

**1203396 [2012] RRTA 838 (11 October 2012)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1203396
<b>DIAC REFERENCE(S):</b>	CLF2011/45362
<b>COUNTRY OF REFERENCE:</b>	Turkey
<b>TRIBUNAL MEMBER:</b>	Diane Barnetson
<b>DATE:</b>	11 October 2012
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Turkey, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2011.
3. The delegate refused to grant the visa [in] January 2012, and the applicant applied to the Tribunal for review of that decision.

### RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations 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.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person 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.

### **Complementary protection criterion**

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

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] July 2012 to give evidence and present arguments.

#### *Protection visa application [March] 2011*

21. In the protection visa application, the applicant indicated that he was born in Istanbul, Turkey on [date deleted: s.431(2)]. He belongs to the Kurdish ethnic group and is of the Alevi religion.
22. He has never married and does not have children. He arrived in Australia [in] September 2005 as [a trainee]. His most recent visa was a student visa issued [in] June 2008 and valid until 30 August 2011. He previously travelled to the USA from [2001] to [2002], where he undertook an internship.

23. The applicant was educated to university standard in Turkey, completing his [study] in 1999. He studied for a bachelor [degree] in Australia, obtaining his degree in 2010. He [worked] in Turkey before coming to Australia.
24. In the protection visa application form the applicant wrote that he feared the current Turkish government and police forces labelled him for his political activities and his ethnicity. He believes the police will torture and try to kill him if he returns. The applicant claims that he obtained his passport as his friend arranged a bribe of a police officer. He has returned to Turkey in [March] 2007 for a family visit and in June 2010 to September 2010. He returned with the full knowledge of the authorities. He indicated that he did not re-enter the country legally.
25. The applicant states that he calls his family once or twice a month and they cannot talk privately because “they listen our phone conversation”.
26. The applicant parents and [sibling] live in Turkey. In the form he indicated that he had no close relatives in Australia. The applicant provided a detailed statement with the protection visa application:

*My name is [name], I was born in Istanbul on [date] as a first child of my family with Kurdish and Alevi ethnicity. My Father's name and last name is [name] and he's born in [town name]. My mother's name and last name is [name] and she's born in [town name]. They both are Kurdish and Alevi from both sides of their mothers and fathers who are member of Ballian tribe.*

*All my relatives are back in Turkey and I have no relatives currently living in Australia.*

*I last arrived in Australia [in] September 2010. Below is a statement about myself and brief description of my sufferings in Turkey.*

*Reason for seeking protection*

*I am a Kurdish and Alevi citizen of Turkey. I fear that if I return to Turkey, I will be harmed, persecuted, prisoned or killed by members of the Police, Special Forces or Counter Guerrilla Organization of Paramilitary Forces for the reasons described below.*

*Childhood: [year] – 1992*

*My parents reported me that my mother and father had no choice but migrate to Istanbul from their home city [Town 1] right after the Alevi massacre on 18th of April 1978. They moved to my relatives place first when they moved to Istanbul and then moved to [a] town of Istanbul due to economical reasons. On or about 1985, my father often conversed in Kurdish when my relatives visit us and our neighbours overheard this, and neighbours informed the police of our presence and some of our neighbours stopped talking to us. After a little while the armed forces and police would often come to our apartment to search for illegal or political books. I can't remember hence I was a little kid but can only express it from my father's statements that they took my father and kept him under custody for 14 days and accused him for being a member and supporter of any Revolutionary group based on his Kurdish-Alevi ethnicity. He still has*

*some marks on his body of torture that he endured at the time was taken in police custody.*

*Since our Kurdish-Alevi identity was found out, my family has been faced with consistent pressures from civilians and military forces. I was told that this included threat note often left on our doorstep. On or about 1986, my parents packed our housewares and left the city in 1986. Consequently, my family had no chance but migrate to [Town 2] of [Izmir].*

*High School: 1992*

*I've started to high school in [year] and made new friends from the group of "Yurtsever Devrimci Genclik Dernegi" (Patriotic Revolutionary Youth Association). At the time, unsolved political murders have increased in Kurdistan region and I've been much more sensitive when I see Kurds very hopeless after they've been forced to migrate from their villages after their villages burned by military forces and this occurring issues made me very sensitive to political issues in my region of origin. Every week on Tuesday or Thursday, we would meet as a group and discuss what was happening in Kurdistan and how the Kurdish people assimilated under government policy, and the practice of village burning against Kurdish people in Kurdistan. And our people have been forced to leave their homes, villages and migrate from there with no help and support. I was responsible for distributing information and organising meetings at our friends' houses. Sometimes I was also responsible for arranging transportation other members of the group to and from these meetings.*

