then [City 3] in [Country 1]. The applicant understands that they were provided with “*some type of refugees/permanent status in [Country 1]*” in 2013.
  - e. The applicant’s cousin [Cousin B] has been subjected to attempted kidnapping. His car was chased over a long distance. On the second occasion, attempts were made when he was driving from Mexico City and returning to [a district]. The applicant’s family has been specifically identified for attacks on three different occasions. If the applicant were to return to Mexico, he would be recognised as being “*part of the social group.... Part of a middle-class, professional family*” and he would be a prime candidate for kidnapping and extortion”. The applicant may be regarded as being part of a distinct social group, namely a member of a commercially successful family that can be seen to attract particular attention from the cartel gangs whose activities have been acquiesced to or encouraged by virtue of the inaction of the police. Many kidnappings result in the murder of the victim regardless of ransom.
  - f. It is wrong to assert that the police or the army can provide meaningful protection as it is increasingly becoming apparent that on occasions, they are either the direct perpetrators, or secret members of the cartels or in the pay of them.
  - g. Violence is endemic in Mexico and the family cannot simply walk away from their only source of income and consequently relocation is not reasonable. Country information supports the applicant’s claims; “*...It is a situation exacerbated by a sur place scenario, namely the constant social, economic and political deterioration since the first arrival of the applicant in Australia*”. Mexico is in an endemic state of corruption and criminality.
9. The applicant provided reports and articles relating to the violence by drug cartels as well as corruption by the police and the security forces. The applicant also provided a translated

statement of the applicant's parents dated [in] November 2014 referring to the violence and police corruption that had impacted on the family. The parents made specific reference to the kidnapping of their son-in-law, [Mr A] and [Cousin B] and indicated that the families are constantly living in fear and a sense of angst.

10. The applicant provided to the Tribunal a copy of the delegate's decision record as well as independent country reports highlighting serious security issues in Mexico, including travel advice by the Australian Department of Foreign Affairs and Trade providing an advice of "*high degree of caution*".

## **DISCUSSION & FINDINGS**

### ***The applicant's nationality***

11. On the basis of the available information, the Tribunal finds that the applicant is a national of Mexico. The Tribunal finds that the claims should be assessed against Mexico for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa).

### ***The claims of harm***

12. In the course of the hearing, the applicant gave evidence that he came to Australia in 2006 as the holder of a [temporary] visa valid for [period] will stop he left Australia and later returned as the holder of a [different temporary] visa. He studied a [course]. He told the Tribunal that in Mexico, he completed a [qualification] in [occupation] and he worked in the family business of [a service]. He stated that he returned to Mexico for approximately 2 months on one occasion.
13. The applicant stated that he does not wish to return to Mexico because he fears that he would be targeted. He stated that his brother in law, [Mr A] was kidnapped in 2011 and the culprits left the children in the car. He said that his mother told him about the incident and that [Mr A] paid his own ransom. He said subsequently [Mr A] and the family went to [Country 1] in late 2012. He said [Mr A] and the family have to return to Mexico once a year in order to renew their [Country 1] visas.
14. The Tribunal asked the applicant about other incidents and he stated that his cousin [Cousin B] who was the manager of the family business was being followed for kidnapping. The culprits offered to escort him back home, meaning that they wanted to kidnapping. He said the cousin was subjected to another incident in 2013 when he was being followed. The driver who was armed got out of the car demanding that the driver asks the help. Those who helped were kidnapped and ransom was paid. The applicant stated that his [Relative C] received telephone calls which she thought were made by the applicant. The callers were asking for money. The Tribunal asked the applicant if any of those incidents had been reported to the Mexican authorities and the applicant stated that none had been reported but that there was no point in reporting incidents to the police because the police are themselves involved in organised crime.
15. The Tribunal discussed with the applicant the apparent delay in him lodging the application for a protection visa and asked him for the reasons. The applicant explained to the Tribunal that his parents kept telling him to stay in Australia and he was subsequently advised to apply for a protection visa. The Tribunal indicated to the applicant that the decision record provided in support of the application for review indicates that the arrived in Australia in December 2006, departing [in] February 2007. He returned to Australia [later in] February 2007 as the holder of a [temporary] visa. He departed again [in] April 2008 and returned in June 2008. The applicant's most recent [temporary] visa expired [in] June 2014 which is the day when he lodged application for a protection visa. The Tribunal indicated to the applicant that the delay in lodging the

