

0903290 [2009] RRTA 727 (4 August 2009)

DECISION RECORD

RRT CASE NUMBER: 0903290

DIAC REFERENCE(S): CLF2009/14068 OSF2008/049437

COUNTRY OF REFERENCE: Albania

TRIBUNAL MEMBER: Genevieve Hamilton

DATE: 4 August 2009

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.

BACKGROUND

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 arrived in Australia [in] August 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2009. The delegate decided to refuse to grant the visa [in] April 2009. The applicant applied to the Tribunal [in] May 2009 for review of the delegate's decision.
3. 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

4. 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.
5. 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).
6. 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'

7. 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.
8. 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.
9. 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.

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

17. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to any material favourable to the applicant's case referred to in the delegate's decision.
18. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The Tribunal also received oral evidence from [name deleted in accordance with s431(2) of the Migration Act it may identify the applicant] and [name deleted: s431(2)]. The Tribunal hearing was conducted with the assistance of an interpreter in the Albanian and English languages.
19. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
20. In her protection visa application the applicant stated that she was born in Albania in [month deleted: s431(2)] 1985 and speaks, reads and writes Albanian. She is an Albanian citizen and lived in Albania until she came to Australia, travelling on an Albanian passport. Her occupation was Sales Manager (baker's assistant). She lived in Tirana. She came to Australia on a prospective spouse visa.
21. The applicant stated that she is at risk from organised gangs who kidnap women for body parts and prostitution. As a used woman (not a virgin) she will have no protection from such gangs. She has no male relatives to protect her. 3 sisters and her parents are in Australia (one sister is still in Albania). No one will be watching out for her. There is no place she can seek protection in Albania.
22. In July 2008 she was attacked as a target for kidnapping and fears this will happen to her again. Her mother was escorting her to work and a car pulled up beside them. A man jumped out and tried to drag her into the car. She and her mother struggled free. Her father then escorted her ever day but she still saw the men watching her. She went to the police but they said that since she was soon leaving for Australia she should just ensure to be chaperoned at all times. When the police were around the route she took from home to work the kidnappers were not seen. The authorities do not have the resources to protect her. The kidnapping trade is well organised and the police cannot protect all young women. Many of her friends have suffered a similar attempted kidnapping as she did. The number of incidents overwhelms the police. Girls disappear and later reappear without a kidney, if they are ever heard from again. They are often drugged and sent to other countries to be used as prostitutes in organised brothels.
23. In a separate written statement the applicant recounted how she came to Australia to marry the cousin of her brother in law. They had a wedding celebration but no civil marriage took place, contrary to her expectations. She lived with her sponsor but he did not marry her properly, therefore she now has no value in the eyes of the community in Albania. Her sister in Albania is not allowed to take her in as her in-laws are ashamed of her. Her parents have let out their house (they intend to remain in Australia) so she has nowhere to live. Women who are discarded by their husbands or fiancés often suffer mental breakdown and even commit suicide because of the persecution inflicted on abandoned women. The police in Albania are focused major crime and the courts cannot cope. Her safety will not be of interest to the police.

24. The applicant's mother and father made statutory declarations generally echoing her claims regarding the harm she fears in Albania.
25. In support of the review application the applicant's representative made a written submission addressing the relevant legal principles and outlining the circumstances of the withdrawal of the applicant's sponsorship by her fiancé. As the applicant will no longer have anyone to escort her in Albania she will be at serious risk. She is a woman without the protection of any male relatives. Women from this social group are targeted for crimes including rape and kidnap. Thousands of Albanian women have been sold into prostitution. The applicant has married sisters in Australia and criminals in Albania will believe her to have money. She fears that she will be robbed, raped or kidnapped and trafficked for prostitution or body parts. She will have nowhere to live. She will be destitute. The criminals who tried to kidnap her already will have more opportunity to harm her without fear of retribution from any male relative. As a single woman rejected by her fiancé she will be especially vulnerable. The police are corrupt and ineffective and she has no male relatives to complain on her behalf. Kidnappers and people traffickers are rarely prosecuted. Unmarried women are considered a burden on their family, and crimes against women are very common. The applicant has the lowest status in society, with no prospect of securing accommodation or work. The representative cited country information about the prevalence of trafficking of Albanian women and girls for prostitution and the mistreatment trafficking victims endure. The representative submitted that divorced or rejected women constitute a particular social group in Albania's male-dominated society where marriage is the norm and women are traditionally discriminated against. The applicant will be ostracised and refused protection.
26. The adviser annexed information about organ trafficking in relation to Albania, and on trafficking of women and girls.

