

**1102691 [2011] RRTA 514 (22 June 2011)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1102691
<b>DIAC REFERENCE(S):</b>	CLF2010/160172
<b>COUNTRY OF REFERENCE:</b>	Albania
<b>TRIBUNAL MEMBER:</b>	Adam Moore
<b>DATE:</b>	22 June 2011
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Albania, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants] August 2010 and applied to the Department of Immigration and Citizenship for the visas [in] November 2010. The delegate decided to refuse to grant the visas [in] March 2011 and notified the applicants of the decisions.
3. The delegate refused the visas on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] March 2011 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 (the Regulations) for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse of the family head.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Regulations.

## Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
16. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

17. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

#### **CLAIMS AND EVIDENCE**

20. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

#### **Application for a protection visa**

21. The applicants' written application is made using prescribed Forms 866C 'Application for a person who wishes to submit their own claims to be a refugee', Form 866B 'Persons included in this application and family composition' and 866D 'Application for a member of the family unit' The applicants had the assistance of a registered migration agent with their application. The application was accompanied by certified copies of the applicants' Albanian passports.
22. According to his answers in Form 866C:
  - a. the first named applicant was born on [date deleted: s.431(2)] at [District 1], Albania;
  - b. he speaks, reads and writes Albanian;
  - c. he describes his ethnicity as 'Albanian' and his religion as Roman Catholic;
  - d. he was married [in] July 1979;
  - e. he is a citizen of Albania;

- f. he does not hold citizenship of any other country or have the right to enter and reside in any other country;
- g. he arrived in Australia [in] August 2010 using a passport in his own name on a tourist visa;
- h. he gives his previous address in Albania as [District 1] as the only address where he has lived for more than 6 months in the last 10 years;
- i. he has had 12 years of schooling; and
- j. he describes his occupation prior to coming to Australia as ‘Officer at the Registrar Office [District 1]’

23. At question 41 in Form 866C the first named applicant states that he is seeking protection in Australia so that he does not have to go back to Albania. At questions 42 to 46 he sets out his claims for protection as follows:

**Question 42 Why did you leave that country?**

I left Albania because of the threat that I have experienced as an officer of the registrar in the commune of [District 1], [City] Albania.

I have been physically threatened by [Mr A], a militant and supporter of the democratic party, because I refused to make changes of dates, months and names of his family.

I have been physically threatened by [Mr B], a strong supporter and financier of the socialist party, for the same reasons of refusing to budge to their pressure to make false dates, months etc in their family civil registry.

I have been following the law not to bound to the pressure of people like the above who did so because fo their political support.

I reported the incident to the inspector of the police about the incidents but the inspector did not do anything because the above people have political support and influence to do whatever they like.

They have threatened me on the phone, sending me letters that they will burn your family alive and kill you, you have no place here.

During the course of my work I have assisted Australian embassy in Greece, US embassy in Tirana and other foreign embassies to reveal the truth of the civil registrar of the commune of [District 1] in [City], Albania. Because of my assistance and support to reveal the truth and maintain my integrity as a public servant, I was threatened physically by people who have political power and support.

I tried to report the incidents to the authorities who are supposed to protect me but I was left on my own without the protection of the police because they are scared from these people due to their political influence.

**Question 43 what do you fear may happen to you if you go back to that country?**

I fear that I will get physically eliminated by these people I mentioned above or even other people like [Mr C], [names], all of these individuals have physically threatened me just because I was doing my job.

I have the following witnesses who have seen how [Mr A] has physically insulted me in front of the chairman of the Communie of [District 1], [name] and other employees [names], etc.

**Question 44 who do you think may harm/mistreat you if you go back?**

The people who have the political support, who are members, militants and supporters of the democratic and socialist party. The people that I have mentioned above are people with political power and influence in their hands and threatens public servant like myself who are law abiding citizen and are doing their job according to the law.

Some of my assistance to the foreign embassies have lad to the real true identity of some people who have provided false documents to the foreign countries.

The latest incidents by [Mr B] and [Mr A] both of who have physically beaten me and pointed a gun to me have made me scare that if more people get in trouble because of my honest work, one day I will be killed.

The inspector of the police was unable to help me because these people have the political party support and act as if they are the authority.

**Question 45 why do you think this will happen to you if you go back?**

This will happen to me because of my refusal to do false documents, to change the registrar details of their family members in the civil registry of the commune of [District 1].

