

1001195 [2011] RRTA 466 (3 June 2011)

DECISION RECORD

RRT CASE NUMBER: 1001195

DIAC REFERENCE: CLF2009/104581

COUNTRY OF REFERENCE: Georgia

TRIBUNAL MEMBER: Suseela Durvasula

DATE: 3 June 2011

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Georgia, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] August 2009. The delegate decided to refuse to grant the visa [in] January 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] February 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A

person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

EVIDENCE

19. The Tribunal has before it the Departmental and Tribunal files relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Protection visa application

20. The applicant is a national of Georgia [age deleted: s.431(2)]. He was born in Tbilisi, Georgia. He has a defacto spouse and one son. He lived in Tbilisi for at least 10 years prior to coming to Australia.
21. In his protection visa application the applicant states that he completed 9 years of schooling, completed [a trade] course at [a] college from 1991 to 1995 and went to a military academy from 1995 to 1998. In relation to his employment he states that he worked as a [tradesperson] at [a factory] in Tbilisi from 1998 to 2002. He was [Rank 1] on a military contract at different military bases from October 2003 to September 2008.
22. The applicant arrived in Australia on a Subclass 456 short stay business visa [in] June 2009. He travelled on a passport issued in his own name [in] June 2008. He applied for a protection visa [in] August 2009.
23. In a written statement the applicant sets out his protection visa claims. These are summarised below.
24. The applicant claims that in 1995 he enrolled in the Military Academy because he wanted to protect and defend his country and his people. He studied there for three years. He undertook a training exercise in the United States with other soldiers from around the world. During this exercise he mentioned to his group leader that Georgia is too far away from democracy and still too authoritarian under the Shevardnadze Government. He needs to be changed for a more democratic President. Upon his return to Georgia he was expelled from the Academy. He was not given any official paper but was told that his behaviour in the United States was treacherous and he could not be trusted.
25. The applicant went to work at [a factory] until the end of 2002. He was then made redundant and was unemployed. In October 2003, he was offered a contract to become [Rank 1] in the Georgian Army. Georgia had a new democratic President who cared for the military so he accepted the contract. In 2006 his contract was extended until 2010.

The applicant claims that he continued to hold concerns about the excessive militarisation of Georgia.

26. In 2007, the applicant was transferred to [Unit 1]. He served there until the war started on 7 August 2008. His Commanding Officer, [Major A], whom he knew from the Academy, expressed his cynicism about the war to the applicant and said he would oppose the conflict, even though he would do his duty. He told the applicant that Georgia was starting an offensive in Ossetia and they could not expect anything good from it. He said that he had no choice but to obey the orders and to send their detachment to the war zone. He and the applicant discussed Georgian politics, and the applicant was assigned to non-combat duty.
27. [In] August 2008, the applicant was sent to Gori where it was his job to receive civilian refugees and direct them to transport vehicles which took them to Tbilisi. Late in the afternoon on that day, the applicant encountered a young Russian woman who was very pale and listless. The applicant summoned medical help and waited with the woman until the doctor could attend to her. The doctor told the applicant that the woman looked as if she had been raped. The applicant claims that the woman was raped by Georgian soldiers. When the applicant told other soldiers about the woman, he was accused of being pro-Russian. They started beating him but the fight was broken up by their superior officer.
28. [In] August 2008, the applicant witnessed Georgian soldiers mistreating an older Ossetian man. The applicant claims that he intervened and told the soldiers that they were not at war with civilians. The soldiers' behaviour continued and the applicant reported it to their superior officer. The officer told the applicant that the people from Ossetia are hiding rebels and are now trying to infiltrate Georgia under the pretence of escaping a war zone.
29. [In] August 2008, the applicant noticed a new wrist watch on one of his fellow soldiers. The soldier told the applicant that it was better on him than having some old Ossetian having it. The applicant became increasingly concerned by evidence of the abuse of civilians and became resentful about the war. He decided to finish his army contract early, as soon as the war was over, because he was so disgusted by what he had witnessed.
30. [In] August 2008, the applicant was approached by a foreign reporter when he was helping three Georgian women. The journalist spoke Russian so the applicant started discussing the situation with him and eventually told the journalist everything he had seen and his views on the war.
31. Later that day, the applicant was called to his superior's office and was asked what he was doing talking to a foreigner. The applicant told his superior what he said to the journalist about the abuses and mistreatment he had seen while on duty. He said that it was Georgia who started an offensive and there were some Georgians who abused Ossetian and Russian refugees. He gave his superior an account of what he had witnessed. The applicant claimed that he felt free to say these things because he still believed that his country had achieved democracy and freedom. He also felt completely exhausted and was beyond caring. His superior ordered him out and said the conversation would be continued later.

32. The next morning, the applicant was arrested by two corporals and taken to [Unit 1] where he was detained for a week in harsh conditions. Soldiers on duty took turns to intimidate and assault him.
33. His superior called him to his office and said that he could subject the applicant to trial for slander of the Georgian Army and the government. However, he will simply terminate the applicant's contract without pay. His superior officer accused him of being too caring for Russians, defaming the Georgian Military, and speaking to foreign journalists. The applicant told his superior to keep his pay but he would not behave like a beaten dog. He was then beaten unconscious by two soldiers. He was taken back to a cell and left alone for several days. He claims he was raped repeatedly.
34. The applicant was called to sign a statement acknowledging his termination and agreeing to report to the Military Commission in Tbilisi. He was told that his behaviour was an insult to all Georgians and he did not deserve to live.
35. It took the applicant one month to recuperate but his emotional state was still poor. The applicant did not bother going to the Military Commissariat.
36. In November 2008, the authorities contacted him to interrogate him about [Major A]. They demanded that the applicant write a statement about his communication with [Major A] and their relationship. They interrogated him about his contacts. When the applicant attempted to deny that he and [Major A] discussed the war and Georgian politics, they threatened to treat him in the same way he was treated while in the disciplinary cell. He was told that [Major A] wrote a confession and listed the applicant as his confidante among other people. The applicant recognised [Major A]'s handwriting and realised he was forced to sign a confession extracted under torture. The applicant then agreed to sign a confession and was released after he promised to cooperate.
37. The applicant then decided he needed to leave the country, and spoke with a friend who worked as a travel agent. The friend referred him to a woman who asked for \$US12,000 to obtain his visa and plane ticket. In March 2009, the visa was ready but the applicant struggled to obtain the money required. The applicant's wife and son had moved out temporarily and were living with his wife's parents.
38. [In] May 2009, the applicant received a call from a former Academy friend, [Mr B], with whom he had lost touch over the years. His friend asked if he could come to the applicant's place but he never showed up or rang again. The applicant later learned that his friend was implicated in a coup.
39. In late May 2009, the applicant was in a shop and met another Academy classmate, [Mr B who] came in and warned him that he was about to be served with a summons and be arrested. The applicant believes the military police had learned of the call from [Mr B] made on the day of the coup. The authorities may believe that because of this phone call, the applicant was also involved in the coup. His friend warned him that the trouble was much more serious than what had occurred in 2008 and he should leave the country.

