

1009859 [2011] RRTA 681 (9 August 2011)

DECISION RECORD

RRT CASE NUMBER: 1009859

DIAC REFERENCE(S): CLF2010/105964 CLF2010/149448

COUNTRY OF REFERENCE: Albania

TRIBUNAL MEMBER: Paul Fisher

DATE: 9 August 2011

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first and second named applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first and second named applicants.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Albania, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants] June 2010 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] July 2010. The delegate decided to refuse to grant the visas [in] October 2010 and notified the applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] November 2010 for review of the delegate's decisions.
5. 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 applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. 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.
7. 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 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).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. 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.
11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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.
19. 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

20. The Tribunal has before it the Department's file relating to the applicants. 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.

Background

21. The applicants are a family of Albanian nationals. Their background and protection claims are summarised in the decision of the delegate dated [in] October 2010 refusing their protection visa application, as follows:
 - (a) Applicant 1 is a [age] man originally from Albania. The applicant claims that he was born in [Town 1], Albania. He claims that he is a Catholic, that he is an Albanian national but that he has permanent resident status in Italy. According to the information provided in his application form, the applicant completed [number] years of education in Albania in June 1986 then worked as a labourer in Albania until March 1991. He relocated to Italy in 1991 and worked as a gas fitter, a tree cutter and a baker until February 2001. He last worked as a self employed brick layer in Italy from 2001 to June 2010. The applicant advises that he was married in January 1994 and has two sons born in Italy in [month and year] and [month and year]. He has resided in Italy for the last 19 years and has permanent residence there.
 - (b) The applicant's claims which relate to reasons for claiming to be a refugee are contained in his statement provided in support of the Protection visa application (Part 51 folios 20-23). In summary, the applicant makes the following claims:
 - He has left Albania and Italy because of the fear of being killed by [Family A] and "certain quarters" in the local government in Albania
 - At the age of [age] he was adopted by his [relative] [Mr B] as he did not have children of his own
 - In [Month 1] 2007 he and his wife went to celebrate [event] with [Mr B] in Albania before returning to Italy
 - Later that month he heard from a cousin that his foster father was insulted by a local

man about the applicant marrying a Muslim woman. As a result, a fight ensued and a man called [Mr A] was accidentally killed with his own gun

- His foster father was forced into hiding as the blood feud began
- In [Month 2] 2008 his foster parents were mysteriously killed by the police in their own home, which had been cordoned off
- His foster father had been financially supporting the Demo-Christian party and the church
- After the death of his foster father, the applicant became the next male in line to be targeted in the blood feud
- He tried unsuccessfully to reconcile the dispute through a local priest in both Albania and Italy, where some of [Family A] live
- He now lives in fear and has received numerous threatening phone calls, but is too scared to go to the police
- If he returns to either Albania or Italy he will be killed

(c) The applicant's migration representative has provided submissions (Part 5:1: folios 193-195) and other supporting material on his behalf (Part 5:1: folios 172-192).

(d) Applicant 1 was interviewed on [date] September 2010 regarding the Protection visa application. The interview was conducted with the assistance of an interpreter competent in both the Italian and English languages. Also present at the interview was the applicant's migration representative. The digital recording of the interview is at Part 5:1: folio 43.

(e) At interview, the applicant was given two weeks to provide proof of his foster father's death in [Month 2] 2008. On [date] October 2010 the following further information was provided:

- Copy of translated death certificates for [Mr B] and his wife
- Article on Migrants in Greece - Human Rights Watch
- Islam In Albania - Advanced Research and Assessment Group
- Country Advice Albania - ALB36280 - RRT - 16 March 2010
- Internet article re: Abdul Latif Saleh (AI-Qaeda)

22. The application was refused [in] September 2009. In his decision, the delegate noted that the applicant's migration representative has submitted that his client is being persecuted on "religious and political grounds", but then goes on to describe the "blood feud" However, the delegate did not accept that the reasons for the harm feared by the first named applicant brought him within the scope of the Convention, relying on the decision of the High Court of Australia in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 556 to find that the harm would not be for reasons of his membership of a particular social group but for criminal reasons The delegate concluded that the first named applicant was not a person to whom Australia had protection obligations under the Convention.

23. Despite the second named applicant having completed her own Form 866 Part C, her claims have not been separately assessed. She and the other secondary applicants have simply been refused on the basis that as members of the family unit a primary applicant who is not a person to whom Australia has protection obligations, they do not satisfy the requirements of cl.866.222 for a Protection visa.

Review Application

24. An application for review of the delegate's decision was lodged with the Tribunal [in] November 2011, and the matter constituted [in] November 2011.
25. [In] December 2010 the applicant was invited to attend a proposed hearing scheduled [in] 4 January 2011. The hearing was subsequently adjourned due to the unavailability of the applicant's new representative, and rescheduled to [a later date in] January 2011.
26. [In] January 2011 the Tribunal was provided with the following statutory declaration setting out his protection claims in more detail, as follows:
 1. This statutory declaration is prepared in relation to a request for review by the Refugee Review Tribunal of a decision made by the Department of Immigration and Citizenship to refuse my application for a Protection visa.
 2. I believe that the Department of Immigration and Citizenship made the wrong decision in refusing my Protection visa application.
 3. My family members and I are all in danger if we return to Albania / Italy.
 4. I want to provide the Tribunal with an account of my history so that the Tribunal can make a proper decision about the danger faced by myself and my family members.
 5. I was born in [Town 1] in Albania on [date].
 6. My father's name was [name]. He died in Albania in 2008.
 7. My mother's name is [name]. She still lives in [Town 1].
 8. I have three brothers. I am the third child in the family. The name of my oldest brother is [Mr C]. I don't get along well with him. We have had personality conflicts in the past and I do not know his exact whereabouts now, but I believe that he lives in Italy.
 9. My second oldest brother is [name]. He now lives in the United Kingdom.
 10. My younger brother is [name] and he now lives in the United Kingdom as well.
 11. When I was young I went to live with my [relative] [Mr B] and his wife, [Ms D]. I was adopted by [Mr B] because he and his wife did not have any children, and my own parents have four boys. I went to live with [Mr B] in [Village 2] when I was about [age]. I was well looked after and well brought up by my [adopted parents], and I had a very good relationship with him.
 12. My brothers became more like [relatives].
 13. When I was young Albania was under Communist rule. During this time there was very little flexibility. People were not allowed to practice their religions. People were not involved in politics and everyone had to work for the government. Communism started to break down in Albania in the early 1990s. Some people benefited from the breakdown of Communism because they were able to reclaim their traditional lands.
 14. I left Albania and went to live in Italy on [date] March 1991. The Communist government was starting to collapse. I went to live in a camp of refugees as I had escaped from Albania during the period of the demise of Communism. Fortunately, I was granted a Refugee visa and I was given the right to reside in Italy. I have lived in Italy ever since.
 15. In Italy I had worked in a number of different occupations. I have worked as a baker and plant cutting. I started my own building company in about 2000. I was the owner and operator of this building company which was known as "[name]". I employed labourers and took them to work on different construction sites and covered their wages. This building activity was good for me and I earned a good income.

