

**0903110 [2009] RRTA 676 (13 July 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0903110

**DIAC REFERENCE:** CLF2009/514

**COUNTRY OF REFERENCE:** Kosovo

**TRIBUNAL MEMBER:** Lilly Mojsin

**DATE:** 13 July 2009

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Kosovo, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa.
3. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.
4. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
5. The applicant applied to the Tribunal for review of the delegate's decision.

### **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. 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'**

9. 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.
10. 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.

11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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**

19. The Tribunal has before it the Department's file relating to the applicant.
20. The Departmental file CLF CLF2009/514, relating to the applicant, contains her protection visa application (PVA), a copy of her Travel Document issued by the United Nations for residents of Kosovo and a decision by the Department, rejecting the applicants' claims.
21. The documents in support of this decision are
  - *U.S. Department of State, Country Reports on Human Rights Practices for 2008, February 2009.*
  - *Kosova Women's Network, "Exploratory Research on The Extent of Gender-Based Violence in Kosova and Its Impact on Women's Reproductive Health", 2008. Sourced from [http://www.womensnetwork.org/l7otherreports/index\\_english.html](http://www.womensnetwork.org/l7otherreports/index_english.html)*
22. I have had regard to the evidence contained in those documents as it is relevant to the present application.
23. The applicant stated in her PVA that she was born in Kosovo and arrived in Australia on a specific date. She married in the 1970s and relocated in Kosovo to Peje, to live with her husband. The applicant had three children and ran a business with her husband until war broke out in Kosovo in 1999. As a result of the war, the applicant and her husband lost their business, two of their three houses and all their money and personal possessions. The applicant claims her husband was unable to deal with this loss, and started to physically abuse her. The applicant claims her husband beat her and locked her in the house forcing her to consider either suicide or divorce to escape her situation.
24. The applicant has a daughter who resides in Australia Department movement records indicate the applicant visited Australia twice several years ago for different periods.
25. The applicant claimed she arranged to divorce her husband, which took effect several years ago, while she was in Australia. The lawyer who assisted her said that she had no right to claim against any of her husband's assets. When she returned to Kosovo after her second visit, the applicant claims she stayed with her brother as she was fearful of her former husband.
26. The applicant last departed Kosovo for Australia as the holder of a visitor visa valid for twelve months. The applicant subsequently applied for this visa.
27. The applicant claims that her former husband may kill her and her brothers if she now returns to Kosovo. The applicant claims she did not tell her former husband she was leaving Kosovo when she last departed. The applicant claims that since she has last departed Kosovo, her former husband has been making threatening phone calls to their daughter in Australia. The applicant claims that he has made threats to kill herself and their daughter. The applicant claims she cannot return to Kosovo because she will not be protected from her former husband by the authorities in that country. She claims women have lesser legal rights than

men in Kosovo, and that her husband could simply bribe the authorities to get what he wants. The applicant claims that not only her life but those of her brothers and their families would be in danger.

28. The applicant attended an interview to discuss her claims. I have listened to a recording of the interview. The Department used the services of an Albanian interpreter. The applicant told the Department that she had five siblings who live in Country Z, Pristina and Peje. She lived in Peje after her marriage. Her brother and son live in Peje and another brother lives in Pristina. Another son and daughter are in Australia. She said she divorced her husband several years ago. The divorce certificate is not with her. After the divorce she lived with her son and daughter. She and her son (child A) rented a house several years ago. Child A came to Australia with her. She organised a lawyer to file the court papers for divorce and it was finalised whilst she was away. When asked why she last returned she said that she wanted to go back home but her husband had re-married. She thought he was going to make peace with her as they used to live well. He bashed her in front of her sons and she tried to hide so that people did not know. She did not tell her sister. He wanted to kill her even with a gun. She does not have a house. He threw her outside with nothing. She never reported it to the police. Once, no-one knew, she went and told the police. The police said "you have to call us when he bashes you". When she last went back she stayed wherever she could, she went to her brother in Pristina and then to her sister in Montenegro. After her return from Australia she saw her ex-husband when he passed once on the street with his wife. When asked if he still wants to hurt her she said "yes" When put that the house was half hers she said it was in his name. The lawyer told her she was not entitled to any property. The delegate put to the applicant that she would have protection in Kosovo. She said that she does not want to go back to Kosovo. When asked what she thinks will happen to her she said she will jump off the harbour bridge or go under the train. The applicant explained that her husband wanted to marry another woman and this was part of the reason for his abuse. The applicant claims she told him to go ahead and remarry, but that she refused to move out of their joint home to make way for the new wife.
29. The applicant appeared before the Tribunal to give evidence and present arguments. The applicant's daughter and son-in-law were present during the Tribunal hearing but did not wish to give evidence to the Tribunal. They remained in the hearing room. The Tribunal hearing was conducted with the assistance of an interpreter in the Albanian and English languages.
30. I asked the applicant where her 3 children live. She said one lives in Australia and two live in Peje which is a town in Kosovo. Child B is in Peje, Child A [who had been in Australia] has gone to Kosovo to visit his father and sort things out. I put to her that he is not a permanent resident of Australia. She said he was not but was organising his papers.
31. I asked the applicant about her brothers. She said her two brothers are in Kosovo, one is in Peje and one is in Pristina. I asked the applicant to explain how she went about getting a divorce. She said that it was granted by the Pristina District Court. She said that she was living in the house with her husband and two married sons with their wives. She said that her husband wanted a divorce and he was against some things and he kicked her out. He kicked her out of the house on a specific date in the mid 2000s. She went and stayed at the house of the father of Child A's wife and then found a place to rent in Peje. Her son and his wife with children moved with her. Child B and his wife and family remained in the house with her husband.

