1103215 [2011] RRTA 832 (28 September 2011)

DECISION RECORD

RRT CASE NUMBER:	1103215
DIAC REFERENCE(S):	CLF2010/125442
COUNTRY OF REFERENCE:	Turkey
TRIBUNAL MEMBER:	Denis O'Brien
DATE:	28 September 2011
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of Turkey, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2005 and applied to the Department of Immigration and Citizenship for the visa [in] September 2010. The delegate decided to refuse to grant the visa [in] March 2011 and notified the applicant of the decision.

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 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).

4. The applicant applied to the Tribunal [in] April 2011 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 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. Secondly, 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, if the 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 unable to be controlled by the authorities of the country of nationality.

14. Persecution also 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. Thirdly, the persecution which the applicant fears must be for one or more of the reasons specified 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. Fourthly, 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 he or she has genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded when 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. The expression "the protection of that country" in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in

particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

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

20. The applicant appeared before the Tribunal [in] June 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.

21. The applicant was represented in relation to the review by his registered migration agent.

Protection visa application

22. The applicant is [age deleted: s.431(2)] and is single. He was born in Ankara, Turkey. His father and brother are in Turkey. The applicant arrived in Australia on a student visa [in] March 2005. A further student visa was issued to him in Australia [in] April 2010.

23. He said in his protection visa application that:

- He and his family are in opposition to the Turkey Government and are blacklisted because of their political history, particularly, that of the applicant's father who was one of the founders of the Turkish Revolutionary Communist Party (TDKP) and later one of the founders of the Labour Party (EMEP). The applicant was a member of EMEP.

- His father, is a lawyer who defended [Mr A], [age deleted: s.431(2)] who was later executed by [execution deleted: s.431(2)].

- As a result of defending [Mr A], the applicant's father was also jailed. His defence of [Mr A] also led to members of the family being discriminated against, eg, the applicant's mother lost her teaching career and the applicant was discriminated against at [University 1] in Turkey where he was studying.

- Since being in Australia the applicant has applied several times to defer his military service but his applications were refused. The result is that he is now absent without leave and will be arrested if he returns to Turkey.

- The applicant's father moved from Ankara to [province deleted: s.431(2)] but his legal practice has been subject to inspections and fines from Treasury inspectors. All his bank accounts and properties have been frozen because of the fines.

- His father still speaks out against the Turkish Government at international conferences, including in [city deleted: s.431(2)] [in] September 2010 and in [country deleted: s.431(2)] [in] December 2010.

- If the applicant returns to Turkey, he will be mistreated by Turkish Government departments and the Turkish courts.

Department interview

24. At the interview with the delegate [in] January 2011, the applicant said that:

- He travelled to Australia to study. He did an Advanced Computing Diploma at [institute deleted: s.431(2)] and is presently in the last year of a [subject deleted: s.431(2)] degree at [University 2].

- He had problems at University in Turkey because he and other students in the EMEP mounted a campaign against the university administration concerning the proposed location of a mobile phone tower on campus. He received letters from the university administration as a result, warning him that he could be expelled for his activities. He decided to leave Turkey before the university expelled him.

- While in Australia he has sought through the Turkish Embassy to continue the deferral of his military service training pending completion of his tertiary studies. However, his application was refused. As a result, if he returns to Turkey, he will be jailed and will still be required to do his military service. He will have no opportunity to get a job with government.

- What prompted him to apply for protection in Australia were the elections in Turkey on 12 September 2010, which led to changes in regulations and the justice system, making it harder for individuals to gain access to the European Human Rights Court. Until then he was happy to return to Turkey.

Tribunal hearing

25. At the Tribunal hearing the applicant provided the Tribunal with a large number of documents, including the following:

- Bundle of documents relating to the applicant's attendance and academic progress at [University 1];

- Material concerning [Mr A], including a press report in which [Mr B] refutes an allegation by retired military judge, [name deleted: s.431(2)], who was among the judges who ordered [Mr A]'s execution, that [Mr A]'s lawyers were responsible for his [execution deleted: s.431(2)] due to their alleged failure to raise the issue of his age during the trial;

- A document in Turkish which appears to be dated [in] October 2005 and to be a formal notification of the deferral of the applicant's military service until [a date in] October 2006;

- Translations of certain provisions of Turkey's military laws relating to military service;

- A translation of a decision dated [in] 2003 of the Turkish First Civil Court, Ankara, relating to a suit brought by the applicant [in] 2002 against the Ministry of Internal Affairs concerning injuries to his arm and threats received by him [in] May 2002;

- A translation of an undated interlocutory decision of the Turkish Fourth Criminal Court, Ankara, made in relation to proceedings brought at the instance of the applicant [in] 2004 concerning his subjection to physical violence [in] May 2004 at the hands of certain police officers;

- A report dated [in] May 2004 of a medical examination of the applicant made by [name deleted: s.431(2)] in relation to those proceedings, being a report which refers to a fracture of cranial bone and other injuries;

- A translation of a decision dated [in] 2010 of the Turkish [number deleted: s.431(2)] High Criminal Court, Ankara relating to proceedings brought by the Ankara Chief Public Prosecution Office against the applicant relating to a speech allegedly made by him at [University 1] [in] 2003; the decision sentences the applicant to 18 months imprisonment for breach of article 216 (inciting the population to enmity or hatred and denigration) of the Turkish Penal Code and to 6 months imprisonment for breach of article 301 (Insulting Turkishness, the Republic, the organs and institutions of the State) of the Turkish Penal Code;

- A statement dated [in] May 2011 by [Mr B], written in his capacity as lawyer for the applicant, in which he refers to the sentence the applicant has received and states that the sentence will cause the applicant to get the maximum sentence of 3 years for being a deserter from military service; the statement also refers to the two assaults on the applicant "for political reasons" and to the fact that the criminal case in relation to the second assault remains undecided in the courts, despite the 7 years that have passed since its commencement;

- Photographs of body scars;

- Photographs of the applicant and others at a gathering. At the Tribunal hearing the applicant explained that the photographs were taken at an EMEP congress and he pointed out his father standing beside him in one of the photographs;

- Various photographs of the applicant and others in social settings, including photographs of the applicant and a female, whom the applicant identified at the Tribunal hearing as his former fiancé;

- A lengthy report, apparently downloaded from the internet, entitled "The Terror Report of Turkey 1980-2000", written by a group called the TAYAD Solidarity Committee.

