

1311342 [2014] RRTA 62 (14 January 2014)

DECISION RECORD

RRT CASE NUMBER: 1311342

DIBP REFERENCE(S): CLF2013/21982

COUNTRY OF REFERENCE: Turkey

TRIBUNAL MEMBER: Giles Short

DATE: 14 January 2014

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first-named applicant satisfies paragraph 36(2)(a) of the Migration Act; and
- (ii) that the second-named applicant satisfies subparagraph 36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first-named applicant.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. [The applicant] and her husband are citizens of Turkey. [The applicant] has said that she belongs to the Kurdish ethnic group and that she was involved in Kurdish cultural and political activities in Turkey. She has said that as a result of her involvement in those activities she came to the attention of the police in Turkey and she was accused of involvement in Kurdish terrorist organisations. She has said that she fears that she will be arrested if she returns to Turkey. Her husband claims to be a member of her family unit and has combined his application with her application as permitted by the Migration Regulations 1994.
2. [The applicant] and [her husband]'s applications for protection visas were refused by a delegate of the Minister for Immigration and they have applied to this Tribunal for review of that decision. A summary of the relevant law is set out at Attachment A. I have taken the policy guidelines prepared by the Department into account to the extent that they are relevant. The issue in this review is whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention if she returns to Turkey.

CONSIDERATION OF CLAIMS AND EVIDENCE

Does [the applicant] have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Turkey?

[The applicant]'s claims

3. [The applicant] has said that she was born in a village about [number] kilometres from the city of [City 1] but that her family moved to [City 1] when she was around [age] or [age] years old because they did not feel safe in the village due to oppression by the Turkish security forces. She has said that when she was in [primary school] her father died and her family moved to [Town 2] where she continued her education. She has said that she was one of five to ten students at her high school actively supporting the Kurdish cause and that she attended political and cultural events such as Nevroz (Kurdish New Year) and protest meetings in [Town 2].
4. [The applicant] has said that after she completed high school she had moved to the city of [City 3] in September 2009 to undertake a university preparation course. She has said that she shared a unit with two university students, one of whom was a relative of her husband. She has said that they introduced her to [the] DTP (Demokratik Toplum Partisi - Democratic Society Party)¹ and she said at the hearing before me that she had been a member of the DTP. She said that she had been involved in the women's section.
5. [The applicant] has said that, during the [months] which she spent attending the university preparation course, her awareness of the Kurdish cause improved. She has said that she read books and magazines about the Kurdish cause, she attended political discussions with her

¹ The DTP is one of a succession of pro-Kurdish political parties in Turkey which have been shut down by court order: see Yigal Schleifer, 'Turkey: Closing largest Kurdish party DTP, Turkey could stall reform efforts', *The Christian Science Monitor*, 16 December 2009, CX247680.

friends and she made new friends at [University], the DTP and [Organisation 4]. At the hearing before me she said that this was a pro-Kurdish organisation and that it was involved in Kurdish women's rights, encouraging women to be involved in social environments, and also in Kurdish language studies. [The applicant] has said that she was helping these organisations with projects designed to increase the awareness of Kurdish women about Kurdish culture and art. She has said that during the time she was in [City 3] she participated in many political and social activities such as Nevroz celebrations and various protest meetings.