32. Her husband continued to threaten her after she moved out. The rent for the unit was paid by her daughter in Australia. Child A worked in construction Her husband had his own company. Her sons worked with their father but since his re-marriage, he does not let them work with him. Her son does not have much work and tries to get contract work for himself.
33. I asked the applicant why her husband threw her out of the house. She said that he had a long relationship with another woman and wanted to marry her. This woman did not move in straight away but some months after she and her husband separated. Her husband re-married. The applicant told her husband that it was ok to marry the woman but she just wanted to be left in her house.
34. I asked the applicant who commenced divorce proceedings. She said that her husband commenced them. Her husband submitted the papers to the court and she knew as she received the court notification. She organised for a lawyer and did not want to battle it out. When asked when she received her court papers, she said her head was not screwed on and she was confused at the time.
35. She did not receive further papers and she received no letter after that. I asked why she had not produced her divorce certificate and she said that she has it, at home.
36. I asked why after she moved out her husband continued to want to harm her. She said that he often threatened her during the whole relationship. I asked how far the unit to which she had moved was from her matrimonial home. She said that it was about 20 minutes walk. I asked her why her husband threatened her continually. She said that is the way he is. He threatened her and her brothers, like a terrorist. She was quite fearful of him. When she returned in the summer she was very afraid. He threatened her, he beat her. He intended to throw her over the unit balcony, he shot her with a gun. She called the police emergency line but it is a loud building and they did not hear her call.
37. Her daughter in law went to the matrimonial home with the applicant's grandson. They told her husband where she lived. She was in the unit with 2 other children and he appeared at the unit. She asked him to leave and he came up to her and grabbed her and tried to push her and she grabbed onto the window sill and broke the frame. They were on the 3<sup>rd</sup> floor. She called out for the police to help. The police were walking on asphalt in the street and there were some road works going on in the street. Because of the machinery the police did not hear her call for help. Her son came and he told his father that he does not want him there. This incident occurred on the day she moved in to the unit, about 4 or 5 days after she moved out of her own home. Her husband threatened her constantly telling her he will shoot her brothers. He often came around to the unit to see his grandchildren. He kept visiting her unit. This continued until she left for Australia.
38. Even on the night she left to come to Australia he pulled a gun on her. It happened in a combi. Her husband understood that only his son was leaving but when he realised she was going too he went home to get a gun. It was after midnight about 2 am. I asked her what she did and she said that he said "you will see who is going to Australia" He grabbed the gun and came back as she sat between her grandsons and he pointed the gun at her.
39. He threatened and abused her during the course of the marriage. I asked if that was the only time he threatened her with a gun. She said he only pulled a gun that night.