26. At the Tribunal hearing the applicant said that he started his studies in Australia at [institute deleted: s.431(2)] where he completed a Diploma of Computing. He is presently at [University 2] where he is enrolled in a bachelor degree in [subject deleted: s.431(2)] . He expects to complete his course this year. He believes his student visa may have expired.

27. The Tribunal commented that the applicant's Turkish passport showed that its validity had been extended by the Turkish Consulate in Australia to [a date in] September 2010 but that it showed no evidence of further extensions. The applicant said that the Consulate had told him that it would not extend his passport further because he was now regarded as a military service evader but that, if he went to the Consulate and showed the consular officials that he had an airline ticket for return to Turkey, they would grant him a travel document to enable his return to Turkey.

28. The Tribunal asked the applicant about the purpose of the trip evidenced by the entries in his passport showing his departure from Australia [in] October 2005 and his return to Australia [in] November 2005. He said that he went to Ankara to visit family and his then fiancé and also because he had legal matters to attend to. The Tribunal asked him what these matters were. He replied that, in his interview with the delegate, he did not explain certain things because he was afraid to do so out of concern of possible harm to his father but he could now lift the veil of secrecy. He went on to talk about the cases referred to in the documents mentioned above.

29. The Tribunal put to the applicant that it was having difficulty accepting the evidence the applicant was now presenting about these cases. The Tribunal said that, if the matters had been genuinely in issue when he made his protection visa application, he would have mentioned them in his claims or at least would have mentioned them in his interview with the delegate. However, he had not. The Tribunal said that his raising of these matters now suggested that he may be seeking to make up his case for a protection visa as he went along.

30. The applicant said that he could explain. He said that his father had acted as his lawyer in all his cases. His father was considering reopening the case in which he had acted for [Mr A]. If the applicant's handing up to the Tribunal of records relating to the cases were found out by the Turkish Government, it would have an adverse effect on his father's career and would cause any reopening of [Mr A's] case to collapse. That was because the case brought against the applicant which the applicant was now revealing to the Tribunal had been commenced in the State Security Court and the proceedings had to be kept secret.

31. The Tribunal asked the applicant about the nature of the charges brought against him. He referred to what is set out above concerning his convictions arising out of a speech he gave at [University 1] [in] 2003. He said that there were other speakers on the rostrum also and that his speech as recorded by the authorities was not the whole speech but selective parts of it. The applicant explained to the Tribunal the history of the matter in the Turkish courts and how the higher court had ultimately imposed a sentence of imprisonment similar to that imposed in the court below. The applicant said that the whole proceedings against him had occurred while he was in Australia. He said that he had appealed the decision of the [number deleted: s.431(2)] High Criminal Court and the matter was now before the Court of Appeal. However, there was every possibility he would ultimately be jailed. The changes to judicial structures made as a result of the September 2010 referendum meant that it would not be practically possible for the applicant to go to the European Court of Human Rights (ECHR). The changes meant that it would now take about 6 years for the matter to be dealt with by the ECHR, by which time the applicant would have served his sentence.

32. The Tribunal put to him that what he was saying about the ECHR did not seem to be correct. The Tribunal referred to the US Department of State (DOS) 2010 Human Rights Report for Turkey which talked positively about the constitutional changes made by the referendum and did not mention any restrictions on access to the ECHR. The Tribunal said that DOS report referred to the very large numbers of cases involving Turkey which were before the ECHR, 16,100 in all. The Tribunal said that these numbers suggested the probable reason why the applicant's ready access to the ECHR may be difficult.

33. The applicant responded that the Turkish Government had made arrangements such that foreign media would look positively on the constitutional changes that had been made. However, the foreign media did not comprehend the real content of the changes. The High Council of Judges was appointed by the Government and judges could now be controlled by the Government. There was now no separation of powers.

34. The Tribunal put to the applicant that it did not make sense that he was able to leave Turkey given the offences he was charged with in 2003. He replied that, when he originally left Turkey in March 2005, the Court had not sent to Customs any documents that might have prevented the applicant's departure. He did not at that time have any criminal convictions recorded against him. He also said that, when he left Turkey in November 2005 after his return trip, he did have problems with the police at Customs but he managed to depart the country by paying a US$200 bribe to the officer.

35. The Tribunal asked the applicant about the two cases in which he had initiated proceedings. He said that the first case concerned a claim for compensation he had brought against the Department of Internal Affairs following an attack on him in 2002 by certain unknown persons. The Court rejected the claim. The second case was still continuing and related to an attack made on him in the street in 2004 by police officers. The medical report of [name deleted: s.431(2)] related to those proceedings.

36. In relation to the proceedings brought against the applicant, the Tribunal explained to him that the enforcement against him of laws generally applying in Turkey would not constitute persecution for the purposes of the Convention. The applicant said that, in relation to the proceedings which led to his being sentenced to imprisonment, it was not known who made the recordings of his speech and that the recording had been done selectively so that his words taken out of context might appear to breach the law. In the course of the proceedings the applicant had argued that, under the Constitution, the recording in this form should not be treated as evidence.

37. The applicant told the Tribunal that the proceedings had been brought because of political discrimination against him and that this was all due to his family's politics. He is a member of the EMEP and his father was a founder of the party and had been a founder of the TDKP and THKO in his youth. The Tribunal asked him whether he had his EMEP membership card. He said that he did not know where it was. He showed the Tribunal the photographs referred to above allegedly showing the applicant and his father at an EMEP congress.

38. The Tribunal referred the applicant to his claim that his father spoke out against the Turkish Government at international conferences in 2010. The Tribunal noted that the conference programs would show the applicant's father as a speaker and asked whether the applicant had them. The applicant indicated that he could supply them to the Tribunal.

39. The Tribunal pointed out that his father, despite his profile as an opponent of the Government, appeared to have no difficulty leaving Turkey on his international engagements. The applicant said that his father had no fears for himself but his biggest fears were for his family, especially in relation to his reopening of [Mr A's] case. It was now more common for the authorities in Turkey to make life more difficult for members of the family rather than for the applicant's father himself.

