

**IMMIGRATION AND PROTECTION TRIBUNAL
NEW ZEALAND**

[2019] NZIPT 801453-456

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellants:

BP (Turkey)

Before:

S A Aitchison (Member)

Counsel for the Appellants:

J Walker

Counsel for the Respondent:

No Appearance

Date of Hearing:

9 &10 September 2019

Date of Decision:

30 October 2019

DECISION

[1] This is an appeal against a decision of a refugee and protection officer declining to grant refugee status or protected person status to the appellants, citizens of Turkey.

INTRODUCTION

[2] The appellants are a family, comprising a wife and husband, and their two sons, aged 17 and seven years. Because the children are minors, their parents acted as their responsible adults at the hearing in accordance with section 375 of the Immigration Act 2009 (“the Act”).

[3] The appellants claim to be at risk of serious harm from former business partners of the husband, who have subjected the family to sustained harassment and verbal threats of serious harm and death since the business collapsed and they sustained financial loss. It is also claimed that the sons are opposed to performing military service, and that the elder son is a conscientious objector opposed to the taking of human life through lethal force.

[4] The primary issue for the Tribunal is whether their account is credible and well-founded.

[5] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANTS' CASE

[6] The account which follows is a summary of the evidence given by the husband, wife and eldest son in support of all the appellants at the appeal hearing. The wife's brother, AA, provided a letter on appeal, and the wife's sister, BB, also gave evidence by telephone at the hearing. The evidence is assessed later.

The Evidence of the Husband

Family and education background

[7] The husband, of Georgian ethnicity, was born in the early 1970s in Z town, Y district, Turkey and raised in the Sunni Muslim faith. However, he and his family do not formally practice as Muslims. His ancestors emigrated from Georgia in the late 1800s. The husband can speak a little of the Georgian language. He has one sister who is currently living in Z town. His parents live there in the winter, and in the summer, they live in a rural village nearby (approximately 10 kilometres away).

[8] The wife is also of Georgian ethnicity. She and the husband married in 2001, and they had two sons, who are now aged 17 and seven years.

[9] The husband's family moved to Istanbul in the 1970s where the husband completed his primary schooling. The family moved back to Z town in time for the husband to complete his secondary schooling there. During his schooling, he was verbally insulted, on occasions, by students and teachers, on account of his Georgian ethnicity.

[10] During his student years, the husband developed leftist views and supported the Republican People's Party ("CHP") amongst other political parties and groups. He attended leftist protests and was beaten by the police on a number of occasions.

Military service

[11] From August 1995 to February 1997, the husband performed compulsory military service. He undertook three months military training in X city, and was then deployed to W city in Eastern Turkey for the remainder of his 15 months of service.

[12] During his service, the husband was assigned to the Gendarmerie Commandoes as a private. He was responsible for 16 subordinates. His unit was ordered to take part in operations against the Kurdish Workers' Party, known as the PKK, and was tasked with securing villages for the gendarmerie to enter and arrest suspected terrorists. His unit also conducted arrests and took detainees back to the gendarmerie's camp. The husband witnessed many detainees being ill-treated in the camp, many of whom were beaten, tortured and killed. He did not participate in any of these acts.

Employment and operation of transport business

[13] The husband had aspirations to join the police force, but after passing his written and oral exams and other requirements, his application was declined. He believed that this was because he was Georgian.

[14] The husband was employed in various capacities before joining a timber company in Z town in the late 1990s. Approximately four years later, he joined another timber company, ABC Ltd. After some time working for this company, the husband decided to establish his own transport business and subcontract to ABC Ltd.

[15] Together with a friend, CC, the husband established a transport business in 2007. The business operated in the husband's name and he was responsible for its financial and logistical management. He and CC purchased their first truck for the business for TL90,000 (Turkish Lira). The husband contributed TL10,000, CC contributed TL30,000, and they borrowed the remainder from the bank. The truck was then used to transport wood for ABC Ltd.

[16] In the first two years, the business was successful and made a healthy profit. After the first year, the husband and CC purchased a second truck, with a loan from the bank. A third partner, DD, joined the business after the business entered into a new agreement with a Russian company to transport cement to a port for export. DD purchased a third truck which he contributed to the business partnership.

[17] Other than their financial contributions, the husband's business partners did not perform any other function or role in the business. They came from wealthy families: CC personally owned a sports facility and DD spent his time buying and selling his family's properties.

[18] Five to six months after entering into the contract with the Russian company, the company terminated its business. The husband managed to secure another contract with a separate business, transporting sugar beets domestically. However, the business soon ran into further difficulty. After making a delivery, the driver who the appellant had employed to transport the sugar beets, informed him that the business had failed to pay for the delivery. The husband visited the business and was told by the business manager that it had paid for the delivery. That same evening, the husband learned that the truck used to transport the sugar beets had been burnt out.

[19] The husband discussed these business concerns with his partners and they agreed that the driver must have been responsible for burning the truck. However, they decided not to sue the driver and lodged an insurance claim instead. The truck was repaired over a five to six-month time frame. However, two to three months after the truck was set alight, the business became unable to meet its bank loan payments. The business also owed government tax which it was unable to pay. The tax department and the bank confiscated the business assets, including the three trucks. The husband's father sold his home in Z town and a hazelnut farm, raising approximately TL135,000 to help meet this debt. The husband received several letters from the tax department which he did not open, as he could not face his indebtedness. He is not sure how much the business continues to owe the tax department.

[20] After the business failed, the husband's business partners began to make accusations against the husband claiming that he was personally responsible and that he had even orchestrated the burning of the truck. They demanded that he repay the investment that they had made in the business. The husband considered that CC had already been repaid his investment through profits allocated to him, but that there would still be approximately TL25-30,000 owing to DD.

[21] The demands were persistent and continued up until the time the husband came to New Zealand. CC contacted the husband by telephone and in person. In person, he would threaten to break the husband's legs and kill him if he did not repay him TL50-60,000. CC was careful not to put such threats in the form of a text message or convey these over the telephone, for fear that they could be used as

evidence against him. On one occasion when the husband was discussing the matter with CC in his car, CC put his hand on his pistol (positioned on his belt) and verbally threatened to kill the husband. DD also contacted the husband approximately once a month by telephone and in person threatening that he would harm the husband if he did not repay the sum owed.

[22] In 2011, the husband was forced to relocate to V country to find work to support his family. He worked as a truck driver and slept at night on a construction site. He did not take his family with him as he considered that it was easier to live under the radar in V country alone, and that they would be safer in a smaller place such as Z town where they had friends and family. His wife and sons instead lived in a rental property approximately five minutes walking distance from the husband's and wife's respective families. The husband visited them in Z town approximately twice a month.

[23] While the husband was living and working in V country, he continued to receive telephone calls from CC every two to three weeks, and approximately once a month from DD, demanding that he repay them the money he owed them. CC continued to threaten to kill the husband if he did not do as requested and DD threatened to harm him.

[24] When the husband returned from V country to visit his family, CC would be waiting for him and would continue to threaten him. DD would also confront him and demand payment of the amount he considered owing to him. CC's and DD's family members also threatened the husband. CC's father threatened the husband with a firearm and DD's brother, EE, threatened to hurt the husband if he did not do as requested.

[25] While the husband was living in V country, CC and DD contacted the wife by telephone by and demanded that her husband pay the money owing or face the consequences. CC's wife also approached her at social gatherings with similar demands.

[26] On one occasion in 2012, the husband visited a local police station in Z town and made a complaint about CC and DD and the threats he had been receiving from them. However, the police officer did not take the matter seriously, and told the husband that without any documentary proof or evidence, he could not take the complaint further.

Events since arrival in New Zealand

[27] The husband was issued a work visa for New Zealand in March 2013 and arrived here in April 2013. The wife and their two sons remained in Turkey.

[28] Since the husband's arrival here, CC, his father, and DD, have visited the husband's and the wife's parents, in Z town, on a regular basis, approximately once or twice a month, demanding to know the whereabouts of the appellants and their contact details, and have continued to request that the husband repay the debt owed to them.

[29] The husband considers that, if he and his family returned to Z town or sought to live anywhere in Turkey, CC or DD, or their families, would locate them and kill them because of the debt that they believe he owes them. Disputes of this nature persist and do not go away. He considers that the police are corrupt and will not offer any protection from such harm.

Fears for sons

[30] The husband fears that his sons' lives are also at risk owing to the conflict with CC and DD. He also fears for their safety should they be required to perform compulsory military service. Notwithstanding, the husband has been careful not to influence the elder son's views on military service (who is soon eligible to enlist) as he believes that this is a personal, individual decision that only he should make. Their family collectively support each member's freedom of expression, in every respect, including in politics and voting matters. The husband believes that the right to choose whether to perform military service should be the right of everyone.

[31] The husband also recognises that every individual is different. In his own case, he grew up familiar with firearms, and his father always had hunting rifles around. He and his father both served in the military. The husband served in the eastern region of Turkey, and his father served abroad in the Korean War. By contrast, the elder son has never shown any interest in the military or in weaponry. In fact, from a very early age he has had a phobia of firearms. This phobia was triggered at approximately seven years of age when he witnessed a group of armed men engaged in conflict on the street. Since then, he has feared and avoided environments where firearms may be used. He even refuses to visit his paternal grandparents' home in the village as he knows that hunting rifles are held there. He is also afraid of attending wedding ceremonies where it is customary to fire shots

into the air. When shots are heard randomly in their home area, he enters into a state of shock.

[32] The husband has noticed that, from the age of 14 years, his elder son's sense of identity and his view of the world has been crystallising. The elder son first began to speak to the husband about the issue of compulsory military service several years ago. He told his father strongly and clearly, that he does not want to serve in the military and that he is afraid of weapons. The elder son holds views that military service should be voluntary and is considering a career in engineering, however, he is not yet firm in his choice of vocation as he is still young and maturing. He is a good student and excels in his studies at school.