40. When she last returned from Australia she went to Pristina with her brother, then with her other brother and then she went to her sister's children in Montenegro. She was there for about a number of months. I asked if her husband threatened her again and she said that he did not know she was there as she did everything in hiding. She said that her husband would proclaim a Kanun. I asked why he did not do so to date. She said that he sent men to her brother's house that there is a blood feud. He said 'you owe me blood'. This happened several times from the mid 2000s. I asked if her husband had proclaimed a Kanun. She said that whether he said the word 'kanun' or not, her brother told him that she was not here. I put that these were important events. She agreed that they were. I asked her why she did not tell the Department. She said she did not know she had to tell them. I put to her that independent evidence indicated Kanuns are proclaimed in northern Albania. She said also in Kosovo.
41. I asked her what she feared about returning to Kosovo now and she said she has nowhere to stay she is not safe, her husband will shoot them all. I put to her that she can stay with her brothers. She disagreed. I asked why her brothers are not capable of defending her. She said that they could only defend by shooting.
42. I suggest to her that her husband sought to harm her for a personal reason and not for a Convention related reasons. She responded that it was persecution from her husband and no-one can protect her. I put to her that she did not lodge a complaint to the police. She said that culturally it is a shame to do so. She made complaints but she afraid of a Kanun being issued.
43. I put to the applicant independent advice regarding domestic violence issues in Kosovo, that there are shelters available and that assistance is available for women affected. She said that culturally her heritage and culture is that women tolerate it.
44. I asked the applicant why she waited nearly one year after her arrival in Australia to apply for a PVA I suggested that this delay indicated she did not have a subjective fear of persecution. She said she had the fear.
45. I asked the applicant if she recalled the Australian authorities telephoning her about coming to Australia. She said that they called and she was scared she would not be given a visa. She said she told them everything. She said she gave them the information. The matrimonial house is not in her name.
46. I put to the applicant information pursuant to s.424AA. I told the applicant that this information I considered would be the reason, or a part of the reason, for affirming the decision under review. I said that she had the opportunity to comment on or respond to the information now or she could ask for additional time to comment on or to respond to the information or she could request to adjournment to give him additional time.
47. I then explained to the applicant that she had told the Department when they rang her about her visitor visa application that she resided with her husband whereas she had told the Tribunal she was living in hiding at that time. I explained that the information was relevant as suggested her evidence may be inconsistent. She responded saying that she told the Department that she was living with her husband to get a visa She said she swore on the Koran before the Tribunal. She said whatever the Department asked her she told them.
48. I put to the applicant that she has told the Department, at interview, that she organised a lawyer who filed the court papers for her to obtain the divorce whereas she told the Tribunal

that her husband had filed the papers to organise the divorce. I explained that this suggests her evidence is inconsistent. She said that it was not correct. It was interpreted wrongly.

49. I put to her that the independent information before me does not suggest that she would not receive the protection of the Kosovo authorities if harmed by her spouse. She said that the laws may change and they apply to young people. She said that she does not want to be put in a refuge. I put to her that she had lived in a house with her family. She said she does not want to be the shame of the town to live in a woman's refuge and then her brothers are shot.
50. I put her that she did not suffer serious harm. She said that he kicked her and she had bruising to her legs. She said he used to abuse her and she started locking the door. She has nowhere to go. I said that she had somewhere to go, to her brother's home. She said that her brother cannot look after her and she cannot depend on them.
51. The applicant stated that the laws of Lek Dukagjin People still keep that in their minds. It is not only for Albanians in Albanian and they use it as an excuse.
52. The applicant's daughter and son-in-law both confirmed to the Tribunal that they wanted the applicant to stay with them in Australia.

### **BACKGROUND INDEPENDENT INFORMATION**

53. The town of Peje is in Kosovo. Kosovo, formerly part of the Republic of Serbia, declared independence on 17 February 2008.

Kosovo declared independence from Serbia on February 17. The country has a population of approximately 2.2 million. The UN Interim Administrative Mission in Kosovo (UNMIK) administered Kosovo under the authority of UN Security Council (UNSC) Resolution 1244 of 1999 until June 15, when the country's constitution entered into effect. The constitution establishes a parliamentary democracy and incorporates international human rights conventions and treaties. Multiparty elections in November 2007 for the Assembly generally reflected the will of the voters. Prior to February 17, Kosovo was administered under the civil authority of UNMIK, led by a special representative of the UN secretary-general (SRSG). The government gradually assumed authority and responsibilities in most areas during the year. With the promulgation of the constitution in June, the UNMIK role in the administration of Kosovo was supplanted by other internationally-sponsored mechanisms envisioned under the Ahtisaari plan, including the International Civilian Office and the EU Rule of Law Mission (EULEX), which replaced UNMIK police on December 9. The government, UNMIK international civilian authorities, and the UN-authorized North Atlantic Treaty Organization peacekeeping force for Kosovo (KFOR) generally maintained effective control over security forces. The government and UNMIK generally respected the human rights of residents.

Domestic violence against women, including spousal abuse, remained a serious and persistent problem. The law prohibits domestic violence, and convictions carry prison terms of six months to five years. When victims did press charges, KPS domestic violence units conducted investigations and transferred cases to prosecutors. According to UNMIK, family loyalties, close-knit communities, and the backlog of cases in both civil and criminal courts added to the low rate of prosecution.