40. [In] May 2009, two military police came to the applicant's home and arrested him. He was beaten up and regained consciousness in hospital where he remained for two weeks with bruised kidneys and severe concussion.
41. The applicant's wife arranged for the house to be sold and the applicant stayed with acquaintances at a nearby village. He asked his wife to bring his personal belongings and documents. He asked his wife to sell their house in order for him to get the remaining money to pay for his visa. After the applicant left Georgia, his wife and son went to stay with her parents. After the applicant arrived in Australia, he rang his wife's parents and they told him that his wife and son had disappeared and had not returned.

Departmental interview

42. The applicant was interviewed by a delegate of the Department [in] November 2009. A summary of relevant evidence provided at that interview is set out below:
43. The applicant was asked how he obtained his passport. He said he was in the military and was due to be deployed to [Country 1] in September or October 2008 before the war broke out with Russia. The authorities obtained passports for him and the other soldiers he was being deployed with. However, he and his detachment did not end up going to [Country 1] because the war in Georgia started. The applicant was asked why he was issued an ordinary civilian passport. The applicant said he does not know why - that is what he and the other soldiers were issued with.
44. The applicant was asked about the documents he had brought to the interview. One document was a police summons left with his mother saying that if he did not come to the police, he would be forced to attend. His mother had posted the document to him. Another document is his military service contract. The reference to 1997 in the first paragraph of the contract refers to a law from 1997 under which the contract was signed. The reference to 2002 at the bottom of the first page refers to his wages which are based on a presidential decree made in 2002.
45. The applicant was asked his military rank. He stated that he started at the Military Academy in 1995 as [Rank 1]. After two years, he was a [rank deleted: s.431(2)]. The applicant provided further information about his past study at the Military Academy and his later decision to join the army under contract in 2003.
46. The applicant confirmed his rank was that of [Rank 1] when the war broke out in 2008. The delegate asked why this was, given that the applicant had three years of Academy training and five years of service at that time. The applicant said he never reached any higher rank. He did not finish the Academy so did not qualify as an Officer.
47. The delegate asked the applicant about being sent to Gori at the beginning of the war and what his duties were there. The applicant said he was to meet refugees and give them first aid and transport them. The delegate asked why Russian refugees would be coming into Georgia when the war was between Russia and Georgia. That is, why would they not flee to Russian territory? The applicant said that people did not have any choice but had to run to safety.
48. The applicant was asked about his claim to have spoken to a foreign reporter [in] August 2008. The applicant said this was in Gori while he was on his post. He was

asked why he was certain about the date. The applicant said he took notes of his conversation with the reporter.

49. The applicant was asked whether he thought it would be reasonable to expect punishment for speaking to a reporter during the middle of the war, particularly with a strict chain of command in the military. The delegate put to the applicant that this would seem to be a serious breach of army regulations that would attract punishment. The applicant responded that if someone needs his help he will always help. The applicant stated that he spoke to the journalist [in] August and was called into his superior's office that same day. The following day he was taken by military police to [Unit 1].
50. The delegate put to the applicant that reports indicated that the Georgian Army withdrew from Gori on 11 August 2008. The applicant stated this was not true. The army stayed in Gori the whole time until now.
51. The applicant was asked what he feared would happen to him if he returned to Georgia. The applicant stated that he does not want to experience what happened before. He cannot say what he fears in detail because there are women present. He is sure that what he experienced before will happen again.
52. The applicant was asked how he left Georgia. He stated that he paid \$US12,000 for his visa. He obtained the visa through a former classmate who had a travel agency. This classmate referred him to a woman who took his family data and passport and returned the passport with the visa in it. He only got the passport back when he was at the airport leaving the country. He collected the passport at Tbilisi Airport. He transited through Turkey on the way to Australia. He did not stop there. He has no idea how the false documents were supplied to the Australian Embassy. He just paid his money.
53. At the interview the applicant presented the following documents:
 - 3 photographs of the applicant when he was in the military;
 - Un-translated copy of the applicant's military contract dated [in] December 2002. The Tribunal subsequently received a translation;
 - Un-translated copy of a police summons dated [in] June 2009, ordering the applicant to present for interrogation [in] June 2009. The Tribunal subsequently received a translation;
 - Certificate issued to the applicant for the [training deleted: s.431(2)] issued [in] May 2003; and
 - Certificate issued to the applicant for the [training deleted: s.431(2)] held in 1997.

Delegate's decision

54. The delegate refused to grant the applicant a protection visa [in] January 2010. The main reasons for the delegate's refusal were:
 - The delegate did not accept that the applicant served in the 2008 war given that military contracts are usually no more than 4 years duration. The applicant had only provided a copy of his 2003 contract.

- The applicant's account of his frequent principled dissent against widespread human rights abuses by Georgian soldiers lacks credibility, given the applicant's military training.
- The applicant's account of his evacuation of Gori, based on his own notes was inconsistent with independent information. The applicant stated that the Georgian army withdrew from Gori on 12 August 2008 when independent information indicated they withdrew on 11 August. Therefore, the delegate did not accept that the applicant had contact with a foreign journalist [in] August 2008.
- The delegate did not accept that the applicant was involved in assisting displaced persons, given that Ossetian refugees would have sought refuge in Russia, rather than Georgia, and the need for Georgian soldiers to be involved in combat rather than humanitarian duties.
- The applicant was not promoted during his service tenure.
- The applicant travelled under an ordinary civilian passport rather than an official or military passport and was able to depart Georgia easily.