[33] Personally, the husband does not want either of his sons to endure the harsh experiences he encountered whilst performing military service. He also fears for their safety as there is always a risk of armed conflict, domestically and internationally, with the Turkish military engaged in numerous countries, including Iraq, Syria, Russia, Israel, Greece, and Cyprus. Although there have been recent changes to military service policy, and there are now pay-out options for exemption from military service, given the family's serious financial indebtedness, they would be unable to afford to pay the military exemption fee for either of their sons.

The Evidence of the Wife

Family background

[34] The wife, of Georgian ethnicity, was born in the 1970s in Z town, Y district, Turkey and raised in the Sunni Muslim faith. Her grandparents emigrated from Georgia to Turkey and her parents were born in Turkey. She has three siblings. One of her brothers lives in Istanbul, another in U city (approximately 100 kilometres from Z town), and she has a sister who lives in T city. Her parents remain living in Z town.

[35] The wife completed her primary and secondary education in Z town. She was treated differently at school because of her Georgian ethnicity and was told by her family not to speak the Georgian language, of which she has reasonable command.

[36] The wife married the husband in 2001 and they now have two sons aged seven and 17 years. During their marriage, the wife lived with her husband and

sons in a rental property, approximately five minutes walking distance from each of their respective parents' homes.

[37] The wife encountered significant stress owing to the collapse of her husband's transport business in 2011, in which he was joined by two other business partners, CC and DD. The business entered into bankruptcy after one of the business's trucks was burnt out and the business could not meet bank loan repayments. The business's assets were confiscated, in addition to personal items of the appellants, such as household furniture.

[38] The wife became aware that her husband was being threatened by CC and DD, who considered that the husband, who was ultimately responsible for the business, owed them money. CC threatened to harm the family and to kill the husband. Soon after, the husband moved to V country, where he worked as a truck driver. He returned to visit the wife and sons in Z town approximately once or twice a month.

[39] Between 2011 to 2013, whilst the husband was living in V country, the wife also received threats from CC, DD and CC's wife, who all demanded that her husband repay the debt owed or "face the consequences". They told her that they had no choice but to pay and would not get away. They also engaged mutual friends to convey similar messages. On one occasion, the wife was accosted by CC's wife in a shopping mall. As CC's wife rushed towards her, two persons intervened and held her back. CC's wife demanded that the appellants repay her husband.

[40] The wife was contacted by telephone every two weeks by CC, two to three times a month by his wife, and once a week by DD. On some occasions her sister was present when she received these threatening telephone calls.

[41] The husband was repeatedly threatened by these persons while living in V country. When he returned to Z town, the threats continued.

[42] The husband reported CC's and DD's threatening behaviour to the local police in Z town on one occasion, but they took no action.

[43] The wife and sons travelled to New Zealand to join the husband in October 2015. Since their arrival here, the wife has learned that the husband's parents, and her own, have been visited several times a month by CC and DD with demands that the appellants repay the purported debt.

[44] It would not be possible to return to Z town, or to live elsewhere in Turkey, as CC and DD would find the appellants and kill them. In their region in Turkey, disputes of this nature fester for years and do not dissipate.

Fears for sons

[45] The wife does not want her sons to perform military service and endanger their lives and the lives of others. The elder son will soon be eligible for conscription and has a phobia concerning firearms which developed when he was a boy. When he was approximately seven or eight years of age, whilst the wife was escorting him to school one morning, they found themselves in the midst of a conflict in which a group of men were armed. Since then, the elder son has avoided situations where guns feature, including visiting the husband's parent's home in the village.

[46] The elder son has always claimed that he would never hold a firearm. As an example, he would repeat this view whenever military operations featured on the news. He believes that military service should be voluntary and not compulsory. He has expressed his opposition to the taking of life and ill-treatment, which go hand-in-hand with the military, and he does not want to be forced to partake in such acts. As the son has matured, and as he approaches the age at which he will be liable to perform compulsory conscription, he has increasingly expressed these views. He plans to have a career in either architecture or engineering and has been actively advised by his teachers about what subjects he needs to undertake to prepare for either of these career paths.

The Evidence of the Elder Son

[47] The elder son is 17 years of age. He is aware that his parents have been under pressure from individuals whom they fear in Z town, but his parents have not disclosed details to him and have tried to protect him from their problems.

[48] The son is opposed to performing compulsory military service. He would like to build a life and a career that does not include performing military service. He would not be able to even hold a firearm. He developed a phobia of firearms when he was a young boy after he and his mother became trapped in an armed conflict between a group of men. The men were armed with firearms and attempting to shoot one another. Since then, he has avoided events and places where he knows firearms will be present, including the bedroom in his paternal grandmother's home in their village, where he knows his grandfather keeps his firearm used for hunting. When he sees a firearm, he cannot control his reaction and closes his eyes in fear.

His memory takes him back to the moment when, as a boy caught in an armed conflict, he first experienced fear of firearms. He is aware that his father has a photograph in their home in Turkey of himself in military uniform holding a firearm. He considers that community pressure causes men to join the military, but conscription should be a matter of choice. Some of his friends are excited about joining the military, but he never wants to even hold a firearm, much less kill anyone.

[49] The elder son has discussed his views about performing military service with his parents. They consider that he must form his own views about military service. When the son hears news of military operations and of soldiers killing others, he is resolved that he does not want to kill, and he does not want to die. He considers that shooting another person, even as a soldier, is akin to murder, and that there is no difference. He knows that the military are deployed and engaged in dangerous conflict zones, including in Syria, and does not want to be a part of this.

[50] If he returned to Turkey, the elder son would be forcibly conscripted to perform military service. He has heard of severe consequences for deserters and is too afraid to attempt to evade military service. However, once enlisted he would not be able to comply with the requirement to even hold a gun or perform weapons training. He claims "I can't control my reactions when I see a gun. I can't even hold one" and "All soldiers have to do weapons training. I don't want to hold a gun. It risks me to kill another person. It is no different from murder. I don't want to kill someone".

The Evidence of the Wife's Sister

[51] The wife's sister, BB, gave evidence by telephone to the Tribunal.

[52] BB lives in T city, in Turkey. She is aware of the conflict between the appellants and CC and DD. After the husband's business entered into decline in 2010/2011, these individuals demanded that the debt owed to them be repaid. They have threatened the husband and wife with physical harm. BB is not aware whether these threats have escalated to the making of death threats. These individuals called the wife on the telephone and demanded that her husband pay the sum owed them. When the husband relocated to V country for work, the wife was alone and became very stressed from incessant calls of this nature. BB was present when some of these calls were made.

[53] Since the appellants have been in New Zealand, CC has visited the husband's and wife's parents continuing to put pressure on the family for the debts to be repaid.

Material and Submissions Received

[54] On 22 August 2019, counsel provided written statements for the husband (21 June 2019), wife (undated) and the wife's brother (15 April 2019).

[55] On 3 September 2019, counsel provided written opening submissions. Counsel also tendered country information.

[56] At the hearing on 9 September 2019, the Tribunal provided counsel and the appellant with country information.

[57] At the hearing on 10 September 2019, the Tribunal granted leave for counsel to file written closing submissions by 23 September 2019. Counsel later sought an extension of time to file these submissions. An extension was granted and on 25 September 2019, counsel provided closing submissions, a copy of the biodata page of the wife's sister's passport, and further country information.

ASSESSMENT

[58] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention" or "the Convention") (section 129); and
- (b) a protected person under the 1984 *Convention Against Torture* (section 130); and
- (c) a protected person under the 1966 *International Covenant on Civil and Political Rights* ("the ICCPR") (section 131).

[59] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants' accounts.

Credibility

[60] The Tribunal accepts the core of the appellants' claim that the husband established a transport business in his name, and was joined by two business partners, CC and DD. The business later entered into bankruptcy owing to the cancellation of a core business contract and destruction of one of the business's trucks. The Tribunal also accepts that enmity grew between the husband and his former business partners who believed that he was responsible for the business failure and that he personally owed them money from the business. It is also accepted that the business partners persisted in claiming their purported entitlements. The appellants' evidence in these areas was detailed, consistent and clear.

[61] However, the Tribunal finds that evidence of the nature, level and frequency of threats made by CC, DD and some of their family members, has been exaggerated by the husband, wife and witnesses who appeared on appeal. There are implausible dimensions to the claim and inconsistencies in the husband's and wife's accounts themselves, and between their evidence and the witnesses on appeal. Their evidence also grew mobile in areas. The Tribunal sets out, in full, its reasons below.

Implausible account of nature and frequency of threats made

[62] Although the appellants claimed that CC and DD issued threats of harm to the appellants on a frequent and continuous basis – escalating in the case of CC to direct death threats to the husband, including threatening him with a weapon – at no time were any attempts made to physically harm the husband over the two years the husband remained living in Turkey, sharing his time between V country and Z town (where he returned several times a month to visit his family). Nor were any attempts made to physically harm the wife, who continued living in Z town up until coming to New Zealand some four years after the threats first commenced.

[63] Such circumstances, considered alone, could reflect the fact that the threats were idle, and fall squarely for consideration in the downstream assessment of well-founded fear. However, there are other implausible aspects to the account and a host of inconsistencies which cause the Tribunal to find the account of the nature, intensity and timeframe of the threats to be implausible.

[64] When the Tribunal asked the husband why CC and DD would be motivated to pursue him for so long as claimed, given their claimed personal wealth and the

futility of claiming substantial payment when they knew that the extensive loss experienced by husband and his family made such demands futile, he responded that it was a “show of power”. The Tribunal finds this explanation to be lacking in vigour and falls well short of explaining the intensity of the pursuit.

