

**1208496 [2012] RRTA 1144 (24 December 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1208496

**DIAC REFERENCE(S):** CLF2011/210722

**COUNTRY OF REFERENCE:** Turkey

**TRIBUNAL MEMBER:** Andrew Rozdilsky

**DATE:** 24 December 2012

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

## 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 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 Turkey, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2011.
3. The delegate refused to grant the visa [in] May 2012, and the applicant applied to the Tribunal for review of that decision.

### 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of 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.

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal on 19 December 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
21. The applicant was represented in relation to the review by his registered migration agent.

### **Protection visa application**

22. The applicant was born on [date deleted: s.431(2)], and is an ethnic Turk and Muslim. He arrived in Australia as a student.
23. The applicant claims to be a homosexual.
24. The applicant claims that he was beaten by a religious teacher, and that he sustained injuries as a result. He further claimed to have been assaulted by teachers and fellow students whilst at school for reasons of his sexual orientation.

25. The applicant claimed to have been sacked from his job after his boss found out he is gay. His friend [Mr A] was severely beaten and threatened with death for having sexual relations with the applicant. [Mr A] was also sacked from his job.
26. The applicant claimed to have been beaten by his father many times.
27. The applicant's evidence is that homosexuals are exempt from military service if they prove that they are gay, but that he concealed his sexual orientation and undertook military service to avoid discrimination in future, as if he disclosed his sexual orientation in relation to obtaining an exemption from military service, that this would follow him for his entire lifetime in Turkey.
28. The applicant feared ostracism from the community, his family, friends and future employers.
29. The applicant claimed to be beaten and to have suffered injuries to his arm when assaulted by a commander when his sexual orientation with another soldier was discovered. The applicant claimed to have attempted suicide by taking an overdose of medication. The applicant and his friend were threatened with expulsion from military service and threatened with a "pink discharge" from military service for being gay. The applicant further claimed he faced harassment from other soldiers.
30. The applicant was beaten by his father when he learned the applicant's sexual orientation, and the applicant moved in with his friend [Mr A].
31. In [2010], the applicant and [Mr A] were beaten by hotel security in [City 1] for displaying affection to each other.
32. The applicant claimed to have been ostracised and degraded by teachers, classmates, friends and relatives because of his sexual orientation.

#### **Statement in support of protection visa application**

33. The applicant claimed that he fears mistreatment and discrimination for reasons of his sexual orientation. He claimed to have been raised in a radical fundamentalist and nationalist social environment. He as a child was required to attend Quranic school. His family were of a farming background.
34. The applicant claimed that at school he played with girls and liked girl's toys. He was called names and made fun of by other children. The applicant's father was dismayed by the applicant's effeminate behaviour as they lived in a small village, and as a result the applicant was sent to study the Quran and faced abuse and ostracism when so doing.
35. The applicant claimed that he was beaten by his father many times and that he was subjected to verbal abuse. His father sent him to a boys' boarding school in order to attempt to alter the applicant's behaviour.
36. In [the 1990s], the applicant started middle school. He felt lonely and claimed to be ostracised, and that he spent holidays in Istanbul with his family. The applicant claimed that it was at this time his sexual feelings developed and that he became attracted to boys.
37. The applicant disclosed his sexuality to [Mr B], and the two had sex together, and had sexual relations with other boys as well. The applicant claimed that he was caught having sex in the

shower with [Mr B], and that he was assaulted and that he suffered injuries. Other students were forced to assault the applicant after he and [Mr B] were discovered. The applicant claimed that abuse and ostracism followed. [Mr B] ended his relationship with the applicant because of the pressure, and the applicant claimed to have feared being raped by his teachers.