6. [The applicant] has said that [in] December 2009 she attended a demonstration in front of the DTP building in [City 3] to protest the case being brought to close the DTP. She has said that at this demonstration a university student was shot dead by the police. She has said that she attended another protest demonstration a few days after the DTP had been banned [in] December 2009. At the hearing before me she said that this demonstration had been to protest the closure of the DTP and that it had been held in a square in front of the DTP building. She said that local council members and provincial representatives had spoken at the demonstration. She said that she thought that there had also been parliamentary deputies present but she could not remember who had been there.
7. [The applicant] said that the police used water cannon and tear gas to disperse the protest. She said in the statement accompanying her original application that on this occasion she had been punched in the face and kicked by the police and she confirmed this when she was interviewed by the primary decision-maker in relation to her application. She has said that when she and her friends were leaving the demonstration the police took their identification and address details and that on the same night the police raided their unit. At the hearing before me she said that she thought that they had wanted to discourage them from being involved in these sorts of protests. She said that she thought that she might have been singled out because when the police had stopped her she had confronted them.
8. [The applicant] has said that the police who raided their unit found publications in Kurdish which she admitted belonged to her and that she was taken to the police station, questioned and detained for about four hours. She has said that one of the police officers slapped her and that she was warned to keep away from politics. At the hearing before me she said that the books had been novels and books about the history of the Kurdish people. She said that she had also been subscribing to a monthly magazine in Kurdish and she had had copies of a daily newspaper in Kurdish. She said that you could buy such books and magazines only in certain bookshops: they were not sold everywhere.
9. [The applicant] has said that about one week after this she joined the BDP (Barış ve Demokrasi Partisi - Peace and Democracy Party, the successor of the DTP) and she has produced a copy of a BDP form dated [December] 2009 and a further document in relation to her membership of the BDP.² She has said that [in] December 2009 she attended a protest meeting organised by the [Organisation 4] in relation to the arrests of party officials under 'KCK operations' (a reference to operations against the Koma Civakên Kurdistan or Kurdistan Communities Union, the umbrella political organisation of the Partiya Karkerên Kurdistan or PKK - the Kurdistan Workers' Party). She has said that the police detained several people at the demonstration and that she herself was beaten with batons. At the hearing before me she said that more than 500 people had attended this meeting which had been protesting the arrest of members of the DTP on the basis of allegations that they

² See folios 2 and 80 of the Department's file [deleted].

belonged to the KCK which she said ran the urban operations of the PKK. She said that once the protesters had started chanting slogans the police had attacked them and had dispersed them.

10. [The applicant] has said that in late April 2010 the police raided her unit again while she was out and they took some books. She has said that she became fearful for her safety and that she moved back to [Town 2]. At the hearing before me I noted that she had said that they had her address details. [The applicant] confirmed that they had most probably known where she lived in [Town 2]. She said that she had not thought that she would be safer in [Town 2] but that she would be away from their eyes. She said that she had not heard anything further from the police about the books which they had taken. She said that between April and September 2010 she had not been involved in any political activities because she had been preparing for the university selection examinations.
11. [The applicant] has said that she completed the university selection examinations in June 2010 and that she was accepted by [City 1] University. She has said that when she went to enrol at [City 1] University in early September 2010 she was stopped by the police and asked to show her ID at the gate of the campus. She has said that they asked her to wait and they took her ID to a police car where she believed that they had checked her records. At the hearing before me she said that the police had been checking the IDs of all the students who had been arriving at the university.
12. [The applicant] has said that when the police returned they told her that they had been instructed to take her to the police station. She has said that at the police station she was questioned by two plain clothes policemen from the Anti-Terror Unit who asked her about her involvement in the protests and other activities in [City 3]. She has said that the police threatened her, asking her if she thought that she would be able to continue her political activities in [City 1], before eventually releasing her. She has said that as a result of this incident she was scared to remain in [City 1]. She said at the hearing before me that she had had not known many people in [City 1] and that she had been scared that she could have been arrested again. She said that if there had been any protests or meetings in [City 1] to defend Kurdish rights she would have been involved.
13. [The applicant] has said that after this she returned to [City 3]. At the hearing before me I noted that she had said that she had left [City 3] in April 2010 because she had feared for her safety. [The applicant] said that she had not thought that she would be safer in [City 3] but that it was a bigger place and she had thought that there would be more activities there in which she could be involved to help Kurdish rights. She has said that while she was in [City 3] between September and December 2010 she was involved in the Women's Branch of the BDP and the [Organisation 5] which she said at the hearing before me was a Kurdish organisation involved in traditional women's social activities.
14. [The applicant] has said that in November 2010 she noticed that she was being followed by an unmarked car. At the hearing before me she said that she had suspected that the police had been following her. She said that it had been obvious: whenever she had gone to the [Organisation 5] she had seen the same car and when she had gone out, for example, to buy something, she had seen the same car all the time. She has said that she therefore left [City 3] once again and returned to [Town 2]. She has said that from December 2010 to June 2011

she undertook a Kurdish language course in [Town 2] and she has produced a copy of a certificate in relation to this course.³