[65] It is also implausible that the husband would leave his family and live separately in V country, some distance away from them, when they had also been threatened with serious harm. Asked to explain these circumstances, the husband stated that it was easier to keep a low profile in V country and that, if his family joined him they would be conspicuous. He believed it easier for them to remain with family in Z town. However, this explanation does not address the reality that in Z town, the family’s living arrangements were well-known, and they would be within easy striking distance should CC or others seek to follow through on the threats made. The husband also added that his living circumstances would not be suitable for his family as he slept on a construction site. However, while relocation of the family to another city such as V country might present a challenge, there is no evidence that such a challenge would be insurmountable.

[66] Were such threats made and taken seriously, as claimed, it is inevitable that the husband and wife would have taken measures to ensure the family members were safe. Not only did the husband move away from the family in Turkey, he then left altogether, moving to New Zealand and leaving his wife and family behind for some two years before they joined him here.

[67] The husband claimed that the risk to his family was mitigated by their living near family. However, his evidence was that CC was armed with a firearm and living in the same locality as the wife and sons. Had he been motivated to harm them, he could easily have done so.

[68] In light of all of these considerations, the Tribunal does not accept that the husband and the wife were the subject of plausible threats of violence as they have claimed.

Inconsistent evidence of threats from CC with firearm

[69] The most serious of the threats recounted by the appellants was the husband’s claim that CC threatened him, on a monthly basis, with death and with a firearm. However, the husband’s evidence as to how CC threatened him with the firearm was inconsistent before the RSB and the Tribunal. At the RSB, the husband claimed that, on one occasion, CC “drew a gun” on him. By contrast, during his

hearing before the Tribunal, he stated that CC did not draw or point a firearm at him, but rather put his hand on his firearm which was fastened on his hip. Asked to comment on this discrepancy in his evidence, the husband stated that he had not claimed that CC “drew a gun”. Reminded that he had stated this several times in his evidence to the RSB, the husband simply maintained his claim to the Tribunal.

Inconsistent evidence of threats by CC’s and DD’s family members

[70] Before the RSB, the husband also claimed that CC’s father had threatened him with a firearm. However, when asked by the Tribunal whether CC’s father had threatened him with a firearm, he responded that he had not done so. Reminded of his earlier evidence to the RSB and asked to comment on the discrepancy, the husband changed his account and maintained his earlier evidence to the RSB. Asked by the Tribunal to further explain the discrepancy, he could provide no sensible explanation and simply commented, in the abstract, on the difference between holding and pointing a firearm at a person.

[71] The husband also told the RSB that DD’s brother, EE, made demands and threatened him with physical harm. However, when asked by the Tribunal if any member of DD’s family had threatened him, he responded that they had not. Reminded of his earlier evidence, the husband then changed his evidence and stated that EE had in fact threatened him and that he was often with DD when he made contact with the husband to harass and threaten him about the money he believed the husband owed him.

[72] The Tribunal does not accept this explanation. Had EE appeared frequently with DD when he made demands and threats as claimed, the husband would have recalled this. His mobile explanation for the inconsistency is an attempt to cover up a fabrication on his part.

Contradictory accounts as to the manner of delivery and nature of CC’s threats

[73] The husband was adamant that CC had been careful not to deliver any death threats or threats of harm through written means or by telephone, which could later be used as evidence against him.

[74] However, this is inconsistent with evidence given both by the wife and by the wife’s brother.

[75] The wife claimed that CC had threatened the husband with physical harm by telephone.

[76] The wife's brother gave evidence that was inconsistent in a different way. Although unable to give evidence at the hearing owing to health concerns, he provided a written statement in which he stated, with respect to his knowledge of threats made by CC to the appellants, that: "I saw the death threatening messages".

[77] Asked to comment on these contradictions, the husband stated that it was possible that, having heard that CC had threatened the husband, the brother had exaggerated these, hoping to assist the appellants with their refugee and protection claim.

[78] When the wife was asked to comment on the difference between her claim (that the husband was threatened with physical harm during a telephone call) and her brother's statement (that the threat was in written form, by text) she stated that her brother must have seen messages of warning from CC to the appellants and interpreted the threat to be a death threat. In effect, the wife could provide no sensible explanation for this inconsistency, as there has been no consistent evidence that any threats CC made were in writing.

[79] Asked to explain the discrepancy in these accounts, the husband maintained his own account, as did the wife. They were unable to reconcile their evidence.

Inconsistencies between appellants' evidence and evidence of the wife's sister concerning the level of threats made by CC

[80] The wife's sister gave evidence to the Tribunal that she had no knowledge that death threats had been made to the appellants. That was inconsistent with evidence given by the wife to the Tribunal, that she had conveyed to her sister the warnings and threats the family had received (including death threats), and that her sister had been present while she had received a number of telephone calls from CC and DD.

[81] Asked to comment on this contradiction, the wife stated that "she [her sister] knew what I know". She explained that such events took place a long time ago. That is true and this may not be significant in isolation but, given that the wife had claimed to the RSB and the Tribunal that the appellants were fearful for their lives, and that she had told her sister what she knew about the extent of the demands and

threats, it is surprising at least that the wife's sister could not recall this while giving evidence to the Tribunal.

Husband's inconsistent evidence of threats conveyed to wife

[82] The husband also gave inconsistent evidence as to who contacted his wife and relayed messages and threats to her. At the RSB, he stated that CC, his father and his wife, each repeatedly contacted his wife about the money owing. However, to the Tribunal, he stated that it was only CC's wife who made contact with his wife. Asked to comment on this apparent discrepancy, the husband stated that he was stressed and did not know all the details because such events happened directly to the wife. However, the husband had claimed to be aware of the extent of the threats at the RSB, and given the shared security risk for the family, he could be expected to know who was threatening and relaying messages to his wife.

Inconsistent evidence between the husband and wife of reports made to police

[83] The husband and wife also gave inconsistent and mobile evidence as to whether the husband reported the threats made by his former business associates to the police. When the Tribunal asked the wife whether the husband had reported the threats to the police, she stated that he had not. Reminded that her husband claimed that he had reported the threats to the police on one occasion, she changed her account to be consistent with that of her husband.

Conclusion on credibility

[84] Counsel submits that the Tribunal must take into account the cultural context in which the threats were made against the appellants. She recites the husband's and wife's evidence that hostilities persist for a very long time in Turkey and are passed from generation to generation. She also submits that the husband's former business associates "remain extremely angry and vengeful" over what they perceive as a "serious wrong" committed against them and that they continue to present a "very real" threat.

[85] However, even accepting the long-standing nature of family feuds in Turkey, and the emotive nature of disputes of this kind, these factors do not adequately explain the disjunct between the claimed nature, intensity and timeframe of the threats made towards the appellants, and the lack of any attempt to carry out the threats, despite the existence of clear opportunities to do so.

[86] Cumulatively assessed, the mobile, inconsistent and implausible aspects of the appellants' and their witnesses' accounts, of the threats of serious harm and death, cause the Tribunal to reject this evidence. In doing so, the Tribunal is mindful of the differences in memory recall between witnesses, cultural differences, the effects of stress on memory and the effluxion of time. However, such factors cannot explain the concerns outlined above.

Facts as Found

[87] The husband and wife, of Georgian ethnicity and in their 40s, were born in Z town, Y district, Turkey. The husband's sister and parents continue to live in Z town. The wife's parents live in Z town and she has a brother living in V country, a sister in T city, and another brother in U city, approximately 100 kilometres from Z town.

[88] The husband's family moved to V country in the 1970s where he completed primary school. They then returned to Z town where the husband completed his secondary education. The wife completed her primary and secondary education in Z town. During their school years, they experienced some insults on the basis of their ethnicity.

[89] The couple married in 2001 and they have two sons. The younger son is a child, aged seven years. The elder son is 17 years old. They are both Turkish nationals.

[90] The husband established a transport business in his name and was later joined by two business partners, CC and DD. In 2010, the business entered into financial difficulties and was forced to close. The husband's parents sold their home and a production farm to help pay some of the debt owing. The business still owes an unquantified amount of debt to the tax department. The husband's business partners also believe that he owes them money for their contributions to the business and have placed pressure on the husband to pay them accordingly, but it is not accepted that the appellants have been subjected to genuine threats of violence.

[91] The husband travelled to New Zealand in April 2013 and the wife and sons arrived in October 2015.

[92] The elder son has a long-standing fear of firearms. Since the age of seven years, when he witnessed armed men engaged in conflict in the street on his way to school with his mother, he has feared the sight of firearms, and has avoided

places and occasions where he anticipates firearms will be present or used, including his grandparent's home in the village (where a hunting rifle is held) and weddings (where firearms are fired). The son becomes upset and fearful, and cannot control his reactions, when he sees or hears a firearm. The Tribunal has not had the benefit of any expert opinion as to whether he has a phobia as claimed. However, having questioned him closely and considered his responses it is accepted that his views are genuine and sincerely held.

[93] Although only 17 years of age, the son has thought seriously about life, death, war and their meaning to him. His fears have persisted throughout his adolescence, stemming from a traumatic childhood incident, and within the pervading militaristic culture, have developed into strong views in opposition to holding and using a firearm and against the taking of life. The son has given considered thought to the fact that his father and grandfather both performed military service, and does not seek to follow their path, which he dismisses as unheroic. He is firmly of the view that the use of a firearm, and the taking of lives, even in a military operation, is akin to murder. The son has maintained and strengthened these views over time and confided these to his parents, who have given him autonomy to forge his own views. Such views have become fundamental to his identity and he believes he should be able to exercise his right to choose not to perform military service.