38. The applicant claimed that he was unable to disclose his situation to his family fearing that he would be disowned. The applicant claimed that abuse continued at school, and that he was even deprived of food. The applicant wanted to change schools, but was unable to convince his father to do so.
39. The applicant ran away to Istanbul, but was caught by his father and beaten. His father wanted to send the applicant back to the boarding school, but the applicant threatened suicide and was allowed to attend school in Istanbul.
40. The applicant claimed that his family is very religious. The applicant's brother became involved with the Suleymanci sect in Istanbul. The applicant refused to join.
41. The applicant had a sexual relationship with a classmate in middle school. The applicant's father again wanted to send the applicant to boarding school, but the applicant decided to work instead. He began working in a restaurant towards the end of [the 1990s]. He had some gay friends, some of whom were cross dressers.
42. The applicant's father and brother engaged in special prayer activities at home, and asked the applicant to join in. They were also involved in the religious party Fazilet Partisi. Meetings of the party were held in [location details deleted: s.431(2)]. The applicant was required by his father to attend meetings.
43. The applicant later disclosed his sexual orientation to two female friends at his workplace. They began to attend at gay or gay friendly clubs together. In [the early 2000s], the applicant met [Mr A] at a bar, and they began to go out together. They kept the relationship secret for two years.
44. In [2004], the applicant was sacked from his job when his sexual orientation was discovered. [Mr A] was also severely beaten and threatened with death and sacked from his employment. The applicant had been fired for public displays of affection with his boyfriend and had been seen kissing [Mr A]. He faced abuse from workmates.
45. The applicant was unemployed. His father forced the applicant to give religious lessons to children. He was often beaten if he refused.
46. The applicant undertook military service. He feared harassment or being raped. The applicant's father forced the applicant to go for a military service examination. The applicant did not have the courage to admit his sexual orientation in order to be disqualified from military service. He feared if he did so he would not be able to find work afterwards.
47. On [date deleted: s.431(2)], the applicant commenced military service. He tried to conceal his sexual identity. He met [Mr C], and they had a sexual relationship in secret. They began to act more openly about their sexuality towards the end of the applicant's military service. They were caught having sexual relations by their commander. The applicant was assaulted and threatened with gang rape. In the process, the applicant [had a bone] broken and he was hospitalised. The applicant and [Mr C] were threatened with discharge. The applicant after

these events faced discrimination, humiliation, verbal abuse and assaults during military service. The applicant was beaten in front of soldiers during an assembly and verbally abused. He was deprived of food, made to clean toilets, and his mistreatment at the hands of fellow soldiers deteriorated further, and he faced more serious assaults.

48. The applicant's partner [Mr C] was raped. He attempted suicide.
49. The applicant and [Mr C] ultimately were discharged and sent home. The applicant was detained until completing military service, being discharged on [date deleted: s.431(2)], whilst [Mr C] was transferred .
50. The applicant had a family religious ceremony when he completed service to commemorate the fact that he had become a man. Plans were made to find the applicant a religious woman to marry from the fundamentalist group the applicant's family belonged to.
51. The applicant had psychological treatment due to his experiences in military service. He remained in contact with [Mr A], who helped him get a job.
52. The applicant was pressured by his father to attend prayers, despite having no interest or religious beliefs.
53. The applicant claimed that after the AKP came to power in Turkey, fundamentalism has been on the rise.
54. The applicant claimed that he was assaulted by his father many times for going out late at night. He faced pressure to go out and meet girls.
55. On New Year's Eve, 2009, the applicant was threatened with serious injury by his father for being an infidel for wanting to go out for the night. The applicant decided to flee and started to live with [Mr A]. He returned home to tell his mother that he was moving out, but his mother told him that his father would beat her as well if he moved out. The applicant told his father that he was moving in with [Mr A] in any case, and was assaulted by his father. The applicant further feared reprisals from his father or brother at his workplace, and decided to stop working there.
56. The applicant claimed that Suleymanci has strong connections with the police and other authorities.
57. The applicant remained in contact with his mother to reassure her that he was ok. The applicant told his mother at one point that he is gay.
58. [In] July 2009, the applicant's boyfriend called the applicant and told him to leave the house. His father had learned the reasons of his dismissal in 2004, and [Mr A] was attacked and beaten and threatened with a pistol. [Mr A] was sacked from his job. He was threatened with death.
59. The applicant called home and told his father that he is gay after having had a few drinks. The applicant was threatened with death and with being disowned by his father.
60. The applicant decided to leave Turkey. He obtained a passport in September 2009, and obtained a visa for Australia [in] October 2009.