15. [The applicant] has said that she established close contact with the officials of the BDP in [Town 2]. She has said that she attended a demonstration [in] April 2011 to protest the decision of the Supreme Electoral Board (Yüksek Seçim Kurulu or YSK) to bar a number of candidates from standing in the parliamentary election in June 2011 including some of those backed by the BDP. (This decision was later reversed.) She has referred to the fact the son of a neighbour of hers was killed in this demonstration.
16. [The applicant] has said that a well-known Kurdish politician, [Ms A], was the BDP candidate in their region at the election in June 2011 and she said at the hearing before me that she had gone door to door talking to people about why they should vote for [Ms A] as well as distributing pamphlets. She has said that she experienced threats and intimidation by the police while she was involved in the election campaign. At the hearing before me she said that they had asked her what she was doing and she had told them that it was her right to campaign like this. She said that one of the police officers had slapped her on her face but she had continued her involvement in campaigning. She said that all her friends who had been involved in campaigning had had the same sort of problems with the police.
17. [The applicant] has said that after the election some women in her neighbourhood asked her to teach them Kurdish in their own homes. She has said that [in] September 2011 the police raided her home and took her to the Anti-Terror Unit where she was questioned about her activities. At the hearing before me she said that the raid had taken place at 4.00 or 5.00 am and they had asked for her by name. She said that they had told all the family members to turn their backs and to put their hands on the wall. She said that they had searched the house and they had taken her books. [The applicant] has said that she was accused of carrying out KCK/PKK propaganda in people's homes. She has said that she was questioned for about two hours and hit and kicked. She has said that she was detained for about 14 hours in total and released in the evening. She has said that she was warned that if she continued her political activities she would end up in prison.
18. At the hearing before me [the applicant] said that this arrest had been the last straw. She said that she had been really scared and she had not been feeling well psychologically because they had said that she was part of the KCK and this was a very serious allegation. She said that there were many people being detained for allegedly being members of the KCK including some Members of Parliament from the BDP. She said that as a result she had started thinking of getting away from these problems and she had told her fiancé what had happened. She said that they had accused her of being part of a terrorist organisation and they had tortured and harassed her. She said that she considered herself really lucky that they had let her go. She said that a few of her friends had been detained on the basis of allegations of being members of the KCK and their matters were still before the courts.
19. [The applicant] has said that after this she moved to stay in the home of her future husband in [City 1] because she was scared to stay in [Town 2]. She has referred to the fact that in October 2011 her husband returned to Turkey from Australia (where he had been studying since 2008) and they got married in October 2011. She said at the hearing before me that maybe 600 people had attended their wedding and that it had been possible to organise all of this within the space of two months. [The applicant] has said that she then obtained a

³ See folio 3 of the Department's file [deleted].

passport in her married name. She confirmed at the Departmental interview that she had required a police clearance certificate to obtain her passport. At the hearing before me she said that she thought that she had obtained the police clearance certificate in [City 1] although her registered address had been in [Town 2]. At the Departmental interview and at the hearing before me she referred to the fact that she had not committed any crime nor had she been charged with any offence in Turkey.

20. [The applicant] left Turkey [in] February 2012. She has said that her family home was raided by the police [in] October 2012 and that the police also asked about her at her husband's family home. She has said that as a result she became more concerned about her safety and she decided to seek protection in Australia. At the Departmental interview she said that she had not applied for protection immediately after she had arrived in Australia because when she had first come here she had been in a terrible state psychologically and she had gone through some treatment. She said that also she had not intended to stay here because her husband's family had not wanted them to stay in Australia. She said that they had not known the severity of what she had gone through.
21. At the hearing before me I put to [the applicant] that the Turkish authorities had not prevented her from obtaining a passport or leaving the country which made it difficult to accept that they would have been looking for her in Turkey eight months after she had left the country. [The applicant] said that she did not know why they had been asking for her. She said that they had known that she had not been involved in the terrorist organisation: they had just been saying this to discourage her from being involved in her activities helping Kurdish people and teaching them their language. She said that she was just a member of the BDP and she believed that Kurdish people should have the right to go to school and to study in their own language. She referred to the fact that she herself had not been able to study in Kurdish when she had been young: she had had to learn Turkish to be able to study.
22. [The applicant] said that she was involved with the Kurdish Association in Australia and she had helped them with their activities. She said that they had asked her to teach reading and writing in Kurdish and this was planned to start in 2014.
23. I also took evidence from [her husband] who said that since 2009 maybe more than 10,000 people had been gaoled on the basis of alleged involvement in the KCK. He said that when this allegation had been made against [the applicant], even though it had just been to scare her, they had thought it best that she leave Turkey. He said that he himself had been through similar things before he had come to Australia although he had never faced allegations of involvement in the KCK or PKK. He said that he had only attended a few protests and he had been arrested a few times. He confirmed that he had been intending to return to Turkey after he had completed his studies. He said that his plans had changed because of what his wife had been through. He said that they were both scared of the uncertainty.