[94] It is on this basis that the Tribunal will assess the appellants' claims.

The Refugee Convention

[95] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[96] Article 1A(2) of the Refugee Convention provides that a refugee is 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."

[97] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[98] For the purposes of refugee determination, “being persecuted” requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]–[130] and [177]–[183].

[99] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the husband and wife being persecuted if returned to Turkey?

[100] The Tribunal accepts that the husband’s former business partners have made demands for the reimbursement of money which they consider the business owes them. The Tribunal acknowledges that the husband and wife have suffered psychological effects from the failure of the business. The wife’s sister expressed that the wife had experienced “mental anguish”. It is also accepted that they have experienced a level of harassment from the former business associates concerning the purported debt. Upon return to Turkey, the former business partners may continue to make demands and harass the appellants to some extent.

[101] However, the Tribunal rejects the appellants’ claim that they received threats of physical harm and death. The harassment experienced, even cumulatively assessed, does not breach any of the appellants’ fundamental human rights nor does it reach the level of serious harm. Further, it would not do so if such harassment was to be replicated in future.

[102] While the husband and wife may face some level of discrimination in the future on account of their Georgian ethnicity, and the wife some discrimination on the basis of her gender, there is no evidence that this will reach the level of serious

harm. On appeal, the appellants confirmed that they no longer rely on these statuses as a ground for persecution.

[103] There is no real chance of the husband or the wife being persecuted upon return to Turkey.

Objectively, on the facts as found, is there a real chance of the elder son being persecuted if returned to Turkey?

[104] The elder son's fear of serious harm on the basis of continued threats from former associates of the husband can be dismissed shortly, for the same reasons as expounded above. There is no credible evidence of any threats of serious harm being made against any of the appellants and no real chance of any such threats being carried out in the future. While the son may experience some mental distress over the family's predicament and from any continued demands or harassment made by the former business associates, and having regard to his particular vulnerability as an adolescent, such does not rise to the level of serious harm.

[105] The Tribunal turns now to consider the elder son's opposition to performing military service.

COUNTRY INFORMATION

[106] In order to comprehensively assess the elder son's opposition to performing military service, it is necessary to briefly outline a backdrop of country information on the structure, composition and engagement of the Turkish armed forces, the legal framework for military service, and the treatment of conscripts and draft evaders.

Structure, composition and engagement of the Turkish Armed Forces

[107] The Turkish Armed Forces (TSK) comprise three military branches, namely, the Turkish Land Forces, Turkish Naval Forces and Turkish Air Forces, and has approximately 657,000 personnel. According to recent figures, the army employs 23,789 officers, 62,174 non-commissioned officers, and 73,966 specialist sergeants and corporals. The remainder are contract officers or civilians without military academy training who are recruited upon application as entry-level officers: "Parliament Adopts Bill Reducing Conscription, Making Paid Military Service Exemption Permanent" *Daily Sabah* (25 June 2019); and Central Intelligence Agency *The World Factbook: Turkey: Military* at www.cia.gov.

[108] In short, the TSK is responsive to primary domestic threats, including fundamentalism, separatism (Kurdish discontent) and the extreme left wing. Since the 1990s, faced with multifaceted threats emanating particularly from the Middle East, the TSK has carried out operations in countries such as Syria and Iraq. It also contributes to international security and peacekeeping operations under the NATO, UN and EU frameworks: see Y Gürsoy *Turkish Defence Policies and Armed Forces: Continuities and Changes Since the Cold War* European Consortium for Political Research (draft for the 2017 ECPR General Conference); S Hacaoglu “Mapping the Turkish Military’s Expanding Footprint” *Bloomberg* (7 March 2019).

The legal framework for military service

[109] All male citizens are subject to compulsory military service in Turkey. Military conscripts are called to register at the age of 20 (they are called to report to the military draft branches between July 1st and October 31st of the year of their twentieth birthday) and enter service at 21 years of age. Relevantly, Article 2 of *Turkey: Military Law No.1111 of 1927, Military Law (20 March 1927)* (published by National Legislative Bodies/National Authorities), provides:

“Military [eligibility] age for every man shall be according to his age recorded in his basic citizenship register and shall begin on 1st January of the year when he reaches the age of 20 and shall end on 1st January of the year when he reaches the age of 41.”

[110] There is no civilian alternative to military service: Immigration and Refugee Board of Canada (IRB) Turkey: Military service, both compulsory and voluntary, including requirements, length, alternatives and exemptions; consequences of draft evasion and conscientious objection (2011-May 2014) [TUR104876.E] (4 June 2014) (“IRB report”). However, there are some limited exemptions. Article 10 of Military Law No 1111 provides that those who are not physically or mentally fit for military service are exempted from performing military service. Several other exemptions apply to those who are brothers or sons of martyrs “who fell victim to terrorism during their military service” or those who have gained Turkish citizenship by way of migration and who have enlisted or completed their military service in the state they migrated from. Students are also permitted to complete their higher education in universities or institutes before being conscripted, provided they preserve their student status and are not older than 35 years of age: see Organisation for Security and Cooperation in Europe (OSCE) Response by the Delegation of Turkey to the Questionnaire on the Code of Conduct on Politico-Military Aspects of Security (14 June 2017) at p14.

[111] There are also “buyout options,” in other words, options for payment for exemption from military service. The conditions and applicable sums have varied considerably over time, and have been increasing over recent years. The United Kingdom Home Office reports, in *Country Policy and Information Note Turkey: Military Service* (September 2018) (“the UK Home Office report”) at 4.4.2, that:

“According to Information received from the Turkish Ministry of Foreign Affairs in April 2018, legislation governing the military service exemption of Turks living abroad – The Law on the Amendments to the Military law – was adopted on 14 January 2016, and was valid from 27 January 2016 to 31 December 2017...This entitled certain citizens meeting a number of criteria, to be exempt from military service upon payment of E1000 (or equivalent).

This particular option for buyout ended in December 2017 as intended. It was essentially a special deal, offering a much lower buyout fee. The process has gone back to the previous system, where applicants were paying 6,000 Euros...”

[112] Notably, in June 2019, Parliament adopted a bill that reduced compulsory conscription from 12 to six months. It also specified that conscripts can opt to pay TL30,000 (approximately €5000-6000) in order to undergo only one month of military training and be exempted from the remaining five months: “Parliament Adopts Bill Reducing Conscription, Making Paid Military Service Exemption Permanent” *Daily Sabah* (25 June 2019).

[113] In terms of enforcement of these provisions, the IRB reports says that, Article 45 of the Turkish Military Penal Code provides that: “Individuals may not evade military service, and penalties may not be revoked, for religious or moral reasons”. Article 63 of the Law on Absentee Conscripts, Draft Evaders, Persons Unregistered and Deserters (National Legislative Body / National Authorities *Turkey: Law of 1930 on Absentee Conscripts, Draft Evaders, Persons Unregistered and Deserters* (22 May 1930)), carries the following penalties:

“One month imprisonment for those who report to the authorities within seven days;
 Three months for those who are arrested within seven days;
 Three to twelve months for those who report within three months;
 Four to eighteen months for those who are arrested within three months;
 Four to twenty-four months for those who report after three months;
 Six to thirty-six months for those who are arrested after three months.”

[114] According to several sources, sentences of up to ten years’ imprisonment can be imposed in the case of aggravating circumstances, such as self-inflicted injuries, or using false documents: IRB report; and the United Kingdom Home Office report.

The Allocation of conscripts between the branches of the armed forces

[115] As depicted above, since June 2019, cognisable changes have been made to military service obligations in Turkey. Whereas the TSK was previously a conscript army with conscripts deployed to conflict areas, in recent years, it has become increasingly professionalised, to the point that the TSK has ceased sending conscripts to conflict zones.

[116] Various reports refer to such changes and their effect within the TSK as “radical structural reforms” and a “new system”. The NATO Association of Canada reported in *Professionalization of the TSK: ‘Contractual Soldiering’ in Turkey* (21 May 2016) at natoassociation.ca that:

“In recent years, the military service system in Turkey has gone through a set of radical structural reforms that aimed to transform and professionalize the army by moving from a rigid conscription system, which requires non-university graduate men aging from 21 to 41 to serve 12 months as a soldier, towards a contract-based ‘soldiering’, which allows recruits to re-enlist for another term thereby increasing the number of professional soldier and maintaining personnel continuity.”

[117] The news report, “Parliament Adopts Bill Reducing Conscription, Making Paid Military Service Exemption Permanent” *Daily Sabah* (25 June 2019), also reports that:

“The new system aims to boost the efficiency of the army and enable it to switch a ‘professional’ concept relying on well-trained professionals instead of young men who had to undergo short military training before being dispatched to risky areas for counterterrorism operations. Turkey already abandoned deployment of conscripts to risky zones and through new system, aims to decrease the number of conscripts as low as possible while boosting revenues with paid military service.”

[118] In the same vein, the Netherlands Ministry of Foreign Affairs *Thematic Country of Origin Information Report Turkey: Military Service* (July 2019) (“Netherlands MFA report”) states at p132:

“The army stopped deploying conscripts in combat operations a few years ago. Military operations are carried out by professional soldiers, both in south-eastern Turkey and in Iraq and Syria. Although conscripts could still be deployed in active conflicts or military operations, including counter-terrorism operations, in the 1990s and early 2000s, this is no longer the case.”

[119] Further, as explained by E Güvendik in “More Cash, Greater Efficiency Under New Conscription System” *Daily Sabah* (14 June 2019):

“Military service is viewed as a patriotic duty by the majority of Turkish citizens, but it also poses a dilemma for the army which has to provide professional training to thousands of inexperienced conscripts in a short time. The country already decreased the number of conscripts, especially in risky areas where counterterrorism operations against the PKK terrorist group are being conducted in

southeastern and eastern Turkey. It also started hiring contract officers to aid career officers in risky operations and for the defense of national borders.”

