

1011563 [2011] RRTA 646 (25 July 2011)

DECISION RECORD

RRT CASE NUMBER: 1011563

DIAC REFERENCE(S): CLF2010/102937

COUNTRY OF REFERENCE: Serbia

TRIBUNAL MEMBER: Mary Cameron

DATE: 25 July 2011

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Serbia arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2010 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] August 2010. The delegate decided to refuse to grant the visa [in] November 2010 and notified the applicant of the decision and her review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied to the Tribunal [in] December 2010 for review of the delegate's decision.
4. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

5. 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.
6. 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).
7. 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'

8. 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.

9. 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.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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

18. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
19. In support of the primary visa application the applicant submitted a written statement, according to which she left Serbia to escape from personal abuse, violence, rape and enslavement. According to her written submission the applicant was evicted from her step mother's house at the age of sixteen and with nowhere else to go or to live, her only option was to marry her then boyfriend who was twenty four years old and an alcoholic, as was his father. She lived with her husband in his parents' house, and was the only woman in the house as her mother in law was deceased. She was physically and mentally abused by her husband and her husband's father and her life was extremely hard.
20. According to the applicant's statement she made the best she could of her situation and had two children, and did everything she could to protect and educate her children.
21. According to her statement the applicant's husband was a member of a renegade band of Milosevic supporters who considered themselves beyond the law. They had formed during the war in 1991 and committed atrocities against non-Serbian people. They looted, stole and were party to the disappearance of many people during the war years, and have continued to undertake their barbaric actions and to diversify their dealings even now that open hostilities have ceased, and they now deal in drugs and weapons.
22. According to the applicant's written statement, her husband is an alcoholic and the other men in the organisation have little respect for him or what he is and including the applicant. According to her statement these men used to hold their meetings in the applicant's house and she had to provide food and drink for them and serve them. As a result of her proximity she overheard much about their activities. According to the applicant's statement she and a friend (who was a lawyer) in an attempt to stop the conduct of these people, collected evidence against them and presented it to the police. The next day her friend's car was blown up and the friend immediately packed up and fled the country. She warned the applicant. Within a week three of the men attacked the applicant in her home. They raped her and poured boiling milk over her as a warning for what she had done, and was threatened that if she ever did anything like that again she and her children would be killed. She had nowhere to go and had to comply to protect her children.
23. According to the applicant's statement, her biological father who had never met the applicant, travelled to Serbia and searched for her, and left messages and notes with various parties. After he had returned to Australia the applicant succeeded in making contact with him and he subsequently paid for the applicant to visit him in Australia. The applicant was upset while she was in Australia and her father was frustrated because the applicant did not want to tell him what she had been through. Eventually she built up the courage to contact her husband

by internet to tell him she was not going to return home. Her husband threatened her as his gang had.

24. According to the applicant's statement the gang members are infiltrated throughout all the structures of society in Serbia, and they continue to loot people's property and deal in drugs and weapons. They have established a legitimate business front to launder the proceeds from their activities and to legitimise their illegal gains. Members of the police force protect them, and there are politicians who are also party to these activities and will stop at nothing to protect themselves. According to the applicant's claims, because of what she knows and because she has tried to escape from their sphere of control, they will consider the applicant a risk to their safety and better if she "disappeared." According to her statement these men will torture and kill her.
25. According to the applicant's statement, when the applicant had to leave Australia upon the expiry of her visa, her father organised for her to fly straight to Budapest so that she did not have to land in Serbia. She did not tell anyone of her plans and lived with a friend while she tried to figure out what to do. Her father was able to send her some money each month to assist her. All the time she was in Hungary she was afraid that people would find her, and she knew they were looking for her as they had threatened some of her friends. She moved around and sometimes slept in sheds. Twice she was nearly found and her resolve diminished, but her father encouraged her to persevere and survive. Eventually the people she lived with were so frightened that the applicant could no longer live with them and she approached the UNHCR and applied for refugee status in Hungary. She lived in the hostel in quarantine for about fifteen days. Her application was rejected. Her father then organised another visitor visa for the applicant and she returned to Australia where her father is caring for her at his home.
26. The applicant also submitted a further statement of claims which essentially reiterates her earlier statement of claims set out in the above paragraphs; a copy of her Serbian passport; an extract of her marriage record; and two medical reports.
27. A report from [doctor deleted: s.431(2)] dated [in] July 2010 states that the applicant was physically, mentally and sexually abused in Serbia. A detailed report [doctor deleted: s.431(2)] (Psychiatrist) sets out the applicant's personal history as reported to [doctor deleted: s.431(2)] who concludes that the applicant is physically well but has significant scarring on her body, and that she reports menstrual problems. In respect to applicant's mental health assessment [doctor deleted: s.431(2)] states that the applicant was composed except when discussing her abuse when her tears were appropriate and her anxiety understandable. There was no evidence of depression or psychosis and the applicant appeared honest and insightful.
28. [In] October 2010 the applicant provided a statement to the Department entitled "Supplementary Information" in which she provides names and identities of approximately fifteen men who she claims to have been involved in criminal activities and corruption in Serbia. The identities include several senior police officials, and members of the People's Party, of the Hungarian Association, and the SPS Party in Serbia.
29. The delegate refused the application [in] November 2010 finding that the harm which the applicant fears in Serbia is not harm directed at her for a Convention reason, and also finding that the applicant could avail herself of State protection in Serbia.

30. In support of the review application the applicant's representative submitted a written statement, which re-states key aspects of the applicant's claims. According to the statement, in 1999 the applicant's children went to study in Subotica and the applicant too began to spend most of her time in Subotica. The group of men with whom her husband was involved in illegal activities was still connected to the government and though she might try to escape their control and report them. This was why they raped her and poured scalding milk over her. She was badly burned but not allowed to go to a hospital, and has scarring. After this event she had to report all her activities and all her social contacts. For the years before coming to Australia she was subject to regular threats and constant control. She learned to keep silent, tried not to see or hear anything and withdrew into herself.
31. According to the representative's statement, despite the applicant's concerns her sense of justice caused her to speak up at a party meeting that Hungarians should not be displaced in order to move Serbians in. She was taken out into the hallway and told to be careful that she did not get into trouble. According to the submission the trouble to which they were referring was that the applicant could disappear or something worse as did happen to some Hungarians. According to the submission, now that applicant has come to Australia the group will know that she spoken about their activities and they will carry out their threats, and that since the applicant applied for protection her son has been beaten up and nearly killed, and that this was done by the same people who are threatening the applicant.
32. According to the applicant's submission these things are happening because she dared to express that members of government, political parties and their associates were involved in corrupt activities, and she also suffered persecution because she is Hungarian. It was difficult to express what has happened for reason of her ethnicity because it has happened all her life and she has not known differently. The government is not providing protection against this mistreatment which has included people throwing cigarettes in her hair, being called a "dirty Hungarian and tripped over: having hair ripped out of her scalp and being spat on; people including Serbian children hitting her and calling her a "Hungarian do" which was also written on her car, and not being served in shops.
33. According to the representative's submission the applicant was treated like a slave because of her nationality, and could only ever get the most basic of jobs despite being qualified to do more, and sometimes could not even obtain those basic jobs. When she went to clean a house she was told she should go back to her mother who should abort her, and she was ordered to clean using hydrochloric acid even though it could have burnt her hands. She was told that she should not think, but should do as she was told and put up with her working conditions or otherwise be sacked. Her fears were increased because of death threats that are made against Hungarians with graffiti, and also through the media. The parties have clearly stated that Hungarians have no place in Serbia and that they are going to do some ethnic cleansing, and that some people have been threatened at gunpoint and forced to leave.
34. According to the representative's submission the applicant fears that if she is forced to return to Serbia she will suffer persecution including beatings, torture and death at the hands of the group of corrupt government members and officials and their associates for reason of her political opinion that the government is corrupt and her ethnicity. She also fears that she will suffer persecution including beatings and other mistreatment at the hands of the Serbian people because of her ethnicity, and that the government is unwilling to protect her against such persecution.