16. I married my wife, [Applicant 2], in January 1994. We have two sons, [Applicant 4] born on [date] and [Applicant 3], born on [date]. [Applicant 2] was also born in Albania.
17. When I was growing up in Albania, religious differences were definitely present. The majority of the population of Albania is Muslim, although in certain parts, particularly in the north, there are more Catholics.
18. My family is Catholic.
19. The family of [Applicant 2] is Muslim.
20. My relationship with [Applicant 2] is a love story. I met [Applicant 2] when she was only [age]. We courted and fell in love. We decided to marry. [Applicant 2] was [age] and I was [age]. Our families were quite supportive of our marriage. The one exception was my brother, [Mr C], who objected to the marriage on the grounds that [Applicant 2] was from a Muslim family. He did not want a member of his Catholic family marrying into a Muslim family. [Mr C]'s attitude reflected the attitude of many Albanians. I was very lucky that the rest of my family and my adopted parents were supportive of the relationship.
21. I do not regret my decision to marry [Applicant 2]. We have a strong and happy marriage and are blessed with two beautiful and healthy boys. [Applicant 2]'s mother is Christian but her father is Muslim and that is why she was brought up as a Muslim. Many Albanian people do talk about mixed marriages and many people do not agree with marriages between Christians and Muslims.
22. By the time [Applicant 2] and I married, I had already moved to Italy, and her family had come to Italy to live as well. However, we went back to Albania for our wedding.
23. In Italy there was really no discrimination against us on the basis that we were in a mixed religion marriage. Our sons have been raised as Christians.
24. In Italy, [Applicant 2] and I had a good life. We bought a house in which we lived in [town] in 2006 and we still own that property. That property is currently vacant. We do not own any other real estate in Italy. We bought land and a house in Albania in 2004. Our plan was to retire in Albania one day, and to be able to use this land and the house for holidays in the meantime. We thought that it would be nice for us and for our children to spend time in Albania during the holiday times. The house and land is near the beach in [Town 1]. We still own this property.
25. In 2007, [Applicant 2] and I and the children went over to Albania to celebrate [event]. We stayed in [Village 2] and attended church on Sunday. My adopted father, [Mr B] also attended the church. A man from our community by the name of [Mr A] was extremely rude about [Applicant 2]'s attendance at the Christian church for the [event]. He said words to [Mr B] along the lines of "why are you bringing that Muslim woman to a Christian church?" He was very rude about [Applicant 2] and called her bad names. [Mr B] fired back and protected me and [Applicant 2]. He told [Mr A] that [Applicant 2] had every right to come to the church with the family.
26. A few days later [Mr B] went for coffee at a local coffee bar. [Mr A] was there and again attacked [Applicant 2] and said disgusting things about her and our children. Again, [Mr B] defended [Applicant 2] and her right to come and visit the family in [Village 2]. [Mr A] ended up hitting [Mr B] on his face, and told [Mr B] that "it is better that your son doesn't come back to Albania again with that wife he has". [Mr A] hit [Mr B] and they started to have a physical fight with each other. [Mr A] had a gun and pulled out the gun to shoot [Mr B]. [Mr B] grabbed the gun and shot [Mr A] and he died
27. [Mr B] shot [Mr A] in self defence, and so he was not charged with a crime.
28. The difficulty for [Mr B] was that under the Albanian tradition, a person who kills a member of another family is liable to be killed himself by the male members of the opposing family. Sometimes the conflicts which are known as blood feuds can be resolved if the other family

decides not to take revenge.

29. The difficulty in this instance is that [Family A] is a very large and powerful family. They have many males in the family and are known to be very aggressive and short tempered. [Family A] is involved in other blood feuds in the area.
30. [Family A] decided not to "forgive" the blood in this case and vowed an intention to take blood from [Mr B] or the next male member of [Mr B]'s family, which of course is me. This was completely out of my control and against my will. I have become involved in a blood feud and am in extreme danger of being killed. As well as being afraid for myself I am very afraid for my two sons as the traditional rules do allow for other male members of a family to be killed if the primary target cannot be killed.
31. [Family A] declared an intention to take revenge. This intention was not communicated to be directly, but by other members of the community. It was made very clear to me that my life was in danger.
32. [Applicant 2] and I and our children were living in Italy. Nevertheless, we were very afraid for my life. We knew that it would be a very easy matter for a member of [Family A] or for their request to harm me in Italy. It has always been fairly easy for Albanians to travel illegally into Italy.
33. In recent times it has become even easier for Albanians to travel to Italy as it is now possible to travel into Italy on an Albanian passport without a visa. This means that it is even more dangerous for me living in Italy. Albanians rely on word of mouth and talk a lot about the whereabouts and activities of other people from their villages. It is a very simple matter for anyone in Albania to track down any other Albanian in Albania or in Italy.
34. In Albania everyone is allied to a political party. If you are not allied to a political party it is very difficult to survive and virtually impossible to do business. Everything in Albania depends on your connections.
35. [Mr B] was supportive of the Demo-Christian Party. The Demo-Christian Party was aligned to the Democratic Party. The main political parties in Albania are the Democratic Party and the Socialist Party. The Demo-Christian Party fell out with the Democratic Party in about 2007, which meant that members of the Demo-Christian Party no longer had a powerful ally. This meant that people who had supported the Demo-Christian Party were essentially out in the political wilderness without protection.
36. The Democratic Party has been in power in Albania but members of the Demo-Christian Party have not been able to take the advantage of protection from the Democratic Party since 2007.
37. Traditionally, political membership follows in a family and so I am considered to be a supporter of the Demo-Christian Party because of [Mr B]'s support for that party. I also sponsored the Demo-Christian Party by making payments of about €4,000 to €5,000 per year. I made these payments so that I could hold my land and get political protection and also because [Mr B] was a member of the party.
38. As members of the Demo-Christian Party are now on the outer side of politics, it is difficult for members of that party to seek protection from state agencies or local council agencies in Albania.
39. On [date] [Month 2] 2008 the local police went to [Mr B]'s house. It is believed that the main reason for the attendance of the police at [Mr B]'s house was that [Family A] had friends who are members of the police force, and they asked the police to attend at [Mr B]'s house to kill my [adopted parents].
40. Both my [adopted parents] were shot and killed by the Albanian police on this day. The police have subsequently claimed that they went to the address to arrest [Mr B] for the death of [Mr A] and that [Mr B] resisted arrest. However, this story cannot be true because [Ms D]

was shot dead as she opened the door. They shot [Mr B] after they had shot [Ms D].

41. I was in Italy when I heard the news of the shooting of my [adopted parents]. It was a very big story at the time, and was on television. I think that the police killed my [adopted parents] at the request of the powerful [Family A].
42. Because of his involvement in the Demo-Christian Party and my imputed involvement in that party because of [Mr B], there is no way we could have any support from the local authorities.
41. The murder of my [adopted parents] was devastating to me. [Mr B] was [age] at the time of his death.
44. [Family A] do not regard the death of [Mr B] as avenging the blood owed to them because they do not acknowledge that they killed him. They say that they are still owed blood by a member of my family, and they are looking to target me.
45. I am very afraid that [Family A] will target me next. I am the next male member of my family. I know that [Mr A] killed a father and son of another opposing family in a different blood feud. The name of the family of the people he killed is [name] and he killed [name] and [name]. This happened in around [year] or [year] but this feud is still ongoing and [Family A] has proved itself to be very dangerous and very aggressive.
46. I have indicated openly that I want the chance to talk with [Family A] about this feud and to try and resolve the problem. I have contacted the priest, [Priest F], who is based in [Village 2], Albania. I contacted him by phone from Italy and my [relatives] and friends of my father and [Mr B] also approached the priest. The tradition is that the older people attempt these negotiations. The priest has gone to the [Family A] house with five other people who are elders and respected members of the village community to try and sort out the problem. [Family A] have sent the negotiators away and said that they intend to take blood. The priest has come two times to Italy to try and speak to me as well and I have always said that I want to try and resolve the dispute.
47. [Priest F] has written a declaration. I believe this was sent to the Department of Immigration and Citizenship as well as a letter from the Mayor of [Village 2].
48. I have offered to pay money to [Family A] to try and resolve this matter. I was happy living in Italy with my wife and children. We had a very good life and I have no desire for my whole life to be upset by this terrible problem.
49. I received a number of threatening phone calls. The phone rang and I answered it. The voice on the other end would say words to the effect of "if we don't kill you we will kill your kids". I found these phone calls extremely terrifying. The thought that my children could be targeted and killed was very worrying for me
50. I used to change my number frequently. Often I would not answer a phone if I did not know the number calling in. As a result of this and also as a result of my fear of leaving the house, my business reduced and my business income was much lower in the last year before I left Italy and came to Australia.
51. When I received the threatening phone calls I said that I would go to the police and the voice on the other end of the phone said "alright, you go to the police - don't worry, we will find you". There is no way whatsoever that the Albanian police can or will protect me from my fear. I know that the police are willing to support [Family A] and would not take any action against them if I were to be killed.
52. I have not been back to Albania since my my [adopted parents] were killed, except for about 12 hours to get passports to travel. These days it is not possible to get Albanian passports without physically going to the country to get those passports. I didn't tell anyone that we were going to Albania, and we kept very quiet about our plans.
53. [Applicant 2] and I have talked about the problem at great length and we decided that we

had no choice but to leave Italy and try and find refuge in another country. We obtained visas for Australia and came to Australia on [date] June 2010.