[120] The news report “Over Half a Million Turkish Citizens Apply for Paid Military Exemption” *Daily Sabah* (15 September 2018) also states that:

“Currently, the army consists largely of conscripts that Turkey only recently stopped deploying for counterterrorism and other risky operations.

Previously, soldiers were forced to serve in dangerous areas with little training in their short tenure in the military often ending up killed in counterterrorism operations.”

[121] In “Gov’t in Talks With Parties Over New Military System” *Hurriyet Daily News* (13 June 2019), President Erdogan is reported as explaining that:

“In critical missions, all our troops, especially those tasked in the fight against terror, are composed of regulars. Conscripted soldiers are generally tasked in ground missions and garrisons”.

[122] This transition has not been without challenges. The TSK has long relied on conscripts rather than career officers, particularly in noncombat duties. Recent changes have applied pressure to provide professional training to thousands of inexperienced conscripts in a short time: “Parliament Adopts Bill Reducing Conscription, Making Paid Military Service Exemption Permanent” *Daily Sabah* (25 June 2019).

[123] What is clear, however, is that it is no longer the case that the TSK is substantially comprised of conscripts who were randomly allocated to units and deployed to areas of conflict as was found by the Tribunal in previous cases of this nature, such as *AC (Turkey)* [2012] NZIPT 800246 at [48] and [49], and as adopted in *AD (Turkey)* [2013] NZIPT 800363. By way of contrast to the current position, at paragraphs [48] and [49] the Tribunal in *AC (Turkey)* stated:

“There are currently some 600,000 persons serving in the Turkish armed forces, of whom some 500,000 are conscripts (see War Resisters International, at www.wri-irg.org). Of them, some 515,000 troops are on active duty (see www.globalsecurity.org), with many in the south-east of the country where the conflict against Kurdish separatist groups is concentrated. If even one third of the armed forces are actively involved in fighting Kurdish separatist groups, it would give the appellant a one in three chance of being required to undertake active service in the south-east. As to the random selection of conscripts for service in the south-east, see the United Kingdom’s Country of Origin Research and Information Unit’s CORI Research Analysis Tur0111.Military (20 January 2011):

‘ABC News reports that as members of the Turkish military, some Kurds, ‘fight the PKK rebel group that claims to represent them,’ further ‘Anecdotal evidence suggests the military is comfortable assigning Kurdish soldiers to combat against the PKK – [Burhan Ekinci, a journalist with Taraf newspaper] called deployments for ethnic Kurds and Turks alike a “complete lottery” – and indeed Kurdish soldiers are often familiar with the terrain in the rugged east.’

The fact that the Turkish military is substantially comprised of conscripts, coupled with the high numbers actively serving in the south-east and what appears to be a

random system of allocation to units, establishes a likelihood of deployment to the south-east region that crosses the real chance threshold...”

Treatment of conscripts during military service and draft evaders

[124] The ill-treatment of conscripts serving within the TSK and those who evade or desert military service, has been widely reported.

[125] Asker Haklari (The Rights of Conscripts Initiative), an organisation that receives and reports abuses against conscripts, records that they received 432 complaints between April 2011 and April 2012, of insults, beatings, forced excessive physical activity, denial of proper health care, threats, disproportional punishment, sleep deprivation and institutional bullying: A Haklari, *The Rights of Conscripts Initiative Executive Summary of the Report; Violations of the Rights of Conscripts in Turkey* (2012) as cited in the IRB report at 1.1.

[126] The European Commission’s 2013 Progress Report for Turkey recorded that it had received reports that conscripts were subjected to ‘ill-treatment’ in the TSK. The European Commission stated that, because of this, Parliament’s Human Rights Inquiry Committee had opened a “monitoring dossier” on human rights abuses committed during military service: European Commission *Turkey 2013 Progress Report* (16 October 2013) as cited in the IRB report at 1.1.

[127] A similar picture is conveyed by sources relied upon in IRB report that conscripts were subjected to ill-treatment, severe beatings and that there were a high number of suicides among conscripts. The Netherlands MFA report also records at 3.1 that, according to media reports, conscripts in the TSK have experienced severe bullying, physical abuse and torture, sometimes contributing to suicide.

[128] That this practice continues up to the present time is conveyed by the United States Department of State *Country Report on Human Rights Practices 2018 – Turkey* (13 March 2019) at p2, which record again that, “[a]ccording to media reports, some military conscripts endured severe hazing, physical abuse and torture that sometimes resulted in suicide in 2018”.

[129] With respect to reported suicides in the TSK, the article “1036 Committed Suicide on Drafting in 12 years” *Bianet* (December 2013) reports National Defence Minister Ismet Yilmaz as stating that there had been at least 1036 recorded suicides for conscripts during compulsory training since 2002: see also “More Turkish Soldiers Died from Suicide Than Combat in 10 Years: Panel” *The Daily Sabah*

(14 March 2015); and European Commission *Turkey Progress Report* (8 October 2014).

[130] Concerning the treatment of draft evaders and deserters, the Australian Government - Department of Foreign Affairs and Trade (*DFAT Country Information Report – Turkey* (5 September 2016) records at p28 that the Turkish authorities maintain a sophisticated national database of military service which makes evasion “almost impossible”. Even in the instance of being stopped by police for a traffic infringement, their military service record will be cross-checked at the same time. Should a conscript fail to report for duty, their name and address will be forwarded to the security authorities by the administrative authorities and the police and gendarmerie will then be authorised to begin to search for these persons: IRB report.

[131] Draft evaders and deserters are subjected to prosecution and face periods of imprisonment according to the military law. Upon detention, and whilst serving sentences, they may be subjected to ill-treatment. Those who continue to evade conscription are subjected to increasing penalties. Amnesty International provides the example of a conscientious objector who was prosecuted and sentenced on three repeat occasions for draft evasion in 2006, and again in 2009 and July 2013. He was subjected to ill-treatment on these repeat occasions. Amnesty International further records the view expressed by the NATO Implementation Force (IFOR) that most conscientious objectors who have been detained in Turkey have reported physical mistreatment: Amnesty International *Urgent Action: Conscientious Objector Detained in Turkey [EUR 44/018/2013]* (18 July 2013).

[132] Other accounts of repeat arrests, imprisonment and mistreatment of conscientious objectors who evade or desert military service are conveyed in, for example, Jehovah’s Witnesses *Turkey Refuses to Conform to European Standards in the Matter of Conscientious Objection* (17 March 2014) at www.jw.org, which records that:

“[Feti Demirtas] has been prosecuted ten times and has served in prison for more than a year and half.

When first arrested, a sergeant ordered him to put on a military uniform but Feti refused - he chose to obey his Bible-trained conscience. The base commander then had him brought in front of 400 men and ordered Feti to put on a military uniform. Again he refused. During this first imprisonment, he was verbally abused, kicked in the head, shoulders, and legs, and slapped in the face by prison guards.

Upon his fifth arrest and imprisonment in April 2006, guards forced Feti to strip to his underwear so that he might put on the uniform. When he would not put on the uniform, guards put him in the disciplinary barracks for four days. In an effort to break his will, they handcuffed him to an iron bar on his bed at night and to prison bars during the day. Feti said, ‘I was fearful during the day and could not sleep at

night due to my real and ever present fear of the type of mistreatment I might experience next. Although I was emotionally drained due to my treatment, I remained determined to live by my conscience’.”

[133] In “Turkey: Conscientious Objector Ossi Harassed Again” *War Resisters International* (21 November 2017) it is reported that:

“Astoundingly, two decades after his imprisonment, Osman Murat Ülke was summoned to the police station again this week by the prosecutor... who has reopened his case, and ordered him to make a statement at the local police station. Ossi was the first conscientious objector arrested in Turkey, having burnt his military papers publicly at a press conference in Izmir on 1 September 1995. The following decade included repeated arrests and imprisonments, and his case was eventually taken to the European Court of Human Rights, which ruled in his favour.”

THE RELEVANT HUMAN RIGHTS

[134] The right to freedom of thought, conscience and religion, as contained in Article 18 of the ICCPR and Article 14(1) of the Convention on the Rights of the Child (CRC) is at the heart of this inquiry. Also, of relevance is the right to be free from cruel, inhuman or degrading treatment or punishment contained in Article 7 of the ICCPR and the right to be heard, as set out in Article 12 of the CRC.

Freedom of Religion and Belief

[135] Article 18 of the ICCPR provides:

“Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

[136] Article 7 of the ICCPR provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

[137] Article 7 is an absolute and non-derogable right. In *AC (Syria)* [2011] NZIPT 800035 at [82]–[83], the Tribunal made the following observations about the scope of Article 7:

[82] That said, it is important to bear in mind that the level of harm required to constitute cruel, inhuman, or degrading treatment or punishment, whether for the purposes of the being persecuted analysis or as a stand-alone issue in the protected person jurisdiction, is a relatively high one. There is a broad acceptance in international jurisprudence and academic commentary that, whatever else may be required, the anticipated harm must be of sufficient severity or seriousness to bring it within the range of harm proscribed by the prohibition against cruel, inhuman, or degrading treatment or punishment. See generally, M Nowak and E McArthur *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2010) at p558; W Kälin and J Kunzli *The Law Of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at pp320-333; K Wouters *International Legal Standards for Protection From Refoulement* (Intersentia, Antwerp, 2009) at pp381-391.

