

**1212489 [2013] RRTA 511 (2 August 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1212489

**DIAC REFERENCE(S):** CLF2011/170868 CLF2012/108801

**COUNTRY OF REFERENCE:** Albania

**TRIBUNAL MEMBER:** Marten Kennedy

**DATE:** 2 August 2013

**PLACE OF DECISION:** Adelaide

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependent.

## STATEMENT OF DECISION AND REASONS

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act). The applicant, who claims to be a citizen of Albania, applied to the Department of Immigration for the visa on 1 June 2012 and the delegate refused to grant the visa on 3 August 2012.
2. The applicant appeared before the Tribunal on 1 May 2013 to give evidence and present arguments. Unfortunately on that occasion the Tribunal ran out of time to complete the hearing, and it resumed on 7 May 2013. At the hearing on 7 May 2013, the Tribunal received evidence from [the applicant's sister]. The Tribunal convened a further hearing on 4 July 2013 to enable the applicant and his representative to address an issue that was not addressed at the earlier hearings. On each occasion the Tribunal hearing was conducted with the assistance of an interpreter in the Albanian and English languages.
3. At the hearing of 1 May 2013, both I and the applicant encountered difficulty communicating with one another via the interpreter engaged on that occasion. I persisted with the hearing on that occasion as the difficulties with the interpreting only emerged over time, and for the most part appeared to me to be intermittent. At the hearing of 7 May 2013, a different interpreter assisted the Tribunal and no difficulties were experienced or observed by me. I took the opportunity on that occasion to comprehensively review the applicant's evidence given at the hearing of 1 May 2013, as I understood it, and to clarify aspects of the applicant's evidence where difficulties arose. In undertaking this exercise, I was satisfied that I fully understood the applicant's evidence from the earlier hearing.
4. For completeness, I record that in the course of the first hearing I began to develop some concerns as to the applicant's credibility arising from what appeared to me to be difficulty in obtaining answers to relatively simple questions, for example the location of the applicant's café. As the proceedings developed, it was clear to me that these difficulties were the product of inaccurate interpreting on 1 May 2013. I have therefore drawn no adverse inferences as to the applicant's credit from the difficulties we both encountered in the course of the hearing of 1 May 2013.
5. The applicant was represented in relation to the review by his registered migration agent.

## CLAIMS

6. The applicant claims that in August of 2009 he and his parents opened a coffee shop in [Town 1]. In March or April of 2010, two persons unknown to him demanded that he pay them USD\$500 each month for protection. When the applicant ignored them his shop was trashed, and he began paying the protection money.
7. The applicant claims that the police would not assist him as they were corrupt. The applicant claimed he approached the police, but nothing happened.
8. After 12 months, the people came again and increased their demands to USD\$1000 per month. The applicant paid until November 2011 whereupon the applicant claimed he was unable to pay and refused. The people returned and threatened to kill him [in] January 2011. The applicant says this happened in the presence of a policeman who was in the shop but did nothing.

9. The applicant claims that the [next day] the people returned and bashed and stabbed him. After receiving medical treatment the applicant claims he went into hiding at his [sibling]'s place. His parents continued to receive threats even after he left Albania.
10. At the hearing, I invited the applicant to elaborate on aspects of his claims and his background.
11. The applicant told me that while he had visited surrounding countries in Europe, he had only ever lived in Albania. The most time he had spent outside Albania was a few weeks.
12. His café was [in Town 1]. It is not particularly close to the city centre. The café is in a side street, and there are other businesses nearby. The applicant described the location as being near [a certain organisation], and this was something residents of [Town 1] would understand.[Information on location]. The café served coffee and small 'meze' style meals. There is no accommodation. Inside the café there are four or five tables for customers, and outside there are another two or three. The applicant said the business was very small. In [Town 1] there are some cafes that are smaller, but the applicant agreed it was a very small business.
13. The applicant told me, in relation to the extortion he had described, that different people approached him on the different occasions – it was never the same people. He did not know the group by name, but you were able to find out from other people's stories who the people are. The applicant said that he had since learned more about the group, and particularly what they were capable of.
14. I asked the applicant what had happened during the period of time after he stopped paying the group in November of 2011 and the violent attack on him in January of 2012. The applicant said that members of the group would come to his café and drink and abuse him and refuse to pay. He would be asked for money every time they passed. They had come in December of 2011 to work out how much money the business was making. The applicant said he never returned to the business after the stabbing.
15. I asked the applicant why he thought he had been targeted by the group. The applicant said there was no particular reason – they do it to every business. I indicated to the applicant and his representative that when I had first looked through his matter I had questioned whether there was any connection between his claims and the Refugees Convention reasons. The applicant's representative told me that he had discussed this concern with his client, and in his submission the matter was a complementary protection issue rather than a Refugees Convention claim.