54. I am very afraid of returning to Albania / Italy and we ask the Australian government to protect us.
 55. I have been told that in order to be accepted as refugees, we have to demonstrate that our fear in relation to returning to Albania / Italy is related to our religion, political opinion, nationality, membership of a particular social group or race.
 56. I believe that our fear is connected with religion. Because [Applicant 2] and I are in a mixed religion marriage, we are targeted by an aggressive and criminal family in Albania. This family has established a blood feud with [Mr B] which has put me in danger. The true basis of the hatred of [Family A] towards my family is my decision to marry a Muslim woman.
 57. I believe that my fear is also connected with politics. Because of [Mr B]'s political membership and my imputed political membership, we cannot avail ourselves of the protection of the Albanian system and have become a target as a result. [Family A] has targeted us because we are weak. We are weak in numbers and also weak because we do not have the right connection to get protection in Albania. The Italian authorities are not able to protect us.
 58. It is not safe for us in Italy. We had permanent residence visas in Italy and I believe that they are still valid but I am not sure. Our right to reside in Italy may lapse if we are absent from Italy for a period of time.
 59. I ask the Australian government to give my family protection.
27. [In] January 2011, the Tribunal received copies of two notarised statements from witnesses in Albania dated [in] August 2010, with authorised translations.
 28. The first statement is from [Mr E], head of the [Village 2] commune in [Town 1], Albania, It confirms that the first named applicant is the informally adopted son of [Mr B], that a blood feud arose in the circumstances claimed, that despite the killing of [Mr B] and his wife in a police raid [Mr A's family, Family A,] are still eager for blood revenge, and that efforts by the local government, the Catholic clergy and the blood reconciliation association to reconcile the two families have failed. He also notes that he is aware that in furtherance of the feud, an attempt was made on the life of the first named applicant in Italy.
 29. The second statement is from [Priest F], pastor of the [parish] in [Village 2], which includes the village of [village deleted: s.431(2)]. The deponent states that he has known [Family B, Applicant 1's] family since he came to the parish six years earlier, confirms the existence of the claimed blood feud, including the fact that it has pursued the applicant to Italy, and deposes that he has personally been involved in unsuccessful attempts to reconcile the two families, even travelling to Italy to speak with members of [Family A] there.

Tribunal Hearing

30. The applicants appeared before the Tribunal [in] January 2011 to give evidence and present arguments, via videolink from Adelaide. The Tribunal hearing was conducted with the assistance of an interpreter in the Italian and English languages. The applicants were represented in relation to the review by their solicitor and registered migration agent, who also attended the hearing.
31. The Tribunal explained its role, the purpose of the hearing, and the applicable legislative framework, and outlined its concerns about the applicants' claims.

Evidence of the First Named Applicant

32. Asked how long he had lived in Italy, the applicant indicated that he had been there since 1991.
33. Asked whether he had been working there, the applicant recounted his employment history. He said he had been an apprentice in 1992-1992, installing gas mains in roads, he worked as a woodcutter for a year, and then as a baker for six years before setting up his own building company.
34. Asked what had happened to the business since he came to Australia, the applicant indicated that he had closed it down and sold the assets.
35. Asked his religion, the applicant indicated that he is Catholic. Asked whether he practises, the applicant confirmed that he does, not every Sunday, but he attends church at the [special occasions].
36. The applicant was asked to explain why he had come to Australia. He indicated that he had met his wife in 1992, and they were married in a registry office about two years later. She subsequently came to live with him in Italy. God blessed them with two wonderful children. They lived and worked together, from time to time returned home to Albania, and eventually came to Australia together.
37. In [Month 1] 2007 they had returned to Albania to celebrate [event deleted: s.431(2)], and their family attended church together. Their village is 100% Christian, and his wife was not viewed well by others because of 'religious racism'. This is because he was one of the few who had married a Muslim. When they went to church on this occasion they had problems with [Mr A]. Harsh comments were made, with people demanding to know why the applicant had brought a Muslim into the church. The said that his children were not Christians because they were the pups of a Muslim. They tried to put an end to the discussion, and returned to Italy, but [Mr A] continued to insult [Mr B] at a bar. A fight ensued involving a number of People and [Mr A] ended up dead. This occurred [in Month 1] 2007.
38. After that, Albania became a no go zone for them, because a blood feud developed between the two families. From that time on his life has been different and his family has been in danger. The matter was complicated by the fact that his adoptive father had helped the Christian Democratic Party in Albania.
39. In [Month 2] 2008 his adoptive father and mother were killed by the local police. After their deaths, the applicant tried to make peace with [Family A] to end the feud. They said that now the [adoptive parents] are dead, they should make peace, but unfortunately this had turned into a feud which didn't end with the loss of life. They want to take it out on the applicant and his family, and they have sought the applicant out in Italy, where they also have family and many friends. The applicants were forced to shut down any aspects of their lives, and could hardly go out at all. They could not return to Albania for fear of [Family A], but they were also fearful of the police, who had killed his adoptive parents. Illegal things occur in Albania; it is not just [Family A] but the police as well.
40. Things became difficult for them in Italy as well. In 2010 he had to move his work to Milan because things had become impossible in [City 3] where they had been living. Asked to detail the problems they were experiencing, the applicant said that he received phone calls from

unknown numbers warning him that he did not have long before he would die, and that if he did not pay his children would pay. On one occasion in early 2010 he was chased by a car, although he didn't recognise the people chasing him. Other Albanians in Italy warned him that if he called the police he would suffer.

41. The applicant was asked whether he is sure there is no other reason for the blood feud, the applicant replied that he is not aware of any other reason. Asked how [Family A] even knew he had married a Muslim, he replied that the fact of his marriage was known, and he comes from a small village with not a very large population.
42. Asked why the relationship had only become a problem after many years of marriage, the applicant explained that he was already living in Italy, and that he had not met his wife through other people, he just met her himself at the beach. She came to Italy to live with him. There was evidently already some negative sentiment towards them, but the problem only came to a head when they returned to his village at [Month 1] 2007 and attended the church.
43. The applicant was asked why the blood feud hadn't been satisfied after the death of [Mr B]. He replied that [Mr B] had been massacred by the police on the premise that he was a supporter of the Democratic Party.
44. Asked whether he is suggesting that [Family A] has members in the police force, the applicant replied that he suspects that they do, although they deny it. He thinks they must have some connection to the police. His mother had nothing to do with this dispute, and yet she was massacred.
45. The Tribunal asked the applicant whether he thinks that other family members are also at risk because of this feud. By way of reply, he noted that his father is dead, and his mother is old. He has had no contact with his eldest brother since the feud broke out; he thinks he moved to Italy too. Asked whether his brother moved because he is also at risk, the applicant replied by explaining that that they had drifted apart, and that his brother blames his wife for bringing this on the family. His two other brothers are in England.
46. The applicant thinks that he is a particular target because having married a Muslim woman he is at the root of the problem. After what has happened, he thinks that his wife and children are also at risk.
47. The Tribunal observed that children and women are not normally targeted in blood feuds. The applicant agreed in principle, but noted that in 1994 a father and son had both been killed in [name deleted: s.431(2)] in a blood feud. He fears that [Family A] are capable of anything.
48. The applicant was asked whether his children understand why they have come to Australia. He replied that they only told them after they arrived in Australia that they were unable to return home owing to some problems, but the children do not know the details.
49. The Tribunal noted that the applicant claimed that [Mr B] killed [Mr A] in [Month 1] 2007, and then the police killed [Mr B] in [Month 2] 2008. The applicant confirmed that this was correct. The Tribunal asked why, if the first killing had given rise to a blood feud, and [Family A] is as powerful as he claims, [Mr B] had not been killed sooner, and by [Family A] themselves. The applicant reiterated that it wasn't actually [Mr A] who had his father killed, it was the police.