Review application

55. The applicant was represented in relation to the review by his registered migration agent.
56. The Tribunal invited the applicant to appear at a hearing held [in] April 2010. [In] April 2010 the applicant's representative advised the Tribunal that the applicant was unwell and unable to attend the hearing. The representative provided a medical certificate from [Doctor C] stating that the applicant was unfit to attend a hearing 'until further notice' due to severe anxiety/depression and insomnia.
57. [In] April 2010 the applicant's representative requested that the Tribunal postpone the hearing for 3 months to allow the applicant to obtain further treatment and counselling. Accompanying the request was a letter from a social worker at the [facility deleted: s.431(2)] stating that the applicant was an inpatient at the [facility deleted: s.431(2)] since [a date in] April 2010 and was receiving treatment for post traumatic stress disorder and major depression. He required 3 months for further treatment and counselling.
58. [In] April 2010 the Tribunal advised the applicant that it had agreed to postpone a hearing for 3 months, contingent upon receiving an update of his medical condition by [a date in] May 2010. The Tribunal did not receive this update from the applicant.
59. [In] July 2010 the Tribunal invited the applicant to provide medical evidence from a mental health professional outlining his capacity to participate in the hearing.
60. [In] August 2010 the Tribunal received a report from [Doctor C], the applicant's general practitioner. This states that the applicant was a victim of rape and war crimes in Georgia. He feels very depressed. He was assaulted [in] June 2010. He suffers from a severe form of post traumatic stress disorder complicated by anxiety-depression. His prognosis is guarded and he requires further treatment and follow up.

61. [In] August 2010 the Tribunal received a submission from the applicant's representative requesting that the hearing should not take place until the Tribunal can be confident that the applicant's psychological well-being has improved to the point that he is able to give evidence in support of his claims.
62. [In] September 2010 the Tribunal invited the applicant to provide a report from his treating psychiatrist about his capacity and competence to participate in a Tribunal hearing; when he is able to participate in a Tribunal hearing; any special arrangements the Tribunal could make to facilitate his attendance at the hearing; and any information or written arguments he wishes the Tribunal to consider, including any issues raised in the delegate's decision.
63. [In] October 2010 the representative asked for an extension of time to provide this information. The Tribunal granted this extension of time. [In] November 2010 the representative asked for a further extension of time to provide this information. The Tribunal granted this extension of time.
64. [In] November 2010 the representative provided a report from a counselling psychologist, [name deleted: s.431(2)], dated [in] November 2010, stating that the applicant suffers from post traumatic stress disorder, severe anxiety and depression and dissociative disorder. The representative submitted that the hearing should be adjourned until the applicant was capable of giving evidence.
65. [In] December 2010 the Tribunal wrote to the applicant advising that it was not prepared to postpone the review for an indefinite period. The Tribunal advised that it intended to proceed with the review on the basis of the available evidence and invited the applicant to provide any further information which may be relevant to the Tribunal's review.
66. [In] December 2010 the applicant's representative sent the following documents to the Tribunal:
 - a statutory declaration by the applicant dated [in] December 2010;
 - a country information report on Georgia by Amnesty International, dated 11 August 2010;
 - a submission addressing the issues raised by the delegate, the applicant's claims and the independent country information;
 - loan agreements as evidence that the applicant borrowed money [in] April 2009 to fund his trip to Australia. The money was borrowed in the name of the applicant, his mother and his sister.

Further statutory declaration by the applicant

67. In a statutory declaration dated [in] December 2010 the applicant addresses concerns raised by the delegate.
68. He states that he took up a post with [Unit 2], not [Unit 1], as suggested by the delegate.
69. The applicant describes the circumstances in which his military contract was extended. He states that they were not given any documentation or asked to sign any documents

to extend his military contract. The platoon chief just asked them to sign a piece of paper as confirmation of their agreement to extend their military contract.

70. The applicant explains why he felt compelled to criticise the Georgian government. He states that as a soldier in the Georgian army he was not only taught about combat, he was also taught to protect people. He complied with the army regulations and the chain of command to the best of his ability. However, when he witnessed Georgian soldiers committing human rights abuses he simply could not ignore it. He felt it was his duty to protect the victim, which is what he tried to do. He was afraid these human rights abuses would continue to occur and so he revealed what he had witnessed to a foreign journalist. He hoped his revelations would be printed and that the perpetrators of these abuses would be brought to justice for their actions.
71. The applicant states that on the second day of the war, [in] August 2008, he began to take notes about the various human rights abuses he witnessed being carried out by the Georgian soldiers. He kept the notes in the hope that he could use them after the war to report the abuses and to bring the Georgian soldiers involved to justice. The notes remained in his pocket at all times, except when he slept or showered. He did not think anyone would see them.
72. The applicant describes the circumstances in which he was interviewed by the foreign journalist. He states that this interview took place [in] August in Gori. At that time, the Georgian army was still present in Gori. The following day, more than half of the Georgian army withdrew from Gori. The Georgian army did not withdraw on 11 August 2008 as suggested in the delegate's decision record. He has evidence which confirms that soldiers from the Georgian army began to withdraw from Gori on 12 August 2008, not 11 August 2008.
73. The applicant addresses the delegate's concerns about the assignment of soldiers to assist displaced persons. He states that in the Georgian army, different soldiers carried out different roles. Some of the soldiers were assigned the typical combat roles. Other soldiers were assigned non-combat roles such as transporting wounded people, transporting weapons, transporting food and assisting displaced persons. The senior battalion officer, [Major A], was responsible for assigning roles to the soldiers. The applicant had known [Major A] since 1995. They had studied together in the military academy and were very good friends. [Major A] did not assign the applicant combat roles because he knew it would be dangerous. Instead he assigned the applicant to the less risky role of assisting displaced persons. Apart from the applicant there were about 30 other Georgian soldiers who assisted displaced persons.
74. The applicant states that a number of ethnic Ossetian displaced persons came into Gori because they were seeking refuge. The fact that the region is principally inhabited by ethnic Georgians would not deter them. Although there is conflict between ethnic Ossetian and ethnic Georgians, the conflict is political in nature. Generally speaking, ethnic Ossetians do not perceive ethnic Georgians as attacking them.
75. The applicant addresses the delegate's concerns about his lack of promotion within the army. He states that in the Georgian army, a soldier can only be promoted to the position of officer after he or she has formally completed the military academy. The applicant was expelled from the military academy after he commented about the poor state of Georgian democracy. As such, even though he underwent eight years of

military service and training, it was not possible for him to be promoted to the position of officer because he had not formally completed the military academy.

76. The applicant addresses the delegate's concerns about how he obtained his passport. In June 2008, in anticipation at being deployed to [Country 1], he was issued an ordinary civilian passport, not an official or military passport. All of the other soldiers were also issued ordinary passports and military identity cards. His identity card is currently at the Office of the Minister of Defence in Georgia. The applicant applied for his passport himself, as did all the other soldiers. The army did not retain his passport but did retain the military identity cards.
77. The applicant addresses the delegate's concerns about how he was able to leave Georgia. He states that he was wanted by the Georgian authorities under suspicion of being involved in the coup [which involved] his friend, [Mr B]. As a result of this he knew it would be difficult for him to leave Georgia and he thus had to pay a bribe. He paid the soldiers at the airport US\$3,000 to allow him to pass through the checkpoints at Tblisi Airport.