The hearing

27. The applicant described the problems that emerged in her relationship with her finance from the day she arrived here. A traditional wedding celebration was held about a month later but the marriage was never registered – her fiancé was supposed to arrange this to happen on the same day, but he didn't. She felt trapped in his parents' house because she did not know how to get around. He kept saying he would register the marriage but it never happened. Her feeling was that he just wanted a housekeeper for his parents. The Tribunal put to the applicant that her sponsor had reported that he found out she had a boyfriend in Albania and that was why he withdrew his sponsorship. The applicant denied this was the case. She came here with the intention of establishing her married life with the sponsor, as her sisters had done successfully.
28. The Tribunal put it to the applicant that she had a job previously, and her parents could help her with money for rent, so she should be able to re-establish herself in Albania.
29. The applicant said she could not go back to Albania as she has no security there. Even before she came here she was chased by a trafficking group. The applicant described this incident in detail. She later saw the same car driving around. It was the same car, the applicant claimed, as later abducted some children. It was a late model Mercedes Benz, black with tinted windows. The Tribunal asked how she knew it was the same car that abducted the children. The applicant said she heard it from others; she was not absolutely certain it was the same car. The Tribunal asked how she knew the car that she saw after the attempted abduction was the same one whose occupants attacked her. The applicant said it looked the

same. The Tribunal asked the applicant if she had been able to identify her attackers to the police; the applicant said her father gave them as much information as possible.

30. The Tribunal put it to the applicant that not all women who were trafficked from Albania were trafficked by force. The applicant maintained that they were. There was discussion about the size of the population of Tirana. The Tribunal observed that although trafficking does occur, Albanian women in general did not face a real chance of this happening. The applicant said that she was particularly at risk because she has no one to protect her. She feels safe in Australia, and wants the protection of her family that she has always had.
31. The applicant's parents gave evidence, generally echoing the applicant's claims. They described the difficulties they had making contact with her after she came to Australia and also when they arrived a few months later. Her mother said the lack of communication from her was very worrying. Their only news was from her sisters. Eventually they went to her in-laws' house and were told that the sponsor had forbidden her to contact them. They tried to contact him to discuss it but he would not return their calls. Eventually the applicant packed her things and they went to collect her. She was very upset at how her marriage had turned out. Now she would be stigmatised. Criminals do target girls without protection. The police collaborate with them.
32. The applicant's representative said that no girl went anywhere in Tirana without an escort. There is forced trafficking – the criminals pick people up off the street, in no fear of the authorities. As a non-virgin the applicant would be given even less protection, and had a reduced chance of remarrying.

After the hearing

33. The Tribunal received from the adviser a written statement from a former high-ranking policeman in Albania, now living in Australia, commenting on the difficulties Albania faces in providing adequate state protection to potential trafficking victims

Country information

34. The UK Home Office Country of Origin Information Report says:

Women

3.12 The Freedom House 2008 report, published August 2008 stated:

“The constitution places no legal restraints on women's role in politics and society, but women are vastly underrepresented in most governmental institutions. At the end of 2007, only one of 15 government ministers and 10 of 140 members of parliament were women. Traditional patriarchal social mores impose significant limits on the position of women in society. A gender equality law was adopted in 2004, but the situation for women has improved only slightly. Domestic violence is common and is not a criminal offense. Women who seek redress against domestic abuse are often ignored by the authorities, who generally lack training on such issues.”