[83] The underlying rationale is identified by Kälin and Kunzli (*op cit*) at 329-330:

‘Not every case of infliction of pain or suffering violates the prohibition of torture and inhuman or degrading treatment or punishment. The ill-treatment must reach a certain threshold of severity, ie a minimum degree of intensity, to be covered by the prohibition. As reflected in the jurisprudence of the treaty bodies and regional human rights courts, this threshold cannot be determined in the abstract but is heavily dependent on the circumstances involved. ...

The need to determine where the threshold lies between conduct not covered by the prohibition on torture and inhuman or degrading treatment that falls within the substantive scope of the prohibition does not mean that exceptions could be justified with arguments that a certain treatment is proportional. Rather, the absolute nature of the prohibition means that any infringement above the threshold automatically constitutes a violation. It follows that one should be careful in not setting the threshold of applicability of this fundamental human right too low a level that trivialises and ultimately undermines the concept of torture. In our view, it is more appropriate to assess compatibility of a comparatively minor infringements with human rights law in the light of the right to privacy which is subject to certain limitations.”

The Right to be Heard

[138] Article 12 of the Convention on the Rights of the Child provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Objection to the Performance of Military Service

The general approach

[139] The Tribunal's legal approach to cases of this kind was considered in depth by the Tribunal in *DS (Iran)*, which summarised key propositions adopted by the Tribunal in prior cases such as *Refugee Appeal No 75378* (19 October 2005) and *Refugee Appeal No 71219/98* (14 October 1999). The Tribunal summarised these propositions in *DS (Iran)* at [245] as follows:

- (a) While there is nothing fundamentally unlawful about a state policy imposing a period of compulsory military service, a valid claim for refugee status may be grounded in an objection to performing military service in compliance with such a policy.
- (b) Entitlement to refugee status on the basis of an objection to military service can be viewed through the prism of Article 18 of the ICCPR.
- (c) Article 18 covers not just religious beliefs, but secular ones as well. Nevertheless, to come within the ambit of Article 18 the objection must be one which could be appropriately categorised as a "belief". Thus, a mere point of view based on personal inconvenience would not suffice. The RSAA held at [66]:

"To be potentially within the ambit of Article 18, any objection must, however, be one that can be appropriately categorised as a belief, if it is to be capable of being relied on by the individual to ward off a requirement of state that they perform military service against their will. Objections arising from matters amounting to personal inconvenience would not qualify. While the individual concerned has the right under Article 18(1) to privately think he/she should not be obligated to serve because of matters of inconvenience, this cannot sensibly be described as a belief. "Belief", in this sense, transcends mere point of view and rather describes a state of mind that is fundamental to the identity of the individual as a human being."

- (d) Whether or not coercion by the state to perform military service notwithstanding such a belief amounts to a violation of Article 18 depends on whether the policy of the state in question amounts to a permissible limitation in terms of Article 18(3) of the ICCPR. Thus, the limitation has to be prescribed by law, in pursuit of a legitimate aim, and be necessary and proportionate in a democratic society.

- (e) If the limitation meets the criteria of Article 18(3), the freedom to manifest that belief in Article 18 gives way to that limitation. Therefore, the mere fact that the state operates a policy of conscription does not, without more, ground a valid claim to refugee status.
- (f) The lack of provision by states of alternative forms of service for persons with genuinely held beliefs against performing military service does not, without more, give rise to a valid claim, although the lack of provision of such alternatives is a relevant factor in the assessment of whether such a claimant is 'being persecuted'.

[140] In *DS (Iran)* the Tribunal noted that, since these early authorities, there had been a number of relevant developments in the jurisprudence. In particular, it recorded that there had been a controversial shift concerning the way the Human Rights Committee conceptualised such claims within the framework of Article 18. Whereas, in earlier case law, it had approached the issue as a question of permissible limitations, in more recent case law, the majority had held that the right to conscientious objection was inherent in Article 18(1), such that any failure to provide for a proportionate form of alternative service amounted to a breach of Article 18(1). Under this new approach, it was not necessary to subject the issue to an Article 18(3) analysis.

[141] With respect to this shift in approach, the Tribunal commented at paragraphs [253] to [255] that:

"This jurisprudential development by some members of the Human Rights Committee has proved controversial. A number of long-standing members of the Human Rights Committee have issued individual opinions concurring with the outcome but challenging the new direction being taken. In the Tribunal's view they are right to do so. It is difficult to discern the logic of the reasoning of the majority. There is no convincing (or, indeed, any) explanation offered by the majority to justify the jurisprudential leap now being taken.

It can be readily accepted that a conscientious objection "inheres" to Article 18(1) – this is the point stressed in *Refugee Appeal No 75378* – although it is debateable whether this can be categorised, as the majority appear to do, as an autonomous 'right'. But this inherent quality only takes things so far.

Article 18(1) provides that "everyone shall have the right to freedom of thought, conscience and religion" and provides that everyone has the freedom to have or adopt a religion or belief, thereby also protecting individual choice on such matters; see generally Human Rights Committee *General Comment No 22 (supra)*. The use of the preposition 'of' in Article 18(1) indicates that what is protected is thought, conscience and religion *in itself*. The holding by a person of such thought, conscience or belief is something which Article 18 expressly distinguishes from manifestations of the underlying belief (whether in public or private). Article 18 thus constructs manifestation as the external projection of a freely chosen but otherwise internally confined belief by way of associated activity or symbolism. The process of manifestation necessarily transitions the issue of limitation from being about

internalised choice to externalised choice-consistent conduct. This is something only Article 18(3) speaks to.

In the context of an objection to military service, the act of conscription does not prevent the person from continuing to hold the internal belief. The interference relates to externalising that chosen belief by associated conduct – in this case, refusing to serve. As a matter of interpretation and logic, Article 18(3) necessarily becomes the appropriate lens through which interferences are to be assessed.”

[142] The Tribunal adopts this reasoning and approach. As explained by O Cinar in *Conscientious Objection to Military Service in International Human Rights Law* (Palgrave Macmillan, New York, 2014) at pp 46-47 concerning Article 18 of the UDHR (as mirrored in Article 18 of the ICCPR):

“[C]onsiders belief to be a sphere where the individual alone freely makes all sorts of decisions pertaining to himself/herself. This sphere constitutes the *forum internum* aspect of freedom of thought, conscience, and religion and no one may impinge on it. The significance for those wishing to exert the right to conscientious objection is that objectors in fact relate to the *forum internum* aspect of freedom of thought, conscience and religion.

However, the manifestation of this decision in the public sphere concerns the *forum externum* aspect, which may be subject to limitation. In fact, the *forum externum* aspect of this freedom is restricted by a general limitation clause in Article 29 of the UDHR [18(3) ICCPR].”

Lack of alternative service and impermissible limitation on right in question

[143] In *DS (Iran)* the Tribunal cited the position adopted in *Refugee Appeal No 75378*, that it could not be said that the lack of alternative forms of service, without more, was an impermissible limitation on the right of persons with a conscientious objection to manifest their religion or belief by refusing to be conscripted. The Tribunal recorded that, since this time, however, the Human Rights Committee had noted that an increasing number of States parties to the ICCPR, who retained compulsory military service had introduced alternatives and, quoting from the decision of *Yoon and Choi v Republic of Korea* at 8.4, that it considered that respect for conscientious beliefs and manifestations was “an important factor in ensuring cohesive and stable pluralism in society”. At [259] the Tribunal quoted from the *Yoon* decision as follows:

“8.4 ... It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.”

[144] The Tribunal also recorded a similar approach adopted by the European Court of Human Rights (“ECtHR”) in *Bayatyan v Armenia* Application No 23459/03 (7 July 2011) (“*Bayatyan*”), a case concerning a Jehovah’s Witness who had been

convicted and imprisoned for refusing to perform compulsory military service, where the Court noted, at [46]–[49], that almost all the member states of the Council of Europe which had ever had compulsory military service had introduced laws at various points, recognising and implementing the right to conscientious objection, and found (at [124]) that the Armenian Government had not established that the lack of alternative service was necessary “in a democratic society”, a necessary criterion if such a limitation on his freedom to manifest his beliefs were to be permissible under Article 9 of the ECHR. The Tribunal, in *DS (Iran)* cited from the *Bayatyan* decision (citations omitted) as follows:

“124. The Court cannot overlook the fact that, in the present case, the applicant, as a member of the Jehovah’s Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. Since no alternative civilian service was available in Armenia at the material time, the applicant had no choice but to refuse to be drafted into the army if he was to stay faithful to his convictions and, by doing so, to risk criminal sanctions. Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. In the Court’s opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European States.

125. The Court admits that any system of compulsory military service imposes a heavy burden on citizens. It will be acceptable if it is shared in an equitable manner and if exemptions from this duty are based on solid and convincing grounds.... The Court has already found that the applicant had solid and convincing reasons justifying his exemption from military service.... It further notes that the applicant never refused to comply with his civic obligations in general. On the contrary, he explicitly requested the authorities to provide him with the opportunity to perform alternative civilian service. Thus, the applicant was prepared, for convincing reasons, to share the societal burden equally with his compatriots engaged in compulsory military service by performing alternative service. In the absence of such an opportunity, the applicant had to serve a prison sentence instead.

126. The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.... Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant’s by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.”

[145] The Tribunal noted (at [262]) that the decision had been followed in a number of cases since: *Bukharatyan v Armenia* (37819/03, 10 January 2012); *Tsaturyan v Armenia* (37821/03, 10 January 2012); *Savda v Turkey* (42730/05, 12 June 2012); and *Tarhan v Turkey* (9078/06, 17 July 2012). Concerning these judgments of the ECtHR, the Tribunal further highlighted at [262]–[264] that:

“[...] The ECtHR reiterated in each case that the Turkish system of compulsory military service allowed for no exceptions on grounds of conscience and resulted in heavy criminal sanctions being imposed on those who refused to comply. The Court held that it failed to strike a proper balance between the general interests of society and that of conscientious objectors. The prosecutions, convictions and sanctions imposed on conscientious objectors, when no measures were provided to take account of the requirements of their beliefs, could not be regarded as necessary in a democratic society.