Submission by the applicant's representative

78. In a submission dated [in] December 2010, the applicant's representative provides further submissions in relation to the applicant's protection visa claims and addresses the issues raised in the delegate's decision. The representative claims that the applicant fears persecution by the government and military of Georgia due to his political opinions, which includes support for democracy and opposition to human rights abuses. The representative referred to independent country information to support these claims.

Tribunal hearing

79. The applicant appeared before the Tribunal [in] April 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Georgian and English languages.
80. The Tribunal asked the applicant about his current circumstances. He stated that he lives on his own and does not work. He is being assisted by the [agency deleted: s.431(2)]. He does not have any friends or relatives in Australia.
81. The Tribunal asked the applicant if he was seeking any medical help or taking any medication. The applicant stated that he was not going to a doctor. He was taking anti-depressant medication. He was attending counselling but he stopped last month as he did not properly understand what he was supposed to do. He was seeing a Russian counsellor, but as Russian is not his first language, he sometimes struggled to understand the counsellor. He has been feeling mentally unwell since he has been in Australia.
82. He was admitted to [Hospital 1] [in] April 2010 and was discharged [in] May 2010. He gave the Tribunal a discharge summary report from the hospital. The report by the attending physician, [doctor deleted: s.431(2)], states that the applicant was diagnosed with post-traumatic stress disorder, bipolar affective disorder and severe depression. The report states that the applicant referred to his experiences as a professional soldier,

his wartime experiences in Georgia and intrusive thoughts and disturbing recurring images from his past.

83. The applicant confirmed that he had had a Russian interpreter at the Departmental interview. The Tribunal asked him if he had understood the interpreter. The applicant stated that he understood the main part of what was said but had difficulty with some parts.
84. The Tribunal asked the applicant about his time in the Military Academy. The applicant stated that he joined in 1995. While in the Academy, he learnt about tactics, preparing to be a soldier, and using the equipment. He was sent to the United States for training for two months. While he was there he had an argument with the group leader and as a result of the argument, he was expelled from the Academy in 1998. The Tribunal asked him about the argument. The applicant stated that they had to get up at 4:00 am every day and had to march to their meals. Although their group consisted of soldiers from other countries, only the Georgian soldiers had to do this. The applicant asked his group leader why the Georgian soldiers had to behave in this way. The group leader got angry with him and accused him of having contact with one of the American leaders. When the applicant returned to Georgia, he was told that his behaviour at the training exercise was not acceptable and he was expelled from the Academy.
85. The Tribunal asked the applicant why he re-joined the military in 2003, given his previous expulsion. The applicant stated that he had worked as a [tradesperson] at [a factory] until 2002. He was made redundant from his job. He had to find a job in order to support his family. In Georgia, the best jobs are with the police or the army, so he decided to re-join the army. The Tribunal asked the applicant if his previous expulsion would have allowed him to re-join the army. The applicant stated that he obtained the relevant documents with the help of his friends and classmates from the Academy. He also passed the relevant examinations and was able to join the army. He signed a contract [in] December 2002.
86. While on his contract, the applicant stated that he spent his time training and preparing tactics. He was not in any combat situation. He was moved to a place where there were American instructors and he was trained by those instructors. He was due to be deployed to [Country 1] but he did not go as the conflict in South Ossetia had started.
87. The applicant stated that his contract was extended in 2007 but he did not have to sign any formal documents at this time. In 2007, he joined [Unit 2]. His Commanding Officer was [Major A]. He knew [Major A] from his time in the Military Academy. He was aware that [Major A] went to [Country 1] with [Unit 1]. The applicant stated that there was an error in his protection visa application. He told the person writing his statement that he had joined [Unit 2] but the claim stated that he was with [Unit 1]. The applicant stated that he was not promoted within the military as he had no education and did not finish the Military Academy.
88. The Tribunal asked the applicant why [Major A] would have spoken to him so openly about his concerns with the offensive in South Ossetia. The applicant stated that he was friendly with [Major A] and they were still friends from their time in the Academy. [Major A] did not want to be involved in the war as he believed that civilians would die in vain. [Major A] was later arrested and the applicant does not know what has happened to him.

89. The applicant described his role in the conflict. He had to accept refugees from a town in South Ossetia and send them to Georgia. He had to allocate them onto buses that went to Tbilisi. There were about 20 people in his battalion and it was led by a captain. He cannot remember the Captain's name as it was the first time he had met him. They had to send refugees from one part of Georgia to another. It was not in the border area. They operated about three to five kilometres outside of Gori.
90. The Tribunal asked the applicant to describe some of the mistreatment by Georgian soldiers towards the refugees. The applicant became distressed as he spoke of the incidents. He saw soldiers taking things from refugees such as watches. He tried to give hot food to the refugees but one of the other officers told him they only deserved to eat cold food. He saw soldiers beating and kicking the refugees. The applicant stated that he took notes of these incidents and he kept them in his pocket. The notes are still with his mother in Tbilisi. He did not bring them to Australia as he was running away quickly at the time and did not think what to bring with him. He did not show the notes to anyone as he could not find anyone to give them to. He took the notes because he believed that what he was witnessing was not lawful or humane conduct.
91. The Tribunal asked the applicant to describe his conversation with the journalist. He stated that he was a [foreign] reporter who came with some Georgian women. He cannot exactly remember the agency he worked for but he believes it was called [name deleted: s.431(2)]. They did not film the applicant as it was forbidden but simply spoke to him. The Tribunal asked the applicant what motivated him to speak to the journalist. The applicant stated that he was concerned about the unlawful things that were happening. The journalist gave him his business card and promised to help him. However, he later discovered that the business card was stolen from him.
92. The Tribunal put to the applicant that independent information indicated that journalists were not permitted to speak to soldiers during the conflict and were not permitted into the conflict area. The applicant stated that there was a large centre for journalists established in Gori and the journalist was a part of that group. There were many journalists present at the time.
93. The applicant confirmed that he spoke to the journalist [in] August 2008. The Tribunal put to the applicant the information in the delegate's decision that indicated that Georgian troops withdrew from Gori on 11 August 2008. The applicant stated that this was incorrect and troops were still in Gori on 13 and 14 August.
94. The applicant stated that his Commanding Officer called him [in] August 2008 and accused him of speaking to a foreign journalist. The applicant did not tell his Commanding Officer this but somehow he found out. The applicant stated that he was then detained in the military prison. He was not charged or convicted of any offence. The military police ruined his life when he was in detention. The applicant was then dismissed from the military.
95. The applicant stated that he had to report to the Military Commissariat after his release from detention to present some documents and formalise his termination. He did not go to the Commissariat but there were no consequences as a result of this.