Violence against women

3.13 The Council of Europe Report by the Commissioner for Human Rights, published 18 June 2008, stated “Violence against women, particularly domestic

violence is a widespread human rights violation which is under-reported, under-investigated, under-prosecuted and under-sentenced in Albania There is an un-qualified number of offenders enjoying impunity as the crime is still seen as a private issue and therefore seldom reported.”

35. The following are extracts from US State Department Reports:

2008 Human Rights Report: Albania

BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR

[2008 Country Reports on Human Rights Practices](#)

February 25, 2009

The law prohibits discrimination based on race, gender, ethnicity, disability, language, or social status; however, discrimination against women, Balkan Egyptians, Roma, and homosexuals persisted.

Women

The criminal code penalizes rape, including spousal rape; however, victims rarely reported spousal abuse nor did officials prosecute spousal rape in practice. The concept of spousal rape was not well established, and often neither authorities nor the public considered it a crime. The law imposes penalties for rape and assault depending on the age of the victim. For rape of an adult, the prison term is three to 10 years; for rape of an adolescent aged 14-18, the term is five to 15 years and, for rape of a child under 14, seven to 15 years.

Domestic violence against women, including spousal abuse, remained a serious problem. In November 2007 the OSCE noted that "domestic violence was under-reported, under-investigated, under-prosecuted, and under-sentenced" and that officials granted immunity to the overwhelming majority of perpetrators. The government has a department of equal opportunities at the Ministry of Labor, Social Affairs and Equal Opportunity that covers women's issues, including domestic violence.

The government did not fund specific programs to combat domestic violence or assist victims, although non-profit organizations did. Women to Women, a Swedish NGO, reported that there were approximately six domestic violence hot lines that operated throughout the country. The hot lines, serving mainly the northern part of the country received approximately 24 calls per month from women reporting some form of violence. Shtreheza, an NGO that operated two shelters for battered women in Tirana, reported an increase in cases of domestic violence, primarily due to increased awareness of services.

In many communities, particularly those in the northeast, women were subject to societal discrimination as a result of traditional social norms that considered women to be subordinate to men. Reporting on the participation of women in the February 2007 local elections, the OSCE's Office for Democratic Institutions and Human Rights election observation mission noted that family voting was a problem in 30 percent of the voting centers visited on election day and that the practice raised "serious concern of the disenfranchisement of some women and other family members affected by it."

In 2006 the parliament, with the assistance of the Women's Legal Rights Project, enacted an expansion of the law against domestic violence, adding administrative penalties such as protection orders. This law helped raise awareness of the issue and

assistance available for victims through the legal system and nonprofit organizations. Implementation of the law is still in the nascent stages, and has been sporadically enforced. The government reported greater awareness of this issue by the population, and 466 complaints were made by citizens regarding domestic violence. Implementation of the restriction orders started during the year with 340 requests for restrictions and 740 citizens placed under police protection. The Ministry of Interior reported 17 murder cases in families occurred during the year.

The law prohibits prostitution; however, it remained a problem.

The law prohibits sexual harassment; however, officials rarely enforced the law.

The law provides equal rights for men and women under family law, property law, and in the judicial system. In practice cultural traditions often favored men over women.

Neither the law nor practice excluded women from any occupation; however, they were not well represented at the highest levels of their fields. The law mandates equal pay for equal work; however, the government and employers did not fully implement this provision.

Trafficking in Persons

The law prohibits all forms of trafficking in persons and provides penalties for traffickers; however, individuals and organized crime syndicates trafficked persons, particularly women and children, from and within the country.