## **CONCERNS**

16. I raised a number of concerns I had about the credibility of the applicant's claims and evidence.

*The applicant's previous dealings with the Department and Tribunal, and migration history*

17. I referred to information set out by the Minister's delegate in the decision record of 3 August 2012, which was provided to the Tribunal when the applicant lodged his application for review.

18. [In] 2001, the applicant lodged an application for a partner visa based on his marriage to an Australian citizen. The applicant had claimed that he married his sponsor, [Ms A in 2000].
19. In 2002, [Ms A] failed to attend an interview with the Department, and did not respond to any Departmental correspondence, and the visa was refused. I have noted that at the protection visa interview, the applicant is recorded to have been unable to identify his ex-wife's birthday or remember her middle name.
20. I suggested to the applicant that on the face of it, this information did not appear to be consistent with a genuine marriage being in existence, and raised the prospect of the applicant having attempted to mislead the Department previously. I suggested this may put in question his credibility as a witness.
21. In response, the applicant submitted that his marriage was genuine and his wife had spent four months with him overseas and that they had communicated regularly. The applicant said the relationship failed due to interference from her family who did not support the relationship.
22. [In] 2009, the applicant applied for and was granted a sponsored visitor visa. He arrived in Australia [in] May 2009 and departed [in] August 2009. The applicant was refused a further sponsored visitor visa [in] 2011. The applicant applied for a further visitor visa [in] September 2011, which was again [refused]. An application for review was lodged with the Migration Review Tribunal (MRT), and the review was heard [in] 2012. Both the applicant and [his sister], gave evidence to the Tribunal at that hearing.
23. The MRT set aside the decision to refuse the applicant a visitor visa, and as indicated above the applicant arrived in Australia [in] 2012. His visa was due to expire [in] 2012. As indicated above the applicant applied for the protection visa the subject of this review on [2012].
24. I referred to a copy of the decision record of the MRT [case number], and records of the applicant's visa grants and movements into Australia. I raised the information where applicable using the procedure provided for in section 424AA of the Migration Act.
25. [The applicant's sister] is recorded as having told the Tribunal that her brother (the applicant) had a business and reasonable life in Albania, and he wished to return to his parents and the business [after his proposed visit].
26. The applicant is recorded to have told the Tribunal that there was no reason why he wished to leave Albania, and denied that he wished to work in Australia. He told the Tribunal that he wished to maintain the family business and he hoped to take it over from his parents.
27. I suggested to the applicant that given the circumstances he had outlined relating to his claims for protection in Australia, it would appear that he was either being untruthful to the MRT, or he was being untruthful to me. I suggested that I may form the view that his evidence was unreliable.
28. In response, the applicant admitted misleading the MRT, but said he had no choice given his circumstances, which had escalated and become critical at the time of the MRT hearing.
29. Referring to the information I had outlined regarding the applicant's arrival in Australia, and the fact that he had applied for his protection visa only as his visitor visa was coming to an

end, I suggested to the applicant that this did not appear to be consistent with a genuine fear of harm in Albania, and was more consistent with an attempt to prolong his stay in Australia. I indicated that I might expect that if he was genuinely in the situation he claimed to be in when he arrived in Australia, then he would have approached the Department for protection earlier.