application for a protection visa could raise doubts about his fear of harm. The applicant stated that he was waiting for more evidence, such as a statement from his parents.

16. The Tribunal discussed with the applicant that even if the Tribunal were to accept that the claimed incidents did occur, the Tribunal needed to consider whether the applicant could relocate to other parts of Mexico, such as Mexico city. The applicant stated that Mexico City is dangerous and whilst there have been fewer crimes, it is still a dangerous city. He said the nature of his family business and his qualifications mean that he would want to work in the family business. The Tribunal indicated to the applicant that he has qualifications in [occupation] which means that arguably he has transferable skills enabling him to work in variable areas. The applicant stated that he has only worked in the family business. He reiterated that he does not agree that Mexico City is safe. He said that citizens cannot trust the police or the army and he is frightened to return to Mexico.
17. The Tribunal indicated to the applicant that the Tribunal's task is to determine whether there is a real chance or a real risk of significant or serious harm occurring to him if he were to return to Mexico. The applicant stated that his family members are frightened to travel by cars and they travel by private planes. The Tribunal indicated to the applicant that country information suggests that there has been some advancement by the Mexican authorities in their attempts to control crying in Mexico. The applicant stated that serious crimes have persisted in Mexico and any positive news relates to the fact that this is what the Mexican authorities want others to believe.
18. The applicant's claims are consistent with country information available to the Tribunal. The applicant has provided a statement from his parents and the Tribunal has no reason to doubt the accuracy of the content. The Tribunal found the applicant generally credible. In essence the applicant has claimed that members of his family have been subjected to incidents of harm and that he fears returning to Mexico. He fears that he would be kidnapped for ransom by criminals and drug cartels. He fears that this would happen because he comes from a recognisable wealthy middle-class family who are business owners.
19. On the basis of the available information and in consideration of the evidence as a whole, the Tribunal accepts that the applicant comes from a wealthy middle-class family and that the family owns a [service] business in Mexico. The Tribunal accepts as plausible that the applicant's brother in law, [Mr A] was kidnapped by men who demanded ransom which [Mr A] paid, that the children were left in the car, and that subsequently [Mr A] and the family went to [Country 1]. The Tribunal accepts as plausible that the applicant's cousin, [Cousin B] was subjected to an attempted kidnapping and whilst [Cousin B] was not injured, the [other workers] who were in the [car] were taken away and ransom had to be paid. The Tribunal accepts as plausible that at the applicant's [Relative C] had received a call about 2 to 3 years ago by an unknown caller whom she thought to be the applicant and who tried to obtain money from her. The Tribunal accepts as plausible that there was a second occasion and the applicant's mother recognised that it was not the applicant who was calling and the mother was verbally abused by the caller. The Tribunal accepts as plausible that the applicant's father had also received a call from an unknown person attempting to extort money. The Tribunal is satisfied that the incidents suffered by members of the applicant's family amount to serious harm.