The country was a source country for trafficking of women and children for the purposes of commercial sexual exploitation and forced labor, although there has been a slow but steady decline in the number of persons trafficked each year. Greece is the main country of destination for trafficked women. Italy, Macedonia, and Kosovo were also destinations, with many victims trafficked onward to Western Europe. Traffickers largely used overland routes or falsified documents to transport their victims by airplane or ferry. Police and shelter representatives continued to report a trend of traffickers moving females from villages and smaller towns to larger cities for forced prostitution in hotels and private homes. During the year NGOs Terre des Hommes (TdH) and Arsis provided assistance to Albanian children who are suspected to be victims of trafficking – 486 Albanian children were assisted in Greece and 327 in Albania.

During the year the government increased its investigations and prosecutions for human trafficking offenses. By year's end police referred 51 new trafficking cases to the General Prosecutor's Office, which investigated 65 persons on trafficking charges. Authorities referred 43 cases to the Serious Crimes Court; the court prosecuted 62, of whom the court convicted 57 of trafficking. The court sentenced four offenders to up to two years' imprisonment; 10 to between two and five years' imprisonment; 26 to between five and 10 years' imprisonment; and 25 to over 10 years' imprisonment.

The government provided limited services to trafficking victims, operating a shelter near Tirana; however, it has not provided any assistance to the four non-government shelters. On July 23, the government approved a new National Action Plan through 2008-10 to specify government actions to provide services to victims of trafficking; however, implementation was slow.

The government made improvements to encourage implementation of its National Referral Mechanism, which partnered the government with local civil society and international intergovernmental organizations to provide a holistic approach to combating trafficking in persons, although there continued to be problems. Due to increased police training and a proactive approach towards identification, the number of victims of trafficking that the government officially identified was slightly higher than the number of victims identified by NGO sources. Although some discrepancies still existed, official identification and referral improved markedly throughout the year. The establishment of a database to manage and track cases contributed to this increase in identification.

Country Narratives -- Countries A Through C

OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS

[Trafficking in Persons Report 2009](#)

ALBANIA (Tier 2)

Albania is a source country for men, women, and children trafficked for the purposes of sexual exploitation and forced labor, including forced begging. Albanian victims are trafficked primarily to Greece, and also to Italy, Macedonia, Kosovo, Spain, France, the U.K. and other Western European countries, as well as within Albania. Available data indicate that more than half the victims of trafficking are under the age of 18. Most sex trafficking victims are women and girls between the ages of 15 and 25, and 90 percent are ethnic Albanian. Ethnic Roma children are most at risk for forced begging. There is evidence that Albanian men have been trafficked for forced labor to the agricultural sector of Greece and other neighboring countries.

The Government of Albania does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. The government demonstrated increased political will to combat human trafficking over the last year, particularly through progress made in its efforts to identify victims of trafficking. **Concerns remained regarding whether the government vigorously prosecuted labor trafficking offenders and public officials who participated in or facilitated human trafficking.**

Recommendations for Albania: Vigorously investigate and prosecute law enforcement officials' complicity in trafficking; vigorously prosecute labor trafficking offenders; continue to work with NGOs and civil society to ensure full implementation of the national mechanism for referring victims to service providers; continue funding victim assistance and protection services, including shelters; and improve existing prevention programs in collaboration with NGOs, including joint activities targeted at reducing the demand for human trafficking.

Prosecution

The Government of Albania made some progress in its anti-trafficking law enforcement efforts during 2008. Albania criminally prohibits sex and labor trafficking through its penal code, which prescribes penalties of five to 15 years' imprisonment. These penalties are sufficiently stringent and exceed those prescribed for rape. In 2008, Albania prosecuted 22 trafficking cases, compared with 49 in 2007, and convicted 26 trafficking offenders, compared with seven in 2007. All of the prosecutions and convictions involved sex trafficking of women or children. In 2008, sentences for convicted trafficking offenders ranged from two to 25 years' imprisonment. The government instituted routine anti-trafficking training for police recruits and current police officers, and organized additional training for judges and

social service providers. In an outreach effort to potential female victims, in 2008 the government assigned approximately 20 female anti-trafficking police officers to organized crime police units throughout the country. Pervasive corruption at all levels and sectors of Albanian society remained an obstacle to reducing human trafficking in Albania. The government reported that the cases of official complicity referenced in the 2008 Report were determined to have involved smuggling, not human trafficking.