35. According to the representative's submission the country information indicates that the applicant's fear of persecution for these reasons is well founded. According to the submission it is not reasonable nor possible for the applicant to relocate to another area within Serbia and sustain a livelihood, and in sum, there is a real chance that the applicant will face harm amounting to persecution if she returns to Serbia.
36. The representative's submission incorporated country information from a range of sources regarding government corruption in Serbia and the targeting of people of Hungarian ethnicity in Serbia.
37. Also provided in support of the review application was a further report of [doctor deleted: s.431(2)] providing details of the applicant's claims to have experienced past harm in Serbia, and stating that these experiences have resulted in post-traumatic stress.
38. The applicant appeared before the Tribunal [in] May 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hungarian and English languages.
39. The applicant was represented in relation to the review by her registered migration agent.
40. The applicant confirmed that she was born in [year deleted: s.431(2)] in [town deleted: s.431(2)] in the former Yugoslavia, and is of Hungarian ethnicity and Roman Catholic religion. She confirmed that she completed twelve years of schooling and later [studied] at a vocational college and completed a number of [courses].
41. The Tribunal asked the applicant about her family composition and she stated that her father lives in Australia (he attended the hearing in support of the applicant), and that her mother and her younger brother live in Serbia. She stated that she also has five half siblings in Australia who are her father's children from his second and third marriages. The applicant confirmed that she has a son and a daughter who are [ages deleted: s.431(2)] and that she is separated from her husband. Her husband and children live in Serbia.
42. The Tribunal asked the applicant about her occupation when she lived in Serbia. She stated that for a long time she worked in [details deleted: s.431(2)], and that later in her life she worked in the field of [details deleted: s.431(2)], with long periods of unemployment. She stated that she tried to set up her own small [business] but that it was almost impossible to do this as a person of Hungarian ethnicity.
43. The applicant confirmed that she first came to Australia in October 2009 to spend time with her father, with whom she had made contact for the first time. The Tribunal asked the applicant why she had not applied for protection when she was in Australia in 2009. The applicant stated that she had not thought about this possibility and she had promised that she would return to Serbia. She stated that now she is too scared to return.
44. The Tribunal asked the applicant who she is afraid of in Serbia, and she stated that she is afraid of a network of men including Serbian political figures who are associates of her husband.
45. The Tribunal indicated to the applicant that her statements about politicians in Serbia were rather vague, and that she had not indicated in her evidence that she has any political profile in Serbia such as to bring her to the adverse attention of the Serbian authorities. The

applicants stated that she is not just afraid of Serbian politicians but also of Hungarian representatives in Serbia. The Tribunal asked her why she is afraid of Hungarian representatives in Serbia, and she stated that following the war and before the applicant herself became a member of the Hungarian Association in Serbia, she witnessed many things, including VMS joining this association and the leader of the party being one of the people she had named as corrupt in her submissions to the Tribunal.

46. The Tribunal asked the applicant why she was afraid of the Hungarian Association in Serbia. She stated that before she signed up to that association some of the people were looting, robbing, persecuting and chasing people from their homes. She stated that they were part of a conspiracy by the Serbian Communist Party. The applicant stated that she was aware of the corrupt dealings of these people before she herself signed up to the party and it was through their doing that she had been abused and tortured. She stated that once she joined the association she came to know who would be targeted for eviction to enable ethnic Serbs to move in.
47. The Tribunal noted that the applicant had not raised these claims in her written submissions, which had focussed on her abuse by criminal associates of the applicant's husband. The applicant stated that the criminal associates of her husband included members of the VMS and also of Serbian political parties.
48. The Tribunal asked the applicant why she joined the VMS. She stated that she was trying to obtain immunity from harassment.
49. The Tribunal asked the applicant what had happened after she departed Australia. The applicant stated that she had to return to Serbia to get some documents. She stated that her daughter and son-in-law are living in Hungary and took her back to Serbia to get the documents.
50. The Tribunal noted that the applicant had applied to the UNHCR for recognition as a refugee in Hungary. The applicant stated that this was correct. She agreed that the application had been refused, and that she wasn't told exactly why it had been refused but that reference had been made to Canadian material which said that there was no persecution of Hungarians in Serbia, and also reference had been made to the prosecution of corrupt police in Serbia. The Tribunal asked the applicant whether she has a copy of the letter that she received from the UNHCR. The applicant stated that she thinks she handed it over to border control when she returned to Serbia from Hungary and that she did not get it back.
51. The Tribunal asked the applicant why she would have given such a document to border security. She stated that initially her passport allowed her to remain in Hungary for only ninety days but the fact that she had applied for refugee status allowed her to stay there for a longer time.
52. The applicant told the Tribunal that she returned to Australia for a second time [in] June 2010 as the holder of a second sponsored visitor visa, and that she travelled on her Serbian passport which she had obtained prior to her first visit to Australia in mid-2009. She confirmed that she had no difficulty obtaining a passport. The applicant explained to the Tribunal that her father had travelled to Serbia and gone to Belgrade with the applicant to apply for the visitor visa. She stated that she had been in Hungary and when her father arrived at the end of May she went with him to get the visa. She returned with her father to Australia and lodged her protection visa [in] August 2010.

53. The Tribunal asked the applicant why she fears persecution if she returns to Serbia. The applicant stated that she had an awareness of some political figures and of what they were doing over the years in Serbia, and the suffering that was caused. The applicant stated that she had attempted to make a submission to the police which named a number of people. She agreed with the Tribunal that this had happened in 1994.
54. The Tribunal asked the applicant about the other person she had claimed was involved in this attempted submission to the police. She stated that the other person was a friend and a lawyer who was a refugee from Croatia. She stated that her name was [Ms A].
55. The Tribunal asked the applicant why she would have chosen to do something as clearly risky as reporting her husband and his criminal associates to the Serbian police. The applicant stated that she did so because of her sense of justice and morality. The Tribunal asked the applicant whether she had contemplated that her actions might result in her being seriously harmed. The applicant stated that she thought at the time that the police wanted to re-establish law and order in Serbia and seek the truth, but she found herself in deep water and was very scared.
56. The Tribunal asked the applicant to describe what happened in 1994. The applicant stated that she and [Ms A] had compiled a list which they put together by inquiring from young people about purchases they had made on the black market, and tracing the names. She stated that for example, they found that a person who owned a bicycle factory was using his wealth to influence politicians. The applicant told the Tribunal that they completed a submission and [Ms A] took it to the police, and as a consequence on the following day her car was blown up. The applicant stated that [Ms A] also received a warning from the Serbian police, and she packed up and left her home. The applicant told the Tribunal that she has since lost contact with her friend.
57. The Tribunal asked the applicant what had happened to her after this incident. The applicant stated that she received a phone call warning her that she was being watched. She stated that a few days after the incident she was travelling and was stopped by the police, who then dragged her from her vehicle and raped her. Once this had happened the policemen again warned her that they would be watching her. The applicant stated that she was given a 'day book' and required to record all of her movements, and to keep the log book with her at all times.
58. The Tribunal asked the applicant whether it was the police who required her to maintain this record of her movements and the applicant stated it was not the police but the organised gang of men which included her husband. She stated that this group of men visited her home and would come into the kitchen and abuse and manhandle the applicant because she is Hungarian, and because her husband was a weak alcoholic. The applicant stated that she eventually learnt how to live in these conditions.
59. The Tribunal noted that according to the applicant's written submissions she had been living for much of the time in Subotica with her children. The applicant stated that this was not really correct and that from the time she married her husband in 1983 she was only ever able to be away for very short periods of perhaps a week or two.
60. The Tribunal asked the applicant whether she was tortured by her husband's associates because she started to spend some time away. The applicant agreed that this was the case. The Tribunal asked the applicant why her husband and his associates would think that she

was trying to 'escape' if she was merely setting their children up at university. The applicant stated that she really didn't know why these men were scared of her and needed to keep her captivated but they did. She stated that she had no chance of reporting them to any authorities, but maybe they had thought that she had learned more about them and their activities than she actually had. The applicant stated that she put up with her situation for the sake of her children.

61. The Tribunal asked the applicant whether her children knew what had happened to her. The applicant stated that they didn't and they thought that she had suffered burns by tipping hot water over herself and she has not told them otherwise.
62. The Tribunal asked the applicant whether her children have an ongoing relationship with their father. The applicant stated that her daughter is closer to her than her son is and her daughter had figured out that the applicant was suffering. She stated that her son had been closer to his father, and is living with his father.
63. The Tribunal asked the applicant about the incident she had described when she was tortured by having boiling milk tipped over her. The applicant stated that she had been caught out without her 'log book' and that four men took her to her home and verbally abused her and returned some hour later when the applicant was boiling milk to make yoghurt, and they again abused and threatened her and then two of the men held her down and two others raped her. The men then tied her hands and feet and poured boiling milk over her chest. The applicant stated that she could not remember clearly except coming to and a doctor was cutting through her jumper. She stated that the doctor is one of the men she had identified in her report. She stated that she was also administered pain killers. Despite the Tribunal's request that she not do so, the applicant raised her shirt to show the Tribunal the extent of her scarring.
64. The applicant then told the Tribunal that she believes that the same gang of criminals have harmed her son, who was set upon and beaten in the street in university town in Bosnia. The applicant stated that when her son reported this to the police the police broke his fingers and because her son is a [musician] they have pretty much wrecked his life. The applicant stated that her son went to the hospital but was not admitted because he is Hungarian. The Tribunal asked the applicant who had beaten her son up. She stated that he doesn't know, but that he identified a thirty year old Serbian who he had never seen before. The Tribunal noted that the applicant had claimed that her son's hip had been broken in the attack and queried how she knew this if he had not received medical treatment. The applicants stated that she knew that her son's hip was broken because he is having trouble walking and that there is a loose bone that makes a clicking sound when he walks.
65. The applicant then told the Tribunal that her son has been involved in another violent incident, when he had been out at a restaurant with some room-mates and was returning home when two people attacked him and he sustained a head injury requiring stitches, and talked about throwing him in the river and made disparaging remarks about Hungarians. The applicant told the Tribunal that her son was left to die and that he woke up in hospital with his hand in plaster, and the hospital encouraged him to report the matter to the police. The applicant stated that when her son went to the police to report the attack the police broke his fingers on the same hand that was in plaster. The applicant showed the Tribunal a photograph of her son with his arm in a sling and cuts on his hand.