***Is there a real chance that the applicant would suffer serious harm in the reasonably foreseeable future, and is that harm Convention related?***

20. The applicant has provided a significant number of credible country information reports, and information available to the Tribunal indicates that kidnappings are a serious problem in Mexico. There are credible reports of police involvement in corruption and kidnappings for ransom, at the State and local levels. While not intending to be a comprehensive assessment of the security situation in Mexico, in its travel advice of 25 January 2016, the Australian Department of Foreign

Affairs and Trade (DFAT), noted that “since 2006, Mexico has experienced a dramatic increase in drug-related violence. Violent crime related to the drug trade, including murder, kidnapping and carjacking has become widespread... Violent crime, including murder, armed robbery, sexual assault and kidnapping occurs in Mexico, including in popular tourist destinations and beach resorts, and the risks increase after dark... There have been reports of sexual assault, extortion and robbery being committed by individuals presenting themselves as police officers, sometimes driving automobiles resembling police vehicles. Incidences of kidnapping a common and there have been allegations of complicity by police officers.... Express kidnappings were victims of forced to withdraw funds from ATMs the secured their release, continue to increase, particularly in urban areas. People travelling on the Metro in public transport in Mexico City have been among those targeted... Criminals are regularly target vehicles, including camper vans and SUV’s.... Crime levels on intercity buses and on highways a high...”

21. The US Department of State also warned travellers about the risk in going to Mexico due to “threats to safety and security posed by organised criminal groups in the country... US citizens have been the victims of violent crimes, such as homicide, kidnapping, carjacking and robbery by organised criminal groups in various Mexican States...”<sup>1</sup>
22. In its 2014 report on human rights<sup>2</sup>, the US Department of State noted “significant human rights-related problems included police and military involvement in serious abuses, such as unlawful killings, porch, disappearances, and physical abuse. Impunity and corruption remained serious problems, particularly at the State and local levels, in the security forces, and in the judicial sector. Organised criminal groups persisted in perpetuating high levels of kidnapping and violence against journalists and others that limited freedom of expression..... Impunity for human rights abuses remained a problem throughout the country with extremely low rates of prosecution for all forms of crime. Neither general information about government investigations of the human rights allegations nor information about specific cases was easily available to the public.... There were numerous reports the government or its agents committed arbitrary or unlawful killings, often with impunity. Organised criminal groups were also responsible for numerous killings, often acting with impunity and in league with corrupt state, local, and security officials.... There were reports of forced disappearances by security forces along with hundreds of complaints of disappearances related to organised crime. Most occurred in the course of sanctioned security operations. While the Federal criminal code classifies forced disappearances as a crime, it does not constitute a crime in several local penal codes.... As of August 31, the CNDH [Mexico’s National human rights commission] processed 445 complaints of rule or degrading treatment and 552 complaints of torture. The CNDH issued 10 recommendations in cases of fraud and degrading treatment and to recommendations in cases of torture.... Treatment and physical conditions in prisons and detention centres will often harsh and life-threatening, most notably in State level presence, due to corruption, overcrowding, prisoner abuse, alcohol and drug addiction, a loss of security and controlled....”
23. The report went on to refer to the corruption within the justice system; the report noted that although the Constitution and law provided for an independent judiciary, “court decisions were susceptible to improper influence by both private and public entities, particularly at the State and local level<sup>3</sup>”. The report referred to the internal displacement of people. It reported that “drug cartels had emptied into higher rural communities in the country to take land and natural resources. The NGO estimated hundreds of thousands of citizens, many fleeing areas of armed conflict between the government and organised criminal groups, were internally displaced....According to CNDH, many of those who fled their communities were responding to

<sup>1</sup> US Department of State, *Mexico travel warning*, 19 January 2016

<sup>2</sup> US Department of State, *country reports on human rights practices, Mexico 2014*

<sup>3</sup> *Ibid* a page 12.

violence related to narcotics trafficking. The CNDH blamed government negligence for the 98% in punitive rate associated with violent crimes and cited this as a predominant factor...<sup>4</sup>”