30. In response, the applicant stated that he had waited a month before telling his sister about his predicament. She had noticed he was preoccupied. They had decided to await supporting documentation before applying for protection, but lodged the application when the visitor visa was coming to an end when they realised the supporting documentation would be some time away. It was also submitted that the decision to apply for the protection visa was not taken lightly because it would put at risk the \$15000 bond lodged for the visitor visa, but the applicant felt he had no choice.
31. I received evidence from the applicant's sister. I had questioned the applicant closely about the circumstances in which he had raised his problems in Albania with her. I was able to test this aspect of the applicant's evidence, and was able to also test the applicant's evidence about the situation and nature of the café with her.

*Concerns about material particulars of the applicant's claims*

32. As mentioned by the delegate, country information establishes that Albania is a very poor country, indeed the poorest in Europe. Per capita income in Albania was expected to reach USD\$4,000 per year in 2009<sup>1</sup>, and the average gross salary was USD\$332 per month in 2010.
33. The delegate questioned the plausibility of a protection demand by organised criminals of US\$1000 per month in this context. The delegate suggested that it seemed implausible that a criminal gang would extort an amount of money that could not possibly be paid, as it would force the business to close and jeopardise the source of income.
34. I suggested to the applicant that it seemed to me that the delegate had a very good point in this regard. I invited the applicant to comment, and clarify perhaps whether he had exaggerated any aspect of his evidence.
35. In the course of his evidence, I had asked the applicant for detailed evidence about his café, including its menu and turnover. The applicant took me through some simple calculations based on his usual numbers of customers and the menu he offered in his café. It was the applicant's evidence that he might generally expect each customer to spend US\$5 to US\$6 on a meal including alcohol. The applicant emphasised that sometimes it would be less and sometimes it would be more, and he considered this a reasonable generalisation. The applicant said that in this way, he might take up to US\$50 per day, which would equate to about US\$1300 per month.
36. Various sources indicate that the price of a coffee in [Town 1] can range from 50 to 150 Lek (approx. AUD 0.45 to 1.35<sup>2</sup>). For example, according to a website detailing the cost of living

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<sup>1</sup> CS233544

<sup>2</sup> 100 Albanian Lek = 0.90 AUD

in [Town 1], a regular cappuccino is [about AUD 1.26]. The same source notes that a meal at an inexpensive restaurant, on average, costs [approximately AUD\$5].<sup>3</sup>

37. The applicant also submitted in response to my concerns in this regard that the average income for Albania would be based on nation-wide figures, including the very poorly paid and farmers. The applicant said that the figure referred to by the delegate was not an accurate figure to apply to business owners in [Town 1].

*Concerns about the documents provided*

38. Document fraud and corruption is rife in Albania. The Immigration and Refugee Board of Canada reports to “mega laboratories” being detected in Albania manufacturing fraudulent travel documents<sup>4</sup>. Albania also ranks poorly in surveys of corruption and transparency. The US State Department refers to corruption and unprofessional behaviour within the Albanian Police Force.<sup>5</sup>
39. I raised these general concerns about the reliability of documentation from Albania with the applicant, and also raised the specific concerns noted by the delegate to the effect that two of the documents he had produced, purporting to be from the Ministry of the Interior referred to telephone numbers for the [Town 1] Regional Police Board and the No.2 Police Station that did not match information on the relevant websites.
40. I suggested to the applicant that in light of this general and specific information, I may be unwise to place any determinative weight on the documents he provided.
41. The documents that the applicant provided to support his claims included a ‘Brief of Evidence for [Town 1] Region Prosecution Office’, an ‘Attestation’ signed by the Chief of the Criminal Police Department, witness statements by person who assisted the applicant after the stabbing incident, and a medical discharge note. I have considered the content of these documents carefully, and on their face they would tend to corroborate the applicant’s claims.
42. I asked the applicant if he would agree with me that document fraud and corruption is rife in Albania. The applicant said he could not comment about the situation generally, but everything he had provided was truthful.
43. [The applicant’s sister] gave evidence to me regarding her own enquiries about the documentation provided when the issue about the telephone numbers had been brought to her attention. [The sister]’s evidence was supported by a written statement. [The sister]’s evidence in this regard is that she had called one of the numbers, and a recorded message had said the number had been changed. She had noted from the website that two numbers appeared to be interchanged. She had asked [another sibling] in [Town 1] to investigate, and when she called the response was that the number was out of service for technical reasons. [The sibling] had gone to the Police station in person to investigate, and the secretary at the Police station confirmed the website number was correct.