I have always preferred to follow the law and not the political party agenda of assisting some of their supporters who are involved in criminal activities and with their money they assist these politicians in the election campaign to come to power.

***[Question 46 do you think the authorities of that country can and will protect you if you go back? If not, why not?***

*The page that contains this question is missing from the application.]*

24. In Form 866B, it is stated that the persons included in the application are the applicants. It is stated that the applicants have members of the family unit in Australia who are not included in the application as follows:
  - a. [Name deleted: s.431(2)] (relationship not stated) an Australian citizen;
  - b. [Name deleted: s.431(2)], daughter of the first named applicant, an Albanian citizen.
25. The details of the second named applicant are given in Form 866D, which is for applicants who are part of the application but do not have their own claims to be a refugee. It is stated that:
  - a. the second named applicant was born on [date deleted: s.431(2)] [in] Albania;

- b. she is a citizen of Albania; and
- c. she does not hold citizenship of any other country;

### **Departmental interview**

26. The first named applicant was interviewed by the delegate [in] February 2011 by telephone with the assistance of an interpreter in the Albanian and English languages. Also present was the applicant's representative. The Tribunal has listened to a recording of the interview. What follows is a summary of his evidence:

- he said he was frightened to return to Albania because of different individuals and his profession;
- he said he was working registrar office of the [District 1] Council from 1996 to 2009;
- during his work in the office of the registrar and following the laws of Albania people requested him to give them a false and unlawful documents;
- he said he was threatened with his life with guns and knives to force him to give out false documents. He said he had physical fights during these occasions as well;
- he said in a complaint to the Albanian authorities about the people who had threatened him but because of political problems in Albania the cases were closed;
- he said he requested the head of the council to release him from his duties and he went into a different profession. He said his new work was as an officer in the council after he returned from Australia in June 2009;
- he was asked if the fact that he changed his profession would solve his problems. The applicant said it did not solve his problems that's why he is requesting to live outside Albania;
- he was asked about his claim of being physically threatened by [Mr A] of the Democratic Party. He said this happened in June 2008. He was asked to describe what happened. He said this man came to his office and asked for a certificate in a different name because he wanted to make a false passport. The applicant said that he did not agree to give it to him and [Mr A] threatened him with a handgun. He said he had witnesses to this event who heard the noise and came to his office and saw this. When the witnesses came [Mr A] left. He said he reported this incident to the police but the case was close to nothing happened;
- he was asked about another incident with [Mr B] of the Socialist Party. He said this happened in 1998. There was a change of government in this year and this man came to his office and told him to quit because he is no longer entitled to the job. He also requested false documents to emigrate. The applicant said [Mr B] threatened his life. The applicant said he reported this event to the council security. The police called in [Mr B] to discuss the case and it was closed. He said this was due to the revolution and the change of government;

- he was asked about threatening letters that he said that he had received. He said he had not kept the letters but he knew the names of the people who had threatened him;
- he was asked why he thought he needed protection now after having worked in this registry office for 13 years and being still alive. He said it is because the situation in Albania is changing every day and especially since 2008 it has been getting worse.
- he was asked why these people would bother with him if he didn't work in the registry office any more. He said they want to get back to him because they could not reach what they wanted and because he did not give up his job at the time;
- he was asked about the witnesses here named in his claims and if he had any supporting letters from any of them. He said he had not that he could obtain something;
- he was asked if he had a son in Australia. He said he did. He was asked if he was doing well in Australia. He said he was;
- he was asked about his written claim that he had been physically beaten. He was asked when this occurred. He said it was the occasion with [Mr A] when he had a fistfight in 2008 in his office. The applicant said he was punched. He said he was not hospitalised;
- he was asked what he thought what happened to him if he returns to Albania. He said he thought they will eliminate him;
- he was asked if he was no longer working for the registry office why they would bother to do with him. He said it is a tradition that people remember things and get back at you. It's a blood feud. They said they are in favour because of who they are and they have protection from the government;
- he was asked if he thought these people had other targets by now. The applicant said he feared that they would eliminate him;
- he was asked why he would not just relocate within Albania if he was afraid of these people in [District 1]. He said it's everywhere the same within Albania.