As with rape, domestic violence remained a significant problem that was underreported. In July 2007 the OSCE issued a report on domestic violence that highlighted problems in the adjudication of domestic violence cases, including unlawful delays in reviewing applications for protection orders. The OSCE also expressed concern over appellate procedures in domestic violence cases; in some cases, courts unlawfully noted in their decisions that an appeal by the defendant would stay the execution of a protection order.

The KPS reported that 21 domestic violence victims were housed in shelters between January 1 and June 30. The Center for Protection of Women and Children provided assistance to 63 victims of domestic and sexual violence between January and September 24. The Ministry of Justice Victim Advocate and Assistance Unit was involved in 646 domestic violence cases between January and June. Convictions in such cases were rare, and sentences ranged from judicial reprimands to imprisonment. Traditional social



attitudes towards women in the male-dominated society contributed to the high level of domestic abuse and low number of reported cases.

There were no governmental agencies dedicated solely to dealing with family violence. The Ministry of Labor and Social Welfare provided some financial support to NGOs running shelters for domestic violence victims, which also accommodated some trafficking victims. The ministry provided social services through social welfare centers. Several domestic and international NGOs pursued activities to assist women; however, they were constrained by a tradition of silence concerning domestic violence, sexual abuse, and rape.

During the year a 24-hour anonymous hotline for reporting domestic abuse operated in Pristina, Gjilan/Gnjilane, Peje/Pec, Prizren, and Mitrovice/Mitrovica. The hotline provided assistance to 582 victims during the year; it received 446 calls related to domestic violence, 27 to trafficking cases, 25 to child mistreatment, and 35 to sexual mistreatment. The hotline informed callers of their rights, available shelters, and related information.

The KPS training school offered special courses on domestic violence and rape. There were no reports that the KPS responded inappropriately to rape or domestic abuse allegations.

Although the law prohibits prostitution, it remained prevalent. During the year the UNMIK police prostitution investigation unit turned over its responsibilities to the KPS. UNMIK continued to monitor and mentor the KPS.

Women possess the same legal rights as men but traditionally have a lower social status, which affected their treatment within the legal system. Despite a lack of legal impediments, relatively few women obtained upper-level management positions in business, the KPS, or government. While the number of employed women continued to increase, female unemployment remained at around 80 percent, 25 to 30 percent higher than the rate for men. Women represented less than 30 percent of the government workforce.

Traditional social attitudes toward women resulted in discrimination. In some rural areas, women often had little ability to make decisions involving their children or to exercise control over property. While the law makes no gender distinction in the right to inherit property, family property customarily passes only to men. Kosovo Albanian widows, particularly in rural areas, risked losing custody of their children due to a custom calling for children and property to pass to the deceased father's family, while the widow returns to her birth family. <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119462.htm>

#### 54. UNMIK state: <http://www.unmikonline.org/intro.htm>

UNMIK Police, together with the Kosovo Police Service (KPS), has successfully investigated 182,983 cases, established 33 police stations and 13 border/boundary control points, policing Kosovo for over eight years through a range of activities from beat patrols and traffic checks to sophisticated investigations into serious crimes. During this time, in cooperation with OSCE, 8,270 KPS officers have been recruited, trained and deployed through the chain of command from the police stations up to the Main Headquarters level and into various specialised police departments (as of November 2007).

- UNMIK Police Commissioner: Richard Monk from the United Kingdom.
- From a peak of more than 3,300 police officers from more than 50 countries in the year 2001, UNMIK Police today (01 February 2008) has a greatly reduced presence of 1499 police officers from 31 countries.
- 499 Formed Police Units (FPU) from Pakistan, Romania, Poland, Ukraine (as of 01 February 2008).
- Specialized agencies, including Financial Investigation Unit (Guardia di Finanza), investigate misuse of public money and financial crime.
- Financial Information Centre (FIC) monitors financial transactions by banks, financial institutions and other entities as a check against money laundering operations.

The Kosovo Police Service (KPS) has become a highly respected institution that enjoys the trust of its citizens. With KPS now holding the command of all 33 police stations and five out of six Regional Police Headquarters across Kosovo, UNMIK Police has assumed a supporting and monitoring role while retaining overall supervisory authority of the UNMIK Police Commissioner. Further transition continues.

- 7,124 Kosovo Police Service (KPS) officers. By gender; 6160 male, 964 female. By ethnicity; 6082 Albanian, 746 Serbian, 414 other minorities. (as of November 2007).