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<sup>3</sup> [Citation]

<sup>4</sup> Immigration and Refugee Board of Canada Response to Information Request 16 October 2006 as cited in UK Border Agency COI Albania 30 March 2012 at item 32.01

<sup>5</sup> UKBA 10.04

44. A further document and translation was provided, with the letterhead of the Ministry of the Interior, Police Directorate of [Town 1], advising that the letter (referring to the earlier document with the doubtful telephone number) had contained the wrong telephone number, and quoting the correct telephone number.
45. A further document from the 'Number 9 Ambulance' was also produced, now bearing a telephone number, addressing the delegate's concerns that the earlier document from the same source did not appear to be on any letterhead. [The sister] said this is not unusual for Albania. She had tried to contact the No.9 Ambulance Service herself and could not get through on the number published on the internet. She had arranged for her father to contact them to investigate, and he had learned the medical centre does not have a letterhead. [The sister] states that she was told by her father that the Ambulance service was able to trace the document by its reference number.

*Consideration of these concerns and my findings of fact on the applicant's claims*

46. As to the documents, I note that much of [the sister]'s evidence on this matter relates to information she has been told by others. While I appreciate that clerical errors are possible in any society, and Albanian practices in relation to official letterheads may be very different to our own, on balance the documents produced by the applicant to corroborate his claims are, in my view, inherently suspicious. While I have considered the explanations offered on behalf of the applicant, and the correcting documents that have been produced, in all the circumstances I have insufficient confidence in the veracity of the documents, because of flaws identified by the delegate, to place any determinative weight on them. My views in this regard are reinforced by the general information available to me about the prevalence of document fraud and official corruption in Albania.
47. I refrain from making a positive finding that the documents are fabricated. As I foreshadowed to the applicant, I consider that in all the circumstances my approach will be not to place any weight on the documents one way or the other. I consider that the documents are inherently problematic, and their existence is of no assistance to me in assessing the credibility of the applicant's claims.
48. As to my concern about the particulars of the applicant's claims outlined above, I found the applicant's response to this concern to be persuasive, particularly as his evidence was corroborated by the information I have referred to regarding the cost of coffee and meals in [Town 1]. I was also able to observe that the applicant gave his evidence regarding the café; its meals, patronage and prices, in a manner that struck me as arising from genuine knowledge and experience.
49. Having arrived at a monthly turnover of about US\$1300, which I think is a reasonable estimation on the applicant's part, the amount of US\$1000 he claims was being extorted of him no longer seems to me to be inherently implausible. While it is indeed a very high proportion of the applicant's turnover, I am unable to conclude on the basis of the information relied upon by the delegate that it is implausible. As the applicant has claimed, it was a level high enough that he was not able to provide for his own living expenses, and that is why he stopped paying.
50. As to the applicant's previous dealings with the Department and Tribunal, and migration history, these matters continue to cause me concern, and I have approached his evidence with some caution given the applicant acknowledged having given the MRT false evidence

previously. However, I was impressed by [the applicant's sister] as a witness. To the extent that [the sister] was giving evidence arising from her own knowledge, I accept her evidence. I recognise, of course, that much of [the sister]'s knowledge of the circumstances giving rise to the applicant's claims arise from information she has been given by others. Nonetheless, I have placed significant weight on my observation that where I tested the applicant's evidence against [his sister] on subject matters that could not have been predicted, and on matters where [the sister] was not relying on information from the applicant, there were no significant inconsistencies.