40. The Tribunal asked the applicant when it was that he first applied to postpone his military service. He said that he first applied in Turkey when he was still a student. The postponement had been granted until 2006. He had tried to obtain a further postponement after he came to Australia as a student but the authorities had refused. At the same time friends of the applicant in a similar position had been granted postponements. The position with the applicant was that he was now considered a draft evader, with a criminal record, and would be subject to a penalty of 6 years imprisonment. The applicant did not know what he would do because he was now unable to take his case to the ECHR.

41. The Tribunal put to him that the Refugees Convention did not provide protection against the ordinary application of Turkey law, including the law relating to military service. The applicant said that he had not been trying to escape his military service obligations but he had been victimised by the Turkish Consulate and had done nothing wrong. He did not think that it was a mistake by the Consulate, given that hundreds of Turkish students in Australia had managed to get their military service postponed. The Tribunal asked him whether he had a copy of the application he had made to the Consulate for deferral of his military service. He said that there was no application. He had simply presented the deferral letter referred to above and information from [University 2] about his student status. So far he had had no reply from the Consulate. He said that he had visited the Consulate three times about this matter; the first time was in September 2006, the second time was about six months after that and the third time was in 2008.

42. The Tribunal referred to the fact that the applicant had said in his protection visa application that he had been discriminated against at his university in Turkey. The Tribunal asked him what he meant by this. He said that he was involved with colleagues in a youth organisation affiliated with the EMEP and he was one of the leaders of the organisation. In everything he and his colleagues did at university, management came down on them with disciplinary action. One example was the petition they organised to stop the erection of a mobile phone tower on the campus because of the danger it posed to health. The university administration took disciplinary action against him and suspended him from classes. Eventually he was expelled from the university.

43. The Tribunal asked him if he had the letter from the university informing him of his expulsion. He said that he had never seen it. It was sent to his family home in Turkey after he had come to Australia. His father read it out to him over the telephone.

44. The Tribunal put to the applicant that the delay of some five and a half years which occurred between the date of his first arrival in Australia and the date on which he made his protection visa application suggested that he may not have fled Turkey because of persecution and that he may not have real fears of persecution in returning to Turkey. The applicant replied that he had kept up his hopes to the last while he was in Australia that the criminal case against him would result in a just decision, a decision that was not made just because of his name but was in accordance with the law. But those hopes had been dashed by the latest decision of the

court. His second hope was that he would be able to take his case to the ECHR but that hope too was dashed by the constitutional changes made in September 2010.

45. The Tribunal put to the applicant under s.424AA of the Act the information he had given the delegate in his interview with the delegate that what prompted him to apply for protection in Australia were the September 2010 constitutional changes bringing changes to the justice system and making it harder for individuals to gain access to the ECHR and that, up until these changes occurred, he had been happy to return to Turkey. As required by the section, the Tribunal advised the applicant that he could ask for further time to reply to this information if he wished. When the applicant indicated that he would like to respond on another day, the Tribunal said that it would write to the applicant putting the information to him, as there were other matters which might appropriately be covered in a letter from the Tribunal.

Letter under s.424A and s.424

46. After the hearing the Tribunal wrote to the applicant again putting the information to the applicant and inviting his response. The Tribunal also invited the applicant to provide:

- information, which might include a party membership card, showing that he was a member of the EMEP;
- information, which might include conference programs, showing that his father gave speeches critical of the Turkish Government at international conferences in [city deleted: s.431(2)] [in] September 2010 and in [country deleted: s.431(2)] [in] December 2010, as claimed in the applicant's written statement accompanying his protection visa application;
- information, which might include a copy of the letter from [University 1] which he told the Tribunal was sent to his home in Turkey, showing that he was expelled from the University.

47. The applicant sought an extension of time to respond and an extension was granted until [a date in] August 2011.

Applicant's response

48. The applicant provided a response [in] August 2011. He said that he had told the delegate that he would have been happy to return to Turkey because all his friends and family were there. On the other hand, there was currently a threat to his life in Turkey and there were set up court cases against him which would have him sent to prison.

49. The applicant provided with the response a letter from the Department of Student Affairs, [University 1], dated [in] March 2006 informing him of his expulsion from the university for, amongst other things, disturbing the affairs of the university and for disseminating material for political purposes.

50. The applicant further provided an email which referred to two functions at which his father is mentioned as one of the speakers. One of the functions was in [city deleted: s.431(2)] [in] December 2010 to remember [Mr A]. The other was a symposium organised by [group deleted: s.431(2)], entitled "[title]" to take place in [city deleted: s.431(2)] [in] September 2010.

Country of origin information

General country information

51. The US Department of State *2010 Human Rights Report: Turkey* (8 April 2011) includes the following:

> Turkey, with a population of approximately 74 million, is a constitutional republic with a multiparty parliamentary system and a president with limited powers. The Justice and Development Party (AKP) formed a parliamentary majority in 2007 under Prime Minister Recep Tayyip Erdogan. Civilian authorities generally maintained effective control of the security forces.
>
> There were reports of a number of human rights problems and abuses in the country. Security forces committed unlawful killings; the number of arrests and prosecutions in these cases was low compared to the number of incidents, and convictions remained rare. During the year human rights organizations reported cases of torture, beatings, and abuse by security forces. Prison conditions improved but remained poor, with overcrowding and insufficient staff training. Law enforcement officials did not always provide detainees immediate access to attorneys as required by law. There were reports that some officials in the elected government and state bureaucracy at times made statements that some observers believed influenced the independence of the judiciary. The overly close relationship between judges and prosecutors continued to hinder the right to a fair trial. Excessively long trials were a problem. The government limited freedom of expression through the use of constitutional restrictions and numerous laws. Press freedom declined during the year. There were limitations on Internet freedom. Courts and an independent board ordered telecommunications providers to block access to Web sites on numerous occasions. Violence against women, including honor killings and rape, remained a widespread problem. Child marriage persisted, despite laws prohibiting it.
>
> During the year there were some positive developments. On April 11, the political parties law was amended to allow campaigning in languages other than Turkish, including Kurdish. On July 25, the government amended the antiterror laws to prohibit prosecution of minors under the laws, reduce punishments for illegal demonstrations and meetings, and allow for the release of minors who had been previously convicted under the laws, resulting in the release of hundreds of children from prison. On September 12, a package of constitutional reforms was passed by a referendum; it included provisions that changed the composition of the Constitutional Court and the Supreme Board of Judges and Prosecutors; allowed appeal of decisions of the Supreme Military Council in civilian courts; established an ombudsman; and allowed positive discrimination in favor of women, children, veterans, persons with disabilities, and the elderly.
>
> RESPECT FOR HUMAN RIGHTS
>
> Section 1 Respect for the Integrity of the Person, Including Freedom From:
>
> ….
>
> e. Denial of Fair Public Trial
>
> The law provides for an independent judiciary; however, the judiciary was occasionally subject to outside influence. The law prohibits the government from issuing orders or recommendations concerning the exercise of judicial power. In

November the EC's progress report on the country noted that senior members of the armed forces in particular continued to make statements on judicial matters.