66. The Tribunal asked the applicant whether her son's attackers had said anything, and the applicant responded that they had not. The Tribunal asked her whether the police had said anything when her son went to report the incident. The applicant stated that when her son had gone to the police he had been in excruciating pain and there was a police incident report saying that he had misbehaved and had to be restrained but did not mention breaking his fingers. The Tribunal queried whether the applicant's son could have been injured in the course of an incident at the police station. The applicant agreed that this may be the case but stated that the police action could not be justified.
67. The Tribunal noted that the applicant had not made any reference to any incidents of harm to herself in the ten years preceding her first visit to Australia in 2009. The applicant stated that she had been in psychological and ongoing terror during that period, and that her every move had been watched. She stated that she cannot seek protection in Serbia because there is corruption in the police and in various levels of government, with crime figures operating under the auspices of the authorities.
68. The Tribunal asked the applicant what she fears will happen to her if she returns to Serbia. The applicant stated that she can see options. One is that her husband's associates will continue to torment her or they will tire of her and kill her.
69. The Tribunal asked the applicant whether she could relocate to a part of Serbia away from the criminal elements she fears. The applicant stated that there is nowhere in Serbia where she could hide because of the networks maintained by organised crime figures in Serbia and other parts of Europe.
70. The Tribunal asked the applicant about her attempts to obtain protection from the UNHCR in Hungary. The applicant's representative attested to her attempts to have the UNHCR re-issue its report in respect of the applicant, and the UNHCR's unwillingness to do so, although the agency has confirmed in writing that the applicant did indeed apply for protection in Hungary and her application was refused. (DIAC file f.102).
71. The applicant told the Tribunal that when she departed Australia after her first visit, she was scared to return to Serbia so she flew directly to Hungary and applied for protection. She stated that this was really a temporary solution and a way of extending her stay in Hungary beyond ninety days.
72. The applicant provided the Tribunal with an email from the regional [office] of the [Association of Vojvodina Hungarians]. The Tribunal asked the applicant why she involved herself with this party which included members who had threatened her with harm. The applicant stated that when she joined she had thought that by being a member she might be left alone by her persecutors, and also that she might meet some decent, honest people who could effect change, but she became disillusioned.
73. The Tribunal noted that the applicant's claims had evolved significantly from the time of her original protection visa application and throughout the course of the review. The applicant's representative responded that this had happened because the applicant's experiences have been horrific, and as her psychiatric report indicates she has suffered from PTSD, and her original claims represented only 'the tip of the iceberg'.
74. Subsequent to the hearing by letter dated [in] May 2011 the applicant's representative provided a further written submission clarifying aspects of the applicant's claims and drawing

the Tribunal's attention to several cases in which the Tribunal, differently constituted, had in the past expressed the view that people exposing corruption in government institutions may have a well founded fear of persecution for reason of political opinion within the meaning of the Convention.

75. Accompanying the representative's final submission is a further statement of the applicant listing a series of names of members of the corrupt group she claims to fear, the corrupt practices in which they remain involved, and indicating that some of them are engaged at quite a high level in Serbian political institutions, and in the police force.

Country Information

Government

76. According to Freedom House reports;

“Serbia is an electoral democracy. The president, elected to a five-year term, plays a largely ceremonial role. The National Assembly is a unicameral, 250-seat legislature, with deputies elected by party list to serve four-year terms. The prime minister is elected by the assembly. Both the presidential and parliamentary elections in 2008 were deemed free and fair by international monitoring groups.

In addition to the main political parties, numerous smaller parties compete for influence. These include factions representing Serbia's ethnic minorities, two of which belong to the current coalition government. A new Law on Political Parties, passed in May 2009, increased the number of signatures needed to form a party to 10,000, or 1,000 for ethnic minority parties.

Serbia has made some progress in reducing corruption since the ouster of former president Slobodan Milosevic, but it remains a serious concern. Problem areas include public procurement, privatization, taxation, customs, and licensing. An official Anti-Corruption Agency is due to become operational in 2010. Serbia was ranked 83 out of 180 countries surveyed in Transparency International's 2009 Corruption Perceptions Index.

The press is generally free and operates with little government interference, although most media outlets are thought to be aligned with specific political parties. In August 2009, the parliament passed a new media law despite opposition from press freedom groups, which objected to its high fines and other provisions. Investigative journalism in Serbia remains weak, and businesspeople and government agencies often try to influence outlets through advertising purchases. Libel remains a criminal offense punishable by fines, but not imprisonment. There were no reports of the government restricting access to the internet.

The constitution guarantees freedom of religion, which is generally respected in practice. However, increases in ethnic tension often take the form of religious intolerance. Critics have complained that the 2006 Law on Churches and Religious Communities privileges seven “traditional” religious communities by giving them tax-exempt status and forcing other groups to go through cumbersome registration procedures. Students are required to receive instruction in one of the seven traditional faiths or opt for a civic education class. There were no reports that the government attempted to restrict academic freedom during 2009.

Citizens enjoy freedoms of assembly and association. However, in May 2009 the parliament adopted legislation that bans meetings of neo-Nazi or fascist organizations and their use of neo-Nazi symbols. A September gay pride parade in Belgrade was cancelled because the government claimed it could not guarantee the security of the participants. Foreign and domestic NGOs are generally free to operate without government interference, and a new Law on Associations clarifying the legal status of NGOs was adopted in July 2009. The laws and constitution allow workers to form or join unions, engage in collective bargaining, and strike. In November 2008, a new agreement between the government, trade unions, and employers' associations was signed, but the global economic crisis has prevented it from being implemented.

Judicial reform has proceeded slowly in recent years. The Council of Europe's Venice Commission has criticized the degree of control the Serbian parliament has over judges, and in April 2009, two new bodies—the High Judicial Council and the State Prosecutorial Council—were created to supervise the election and promotion of judges and prosecutors. While these bodies have reformed Serbia's judicial system somewhat, critics claim there is still too much room for political interference, especially concerning the reappointment procedure. The judicial system suffers from a large backlog of cases, long delays in filing formal charges against suspects, and the failure of legislative institutions to heed judicial rulings. The new criminal procedure code adopted in 2006 is scheduled to enter into force at the end of 2010, after being delayed twice. Prisons are generally considered to meet international standards, although overcrowding, drug abuse, and violence among inmates remain serious problems.

Serbian cooperation with the ICTY has improved significantly in recent years. All but two of the tribunal's 46 Serb indictees have been arrested, leaving only former Bosnian Serb military commander Ratko Mladic and a former Croatian Serb leader at large. (the Tribunal notes that this is no longer the case at the time of this decision). Serbia has also begun to prosecute war crimes more vigorously in domestic courts, as demonstrated by a Belgrade court's March 2009 decision to impose prison sentences of up to 20 years on 13 Serbs convicted of a massacre of Croatian civilians in 1991.

Ethnic minorities have access to media in their own languages, their own political parties, and other types of associations. Nevertheless, they are underrepresented in government. The country's main minority groups are the Bosniaks (Muslim Slavs), concentrated in the Sandzak region adjacent to Montenegro; an ethnic Albanian population in the Presevo Valley, adjacent to Kosovo; and the Hungarian community in Vojvodina. Tensions in Kosovo have threatened to spill into Presevo. In June 2009, two Serbian police officers were attacked and wounded in the area. In August, ethnic Albanian officials initiated an effort to create a formal "Presevo Valley district" within Serbia. In addition, there are concerns about the spread of extreme forms of Islam and internal political rivalries in the Sandzak. Serbia is also home to a significant Romany community, which often faces police harassment and other forms of discrimination. In March 2009 the parliament adopted legislation that would establish an independent commissioner to protect ethnic, religious, and other vulnerable groups—including sexual minorities—from discrimination.