51. While I have approached the applicant's evidence with caution, I do not consider that any aspect of his claim is inherently implausible. In this regard, February 2013 travel advice from the US Department of State (USDOS) notes that “[o]rganized criminal activity occurs in all regions of Albania”, and “occasionally results in violent confrontations between members of rival organizations”. USDOS added that “[h]igh unemployment and other economic factors encourage criminal activity”, and that “[p]ick-pocketing, theft and other petty street crimes are widespread, particularly in areas where tourists and foreigners congregate”<sup>6</sup> According to *Balkan Insight*, a study of crime tendencies<sup>7</sup> in Albania between 2008-2011 demonstrated that “Albania has seen marked growth in violent crimes like murder, battery, robbery and theft”, which according to the Institute for Democracy and Mediation (IDM), “underscores not only a failure of enforcement agencies, but also of politicians and Albanian society with its distrust of the law”.<sup>8</sup>
52. To the extent that I have been able to effectively test the applicant's evidence through the evidence of [his sister], I have noted that the evidence of joint experiences relevant to these proceedings has been consistent. Also as mentioned above, I am not prepared to positively conclude that the documents produced by the applicant have been fabricated, notwithstanding that aspects of the documents raise suspicion.
53. On the other hand, I do not accept the applicant's assertion that his earlier spouse application was made in good faith. On the face of it, I consider it to be an instance of the applicant being involved in an earlier attempt to mislead immigration officials. Likewise, the applicant claims that he knowingly misled the MRT in its review of the decision to refuse him a visitor visa.
54. I have had regard, as I must, to Departmental policy regarding the assessment of credibility of applicant's in protection visa claims. The policy restates the principle with which I am already familiar that where I find an applicant to be generally credible, then I should give the applicant the benefit of the doubt, that I am not obliged to accept uncritically an applicant's claims, and that an applicant is not entitled to have their claims accepted simply because there is a possibility that they might be plausible or because they should be given the benefit of the doubt.<sup>9</sup>

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<sup>6</sup> US Department of State 2013, *Albania Country Specific Information*, 27 February  
<[http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1076.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1076.html)> Accessed 20 May 2013

<sup>7</sup> Please note that only an Albanian language version of the IDM report was located: *Foretold Insecurity: Crime Trends in Albania 2008 – 2011* <[http://idmalbania.org/sites/default/files/publications/crime\\_trends\\_5.pdf](http://idmalbania.org/sites/default/files/publications/crime_trends_5.pdf)>

<sup>8</sup> Likmeta, B 2012, ‘Albania Registers Sharp Rise in Crime’, *Balkan Insight*, 7 September  
<<http://www.balkaninsight.com/en/article/albania-registers-stunning-rise-in-criminality-study-finds>> Accessed 20 May 2013

<sup>9</sup> PAM3 10.4.2



55. My assessment of the applicant's general credibility is finely balanced. His previous dealings with the Department are of concern, yet in the course of the hearing I observed him to speak of his café from a position of actual experience, and my testing of his evidence through [the applicant's sister] did not demonstrate any inconsistency. Having regard to the policy, and exercising my own judgment as to the applicant's credibility I consider it appropriate to give him the benefit of the doubt, notwithstanding the reservations I have described.
56. I proceed therefore on the basis that the applicant, as claimed, has been the victim of criminal extortion in Albania and genuinely fears harm at the hands of criminals in circumstances where he has stopped meeting their demands. I accept that the applicant was physically harmed by the group as he has described. I accept that the applicant subjectively fears that the Albanian police will offer no effective protection to him, but I will return later to consider whether objective evidence about the situation in Albania justifies the applicant's concerns. I accept that the applicant has a genuine fear of harm at the hands of a criminal gang should he return to Albania.