*Sivas Massacre July 1993*

*On July 2 1993 A fascist and fundamentalist group has been organized by MIT (National Intelligence Organization) in Sivas to attack Alevi intellectuals who came to attend to the festival of Pir Sultan Abdal. Islamist provocative bulletins have been faxed from Sivas Security Directorate to local newspapers in Sivas to provoke these people and organize this massacre against Alevi Intellectuals. A fire was deliberately lit in the Madimak Otel to kill artists, musicians, and writers cause the death of 37 Alevi people. 35 of these people killed in the hotel and other 2 has killed on the street. The police did nothing to stop this massacre just like other ones in past.*

*My work at the radio station: 1993 – 1995*

*In early July 1993, one of the friends from PRYA introduced me to a new [radio station] to become a voice of Alevi-Kurdish people and defend the rights of democratic opponent. I then started to work in Radio station at [Town 2] called [Town 2 radio station]. I would usually make a program for an hour and it was called [program name], discussing the equality, democracy and freedom for Alevi-Kurdish people Later my program hours increased to 2 hours when we have received high amount of positive feedbacks from our listeners. We would often see undercover police car presence as we were entering and leaving the radio station in [Town 2]. A statement from the owner of the [Town 2] Radio Station is also attached to this statement.*

*Detention by undercover police: May 1994*

*On or about early May 1994, undercover police took me to the custody as I was leaving the radio station right after finishing a radio program that I played Marches and Alevi Folk Songs and made a short speech to support labour rights of the Alevi people. The police took me to the Izmir Anti-terrorism headquarters in Izmir - Hatay Bozyaka. They did not explain anything and just started to [hit me] with the radio device, and the scar [from this incident] is still visible today. I was kept custody in the Anti-terrorism unit for nearly two days. Inside the cells, I saw three of my other colleagues also from the radio station in [Town 2] join me in custody. The police inside the cell, was telling me that I was a traitor to the country, repeatedly beat me. I was not given any food or water until the next morning. The police told me that they would keep a close eye on me from thereon. I was released the following night with help of intern lawyer [Mr A], and he help me to go to a clinic.*

*After the incident, I refused to give in to the threats and continued to work in the [Town 2] station, but also started to make extra radio programs in our sister radio station in [Town 3] station on June 1994.*

#### *Second Detention by police: June 1994*

*On or about early June 1994, about eight police officers raided the [Town 3] radio station. And took four of my friends and me in to custody in the Izmir Anti-terrorism headquarters in Izmir - Hatay Bozyaka without any explanation. During custody, we consistently got kicked and the police swore and threatened to stop our political activities or they'll turn or life to hell. If we don't like the system we have to get the f..(swore) this country. One of the police officers recognized me and from the previous incident, and branded me as a person who was seeking the rise of the Kurds. We were not allowed to ask any questions and were never told why we were detained. We were released on the next day.*

#### *Threats and close of radio station*

*About a week later, my friends and I saw an article in a [nationwide newspaper], titled "[article title]", referring to statements from the [Department of Security] which identified our radio stations in [Town 2] and [Town 3] as enemies of government and ethnic discriminators. We were also told that our [radio stations] were referred to [by a certain Court] alleging that the stations were carrying out "illegal activities" by defending rights of Kurds and Alevi.*

*After the publication of this article, we had received threats from civilian fascists, Turkish government, police and local authorities. However, just prior to the closure of the radio stations in early 1995, our radio stations organized a solidarity concert to get united and get support on our fight for Alevi's rights. I gave a speech at the beginning and during the concert about the democracy, freedom and equality in Turkey for us, and how Kurds and Alevi should get equal rights in the society.*

#### *Police search of my family home: 1996*

*Shortly after the closure of the radio station, four policemen came to my home in 1996. They made a detailed search of our house, beaten father and me, and also sworn at my mother about our Alevi background. They then left after taking a number of what they claimed to be illegal leftist publications and materials.*

University, [Town 4]: 1996

*On September 1996, I successfully entered into the [University] majoring in [course name]. The university year runs from September to June.*