61. The applicant claimed to be upset to leave [Mr A] behind.
62. The applicant is able to live openly as a gay man in Australia. He claimed to still be in contact with [Mr A], although that relationship later ended.
63. The applicant extended his visa until April 2014. The applicant returned to Turkey [in] 2010, as [Mr A] insisted on seeing him. He and [Mr A] were beaten in [City 1] when they displayed affection to each other. The applicant returned to Australia [in] 2010. In March 2011, the applicant travelled to Thailand to see [Mr A] again, refusing to return to Turkey after the experiences on the previous return.
64. [Mr A] subsequently started a relationship with another man.
65. The applicant fears abuse, discrimination and persecution in Turkey, and extreme difficulty in getting employment. The applicant fears harm at the hands of his family, friends, the community and in particular fears his father and brother. The applicant claimed that no protection is available to him as a homosexual.
66. The applicant provided statements in support of his application confirming his sexual orientation. He has been involved in relationships in Australia.

#### **Departmental interview**

67. At the departmental interview, the applicant expanded on his claims. He addressed the issue of his delay in lodging his protection visa application indicating that the government had promised to liberalise the rights of gays in Turkey, and that he thought conditions may improve in Turkey. It was put to the applicant that it was not illegal to be gay in Turkey, but he maintained that he faced harm and that public perception of gays was highly negative in Turkey. He did not respond when confronted by the delegate with the assertion that there is harassment of gays all around the world. The applicant when it was put to him that Iranian homosexuals flee to Turkey for refuge indicated that the reality of the situation in Turkey is quite different. The applicant was confronted regarding his return to Turkey, and maintained that this was at [Mr A]'s insistence that he returned to Turkey. The applicant maintained he could not relocate in Ankara or Istanbul.

#### **Delegate's decision**

68. The delegate accepted that the applicant is gay.
69. Relying on country condition information the delegate determined that the applicant's fear of persecution is not well-founded. The delegate found that honour killings of gays are rare in Turkey.
70. The delegate noted the applicant's delay in lodging his protection visa application.
71. The delegate concluded that had the applicant been caught having sex in a Quranic school he would have faced more serious harm than a beating.
72. The delegate found it to be a paradox that the applicant would take the risk of being caught having sex with another soldier while claiming to fear other soldiers.



73. Further, the delegate noted that the active partner anal sex in homosexual relations are not considered to be homosexual in Turkey.
74. The delegate further found that employment rights are protected by legislation in Turkey.

### **The Tribunal hearing**

75. The applicant testified that he fears persecution in Turkey for reasons of his homosexuality. He fears harm at the hands of his family because of their fundamentalist beliefs and family traditions and because to them, homosexuality is a huge sin, and that the family's honour would not be restored until he is killed. He knows his own family and there is a real and present risk to his life if he returns to Turkey as they will not accept his sexual orientation. The applicant further fears serious harm from extended family and friends for reasons of his sexual orientation and that his sexual orientation would not be accepted by them. The applicant also fears serious harm from the local populace. The applicant further fears that he would not be able to secure employment, as for him it is impossible to conceal his sexual identity, and that accordingly he would not be able to remain employed. The applicant further testified that the Turkish populace does not tolerate homosexuality, and that he faces serious harm as a result. The applicant further testified that he fears the police who are generally religious, and increasing religious fundamentalism in Turkey.
76. The applicant testified that he has had no contact with his family since his arrival in Australia, and that he was forced to run away from them when they became aware of his sexual orientation.
77. The applicant testified in relation to the preparation of his protection visa application and statement and why corrections to the statement had been required. He testified that he provided a supplementary statement in advance of the hearing to address the conclusions drawn by the delegate in refusing his application.
78. The applicant testified that he came to Australia on a student visa, but that his intentions were to get away from Turkey in fear that he would be killed by his family. He testified that his family is fundamentalist and linked to a fundamentalist Islamic organisation, and that his sexual orientation places him at risk of serious harm at their hand. He further testified that he did not lodge his protection visa application earlier as he had a valid student visa, and that it was not until he met his partner that he was aware that he could lodge a claim based on his sexual orientation. It was not until he returned from Turkey after visiting his partner at the time and faced a serious assault that he took the final decision to not return to Turkey. He was questioned closely on both his return to Turkey, and his delay in lodging his protection visa application after returning to Australia. He thought that he could live in another city far from his family safely, but when he travelled to Turkey to visit his then partner at his partner's insistence, that he and his then partner suffered a serious assault whilst in an ostensibly tolerant tourist destination in Turkey. When his then partner insisted on seeing him again, the applicant would not return to Turkey, but instead insisted on meeting his partner in Thailand rather than risk further harm in Turkey. Further he testified that after the breakdown of his relationship he was psychologically incapable of making a logical decision in relation to his future and related that he had attempted suicide at the time. He put together all the incidents that he went through, and then took the decision to lodge his application.
79. The applicant was questioned extensively on his sexual orientation. His evidence was that he is gay, that he discovered this at an early age after puberty, and that he believed at first that he