The High Council of Judges and Prosecutors (HSYK) selects judges and prosecutors for the country's courts and is responsible for court oversight. The constitution provides tenure for judges, but the HSYK controls the careers of judges and prosecutors through appointments, transfers, promotions, expulsions, and reprimands. The September 12 constitutional amendments expanded the number of permanent members of the HSYK from seven to 22. The amendments also called for 10 members to be directly elected by the approximately 12,000 judges and prosecutors throughout the country, while the 10 other members are appointed by the president, the Court of Appeals, the Council of State, and the Justice Academy. The remaining two members are the minister and under secretary of justice. Supporters of the changes hailed the development as a step toward an independent judiciary. Opponents, however, argued that the government would use influence among judges and prosecutors to ensure the election of handpicked candidates to the HSYK and contended that the president would be likely to select progovernment candidates as well The minister of justice presides over the HSYK, and at least once in the past year the minister prevented the HSYK from convening, accusing the HSYK of attempting to intervene in ongoing trials.

The close connection between public prosecutors and judges gave the appearance of impropriety and unfairness in criminal cases. Prosecutors and judges study together before being assigned by the HSYK. Once appointed, they were often housed together, frequently shared the same office space, and often worked in the same courtroom for more than five years.

According to several regional bar associations, the government devoted insufficient resources to public defense. The associations also noted that public defense attorneys undergo less rigorous training than their prosecutorial counterparts and are not required to take an examination to demonstrate a minimum level of expertise.

Constitutional amendments adopted on September 12 allow individuals to apply directly to the Constitutional Court for redress. Previously, only the lower courts, the president, and members of parliament under certain conditions could apply to the court.

On January 21, the Constitutional Court declared unconstitutional the provision of the law allowing military personnel to be tried in civilian courts. However, the September 12 constitutional amendments contain a provision for trial of military personnel in civilian courts if the crime is committed against the state, constitutional order, or the functioning of constitutional order. The amendments provide for civilian judicial review of decisions of the Supreme Military Council. The amendments also annulled the constitutional provision that prevented the trials of persons involved in the 1980 coup, including former military generals.

According to an AI report during the year, criminal defendants faced protracted and unfair trials, especially for violations of antiterror laws. The report also asserted that convictions under antiterror laws were often based on unsubstantiated or unreliable evidence.

Trial Procedures

Defendants enjoy a presumption of innocence. Courtroom proceedings are public for all cases except those involving minors as defendants. Court files, which contain

charging documents, case summaries, judgments, and other court pleadings, are closed to everyone other than the parties to a case. This makes it difficult to obtain information on the progress or results of court cases except through formal channels. There is no jury system; a judge or a panel of judges decides all cases. Defendants have the right to be present at trial and to consult with an attorney in a timely manner. Defendants or their attorneys can question witnesses for the prosecution and, within limits, present witnesses and evidence on their behalf. Defendants and their attorneys have access to government-held evidence relevant to their cases. Defendants enjoy the right to appeal, although appeals generally took several years to conclude.

International human rights organizations and the EU stated that the courtroom structure and rules of criminal procedure gave an unfair advantage to the prosecution. During a trial, the prosecutor could call any witness desired, whereas the defense had to request that the judge call a witness. Judges decided whether to ask and how to phrase defense counsel's questions but asked all of the prosecution's questions in the exact form presented. Prosecutors entered the courtroom through the same door as the judge; defense attorneys entered through a separate door. Prosecutors sat at an elevated desk at the same level as that of the judge; the defense sat at floor level.

Defendants sometimes wait several years for their trials to begin. Subsequently, trials often last several years. Proceedings against security officials often were delayed because officials did not submit statements promptly or attend trials.

In 2009 the European Court of Human Rights (ECHR) found 95 violations of the European Convention on Human Rights by the country involving length of proceedings.

The law prohibits the use in court of evidence obtained by torture; however, prosecutors in some instances failed to pursue torture allegations, forcing defendants to initiate a separate legal case to determine whether the exclusion of evidence was lawful. Human rights organizations reported that, in such instances, the primary case frequently was concluded before the secondary case was decided, leading to unjust convictions.

Political Prisoners and Detainees

The HRA asserted that several thousand political prisoners from all parts of the political spectrum existed, although the government does not distinguish them as such. The government claimed that alleged political prisoners were in fact charged with being members of, or assisting, terrorist organizations.

According to the Ministry of Justice, from January to June, 7,217 suspects were detained on terrorism-related charges. During the same period 1,553 terrorism cases were opened against 3,333 suspects.

International humanitarian organizations were allowed access to alleged political prisoners, provided they could obtain permission from the Ministry of Justice. In practice, organizations rarely received permission.

Regional Human Rights Court Decisions

Article 90 of the constitution states that "in the case of a conflict between international agreements in the area of fundamental rights and freedoms...the provisions of international agreements shall prevail." The country is signatory to the European Convention on Human Rights. Due to this provision, the country's courts

are subject to the jurisdiction of the ECHR. Decisions of the ECHR bear the force of law in the country and take precedence over case decisions from the Court of Appeals or Constitutional Court.

As of November 30, there were 16,100 cases involving the country outstanding at the ECHR. As of November 22, there were 330 ECHR decisions involving the country. According to the EU's November progress report, a high number of alleged violations continued to be submitted to the ECHR.

On September 14, the ECHR ruled in a high-profile case that the country was liable for failing to protect the life and freedom of expression of Armenian-Turkish journalist Hrant Dink in 2007. The ECHR ruled that the government failed to prevent the murder of the journalist after threats were made against him and did not carry out an effective investigation afterwards.