96. In November 2008, military police who were not wearing uniforms came to his home to interrogate him about [Major A]. They forced him to write a confession against [Major A].
97. The Tribunal asked the applicant how he knew [Mr B]. The applicant stated that he knew him from the Military Academy before he was dismissed. He occasionally spoke to him on the phone.
98. The Tribunal asked the applicant what he knew about the attempted coup in May 2009. The applicant stated that he only knew what he had watched on TV. He understood that they arrested [a number of] people for plotting against the military. [Description deleted: s.431(2)]. The applicant stated that [Mr B] contacted him [in] May. He is not sure why [Mr B] rang him but he asked if he could come to the applicant's place. However, [Mr B] did not come to his place. Another classmate, [name deleted: s.431(2)], warned him that he was about to be arrested because the military police had learned about the call from [Mr B] to the applicant on the day of the coup. It was at this point that the applicant decided to leave Georgia.
99. The applicant stated that he was not charged with anything. He was given a letter requiring him to go to court to be a witness. This letter was sent to his home.
100. The applicant stated that he sold everything in order to get a visa to come to Australia. He paid \$13,000 for a visa and \$3,000 to get through Customs and the airport. He obtained a loan against his house in order to raise the money.
101. The Tribunal asked the applicant what he feared if he had to return to Georgia. The applicant stated he fears he will experience the same thing that had occurred before. Several times, the military police came to his home looking for him. They also approached his mother and members of his family. They sent a request to his home asking him to appear before them. The applicant stated that he specifically fears harm from the military police as these were the people responsible for persecuting him in the past. He fears being arrested and detained. He fears the police will beat and assault him as they have done in the past
102. At this point, the applicant became ill and had to leave the hearing room. He returned to the hearing room after a few minutes and was visibly distressed.
103. The Tribunal asked the applicant if he had had any contact with his family. The applicant stated that he was in contact with his mother. He also spoke to his wife and son through Skype and he understood that they were safe. The Tribunal asked the applicant if he would continue to speak out against the Georgian military if he returned to Georgia. The applicant stated that he would always speak out and he would continue to tell his friends what he had witnessed.

Post hearing submissions

104. At the end of the hearing the applicant's representative asked for 14 days to provide further submissions. The Tribunal granted this period of time. [In] April 2011 the representative asked for an extension of time until [a date in] May 2011 to provide the submissions. The Tribunal granted this extension of time.

105. [In] May 2011 the Tribunal received further submissions from the applicant's representative.
106. The representative refers to independent country information supporting the applicant's account that foreign journalists were in Gori in August 2008. This information includes newspaper reports from journalists in Gori, information from Amnesty International and information from the Ministry of Foreign Affairs of Georgia.
107. In a statutory declaration dated [in] May 2011, the applicant repeated some of the matters raised in his statutory declaration dated [in] December 2010 and his evidence at the Tribunal hearing. The applicant adds the following information:
- The applicant described in more detail his contact with the foreign journalist [in] August 2008 and the presence of foreign journalists generally in Gori.
 - He reported abuses of refugees to his Captain. He believed the Captain would remove the soldiers responsible and investigate the complaints. Unfortunately this did not happen. The Captain told the applicant he did not care.
 - If he were to return to Georgia, he believes he will be seriously harmed or killed by the military police and/or non-military police because he informed a foreign journalist about human rights abuses he witnessed the Georgian soldiers committing. The police would perceive this as being anti-government.
 - He believes he will be seriously harmed or killed by Georgian authorities because they suspect he was involved in the coup [that involved] his friend [Mr B]. He had no involvement in this coup.

Independent country information

108. The applicant's representative has provided a country information report on Georgia prepared by Amnesty International, dated 11 August 2010 (the Amnesty Report'). The report states:

Amnesty International found that the occurrence of politically motivated assaults, detentions, and mistreatment is a common practice in Georgia as is police impunity and arbitrary arrest. Amnesty has documented reports highlighting that Georgian soldiers violated the rights and dignity of many South Ossetian civilians and refugees during the August 2008 conflict. Further, Amnesty International has gathered evidence that soldiers and other members of civil society who spoke out against the war and against these abuses were subject to mistreatment by Georgian authorities. (p.1)

Georgian military contracts and promotions within the military

109. The Amnesty Report states the following about contract military service and promotions.

After completing the first four years of contract base military service, volunteers are able to continue their service for four or more years. Commanders almost always volunteer servicemen to continue to serve with the Georgian Armed Forces...Contract servicemen rise in the ranks...solely at the discretion of the Commanders of each unit...The last way a contract military serviceman can improve his career by becoming an officer is by joining the National Defence Academy...

An efficient promotional system appears to elude the Defence Ministry and Georgian Armed Forces...These personnel changes inevitably push out many experienced and devoted veterans and prohibit many qualified servicemen from rising in rank. (p.4)

Humanitarian assistance provided by the Georgian military

110. The Amnesty Reports states that:

The UNHCR reported that the August 2008 conflict displaced approximately 192,000 people, 127,000 of which were displaced within Georgia around the Gori region. The direction of flight was 'divided largely, but not exclusively, along ethnic lines with Ossetians having fled northwards towards the Russian Federation and ethnic Georgians having fled southwards'...The Georgian Government was reported to have offered substantial aid and assistance to people fleeing the conflict zone...Human Rights Watch reported that civilians gathered in the Gori central square to receive food and other humanitarian assistance from Georgian authorities. (p.8)

Withdrawal of the Georgian army from Gori in August 2008

111. The Amnesty Report, citing news reports by the BBC, *The Times* and Human Rights Watch (among other sources), states that the parts of the Georgian army was still present in Gori on 12 August 2008:

On 12 August, American officials in Washington confirmed that the Russian army had halted near the boundary of Georgia and South Ossetia and had indeed not yet entered the city of Gori; it was not until the morning of 13 August that Russian forces entered Gori. Similarly, while the Georgian army was reported by some sources to have pulled out of Gori on the night of 11 August 2008 in a panicked retreat, in reality only part of the Georgian army and a number of Georgian residents left the city and retreated along the roads back towards Tbilisi on that night. Throughout the day and into the night of 12 August the remainder of the Georgian army withdrew back towards Tbilisi, in an increasingly haphazard and panicked retreat. However, the BBC reported that 'at the border, it soon became apparent the Georgian withdrawal had not brought an end to the fighting'.