*I could only be able to stay in a government hostel due to economic limitations of my family and I found a place in [a Government] Hostel. I realized that the hostel's manager was a member of MHP (based on his special silver ring with folk symbol on right hand) when I signed up.*

*He warned me from the first day that the Kurds are not welcomed here and I must be extremely careful here in [Town 4]. I tried to hide my ethnicity to avoid being targeted while I was staying in hostel.*

*I saw the hostel manager was very close to the leader of the Ulkucu Genclik (Nationalist Movement Party's Youth) group, as they would often meet in the hostel's canteen. The manager was passing some notes from his personal diary (agenda) and identifying the Easterner Students as "Kurds, Alevis". He was getting this information from the National ID cards and his personal opinion from students' accents, appearance during the sign up and passed this information to the leader of the right-wing nationalist group, Nationalist Movement Party (also known as MHP and Ulkucu), so they can keep an eye on us closely as labelling us "potential terrorists in the region".*

*The MHP student group bullied all of student from Eastern part of Turkey such as Diyarbakir, Tunceli, [Town 1] (my town) and Bitlis. Two students from Diyarbakir left the hostel as well as their school and went back to Diyarbakir. We had no choice but pretend like not Kurdish or Alevi.*

#### *Harassment by MHP*

*I stayed in a dorm room with 5 other students in the hostel. They were all the members of Ulkucu (MHP) group. During the ramadan of 1997, they woke me up for the meal of Sahur, which was about 4 am or so for us to eat before starting fasting. I had no choice but wake up and go with them to the canteen and eat the meal then go to bed afterwards.*

*During the day in ramadan, I pretended like I was fasting but wasn't be able to handle hunger. I was hiding some cookies, biscuits in my jacket and I was trying to eat them when I go to the toilet at the campus. I was being extremely careful so no one can see or understand that I'm not fasting.*

*The main canteen of the campus was monitored by a member of a MHP group member from morning till 5pm of closing. One of the members of the Ulkucu group sat on a chair in the first row of the canteen tables, facing the service section of the canteen where they serve foods and drinks. He was constantly watching to see if anyone was buying food or drinks so he could identify who wasn't fasting then label this person as "Alevi or Communist or Leftist, infidel".*

*I saw 6 members of Ulkucu group beat one new student after he purchased a cup of tea in ramadan. They beat him up right outside of the canteen and shouted to the crowd*



*"every infidel bastard will get this". This incident never reported police nor handled by Head Teacher because the head teacher was a supporter of this group as well.*

*I was subjected to racist and ideological harassments when one of the members of the Ulkucu group saw me dispose of some of the wrappers from the cookies that I ate at the school's toilet then told the others. They harassed me because I was not fasting in ramadan. They told me that " aren't you a muslim, what's wrong with you, all of your organs working properly and you're not disabled so why aren't you fasting? Are you an infidel? Are you a Alevi, Kizilbash ..(sworn)..? I said no this wrapper was left from before ramadan and I am fasting. They didn't seem like fully believed me and told me that I've to watch my back after this moment.*

*I moved out from the student hostel. I felt I had no choice because all of the students living in the hostel were Ulkucu or supporters and I wasn't feeling safe there anymore.*

*Third Detention by police: Qurban Aid, April 1998*

*While I was at University, I visited Izmir very often because it was only [few] hours bus ride away. I visited my family and also visited friends of mine who were members of HADEP (a pro-Kurdish political party) and helped them with meetings and handing out pamphlets of HADEP. I wasn't a member of HADEP because law as a student's membership forbade it to a political party. However I was helping out my friends at HADEP activities.*

*In April 1998, I went to Izmir to be with my family in public holiday of Qurban Aid. I visited my friends at the HADEP office and my cousin [Mr B] (also a member of HADEP) and they told me that they were going to hand out pamphlets for Qurban Aid with a message celebrating Qurban Aid and also informing people that if they wanted to make a donation to HADEP they could donate the skins of the sheep they will sacrifice in Qurban Aid. The skins of the sheep are very lucrative and often collected by religious organizations and sold to make money for their cause.*

*We printed these handouts and the next day (the 1st day of the Aid/festival) myself, and our friends [names] were going to give out these handouts at the [Town 2] [Park]'s front entrance which was facing to the main road.*