50. Asked again why, in light of the feud, it had taken so long for any action to be taken against his father, the applicant explained that he had been in hiding for some time before deciding to return for the village feast. He had only been back one week when he was killed. At that time only a few family members even realised that they had returned.
51. [Family A]'s attention had been focussed upon the applicant's adoptive father, but after he was killed their attention turned to the applicant. The applicant's family contacted the priest to try to intercede on their behalf and make peace. Over a period of 12 months or so they made overtures and even offered to pay money, but the offers were rejected.
52. The applicant was asked when he had arrived at the conclusion that they would not shift their position. He explained that it was eventually apparent that they feel so powerful they do not need to compromise. He concluded it was hopeless by around January 2010.
53. The Tribunal noted that the passports submitted with the protection visa application indicate that the applicants' visas to come to Australia were granted [in] January 2010 but they did not come to Australia for a further five months. The applicant was asked why, if the threat against them was so serious, they did not leave as soon as the opportunity to do so arose. The applicant replied that by that stage they had essentially vacated their home in [City 3]. He reiterated that he had gone to work in Milan, and that his wife and children had gone to live with his mother-in-law in [town deleted: s.431(2)]. Meanwhile they had continued trying to negotiate with [Family A] in an attempt to buy time.
54. Asked whether he would have remained in Italy if he had been able to negotiate a settlement, the applicant replied in the affirmative. When they applied for a visa to visit his brother in Australia they were still waiting for a settlement and hoping they could stay in Italy. They would not have come here if they didn't have to. His children are not happy at having been uprooted; they cry every day.
55. Asked whether he came to Australia thinking he could get asylum here, the applicant replied that he hoped he could, but that the great distance to Australia was also a factor.
56. The applicant was referred to two Albanian language newspaper reports published in the Albanian online journal [name deleted: s.431(2)] refer to the deaths of the first named applicant's adoptive parents. The articles, dated [in Month 2] 2008, are available respectively from [websites deleted: s.431(2)]. **Error! Hyperlink reference not valid.** In translation, the titles read [title deleted: s.431(2)]. [Information deleted: s.431(2)].
57. The applicant confirmed that he had read similar reports, but disputes their accuracy. In the reported version of events, not even the dates are accurate. The police version asserts that he was killed on the [date deleted: s.431(2)] [Month 2] 2008 when in fact he was killed on [a different date in Month 2], at [time deleted: s.431(2)] in the evening. The Tribunal noted that the first article was consistent with that, being dated [date deleted: s.431(2)] [Month 2] 2008 and referring to the death of his parents the previous evening at about [time deleted: s.431(2)].
58. The applicant was asked to address the reasons given in the article for the dispute having arisen in the first place. He replied that the allegation was untrue, and that there was no dispute over land. His adoptive mother was killed outside of the house where she had gone to tie up the animals. His adoptive father is [old], and would not have been able to resist the police. Furthermore, [Mr A] and his father were not even neighbours; [Mr A] lived

approximately one kilometre away. Nor did they even own adjoining land; they each owned land on different hills.

Evidence of the Second Named Applicant

59. The applicant also gave evidence corroborating the evidence of the first named applicant.
60. In particular she explained that she had converted to Catholicism and been baptised in Italy, and she identifies as a Catholic. However, [Family A] are bad and have caused many problems.
61. The applicant also acknowledged that blood feuds are usually between men, but in this case they have it in for her too, because she is seen as the cause of the problem. The problem started from when they verbally attacked her as soon as she came out of the church. They said all sorts of horrible things including asking what she had brought those bastards (her children) there for.
62. The newspaper reports can say what they like, but it is clear that her husband's adoptive parents were murdered by the police, as the mother was found outside with a bullet in her head, whereas the father was inside.

Further Evidence of the First named Applicant

63. The first named applicant then concurred with his wife's assessment, noting that it had been dark when the killing occurred, and that it was not a murder-suicide as claimed.

Post-hearing

64. [In] February 2011 the Tribunal received a further submission from the applicants' representative, stating as follows:

My clients and a community interpreter came to see me on [date] January 2011 so that I could speak with [Mr E], the head of the [Village 2] Commune. The Tribunal will recall that [Mr E] has provided a statement in relation to this matter dated [date] August 2010, but he could not be reached by telephone at the hearing in this matter. Unfortunately, [Priest F], who had also provided a statement in relation to the matter, was unavailable as he travels very frequently and is hard to catch by telephone.

On [date] January 2011 my clients made contact with [Mr E] on the mobile but despite repeated efforts to call him on two separate numbers over the ensuing 45 minutes, we were unable to reach him again. We have since learned that these problems were attributable to telecommunications network problems in Albania.

My clients and their community interpreter again attended at my office on [date] January 2011 and I am pleased to report that I was able to have a conversation with [Mr E] on that occasion- I was assisted by a community interpreter by the name of [name]. [Mr E] provided the following additional comments:

- He is the head of the [Village 2] Commune. He has been elected to the position twice.
- He is [age] and as such, is considered to be one of the older people of the village community.
- There are two "blood feud" cases that he is having to deal with in his role as head of the [Village 2] Commune. One of these cases is the case involving [Family B] and [Family A]. The other case relates to two completely different families.

- He has made some progress in trying to reconcile the other blood feud, but there is not prospect whatsoever of resolving the blood feud between [Family B] and [Family A].
- [Family A] are from the mountains. They live by the old traditions and are very attached to the old traditions. They are not at all progressive or modern in their thinking. They believe that the tradition means that they have to take blood from [Family B], and that they can target any male member of that family.
- He is aware that the problem between [Family B] and [Family A] started with an argument between [Applicant 1's relative Mr B], and [Mr A]. He was not personally present when the arguments began but he has been told that the arguments related to [Applicant 1] having a Muslim wife.
- The village in which these families reside is almost 100% Catholic. The people of the village tend to be against the Muslim. [Mr A]'s attitude towards [Family B] for the mixed marriage of [Applicant 1] was not unusual in this respect. However, [Family A] are known for being aggressive and volatile and very hot tempered.
- [Mr E] has personally visited [Family A] on two occasions to try and reconcile the dispute. The most recent occasion was about three weeks ago and the previous occasion was about one year ago. He is not sure exactly of the dates. On both occasions he has tried to encourage [Family A] to forgive the blood. He has pointed out that [Mr A] is already dead, and that it doesn't seem right to try and take blood from his adopted son or other family members. [Family A] have refused all attempts to reconcile and have repeatedly said that they do not forgive and that they intend to take blood.
- [Mr E] has not personally visited [Family A] with the priest, [Priest F], but he knows that [Priest F] has been involved as well, and that he has also been unsuccessful in making peace.
- He has spoken with [Applicant 1] about the case, and he knows that [Applicant 1] is willing to try and resolve the problem and will do anything he possibly can to make peace with [Family A] so that he and his family can live safely.
- It would be very dangerous for [Applicant 1] to comeback to Albania. Even if he moved to another part of Albania it would be very dangerous as there is no problem in Albania finding out where people are. This is especially the case for a big family like [Family A] who have family members everywhere. Even in Italy it would not be safe as many Albanians travel to Italy.
- [Family A] is known to be involved in another blood feud. He is not personally involved in trying to resolve that one but he has heard about it. In the other dispute, the other family lives in [City 4]. [Family A] killed two people from this other family, then the family from [City 4] killed one [Family A] person, and then [Family A] killed one more of the members of the family from [City 4] This is also an ongoing blood-feud.

He is happy to speak with the Tribunal should the Tribunal have any further questions. The best phone number to call is [number].

65. [In] May 2011, the Tribunal was provided with a further submission enclosing the original of the first-named applicant's statutory declaration made [in] January 2011, copies of a number of RRT decisions consistent with the outcome being sought in the present application, and a copy of a letter from [Agency 1] dated [in] March 2011, along with an authorized translation. The submission states as follows:

I note that we have previously provided the Refugee Review Tribunal with a copy of attestations of [Mr E], the head of the [Village 2] Commune and translation and the attestation of [Priest F] and translation. We have also provided the Tribunal with an account of a conversation between myself and [Mr E] of [date] January 2011.

If the Tribunal has any further questions or wishes to test the evidence of these two witnesses, we are happy for the matter to be reconvened before the Tribunal Member and the witnesses contacted by telephone.