was abnormal, and noted that in Turkey, the Minister of Health views homosexuality as an illness. The applicant testified that he never felt any attraction towards girls. He related his first sexual experiences in school. The applicant testified as to his activities in the gay community in Australia, his attendance at [Hotel 2] and provision of a detailed description of its physical layout, security arrangements there, its location and other details which was persuasive as it was presented spontaneously without hesitation. He testified that he was only at [Hotel 3] once, but prefers going out in [suburb deleted: s.431(2)]. He testified that all his friends know he is gay in Australia. He also testified about the fact that he and his partner prefer to stay home and enjoy each other's company. After the hearing, the applicant provided a letter of support from his partner who corroborate his evidence that he is a gay man. The applicant further testified that he practices safe sex to reduce the risk of contracting the HIV virus.

80. The applicant recounted his experiences of harm in Turkey as a result of his sexual orientation at Quranic school, the military, expanding upon evidence provided by him at earlier stages of the application process.
81. The applicant testified that he cannot live openly as a gay man in Turkey, and that he would not be able to tolerate concealing his sexual orientation to avoid serious harm in Turkey and that in effect he is not prepared to live in hiding. He cannot and will not keep running away every day in fear of harm.
82. The applicant recounted his experiences in Turkey as a result of his sexual orientation. He provided detailed testimony in relation to his experiences in school, military service and in [City 1] rich in corroborating detail.
83. The applicant testified that the authorities would not provide protection to him in Turkey from the threat of harm to him at the hands of members of his family.
84. The applicant was challenged in relation to the threat of harm at the hands of his family given the vast population of Istanbul, and Turkey as a whole, and their ability to track him down. He maintained that as fundamentalists his family will go to all lengths to track him down in Turkey, that they have links and connections with the police, and testified that he even fears that they will find him in Australia. He further related stories of widespread assaults of gays in Turkey, and police indifference to such attacks.
85. The applicant was challenged in relation to having returned to Turkey to see his then partner, given the apparent inconsistency between these actions and a subjective fear of persecution. The applicant testified that they took extraordinary precautions, meeting in a neutral location, but that despite this he was the victim of a serious assault at the time.
86. The applicant was asked to comment on the delegate's finding that had he been caught having sex with another boy at a Quranic school that he would have faced far more serious harm than a beating. He testified that the school wanted to maintain its reputation and more serious consequences did not follow as the school did not want the incident to reflect badly on the school's reputation.

### **Country condition information**

87. Country condition information relating to homosexuals in Turkey before the Tribunal indicates as follows:

Despite Turkish law having no explicit provisions that discriminate against lesbian, gay, bisexual, transgender or intersex (LGBTI) individuals, references in the law relating to morality, protection of the family and unnatural sexual behaviour are variously used as a basis for abuse and discrimination by Turkish authorities. Government ministers and officials have made various statements vilifying homosexuality, and the military forbids homosexuals from service.

A number of LGBTI advocacy groups established in recent years have promoted the need for the government to address the issue of rights and equality, although the government has expressed no desire to incorporate this into any future draft constitution.

### *Ankara*

No information was located to suggest that tolerance or acceptance of gay men in Ankara differs greatly from the rest of Turkey, although one source suggested that due to the conservative nature of the capital, LGBTI individuals tend to be less visible. However, a number of gay rights demonstrations have taken place in recent years, largely without incident.

### Gay men being targeted for harm

#### *Government*

While various sources suggest that gay men can be targeted for harm by Turkish authorities, limited specific information was located to support this. A wide body of evidence exists indicating that transgender women in particular are at far greater risk of harm from authorities than gay men, given the absence of reporting on the latter. According to Amnesty International, police officers view all transgender women in public places as legitimate targets for arrest, harassment and physical abuse.