Civil Judicial Procedures and Remedies

There is an independent and impartial judiciary in civil matters. The law provides that all citizens have the right to file a civil case for compensation for physical or psychological harm suffered, including for alleged human rights violations. The September 12 constitutional amendments allow individuals to bring a case directly to the Constitutional Court. The amendments also establish the creation of an independent human rights commission and an ombudsman's office. Neither institution had been established by year's end.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The September 12 constitutional amendments protect the "secrecy of private life." The amendments state that persons have the right to demand protection and correction of their personal information and data.

The law allows for telephone tapping with a court order. Only the country's telecommunication agency is authorized to tap telephones, and only when presented with a court order directed against alleged drug traffickers, organized crime members, and terrorists. There were occasional complaints by individuals and public figures, including higher court members and politicians, that their telephones were illegally tapped without a court order.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The law provides for freedom of speech and of the press; however, the government continued to limit these freedoms in significant numbers of cases. The EC stated in its November progress report that the law does not sufficiently guarantee freedom of expression and noted as particular concerns the high number of cases initiated against journalists, undue political pressure on the media, legal uncertainties, and frequent Web site bans.

Article 301 of the penal code criminalizes insults to the Turkish nation. The minister of justice must give permission for a case concerning article 301 to proceed. A separate legal provision forbids insulting the country's founder, Mustafa Kemal Ataturk. Prosecutors continued to conduct ideologically motivated investigations under both the constitution and the law. Other laws, such as antiterror laws and laws governing the press and elections, also restricted speech.

According to the Ministry of Justice, the minister received 352 complaints concerning article 301 during the year and rejected 342 of them. The minister gave permission for the remaining 10 cases to proceed.

Individuals in many cases could not criticize the state or government publicly without risk of criminal suits or investigation, and the government continued to restrict expression by persons sympathetic to some religious, political, and Kurdish nationalist or cultural viewpoints. Active debates on human rights and government policies continued in the public sphere, particularly on problems relating to the role of the military, Islam, political Islam, Kurds, Alevis, and the history of the Turkish-Armenian conflict at the end of the Ottoman Empire. However, many who wrote or spoke on such topics, particularly those who criticized the military, the Kurdish problem, or the Armenian problem, risked investigation, albeit fewer than in previous years. The Turkish Publishers' Association (TPA) reported that serious restrictions on freedom of expression continued despite legal reforms related to the country's EU candidacy.

During the year authorities continued to file numerous cases against publications under antiterror laws. The HRF reported that the laws contain an overly broad definition of offenses that allows ideologically and politically motivated prosecutions. There were at least 550 cases against the pro-Kurdish daily newspaper *Ozgur Gundem* under antiterror laws. There were some convictions, but most cases remained open at year's end.

….

Elections and Political Parties

In October 2009 the law on the election of parliamentarians was amended so that parliamentary elections are to be held every four years instead of every five.

The 2007 parliamentary elections were held under election laws that the Organization for Security and Cooperation in Europe (OSCE) found established a framework for democratic elections in line with international standards. The law requires a party receive at least 10 percent of the valid votes cast nationwide to enter parliament. Some political parties and human rights groups criticized the 10 percent threshold as unduly high. Three parties of the 21 eligible to run crossed the threshold in the 2007 elections. Candidates who ran as independents were able to bypass the threshold.

In its observation report following the 2007 elections, the OSCE noted that despite a comprehensive legal framework for elections, a number of laws creating the potential for uncertainty and arbitrary interpretation constrained political campaigning and freedom of expression in a broader context. The OSCE also noted the positive efforts made to enhance the participation of citizens of Kurdish origin in political life.

On April 11, the political parties law and the election law were amended to allow the use of languages other than Turkish during an election campaign. While Turkish is still the primary language for election campaigns, other languages, such as Kurdish, may be used.

The military's political influence via formal and informal mechanisms declined during the year. In December the military published a statement on its Web site reminding the country that the official language was Turkish as a reaction to statements by some political leaders that they would use Kurdish in parliament and during official business. However, the president and other government officials

immediately attempted to give official context to the military's statement by stating that Turkish is the official language of the country.

Political parties and candidates could freely declare their candidacy and run for election. However, the chief prosecutor of the Court of Appeals could seek to close political parties for unconstitutional activities by bringing a case before the Constitutional Court.

The September 12 constitutional amendments repealed the constitutional provision that allowed removal of a person from parliament if he or she was involved in acts that caused a political party to be closed. However, in November the EC noted in its progress report that a majority of the former Democratic Society Party and BDP members of parliament had been taken to court and that the country "still needs to align its legislation as regards procedure and grounds for closures of political parties with European standards" on freedom of association.

During the year police raided dozens of BDP offices, particularly in the southeast, and detained more than 1,000 BDP officials and members. Prosecutors also opened numerous investigations and trials against BDP members, mostly for alleged membership or support of the KCK. Jandarma and police regularly harassed BDP members through verbal threats, arbitrary detentions at rallies, and detention at checkpoints. Security forces also regularly harassed villagers they believed were sympathetic to the BDP. Although security forces released some detainees within a short period, many faced trials, usually for supporting an illegal organization or inciting separatism.

There were 48 women in the 550-seat parliament and two female ministers in the 27-member cabinet. More than 100 members of parliament and at least three ministers were of Kurdish origin.

….

Section 5 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

A number of domestic and international human rights groups operated in many regions but faced government obstruction and restrictive laws regarding their operations, particularly in the southeast. Government officials were generally uncooperative and unresponsive to their views, although cooperation increased during the year. Human rights organizations and monitors as well as lawyers and doctors involved in documenting human rights violations continued to face detention, prosecution, intimidation, harassment, and closure orders for their activities. Human rights organizations reported that official human rights mechanisms did not function consistently and failed to address grave violations. During the year AI reported that some human rights defenders were prosecuted for monitoring and reporting human rights violations.

The HRA had 28 branches nationwide and claimed a membership of approximately 11,000. The independent HRF, established by the HRA, operated torture rehabilitation centers in Ankara, Izmir, Istanbul, Diyarbakir, and Adana, as well as a "mobile office" in the southeastern region. It also served as a clearinghouse for human rights information. Other domestic NGOs included the Helsinki Citizens Assembly, the Human Rights Research Association, the Turkish Medical Association, the Civil Society Development Center, and human rights centers at a number of universities, among others.