I note that at the hearing in this matter the Tribunal indicated that it had undertaken its own research regarding the killing of [Applicant 1]'s adopted parents, [Mr B] and his wife [Ms D], and that the Tribunal had perused articles where the killing of these two individuals by officers of the Albanian police was reported. The Tribunal further noted that the newspaper articles did not make reference to the killing being conducted by the police at the request of members of [Family A]. I believe that the Tribunal accepts that such an admission is never likely to be made by any law enforcement agency, and we can only ask the Tribunal to look at the circumstances surrounding the killing of [Mr B and Ms D].

Return to Italy & right of residence in Italy

The Tribunal has been provided with a copy of the permanent resident visas of [Applicant 1 and Applicant 2].

Enquiries have been made of the relevant Italian authorities as to whether [Applicant 1 and Applicant 2] can now return to Italy. The information secured through [Agency 1] indicates that whilst the police did not receive a proxy from [Applicant 1] to access his personal data, as a matter of general information a foreigner who possessed a CE (European community) residency permit for an extended period cannot be absent from the TN (Italy) for more than one year. [Applicant 1 and Applicant 2] left Italy [in] June 2010.

[Applicant 2] has recently instructed me that she has been invited to attend a citizenship interview in Italy. The possibility of losing their Italian residency has brought a great deal of anxiety in the minds of [Applicant 1 and Applicant 2]. They have considered returning to Italy so as to preserve their residency. However, they left Italy because they were not safe there and feared being killed. Nothing has changed. They remain fearful of being killed in Italy and they have decided to remain in Australia where they are safe, rather than returning to Italy and facing a real risk of harm even though this course of action means losing their right of residence in Italy.

We submit that [Applicant 1 and Applicant 2]'s decision to remain in Australia and thereby lose their Italian residency gives credence to their claimed fear of harm in Italy (and Albania). We ask the Tribunal to accept that this is a decision that has not been made lightly by [Applicant 1 and Applicant 2].

We submit that on the basis of the information provided, the Tribunal can find that from [June] 2011 [Applicant 1 and Applicant 2] will no longer have the right of residence in Italy, and that therefore their claims need only be assessed as against Albania.

Convention Claim

[Applicant 1 and Applicant 2] claim that they are refugees for the following reasons:

- A fear of persecution in Albania because of their religion (mixed religion marriage).
- In [Applicant 1]'s case, a fear of persecution in Albania because of his political opinion (supporter of the Demo-Christian Party which is not now in power and has no strong political ally).
- Membership for [Applicant 1 and Applicant 2] of the particular social group "Albanians in a mixed Muslim / Christian Marriage".

Mixed Marriage Claim

[Applicant 1 and Applicant 2] claim that through no fault and no action of their own, [Applicant 1] has become the primary candidate for revenge under a traditional blood feud. He has become the target for revenge because [Mr B] killed [Mr A] a physical argument between [Mr B] and [Mr A] regarding the mixed marriage between [Applicant 1 and Applicant 2].

We refer the Tribunal Member to his own decision in the matter of 061031514. The fact situation in that case was similar to the fact situation in this case. An individual Albanian national, (with a possible right of residence in Greece), was subject to being killed under a traditional blood feud by members of the family of a Muslim girl with whom the applicant's brother had had a relationship (pregnancy 1 abortion).

The Tribunal noted that in order to make a successful claim for protection, an applicant had to demonstrate that there was a "Convention nexus", that is that there was a connection between the claimed fear of harm and the Refugee's Convention. The Tribunal noted that the applicant's claim could be characterised as a "blood feud" type claim, and that it would therefore be affected by Section 91S of the Migration Act, and the ensuing decisions culminating the decision of the majority of the High Court of Australia in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2006] 231 ALR 556*. In 061031514, the

Tribunal Member noted that it was the religious difference which lay at the heart of the dispute. The Tribunal proceeded to consider the relevant case law and found that whilst on a superficial level it could be said that the applicant's brother, and by derivation the applicant himself, feared that he would be punished in retaliation or by way of revenge for the slight on the opposing families honour, the Courts have cautioned against such a "black and white" approach. The Tribunal cites, for example, the decision of the Federal Court in *SHKB v Minister for Immigration and Multicultural Affairs [2004] FCA 545*. The Tribunal determined that whilst there was no direct evidence of the precise motivations on the opposing family, it did appear that religious difference was critical to them in finding that the relationship was unacceptable, and which had led to the ensuing feud.

In our submission, this case is on all fours with the decision of the Refugee Review Tribunal in 061031514. I have been unable to identify another case which sits squarely with the fact situation in this case.

We would urge the Tribunal to adopt similar reasoning in this case and conclude that the mixed marriage constitutes the essential reason for the fear of harm in this matter.

Political Opinion

[Applicant 1] supported the Demo-Christian Party. He made financial contributions to the party. That party is now on the "outer" of Albanian politics and because of his and [Mr B]'s support of the party, he has no ability to secure protection from local law enforcement agencies in Albania. In addition, the claim is made that [Applicant 1] faces a fear of persecution in Albania because of his political opinion. We refer the Tribunal to the decision of the Refugee Review Tribunal in *0804260*. In that matter it is the writer's understanding that the applicant claimed a fear of persecution in Albania because of his membership of the Demo-Christian Party. In that matter, the Tribunal quoted an extract from advice given by Dr Shannon Woodcock of the School of Historical and European Studies at La Trobe University about the importance of political associations in Albania, and the personal danger faced to individuals who have aligned themselves with the wrong political party. The applicant in that matter (0804260) was successful.

State Protection 1 Non State Actors

It is not necessarily conceded in this matter that any persecution suffered by [Applicant 1 and Applicant 2] in Albania would be perpetrated by non state actors. [Applicant 1 and Applicant 2] believe that the Albanian police acted at the bidding of [Family A] in killing [Mr B and Ms D]. Even if the Tribunal finds that any persecution feared would be perpetrated by non state actors, it is submitted that the Tribunal must nevertheless find in favour of [Applicant 1 and Applicant 2] if it is satisfied that the Albanian authorities are unwilling or unable to protect them.

In *Minister for Immigration and Multicultural Affairs v Khawar [2002] 210 CLR 1* Gleeson CJ stated:

"Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condemnation of Condonation of such conduct by the state or agency of the state,

resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds, it may be satisfied by the motivation either by the criminals or the state.

Similarly, McHugh and Gummow JJ stated

"The persecution in question lies in the discriminatory inactivity of state authorities in not responding to the violence of non state actors. Thus, the harm is related to, but not constituted by, the violence. "

It is submitted that there is ample evidence before the Tribunal to establish that the Albanian authorities are corrupt, ineffectual and not capable of providing [Applicant 1 and Applicant 2] with the protection they require. In addition, we ask the Tribunal to accept that [Applicant 1 and Applicant 2] face particular obstacles in securing protection in Albania, because of their long period of residence in Italy and [Applicant 1]'s support of the Demo-Christian Party and consequent lack of any networks within the ruling parties.

We would ask the Tribunal to advise us if it does not accept that [Applicant 1 and Applicant 2] do not now have the right of residence in Italy, and to advise us if it wishes to take evidence from the witnesses.

66. The letter from [Agency 1] notes that the applicant has not specifically authorised the release of information about his immigration status in Italy, but observes nevertheless that his permanent residence entitlement lapses if he spends 12 months outside Italy continuously.

Country Information

67. An Immigration and Refugee Board of Canada (IRBC) report accessed from http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=412400 on 28 May 2007 explains motives for contemporary blood feuds or similar revenge killings in Albania as follows:

While the Kanun touches upon many aspects of Albanians' social existence, it specifically concerns the notions of honour, hospitality and vengeance (*The Observer* 12 Feb. 1995). A male member of the family takes the decision to begin or end a feud (BBC 5 May 2002; *The Mirror* 31 Aug. 2002). The Kanun stipulates blood revenge (*gjakmarrja*) for major offences, including intentional murder (accidental killings require the perpetrator to hide for a period of time), insulting a man's personal honour, insulting the honour of a woman and violating hospitality (Shkoder.net n.d.). An examples of insult toward a man's personal honour is calling him a liar in front of other men (*The Mirror* 31 Aug. 2002) while insult to the honour of a women includes rape (Shkoder n.d.) and adultery (*The Observer* 21 Sept. 2003). Most reports refer to a blood feud starting as a result of a killing (ibid.; MRD Nov. 2002, 341; RFE/RL 12 Oct. 2001a; ibid. 12 Oct. 2001b; ibid. 12 Oct. 2001c) and these commonly relate to fights over women (*The Mirror* 31 Aug. 2002).