New Provisional Criminal Code and Provisional Criminal Procedure Code of Kosovo came into effect from April 2004. UNMIK Regulation No. 2005/52 established the independent Kosovo Judicial Council and UNMIK Regulation No. 2005/53 established the Kosovo Ministry of Justice.

The courts are responsible for the administration of justice in Kosovo in accordance with the applicable law. The court structure includes the Supreme Court of Kosovo, District Courts, Municipal Courts and Courts of Minor Offences (including a High Court of Minor Offences). A Special Chamber of the Supreme Court deals with Kosovo Trust Agency related matters.

Judicial Inspection Unit (JIU). The JIU is an independent office mandated to investigate complaints of judicial and prosecutorial misconduct, and refers cases to the KJC for disciplinary action as appropriate.

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Upon the signing on 25 February 2008 of a memorandum of understanding between UNMIK, UNOPS, the EU and the US Office, the vetting and appointment process for Kosovo's judges and prosecutors will commence. It is envisaged this process will strengthen Kosovo's courts by eliminating presently serving judges and prosecutors whose performance is not of the requisite ethical and technical standard for a modern European legal system.

The KJC is an independent professional body responsible for the judiciary and courts. It is composed of five judges (of whom the President of the Supreme Court is an ex officio member) and 2 prosecutors and four other ex officio members, namely the Minister of Justice, the President of the Kosovo Chamber of Advocates, the Chairperson of the Assembly Committee on Legislative, Judicial and Constitutional Framework Matters and a professor of law nominated by the Assembly upon the recommendation of the governing board of the University of Pristina.

The DOJ has been involved in the development of a comprehensive system for legal aid and the implementation of UNMIK Regulation No. 2006/36 On Legal Aid. In September 2007 the Legal Aid Commission was formally inaugurated and in January 2008 five (5) District Legal Aid Bureaus opened to the public providing legal aid to eligible persons in civil and administrative legal matters. Full transfer of competence from DOJ to the Legal Aid Commission, including in financial matters, will occur following the signing of an MOU between the Legal Aid Commission and the DOJ.

- There are currently 302 local judges and 83 local prosecutors. However, additional positions have been made available in the 2008 budget to increase the total to 392 judges and 92 prosecutors.
- 15 international judges and 11 international prosecutors.

UNMIK Travel Documents that enable Kosovars to travel abroad. Total number of Travel Documents: 717,897. According to figures for 2007/2008 the average is about 2,500 Travel Documents per week. In addition, average of Travel Document extensions is 1,800 per week. (Figures as of 01 February 2008). Travel documents are recognized by 39 countries: Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, FYROM, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lithuania, Luxemburg, The Netherlands, Malaysia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America, and Uzbekistan.

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55. *The United States State Department advises the following in its most recent Country Reports on Human Rights Practices for 2008:*

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prosecutors. According to UNMIK, family loyalties, close-knit communities, and the backlog of cases in both civil and criminal courts added to the low rate of prosecution.

As with rape, domestic violence remained a significant problem that was underreported. In July 2007 the OSCE issued a report on domestic violence that highlighted problems in the adjudication of domestic violence cases, including unlawful delays in reviewing applications for protection orders. The OSCE also expressed concern over appellate procedures in domestic violence cases; in some cases, courts unlawfully noted in their decisions that an appeal by the defendant would stay the execution of a protection order.

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Traditional social attitudes toward women resulted in discrimination. In some rural areas, women often had little ability to make decisions involving their children or to exercise control over property. While the law makes no gender distinction in the right to inherit property, family property customarily passes only to men. Kosovo Albanian widows, particularly in rural areas, risked losing custody of their children due to a custom calling for children and property to pass to the deceased father's family, while the widow returns to her birth family.

56. The *Kosova Women's Network* released an extensive report on gender based violence on Kosovo, including domestic violence. This report confirms that gender based violence is widespread and to some degree, socially sanctioned as a private family matter. However the report also details a number of steps taken by the Kosovo government to address the problem.

The Kosova Police Service (KPS) put in place Regional Domestic Violence Coordinators and Primary Domestic Violence Investigators in 2004.

Every police station must have two trained Domestic Violence Investigators, typically a man and a woman, who comprise Domestic Violence Investigation Units. Officers must respond to and investigate every report of domestic violence, including child abuse, 24 hours per day. KPS officers attend mandatory training at the Kosova Police Service School on gender, domestic violence, procedures for domestic violence cases, trafficking, and human rights. In addition, OSCE taught more than seven thousand officers procedures for domestic violence cases through a program entitled "Enhancing Response" in 2004. Following training, most KPS officers demonstrated a thorough understanding of the term "gender-based violence" and what constituted domestic violence according to the Regulation on Protection against Domestic Violence.