### CONSIDERATION

57. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations) An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
58. I am satisfied that the applicant is a citizen of Albania as he claims, and that Albania is the country of reference for the Refugees Convention, and the receiving country for the purposes of considering Australia's complementary protection obligations. There is no probative evidence before me to suggest that the applicant has a right to enter and reside in any other country. While I questioned the applicant about references in the file to his ability to speak Italian, I accept his response that ability to speak Italian is common in Albania, and this ability of itself falls well short of probative evidence that the applicant has a right of entry and residence in Italy.

### *Refugees Convention*

59. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the **Refugees Convention**, or the **Convention**).
60. Australia is a party to the Convention and generally speaking, has protection obligations in respect of 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.

61. 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.
62. As the applicant stated in his evidence in response to my question, there was no particular reason why he had been the subject of the extortion demands by the gang. There is nothing in the applicant’s evidence or claims which suggest that he was targeted by the gang by reason of his race, religion, nationality, particular social group or political opinion.
63. As to ‘membership of a particular social group’, the applicant’s representative explained that consideration had been given to framing the claims by reference to that ground, but this was not pressed. I have nonetheless turned my mind to the question of whether the evidence before me identifies a particular social group, and whether the harm feared by the applicant is ‘for reasons of’ his membership of that group. As a claim in respect of a particular social group was not pressed, no description of a particular social group was put forward.
64. Notwithstanding my preliminary reservation about nexus with the Refugee Convention, as discussed at the hearing, I nonetheless consider that the material before me warrants consideration of a particular social group of ‘business people who refuse to pay extortion.’
65. I have regard to the authority in *Applicant S v Minister for Immigration and Multicultural Affairs*.<sup>10</sup> In that case, the High Court set out three key questions to be considered in identifying a particular social group:
- “First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large...
66. I do not consider a group such as ‘business people who refuse to pay extortion’ falls within the definition of ‘particular social group’ because it cannot be said that a characteristic or attribute common to all members of the group identifies the group. To the contrary, I consider that it is the actions of individuals in not paying extortionate demands that is the only unifying feature.
67. In *Morato v MILGEA*<sup>11</sup>, the Court discussed the extent to which engaging in actions can result in individuals who engage in those actions becoming a cognisable social group. While the Court appears to recognise that in certain circumstances, such as where actions bear upon an individual’s identity to such an extent that they define the place in society of the individual, then the actions might define a cognisable group, but I do not think that is the case in respect of the applicant. I do not think that the action of the applicant in not paying the extortionate demands of the criminals brings him within a cognisable social group of people within Albanian society.

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<sup>10</sup> [2004] HCA 25

<sup>11</sup> (1992) 39 FCR 401

68. In the alternative, to the extent that a group of people who do not pay extortion might be identifiable, I consider they would be identifiable only to the people to whom extortionate payments have been demanded; that is, the criminal gang. In this situation, I consider that the second question posed by the High Court in *Applicant S* will fail, in that the unifying characteristic of the group is then a shared fear of harm at the hands of the only group that is able to identify them.
69. In the further alternative, I do not think it can be said that any motivation to harm the applicant is by reason of his membership of a group of people who do not to pay extortion. To the contrary, the motivation to harm the applicant is criminal in nature, and peculiar to his individual refusal to meet the extortionate demands – and not because he is a member of the group.
70. I consider that the applicant's representative was correct not to press a characterisation of the applicant's circumstances as having a nexus to the Refugees Convention on account of his membership of a particular social group. I do not consider the applicant falls into any relevant particular social group, and the motivation for harming the applicant is not by reason of his membership of any group.
71. I have also turned my mind to whether the applicant has had (or will have) protection withheld by the Albanian police because of a Convention reason. No Convention reason has been put forward by the applicant in this context. The applicant's evidence is that the Police will not protect him because they are corrupt.
72. I find that the applicant's claims, which I have accepted, offer no nexus to the Refugees Convention.
73. I find that the applicant does not have a well-founded fear of persecution for a Convention reason, and therefore I am not satisfied that Australia has protection obligations under the Refugees Convention in respect of him.