According to Radio Free Europe/Radio Liberty (RFE/RL), revenge killings "are now conducted with little respect for, or understanding of the [K]anun code" (12 Oct. 2001c). For example, there have been cases where feuds have begun because human traffickers have lured daughters or sisters into prostitution (*The Observer* 21 Sept. 2003). The International Crisis Group (ICG) also reported examples of feuds resulting from "an untoward advance toward a woman," the killing of a dog, disagreements among criminal gangs, following car accidents or because of disputes over land or water (ICG 1 Mar. 2000, 23).

68. Blood feuds do not appear to recognise international boundaries. A BBC news item entitled *When a blood feud came to Britain*, dated 17 October 2005 and available at http://news.bbc.co.uk/2/hi/uk_news/4621523.stm, describes a case where two Albanians travelled unlawfully to the UK, and in furtherance of a blood feud, located and killed another Albanian who had fled there before themselves returning to Albania.

69. The problem of blood feuds persists today, and the willingness or ability of the Albanian law enforcement authorities to address the problem is compromised by the fact that they are weak, ineffectual and corrupt, as is evident from the latest United States Department of State's (USSD) Human Rights Practices report on Albania. The report, which was issued on 8 April 2011 and is available at <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154409.htm>, includes the following:

There were reports that police severely beat and mistreated suspects during interrogation and detention. Some cases of physical mistreatment were reported in prisons. Police corruption and impunity persisted. Government corruption remained a serious and unresolved problem. Discrimination against women, children, homosexual persons, and minorities were problems. Trafficking in persons also remained a problem...

During the year there were continuing reports of societal killings, including both generational "blood feud" and revenge killings. Such killings sometimes involved criminal gangs. According to the Interior Ministry, there were five blood feud-related killings during the year. However, NGOs reported 55 blood feud-related killings during the year. According to NGOs, fear of blood feud reprisals effectively imprisoned approximately 1,490 families their homes. The Court of Serious Crimes tried blood feud cases. The law punishes premeditated murder, when committed for revenge or a blood feud, with 20 years' or life imprisonment...

Despite improvements in law enforcement training and management, police did not consistently respect the human rights of citizens during the performance of their duty and were not fully accountable to the rule of law. In some instances, police impunity was a problem. Police officers did not enforce the law equally and an individual's political or criminal connections often influenced enforcement of laws. Low salaries contributed to continued corruption and unprofessional behavior which remained impediments to the development of an effective civilian police force.

70. The USSD report also contains the following, somewhat contradictory statement going to the question of whether political violence is a problem in Albania:

There were no reports that the government or its agents committed arbitrary or unlawful killings. The killings of two political figures--Socialist Party Member of Parliament Fatmir Xhindi and a Christian Democrat leader, Alex Keka--were under investigation and remained unresolved at year's end.

71. The evidence as to the nature and extent of Catholic-Muslim violence in Albania is somewhat equivocal. DFAT report CX 94926, dated 30 April 2004, reads as follows:

A.1. It is not plausible that as a result of marriage to a Catholic, an Albanian woman would be liable to generalised persecution. Albania is tolerant to different religions and there is very little religious fundamentalism - except possibly for some specific areas in northern Albania.

Death threats within families usually stem from blood feuds (or family vendettas), as opposed to religious or broader persecution. Blood feuds are an old historical practice in Albania, primarily rooted in the tribal society of the northern Albanian highlands. Central to the notion of blood feud is the concept of honour and kinship: a man can be justified in killing someone who has insulted his, or his family's, honour. Subjects in a blood feud can be forced into hiding but only in their own home, which is considered inviolate in the blood feud tradition. It is very difficult to determine if an applicant's asylum claim based on a blood feud is genuine or not. Some countries refuse to accept asylum applications based on blood feud claims.

A.2. The Albanian government is tolerant to different religions and community groups. The Albanian government has enacted religious freedom legislation within its constitution. Further information can be found at "www.keshilliministrave.al" Sources said that although the majority of the Albanian population is Muslim, there is only a relatively small number who strictly

practice the religion. As an example, head-scarves tend to now be worn mainly by older women living in villages.

The Albanian government has also enacted strong legislation in an attempt to eradicate the blood feud tradition. Penalties for blood feud killings are more severe than for other murders. A credible threat of revenge or blood feud that causes a person to remain in hiding is punishable by up to three years in prison.

A.3. Relocation to other towns is an option. In large towns, mixed marriages are not rare.

A.4. Albanians are generally tolerant of different religions. Our understanding also is that Albania is a religiously tolerant society. There have been recent reports of religious conflict in southern Albania around Korce between Muslim and Greek orthodox communities, but these conflicts have been mainly based on disputed territory and political-cultural disagreements, not religious intolerance. Albania's long-term goal is eventual EU membership, so it is striving to develop the institutions and practices acceptable in a modern, democratic society.

72. An article by Stephen Schwartz, of the Centre for Islamic Pluralism, published by TCS Daily on 8 May 2006 and accessed from <http://www.tcsdaily.com/article.aspx?id=050806D> on 29 May 2007, includes the following reference Muslim-Catholic conflict in Albania, but also speculates that the media may be inciting such incidents:

Shkodra, Albania -- Does the mainstream media (MSM) incite the clash of civilizations (COC) between the Judeo-Christian world and Islam? At times, it seems so....

But let me not stray too far from what brought me to Albania. The April 2006 issue of *First Things*, an American Christian magazine of considerable influence, printed an article of mine calling on the Vatican to do more to help Albanian Catholics preserve their cultural heritage -- not in the face of Muslim aggression, but against the remnants of Communist corruption in politics and legal standards

The article called forth a generous comment from the editor of *First Things*, Jody Bottum, who also, however, mentioned news reports of Muslim-Catholic conflict in the northern Albanian city of Shkodra, in which Catholics were historically a majority and now make up half the population. Many Catholics have left Shkodra for other Albanian cities where economic opportunities are better. As a Catholic and anti-Communist redoubt, Shkodra continues to suffer, in its social development, from the discrimination imposed on it by decades of Marxist terror. My article, Mr. Bottum's comments, and links to the news stories about Muslim-Catholic tensions may be read [here](#).

73. On the other hand, the 2010 USSD International Religious Freedom Report on Albania, published on 17 November 2010 at <http://www.state.gov/g/drl/rls/irf/2010/148905.htm> states that *[t]he government generally respected religious freedom in practice...There were no reports of societal abuses or discrimination based on religious affiliation, belief, or practice.*

74. RRT Country Advice ALB38907, dated 16 June 2011, includes the following information about the rights of certain Albanian passport holders to temporarily enter and reside in European countries parties to the Schengen Convention:

1. What rights do Albanian citizens have under the Schengen Agreement to enter and reside in Schengen Agreement countries?

The Schengen Agreement of 1985 and subsequent Schengen Convention of 1990 abolished controls at the borders between signatory countries. The Schengen area refers to the external borders of these countries, within which travellers can move freely without being subject to internal border checks. Such travel is limited to up to three months within a six-month period. Third country nationals are generally required to obtain a short-stay visa to enter the Schengen

area. The Schengen provisions do not provide the right to residence or employment in signatory states.

Albania is not included in the Schengen area. However, Albanian citizens who hold biometric passports were granted visa-free travel within Schengen zone countries as of 15 December 2010. Multiple entries are permitted, as long as the total period of stay does not exceed three months within a six month period. Switzerland's Federal Department of Foreign Affairs, the Swedish Migration Board, the Austrian Foreign Ministry and the Consulate General of the Czech Republic in Chicago all confirm that this three month limit applies in their respective countries to Albanian citizens without a visa.

The visa exemption does not provide Albanian citizens with the right to work or settle in any of the Schengen countries. In addition, entry conditions for third country nationals still apply for Albanians entering the Schengen area; at the external border of a Schengen country travellers are required to prove that they have sufficient funds to cover their stay, demonstrate that the purpose of their travel is for a genuine visit, and specify the place where they will be staying.