*We saw a police minibus that cam for us with 5-6 policemen after 15-20 minutes but we didn't try to run or anything. One of the police came and kicked [one friend] in his stomach and other one smacked [another friend] and shouted us "..(sworn).. terrorists you even do this in a Holy Day". We couldn't understand anything but they kept shouting and forced us to go in to the minibus. The policeman who came out last took the handouts and said "I'll stick them in your ..(sworn). .Communists, I knew this bastard from that Communist Radio station (he was referring me and [Town 2] radio station) these f..(sworn).. Kurds needs to get. .(sworn). .ed so they can stop". And he punched me in the face.*

*They started to beat us with punching in our stomachs, kicking us at lower legs especially knees and hit our heads with radios in the minibus till we arrive to the Anti Terrorism Head quarter at Izmir - Hatay-Bozyaka and they took us into custody.*

*They questioned and beat us again especially sides of our legs, ties. They were shouting and swearing us constantly with saying "we'll f... your entire generation then you Kurds will stop"; "the best saying in Turkish is "the best Kurd is the dead Kurd"; "You all are ..(sworn).. terrorists we'll clean this country from Kurds don't you worry"; "If we have to kill one by one it may take only a little time but will be worth it."*

*One of the police officers was constantly telling the others to make sure they don't leave any marks on our body but to show us this is how to hand out a terrorist Kurdish party's handout with donation request on it. The police accused us of collecting donations and helping the PKK via HADEP.*

*We all denied it and said we were only handing out the pamphlets to celebrate the festival and donations were voluntary. We tried to tell the police we had no connection with PKK whatsoever but they were not listening and kept increasing the pressure and swearing and physical violence.*

*They kept us there about 5-6 hours. When the police let us go, we had minor injuries and some bruises around our bodies. We did not seek medical help nor see a doctor because the police threatened us before we left and told us that if we got to a doctor or anyone about this incident they would break our necks next time.*

*On 1 May 1998, we have organized a group of 100-120 people from HADEP to attend Labour Day Event that is organized by Turk-Is Union, Petrol-Is Union, DISK (Revolutionary Labour Union Confederation), KESK (Public Labourer Union Confederation). A very large group of Police group started to beat us up with batons and kicked us without any warning or reason. Union representatives, civil society representatives and some attendee lawyers have stopped to police and helped us to not taken under custody.*

*Fourth Detention by police: December 1998*

*In winter 1998/1999, around December 1998, while at university in [Town 4]. I was attacked at the bus station by four students from Ulkucu group. The group members called the person who started the attack "Reis" meaning leader/chief, although his actual name was [name]. A police vehicle arrived after 15-20 minutes but the officer didn't get out of the car. The policeman called out to Reis spoken to him privately. After Reis had spoken to the policeman I was taken by the police in their car and verbally harassed and threatened me and hit me over the head and pulled me in the car from my neck. The police swore at me and insulted me, as well as saying in a threatening way things to me like "You have to obey the rules here in [Town 4] otherwise we'll fix you up, we know where who you're. They told me that Kurds are not tolerated here, you either get the hell out of here or shut the f..(sworn).. up or you'll see what happens next."*

*In 1999 I suffered from increased verbal and physical harassment by this Ulkucu group. At that time, I was travelling to Izmir very often to get out [Town 4] and get together with my leftist friends at HADEP and my family.*

*The police have taken me on the way home in [Town 2] [in] of March 1999. They kept me two days In Anti-terrorism Head quarter at Izmir-Hatay Bozyaka. And they tied my eyes; they were beating me very hardly, swearing and insulting me first day. They've*

*asked me questions about DEVSOL (Revolutionist Left), TKP/ML TIKKO (Turkish Communist Party/Marxist Leninist -Turkey Labour Villager Victory Army). They also asked me questions about my cousin [Mr B]. They've released me in the morning of second day on the road of Torbali region in rural area.*

*The police have taken me on June 1999 without any reason when I was leaving the university campus in [Town 4], they took me to the police station at the central. They beaten me up in the police car from left side and I feel like I was chocking when he hit me form left back to my kidney. The officer at the back seat (on my left) was asking me that am I supporting HADEP or am I Kurdish and saying that "are you a Kurdish m.,f(sworn)..? What are you after here you f.(sworn)..Kurdish son of the b..(sworn)..? Do you do provocation activities against the Government? Am I doing any activities like I was doing in communist Radio station? I said no, I'm only here for my education and I don't know what he's asking about.*

*He said, "I'll teach you what I am asking about in the station". He kicked me from my back when we arrive to the station. He questioned me with same questions and sworn me with smacking me and kicking my knees and lower legs. He kept me there about 1-2 hours and told me that he'll turn [Town 4] to grave for me. They released but told me that they will take me in soon.*