#### *Non-state actors*

Harm against gay men from non-state actors is widespread, and a number of examples were located of hate crimes and murders being perpetrated against homosexuals in Turkey in recent years.

### Protection from Turkish police

It is common for LGBTI individuals to not report acts of violence or to seek assistance from authorities to offer protection as they believe that due to their gender identity or sexual orientation the authorities will not assist them. While police have provided protection to some LGBTI pride parades, police responses to individual acts of violence and intimidation is largely thought to be inadequate, if not non-existent

### Tolerance or acceptance of gay men in Turkey

Homosexual acts in Turkey have been legal since 1858, as has the equal age of consent for homosexual and heterosexual acts; a law on gender recognition after gender

reassignment treatment was enacted in 1988.<sup>1</sup> Despite this, according to the Global Gayz website, the human rights of lesbian, gay, bisexual, transsexual and intersex (LGBTI) individuals “is one of the most controversial human rights issues in Turkey...[h]omosexuality is not illegal...[h]owever, owing to conservative values embedded in Muslim-majority Turkish society, homosexuality remains a taboo topic in public discourse”.<sup>2</sup> According to Amnesty International, authorities at best ignore the rights of lesbian, gay, bisexual and transgender people, and at worst single them out for discriminatory treatment.<sup>3</sup>

The most recent US Department of State (USDOS) human rights report on Turkey states that “[w]hile the law does not explicitly discriminate against lesbian, gay, bisexual, or transgender (LGBT) individuals”, non-governmental organisations (NGOs) working with LGBT individuals claim that “references in the law relating to ‘the morals of society,’ ‘protection of the family,’ and ‘unnatural sexual behaviour’ were sometimes used as a basis for abuse by police and discrimination by employers”. In 2009 and 2010, several government ministers and officials variously described homosexuality as “a behaviour disorder...spreading in a scary way within society”, as well as being “against human nature, and...should be corrected without targeting homosexuals”, and as “a biological disease...that needs to be treated”.<sup>4</sup>

Despite widespread criticism for such remarks, activists believe these comments are indicative of what they say is “increasing prejudice, discrimination and violence – even from police – against homosexuality and transgender people...[a] total of 45 gays and transgender people were killed over three years in ‘hate murders’”.<sup>5</sup> In November 2010, neither the ruling Justice and Development Party (AKP) nor the main opposition Republican People’s Party (CHP) expressed a desire to address LGBTI rights in any future draft constitution. An AKP spokesperson said that while “the AKP’s stance on human rights was clear...[it] has not considered the issue at all”.<sup>6</sup>

While military service is mandatory in Turkey, some within the armed forces “consider gays ‘sick’ and therefore ineligible to serve...[t]o screen out the gays from the new recruits, Turkey has a policy of ‘will ask, must tell’”. According to one openly gay man, a military psychiatrist demanded explicit photographs in order to exempt the man from

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<sup>1</sup> Bruce-Jones, E, & Itaborahy, L. 2011, *State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults*, International Lesbian, Gay, Bisexual, Trans and Intersex Association website, May, p.8, 10, 17  
[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2011.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf) – Accessed 16 September 2011

<sup>2</sup> ‘Global Gayz – Republic of Turkey, Middle East’ (undated), Global Gayz website  
<http://www.globalgayz.com/country/Turkey/TUR> – Accessed 15 September 2011

<sup>3</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.6  
<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 16 September 2011

<sup>4</sup> US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Turkey*, 11 April, Section 6

<sup>5</sup> ‘Turkey’s gays, transsexuals decry increasing homophobia’ 2010, Google News website, source: *Agence France-Presse*, 3 April  
[http://www.google.com/hostednews/afp/article/ALeqM5i\\_mI\\_smXF4WPvvhQwkZqoC8ApXg](http://www.google.com/hostednews/afp/article/ALeqM5i_mI_smXF4WPvvhQwkZqoC8ApXg) – Accessed 20 April 2010