KPS officers from Domestic Violence Units said they followed specific procedures: secure the location where the incident took place; confiscate weapons; separate the victim from the abuser; photograph the scene and injuries; interview persons at the scene; arrest the abuser; take the victim to receive medical treatment and to a shelter if she wants; inform the Prishtina command centre, CSW, Victim Advocates, and local shelter, as needed; send the file to the prosecutor; assist with protection orders; and intervene if a protection order was broken. KPS had a 24-hour emergency hotline to report domestic violence and other crime, but police were slow to respond to emergency calls. Most KPS officers seem sensitive in communicating with persons who suffered violence. While additional training could always help, shelter representatives generally praised highly the performance of officers in Domestic Violence Units and encouraged them to "keep up the good work."

The report goes on to detail a network of social workers employed by the Ministry for Labour and Social Welfare whose role is to assist victims of domestic violence, direct them to shelters, provide legal assistance and medical and court liaison. The report discusses the role of the Victims' Advocacy and Assistance Division which operates under the auspices of the Ministry of Justice. The report also details the existence of a network of women's shelters which operate across Kosovo.

a. Centre for the Protection of Women and Children

After July 1999, CPWC diversified its activities and established nine field offices in One in Peje, [http://www.unfpa.org/women/docs/gbv\\_kosovo.pdf](http://www.unfpa.org/women/docs/gbv_kosovo.pdf)

#### 57. A Women's Wellness Centre is located in Peje/Pec

The International Rescue Committee opened WWC in January 2000, in collaboration with women from the local community, to provide a safe and confidential environment in which to offer women the opportunity for counselling, reproductive health and gender-based violence education, referrals and/or direct assistance related to identified health, social, educational, psychological, legal and social needs. WWC was registered under UNMIK as a local NGO in May 2001. In December 2002, WWC opened a Safe House shelter to offer temporary housing and access to support services for women and children who had become victims of domestic violence, and/or sexual and physical assault. Since its inception and until end of 2004, the shelter provided a safe haven to about 60 women and 43 children and provided counselling to more than 900 survivors through both individual and group sessions. [http://www.qmg-ks.com/index.php?option=com\\_content&view=article&id=61:general-information-on-wwc&catid=36:materiali-anglisht](http://www.qmg-ks.com/index.php?option=com_content&view=article&id=61:general-information-on-wwc&catid=36:materiali-anglisht)

#### 58. The *International Centre for Minority Studies and Intercultural Relations (IMIR) 2004* [http://www.imir-bg.org/imir/reports/The\\_Kanun.pdf](http://www.imir-bg.org/imir/reports/The_Kanun.pdf) report on the Kanun states:

the Kanun included an elaborate legal code trying to regulate blood feud (gjakmarrya) – a system of reciprocal "honour killings". According to the Code, if a man is deeply affronted, his family has the right to kill the person who has insulted him. However, by doing this, the family will become a target for revenge on the part of the victim's family. The victim's closest male relative is obliged to kill the murderer of his family member. The pattern of reprisal killings thus formed has been passed on for generations of families and has been manifested up to the present day in Albania, Kosovo, and, partly, in Montenegro. "Blood is never lost", states the Kanun<sup>2</sup>. The perpetrator is entitled to ask through the agency of a mediator – a well-respected member of the community, for a besa – a vow that no one would hurt him. Those who have not taken revenge, fall into social disgrace. At public gatherings they are served coffee or brandy in cups and glasses with a bullet put inside, in order to be urged to avenge the injury. The Code does not allow the murdering of women or children. The only place where blood should not be shed is the house of the marked victim. Because of the ruthlessness of blood feud, most of the houses in Northern Albania look like fortresses built of stone, with small apertures serving as windows. Even to date many Albanians shut themselves inside their houses where they remain isolated for life in order to escape from blood vengeance. In the past, they used to hide in towers as well.

From the end of the war in Kosovo in 1999 until 2003, about 40 murders related to blood feuds were recorded in Kosovo, according to data reported by the Council for the Defence of Human Rights and Freedoms. Cases of blood vengeance have reappeared as a consequence of the poor functioning of law and order and the institutions that regulate the law, was the opinion of Pajazit Nushi, president of the Council.