112. Human Rights Watch states that the exact time that Russian Army occupied Gori is disputed:

Even though the Russian Ministry of Defense announced that Russian forces had ended all combat operations at 3 p.m. on August 12 and that all units had received an order to remain in their positions, Russian armed forces crossed the South Ossetian administrative border on August 12 and moved toward Gori city. The exact time when Russian forces occupied Gori city is disputed. The Russian authorities admitted that they were removing military hardware and ammunition from a depot in the vicinity of Gori on August 13 but denied that there were any tanks in the city itself. Russian tanks blocked roads into Gori city on August 14. By August 15, Russian troops had advanced past Gori city as far as the village of Igoeti, 45 kilometers west of Tbilisi. (Human Rights Watch, 23 January 2009, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, p.31, <http://www.hrw.org/en/reports/2009/01/22/flames-0>, accessed 27 May 2011)

113. The *New York Times* reported on 12 August 2008 that Russian troops had not yet entered Gori:

There were conflicting reports along the road between the Russian columns and the capital about whether the Russians had captured Gori, a central Georgian town with a

major military installation astride the country's main east-west road about a 45-minute drive from the capital. The city, the birthplace of Stalin, was now a potential strategic prize.

Residents fled the city beside Georgian military units, which rode yellow municipal buses and armoured personnel carriers. But Russia insisted that it had not entered Gori.

This appeared to be confirmed by American officials in Washington, who said that Russian units had stopped near the boundary with South Ossetia. (Schwartz M, Barnard A and Kramer AE, 12 August 2008, 'Russian Forces Capture Military Base in Georgia', <http://www.nytimes.com/2008/08/12/world/europe/12georgia.htm?pagewanted=all>, accessed 27 May 2011)

Treatment of South Ossetians by Georgian Soldiers

114. Amnesty International (at p.9) and Human Rights Watch report that many indiscriminate attacks by Georgian soldiers on ethnic Ossetians were reported during the August 2008 conflict. A number of witness accounts claim that Georgian forces ransacked houses and stole money, valuables, identification documents and other things from houses in South Ossetia. Georgian forces beat and ill-treated at least five of the 32 Ossetians detained in August (Human Rights Watch, 23 January 2009, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, <http://www.hrw.org/en/reports/2009/01/22/flames-0>, accessed 27 May 2011)

Detention of Georgian Soldiers for Opposing the War

115. The United States Department of State reports that:

Human rights NGOs claimed the government detained 60 to 100 soldiers after the armed conflict in August 2008. Some attributed the detentions to their failure to report to their units during the war. Others maintained that the detentions were for suspected drug use or some other charge. The press reported that soldiers were arrested for speaking out against the government. (United States Department of State, 11 March 2009, 2009 Human Rights Report: Georgia <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136032.htm> , accessed 1 June 2011).

116. Amnesty International (at p.13) and Human Rights Watch report that torture and other, cruel, inhuman and degrading treatments and punishments continue to be employed by government officials with limited accountability. Georgian citizens in police custody and within the penitentiary system continue to make allegations of inhuman and degrading treatment, including beatings, rapes and threats of rape. Human Rights Watch has expressed concern over the excessive use of force by law enforcement officials. (Human Rights Watch, 19 May 2009, 'Letter to Georgian authorities regarding abuse in police custody', <http://www.hrw.org/en/news/2009/05/19/letter-georgian-authorities-regarding-abuse-police-custody>, accessed 1 June 2011; Human Rights Watch 22 April 2009, Human Rights Watch concerns and recommendations on Georgia, <http://www.hrw.org/en/news/2009/04/22/human-rights-watch-concerns-and-recommendations-georgia>, accessed 1 June 2011).

Failed May 2009 Coup

117. The US State Department reports the following about the failed coup [details deleted: s.431(2)]:

On May 5, the senior leadership of a battalion-sized military unit at the Mukhrovani base reportedly initiated a mutinous event against the government. The vast majority of the unit, including 500 members, was not involved and was unaware of the conspiracy and surrendered peacefully the same day. Three of the alleged organizers escaped. On May 21, the three were caught in a firefight with police in a Tbilisi suburb. In the shootout police killed , Gia Kriashvili, and wounded the other two, Levan Amiridze and Koba Otanadze, resulting in their hospitalization. The Ministry of Internal Affairs stated that the three men had put up armed resistance necessitating the use of lethal force. Many NGOs questioned the appropriateness of the force used in their arrest. NGOs also highlighted concerns about detention. On August 24, the Tbilisi City Court began hearings in the cases of 41 persons accused of participating in the uprising. Most faced a 27-year sentence. Verdicts were pending at year's end...

During the year there were also reports that authorities detained individuals solely because they were family members of a criminal suspect despite the lack of evidence of any ties to the alleged crime. The public defender and NGOs reported that in the early hours of May 20, police officers from the Ministry of Internal Affairs' detained at least 11 relatives of Koba Otanadze, accused of being one of the leaders of the Mukhrovani mutiny (see sections 1.g. and 1.c.). The family members included Otanadze's brothers, Jimsher and Nugzar Otanadze, as well as Jimsher's wife, Gulo Zaridze, and Jimsher's son, Giorgi Otanadze. Authorities did not formally register their detention of these individuals, and the public defender could not determine their whereabouts. They were released 21 hours later after the arrest of Koba Otanadze. On May 22, the Ministry of Internal Affairs confirmed the detention of some family members under the status of "suspects" or "witnesses." Charges of resisting arrest were filed against Nugzar Otanadze (see section 1.c.), but no other formal charges had been filed at year's end, either against detained family members or against those responsible for such detentions. (United States Department of State, 11 March 2009, 2009 Human Rights Report: Georgia <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136032.htm> , accessed 1 June 2011).

118. The Amnesty Report states that during the course of the arrest of the coup members police seized four cell phones and several SIM cards. With this evidence, police arrested 3 dozen people over the next 2 days, 20 of which were military personnel and the rest were civilians (p.11).

Current Human Rights situation in Georgia

119. The US Department of State reports the following about Georgia's current human rights record:

The main human rights abuses reported during the year included abuse of prisoners and detainees, poor prison conditions, and arbitrary arrest and detention. There were reports of selective application of the law--crimes allegedly involving government officials or supporters were slowly investigated and often remained pending, while crimes allegedly involving persons or organizations linked to the opposition were investigated quickly and prosecuted to the full extent of the law. This imbalance led to allegations of impunity for government officials. There continued to be allegations of a lack of due process, government pressure on the judiciary, and that individuals remained in prison for politically motivated reasons. There were reports of pressure

on businesses to suppress potential support for the opposition and independent media. There were reports of curbs on media freedom. There were some cases of restrictions on religious freedom and a lack of progress on religious issues. There were also reported cases of violations of the rights of internally displaced persons (IDPs) during some evictions in Tbilisi, and senior level corruption in the government. Harassment of opposition and NGO members, prejudice against persons based on their sexual orientation and government interference with labor associations also were reported....

Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The constitution and law prohibit such practices; however, there were reports that government officials continued to employ them with limited accountability. The PDO's 2009 annual *National Preventive Mechanism Report* (released in June) noted that allegations of mistreatment increased compared with previous monitoring. In a June 26 speech, the public defender stated that accountability for torture and other inhuman treatment remained a problem.

d. Arbitrary Arrest or Detention

The constitution and law prohibit arbitrary arrest and detention; however, the government's observance of these prohibitions was uneven...

The Human Rights Protection Unit in the Office of the Prosecutor General issued regular updates on the status of cases, trials, and investigations of human rights violations. However, NGOs maintained that the incidence of abuse was higher than the number of cases investigated by the prosecutor general, and failure to conduct systematic investigations and pursue convictions of all alleged abusers contributed to a culture of impunity. Human rights NGOs also asserted that many instances of abuse went unreported by victims due to fear of reprisals or lack of confidence in the judicial system. (United States Department of State, 8 April 2011, 2010 Human Rights Report: Georgia <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154425.htm>, accessed 1 June 2011)

120. Amnesty International reports that political dissidents and opponents are often ignored and mocked by authorities, and sometimes gaoled for their political expression. Some NGOs have reported that the Georgian government holds political prisoners and detainees, often without due process and without making the whereabouts of these prisoners public (p.12).

FINDINGS AND REASONS

121. Based on a copy of the applicant's passport, the Tribunal accepts the applicant is a national of Georgia and has assessed his claims on this basis.

Summary of applicant's claims

122. The applicant's claims may be summarised as follows. The applicant claims to fear persecution for reasons of his political opinion or imputed political opinion. Specifically, the applicant claims to fear persecution for speaking out against human rights abuses committed by Georgian soldiers in the August 2008 conflict with South Ossetia. He also claims to fear persecution because of his perceived involvement in a coup [involving Mr B] against the Georgian military in May 2009.

123. The applicant claims that he attended the Georgian military academy between 1995 and 1998. He was expelled from the academy in 1998 for speaking out against the way Georgian soldiers were treated and against the current government. The applicant claims he rejoined the military on a contract in 2003. His contract was extended for a further period in 2006. The applicant claims that in 2007 he was transferred to [Unit 2] where his commanding officer was [Major A]. He claims that [in] August 2008 he was sent to Gori to receive and relocate refugees from the conflict with South Ossetia. He states that he witnessed Georgian soldiers abusing and mistreating the refugees and he spoke out about this. He claims he spoke to a foreign journalist about what he had witnessed and reported his conversation to his commanding officer when questioned. The applicant claims he was subsequently dismissed from the military.
124. The applicant claims that [in] May 2009 he received a call from [Mr B], an old classmate from the military academy. [Mr B] asked if he could shelter at the applicant's home. The applicant later came to learn that [Mr B] was implicated in a coup against the Georgian military, although the applicant had no involvement in this coup.
125. The applicant claimed that he was detained by the military police on 3 occasions: [in] August 2008 for speaking to the foreign journalist, in November 2008 when he was interrogated about [Major A], and again [in] May 2009 when he was suspected of being involved in a coup [involving Mr B]. The applicant claims that each time he was detained he was severely beaten and was sexually assaulted. The applicant claims that the police issued him a summons to present for further interrogation [in] June 2009.
126. The applicant claims to fear that if he returns to Georgia, he fears he will be detained, beaten, seriously harmed or killed by the military or non military police. He claims he will continue to speak out against the Georgian military and tell others what he had witnessed during the South Ossetia conflict.

Assessment of applicant's credibility

127. The Tribunal found the applicant to be a credible witness. He has provided consistent evidence over a period of time and in different forums. His evidence at the hearing was consistent with the written statement in his protection visa application, his two statutory declarations to the Tribunal and his evidence at the Departmental interview. He provided a detailed account of his past experiences in Georgia and he was able to recount specific details. His evidence was supported by the independent evidence available to the Tribunal. He has not sought to exaggerate or embellish his account of what happened to him in Georgia. He answered the Tribunal's questions in an open and straightforward manner.
128. The Tribunal finds there is sufficient medical evidence to establish that the applicant has post-traumatic stress disorder and anxiety/depression as a result of his past experiences in Georgia. This includes the report from [Doctor C], dated [in] August 2010, a report from psychologist [name deleted: s.431(2)], dated [in] November 2010 and a discharge summary report from the treating physician at [Hospital 1] dated [in] May 2010. In particular, the Tribunal gives weight to the discharge summary report from [Hospital 1] as this was not prepared specifically for the purpose of this application, but when the applicant was admitted to hospital. The treating physician refers to the applicant's past wartime experiences in Georgia and the disturbing incidents experienced and witnessed by the applicant. This medical evidence, along

with the applicant's presentation at the hearing, further supports the applicant's claims about the abuses he witnessed in Georgia and the harm he personally suffered at the hands of the Georgian military police.

Claims of past harm

Concerns raised by the delegate

129. The Tribunal will now address the concerns raised by the delegate.
130. Firstly, the delegate did not accept that the applicant had served in the 2008 war given that military contracts are usually no more than 4 years and the applicant had only provided a copy of his 2002 contract. The applicant has provided a credible explanation in his statutory declaration dated [in] December 2010, as to why he was not asked to sign any formal documents to extend his contract. The applicant's explanation is also supported by the Amnesty International report referred to above, which states that military contract extensions are not a formal or well documented procedure. The Tribunal therefore accepts the applicant's explanation and accepts that he continued to serve in the military in 2008 despite the fact that he had no formal contract.
131. Secondly, the delegate found that the applicant's account of his service in the military lacked credibility as he was not promoted during his tenure. The applicant has provided a credible explanation in his statutory declaration dated [in] December 2010 as to why he was not promoted. The Tribunal accepts he was not promoted as he had not completed the military academy and was expelled from the academy in 1998 for challenging his group leader. The applicant's explanation is also supported by the Amnesty International report referred to above, which states that promotions within the Georgian military are discretionary and arbitrary.
132. Thirdly, the delegate had concerns that the applicant easily left Georgia under an ordinary civilian passport rather an official military passport. The applicant has provided a credible explanation in his statutory declaration dated [in] December 2010 as to why he only had an ordinary civilian passport and how he was able to leave Georgia by paying a bribe (see paragraphs 76 and 77). The Tribunal accepts this explanation.
133. Fourthly, the delegate did not accept that the applicant was involved in assisting displaced Ossetian refugees. The applicant has provided a credible explanation as to why he was assigned this role during combat operations instead of undertaking combat duties. The Tribunal accepts that due to his friendship with [Major A] he was assigned a non combat role. The applicant's account is also supported by the independent country information referred to above that the direction of flight of refugees was not exclusively along ethnic lines and that the Georgian government was involved in humanitarian assistance during the conflict. The Tribunal therefore accepts the applicant's evidence that he was involved in assisting displaced Ossetian refugees.
134. Fifthly, the delegate did not accept the applicant's claim that he spoke to a foreign journalist [in] August 2008, as independent information indicated that the Georgian army withdrew from Gori on 12 August 2008.