The first session of the trial against Muharrem Erbey, president of the HRA in Diyarbakir and vice president of the national HRA, began on October 20 along with the other suspects in the KCK trial in Diyarbakir. The HRA and many international human rights organizations continued to claim that Erbey was arrested for his work at the HRA and as a human rights lawyer. The trial continued at year's end.

During the year the 2008 trial in an Adana court against HRA Adana secretary general Ethem Acikalin continued; he faced two years in prison for making propaganda of an illegal organization. Acikalin was charged after chanting slogans during a 2007 press meeting commemorating the death of 28 inmates during a military operation in 2000. On October 9, in another case, Acikalin was sentenced to three years in prison for statements he made regarding children who had been tried under antiterror laws. Numerous other court cases were outstanding against Acikalin at year's end. Media reports indicated that Acikalin took refuge in Switzerland in March and remained out of the country at year's end.

On June 12, a court convicted four members of HRA's Canakkale branch, including its chairman, to 18 months' imprisonment each for organizing an unauthorized "World Peace Day" gathering in 2007. An appeal remained pending at year's end.

The government generally cooperated with international organizations such as the CPT, UNHCR, and the International Organization for Migration; however, some international human rights workers reported that the government purposefully harassed them or raised artificial bureaucratic obstacles to prevent their work during the year.

The HRP was authorized to monitor the implementation of legislation relating to human rights and to coordinate the work of various government agencies in the field of human rights. Despite lacking a budget and sufficient resources, the HRP carried out a number of projects with the EC and Council of Europe.

During the year the HRP promoted human rights by showing short films on topics such as freedom of expression, discrimination, children's rights, and torture. The HRP maintained a no-cost emergency hotline for persons to report information on human rights violations for transmission to the appropriate government body. The HRP reported increased awareness of its activities during the year.

There were provincial human rights councils under the HRP in all 81 provinces and their constituent subprovinces. These bodies served as a forum for human rights consultations among NGOs, professional organizations, and the government. They had the authority to investigate complaints and to refer them to the prosecutor's office. However, many councils failed to hold regular meetings or effectively fulfill their mandates. The HRA generally refused to participate on the councils, maintaining that they lacked authority and independence.

The September 12 constitutional amendments called for the establishment of an ombudsman's office and an independent human rights commission. At year's end, parliament had taken no legal steps to establish either institution.

The parliamentary HRIC received 3,200 petitions and published 15 reports from October 2009 to October 2010. These covered various complaints, such as sexual harassment in universities, the situation in state-run orphanages, and conditions in military and civilian prisons. For the first time, the HRIC was allowed to visit and evaluate military prisons during the year. The EC noted in its November report that

> the HRIC focused on policymaking and the legislative process during the year as well.
>
> ….

Information concerning the applicant's father, [Mr B]

52. [Information deleted: s.431(2)].[1] [Information deleted: s.431(2)].[2] [Information deleted: s.431(2)].[3]

53. The 1983 Turkish Constitution included a bar on judicial action against those involved in the 1980 coup. However, this bar was overturned by referendum in 2010.[4] In June 2011, *Hurriyet Daily News* reported that the prosecution of the instigators of the 1980 coup, including coup leader Kenan Evren has begun in Turkey.[5] Some commentators, including Human Rights Watch have noted that Turkey's interest in pursuing human rights violations associated with the 1980 coup may be related to Turkey's bid to join the European Union.[6]

54. The UK Home Office lists the Turkish Revolutionary Communist Party (TDKP; *Türkiye Devrimci Komünist Partisi*) as an illegal party founded in 1980 and states that the legal wing of the party is the EMEP (the Labourers Party).[7]

55. A Google search of the website of the EMEP did not locate any references to [Mr B] (http://www.emep.org/ – Accessed 10 June 2011). The Immigration and Refugee Board of Canada 1998 report, *Turkey: Emek Partisi (Labour Party), known also by the acronym EMEP, and treatment of its members by the government and the security forces*, provides the following information:

> Information on the *Emek Partisi* (Labour Party), known also by the acronym EMEP, further to that provided in *Political Handbook of the World 1997* is scarce. Although *Political Handbook* describes the Labour Party as the successor of the "pro-Albanian neo-stalinist" Turkish Revolutionary Communist Party led by Ihsan Çaralan, two reports cited in this Response describe the Labour Party as being led by Dogu Perincek who, according to *Political Handbook*, is the Leader of the Worker's Party.
> According to a 4 March 1998 TRT TV report, Labour Party leader Dogu Perincek was charged under the law on terrorism of "separatist propaganda" and was sentenced to one year in prison and a 100-million Turkish lira fine.
> A 27 July 1997 Associated Press report states that the Labour Party was a small leftist organization led by Dogu Perincek and a 13 July 1998 report from

---

[1] [Information deleted: s.431(2)]
[2] [Information deleted: s.431(2)]
[3] [Information deleted: s.431(2)]
[4] 'Prosecutor assigned to probe for Turkey's 1980 coup' 2011, *Hurriyet Daily News*, 7 April, http://www.hurriyetdailynews.com/n.php?n=prosecutor-assigned-to-the-probe-for-turkey8217s-1980-coup-2011-04-07 - Accessed 10 June 2011
[5] 'Evren questioning sign of democractic shift in state, Turkish PM says' 2011, *Hurriyet Daily News*, 7 June, http://www.hurriyetdailynews.com/n.php?n=evren-prosecution-sign-of-transformation-of-state-pm-2011-06-07 - Accessed 10 June 2011
[6] 'Concrete Progress Should Be Measure of Eligibility, Says Rights Group' 1999, *Human Rights Watch*, 9 December http://www.hrw.org/en/news/1999/12/09/eu-membership-process-could-bring-human-rights-reform-turkey - Accessed 10 June 2011
[7] United Kingdom: Home Office, *Country of Origin Information Report - Turkey*, 9 August 2010, available at: http://www.unhcr.org/refworld/docid/4c6135932.html - Accessed 10 June 2011

Zaman (Internet version) established the number of EMEP party members at 3,268.
A 6 February MED TV report states that activists of EMEP and two other parties demonstrated in early February 1998 in front of the United States Embassy in Ankara to protest U.S. "imperialism" in the Middle-East.[8]

National service obligations

56. Compulsory military service applies to all Turkish males between the ages of 19 and 40. However, men who have not completed military service by the age of 40 may still be called up after the age of 40. According to War Resisters International, students in Turkey may postpone compulsory military service until the age of 29, or the age of 35 for postgraduate students.[9]

57. Turkish citizens living abroad may apply for a postponement from military service for up to three years at a time until the age of 38.