## **Submissions**

27. Prior to the delegate making his decision, the applicants' representative made a written submission and provided some written material about the political crisis in Albania, including an EU statement dated 27 January 2011 and some news reports. The news reports deal with the ongoing crisis since the disputed parliamentary election in 2009 and the subsequent inflammatory rhetoric between the ruling democratic party and the opposing socialist party which disputes the results of the poll and escalation of the conflict into rioting. The representative wrote:

Please find attached herewith the latest political crisis in Albania- As I have already told you that the quality of the telephone interpreting was not at even at para - professional level of NAATI, therefore should not be taken into consideration to have a negative impact on my client's claim.



To put it in the perspective, even though my client's claim were not current episodes, however, [the applicant] believes that because of the verbal threat he has received even prior to his last arrival in Australia have made him feel unsafe and uncertain- [the applicant] has seen other experiences happened in Albania where people that have worked in the local council have not bowed to the threat of certain criminal elements were physically beaten and they lived their family life full of fear and sometimes ended up in hospital, etc.

[The applicant] did not want to live his life full of fear, why? Because [the applicant] has fully cooperated with the Australian Embassy in Athens, Greece, US and UK Embassy in Tirana, Albania, where he has fully revealed the real identity of the people who have applied in these countries for asylum. This kind of cooperation even though legal have put [the applicant] on the spotlight of a dangerous criminals who will take vendetta against [the applicant] one day when they get the right opportunity to do so and put his life at risk.

[The applicant] has felt political persecution by people who have the political support from both major parties.

Albania is a very small country and relocation to another part of the country will not change the risk of his life from people who think that [the applicant] has fully cooperated with foreign governments to tell the truth to them about identity issues. Even in Europe from 15/12/2011, Albanians can freely go without a visa, that adds another risk to him. [The applicant] choose Australia because it is far away and his son is here as well who can support him during these difficult times in his life.

I feel that [the applicant] satisfies the Convention on Refugees based on political factors by being persecuted during the course of his official duty in the local council.

Please feel free to contact myself should you need any further information on this case. Thank you.

### **Tribunal hearing**

28. The first named 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 Albanian and English languages.
29. The first named applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
30. After explaining to the applicant the role of the Tribunal and the operation of the Convention in Australia, the Tribunal questioned the first named applicant about his claims for protection. What follows is a summary of his evidence. For convenience, he will be referred to as the 'applicant'.

### *Application for protection*

31. The applicant said he has no English language skills and he had the assistance of his registered migration agent, who speaks Albanian, in completing his application for protection. He said the representative read back to him the contents of his application and that he confirmed the accuracy of its contents. He said he did not have any new matters to raise.

### *Background and travel*

32. The applicant confirmed that he had lived all his life in [District 1] at the one address, which was his family home. He said that he and his wife had travelled together to Australia and they arrived [in] August 2010. They are currently living at their son's home, who is an Australian citizen. Their son is married and has one son.
33. The applicant said that he is now [age deleted: s.431(2)], and his wife, the second named applicant, is [age deleted: s.431(2)]. He confirmed that his wife has no claims to be a refugee in her own right.
34. The Tribunal asked the applicant about his employment in Albania. He said:
  - a. he first worked at [a cooperative] under the communist regime until 1991;
  - b. he said he became involved with the democratic movement and was involved in the overthrow of the communist regime. He said he participated in a number of demonstrations and protests. He said he gained the trust of the people and was able to work in the civic office. He said he was appointed secretary and also chairman of the city council committee which he held until 1996;
  - c. he said there were new elections in 1996 and he became the officer for civil status. He held this position for 13 years until 2009;
  - d. he then worked for one year as a service officer for the city council.
35. The applicant confirmed that his passport was issued [in] November 2009. He said that this was because as part of the road to joining the EU all old passports were recalled and new biometric passports were issued in accordance with EU standards. He said he had held his old passport for about 5 or 6 years.
36. He said that the only country that he travelled to before arriving in Australia was Australia.

### *Right to enter and reside in a safe third country*

37. The Tribunal asked the applicant if he had the right to enter and reside in any country other than Albania. The applicant said that he has the right to enter any country in the "Schengen" zone and stay there for a maximum of three months. He said this came into effect on 15 December 2010 for Albanians. He said the Schengen Agreement is signed by 27 countries in Europe.