135. The Tribunal finds the applicant gave a detailed credible account of his encounter with the foreign journalist. The applicant's account is also supported by the independent country information referred to above which indicates that some Georgian forces remained in Gori on 12 August 2008, or as late as the morning of 13 August 2008 when Russian forces entered Gori. The applicant's representative has also cited a number of independent sources referring to the presence of foreign journalists in Gori during the conflict
136. In light of the independent reports that Georgian troops were still present in Gori on 12 August 2008, that foreign journalists were present in Gori, and the applicant's consistent and detailed account of his conversation with a foreign journalist, the Tribunal accepts the applicant's evidence that he spoke to a foreign journalist [in] August 2008 about the human rights abuses he had witnessed being committed by the Georgian army.
137. Sixthly, the delegate considered that the applicant's account of frequent principled dissent against human rights abuses by Georgian soldiers lacked credibility given the applicant's military training. The applicant has provided a credible explanation in his statutory declaration dated [in] December 2010 and in his evidence to the Tribunal, as to why he spoke out against abuses by soldiers. The applicant's evidence about human rights abuses committed by Georgian soldiers is supported by the independent country information referred to above. The applicant's behaviour is consistent with his earlier expulsion from the Military Academy in 1995 and his friendship with [Major A] with whom he could discuss his concerns openly. The Tribunal accepts the applicant's evidence that he could not ignore the abuses he witnessed and that he also saw his role as protecting the civilians affected by the conflict. The Tribunal accepts that the applicant was sincere in his expression of dissent about the abuses he witnessed.

Applicant's claims of detention

138. The applicant claims that he was twice detained for speaking out against abuses by Georgian soldiers during the conflict. The Tribunal finds the applicant gave a credible and detailed account of the circumstances in which he was detained and the abuses he suffered while he was in detention. His evidence is supported by the medical evidence indicating that he has post-traumatic stress disorder as a result of his experiences in detention. The applicant's evidence is also supported by the independent country information that Georgian soldiers involved in the 2008 conflict were detained for speaking out against the government, and the practice of arbitrary arrest and detention in Georgia.
139. The Tribunal therefore accepts the applicant's evidence that he was detained [in] August 2008 for speaking out against the army and the government. The Tribunal accepts the applicant was again detained in November 2008 for being perceived as being against the government due to his association with [Major A].

Applicant's claims of detention for being implicated in the May 2009 failed coup

140. The applicant claims he was again detained [in] May 2009 for his suspected involvement in a coup [involving Mr B]. The Tribunal finds the applicant has provided a credible and consistent account of the circumstances in which he was contacted by [Mr B] [in] May 2009, and the circumstances in which he was subsequently detained by

the military police. The applicant's evidence is consistent with the independent country information referred to above about the events surrounding the coup. This includes the fact that police seized mobile phones and SIM cards when they arrested suspected coup participants and that they also arrested associates of the coup participants. The Tribunal therefore accepts that the applicant was arrested because of his imputed association with those who had protested against the Georgian government.

141. In summary, for the reasons set out above, the Tribunal accepts the applicant's claims of past harm as outlined in paragraphs 121 to 124. The Tribunal accepts that the applicant was twice detained and abused in detention for speaking out against human rights abuses committed by Georgian soldiers in the August 2008 conflict with South Ossetia. The Tribunal accepts that the applicant was detained a third time and was abused in detention because of his perceived involvement in a coup [involving Mr B] against the Georgian military. The Tribunal accepts that he was asked to present for interrogation by the police [in] June 2009 and he did not do so. The Tribunal therefore accepts that the applicant was detained and subjected to harm for reasons of his political opinion and imputed political opinion.

Future harm

142. The Tribunal has accepted the applicant's claims that he experienced past persecution at the hands of the Georgian military police for reasons of his political opinion and imputed political opinion. The Tribunal will now determine whether the applicant has a well founded fear of being persecuted for a Convention reason in the reasonably foreseeable future.
143. The Tribunal has found the applicant to be a credible witness and was sincere in expressing his dissent about the abuses he had witnessed by the Georgian army. The Tribunal therefore accepts the applicant's evidence at the hearing that he would feel compelled to speak out against the Georgian military and tell others about the abuses he had witnessed.
144. The independent country information referred to above indicates that human rights abuses such as excessive use of force by law enforcement officers, arbitrary arrest and detention, politically motivated imprisonment, lack of due process and lack of respect for media freedom remain significant problems in Georgia. The Tribunal therefore accepts that if the applicant was to return to Georgia, now or in the reasonably foreseeable future, there is a real chance that he would not be able to freely express his political opinion in the manner he would wish to. There is a real chance he would be arrested, beaten and detained by the military police or the non-military police. The Tribunal is also satisfied that there is no place within Georgia to which the applicant could reasonably relocate where he would not have a well-founded fear of persecution on account of his political opinion.
145. The Tribunal is satisfied that there is a real chance that the applicant would experience persecution from the Georgian military police or non-military police if he returned to Georgia. As the military and non-military police are state actors, the Tribunal considers that the state is unable to provide him with protection from that persecution.
146. The Tribunal accepts that the persecution the applicant would suffer is 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act, in that it involves a threat to

his liberty or significant physical harassment or ill-treatment. The Tribunal is satisfied the applicant's political opinion is the essential and significant reason for the persecution he fears, as required by paragraph 91R(1)(a). The Tribunal therefore finds that the applicant faces a real chance of persecution for a Convention reason should he return to Georgia now or in the reasonably foreseeable future.

147. The Tribunal finds that the applicant is outside his country of nationality, Georgia. For the reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted in Georgia for reasons of his political opinion and his imputed political opinion. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the government of Georgia. There is nothing in the evidence to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, Georgia. The Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

CONCLUSIONS

148. Accordingly, in all the circumstances, the Tribunal is satisfied that the applicant has a well-founded fear of Convention-related persecution in Georgia.
149. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

150. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.