<sup>6</sup> ‘Turkey’s ruling, opposition parties dismiss need for gay rights’ 2010, *Hurriyet Daily News*, 2 November  
<http://www.hurriyetdailynews.com/n.php?n=homosexual-rights-is-not-an-issue-for-akp-and-chp-2010-11-02> – Accessed 16 September 2011

service. Other homosexuals have reportedly undergone week-long hospital observations by psychiatrists, and some have had their parents interviewed.<sup>7</sup>

In May 2011, a former Turkish soccer referee accused the Turkish Football Federation of “passing documents to the media showing he was exempted from compulsory military service because of his sexual orientation, which in turn led to death threats” The man claimed that he was forced out of the federation two years ago due to his homosexuality, and said that as the issue has attracted widespread media attention, he has since been unable to find a job, and has received threats. The football federation reportedly argued that “referees must have completed military service or have been exempted for reasons unrelated to health” The referee is undertaking court action in order to be reinstated by the federation.<sup>8</sup>

In December 2010, the High Board of Radio and Television (RTUK) fined Haberturk TV for “broadcasting a discussion of homosexuality”; the Board also warned ATV for depicting two men in bed together as a couple. According to USDOS, the RTUK president said that “because both programs presented homosexuality as ‘normal’, the RTUK assessed that they harmed the Turkish family structure...and constituted a breach of the society’s national and moral values”.<sup>9</sup>

According to *Pink News*, the European Parliament criticised Turkey for its record on LGBTI rights, and said that the country must prove that it can provide “genuine protection” to gay people before it can join the European Union.<sup>10</sup> The Global Gayz website noted that “the desire of Turkey to join the European Union has forced the government to grant official recognition to LGBT rights organizations, respect a greater degree of the freedom of speech and the press and to entertain gay rights legislation”.<sup>11</sup> According to *Hurriyet Daily News*, however, in 2008 Turkey refused to sign a European Union-led declaration presented at the United Nations calling for all states to “take steps to stop the criminalization of homosexuality” Turkish NGOs and LGBTI groups called on the Turkish government to reconsider its decision, and while they acknowledged that homosexuality was ostensibly not a crime in Turkey, they noted that they “were not defined in the Turkish constitution’s prohibition of discrimination or the social or civil rights...[w]e are ignored and ignorance is the utmost violence”.<sup>12</sup> No information was located regarding the reasons behind Turkey’s refusal to sign the declaration.

### *Tolerance or acceptance in Ankara*

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<sup>7</sup> ‘Turkish gays and the military’ 2011, *The World*, 3 January <http://www.theworld.org/2011/01/turkish-gays-and-the-military/#comments> – Accessed 21 June 2011 [

<sup>8</sup> ‘Ousted gay referee seeks reinstatement in Turkey’ 2011, *Reuters*, 31 May <http://www.reuters.com/article/2011/05/31/us-turkey-rights-idUSTRE74U2X620110531> – Accessed 10 June 2011

<sup>9</sup> US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Turkey*, 11 April, Section 6

<sup>10</sup> ‘European Parliament says candidate countries must offer gays protection’ 2010, *Pink News*, 12 February <http://www.pinknews.co.uk/2010/02/12/european-parliament-says-candidate-countries-must-offer-gays-protection/> – Accessed 12 October 2010

<sup>11</sup> ‘Global Gayz – Republic of Turkey, Middle East’ (undated), Global Gayz website <http://www.globalgayz.com/country/Turkey/TUR> – Accessed 15 September 2011

<sup>12</sup> ‘Turkey breaks company with EU in gay vote’ 2008, *Hurriyet Daily News*, 22 December <http://www.hurriyet.com.tr/english/domestic/10617078.asp?gid=244> – Accessed 22 December 2008

According to the Turkey Ankara Gay Travel Guide, “Ankara does not have such a colourful and visible gay life” probably due to the capital city’s “more official life style” The guide noted, however, that there are several gay or gay-friendly venues in the city, despite the claim that several have opened and not survived for undisclosed reasons. The guide further claims that although some cinema, bath house and sauna owners welcome homosexuals to their establishments, most “do not like to be mentioned on gay websites or guide books”. There are no exclusively gay baths or saunas in Ankara. The guide notes that gay men should be selective with the people they meet in cruising areas such as parks, as “[i]t is always possible to come across some bad guys who want to trap the gay men in such places”.<sup>13</sup>