Background

24. Although Turkey's Prime Minister, Recep Tayyip Erdogan, recently announced proposed reforms which would among other things allow Kurds to be educated in their own language in private schools, the reforms were criticised for not going far enough and for not addressing the anti-terrorism laws which have been used to criminalise mainly Kurdish politicians and

journalists.⁴ Police continue to use excessive force against unsanctioned public gatherings.⁵ People including officials from the BDP continue to be detained for suspected links with the KCK.⁶ While those detained have been accused of various crimes including membership of a terrorist organisation, aiding and abetting a terrorist organisation and attempting to destroy the country's unity and integrity,⁷ Human Rights Watch observed in a press release issued on 1 November 2011 that there was scant evidence to suggest that the defendants had engaged in any acts that could be defined as terrorism as it was understood in international law.⁸

25. In its *Country Reports on Human Rights Practices for 2012* in relation to Turkey the US State Department reported that:

‘During the year police routinely detained demonstrators for a few hours at a time, and human rights organizations claimed this practice sharply increased from previous years.

In 2010 the government began trying cases against thousands of persons alleged to be members or supporters of the Kurdistan Communities Union (KCK), the umbrella political organization of the PKK terrorist group. The Peace and Democracy Party (BDP) and human rights organizations claimed that, over a three-year period, authorities detained approximately 20,000 persons, of whom they arrested 8,000, and approximately 4,000 remained detained awaiting trial, including 32 elected mayors, hundreds of political party officials, and numerous journalists and human rights activists. Arrests and hearings continued throughout the year, with judges normally rejecting defendants' requests for conditional release, permission to dispute the validity of the charges, and permission for the defendants to use their mother tongue. Arrests and indictments continued at year's end.’⁹

26. The US State Department reported that:

‘The government limited celebrations of the Kurdish holiday Newroz (New Year) to March 21, and the HRA reported that the Ministry of Interior banned or postponed 129 planned Newroz celebrations for arbitrary reasons. Clashes broke out, particularly in [City 3], and police used gas bombs and water cannons against the crowd. According to the HRA, two persons were killed, 178 wounded, 1,014 detained, and 206 arrested during the celebrations. Haci Zengin, a BDP branch office head in Istanbul, died after being hit on the head by a tear gas canister.’¹⁰

27. The US State Department also said that:

‘Throughout the year the police and judiciary pursued action against BDP members, mostly for alleged membership in or verbal support of the KCK/PKK or its actions.’¹¹

⁴ Constanze Letsch, ‘Turkey: Turkish PM unveils reforms after summer of protests’, *The Guardian* (UK), 30 September 2013, CX134684.

⁵ ‘Turkey police crack down on Kurds’, CNN, 31 October 2012, CX298567; ‘Turkey: Police brutality takes hefty toll in BDP's Diyarbakir rally’, *Bianet*, 17 July 2012, CX291633.

⁶ ‘Turkey: 35 people detained in anti-KCK operations across Turkey’, *Today's Zaman*, 25 September 2012, CX296946.

⁷ ‘Turkey: Several detained in anti-KCK operations in Istanbul’, *Today's Zaman*, 18 September 2012, CX295435.

⁸ Human Rights Watch, ‘Turkey: Arrests Expose Flawed Justice System’, 1 November 2011, CX276080.

⁹ US State Department, *Country Reports on Human Rights Practices for 2012* in relation to Turkey, Section 1.d, Arbitrary Arrest.

¹⁰ [Source deleted].

¹¹ US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Turkey, Section 3, Political Parties.

28. The US State Department also reported that:

‘Citizens of Kurdish origin ... who publicly or politically asserted their Kurdish identity or promoted using Kurdish in the public domain risked censure, harassment, or prosecution, although significantly less so than in previous years.’¹²