58. The Refugee Board of Canada reported in May 2010 that Turkish citizens who have been living overseas as a student, or on a legal work permit, for more than three years are eligible to shorten their military service term to three weeks, rather than the standard fifteen months:

59. Turkish citizens who have been living abroad for a minimum of three years and have a legal work permit in the country where they live, have the option of paying 5,112 Euros to shorten their compulsory military service to a term of three weeks.[10]

60. However, citizens living abroad who have not completed military service and who fail to apply for a postponement would be sent to a military training centre upon their return to Turkey and may face charges of draft evasion. Furthermore, they would be unable to renew their passports whilst overseas and would only be permitted to travel back to Turkey.[11]

61. A 2003 Economic Research Forum paper indicates that the ability to postpone and reduce compulsory military service is a major factor in Turkish males pursuing study and employment opportunities overseas.[12]

---

[8] *Turkey: Emek Partisi (Labour Party), known also by the acronym EMEP, and treatment of its members by the government and the security forces*, 1 July 1998, TUR29722.E, at: http://www.unhcr.org/refworld/docid/3ae6acd054.html - Accessed 9 June 2011
[9] War Resisters International 2008, 'Country Report – Turkey', 23 October
[10] *Turkey: Emek Partisi (Labour Party), known also by the acronym EMEP, and treatment of its members by the government and the security forces* 1998, Immigration and Refugee Board of Canada, 1 July, TUR29722.E, at: http://www.unhcr.org/refworld/docid/3ae6acd054.html - Accessed 10 June 2011
[11] Immigration and Refugee Board of Canada 2010, *TUR103457.E – Compulsory military service for Turkish citizens living abroad*, 26 May, European Country of Origin Information Network website http://www.ecoi.net/local_link/141308/241855_en.html – Accessed 13 December 2010 ; 'Dutch Turkish nationals and Turkish compulsory military service' 2008, Nederlands Immigratie en Naturalisatiedienst website, 9 July http://www.ind.nl/en/inbedrijf/actueel/Nederlandse_Turken_en_Turkse_dienstplicht.asp – Accessed 13 December 2010 ; 'Conscription in Turkey' (undated), Middle East Explorer website http://www.middleeastexplorer.com/Turkey/Conscription-in-Turkey – Accessed 13 December 2010 ; UK Home Office 2008, *Operational Guidance Note – Turkey*, 2 October, p.12
[12] Tansel, A. and Demet Gungor, N. 2003, ''Brain Drain' from Turkey: Survey Evidence of Student Non-return' Working Paper 0307, Economic Research Forum website, p.13 http://www.erf.org.eg/CMS/getFile.php?id=165 – Accessed 13 December 2010

FINDINGS AND REASONS

62. The applicant entered Australia on what appears to have been a valid Turkish passport. As mentioned above, the passport has now expired. The Tribunal finds that the applicant is a citizen of Turkey and has assessed his claims against that country as his country of nationality.

63. The applicant claims to fear persecution in Turkey because of his perceived political opinion. However, for the reasons which follow, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Act and the Convention.

64. The Tribunal accepts that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, "in the proof of refugeehood, a liberal attitude on the part of the decision maker is called for". However, this should not lead to "an uncritical acceptance of any and all allegations made by suppliants" As the Full Court of the Federal Court observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

> Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another.

65. As the Full Court noted in that case, this statement of principle is subject to the qualification expressed by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 when it said:

> …in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.

66. If, however, the Tribunal has "no real doubt" that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 241. Furthermore, as the Full Court of the Federal Court said in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a "positive state of disbelief" before making an adverse credibility assessment in a refugee case.

Applicant's political opinion

67. The applicant claims to be a member of the EMEP. Country of origin information indicates that the EMEP is a legal but very small political party. Although invited to do so, the applicant provided the Tribunal with no evidence of his membership of the party. He provided no evidence of persecution specifically on the basis of his membership of EMEP. Rather, his case for refugee status was put on the basis that he has been persecuted in the past because of his association with his father, as the person who defended [Mr A], and because of the applicant's record as a political agitator when he was at [University 1]. For the reasons

that follow, the Tribunal finds that the applicant does not have a well-founded fear of persecution on this basis.

68. If the applicant had a well-founded fear of persecution when he first left Turkey, he would not have delayed for some five and a half years before making a protection visa claim in Australia. When at the hearing this matter was put to him, the applicant said that he had been hoping that the criminal case against him arising from his speech at [University 1] [in] 2003 would result in a just decision but this hope had been dashed by the decision of the Criminal Court at Ankara [in] 2010. The Tribunal does not regard this as a satisfactory answer to the applicant's delay in making his claim because the decision at first instance had been adverse. If, as the applicant's response suggested, this case was the key factor going to his claimed fear of persecution, he would not have delayed applying for protection in the hope that, on appeal, the result at first instance would be overturned.

69. The applicant's further claim that what prompted his refugee claim were the constitutional changes in September 2010 which he asserted had the effect of restricting his access to the ECHR does not make sense. It defies common sense that the applicant, having been convicted at first instance, would have refrained from making a protection visa claim arising from proceedings brought against him because of the possibility of ultimately overturning any conviction in the ECHR, the more so when the country information indicates that the ECHR already has a queue before it of some 16,100 cases involving Turkey.

70. The applicant said that, when he left Turkey for the second time in November 2005, he had problems with the police at Customs and was only able to leave after paying a bribe. These circumstances too indicate the absence of a well-founded fear of persecution. Even after this event, the applicant did not make his protection visa claim in Australia until [a date in] September 2010.

71. A further issue concerning the proceedings brought against the applicant is that they seem to relate to the ordinary application of Turkey's criminal laws. The applicant has asserted that the proceedings had been brought against him because of political discrimination due to his family's politics but no evidence is offered to support this assertion and the record of the court's decision contains no indication that the defence raised any suggestion of this kind; rather the defence seems to rest on the claim that the recorded speech in question of the applicant is a montage of different speeches made by him.