Women make up about 22 percent of the parliament, and five women currently serve as cabinet ministers. According to electoral regulations, women must account for at

least 30 percent of a party's candidate list. Although women are legally entitled to equal pay for equal work, traditional attitudes often limit their roles in the economy. Domestic violence remains a serious problem. The 2005 Law on the Family criminalized physical and psychological abuse, but its implementation has been hampered by the reluctance of victims to report such abuse and by prevailing patriarchal social norms. Some towns in southern Serbia have become transit points for the trafficking of women from the former Soviet Union to Western Europe for the purpose of forced prostitution. (Freedom House *Freedom in the World- 2010* – Serbia <http://www.freedomhouse.org> accessed 6 July 2011)

Justice system

77. The United States Department of State Country Reports (USDOS) on Human Rights Practices – Serbia 2010 (<http://www.unhcr/refworld/doc>) reports that during the year the following human rights problems were reported: physical mistreatment of detainees by police; inefficient and lengthy trials; harassment of journalists, human rights advocates, and others critical of the government; limitations on freedom of speech and religion; lack of durable solutions for large numbers of internally displaced persons (IDPs); corruption in legislative, executive, and judicial branches of government including police; government failure to apprehend the two remaining fugitive war crimes suspects under indictment of the International Criminal Tribunal for the former Yugoslavia (ICTY); societal violence against women and children; societal violence and discrimination against minorities, particularly Roma and the lesbian, gay, bisexual, transgender (LGBT) population; and trafficking in persons.
78. According to USDOS Reports;

“While most police officers were Serbs, the force included Bosniaks (Slavic Muslims), ethnic Hungarians, ethnic Montenegrins, a small number of ethnic Albanians, and other minorities. The police force in southern Serbia was composed primarily of Serbs, although there were a small number of ethnic Albanian officers. There was a widespread belief that impunity was a problem among police.

The constitution provides for an independent judiciary; however, the courts remained susceptible to corruption and political influence. Observers believed that judicial reform, particularly the replacement of judges appointed during the Milosevic era, was essential to eliminate corruption. The country passed five reform laws in 2008, the most controversial of which came into effect during the year. The new laws effectively require every judge to be reselected, allowing the High Court Council (HCC) to reappoint the most effective judges. While most observers lauded the goals of the law, the process was widely criticized for lack of transparency.

Judges and prosecutors, particularly those handling organized crime and war crimes, continued to receive death threats.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The constitution prohibits such actions; however, the government interfered with privacy and correspondence. While the law requires the Ministry of Internal Affairs to obtain a court order before monitoring potential criminal activity and police to obtain

a warrant before entering property except to save persons or possessions, police occasionally failed to respect these laws.

On June 29, parliament adopted the Law on Electronic Communication. Under the new law, telecommunications operators are obliged to retain for one year data about the source and destination of a communication; beginning, duration, and end of a communication; type of communication; and terminal equipment identification and location of the customer's mobile terminal equipment. This retained data can be accessed by intelligence agencies without court permission. A court order is still required to access the contents of these communications. Both the ombudsman and the commissioner for information of public importance and personal data protection opposed the new law.

Most observers believed authorities selectively monitored communications, eavesdropped on conversations, read mail and e-mail, and tapped telephones. Human rights leaders also believed that their communications were monitored.

The law provides criminal penalties for official corruption; however, the government did not implement the law effectively, and officials sometimes engaged in corrupt practices with impunity. There was a widespread public perception of government corruption at all levels. According to World Bank governance indices and surveys by the UN Development Program, corruption was a problem in 2009.

Rape, including spousal rape, is punishable by up to 40 years in prison. Advocates believed that only a small percentage of rape victims reported their attacks due to fear of reprisals from their attackers or humiliation in court. Few spousal rape victims filed complaints with authorities. Women's groups believed that sentences were often too lenient in practice. Out of 78 cases of rape tried during the year, 63 resulted in convictions.

Violence against women was a problem. While high levels of domestic violence were generally understood to persist, there were no reliable statistics on the extent of the problem. Research by NGOs concluded that domestic violence was widespread; every second woman suffered from some form of psychological violence, and every third from physical abuse by a family member. In 92 percent of these cases, the perpetrator was the victim's husband or partner. The Autonomous Women's Centre reported that on average 1,000 women per year turned to it for help. According to Women against Violence Network, 24 women (two of them minors) were killed in the first seven months of the year and, in almost 80 percent of the cases, the suspects were the victim's husband, partner, father, or son.

Domestic violence is punishable by up to 10 years' imprisonment. The law provides women the right to obtain a restraining order against abusers. Such cases were difficult to prosecute due to the lack of witnesses and evidence, and the unwillingness of witnesses or victims to testify. The few official agencies dedicated to coping with family violence had inadequate resources. The NGO community played the primary role in combating violence against women. NGOs operated shelters for female victims of violence, and the government continued to provide financial support to safe houses for victims of family violence throughout the country. The national broadcasting service RTS ran a media campaign to prevent domestic violence. Osvit, a Nis-based

NGO, operated a Romani-language telephone hotline for female victims of domestic violence or abuse.

The private sector considered corruption in the commercial courts to be widespread. Land transfers often were difficult to conclude, leading many in the private sector to allege administrative corruption. It was unclear, however, to what extent these problems were due to corruption rather than bureaucratic inefficiency.

On January 10, the Anticorruption Agency began operating. The agency is an independent state body that reports to the parliament and is responsible for implementing the national anticorruption strategy and overseeing issues related to conflict of interest and financial disclosure. The agency replaced the Republic Board for Resolving Conflicts of Interest and has no independent enforcement capacity. On June 11, the agency published asset declarations of 700 government officials; however, due to the low figures that many leading politicians reported, there was widespread public doubt about the accuracy of the declarations.

One provision of the Anticorruption Agency's mandate requires officials who hold multiple government positions to decide which one of these they would perform. After a prolonged debate, on July 28, the parliament passed amendments to the Anticorruption Law that allow officials to hold multiple, directly elected state functions for a two-year transition period. The Anticorruption Agency and the Council of Europe's Group of States against Corruption opposed the amendments.

On June 1, prosecutors indicted former minister of defence Prvoslav Davinic for abuse of office in connection with his allegedly signing a contract worth 4.6 billion dinars (\$55.9 million) in 2005, thereby exceeding his authority. On September 16, prosecutors indicted Davinic again for abuse of office for having given a ship worth 4.1 million dinars (\$50,000) to the Regional Center for Underwater Demining in Montenegro. Davinic resigned as minister of defence in 2005 due to his implication in a scandal involving purchases of body armour.

On June 29, police arrested four doctors, including Nenad Borojevic, the director of the Oncology and Radiology Institute in Belgrade, and three representatives of foreign pharmaceutical companies in connection with a bribery scandal. The four doctors were accused of having received one million euros (\$1.3 million) in bribes from the country's representatives of Roche, PharmaSwiss, and AstraZeneca in exchange for ordering the purchase of cytostatic cancer drugs from the companies. Press also reported that doctors overprescribed the drugs to increase the amount of drugs purchased. In November police arrested seven additional suspects as part of the same investigation. The new suspects included doctors in Sremska Kamenica, Kragujevac, Nis, and Belgrade, as well as two additional representatives of Merck Pharmaceuticals. The proceedings against all suspects were still in the investigative phase at the end of the year.

There were reports of authorities' failing to act in response to detailed reports of suspected corruption. There were isolated reports of high-profile politically motivated investigations. During the year authorities made some arrests for corruption and continued the prosecution of high-profile cases from previous years.

79. There were no reports of developments in the following corruption cases: the cases of the 19 persons attached to the army and arrested in February and March 2009 for giving and receiving bribes and committing fraud related to obtaining state-owned apartments and medical and social security benefits; the cases of the eight persons arrested in February 2009 in Belgrade, Valjevo, and Vrhpolje for corruption related to misappropriation of National Investment Plan funds; the case of the 35 persons, including 18 police officers, arrested in March 2009 in Novi Pazar, Raska, and Kraljevo for giving and receiving bribes, smuggling oil, meat, alcoholic and non-alcoholic beverages, and other goods across the border between the country and Kosovo, and illegal possession of weapons and narcotics; the June 2009 case of Vesna Stevanovic, a Nis Municipal Department registrar, accused of accepting bribes in exchange for issuing expedited or false citizenship, birth, death, and marriage certificates; and the case of 13 police officers and six customs officers who were arrested in December 2009 on bribery and abuse of power charges.

Critics of government

80. There are some reports of critics of the Serbian government, including parties who have accused the government of corruption, facing harm or threats.