### *Past persecution*

38. The Tribunal asked the applicant to tell it about any incidents of harm he had suffered in the past in Albania. The applicant said there were many incidents but there were 2 which involved physical altercation.
39. The applicant said the most recent incident involved a man called [Mr A]. This happened in the applicant's office in October 2008. He described [Mr A] as "a militant and supporter of the democratic party". The applicant said [Mr A] was a resident of the village of [village deleted: s.431(2)] and he wanted to change his name and surname for the purpose of

approaching another commune to obtain an economic advantage for himself. The applicant said according to law you are not allowed to change your name for the purpose of changing commune or going overseas. The applicant said [Mr A] wanted him to issue a certificate so he could obtain a passport and register in another commune. The applicant said that if he were to issue such a document he would be liable to imprisonment under Albanian law and he refused to issue the document. The applicant said [Mr A] verbally abused him. The applicant said that he then punched [Mr A]. He said [Mr A] punched him back and a fight ensued. He said [Mr A] went outside to his car and got a pistol. He tried to come back into the office building with the gun in his hand but a number of the applicant's co-workers grabbed him and did not allow [Mr A] to re-enter. [Mr A] told the applicant that he was going to hear from him again. Eventually [Mr A] drove away.

40. The Tribunal asked the applicant if had ever heard from [Mr A] again. The applicant said he did not.
41. The Tribunal asked the applicant to tell it about the next incident. He said this was in June 1998 and involved [Mr B]. The applicant said this man also came wanting the applicant to issue a false certificate so that he could obtain a passport. The applicant said [Mr B] already had a passport but wanted another one with a different date of birth. The applicant said he refused to issue the certificate. The applicant said [Mr B] said to him that he would make the applicant disappear and would burn his office down. The applicant said [Mr B] said I will obtain a certificate from you by force and then grabbed the applicant's head and said that he will not be alive in 24 hours and he will make the applicant disappear. The applicant said that he reported this incident to the commune police but said because they supported [Mr B] they closed the case.
42. The Tribunal asked the applicant if had ever heard from [Mr B] again. The applicant said he did not.
43. The Tribunal asked the applicant if there were any other incidents. The applicant said he has had a lot of other incidents where he has had confrontations with other people which have ended in verbal abuse. He said there was another time when he ended up in court because of a physical altercation. He said there was a man called [Mr C] who threatened the applicant in 2005. He was trying to obtain a certificate for someone he said was one of his sons but this person was someone who in fact lived in another commune. The photograph of the person was on a police wanted list. The applicant said the police brought a case and he was called as a witness. The applicant said he was threatened as a result of that.
44. The Tribunal asked the applicant how often these threats that lead to verbal threats had occurred. The applicant said that he worked in constant fear. He said he had to be very careful. He said he kept a weapon in his office to protect himself.
45. The Tribunal asked the applicant if it was because he was doing his job properly and not giving these people what they wanted that he was receiving these types of threats. The applicant agreed.
46. The Tribunal asked the applicant if there were any particular people or groups of people who made his work difficult. The applicant said it was the left wing apparatus and members who were always trying to find reasons to remove him. He said it was the Socialist Party. The Tribunal asked the applicant why he thought that was. The applicant said it was because they knew he could not be corrupted. He said they managed to change the law in Albania so that

the office of the civil registry became part of the police department. He said in this way they could employ anyone they wanted. The Tribunal asked the applicant when this change happened. The applicant said it was in 1998. The Tribunal asked the applicant to confirm that the police were in charge of his department for the whole time that he was working for the civil registrar office. He agreed that was correct. The Tribunal asked the applicant why it was, if these people could get what they wanted because of this change why he kept having these problems. The applicant said it was he was not issuing the documents and if he did, he would end up in prison.

47. The Tribunal asked the applicant why these people were not successful in having him removed from office. The applicant said it was because the mayor was one of his supporters, and because he did not break any laws there were no reasons to remove him.
48. The Tribunal asked the applicant if there were any other things that happened in the course of his work that were important for the Tribunal to know. The applicant said that in the end he resigned because of these reasons. He applied to the mayor for resignation. He said he applied to resign in November 2008 and his request was approved in January 2009.
49. The Tribunal asked the applicant why he said in his application that he was working until August 2010. He said he started work as a service officer for the commune after his resignation from the registrar office but he obtained a visa to come to visit Australia. He said he worked as a service officer from January 2009 to June 2010 until his visa was approved, then he spent three months in Australia on holiday. Then he worked for a further year after he returned to Albania as a service officer.
50. The Tribunal asked the applicant if any other incident happened up until August 2010. The applicant said nothing of importance happened.