Furthermore, Article 2.2 of the Schengen Convention permits signatories to reinstate border controls for a limited period, for "public policy or national security" reasons. Denmark has recently reinstated control booths on its borders in order to counter organised crime and people trafficking. According to recent news reports, new European Commission proposals seek to allow the reimposition of border controls for countries faced with extraordinary flows of migrants. These changes are expected to be discussed at an EU summit on 24 June 2011. In November 2010, European Union Home Affairs Commissioner, Cecilia Malmstrom, advised Albanian students at the European University of Tirana that "the EU might reconsider the visa regime if there was a sharp increase of asylum seekers in member states".

2. What steps do Albanian citizens need to take to avail themselves of any such rights?

Albanian citizens who wish to travel visa-free into the Schengen area must obtain a biometric passport, provide proof that they have health insurance, and demonstrate that they have sufficient funds to cover the cost of the travel and stay. According to Albania's Ministry of Interior, more than 1.2 million citizens applied for a biometric passport in November and December 2010.

3. Can Albanian citizens avail themselves of such rights if: (a) they do not have Albanian passports; or (b) their Albanian passports have expired?

Albanian citizens require current biometric passports in order to travel without a visa into the Schengen area. According to Switzerland's Federal Department of Foreign Affairs, the visa exemption for Albanian citizens "is only valid if...[t]he person who travels holds a biometric passport issued by Albania". The Swedish Migration Board defines a biometric passport as one that is "equipped with a computer chip that stores personal information and a photograph of the holder"

Albanian citizens holding non-biometric passports still require a visa to travel to the Schengen area. In addition, an Albanian residence permit does not allow the holder to travel to the Schengen area without a visa.

FINDINGS AND REASONS

Country of Nationality

75. The applicants claim to be citizens of Albania. They arrived in Australia carrying apparently genuine Albanian passports bearing a subclass 676 Visitor visas issued to him on the basis that they are nationals of that country. The Tribunal accepts on the basis of this evidence that the applicants are in fact Albanian nationals, and has assessed their claims accordingly.

Assessment of the Claims and Evidence

Well-founded Fear of Serious Harm

76. The Tribunal found the applicants to be credible witnesses. Their oral evidence at the Tribunal hearing was both detailed and consistent with their earlier written claims and with the evidence given by the first named applicant at the departmental interview. The demeanour of the applicants at the hearing also seemed to be appropriate and consistent with their holding genuine fears for their safety and the safety of their children in the event that they return to either Albania or Italy.
77. The newspaper articles referred to potentially undermine the reason advanced for the harm feared by the applicants, suggesting that property and not religion was the cause of the dispute between [Family A] and [Family B]. On the other hand, the articles were written by a person with the same family name as [Family B]'s enemies, and it does acknowledge that there was a dispute about the circumstances under which the first named applicant's adoptive parents died. Furthermore, the applicants' version of events is supported by the statements provided by the village head and the parish priest.
78. The Tribunal also notes that the country information suggests that there are many mixed marriages in Albania. However, it does not follow from this that the applicant's claims are untrue; all that can be inferred from the country information is that for some Albanians, perhaps even a majority, mixed marriages are acceptable. Where the evidence is that persons having a particular profile are not generally persecuted, it would be wrong to draw a conclusion about whether a particular applicant will be persecuted without paying close attention to the effect of the qualification provided by the word "generally" The question is whether there is anything in the applicant's circumstances to take him or her outside the "general" situation: see *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1 per McHugh J at [35].
79. Bearing this in mind, the Tribunal's claims appear to be consistent with country information about blood feuds in Albania. There is evidence that some parts of Albania are less prone to blood feuds than others, and that relocation within Albania might be a safe option, and yet the applicant does, the Tribunal accepts, come from the north where such feuds are more common, and the fact that people have been killed overseas in pursuit of Albanian blood feuds suggests that simply relocating within Albania would not necessarily enable a person targeted as a result of a blood feud to avoid the threat arising from the dispute.
80. The country information suggests that the government is making some efforts to tackle the problem, and yet it seems clear that those efforts have been limited, and that blood feuds persist. It is quite clear from the country information that the blood feud problem is a very real one which results in the deaths of many people each year and affects at least hundreds, if not thousands of families in Albania.
81. It is not clear that the political orientation of the applicant and his father played a significant role in the actions of the police. Country information such as the USSD report does not, in the view of the Tribunal, support the proposition that merely being an opposition supporter gives rise to a real chance of being killed by the police. On the other hand, the report is not inconsistent with the proposition that corruption and undue influence might, in conjunction with a lack of political protection, have resulted in a situation where the police may have

been pursuing the agenda of [Family A], stating for example that *an individual's political or criminal connections often influenced enforcement of laws.*

82. Aspects of the [journal deleted: s.431(2)] news reports are disputed by the applicants, but the reports are at least consistent with the claim that [Family B] believes that the police killed the applicant's adoptive parents, although the Tribunal is not persuaded by the applicant's argument that his father would not have resisted the police simply because he is an old man. After all, this is the same man who is said to have become involved in a fight with [Mr A] which resulted in the latter's death. Ultimately, however, the question of whether or not the first-named applicant's parents were murdered by the police appears to be somewhat peripheral.
83. As far as the Tribunal is concerned, the more important issues arising from this incident are: firstly, why the dispute arose in the first place; and secondly, if a blood feud did commence for the reasons claimed, whether the death of [Mr B] brought that feud to an end. The evidence of the applicants and their witnesses has been consistent in both these respects, and indicates firstly that the feud arose from a dispute over the first named applicant having married a Muslim and brought her and their children into the local church, and secondly that the feud continues unabated.
84. Having carefully considered the evidence the Tribunal accepts the applicants' claims, finding in particular that the first named applicant married the second named applicant who was a Muslim at the time, and that despite having subsequently converted to Catholicism, it was known in the village that she was – or had been – a Muslim. The Tribunal accepts that it was the presence of her and the couple's children in the village church during [Month 1] 2007 which had the effect of inciting the religious prejudice of [Mr A] to the extent that he verbally insulted the applicants, setting off a chain of events which resulted in the death of [Mr A] during a fight one week later and the establishment of a blood feud between [Family A] and [Family B].
85. The Tribunal also accepts that in furtherance of the blood feud, both applicants have been pursued and threatened in Italy, forcing them to relocate once already. Had they not been so threatened, there is no obvious reason why they would have wanted to come to Australia, given that they appear to have been well established as permanent residents of Italy, where both of their children were born, and that they did not speak English. The first named applicant explained that but for the family's safety they would not wish to stay here, and noted that their relocation to Australia has been particularly upsetting for the children.
86. The Tribunal therefore finds that there is more than a remote chance that the applicants will encounter serious harm capable of amounting to persecution for the purposes of s.91R of the Act in the reasonably foreseeable future, should they return to Albania.

Convention Nexus

87. The Tribunal has therefore considered whether it is for a Convention reason that the applicants faces a real chance of experiencing serious harm capable of amounting to persecution.
88. In support of the applicants' claims it has been submitted that they face persecution at the hands of [Family A] for the following reasons:
 - A fear of persecution in Albania because of their religion (mixed religion marriage).