Amnesty International reports that some women campaigning across issues including war crimes, transitional justice and corruption have faced “threats to their lives and property, media attacks and malicious prosecutions”. The report states that the authorities failed to protect these women, (Amnesty International, 2010, *Annual Report Serbia 2010*, 28 May) but does not cite individual cases.

Similarly, the UK Home Office issued a guidance note in 2008 which cites “harassment of journalists, human rights workers and others critical of the government” as problems. (UK Home Office, 2008, *Operational Guidance Note – Serbia*, 1 September) A Serbian news website states that the US Department of State also has reported “intimidating and abusing” these same groups as being a problem in Serbia. (‘Human Rights Respected, Problems Remain’ 2009, B92 news website, 26 February http://www.b92.net/eng/news/society-article.php?yyyy=2009&mm=02&dd=26&nav_id=57441 – Accessed 11 March 2011)

Some reports relating specifically to the treatment of journalists were located. In 2010, Serbia reportedly strengthened its protection of journalists from attacks. Convictions were reportedly made in high profile cases including suspects being convicted and sentenced to prison for threatening a journalist from the ‘B92’ publication. (Committee to Protect Journalists, 2011, ‘Attacks on the Press 2010 – Serbia’, 15 February <http://www.unhcr.org/refworld/country,,,SRB,,4d5b95c528,0.html> – Accessed 11 March 2011) A more dated report discusses the assassination Dusko Jovanovic, editor-in-chief of a daily publication which accused the government of corruption, in 2004. (UK Home Office, 2005. *Serbia and Montenegro (Including Kosovo) Country Report*, April)

It is also noted that International Crisis Group reports that past attempts to address corruption amongst Kosovo Serbs in particular “risked inviting questions about one’s commitment to Kosovo”. (International Crisis Group, 2009. *Serb Integration into Kosovo: Taking the Plunge. Europe Report No 200*, 16 May, p. 15

http://www.crisisgroup.org/~media/Files/europe/200_serb_integration_in_kosovo___taking_the_plunge.ashx – Accessed 11 March 2011)

In early 2010, tens of thousands of anti-government protesters attended a rally addressed by Progressive Party leader Tomislav Nikolic. Nikolic is quoted as accusing the incumbent government of corruption during the rally. Police reportedly subsequently detained approximately 20 football fans who were chanting anti-government slogans; ('Serbia's pro-West government hit by protests' 2011, *CBC News*, 5 February – <http://www.cbc.ca/news/world/story/2011/02/05/serbia-protests.html> – Accessed 11 March 2011) however whether these slogans were specifically regarding corruption is not reported.

There is limited recent information regarding the extent of organised crime infiltration of the Serbian government. In 2008 the UK Home Office issued a guidance note which stated that Serbia was facing a "serious threat from organised crime." The note continues, stating that "[c]riminals have exploited the vacuum, created by the conflicts of the 1990s and the isolation due to international sanctions, to establish lucrative networks, which reach far into government and have slowed social and economic development. (UK Home Office 2008 *Operational Guidance Note – Serbia*, 1 September)

According to the 2010 Organised Crime and Corruption Reporting Project report on corruption in Serbia, law enforcement officials claim most of the largest drug groups in Serbia could not operate without help from inside the government. ('Serbian Tactics Change In Fight Against Corruption' 2010, Organised Crime and Corruption Reporting Project website, 8 July

<http://www.reportingproject.net/occrp/index.php/ccwatch/cc-watch-briefs/725-serbian-tactics-change-in-fight-against-corruption> – Accessed 10 March 2011)

In 2005, Milorad Ulemek, former head of the police's Special Operations Unit went to trial amid allegations that in 2003 he organised the death of then Serbian Prime Minister Zoran Djindjic. The defence, however, was trying to show that Djindjic maintained a suspiciously close relationship with organised crime gang, the Zemun Clan. ('On Trial – A lively start for a new organised-crime court' 2005, *The Economist*, 19 May http://www.economist.com/node/3992436?story_id=3992436 – Accessed 11 March 2011) Ulemek was convicted of Djindjic's murder in 2007, and sentenced to 40 years in gaol, along with a number of members of the Zemun Clan. ('Djindjic's killers convicted, sentenced after 3 1/2-year trial' 2007, Southeast European Times website, 24 May

http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/05/24/feature-01 – Accessed 11 March 2011)

Historically, according to a paper written for the European Stability Initiative in 2008, the Milosevic regime was not only aggressive, undemocratic and corrupt, but was in essence "a criminal regime, whose security sector was deeply involved not just in war crimes, but also in classic forms of organised crime: drug trafficking, extortion, kidnappings and targeted assassinations". (Anastasijevic, D. 2008 What's Wrong with Serbia? European Stability Initiative website, 31 March <http://www.esiweb.org/index.php?lang=en&id=310>)

81. According to a Reuters news report; in 2010, state security officials who did not want to be names have said of organised crime figures in Serbia;

"We believe these groups laundered as much as one billion euros through murky privatisation deals and purchases of property since 2000,"

Serbia's ex-communist authorities in the 1990s forged close ties with organised crime rings and used them for ethnic cleansing and clandestine operations during the wars in Bosnia, Croatia and Kosovo.

Dozens died in gangland-style shootouts in Serbia and its then federal partner Montenegro, including ministers, prominent officials, industrialists and key underworld figures.

Following President Slobodan Milosevic's overthrow in 2000, Serbian authorities tried to stamp out organised crime. In retaliation, disgruntled secret service officers and criminals in 2003 assassinated the then Prime Minister Zoran Djindjic.

In a recent speech Tadic warned that Serbia's prosperity depended on the determination of authorities to crack down on organised crime, which he described as a key security threat to the nation of 7.3 million." (www.reuters.com/article/2010/0).

82. According to an address by the Serbian President to the Parliamentary Assembly on 26 January 2011;

“Organised crime groups are using the Balkans as an “entry point” to corrupt, subvert and pervert Europe, Serbia’s President Boris Tadić warned the Parliamentary Assembly today. The president said that Europe and Serbia are “confronted by a profound threat to our democracies.” He underlined the commitment of his country’s security forces to rooting out the global crime groups which are “as fatal as cancer” and “alarming” for their size, sophistication and adaptability. “Serbia will stay the course until the war against organised crime is won,” President Tadic declared.” (<http://www.humanrightseurope.org/2011/01/boris-tadic-europe-must-take-action-against-organised-crime>)

83. According to the US Department of State Bureau of Diplomatic Security *Serbia 2011 Crime and Safety Report* organized crime and the associated violence and corruption it creates remain a concern in Serbia. According to the report Serbia’s security forces’ recent successes in combating drug trafficking have increased violence directed at competing factions and internal suspicions within criminal organizations. The risk of collateral damage inflicted upon the general population by attacks between rival members of organized crime is possible and could occur in all parts of the city and especially in popular business and restaurant areas. The favoured attack by rival organizations is the car bomb, specifically targeting an individual’s vehicle. Following the assassination of Serbia’s Prime Minister in the spring of 2003 by a criminal group, the Serbian Government launched a crackdown on organized crime. Starting in 2008, the Government passed and began implementing new legislation to strengthen the tools available to law enforcement and prosecutors to combat organized crime. (<https://www.osac.gov/Pages/ContentReport>)

Hungarians in Serbia

84. According to the European Commission against Racism and Intolerance (ECRI), as of 2008 there was a climate of hostility in Serbia against national or ethnic minorities, including

Hungarians. (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.20 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010) The United States Department of State (USDOS) reported that although not widespread, there “continued to be physical attacks and incidents of vandalism against minorities in Vojvodina, including ethnic Hungarians” throughout 2009. (US Department of State 2010, *Country Reports on Human Rights Practices 2009 – Serbia*, 11 March, Section 6) In March 2009, unidentified individuals speaking Serbian attacked an ethnic Hungarian in Sombor, while separately, 15 youths attacked another Hungarian in Temerin. In May 2009, anti-Hungarian graffiti was painted on a billboard in Backa Topola. (US Department of State 2010, *Country Reports on Human Rights Practices 2009 – Serbia*, 11 March, Section 6)