Protection

The Government of Albania boosted efforts to provide victims of trafficking with protection and assistance in 2008. Officials improved the functioning of the national victim referral mechanism and, as a result, identified 108 victims of trafficking in 2008, a five-fold increase from the previous year. The government provided approximately \$262,000 in funding to the government-operated victim care shelter, an increase of 16 percent over the previous year; it also provided occasional in-kind assistance, such as use of government buildings and land, to four additional NGO-managed shelters. The government encouraged victims to participate in investigations and prosecutions of trafficking offenders; however, victims often refused to testify, or they changed their testimony as a result of intimidation from traffickers or fear of intimidation. Victims were not penalized in Albania for unlawful acts committed as a direct result of their being trafficked. Albanian law provides for legal alternatives to the removal of foreign victims to countries where they may face hardship or retribution.

Prevention

The Government of Albania implemented several anti-trafficking prevention activities during the reporting period. International organizations fund the majority of prevention campaigns, but the Ministry of Interior has funded the national toll-free, 24-hour hotline for victims and potential victims of trafficking since November 2007. The Ministry of Education includes in its high school curriculum awareness-raising of the dangers of trafficking. Senior government officials spoke out against human trafficking, and the government provided tax breaks to businesses that employ people at-risk for trafficking. In 2008, the government approved a new national action plan on combating trafficking, which specifically addressed issues related to child trafficking. The Ministry of Tourism took the lead in monitoring a code of conduct for the prevention of child sex tourism that 24 tourist agencies and hotels signed. There was no evidence that the government undertook prevention activities specifically targeted at reducing the demand for commercial sex acts or forced labor.

Tier Placements

OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS

[Trafficking in Persons Report 2009](#)

The Tiers

TIER 1

Countries whose governments fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards

TIER 2

Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards

TIER 2 WATCH LIST

Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:

- a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or
- b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year

TIER 3

Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so

FINDINGS AND REASONS

36. Based on the information in her application the Tribunal finds that the applicant is a national of Albania.
37. The applicant claimed a fear of being kidnapped for prostitution or for body parts. The Tribunal will firstly assess whether there is a real chance of the applicant being seriously harmed as claimed.
38. The Tribunal does not accept that Albanian women in general, or even young, single or divorced/separated Albanian women in general face a real chance of being abducted for the purpose of prostitution. Although the problem of human trafficking from Albania has been extensively studied, there is simply an absence of reliable statistics about the incidence of such events in Albania to support the claim that women in general or any particular subset of them face a real chance being the victim of the said crime
39. However, the applicant said she was particularly at risk because she has already been identified and targeted by a criminal gang for that purpose. The Tribunal has reservations about this claim. It did seem something of a coincidence that it occurred just before the applicant was due to come to Australia for the purpose of marriage. But the applicant and her parents described the incident in detail and fairly consistently. And kidnapping is known to be one, though not the most common, of the methods used by traffickers to get their prey out of Albania. Applying the benefit of some doubt, the Tribunal accepts that this incident occurred.
40. That being the case, the Tribunal accepts that there is a real chance that the applicant will be targeted for abduction in the reasonably foreseeable future, by the same people. Abduction itself constitutes serious harm. Furthermore, all the available research about trafficking victims from Albania indicates they very often experience various forms of violence at the hands of their captors or other middle-men. The Tribunal accepts that the applicant's fear of serious harm is well-founded. She cannot reasonably avoid it by relocating – she already lives in the capital city and the dangers to women in other areas of Albania, especially where they don't belong, are even greater. In Tirana she will need to gravitate to familiar neighbourhoods in order to connect with at least some supportive community.