- In [Applicant 1]'s case, a fear of persecution in Albania because of his political opinion (supporter of the Demo-Christian Party which is not now in power and has no strong political ally).
 - Membership for [Applicant 1 and Applicant 2] of the particular social group "Albanians in a mixed Muslim / Christian Marriage".
89. For the reasons which follow, the Tribunal accepts that the first of these contentions, and does not consider it necessary to address the remaining two.
90. The delegate correctly noted that the mere existence of a blood feud threatening the applicants will not of itself bring them within the scope of the Convention definition of a refugee. The decision of the High Court of Australia in *STCB* effectively precludes a claim of persecution made solely on the basis of a person's membership of the particular social group comprised of Albanian citizens who are subject to customary law, on the basis that that putative social group does not satisfied the third requirement laid down by the Court in *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, namely that *the possession of the characteristic or attribute [common to all members of the group] must distinguish the group from society at large (STCB, at [35])*.
91. However, the applicants have given evidence that it is religious prejudice which gave rise to the blood feud in the first place, as illustrated by the disparaging religious comments directed towards the second to fourth named applicants, and the evidence given that the feud extends to the second named applicant, despite her gender, because she is the one said to have caused the offence in the first place. Despite the second named applicant having converted to Christianity, the first named applicant maintains that his relationship with his wife was unacceptable to [Mr A], because she had been a Muslim, whereas most of the locals including [Family B] and [Family A] are Christian.
92. There is some doubt about the existence or extent of the religious conflict which is said to underpin the threat of persecution in this case. The country information generally suggests that there is relative harmony between Christians and Muslims in Albania, and furthermore that mixed marriages are not uncommon. On the other hand, there is evidence of ongoing tensions between Muslims and Catholics in Albania, including the applicant's home region around Shkoder, as illustrated by the country information extracted under that heading above or that adverted to by the applicant's representative. The evidence that such conflict would not appear to be common, and that many mixed marriages do occur in Albania, does not mean that the applicant's claims have no credibility for the reasons explained above. After all, the evidence also indicates that there continues to be widespread lawlessness and violence in Albania including, on occasions, religiously motivated conflict.
93. Consequently, the Tribunal finds for the purposes of s.91R(1)(a) that the essential and significant reason for the risk of serious harm which the applicants face from [Family A] is religion, deriving from the fact that the first named applicant, a Christian, married the second named applicant, a Muslim.

The Availability of State Protection

94. The applicants claim to be at risk of persecution from non-state agents in Albania, but also claims that the state is unwilling or unable to protect him from this threat.

95. Albania has a state apparatus which officially frowns on the practice of blood feuds and has acted, for example, to penalise murders committed pursuant to blood feuds more harshly than common or garden murders. On the other hand, the USSD report on Albania extracted above suggests that the government's efforts have stalled and that the problem persists unabated and may even be on the increase. Furthermore, the applicant claims that [Family A] is large and powerful, and has support within or influence over the Albanian authorities, with the consequence that police protection is unlikely to be afforded him.
96. Having had regard both to the applicants' evidence and to the country information reproduced above, the Tribunal finds that that the State of Albania at present fails to provide the level of protection which its citizens are entitled to expect according to international standards: see *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29]. The Tribunal concludes that the applicants' unwillingness to seek protection from those authorities is therefore justified for the purposes of Article 1A(2).

Conclusion on Persecution

97. In *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, Gleeson CJ made the following observation (at p. 13):

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

98. The Tribunal finds that the first and second named applicants faces a real chance of persecution if they return to Albania in the reasonably foreseeable future, for the Convention reason of religion, which for the purposes of s.91R(1)(a) is the essential and significant reason for the harm feared.

Relocation

99. The country information makes it clear that blood feuds do not abate with time, but continue down the generations, and that people at risk can spend years confined in their homes as virtual prisoners to avoid the threat of becoming victims should they venture outside. The country information also indicates that blood feuds cross international borders, from which the Tribunal infers that suggesting that relocation within Albania is not a safe option for a person who has become the target in a blood feud. The Tribunal notes that Albania is a geographically small country and also that the evidence before the Tribunal suggests that there is no adequate state protection available in that country. Furthermore, as referred to above in BBC report, at least one person has been murdered in the UK in recent years by Albanians who travelled there from Albania to carry out the killing in furtherance of a blood feud. The Tribunal infers from this that the applicants would not be able to avoid the threatened persecution by relocating within Albania, and that relocation is therefore not an option which is reasonably open to them in this case.

Safe Third Country

100. At the time of the visa application, the applicants were permanent residents of Italy, and undoubtedly had the right to enter and reside there for the purpose of s.36(3). The applicants' representative has correctly provided evidence indicating that under Italian law that right

lapsed once the applicants had spent more than 12 months continuously outside of Italy. Stamps in their Albanian passports show that the applicants departed Italy [in] June 2010, entered Australia the following day, and have remained here ever since. The Tribunal therefore finds that their Italy permanent residence entitlement has now lapsed.

101. It may be that if they applied they could regain those rights. However, the Full Court of the Federal Court has held that the term 'right' in s.36(3) refers to a current legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Consequently, the Tribunal finds that the s.36(3) of the Act does not apply to the applicants in respect of Italy.
102. In any event, it is apparent from the evidence before the Tribunal that even in Italy the applicants continued to be threatened, and have already felt compelled to relocate once in order to avoid harm from the appears to have lapsed. If they did have the right to enter and reside there for the purposes of s.36(3), a real question would arise as to whether they would not also face persecution in that country for the purposes of s.36(4)
103. The Tribunal also notes that the applicants hold biometric passports issued after their introduction in May 2009. Since 15 December 2010, they have therefore had a limited right to enter and reside for three months in Schengen countries as explained above in RRT Country Advice ALB38907. The Tribunal has therefore also considered, for the purposes of subsection 36(3) of the Act, the rights Albanian citizens enjoy in respect of the Schengen States generally. The subsection states:
 - (3) Australia is taken not to have protection obligations to 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.
104. Subsection 36(3) requires a right to enter and reside in another country. That right may be temporary or permanent, and there is no restriction on the manner in which the right arises or is expressed.
105. The right to which s.36(3) refers is not merely a right to enter. It must be a right to enter and reside: *WAGH v MIMIA* (2003) 131 FCR 269 per Hill J at [64]. The right should be construed as a whole, and it has been stated that attempts to construe the individual terms within the phrase have the potential to mislead and to divert attention away from the object and purpose sought to be achieved by s.36 as a whole, as well as to divert attention into questionable analogies as to what the phrase "right to enter" or the term "reside" may mean in other areas of the law: *SZMQW v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010), per Flick J at [97].
106. "Reside" in the context of s.36(3) has a more particular meaning than its usual dictionary sense of "to dwell permanently or for a considerable time; have one's abode for a time". It does not imply residence of a settled character or a particular standard of living: *SZMQW* at [23] - [40]. Accordingly, the concept of "reside" need not extend to the ability to establish an abode in another country; it may amount to no more than just the temporary right to eat and sleep there: *SZMQW* at [23] - [40]. Furthermore, the right to reside is not "negated" if, by exercising such a right outside Australia, a person may suffer privation or be exposed to significant difficulties in maintaining a lifestyle, that do not arise for a Convention reason: *SZMQW* at [32].

107. Section 36(3) makes it clear that the right to reside can be permanent or temporary. This raises the question of what will qualify as a right to “reside” temporarily for the purposes of s.36(3). There is no minimum period specified as being sufficient, but the term ‘*right ... to reside*’ suggests more than a right to a mere transitory presence. Justice Hill observed in *WAGH*, at [64], that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside. Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour’s opinion, a more difficult question. The applicants in that case held US visas “for the purpose of business and tourism”. Referring to the usual dictionary sense of “reside”, his Honour stated at [65] that it would be an unusual, but not impossible, use of the word to refer to a tourist: while a tourist may stay for a time in a country, that country would not be his or her place of abode, even temporarily. In the same case, Lee J took a narrower approach. Justice Lee held at [34] that the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgement by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required.
108. In the case of the applicant’s right under the Schengen Agreement, whilst the Tribunal accepts that he may have a present right to enter a Schengen zone country, it is the Tribunal’s view that this right is for the purpose of visitation or tourism for a maximum period of three months. This is not a right to enter and reside in a Schengen zone country for the purpose of receiving protection or some equivalence to that to be provided by a Contracting State under the Convention co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required.
109. As a result, the Tribunal finds that the applicant is not 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.

CONCLUSIONS

110. The Tribunal is satisfied that the first and second named applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the first and second named applicants satisfy the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided they satisfy the remaining criteria for the visa.
111. The other applicants have not made claims against Australia’s protection obligations. Therefore they do not satisfy the criterion set out in s.36(2)(a) for a protection visa. The Tribunal is nevertheless satisfied that they are the children of, and therefore members of the same family unit as, the first and second named applicants for the purposes of s.36(2)(b)(i). As such, the fate of their application depends on the outcome of the first and second named applicants’ applications. As the first and second named applicants satisfy the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to a protection visa provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

112. The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first and second named applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first and second named applicants.