## FINDINGS AND REASONS

59. I find that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. I find that the applicant has made a valid application for review under s.412 of the Act.
60. The applicant claims that she is a national of Kosovo. As Kosovo has now proclaimed its independence, I accept for the purposes of the Convention that the applicant's claims are assessed against Kosovo as her country of nationality.
61. In June 1999, following a 78 day-long NATO campaign, the United Nations was tasked to govern Kosovo through its Interim Administration Mission in Kosovo (UNMIK), with an unprecedented sweeping mandate to provide Kosovo with a "transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo."
62. The applicant claims that she suffered domestic violence at the hands of her husband and that she did not receive and will not receive the protection of the former Interim Administration Mission in Kosovo, now the state of Kosovo.
63. I do not accept that the applicant suffered domestic violence at the hands of her husband as I do not accept that the applicant is a witness of truth. I am satisfied that the applicant has created her claims of domestic violence in order to obtain the visa sought.
64. Firstly, the applicant was contacted by a Department delegate in relation to her visitor visa application, by telephone. She told the Department officer during that telephone call that she lived with her husband, her son, Child B, and his family. When put to her, pursuant to s.424AA, that she had earlier in the hearing told the Tribunal that she was in hiding at this time she said that she told the Department that she was living with her husband to get a visa. She said she only swore on the Koran here, before the Tribunal and whatever the Department asked her she told them. Whilst I accept that the applicant swore on the Koran at the commencement of the Tribunal hearing, I am satisfied that this action does not necessarily suggest that her evidence to the Tribunal must be the truth and that evidence given [to the Department] not sworn on the Koran is untrue. I am satisfied the applicant is prepared to tailor her claims to obtain the visa sought.
65. Secondly, the applicant last departed Kosovo as the holder of a visitor visa valid for twelve months. She applied for a protection visa just before it expired I asked the applicant why she waited nearly a year after she arrived in Australia to apply for a protection visa and I suggested to her that this delay indicated she lacked a subjective fear of persecution. She said she had the fear. I am satisfied that the applicant's delay in applying for a protection visa until nearly a year after her arrival in Australia indicates a lack of a subjective fear of persecution.
66. Thirdly, the applicant told the Department at an interview held by the Department [in Australia] that she had organised a lawyer to file the court papers for her divorce. At the Tribunal hearing she stated that her husband had organised those papers. When this inconsistency was put to the applicant, pursuant to s.424AA, she said that it was not correct. It was interpreted wrongly. I reject her explanation. The applicant utilised the services of an interpreter both at the Department interview and at the Tribunal hearing. The applicant did not suggest at any time that she did not understand the interpreter.

67. I am satisfied that the applicant is not a witness of truth. I am satisfied the applicant has created her claims in order to obtain the visa sought.
68. As I am satisfied the applicant is not a witness of truth I find that the applicant's husband did not assault, threaten or harm the applicant. I am satisfied he did not attempt to throw her over the unit of her balcony or threaten her with a gun. I am satisfied the applicant's husband did not throw her out of the matrimonial home or that he bashed her or threatened her and her son and grandchildren with a gun. I am satisfied the applicant was not a victim of domestic violence or that the Kosovo police or the UNMIK police did not provide the applicant with protection. I am satisfied that the police did not inform her that when her husband bashes her she should only then call them. As the applicant is not a witness of truth I am not satisfied that the applicant and her husband are divorced or that her husband has re-married. I do not accept that the applicant's husband has been harassing or threatening to kill his daughter in Australia or that her husband has threatened to kill her on her return to Kosovo or that when she returned to Kosovo after a visit to Australia the applicant was in hiding staying with her family.
69. I accept that a customary law among the Albanians in Albania and in Kosovo is called the Kanun of Lek Dukagjin, a system of reciprocal "honour killings". The evidence before me does not suggest that the applicant or her husband have proclaimed a Kanun against anyone or each other or against each others family. The applicant's evidence is that her husband might proclaim a Kanun. As the applicant is not a witness of truth and as I have found that the applicant and her husband are not divorced or separated, I am not satisfied that her husband has or will proclaim a Kanun against her and her family.
70. Even were I to accept that the applicant's husband threatened and abused her in the manner claimed [and I do not], generally women who suffer harm from their families for private reasons are not entitled to Convention protection. As the Court stated in *MMM v MIMA* (1998) 90 FCR,
- Persecution for the purposes of the Convention connotes some official approbation of the feared conduct, or at least official failure or inability to do something about it, when the general standards of civilised countries would entitle the putative refugee to the protection of the State ... There is nothing in such general standards to suggest that adults not under a disability have such an entitlement when, for private reasons, their families reject them.
71. Failure of state protection can also, in some circumstances, constitute persecution within the meaning of the Convention, where such failure is itself for a Convention reason. But if the state is aware of the harm and does not act to prevent it or protect the victim, an issue can arise as to whether this failure on the part of the state of itself constitutes persecution for a Convention reason. The question of whether an applicant has been persecuted by reason of a failure of state protection for a Convention reason can arise in the context of women fleeing domestic violence from their husbands.
72. The applicant complains that she called the police emergency line and they did not hear the call. The applicant also claims that she attempted to complain to the police about abuse by her husband when he entered her unit and assaulted her but she called out from the window, and due to road works, the police who were patrolling the streets did not hear her. I am not satisfied that if police do not hear a telephone call or a person calling from a window above them when there are roads works or they inform a person to contact them when they are bashed, suggests that the police service does not provide protection to victims of domestic