85. Many Serbs displaced from their homes as a result of hostilities in Kosovo, Croatia and Bosnia, were resettled in Vojvodina, and have often adopted radical and violent attitudes towards the ethnic Hungarian minority in the area. Roving gangs of youths reportedly “beat up young Hungarians if they hear them talking in the streets” Some Serbs believed that since it was acceptable for Albanians to drive Serbs out from Kosovo, then Serbs should have the right to drive Hungarians and other minorities from Vojvodina. (Horvath, J. 2008, ‘New Hope for Vojvodina?’, 7 February, Telepolis Online, <http://www.heise.de/tp/r4/artikel/27/27229/1.html#> – Accessed 16 November 2010)
86. According to reporting from 2005, violent attacks against Serbs in Kosovo triggered revenge attacks on non-Serbs in Vojvodina. Slogans such as ‘death to Hungarians’ and ‘Hungarians go to Hungary’ were reportedly seen on walls in many Vojvodina towns, and a Catholic cemetery on the border with Hungary was desecrated. Two Hungarians in Temerin were also assaulted. (Briza, J. 2005, ‘Vojvodina Hit by Wave of Ethnic Attacks’, Institute for War and Peace Reporting website, 21 February, <http://iwpr.net/report-news/vojvodina-hit-wave-ethnic-attacks> – Accessed 16 November 2010) According to *Associated Press*, in August 2005, a hand grenade exploded in front of the house of a senior ethnic Hungarian leader in Subotica, causing slight damage but no injuries. (‘Hand grenade hurled at ethnic Hungarian leader’s house in Serbian province, no injuries’ 2005, HighBeam Research website, source: *Associated Press*, 30 August <http://www.highbeam.com/doc/1P1-112631657.html> – Accessed 10 March 2011)
87. In 2005, Human Rights Watch stated attacks on ethnic Hungarians and Croats were widely reported, and while there was no evidence of state involvement in the violence, representatives of these groups accused the Serbian government of “failing to acknowledge the seriousness of the incidents, take action to prevent such violence, or properly punish the perpetrators.” (Human Rights Watch 2005, ‘*Dangerous Indifference: Violence against Minorities in Serbia*’, October, Vol 17, No 7(D), p.1) In December 2004, a group of four or five Serbs allegedly beat a Hungarian at a party in Subotica. According to an eyewitness, the police were slow to intervene, and then allowed the assailants to leave. (Human Rights Watch 2005, ‘*Dangerous Indifference: Violence against Minorities in Serbia*’, October, Vol 17, No 7(D), p.45)
88. In September 2004, the Hungarian government sought to ask the European Union (EU) to help end ethnic violence against the Hungarian minority in Vojvodina. The Serbian Prime Minister acknowledged there had been incidents, but described them as isolated. According to the leader of the Council of Vojvodina Hungarians, inter-ethnic intolerance was being downplayed, as while the most extreme cases involving physical attacks received attention, cases of psychological and verbal abuse were never discussed. (‘Hungary Seeks EU

Resolution on Ethnic Violence in Vojvodina' 2004, SETimes website, 9 September http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2004/09/09/feature-01 – Accessed 10 March 2011)

89. Human Rights Watch has seen no recent evidence of state involvement in violence against ethnic minorities. (Human Rights Watch 2005, '*Dangerous Indifference: Violence against Minorities in Serbia*', October, Vol 17, No 7(D), p.1) According to ECRI, racist acts committed against national or ethnic minorities by the Serbian majority are usually committed by young people who fled to the region in the wake of the conflicts that occurred in the former Yugoslavia in the 1990s. (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.29 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010)
90. According to ECRI, the Serbian constitution, adopted by referendum on 29 October 2006, contains provisions establishing the principles of equality and non-discrimination and protecting the rights of national minorities. (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.8 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010)
91. In June 2006, the Office for Human and Minority Rights was established to perform tasks relating to “the protection and promotion of human and minority rights, to participating in the drafting of legislation on the subject, to monitoring the compatibility of this legislation with international standards, to the status of minorities and the exercise of their rights”. (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.13 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010) In 2007, the Special Representative of the Secretary General of the United Nations noted that the office “did not appear to have the necessary powers and resources to play a leading role in protecting human rights and to support the work of NGOs and civil society in this area.” (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.14 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010)
92. Human Rights Watch stated that government officials, in particular the police, have often denied ethnic motivations behind acts of violence, even before any meaningful investigations into incidents were completed. A number of minority victims of ethnically motivated crimes have expressed frustration with the indifferent reaction from police when making reports about incidents. Human Rights Watch believes allegations of police anti-minority bias may be explained by the police force historically being a key institution of the ultra-nationalistic government of former Serbian president Slobodan Milosevic. (Human Rights Watch 2005, '*Dangerous Indifference: Violence against Minorities in Serbia*', October, Vol 17, No 7(D), p.44) There are also claims that Serbian officials have failed to adequately condemn acts of ethnic violence by Serb ultra-nationalists, or to take steps to decrease tensions among ethnic communities. (Human Rights Watch 2005, '*Dangerous Indifference: Violence against Minorities in Serbia*', October, Vol 17, No 7(D), p.46)
93. In October 2007, a planned Serbian far-right group demonstration in Novi Sad was banned, reportedly only after several objections from national and international organisations. Despite the ban, ultra-nationalists attacked an anti-racist demonstration that day, allegedly

hospitalising some of the participants. Organisers of the anti-racist demonstration subsequently issued a statement claiming the police had not protected them. (European Commission against Racism and Intolerance 2008, *Report on Serbia*, 29 April, p.20 http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SCG-CbC-III-2008-25-ENG.pdf – Accessed 11 August 2010)

FINDINGS AND REASONS

94. The applicant travelled to Australia on a valid Serbian passport and states that she is a national of Serbia. She has provided evidence of her life in Serbia. The Tribunal finds that the applicant is a national of Serbia and therefore for the purposes of the Convention the Tribunal has assessed her claims against Serbia as her country of nationality.
95. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings on the claims the applicant has made. This may involve an assessment of the applicant's credibility. In assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. That said, the Tribunal is not required to accept uncritically any or all allegations made by the applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Moreover the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J: *Selvaduri v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547. If the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make a finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true.
96. The Tribunal has considered the applicant's claims to fear persecution in Serbia for the reasons submitted, which are that she faces persecution for reason of actual or imputed political opinion, and for reason of her Hungarian ethnicity.
97. The applicant's claims are based on the Convention grounds of political opinion and race. Essentially, the applicant claims to have been politically opposed to the corruption within the Serbian authorities dating back to a period in the 1990's when Slobodan Milosevic was Serbian President. She claims that as a result of her husband's criminal and political associations, the applicant learnt of extensive corrupt and criminal activities engaged in by her husband's associates. She claims that she attempted to expose this corruption and was brutalised by the police as a result. She claims that she has been a victim of ongoing persecution as means of silencing and controlling her. She fears facing serious harm if she were to return to Serbia. She also claims to have experienced discrimination and harassment for reason of her Hungarian ethnicity.
98. The Tribunal found the applicant to be a largely credible witness, particularly in regard to past events in Serbia. Her account of her experiences has been consistent throughout the course of the review and is consistent with country information before the Tribunal, including the extensive history of corruption and organised crime in the former Yugoslavia and the failure of the Serbian authorities to protect her from harm associated with her unwilling association with organised crime in Serbia.

99. Based on the applicant's evidence at the Tribunal hearing, and with reference to the psychologist report provided the Tribunal accepts that the applicant is genuinely, albeit subjectively, extremely fearful of returning to Serbia. This is supported by the applicant's past attempts to avoid returning to that country and (unsuccessfully) seeking protection in Hungary. However it is established law that a "well founded fear" involves both a subjective and objective element, and requires an objective examination of the facts to determine whether the fear is justified (*Chan v MIEA* (1989) 169 CLR.).
100. As a result of hearing the applicant's oral evidence at hearing the Tribunal has formed the view that some aspects of the applicant's written submissions were exaggerated to enhance her claims. For instance she claimed that she was forced to maintain a log book recording all of her movements and which was regularly checked by the Serbian authorities. Although the Tribunal accepts as credible the applicant's claims that her activities were monitored, the Tribunal finds her evidence that she maintained a log book which she carried at all times to be implausible and inconsistent with the applicant's evidence regarding her [work] and her travel to and from Subotica where her two children were studying.
101. The applicant also claimed that her son was attacked and harmed by the same 'gang of criminals' who have persecuted the applicant and that his being attacked was linked to her own circumstances. However when questioned by the Tribunal, the applicant acknowledged that her son's attackers were not identified, and that he was attacked when returning from a social event in the university town where he studied. The applicant's oral evidence about these matters was vague, inconsistent in some respects and lacking in detail. However, in considering the applicant's claims as a whole, the Tribunal has given limited weight to these particular aspects of her evidence as they do not detract from her evidence in respect to her central claims.
102. The applicant claims to fear harm from a long standing criminal network of individuals who have persecuted her in the past and who will harm her if she returns to Serbia. She fears that they may kill her. She claims that these individuals can operate with impunity for reason of the involvement of corrupt elements in the police force. The applicant has identified a number of participants in this group, including officers in the Serbian police force and political party officials.
103. The Tribunal has carefully considered the applicant's submissions about the group. The Tribunal has also considered the finding of the delegate that the harm the applicant fears is not based on Convention grounds, but because of her detailed knowledge of the activities of a criminal network.
104. The Tribunal accepts the applicant's claims that she has been threatened, abused and raped in Serbia. Her experience accords with country information set out above, about the rampant nature of organized crime in the former Yugoslavia, and the corruption in the ranks of the Serbian police. Relevantly, the information suggests that the bombing of vehicles was a means that was utilized to threaten or frighten critics of the regime. The Tribunal accepts that the applicant was opposed to the activities of her persecutors and that she attempted to report their activities to the authorities in the past, and to criticize the corruption of the Serbian police and government authorities which enabled the criminal activities of her persecutors to flourish.
105. The Tribunal accepts that the attacks on the applicant were systematic over the years and that she was specifically targeted. The Tribunal also accepts her claims that he was too frightened

and unable to ask police for help because of police involvement in her past abuse and the apparent participation of certain police officials in the criminal activities at the center of the applicant's claims. Country information supports the applicant's contention that there was and is corruption in legislative, executive, and judicial branches of Serbian government including police, and that the police force is corrupt (USDOS Reports above)