#### *Fear of persecution*

51. The Tribunal asked the applicant what he feared might happen to him if he returned to Albania. The applicant said that he was afraid that the people who have threatened him in the past may carry out their threats. The Tribunal asked the applicant if there were any particular people who he feared might do this. He said the three people he had talked to the Tribunal about.
52. The Tribunal asked the applicant if he was talking about [Mr A] in 2008, [Mr C] in 2005 and [Mr B] in 1998. The applicant agreed.
53. The Tribunal asked the applicant why he thought he was still at risk when these three people had had plenty of time to act on their threats. The applicant said that he has had constantly to be careful and protect himself from these people. He said that when someone threatens your life they are certainly thinking about doing something about it. The applicant said on other occasions when they had to obtain a passport they sent their wives, they did not come themselves. The Tribunal asked the applicant why he thought they did this. The applicant said he supposed it was because they did not want to see him.

### *Convention nexus*

54. The Tribunal said to the applicant that from what he had already said, it seemed that his fear arose from the fact that he has been asked for corrupt documents and has refused to issue them. The applicant agreed.
55. The Tribunal asked the applicant how he thought those circumstances fell within the Convention. The applicant said it was because of his political opinion. He characterised it as being against corruption as a result of the party he belonged to. He said it was a government position he held as well.
56. The Tribunal asked the applicant if he was appointed to the job because of his political opinion. The applicant said at the start when he first obtained the post. It was because he was involved with the Democratic Party.
  - a. what party [Mr A] was aligned with: he answered the Democratic Party;
  - b. what party [Mr C] was aligned with: he answered the Socialist Party; and
  - c. what party [Mr B] was aligned with: he answered the Socialist Party.
57. The Tribunal asked the applicant if he thought these people were trying to obtain false documents from him to obtain benefits for themselves. The applicant said he thought it was because they were sent by certain factions to tempt him to break the law.
58. The Tribunal asked the applicant if he thought they were trying to get him to engage in corrupt activity. The applicant said that is what he believed.
59. The Tribunal asked the applicant if they were unsuccessful in these attempts why he thought they might still carry out their threats. The applicant said it was for revenge. He said in Albania revenge is quite common, especially for people who have not been given what they needed to get.

### *Delay*

60. The Tribunal asked the applicant why he had waited until [a date in] November 2010 to lodge his application for protection when he had arrived in Australia [in] August 2010. The applicant said it was because he had already obtained a visa and thought that he could not apply for another visa for one year.
61. The Tribunal asked the applicant if he had lodged an application to extend his stay in Australia. He said that he did for medical reasons but his application was refused. He said he has osteoporosis, trouble with his spine and high blood pressure.
62. The Tribunal asked the applicant's representative if there were any matters that the Tribunal should raise with the applicant. The representative said that when the applicant applied to extend his visa he did not want to breach his visa conditions but he always had in mind his fear of returning because of what had happened in the past.
63. The Tribunal asked the applicant how long he had been afraid of living in Albania. The applicant said he had been living in fear the whole time but he said that after the most recent incident it became quite serious.

64. The Tribunal asked the applicant if he had obtained any migration advice when he applied for his tourist visa. He said he had not and first engaged his representative when he applied for the extension of that visa.

#### *Protection*

65. The Tribunal asked the applicant if he thought the police could protect him in Albania. He said they would not. The Tribunal asked the applicant why he thought this. He said it is because the police are corrupt in Albania. The Tribunal asked the applicant if the police took any action when crimes are committed. The applicant said they act, but they are connected to organised crime and it is just a matter of paying some money and they close the case.
66. The Tribunal asked the applicant if the three men he had mentioned lived in [District 1]. He said two of them still do, but he believes [Mr B] lives in Italy, although he returns quite often.

#### *Relocation*

67. The Tribunal asked the applicant that now that he has resigned from his work if there was somewhere else he could live in Albania without coming across the people he feared. The applicant said that he would not be able to live anywhere else he would not have the support or assistance to live. He said he would be unable to find employment and is approaching retirement age. The Tribunal asked the applicant if he had the financial resources to support himself if he returned. He said he did not. The Tribunal asked the applicant if there is an aged pension in Albania. The applicant said he would have the right to a pension on turning 65.

## **FINDINGS AND REASONS**

### **Country of nationality**

68. Based on his evidence and the copy of his current Albanian passport the Tribunal finds that the applicant is a citizen of Albania, that he is outside Albania, and will assess his claims to protection against that country.