While some care is required, in that the decision in *Bayatyan* and the subsequent cases reflects what had emerged as settled state practice in the specific European regional context, nevertheless, the decisions are notable for the fact that another senior judicial body has identified that the failure to provide for alternative forms of non-military service does raise an issue under the right to freedom of religion and belief.

While evidential complexities may arise in the refugee status determination process given that, unlike the individual complaints processes under human rights treaties, the state will not be party to the inquiry, the reasoning of the Human Rights Committee and the ECtHR provide helpful guidance on the issues that need to be examined in this context. The lack of provision in a national military service law for alternative forms of service cannot, in light of these developments, be presumed to be justifiable on the basis of national security or public order considerations. Rather there must be cogent reasons linking the failure to provide forms of alternative, non-military service to the particular state’s aim of protecting national security and evidence justifying why the lack of such alternative service is proportionate to achieve that aim.”

ASSESSMENT OF THE CLAIM TO REFUGEE STATUS

Objectively, on the Facts as Found, is There a Real Chance of the Elder Son Being Persecuted if Returned to Turkey?

[146] The Tribunal first addresses counsel’s submission that the elder son will be required to commit internationally condemned acts during the period of his military service.

Objection based on risk of being required to commit internationally condemned acts during period of military service

[147] As outlined in jurisprudence above, a valid claim for refugee status can be grounded in a risk of being required to commit internationally condemned acts (in

the form of breaches of international human rights law or international humanitarian law) while performing a period of compulsory military service; see generally the discussion in *Refugee Appeal No 75378* (19 October 2005).

[148] Notably, as articulated in *AD (Turkey)* [2013] NZIPT 800363 at [26], in cases based on participation in an ‘internationally condemned conflict’, it is not necessary that a ‘conscientious’ objection be established. The point is that no one can be compelled to participate in such conflicts against their wishes.

[149] Counsel has tendered reports to demonstrate that the TSK continues to commit internationally condemned acts, in particular, in the south-east of the country and against the PKK: see Amnesty International *Amnesty International Report 2017/2018 – The State of the World’s Human Rights – Turkey* (22 February 2018); United States Department of State *Country Report on Human Rights Practices 2018: Turkey* (13 March 2019); K DeYoung, S Mekhennet, L Loveluck “U.S. Launches Last-Ditch Effort to Stop Turkish Invasion of Northeast Syria” *The Washington Post* (5 August 2019); “UN Report Details Large-Scale Human Rights Abuses in Afrin Under Turkish Military Control” *Stockholm Centre for Freedom* (8 July 2018); and “Turkey ‘to Start Syria Operation’ if US Delays Safe Zone Plan” *Al Jazeera* (1 September 2019). However, it is not necessary to consider such sources here, given substantial changes in military recruitment and deployment policies and practice outlined above.

[150] Counsel submits on appeal that evidence as to whether or not conscripts are involved in frontline activity is conflicting, with some reports suggesting that the army no longer deploys conscripts in active conflicts or military operations, and other information suggesting conscripts are still being used against the PKK. She refers to several country sources, but does not refer to any particular paragraph in these sources. Having reviewed these sources, the Tribunal finds no support for the proposition claimed. It may be that, in referring to the Nato Association of Canada report cited above, counsel has placed emphasis on the claim that:

“[O]ne of the major factors that discourages young men from joining the forces is the high risk of being dispatched to the southeastern region, and taking part in the ongoing counter-terrorism, border-control and anti-smuggling operations along the border...”

However, this statement is made in the context of discussion of a policy and logistically-driven move towards the deployment of professional soldiers and contract-based ‘soldiering’ and attracting long-term recruits.

[151] The Tribunal has previously held that there existed a real chance of those appellants being required to participate in the conflict in the south-east in which the armed forces carried out human rights abuses (given that the military was, at that time, overwhelmingly conscript-based, with high numbers serving in the south-east in what appeared to be a random system of allocation): for example, in *AD (Turkey)* [2013] NZIPT 800363 and *AC (Turkey)* [2012] NZIPT 800246. However, there has now been a substantial shift in professionalising the TSK and conscripts are no longer deployed to conflict areas. When news reports of these changes were put to the elder son, he confirmed that he was aware of these changes and understood that there was no risk of him being deployed to any active conflict. The Tribunal finds that the elder son is not at risk of serious harm on this basis.

[152] The Tribunal turns now to consider the nature of the elder son's claim in light of there being no alternative to military service and his being forced to serve contrary to his convictions.

Objection based on Coercion by the State to Perform Military Service Notwithstanding Belief and there being No Alternative Military Service

[153] The elder son will be liable to perform a period of compulsory military service in less than three years' time. The Tribunal has found on the facts that the elder son holds a strong conviction and belief that it would be morally wrong to take a human life and that he would refuse to hold and operate any weapon.

[154] Determining whether an individual's opposition to military service is sufficiently cogent and serious as to constitute conscientious objection to performing military service is not easy. According to P Schaffer and D Weissbrodt "Conscientious Objection to Military Service as a Human Right" (1972) 9 *International Commission of Jurists* 33, at p44:

"To judge the content of a person's conscience and whether he is in fact acting according to its dictates is one of the most difficult if not impossible tasks for any human tribunal to perform."

[155] Further complicating the assessment is the fact that, as an adolescent, the elder son is in a transitional stage of his life. He is in the process of forging an identity and life direction. As explained by the Committee on the Rights of the Child ("Committee") *General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence* CRC/C/GC/20 (6 December 2016):

"2. Adolescence is a life stage characterized by growing opportunities, capacities, aspirations, energy and creativity, but also significant vulnerability. Adolescents are agents of change and a key asset and resource with the potential

to contribute positively to their families, communities and countries. Globally, adolescents engage positively in many spheres, including health and education campaigns, family support, peer education, community development initiatives, participatory budgeting and creative arts, and make contributions towards peace, human rights, environmental sustainability and climate justice. Many adolescents are at the cutting edge of the digital and social media environments which form an increasingly central role in their education, culture and social networks, and hold potential in terms of political engagement and monitoring accountability.”

[156] The Committee further depicts the transitional stage for adolescents from dependency towards greater autonomy, stating:

“10. As they move through their second decade, children begin to explore and forge their own individual and community identities on the basis of a complex interaction with their own family and cultural history, and experience the creation of an emergent sense of self, often expressed through language, arts and culture, both as individuals and through association with their peers...The process of construction and expression of identity is particularly complex for adolescents as they create a pathway between minority and mainstream cultures.”

[157] The evolving agency and autonomy of children through adolescence is encapsulated in the 1989 *Convention of the Rights of the Child* which provides at Article 12 that they have the right to express their views on matters affecting them. In contextualising this right, the Committee states:

“23. In accordance with article 12 of the Convention, States parties should introduce measures to guarantee adolescents the right to express views on all matters of concern to them, in accordance with their age and maturity, and ensure they are given due weight, for example, in decisions relating to their education, health, sexuality, family life and judicial and administrative proceedings.”

[158] The Committee reinforces the importance of a human rights-based approach in proceedings concerning adolescents, including recognition and respect for their dignity and agency, stating:

“5. The Committee recognizes that adolescence is not easily defined, and that individual children reach maturity at different ages....The process of transitioning from childhood to adulthood is influenced by context and environment, as reflected in the wide variation in cultural expectations of adolescents in national legislations, which afford different thresholds for entry into adult activities...”

[159] In affording this opportunity to express views on matters affecting them in accordance with age and maturity, as in this case, in the context of performing military service, Schaffer, and Weissbrodt at pp42-43 make the point that:

“Since in most cases the person called upon to defend his decision is a young man of only 18 or 19 years of age, the intellectual sophistication of his reasoning should not be the test, but rather the sincerity of his inner conviction.”

[160] It is further necessary to picture the evolving views of an adolescent within the militaristic security culture that is Turkey. In Jehovah’s Witnesses *Turkey*

Refuses to Conform to European Standards in the Matter of Conscientious Objection (17 March 2014) at www.jw.org it is stated that:

“Every Turk is born a soldier.’ That saying is taught to schoolchildren, declared in political speeches, and drilled into men called up for military service. Military service is mandatory for all male Turkish citizens and induction is a cause for celebration.”

[161] In similar terms, B Dimirtas explains in “Understanding Turkish Perception of Conscription and Reluctance to Reform: A Westphalian Approach in a Post-Westphalian World?” (2012) 16(3) *Iran and the Caucasus* 355 at p363 that:

“By forcing male citizens to dedicate some of their youth period to military, it is possible to keep them in the orbit of statist culture and not let them develop the sense of human security and individual-centred worldviews.

In addition, in Turkey, different from Western cultures, military service is seen as one of the stages of manhood, a sort of initiation rite for becoming an adult man...The maintenance of conscription is a way of producing and reproducing gender-based stereotypes and reconstructing the role of heroism.”

[162] Against this backdrop, and having regard to the views expressed by the elder son and his parents, the Tribunal finds the son’s opposition to be sufficiently cogent and serious to constitute conscientious objection to performing military service. Such belief, while it may have initially developed through fear or phobia even, now constitutes, “a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of the right of freedom of thought, conscience and religion”: *Bayatyan* at [110].

[163] The Tribunal accepts that the son would be enlisted into the TSK and that he would not seek to abscond and evade military service out of his fear of facing harsh punishment and abuse.