106. The Tribunal accepts that a criminal network intimidated, threatened and abused the applicant over a long period of time and that this persecution of the applicant commenced in around 1994 when the applicant attempted to report the criminal dealings of the group to the authorities. The Tribunal accepts that the applicant fears this group were she to return to Serbia in the reasonably foreseeable future and that there is a real chance of serious harm against her if she were to return to Serbia. The Tribunal accepts that the persecution involves systematic and discriminatory conduct against her in that he has been specifically targeted in a non-random way by the perpetrators.
107. Based on the evidence before it the Tribunal accepts that the applicant has experienced serious harm in Serbia within the meaning of Article 1A(2) of the Convention as qualified by s.91R of the Migration Act, and that the harm has included threats to her life and liberty, rape and other significant physical ill treatment. The Tribunal also accepts, based on the applicant's evidence and with careful regard to the country information set out above that she fears that she will experience ongoing harm if she returns to Serbia in the future, and that her fear is well founded.
108. However an applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one or more of the reasons enumerated in Article 1A(2) of the Convention, and moreover that to satisfy Article 1A(2) as qualified by s.91R(1)(a) of the Migration Act a Convention reason must constitute the essential and significant reason or reasons for the persecution.
109. Because the Tribunal accepts that the applicant has a well founded fear of serious harm if she returns to Serbia, the issue before the Tribunal is whether her fear amounts to a well founded fear of persecution for a Convention reason.
110. Justice Kirby observed in *Chen Shi Hai v MIMA* (2000) 201 CLR 293.) that the phrase "for reasons of" in the Convention definition obviously imports certain notions of causation (*Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [67].) and that the meaning of any statutory notion of causation depends upon the precise context in which the issue is presented. He noted for example that in the field of torts, the "but for" test, formerly favoured by the common law, needs to be tempered by "the infusion of policy considerations". (*Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [68], referring to *March v Stramare Pty Ltd* (1991) 171 CLR 506 at 515-517) However:
111. In the context of the expression "for reasons of" in the Convention, it is neither practicable nor desirable to attempt to formulate "rules" or "principles" which can be substituted for the Convention language. In the end it is necessary for the decision-maker to return to the broad expression of the Convention, avoiding the siren song of those who would offer suggested verbal equivalents. The decision-maker must evaluate the postulated connexion between the asserted fear of persecution and the ground suggested to give rise to that fear. The decision-maker must keep in mind the broad policy of the Convention and the inescapable fact that he or she is obliged to perform a task of classification. (*Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [68]-[69], per Kirby J.)

112. Courts in other cases have commented on the relevance or otherwise of common law tests of causation. In *Okere v MIMA*, ((1998) 87 FCR 112.) for example, Branson J referred to the common law test discussed in *March v Stramare Pty Ltd*, ((1991) 171 CLR 506 at 515.) concluding that the ordinary meaning of Article 1A(2), considered in the light of the context, object and purpose of the Convention, invites the identification of the “true reason” for the persecution which is feared, by the application of “common sense to the facts of each case”. ((1998) 87 FCR 112 at 117-8. See also, for example, *Gersten v MIMA* (1999) 169 ALR 167, *Peiris v MIMA* (1999) 58 ALD 413, *Hellman v MIMA* (2000) 175 ALR 149, *MIMA v Khawar & Ors* (2000) 101 FCR 501, and *Applicant N 403 of 2000 v MIMA* [2000] FCA 1088 (Hill J, 23 August 2000).
113. The weight of authority supports the view that there is no precise test for causation; it remains for the Tribunal to determine whether there is a relevant causal connection between the harm feared by an applicant and a ground in the Convention, given the specific circumstances of each case. In performing this task, the Tribunal should focus on the words of the Convention definition (*Chen Shi Hai v MIMA* (2000) 201 CLR 293 per Kirby J at [69]; *Gersten v MIMA* [2000] FCA 855 (Hill, Mathews & Lindgren JJ, 5 July 2000) at [23].) and preferably use the language of the Convention itself. (*WAAJ v MIMIA* [2002] FCAFC 409 (Wilcox, RD Nicholson and Downes JJ, 12 December 2002) at [24].)
114. Although there is no precise test for causation in the context of the Convention definition, it is nevertheless clear that in Australian law, the phrase “for reasons of” involves consideration of the motivation and perception of the persecutor/s.
115. There is an abundance of authority for the proposition that persecution involves an element of motivation for the infliction of harm. In *Ram v MIEA & Anor* Burchett J said:
- Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. ... Consistently with the use of the word “persecuted”, the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is “membership of a particular social group” ... The link between the key word “persecuted” and the phrase descriptive of the position of the refugee, “membership of a particular social group”, is provided by the words “for reasons of” - the membership of the social group must provide the reason. There is thus a common thread which links the expressions “persecuted”, “for reasons of”, and “membership of a particular social group” That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase “for reasons of”, and fastens upon the victim’s membership of a particular social group. He is persecuted because he belongs to that group. ((1995) 57 FCR 565 at 568. Approved in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 284.)
116. That case concerned membership of a particular social group. However, as was pointed out in *Chen Shi Hai v MIMA*, the thread to which Burchett J referred links “persecuted”, “for reasons of” and each of the grounds specified in the definition, namely, “race, religion, nationality, membership of a particular social group or political opinion”. (*Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [12] and [24].)

117. In *Applicant A & Anor v MIEA & Anor*, Gummow J cited *Ram* with approval and added that the phrase “for reasons of” serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it. The reason for the persecution must be found in the singling out of one or more of five attributes, namely race, religion, nationality, membership of a particular social group or political opinion. (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 284, per Gummow J.) In *MIMA v Haji Ibrahim* McHugh J similarly emphasised that the Convention requires the Tribunal to ascertain the motivation for the allegedly persecutory conduct which an applicant for refugee status fears. ((2000) 204 CLR 1 at [102].)
118. After careful consideration of the applicant’s evidence the Tribunal is not satisfied that the persecution of the applicant in the past, and the persecution that she fears in the future is persecution for reason of the Convention grounds which she has identified as her political opinion or her race, or for any other Convention reason. Rather the Tribunal finds that she has been harmed by members of a criminal network in Serbia for reason that the applicant is aware of their crimes and has tried in the past to report their criminal activities to the Serbian authorities. The harm which she fears in the future is harm from the same non State actors for the same reasons, which have been exacerbated by the likely perception on the part of her persecutors that the applicant may have identified them in the process of seeking protection outside Serbia.
119. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.
120. Because the relevant Convention nexus can be satisfied by either the discriminatory motivation of the perpetrators of the harm or the discriminatory failure of state protection, in circumstances where the immediate harm appears to have no Convention nexus, then depending on the evidence, it may be necessary to consider whether there is a discriminatory failure of state protection attributable to a Convention reason. For example, in *MIMA v Khawar & Ors* ((2002) 210 CLR 1.) the applicant claimed to have been subjected to domestic violence and denied state protection because she was a woman. Although the judgments differed in their characterisations of the relevant persecution, (*MIMA v Khawar & Ors* (2002) 210 CLR 1 at [30] per Gleeson CJ, at [118] per Kirby J, and at [85] McHugh & Gummow JJ.) the majority (Gleeson CJ and McHugh, Gummow & KirbyJJ; Callinan J dissenting.) found that such circumstances could come within the Convention even though

the harm by the private individuals was unrelated to the Convention. If the persecution was characterised as a combination of serious harm by private individuals and a failure by the state to provide protection against such harm, the Convention nexus requirement could be satisfied by the motivation of *either* the private individuals or the state. (2002) 210 CLR 1 at [31] per Gleeson CJ, and at [120] per Kirby J.) If the persecution was characterised as the failure of the state to provide protection against non Convention related domestic violence, then the reason for the inactivity of the state must be one or more of the Convention grounds. (*MIMA v Khawar & Ors* (2002) 210 CLR 1 at [84] and [87], per McHugh & Gummow JJ.)