Conclusions

29. I found [the applicant] to be a credible witness. Her evidence has been broadly consistent over the course of the processing of her application and it is also consistent with the independent evidence available to me both with regard to the specific events to which she referred and more generally with regard to the situation of Kurdish activists in Turkey. She was able to provide additional detail at the hearing before me, in particular with regard to the occasion [in] September 2011 when she was detained and questioned, and I formed the impression from the way in which she gave her evidence that she was speaking from actual experience.
30. I accept that [the applicant] feels particularly strongly about Kurdish language issues as she indicated in the course of the hearing before me and that she was involved in both the DTP and its successor, the BDP. I accept that she was involved in campaigning for the BDP candidate in her local area, [Ms A], at the election in June 2011 and that she was also involved in various protest meetings or demonstrations between 2009 and 2011 which were broken up by the police. I also accept that she was questioned by the police about her activities on three occasions, in December 2009, in September 2010 (when she went to enrol at [City 1] University) and on 3 September 2011.
31. While I accept that, as [the applicant] said, these incidents were essentially attempts to intimidate her and to discourage her from continuing her Kurdish activism, I accept that, as she likewise said, the accusation levelled against her on the last occasion was a very serious allegation and one which has been used to put many members of the BDP in gaol. I consider that, if [the applicant] were to return to Turkey now or in the reasonably foreseeable future, she would wish to continue her activism both with regard to the use of the Kurdish language and more generally through her membership of the BDP, and that, were she to do so, there is a real chance that she would again be physically assaulted, detained, questioned and quite possibly gaoled - as has happened to many other members of the BDP¹³ - merely for reasons of her peaceful expression of her political opinions.
32. I consider that the harm which [the applicant] fears amounts to persecution involving ‘serious harm’ as required by paragraph 91R(1)(b) of the *Migration Act 1958* in that it involves a threat to her liberty and/or significant physical harassment or ill-treatment. I consider that her political opinion is the essential and significant reason for the persecution which she fears, as required by paragraph 91R(1)(a) of the Migration Act. I further consider that the persecution which she fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason. Since the Turkish Government is responsible for the persecution which she fears, I consider that there is no part of Turkey to which she could reasonably be expected to relocate where she would be safe from the persecution which she fears.

¹² US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Turkey, Section 6, National/Racial/Ethnic Minorities.

¹³ US State Department, *Country Reports on Human Rights Practices for 2011* in relation to Turkey, Section 3, Political Parties.

CONCLUSIONS

33. I find that [the applicant] is outside her country of nationality, Turkey. For the reasons given above, I find that she has a well-founded fear of being persecuted for reasons of her political opinion if she returns to that country now or in the reasonably foreseeable future. I find that she is unwilling, owing to her fear of persecution, to avail herself of the protection of the Government of Turkey. There is nothing in the evidence before me to suggest that she has a 'right to enter and reside in' any country other than her country of nationality, Turkey, of the kind referred to in subsection 36(3) of the Migration Act.¹⁴ It follows that I am satisfied that she is a person in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently she satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for a protection visa.
34. Although [her husband] said in the course of the hearing before me that he had been through similar things to his wife before he had come to Australia, he said that he had never faced allegations of involvement in the KCK or PKK. He said that he had only attended a few protests and that he had been arrested a few times. He did not make specific claims under the Refugees Convention as amended by the Refugees Protocol in his own right. I am not satisfied that he is a person in respect of whom Australia has protection obligations and he therefore does not satisfy the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa. I am satisfied, however, that he is a member of the same family unit as his wife for the purposes of subparagraph 36(2)(b)(i) of the Migration Act. As such, the fate of his application depends on the outcome of [the applicant]'s application. As [the applicant] satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act, it follows that her husband will be entitled to be granted a protection visa provided that he meets the criterion in subparagraph 36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

35. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first-named applicant satisfies paragraph 36(2)(a) of the Migration Act; and
 - (ii) that the second-named applicant satisfies subparagraph 36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first-named applicant.

Giles Short
Senior Member

¹⁴ See *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91.

ATTACHMENT A - RELEVANT LAW

36. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

- ‘(2) A criterion for a protection visa is that the applicant for the visa is:
- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) 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 non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
 - (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

Refugee criterion

37. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
38. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’

39. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
40. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
- (a) a threat to the person’s life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person’s capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
41. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:
- ‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
42. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:
- ‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
43. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be

persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

44. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:
- ‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’
45. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:
- ‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Ministerial direction

46. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - ‘PAM3: Refugee and humanitarian - Complementary Protection Guidelines’ and ‘PAM3: Refugee and humanitarian - Refugee Law Guidelines’ - and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Member of the same family unit

47. Subsection 5(1) of the Act provides that one person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person and that ‘member of the family unit’ has the meaning given by the Regulations for the purposes of the definition.