### **Safe third country**

69. The applicant said that he has the right to enter and reside in the Schengen Agreement countries for a period of up to three months. The applicant's passport is the new biometric type required in Europe. The Tribunal has considered the rights Albanian citizens enjoy under the Schengen Agreement.
70. The Schengen Agreement of 1985 and subsequent Schengen Convention of 1990 abolished controls at the borders between signatory countries. The Schengen area refers to the external borders of these countries, within which travellers can move freely without being subject to internal border checks. Such travel is limited to up to three months within a six-month period. Third country nationals are generally required to obtain a short-stay visa to enter the Schengen area. The Schengen provisions do not provide the right to residence or employment in signatory states.<sup>1</sup>

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<sup>1</sup> 'Free movement within the EU – a fundamental right' 2009, European Commission Freedom, Security and Justice website, March [http://ec.europa.eu/justice\\_home/fsj/freetravel/fsj\\_freetravel\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/freetravel/fsj_freetravel_intro_en.htm) – Accessed 25 September 2009\

71. Albania is not included in the Schengen area. However, Albanian citizens who hold biometric passports were granted visa-free travel within Schengen zone countries as of 15 December 2010.<sup>2 3</sup> Multiple entries are permitted, as long as the total period of stay does not exceed three months within a six month period.<sup>4</sup> Switzerland's Federal Department of Foreign Affairs, the Swedish Migration Board, the Austrian Foreign Ministry and the Consulate General of the Czech Republic in Chicago all confirm that this three month limit applies in their respective countries to Albanian citizens without a visa.<sup>5 6 7 8</sup>
72. The Tribunal finds, therefore, that the applicant has the right to enter and reside in a Schengen zone country for up to three months.
73. Albanian citizens who wish to travel visa-free into the Schengen area must obtain a biometric passport, provide proof that they have health insurance, and demonstrate that they have sufficient funds to cover the cost of the travel and stay.
74. It falls to the Tribunal then to determine whether s36(3) of the Act is enlivened. The subsection states:
- (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
75. Section 36(3) requires a right to enter and reside in another country. That right may be temporary or permanent, and there is no restriction on the manner in which the right arises or is expressed.
76. The right to which s.36(3) refers is not merely a right to enter. It must be a legally enforceable right to enter and reside.<sup>9</sup> The right should be construed as a whole, and it has been stated that attempts to construe the individual terms within the phrase have the potential to mislead and to divert attention away from the object and purpose sought to be achieved by

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<sup>2</sup> 'Tension builds beneath calm after violence in Albania' 2011, *The New York Times*, 25 January

<sup>3</sup> 'Q&A: Schengen Agreement' 2011, *BBC News*, 16 May <http://www.bbc.co.uk/news/world-europe-13194723> – Accessed 10 June 2011

<sup>4</sup> EUD Delegation Tirana (undated), 'FAQ on the visa-free regime', EU European External Action Service website [http://www.eeas.europa.eu/delegations/albania/documents/travel\\_eu/faq\\_visa.pdf](http://www.eeas.europa.eu/delegations/albania/documents/travel_eu/faq_visa.pdf) – Accessed 14 June 2011

<sup>5</sup> 'Visa for persons living in Albania' 2011, Switzerland Federal Department of Foreign Affairs website, 1 April [http://www.eda.admin.ch/eda/en/home/rep/eur/valb/ref\\_visinf/visalb.html](http://www.eda.admin.ch/eda/en/home/rep/eur/valb/ref_visinf/visalb.html) – Accessed 10 June 2011

<sup>6</sup> 'Visa exemption for Bosnian and Albanian citizens from 15 December' 2010, Swedish Migration Board website, 23 December [http://www.migrationsverket.se/info/3266\\_en.html](http://www.migrationsverket.se/info/3266_en.html) – Accessed 14 June 2011

<sup>7</sup> 'Do I Need a Visa?' (undated), Austrian Foreign Ministry, London Embassy website <http://www.bmeia.gv.at/en/embassy/london/practical-advice/schengen-visa-residence-permits/do-i-need-a-visa.html> – Accessed 15 June 2011