### ***Complementary Protection***

74. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
75. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
76. It is submitted on the applicant's behalf that if he were to return to Albania there would be a real risk that the criminals who extorted money from him will attack him again if he is unable

to pay, or even kill him.<sup>12</sup> I accept that the applicant genuinely fears further harm from the criminal gang as a repercussion of ceasing to pay the extortionate demands.

77. However, under the Act, there are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.
78. I have turned my mind to whether the applicant could obtain from an authority of Albania protection such that there would not be a real risk that he would suffer significant harm. At the hearing of 7 May 2013 I expressed a tentative view that there was evidence to demonstrate that the Albanian police were corrupt and ineffective. Upon further consideration of this issue, I took into account credible country information that put in doubt my tentative view.
79. I provided this information to the applicant and his representative and arranged a further hearing to afford the applicant with an opportunity to address this new issue.
80. While the Tribunal has identified no specific information regarding state protection from protection rackets and extortion against business owners in [Town 1], the Tribunal has identified recent information from a source I consider to be highly credible in relation to the effectiveness of state protection from crime more generally. In 2012 the UK Home Office reported that:

*Treatment.* The current government has made the fight against high levels of organised crime and corruption a priority and according to the MOI, police dismantled organised criminal groups during 2010. However, organised crime still remained a serious problem in Albania.

Organised crime was present in Albania and organised criminal activity occasionally resulted in violent confrontations between members of rival organisations. Armed crime continued to be more common in northern and north western Albania than in the rest of the country.

...

In the field of police co-operation and the fight against organised crime, important measures have been taken in recent years. The legal framework has been enhanced, with a new law enabling effective seizure and confiscation of the illegal proceeds of crime. This Law entered into force in January 2010 together with the Law on protection of witnesses and informants.

...

*Conclusion.* The Albanian authorities are making significant efforts to combat organised crime and corruption and, as a result, are able to provide sufficient protection in most cases. However, relatively high levels of organised crime remain within Albania and such protection may not be available in all cases particularly where the corruption of state officials is an issue. Internal relocation is likely to be

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<sup>12</sup> Submissions 22 May 2013

available to individuals seeking to escape a localised threat from members of organised criminal gangs. A grant of asylum or Humanitarian Protection will not, therefore, generally be appropriate. However cases should only be certified as clearly unfounded where it is clear that in the individual case there is sufficiency of protection or that internal relocation is clearly available.<sup>13</sup>

81. Also, I have had regard to an Overseas Security Advisory Council (OSAC) report that police [have a visible presence], and that “the government has improved the country’s law enforcement and security institutions”. OSAC further noted that:

Due to limited resources and manpower, their response is often delayed. Police tend to respond more rapidly when contacted by members of the international community. One concern regarding police performance is their low salaries and the resulting potential for corruption. Regardless, Albanian law enforcement capabilities continue to improve, especially in the areas of counter-narcotics, organized crime and combating illegal weapons trade.<sup>14</sup>

82. It was submitted in response that despite the reports of the UK Home Office to which I had referred the applicant, organised crime remains a serious problem in Albania. I have had regard to the extract of the Amnesty International Report to the effect that the Police do not always enforce the law equally for reasons including criminal connections. I was reminded that the applicant’s evidence is that the police had failed to act on previous occasions, and that an acquaintance of his father, who was a policeman, had told him in confidence that the Police could not do anything.
83. It was further submitted that the applicant could not relocate elsewhere in Albania as it would not guarantee his safety from the criminal gangs.
84. In *MIAC v MZYLL* the Full Federal Court held that, to satisfy s.36(2B)(b), the level of protection offered by the receiving country must reduce the risk of significant harm to something less than a real one.<sup>15</sup>
85. Pursuant to Ministerial Direction 56 under section 499 of the Act, I am to have regard to listed guidelines prepared by the Department of Immigration and Citizenship to the extent that they are relevant to the decision under consideration. ‘PAM3: Refugee and humanitarian – Complementary Protection Guidelines’ is one of the guidelines listed.
86. With respect to section 36(2B)(b) of the Act, and protection from an authority, PAM3 provides that the provision is intended to be interpreted in accordance with existing case law considering the adequacy of state protection in the context of the Refugees Convention, and the decision makers should be guided by the Refugee Law Guidelines (Adequacy of State Protection)<sup>16</sup>.
87. ‘PAM3: Refugee and humanitarian – Refugee Law Guidelines’ is the other listed Departmental guideline to which I must have regard. In relation to the adequacy of State