121. There is country information before the Tribunal which suggests that the applicant may not be afforded protection from the harm that she fears if she returns to Serbia for reason that she is a critic of the Serbian government who has been outspoken in her attempts to report corruption within government authorities including the police. The applicant claims that the police would not help her as they have connections with the individuals who have targeted her. She claims to have been targeted by this group since around 1994. She claims they have abused her verbally and physically, culminating in torture and rape, and have threatened to kill her. She also claimed in her evidence that the police have harmed her in the past and will harm her in the future. When asked about this at hearing, the applicant gave evidence that positions in the police continued to be held by individuals who had been there since the Milosevic regime and who are involved in corruption.
122. The Tribunal has considered whether critics of the Serbian government might constitute a particular social group within the meaning of the Convention.
123. *Applicant A's case* remains the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of "particular social group" in this way:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand. (*Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ.

124. In *STXB v MIMIA* (2004) 139 FCR 1, Selway J at [25] to [27] in considering this test stated that there is one clear difference and another possible difference to the test identified by the Full Court of the Federal Court in *MIMA v Zamora* (1998) 85 FCR 458. The clear difference relates to the third proposition in both tests and pertains to the High Court rejecting that aspect of the third proposition stated by the Full Court, that society must recognise that the group is 'set apart' The possible difference between the tests pertains to the use by the High Court of the word 'distinguish' whilst the Full Court used the words 'set apart'. However after considering a hypothetical example of 'left handed persons' in Australia, his Honour concluded that the High Court used the word 'distinguish' in the same sense in which the Full Court used the word 'set apart'.

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

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. (*Applicant S v MIMA* (2004) 217 CLR 387 at [69] per McHugh J.)

126. *Applicant S* also establishes that there is no requirement of a recognition or perception *within the relevant society* that a collection of individuals is a group that is set apart from the rest of the community. (That is, the third *Zamora* criterion. In *MIMA v Zamora* (1998) 85 FCR 458 the Full Federal Court stated at 464 that *Applicant A's case* was authority for the proposition that “[t]o determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.” However the High Court held that the third of these propositions was incorrect. A number of Court decisions have required the third *Zamora* criterion to be satisfied. See for example, *MIMA v Applicant Z* (2001) 116 FCR 36 (Sackville, Kiefel & Hely JJ, 19 December 2001) at 40, (“able bodied Afghan men”); *MIMA v Applicant M* [2002] FCAFC 253 (Whitlam, North & Stone JJ, 23 August 2003) at [21], (conscientious objectors in Afghanistan); *MIMIA v VFAY* [2003] FCAFC 191 (French, Sackville & Hely JJ, 22 August 2003) at [100], (unaccompanied children in Afghanistan), *SGGB & SGHB v MIMIA* [2002] FMCA 367 (Barnes FM, 1 May 2003) at [30], (feminist women in Afghanistan), *VBAL v MIMIA* [2003] FMCA 120 (Hartnett FM, 7 April 2003) at [30] to [31], (“informants against the LTTE”), “*VAM*” v *MIMIA* [2002] FCAFC 125 (Black CJ, Drummond & Kenny JJ, 10 May 2002) at [12] to [14], (ex-policemen targeted for giving information about a gangster in Malaysia). In light of the High Court’s reasoning in *Applicant S v MIMA* (2004) 217 CLR 387 the reliance on the third *Zamora* principle is no longer good law.)
127. The Tribunal considers critics of the Serbian government to be an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. The Tribunal therefore finds that the group comprising critics of the Serbian government satisfies each of the limbs set out in *Applicant S* such as to constitute a particular social group for the purposes of the Convention. The Tribunal also accepts on the evidence before it that the applicant has a political opinion opposed to the corruption of the Serbian government.
128. Because the Tribunal has found that the applicant is being targeted by a criminal gang for a non-Convention reason, a key question before the Tribunal is whether the applicant would be discriminatorily withheld state protection for a Convention reason such as to import the Convention nexus in circumstances where it would not otherwise be present. It therefore remains for the Tribunal to consider whether there is a discriminatory failure of state protection attributable to the Convention grounds of the applicant’s membership of the particular social group of critics of the Serbian government, or in the alternative a discriminatory failure of state protection attributable to her political opinion.

129. As noted above it has been recognised that the Milosevic regime in Serbia was not only aggressive, undemocratic and corrupt, but was in essence “a criminal regime, whose security sector was deeply involved not just in war crimes, but also in classic forms of organised crime: drug trafficking, extortion, kidnappings and targeted assassinations”. (Anastasijevic, D. 2008 cited above). Numerous sources further indicate that organized crime and the associated violence and corruption it creates remain a concern in Serbia (USDOS Report 2011 cited above).
130. Although not widespread there are nevertheless some current reports that critics of the Serbian government, including parties who have accused the government of corruption, face harm or threats in Serbia. Amnesty International has reported in 2010 that women campaigning across issues including war crimes, transitional justice and corruption have faced “threats to their lives and property, media attacks and malicious prosecutions” and that the authorities failed to protect these women, (Amnesty International, 2010, *Annual Report Serbia 2010*, above) and both the UK Home Office and the US Department of State have identified the intimidation and abuse of journalists, human rights workers and others critical of the government” in Serbia (UK Home Office, 2008, *Operational Guidance Note* and USDOS Reports cited above).
131. There is ongoing albeit limited speculation regarding the extent of organised crime infiltration of the Serbian government. In 2008 the UK Home Office continued to warn that Serbia was facing a “serious threat from organised crime and that “[c]riminals have exploited the vacuum, created by the conflicts of the 1990s and the isolation due to international sanctions, to establish lucrative networks which reach far into government. (UK Home Office 2008 cited above, and as recently as 2010 law enforcement officials in Serbia have claimed that most of the largest drug groups in Serbia could not operate without help from inside the government. (Organised Crime and Corruption Reporting Project website 2010 Serbia, 8 July – cited above)
132. The Tribunal also notes recent reports of claims of indifferent reaction from police regarding human rights abuses in Serbia and observations that the Serbian police force remains influenced and biased by its history as a key institution of the ultra-nationalistic government of former Serbian president Slobodan Milosevic. (Human Rights Watch 2005, cited above).
133. The Tribunal accepts from the independent country information set out in this decision that the authorities in Serbia discriminatorily withhold protection from persons critical of the Serbian government, including those who have accused the government of corruption and collusion in criminal activity. Where critics of the Serbian government are threatened or abused as the applicant has been over the course of many years the Tribunal accepts that such people may have state protection withheld for discriminatory reasons. Looking to the foreseeable future, the Tribunal finds that state protection will be withheld from the applicant for discriminatory reasons.
134. For the reason that there is a real chance that the applicant will be persecuted by a criminal gang in Serbia, and that the Serbian authorities will discriminatorily withhold protection from the applicant for the Convention reasons of her membership of a particular social group of critics of the Serbian government and her political opinion, the Tribunal is satisfied that the applicant’s fear of persecution is well-founded.
135. The Tribunal has found that if the applicant were to return to Serbia now or in the reasonably foreseeable future, there is a real chance that she will face serious harm, amounting to

persecution, from non-state agents (being the criminal organisation with which her husband has been involved). The Tribunal has further found that the motivation of these non-state agents is not for a Convention reason, but instead is motivated by retribution and criminality. In the absence of a Convention ground, the Tribunal has gone on to consider whether state protection from the serious harm the applicant fears would be discriminatorily withheld or denied by the Serbian authorities for a Convention reason. For the reasons above, the Tribunal finds that the Serbian authorities would systematically and discriminatorily withhold state protection from the applicant for reason of her membership of a particular social group of critics of the Serbian government and her political opinion.

136. Because the Tribunal has found that the applicant has a well founded fear of persecution in Serbia for the reasons given, it is not necessary for the Tribunal to consider whether the applicant has a well founded fear of persecution for reasons of her ethnicity.
137. The Tribunal asked the applicant whether she would be safe from the harm that she fears if she were to relocate to another part of Serbia. The applicant has told the Tribunal that given the nature of the criminal group from whom she fears harm, including the involvement of corrupt police and government officials that she would be located anywhere in Serbia, and would have to live in hiding if she returned to that country. Her evidence is consistent with the independent country information before the Tribunal which is set out above. The Tribunal accepts the applicant's evidence in this regard and finds that relocation within Serbia is not reasonable. The Tribunal finds that the applicant has a well founded fear of persecution now or in the reasonably foreseeable future if she returns to Serbia.

CONCLUSIONS

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

DECISION

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