<sup>8</sup> 'Abolition of visa requirement for short-term stays in the Schengen area for citizens of Albania, Bosnia and Herzegovina and the FYR of Macedonia, Serbia, Montenegro and Taiwan' 2009, Consulate General of the Czech Republic in Chicago website, 11 December [http://www.mzv.cz/chicago/en/consular\\_information/visa/short\\_term\\_visa\\_requirements\\_stay\\_up\\_to/abolition\\_of\\_visa\\_requirement\\_for\\_short.html](http://www.mzv.cz/chicago/en/consular_information/visa/short_term_visa_requirements_stay_up_to/abolition_of_visa_requirement_for_short.html) – Accessed 15 June 2011

<sup>9</sup> *WAGH v MIMIA* (2003) 131 FCR 269 per Hill J at [64]. Justice Graham in *SZLAN v MIAC* (2008) 171 FCR 145 held at [68] that this does not call for consideration of two separate rights.

s.36 as a whole, as well as to divert attention into questionable analogies as to what the phrase “right to enter” or the term “reside” may mean in other areas of the law.<sup>10</sup>

77. Thus, “reside” in the context of s.36(3) has a more particular meaning than its usual dictionary sense of “to dwell permanently or for a considerable time; have one’s abode for a time”.<sup>11</sup> It does not imply residence of a settled character or a particular standard of living.<sup>12</sup>
78. Accordingly, the concept of “reside” need not extend to the ability to establish an abode in another country; it may amount to no more than just the temporary right to eat and sleep there.<sup>13</sup> Furthermore, the right to reside is not “negated” if, by exercising such a right outside Australia, a person may suffer privation or be exposed to significant difficulties in maintaining a lifestyle, that do not arise for a Convention reason.<sup>14</sup>
79. Section 36(3) makes it clear that the right to reside can be permanent or temporary. This raises the question of what will qualify as a right to “reside” temporarily for the purposes of s.36(3). There is no minimum period specified as being sufficient, but the term ‘*right ... to reside*’ suggests more than a right to a mere transitory presence. Justice Hill observed in *WAGH v MIMIA* that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside.<sup>15</sup> Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour’s opinion, a more difficult question. The applicants in that case held US visas “for the purpose of business and tourism”. Referring to the usual dictionary sense of “reside”,<sup>16</sup> his Honour stated that it would be an unusual, but not impossible, use of the word to refer to a tourist: while a tourist may stay for a time in a country, that country would not be his or her place of abode, even temporarily.<sup>17</sup> In the same case, Lee J took a narrower approach. Justice Lee held that the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgement by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required.<sup>18</sup>
80. In the case of the applicant’s right under the Schengen Agreement, whilst the Tribunal accepts that he may have a present right to enter a Schengen zone country (the requirement for provision of evidence of health insurance and funds being a question for another day), it is the Tribunal’s view that this right is for the purpose of visitation or tourism for a maximum

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<sup>10</sup> *SZMWQ v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010), per Flick J at [97].

<sup>11</sup> *The Macquarie Dictionary*, revised 3<sup>rd</sup> edition. The *Oxford Dictionary of English* (revised 2nd edition, 2005) similarly defines “reside” to mean to “have one’s permanent home in a particular place”.

<sup>12</sup> *SZMWQ v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010), at [23] - [40].

<sup>13</sup> *SZMWQ v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010), at [23] - [26].

<sup>14</sup> *SZMWQ v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010), per Rares J at [32].  
<sup>15</sup> (2003) 131 FCR 269 at [64].

<sup>16</sup> “To dwell permanently or for a considerable time; have one’s abode for a time”: *The Macquarie Dictionary* (revised 3<sup>rd</sup> ed).

<sup>17</sup> *WAGH v MIMIA* (2003) 131 FCR 269 per Hill J at [65].

<sup>18</sup> *WAGH v MIMIA* (2003) 131 FCR 269 at [34]. See also *SZMWQ v MIAC* [2010] FCAFC 97 (Rares, Besanko and Flick JJ, 6 August 2010). Rares J commented at [35] that “the right can be temporary in nature and last for no particular period greater than the time taken to meet the exigency that gave rise to the non-citizen’s well-founded fear of persecution in the country whence he or she had fled.”



period of three months. This is not a legally enforceable right to enter and reside in a Schengen zone country for the purpose of receiving protection or some equivalence to that to be provided by a Contracting State under the Convention co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required.

81. As a result, the Tribunal finds that the applicant **is not** a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia.