Gay men being targeted for harm

#### *Government*

Limited specific information was located regarding the targeting of gay men for harm by Turkish authorities. With regard to police violence, a large body of evidence indicates that transgender women in particular are at far greater risk of harm from authorities. According to Amnesty International, transgender women have “suffered a long history of violence by police in custody...in many instances police officers view all transgender women in public places as sex workers and legitimate targets for arrest, harassment and in some cases physical abuse”.<sup>14</sup>

### **FINDINGS AND REASONS**

88. The Tribunal, based on the applicant’s passport and other documentation on file, accepts that the applicant is a citizen of Turkey. Accordingly, the applicant’s claims were assessed against Turkey.
89. The Tribunal finds the applicant to have been a credible witness. He was spontaneous, forthright, testified without hesitation, and responded to all questions, even those touching on sensitive personal matters and personal loss in an appropriate manner and in accord with that of a witness of truth.
90. The Tribunal found the applicant’s evidence regarding his sexual orientation to be credible. The applicant related coming to the realisation that he is gay, was open and frank about his gay relationships, and spoke regarding the limitations set by public and police attitudes relating to gays and lesbians in Turkey. His evidence was in accordance with the documentary evidence before the Tribunal relating to the situation of gays in Turkey. He explained satisfactorily his limited involvement in the gay community, and his evidence regarding his current relationship was corroborated by his current partner. The Tribunal is satisfied that the applicant is gay, and that his limited integration in the gay community in Sydney has been by choice, and notes that he has availed himself of the freedom available to him in Sydney as a gay man. He did provide an attestation from his current partner who confirmed the applicant’s sexual orientation. The Tribunal accepts that the applicant is gay as

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<sup>13</sup> ‘General Info – Turkey Ankara Gay Travel Guide’ (undated), Turkeygay.net website <http://www.turkeygay.net/ankara.html> – Accessed 5 October 2011

<sup>14</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.12 <http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 16 September 2011

claimed. In relation to the applicant's return to Turkey, the Tribunal accepts his explanation that it was at the insistence of his then partner that he did so, and further notes his evidence in relation to the harm suffered by him in Turkey on this occasion. It also notes that he refused to return to Turkey a second time when his partner insisted on seeing him, but that the couple met in Thailand because of the applicant's fear of return to Turkey.

91. The Tribunal further found the applicant's evidence regarding his personal experiences as a gay man in Turkey to be credible. It accepts the claims made by the applicant regarding the serious assault against him and his partner before arrival in Australia, and the applicant's attempted suicide. The Tribunal further accepts that the applicant's evidence in relation to attitudes of the police and the local populace in relation to gays in Turkey is in accord with the country condition information before it. The Tribunal accepts the applicant's evidence in relation to his circumstances in Turkey, the threat of harm from his fundamentalist, and the local populace for reasons of his sexual orientation. The Tribunal found compelling the applicant's evidence regarding his refusal to conceal his sexual orientation and accepts that given his own personal history and country conditions in Turkey, that there is a real chance that he would face persecution for reasons of his sexual orientation in Turkey. The Tribunal further accepts that the applicant has faced verbal taunts, minor and major assaults, and general negative attitudes by members of the local populace prior to his departure from Turkey.
92. The Tribunal notes the country condition information before it in relation to the situation of gays in Turkey. Given the applicant's personal circumstances, the apparent continued interest in him by his deceased partner's family, the lack of protection from the police, and the attitudes of the police as credibly described by the applicant in his testimony, and the country condition information relating to police protection of gays in Turkey in general noted above, the Tribunal finds that there is a real chance that the applicant would face persecution as a gay man in Turkey and that, given the country condition information, state protection would not be available to him.
93. The Tribunal finds that there is a real chance that the applicant would face persecution in Turkey were he now to return there for reasons of his membership of a particular social group, gay men in Turkey. The Tribunal finds that the threat of harm to the applicant extends to the entire territory of Turkey, and that he would not be able to relocate in safety, and that it is not reasonable under the particular circumstances of this applicant for him to relocate within Turkey.
94. For all of these reasons, the Tribunal finds the applicant to be a Convention refugee.

## **CONCLUSIONS**

95. 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**

96. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.