[164] There are no applicable exemptions to the son’s circumstances. While there are options for paid exemption, the family remain in a state of financial indebtedness, with business tax owing to the government following their recent business failure, in addition to a sum of some TL25-30,000 which the husband acknowledges he has been unable to repay his former business partner, DD, for his contribution to the business. The family have struggled to make ends meet in New Zealand and to sustain employment here. They have held work visas for only limited periods and have also been engaged in an employment dispute here. The Tribunal accepts that they would not be in a position to pay the exemption fee for the elder son to avoid compulsory military service. The possibility may present for the son to find employment upon leaving school and to save to pay the sum required. However, given the relatively short time frame in question, and the likely wages for a high school educated young adult, the chances of him being able to afford the exemption

fee are slim. There is also a possibility that the son could defer his military service by enrolling in higher study, and thus bide some time to find the means to acquire the sum required. However, whether he would enrol in such study and be in a position to pay the sum required is speculative. There is also no known prospect of family members in Turkey assisting the son to raise the sum. They, too, have also sustained considerable loss in their endeavours to pay the debt owed by the husband's business, and his parents sold their home and farm to help pay that debt. There is also little likelihood of the parents or son being able to secure any bank loan given the parents' credit history and recent bankruptcy. While the sum in question is not substantial, and in many cases others in similar circumstances may be in a position to pay this with ease or with provision of a financial loan (see *AO (Jordan)* [2018] NZIPT 801360), the Tribunal is not satisfied that the elder son's family have sufficient means to acquire the requisite sum within the timeframe in question.

[165] While service may be some three years away, the Tribunal is satisfied that the elder son will maintain his strong views during the period until he becomes liable to be conscripted. It is also true that supervening factors could arise during the interim that might affect the risk as it presently arises. However, the Tribunal is satisfied that the recent substantive changes to conscription and deployment policy and practice in Turkey, now in the process of consolidation, are likely to endure throughout that time. In short, the risk identified is more than just speculative, it is substantive.

[166] As for what the elder son will do upon induction, the Tribunal finds that his objection to bearing arms would be well and truly tested. Owing to his deeply held beliefs and his fear, the Tribunal finds that he will be incapable of holding a weapon even for the purposes of training drills. It has accepted his claims that: "I can't control my reactions when I see a gun. I can't even hold one." And "All soldiers have to do weapons training. I don't want to hold a gun. It risks me to kill another person. It is no different from murder. I don't want to kill someone."

[167] Throughout his period of service of six months, the elder son will be surrounded by weapons, and compelled to arm himself, and there is a real chance he will find himself in situations where an armed presence beyond induction training will be required, at least, for internal security purposes. A recent example of the TSK's involvement in internal security and ensuing harsh responses, was during the 2016 attempted coup. As reported by K Shaheen "A Year On Families of 'Martyrs' Who Resisted Turkey Coup Count Cost" *The Guardian* (15 July 2017), more than

250 people were killed and 2000 injured during the attempted coup, which featured the TSK, in 2016.

[168] The elder son's refusal to handle a firearm and serve, owing to his strong moral and philosophical views, fears, and the potent symbolism of weaponry to him, constitutes manifestation of his opposition. Whilst the conscription itself does not prevent him from continuing to hold his internal belief, his refusal to serve does. Article 18(3) is the appropriate lens through which interference with his right falls to be assessed.

[169] As stated in *DS (Iran)* at [255]:

“Article 18 thus constructs manifestation as the external projection of a freely chosen but otherwise internally confined belief by way of associated activity or symbolism. The process of manifestation necessarily transitions the issue of limitation from being about internalised choice to externalised choice-consistent conduct. This is something only Article 18(3) speaks to.”

[170] The criminal sanctions which the son will face as a consequence of his refusal to serve and his inability to even hold a weapon, and risk of being subjected to physical mistreatment, give rise to breaches to his Article 18 and 7 ICCPR rights.

[171] The imposition of a penalty on the son, in circumstances where the alternative option of shortened military service of one month upon payment of an exemption fee is not available to him, and not other alternative is made for the exigencies of his conscience and beliefs, does not constitute a permissible limitation on Article 18 and is not a measure necessary in a democratic society, the hallmarks of which include “pluralism, tolerance and broadmindedness”: see *Bayatyan* at [126]; *Bukharatyan v Armenia* (37819/03, 10 January 2012); *Tsaturyan v Armenia* (37821/03, 10 January 2012); *Savda v Turkey* (42730/05, 12 June 2012); and *Tarhan v Turkey* (9078/06, 17 July 2012).

[172] The Tribunal further finds that there is a real chance that the elder son will suffer ill-treatment in the form of repeat physical assaults for failing to comply with orders for weapons training and handling. There is also a real chance that he will experience intense mental anguish owing to the harassment and pressure he is likely to encounter from superiors and other recruits, and from the assaults he may experience. Cumulatively assessed, and over the period of six months, such treatment would amount to a violation of his right to be free from cruel, inhuman or degrading treatment or punishment according to Article 7 of the ICCPR. Such breaches would occasion serious harm to the elder son amounting to a real chance of his being persecuted.

[173] Objectively, on the facts as found, there is a real chance of the elder son being persecuted if returned to Turkey.

Is there a Convention reason for the persecution?

[174] As was noted in *Refugee Appeal No 75378* (19 October 2005) at [116]–[117]:

“Under any circumstance, an objection by an individual to a law requiring compulsory military service is inherently an expression of an opinion as to the boundaries of state power in relation to the individual; it is inherently political – see generally Heywood *Politics* (2nd ed, Palgrave, Basingstoke 2002) at p4, who places politics within the realm of conflict resolution in which competing ideas (here, between the individual and the state) are resolved. As noted by Goodwin Gill *The Refugee In International Law* (Clarendon Press, Oxford 1996):

‘Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act.’”

[175] Here, the elder son’s predicament arises because of a genuinely held belief that is central to him – that he ought not commit, or be a party to, the taking of life by lethal force. His belief is political in nature inasmuch as the impermissible actions of the state in requiring him to serve goes to the boundary of state power. His predicament is being contributed to by his political opinion and the second principal issue (is there a Convention reason for the persecution) is also answered in the affirmative.

Objectively, on the facts as found, is there a real chance of the younger son being persecuted if returned to Turkey?

[176] As found by the Tribunal above with respect to the elder son, and for the same reasons, having particular regard to the vulnerability of children, there is no real chance of the younger son facing serious harm owing to his father’s dispute with former business partners.

[177] Further, the younger son is still only seven years of age. It would be premature to determine that he has a sincere conviction equivalent to that held by his older brother with respect to the sanctity of life and the use of weaponry. It is also fundamentally speculative to purport to predict what obligation he might face in the distant future, with respect to the performance of military service.

[178] Objectively, on the facts as found, there is not a real chance of the younger son being persecuted if returned to Turkey.

Conclusion on Claims under the Refugee Convention

[179] For the reasons given above, the Tribunal finds that the elder son has a well-founded fear of being persecuted if returned to Turkey for the Convention ground of political opinion. He is a refugee.

[180] The husband, wife and younger son do not have a well-founded fear of being persecuted on return to Turkey and are not therefore refugees.

The Convention Against Torture

[181] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

Assessment of the Claim under Convention Against Torture

[182] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

[183] The elder son has been recognised as a refugee. In accordance with New Zealand’s obligations under the Refugee Convention, he cannot be deported from New Zealand, by virtue of section 129(2) of the Act (the exceptions to which do not apply). Accordingly, the question whether there are substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand does not arise. He is not a person requiring protection under the *Convention Against Torture*. He is not a protected person within the meaning of section 130(1) of the Act.

[184] As to the husband, wife and the younger son, they rely on the same evidence in support of their claims under the *Convention Against Torture* as they did to support their claims under the Refugee Convention. The Tribunal has already found that the evidence does not establish that any of them face a well-founded fear of being persecuted in Turkey. For the same reasons, on the basis of the evidence

before it, the Tribunal is satisfied that the husband, wife and younger son have not established that there are substantial grounds for believing that they would be in danger of being subjected to torture if they now returned to Turkey.

[185] The husband, wife and younger son are not entitled to be recognised as protected persons under section 130(1) of the Act.

The ICCPR

[186] Section 131 of the Act provides that:

“(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Assessment of the Claim under the ICCPR

[187] By virtue of section 131(5):

“(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:

(b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.”

[188] For the reasons already given, the elder son cannot be deported from New Zealand. Accordingly, the question of whether there are substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand does not arise. The elder son is not a person requiring protection under the ICCPR. He is not a protected person within the meaning of section 131(1) of the Act.

[189] As to the husband, wife and younger son, they rely on the same evidence in support of their claims under the ICCPR as they did in support of their claims under the Refugee Convention. For the same reasons, the Tribunal finds that the husband, wife and younger son have not established substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if returned to Turkey.

[190] The husband, wife and younger son are not, therefore, persons requiring protection under the ICCPR and it follows that they are not protected persons within the meaning of section 131(1) of the Act.

CONCLUSION

[191] For the foregoing reasons, the Tribunal finds that the elder son:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the *Convention Against Torture*;
- (c) is not a protected person within the meaning of the *International Covenant on Civil and Political Rights*.

[192] The elder son's appeal is allowed.

[193] For the foregoing reasons, the Tribunal finds for the husband, wife and younger son, that:

- (a) they are not refugees within the meaning of the Refugee Convention;
- (b) they are not protected persons within the meaning of the *Convention Against Torture*; and
- (c) they are not protected persons within the meaning of the *Covenant on Civil and Political Rights*.

[194] The husband, wife and younger son's appeals are dismissed.

Order as to Depersonalised Research Copy

[195] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellants' names and any particulars likely to lead to the identification of the appellants.

Certified to be the Research Copy
released for publication.

S A Aitchison
Member

"S A Aitchison"
S A Aitchison
Member