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

82. The applicant has given three examples of instances of what he claims has occurred in the past. These were the incidents involving [Mr A] in 2008, [Mr C] in 2005 and [Mr B] in 1998.
83. The Tribunal finds that the applicant is a credible witness. At hearing and at the Departmental interview he gave consistent accounts as to his past. The Tribunal accepts the applicant's claims that these incidents occurred. The Tribunal accepts they involved physical tussles, verbal threats, and in one instance a threat with a hand gun.
84. The Tribunal also accepts the applicant's evidence that he has had other altercations in the course of his employment with the office of the registrar of the commune of [District 1] because of the applicant's unwillingness to comply with requests that he issue identity documents that do not accord with official records.
85. The Tribunal accepts that the applicant has developed a subjective fear for his personal safety because of these incidents.
86. The applicant states that he has been threatened in the past, including in the incident with [Mr A], that that person went outside to his car and obtained a handgun and attempted to return to the applicant's office. The Tribunal has considered whether the threats suffered by the applicant may be instances of serious harm, as a threat to life is one of the instances of serious harm cited in s.91R(1)(b). In *MIMIA v VBAO of 2002* (2004) 139 FCR 405, Marshall J held that threats in the form of declarations of intent cannot *prima facie on their own* constitute "serious harm" within the meaning of s.91R. He held at [41] that "serious harm" contemplates that a person's livelihood or well-being will be jeopardised in a material way, adding that this is not to deny that threats in the form of declarations of intent can never constitute serious harm, but they do not of themselves automatically qualify for that description: at [40]-[41], followed in *VBAS v MIMIA* (2005) 141 FCR 435 and *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005). Dismissing an appeal from *VBAO*, the High Court held that the occasion for considering the issue did not arise on the facts; nevertheless, they did consider the issue, essentially agreeing with Marshall J. Gleeson CJ & Kirby JJ stated that in s 91R(2)(a), "threat" means a likelihood of harm, and not simply a communication of an intention to harm. A past communication of an intention to harm a person might be some evidence of a likelihood of future harm to the person's life or liberty, but the question for the decision-maker is whether there is such a likelihood. The decision-maker is to decide the risk of future harm, not the risk of future communications: *VBAO v MIMIA* (2006) 233 CLR 1 at [1]-[3].

87. The applicant did not give evidence that any of the three men he talked about who threatened him have ever been in contact with him again. There has been ample time since the events recounted by the applicant occurred, for these men to act on their threats. Not only have they not done so, in the applicant's own words, they have sent their wives to his office when they needed something as he thinks they do not want to see him.
88. The Tribunal is not of the view that these past instances have constituted persecution, because they have not involved "serious harm" to the applicant (s.91R(1)(b)). Verbal abuse and physical tussles do not come within the tenor of the types of harm set out in the non-exhaustive list in that subsection of the Act.
89. The applicant states that he still fears for his safety because revenge is common in Albania. Although he did not raise it at the Tribunal hearing, the applicant at interview raised the concept of 'blood feud'. The facts are, however, that:
- a. the applicant has had no further interaction with the three men with whom he has been involved in altercations in 1998, 2005 and 2008; and
  - b. the applicant no longer performs the role at the commune of [District 1] that brings him into contact with people who might demand that he issue false documents.
90. The applicant has asserted that one of the reasons these men acted as they did was in an effort to trick him into acting corruptly so they could replace him in his role with the office of registrar in the commune of [District 1]. As he has now resigned from that position, there is nothing to support the proposition that he would face a real risk of serious harm for that reason any longer.
91. The perpetrators the applicant has identified have never acted on their threats, despite the passage of a number of years since the applicant had altercations with them, the applicant has had no further interaction with these men and he will not be returning to his job as registrar of the commune. For these reasons the Tribunal does not accept that the threats issued against the applicant by these men in the past mean that the applicant faces a real chance of serious harm in Albania now or in the reasonably foreseeable future. The Tribunal does not accept that a blood feud exists between the applicant and these men or that they are motivated by revenge to cause him serious harm.
92. The Tribunal finds that the applicant's fear is not a well-founded fear of persecution.

### **Convention nexus**

93. Having found that the applicant does not have a well-founded fear of persecution, it is not necessary to consider the whether there is any Convention reason for his fear.

### **Second named applicant**

94. No claims for protection have been advanced in respect of the second named applicant in her own right. The fate of her application hangs on the fate of the first named applicant's application, which has been unsuccessful. Therefore, her visa refusal decision must also be affirmed.

## **CONCLUSIONS**

95. The Tribunal is not satisfied that any of the applicants is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

## **DECISION**

96. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.