41. It is not necessary to go further into the applicant's claimed fear of having her organs removed – although Albania is spoken of as a source country for organ trafficking the country information submitted did not support a claim that the applicant faced a real chance of this happening to her.
42. The Tribunal must now consider whether the harm that the applicant has a well-founded fear of – being kidnapped for the purpose of prostitution and the violence that goes with that – is “for reasons of” her membership of a particular social group, which is the Convention ground claimed to apply to her situation.
43. 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.

44. The High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society.
45. The country information indicates that women are still culturally subordinated due to the persistence of traditional attitudes to gender, as are manifested (albeit with variations according to location and economic status) in political practices, employment practices (pay, sexual harassment), family violence, rights to property, and so forth. The Tribunal accepts that women and girls in Albania constitute a particular social group. Their gender is their common attribute and it distinguishes them from society as a whole.
46. 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. 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.

47. 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.
48. The Tribunal finds that Albanian women (and girls) are not trafficked and mistreated because they are women (or any subset thereof). The essential and significant reason they are trafficked is for commercial gain. This is most simply demonstrated by observing that boys are also trafficked from Albania for sexual exploitation. Men, and children of both sexes, are trafficked for labour. Moreover, it is not only women trafficking victims that experience violence although the degree of violence may be differ.
49. However, Convention nexus can be satisfied by either the discriminatory motivation of the perpetrators of the harm, or the discriminatory failure of state protection. Thus, where the immediate harm appears to have no Convention nexus, then it is necessary to consider whether there is a discriminatory failure of state protection attributable to a Convention reason.
50. The leading case on this point is *MIMA v Khawar*. The High Court upheld the Full Federal Court decision, confirming that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. The Chief Justice considered that it would not be sufficient to show maladministration, incompetence, or ineptitude, by the local police, but if an applicant could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then persecution may be made out.
51. It is clear that the state concerned is not required to guarantee the safety of its citizens from harm caused by non-state persons. In *MIMA v Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ observed that “no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence” Justice Kirby similarly stated that the Convention does not require or imply the elimination by the state of all risks of harm; rather it “posits a reasonable level of protection, not a perfect one”. Gleeson CJ, Hayne and Heydon JJ in their joint judgment reasoned that the existence of the appropriate level of state protection led to the conclusion that the applicant was not a victim of persecution, and could not justify his unwillingness to seek the protection of his country.
52. The joint judgment in *S152/2003* refers to the obligation of the state to take “reasonable measures” to protect the lives and safety of its citizens, including “an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system”, or a “reasonably effective police force and a reasonably impartial system of justice”, indicating that the appropriate level of protection is to be determined by “international standards”.
53. Where the issue of state protection is considered in relation to whether a fear of persecution is *well-founded*, what is relevant is whether the protection that is available is sufficient to remove a real chance of persecution. However, on the majority view in *S152/2003*, even where state protection is not sufficient to remove a real chance of serious harm from non-

state actors, Convention protection might not be engaged if the level of protection provided meets international standards.

54. Based on the country information the Tribunal finds that state protection against trafficking is not adequate in Albania when measured against international standards, even though Albania is making significant efforts and has moved off the tier 2 watch list. An inference suggested in the US trafficking report, and an allegation widely reflected in other research on the subject, is the involvement of corrupt police and officials in the trafficking trade. The state itself has not stamped this out. The US reports also indicate that Albania still lags behind expectations when it comes to pursuing vigorously the prosecution of offenders, and a demand-side strategy.
55. But is this discriminatory, and is the essential and significant reason for it, a Convention reason? Although the post-Communist systems of laws and law enforcement in Albania are still developing across the board, it is apparent from the country information cited, that the enforcement of the rights of women to be protected against violence and discrimination generally, is markedly sub-optimal and mirrors closely the subordinate position of women in Albanian society in general.
56. The applicant does not have a right to enter and reside in any third country.
57. Based on the foregoing findings the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason.

CONCLUSION

58. 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

59. 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.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.

Sealing Officers ID: RCHADW