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<sup>13</sup> UK Home Office 2012, *Operational Guidance Note – Albania*, 10 May, pp.10-12

<sup>14</sup> Overseas Security Advisory Council 2013, *Albania 2013 Crime and Safety Report*, 12 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=13750>> Accessed 20 May 2013

<sup>15</sup> In *MIAC v MZYLL* [2012] FCAFC 147 (Lander, Jessup and Gordon JJ, 24 October 2012) the Court stated at [36] that the section must be read as a whole, and that the enquiry provided for in s.36(2)(aa) necessarily involves consideration of the matters referred to in s.36(2B).

<sup>16</sup> PAM3: Complementary Protection Guidelines: item 38

protection, the guideline provides that where a State is able to provide adequate protection, then the applicant's fear of (persecution) will not be objectively well-founded. It is noted that the courts have interpreted 'protection' to mean 'meaningful or adequate or effective protection' that is sufficient to remove a real chance of persecution. The adequacy of the relevant State protection is a question of fact, to be determined on the evidence of each case.

88. I have considered carefully the UK Home Office Report and the OSAC report I have cited above, and also the Amnesty and US Department of State Reports provided on behalf of the applicant in response to me raising the issue of the effectiveness and adequacy of State protection in Albania. While I recognise that crime and corruption is a significant problem in Albania, I consider that the evidence contained in the UK Home Office Report and its conclusions are persuasive.
89. Having regard to the particular conclusions of the UK Home Officer Report that the Albanian authorities are able to provide sufficient protection in most cases, I have turned my mind to the applicant's particular circumstances as recounted to me. The applicant has not claimed that the extortion committed on him was the result of the corruption of state officials. I do not consider there are any particular aspects of the applicant's claims that would take his situation out of the ordinary cases where, according to the UK Home Office, the Albanian authorities are able to provide sufficient protection. I consider that the use of the term 'sufficient protection' in the UK Home Office report justifies a conclusion on my part that the Albanian authorities would be likely to be able to afford the applicant adequate protection from the criminal gang should he return to Albania.
90. I remain concerned by the applicant's evidence that he has previously been unable to obtain assistance from the Albanian police in this matter. I consider it appropriate to consider the situation if I were wrong about the adequacy of protection that could be afforded to the applicant if he were to return to [Town 1].
91. I have therefore also considered the applicant's ability to relocate within Albania. I have had regard to the UK Home Office's conclusion that internal relocation is likely to be available to individuals seeking to escape a localised threat from members of organised criminal gangs. I have considered the applicant's assertion that relocation would not guarantee his safety from the criminal gangs as Albania is a small country, and it is well known that these criminals have connections throughout Albania and neighbouring countries. I prefer the conclusion of the UK Home Office to the effect that relocation is likely to be available to individuals seeking to escape a localised threat from members of a criminal gang. There is no evidence to indicate that it would not be reasonable, in the sense of reasonably practical, for the applicant to relocate to another part of Albania. I consider that the applicant would be able to relocate outside the limited area of the localised threat of harm.
92. I consider that the combined availability of State protection, which I have concluded reaches the threshold of adequacy in the applicant's case, and the alternative of relocation to avoid the localised threat of the criminal gang combines to reduce the risk of significant harm to the applicant arising out of his claims to something less than a real one.
93. I consider that the exceptions provided for in s.36(2B)(a) and (b), of the Act applies to the applicant, and there is therefore taken not to be a real risk that the applicant will suffer significant harm if returned to Albania.

## **CONCLUSION**

94. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
95. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

## **DECISION**

96. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Marten Kennedy  
Member  
2 August 2013