violence. When put to the applicant that she did not lodge a formal complaint with the police about her husband's domestic violence she said that culturally it is a shame to do so. She said she made complaints and she is afraid of a Kanun being issued. The independent evidence, cited above, indicates that the KPS has procedures in place. Every police station must have two trained Domestic Violence Investigators, who comprise Domestic Violence Investigation Units. Officers must respond to and investigate every report of domestic violence, including child abuse, 24 hours per day.

73. A majority of the High Court in *MIMA v Khawar* held 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 independent evidence before me does not suggest that the authorities do not provide effective protection or that they withhold or withdraw the protection of the law from women or women victims of domestic violence.
74. I am satisfied that the applicant did not flee Kosovo fearing Convention related harm from her husband or any other person.
75. I am required to consider the situation were the applicant, a married woman, to return to Kosovo now or in the reasonably foreseeable future.
76. The independent evidence, cited above, indicates that whilst Kosovo women possess the same legal rights as men, traditionally they have a lower social status, which can affect their treatment within the legal system. Also traditional social attitudes toward women can result in discrimination. I accept that gender based violence is widespread and to some degree, socially sanctioned as a private family matter. But the independent evidence before me does not suggest that Kosovo selectively and discriminatorily withholds state protection to women or women victims of domestic violence.
77. Nor do I accept that the laws in relation to receiving the protection of the Kosovo authorities may change and they apply to young people. The evidence before me, cited above, indicates there were no reports that the KPS (Kosovo Police Service) responded inappropriately to domestic abuse allegations or responded only to young people. The KPS training school offered special courses on domestic violence. When victims did press charges, KPS domestic violence units conduct investigations and transfer cases to prosecutors. I accept that the legislation, legal institutions, judicial system and police service of Kosovo has changed from the time when Kosovo was part of Serbia. I am satisfied that the present legislation, legal institutions, judicial system and police service that evolved from programs evolved with the assistance of UNMIK and other international bodies, and the Kosovo state provides a reasonably effective police force and a reasonably impartial system of justice.
78. I accept that women victims of domestic violence in Kosovo suffer a level of shame, embarrassment and humiliation on account of their status, however I do not accept that any emotional or social difficulties the applicant may face on account of a 'failed marriage' or being a victim of domestic violence amounts to serious harm within the meaning of s.91R(2) of the Act. Nor do I accept that women in Kosovo who become victims of domestic violence receive no state assistance. There are now refuges for women who become victims of domestic violence and there is in the applicant's town of Peje specific services available to women who suffer from domestic violence.
79. I accept that the applicant is a member of the particular social group, 'women' in Kosovo. I accept that domestic violence in Kosovo attracts a level of shame and humiliation in a society

where family loyalties, close-knit communities, and the backlog of cases in both civil and criminal courts added to a low rate of prosecution. The applicant claims that her own family are not able to help her financially or otherwise should she return to Kosovo. As I do not accept that the applicant and her husband have divorced, I am not satisfied that the applicant has nowhere to go when she returns to Kosovo or that her family will not assist her.

80. On the information before me I am not satisfied that state protection would be withheld from the applicant for reasons of her membership of the particular social group women in Kosovo or for any other Convention reason. I am satisfied that if the applicant were to return to Kosovo now or in the reasonably foreseeable future, she will not have state protection discriminatorily withheld from her by the authorities for the harm feared from non-State actors for a non-Convention reason.
81. Accordingly I find the applicant does not have a well founded fear of persecution within the meaning of the Convention. I am satisfied the applicant is able to return to Kosovo.

### **CONCLUSION**

82. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

### **DECISION**

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

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 <i>Migration Act 1958</i> . PRRRNM
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