72. The Tribunal considers that a well-founded fear of persecution also does not arise out of the circumstances of the applicant's expulsion from [University 1]. Whatever the basis for the expulsion, it did not involve serious harm to the applicant and systematic and discriminatory conduct, as required under s.91R of the Act. It therefore did not constitute persecution. Nor is there any evidence that similar action by the university would be taken against the applicant in the reasonably foreseeable future.

73. Furthermore, no well-founded fear of persecution arises out of the incidents which led to suits being brought by the applicant. On the applicant's story, the first suit related to injuries he received [in] May 2002. There is no evidence before the Tribunal to suggest who the perpetrators of the injuries were. No Convention nexus is suggested. The second related to an alleged assault by the police [in] May 2004. Again, no evidence of a Convention nexus has been put before the Tribunal. Furthermore, the applicant is pursuing a remedy in relation to this matter in the courts of Turkey and it remains unresolved. No failure of State protection is suggested.

74. The Tribunal considers that the court proceedings which the applicant mentioned before the Tribunal were mentioned merely in an attempt to bolster his claims for a protection visa. While the Tribunal is prepared to accept that the applicant was involved in the proceedings as he asserted, he did not refer to them in his original claims or in his interview with the delegate. When the Tribunal suggested to him at the hearing that he had mentioned them before the Tribunal only to seek to bolster his claims, he responded that disclosing them would have had an adverse effect on his father's career and caused problems for his father's reopening of [Mr A's] case. This connection with his father's activities is not logical and the Tribunal does not accept it. If as the applicant asserts there were security orders preventing his talking about the case prior to the decision of the Criminal Court at Ankara [in] 2010, he certainly had the opportunity to mention the case both in his original claims made [in] September 2010 and in his interview with the delegate [in] January 2011.

75. Another reason why the Tribunal considers that the applicant does not have a well-founded fear of persecution for reasons of his political opinion relates to the position of the applicant's father. The applicant has put before the Tribunal evidence which suggests that his father is able to freely move from Turkey to speak at international gatherings where the Turkish Government has been criticised on human rights grounds. If his father is not persecuted for his political opinion, the Tribunal considers that there is not a real chance of the applicant being so persecuted.

76. The Tribunal has considered in this connection the applicant's claim that the authorities in Turkey are now more likely to target members of his father's family rather than the applicant's father himself. Again, however, there is nothing to back up this assertion. The applicant's father has supplied a statement dated [in] May 2011 relating to the case in which his son, as his client, was prosecuted. If the applicant's father could provide such a statement, there is no reason why he could not have provided a statement about persecution of members of the family unit for the Convention reason of imputed political opinion, if in fact such persecution has occurred.

Compulsory military service

77. Part of the applicant's claim that he will face persecution should he return to Turkey relates to the fact that he is now regarded as a military service evader because he no longer is covered by an authorised postponement of his military service. The Tribunal notes that the applicant's allegation that he has been unable to renew his passport in Australia because of his outstanding military service obligations is consistent with the country of origin information referred to above that persons regarded as draft evaders are unable to renew their passports while overseas and will only be given a travel document enabling them to return to Turkey.

78. It is well established that enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention,[13] for the reason that enforcement of such a law does not ordinarily constitute discrimination.[14] As Brennan CJ stated in *Applicant A*:

> … the feared persecution must be discriminatory. … [It] must be "for reasons of" one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal

[13] *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 per McHugh J at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467.
[14] *Chen Shi Ha V MIMA* (2000) 201 CLR 293, at [20]

> law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of "refugee".[15]

79. Whether Turkish conscription laws are properly to be characterised as laws of general application turns on identifying those members of the population to whom it applies.[16] Laws or policies that target or apply only to, or that impact adversely upon, only a particular section of the population are not properly described as laws or policies of general application. In *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*(2000) 201 CLR 293 Gleeson CJ, Gaudron, Gummow and Hayne JJ said, at 303:

> Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object *depends* on the different treatment involved and, *ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity* Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.

80. The country information discloses that the obligation to perform military service rests upon all Turkish citizen males aged between 19 and 40 (and in some cases those over the age of 40). Although the obligation may be deferred for study and the length of service may be able to be reduced in certain circumstances, Turkey does not recognise any exemptions to the requirement.

81. In the present case, notwithstanding that the treatment under scrutiny is meted out only to males in a particular age range, the Tribunal finds that the Turkish laws relating to compulsory military service are legitimately adapted to achieving the government objective of protecting the state and are not such that would offend the "standard of civil societies which seek to meet the calls of common humanity". As a result, the Tribunal finds that these laws ought properly to be characterised as laws of general applicability.

82. Under Australian law, enforcement of laws providing for compulsory military service, and for punishment for desertion or avoidance of such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention. [17] This is primarily because such enforcement lacks the necessary selective quality.[18] In the present case, there is no evidence to suggest that the law in Turkey relating to compulsory military service is selectively applied to persons on the basis of a Convention ground.

83. The Tribunal finds that enforcement of Turkish military service laws against the applicant does not constitute persecution.

---

[15] *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, at 233

[16] See *Weheliye v MIMA* [2001] FCA 1222 (Goldberg J, 31 August 2001), at [50]

[17] See eg *Mijoljevic v MIMA* [1999] FCA 834 (Branson J, 25 June 1999) at [23], referring to *Murillo-Nunez v MIEA* (1995) 63 FCR 150; *Timic v MIMA* [1998] FCA 1750 (Einfeld J, 23 December 1998); also Hathaway, *The Law of a Refugee Status at* [5.6.2].

[18] For example *Mpelo v MIMA* [2000] FCA 608 (Lindgren J, 8 May 2000) at [33], *MIMA v Shaibo* [2000] FCA 600 (Lindgren J, 10 May 2000) at [28], *Trpeski v MIMA* [2000] FCA (Mansfield J, 6 June 2000) at [27] and *Aksahin v MIMA* [2000] FCA 1570 (French J, 3 November 2000).

84. On the Tribunal's assessment of all the applicant's claims, both individually and collectively, the Tribunal concludes that he is not a person to whom Australia owes protection obligations.

CONCLUSIONS

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

DECISION

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