24. Amnesty International reported that “*impunity persisted the grave human rights violations including torture and other ill-treatment, enforced disappearances and extrajudicial executions. More than 27,000 people remain and missing or disappeared.... Violence related to organised crime remained serious problem. Despite official figures reporting a slight increase in homicides from 35,930 in 2014 to 36,126 in 2015, the figures combined manslaughter and murders, in meeting the fact that the monthly average number of murders increased by 7%... Human rights violations at the hands of armed forces and police remained common...*”<sup>5</sup> Human Rights Watch referred to the Mexican government’s delayed investigations into the enforced disappearances of 43 students and noted that “*state prosecutors sought to cover up military wrongdoing by co-workers in false testimony from witnesses...*”<sup>6</sup>”
25. The Tribunal acknowledges that it is established law that no state is required to guarantee the safety of its citizens. In *MIMA v Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ observed that ‘*no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence*’.<sup>7</sup> Justice Kirby similarly stated that the Convention does not require or imply the elimination by the state of all risks of harm; rather it ‘*posits a reasonable level of protection, not a perfect one*’.<sup>8</sup> What is required for the purposes of Article 1A(2) has been described in several ways. The joint judgment in *S152/2003* refers to the obligation of the state to take ‘reasonable measures’ to protect the lives and safety of its citizens, including ‘an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system’,<sup>9</sup> or a ‘reasonably effective police force and a reasonably impartial system of justice’,<sup>10</sup> indicating that the appropriate level of protection is to be determined by ‘international standards’, such as those considered by the European Court of Human Rights in *Osman v United Kingdom*.<sup>11</sup> Thus, an unwillingness to seek protection will be justified for the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to ‘international standards’.<sup>12</sup>
26. In *Prathapan* at first instance, Madgwick J referred to ‘a reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy’ as ordinarily amounting to effective and ‘available’ protection.<sup>13</sup>
27. In consideration of the evidence as a whole and on the basis of the available information, the Tribunal finds that there is a real chance that the applicant would suffer serious harm, in the reasonably foreseeable future. The Tribunal is satisfied that it is not promote or far-fetched that the applicant would face harm. In essence and on balance of the evidence before it, the Tribunal finds that there is a real chance that the applicant would be kidnapped for ransom and/or physically harmed for ransom. The evidence before the Tribunal indicates that in Mexico, there is not a reasonably effective police force and a reasonably impartial system of justice, or that any intervention by the authorities meets the required standards of state protection. A fair assessment of the evidence before the Tribunal indicates that Mexico is facing significant challenges in human rights issues and the authorities have been implicated in human rights abuses.

<sup>4</sup> *Ibid* at pages 19 and 20

<sup>5</sup> Amnesty International report 2015/2016 *the state of the world's human rights, Mexico*

<sup>6</sup> Human Rights Watch, Mexico: *delays, cover up MAR atrocities response*, 7 November 2014

<sup>7</sup> (2004) 222 CLR 1 at [26].

<sup>8</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [117].

<sup>9</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26].

<sup>10</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [28].

<sup>11</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [27], citing *Osman v United Kingdom* (1998) 29 EHRR 245.

<sup>12</sup> *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29].

<sup>13</sup> *Prathapan v MIMA* (1998) 47 ALD 41.

28. The Tribunal acknowledges that the applicant has delayed applying for a protection visa which could raise doubts about his claimed fear of harm, however independent credible evidence before the Tribunal indicates that the applicant has a well-founded fear of persecution and that any protection offered by the Mexican authorities is not sufficient to remove the real chance of serious harm from non-state actors, such as the drug traffickers/cartels. The question for the Tribunal is whether the harm feared is Convention related. The Tribunal notes that the delegate accepted that the applicant is a member of a particular social group, namely “a commercially successful wealthy middle class family in a rural area who is targeted by cartel gangs for extortion”.
29. The phrase ‘membership of a particular social group’ is indeterminate. It is impossible to define the phrase exhaustively and pointless to attempt to do so.<sup>14</sup> Further, it is not generally possible to define ‘absolute’ particular social groups, because what constitutes a particular social group in one society at any one time may not in another society or at another time. The emphasis is upon whether or not a particular social group exists in the context of a *particular* society.
30. The phrase ‘particular social group’ should be given a broad interpretation, however, the category was not intended to provide a general safety net or ‘catch all’ to cover any form of persecution.<sup>15</sup> In *Morato v MILGEA* Lockhart J said:

*The interpretation of the expression “particular social group” calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. ....*<sup>16</sup>

31. *Applicant A’s case* is the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of ‘particular social group’ in this way:

*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”. As this Court has repeatedly emphasised, identifying accurately the “particular social group” alleged is vital for the accurate application of the applicable law to the case in hand.*<sup>17</sup>

32. Justice McHugh in *Applicant S* summarised the issue in broadly similar terms:

*To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.*<sup>18</sup>

<sup>14</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 259, per McHugh J.

<sup>15</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 241 per Dawson J, at 260 per McHugh J.

<sup>16</sup> *Morato v MILGEA* (1992) 39 FCR 401 at 416.

<sup>17</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow and Kirby JJ. In *STXB v MIMIA* (2004) 139 FCR 1, Selway J at [25] - [27].

<sup>18</sup> *Applicant S v MIMA* (2004) 217 CLR 387 at [69] per McHugh J.



33. The Tribunal is satisfied that the applicant is a member of a particular social group of a *commercially successful wealthy middle class family in a rural area targeted by cartel gangs for extortion*". The Tribunal therefore finds that the applicant's fear of harm is Convention related.
34. The Tribunal will now consider if the applicant's fear is localised and/or whether he could relocate to other parts of Mexico. Consideration of the reasonableness and practicability of relocation presupposes that there is already a place in the country of nationality where an applicant is usually based and from which he or she might move to another part of that country in order to avoid persecution.<sup>19</sup> The principle upon which relocation operates is that there is an area in the applicant's country where he or she may be safe from harm.<sup>20</sup> The issue is therefore whether it would be reasonable to expect an applicant to relocate if the circumstances indicate that there is an area where, objectively, there is no appreciable risk of the occurrence of the feared persecution, that is, where the feared persecution is localised rather than nation-wide.
35. Whilst country information about Mexico is arguably general, it does however support that the applicant's claim that his apprehended fear is not localised. The Tribunal is satisfied that country information supports the applicant's claim that his well-founded fear extends to other areas in Mexico. On the basis of the available information, the Tribunal is satisfied that internal relocation is not an option because there is a risk that the non-state actor will persecute the applicant in other areas of Mexico. The Tribunal is satisfied that there is a real chance that the applicant would be targeted in other areas of Mexico and that country information supports a finding that he would not receive adequate state protection.
36. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant has a well-founded fear of persecution if he returned to Mexico now or in the reasonably foreseeable future and it would not be reasonable for him to relocate to other parts of Mexico. The Tribunal considers that the persecution which he is at risk of suffering involves serious harm as required by s.91R(1)(b) of the Act, in that it involves significant physical harm, harassment or ill-treatment. The Tribunal finds that the applicant's membership of a particular social group, would be the essential and significant reason for the persecution as required by s.91R(1)(a) of the Act. On the evidence before it, the Tribunal is satisfied that the persecution he is at risk of suffering involves systematic and discriminatory conduct, as required by s.91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason.
37. There is no evidence before the Tribunal that the applicant has a legally enforceable right to enter and reside in any other country other than Mexico and therefore the Tribunal finds that he is not excluded from Australia's protection by s.36(3) of the Act.
38. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

## DECISION

39. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Antoinette Younes  
Senior Member

<sup>19</sup> *SZRKY v MIAC* (2012) 132 ALD 525 at [24] (upheld on appeal: *SZRKY v MIAC* (2013) 141 ALD 328).

<sup>20</sup> *MIBP v SZSCA* (2014) 254 CLR 317 per French CJ, Hayne, Kiefel and Keane JJ at [25].