*My housemate told me after this incident that he called my parents and they called my lawyer to asked his help. And my lawyer [Mr A] came to [Town 4] and helped me to get out of [Town 4]. He took me to the Izmir [in] June 1999. He was there to protect me from Ulkucu group so I can sit my last exam safely.*

*Starting to work:*

*I've started to work on 1999 in [District 5] region at [a Hotel].*

*Obtaining a passport*

*I found a job in USA in 2001 via international recruiting agency.*

*I needed to get a passport to go abroad but it was going to be very hard for me to get a passport due to my problems with police at the past. I've got my passport with help of my friends and giving bribe to the police at the passport department then got my passport, I paid him 1000 Turkish liras by then as bribe. I had to get a new passport before I came to Australia on 2005 and I asked helped from my friend to get me a new passport from passport department and I paid 1500 Turkish liras to him and he gave it to the police officer at Passport department as bribe and got me my current passport.*

*Working in the USA: [2001] — [2002]*

*From [2001] until [2002] I Worked in USA at [a] Hotel ([address]).*

*My cousin*

*My cousin [Mr B] couldn't handle the harassments from local police because of his Ethnicity as Kurdish and Alevi and ongoing custodies and has gone to Canada and been accepted as refugee and still living there today.*

*Return to Turkey: November 2002*

*I went back to my country [in] 2002, I've started to work in [a] Hotel in [District 5] in front office.*

*Fifth Detention and military service: 2003*

*[In] August 2003, police took me from a nightclub where we were having some drinks after work in [District 5] of Mugla. It was a random ID check, police officer has turned the back of my National ID card and after he read where I'm originally from. He told me to get in the police car and come to the police station. He said they would detain me due to my compulsory army service issues. I told him that I've right to postponed till 2004 and he said all of the Kurds talk about their "rights" but I'll give your rights in the morning, you don't worry". They kept me in the police station till morning and they took me to the military recruiting office.*

*The police took me to the military recruitment offence in the morning. At that time, I had a legal right to postpone my service until 2004. However the police forced me to sign documents stating that I voluntarily wanted to undertake my military service. This forced me to surrender my right to postpone the service. The paperwork said I had to serve at the [name] military base, starting the next day – [August] 2003 - otherwise I'll be arrested and send to the jail. I had no choice but go there on time.*

*[The] military base is a place where people who the authorities want to punish are sent. It has a very bad reputation. There is a lot of verbal and physical violence. It is like being put in exile - it's for convicts, politically banned people and criminals to do their military service. The soldiers in this base are poorly educated.*

*After 45 days at [the military] base they sent me to the Trabzon. I was discriminated against and insulted by my commanders systematically in Trabzon because they knew that I was Kurdish and Alevi. For example, the commander singled out about 8-10 people from known Kurdish towns in the East of Turkey and said to us that we would not be allowed to handle guns or explosives while on military service. We would only be allowed to be on guard duties. He said to a more junior officer "Just fix them to the guard points", meaning we would only be on watch duty. Normally each person takes the turn at 2 hours of watch duty per day. But because I was in this group, I had a 'minimum 6 hours, sometimes 8 hours per day of watch duty.*

*I finished and discharged from service on November 2004. However I couldn't get better psychologically till April 2005.*

*[name] Hotel: 2005*

*I've started to work in [name] Hotel [District 5] on May 2005. However the management was changed and new manager was a Fascist and Nationalist and right after he realises my Ethnicity he fired me with no reason on August 2005.*

*First trip to Australia: September 2005*

*After all these incidents I've found a getaway from these conditions when I've got a job in Sydney via an international recruiting agency.*

*I've started to work in [name] Hotel in [Sydney] from September 2005 till February 2007.*

*Return to Turkey: March 2007*

*I went back to Turkey on March 2007 to get a student visa to [study] for [a Diploma].*

*Second trip to Australia: November 2007*

*I came back to Australia and started to [study] on November 2007 and then I've started to study [a degree] in [College] and studied from July 2008 till June 2010.*

*Return to Turkey: June 2010*

*I went back to Turkey on June 2010 with hoping to get a better life without any terrible memories or experiences with police and local authorities. I was planning to support my Kurdish party BDP and Kurdish rights.*

*However, one police officer that knew me from before has realised me when I was going to the market where is only in 5 minutes walking distance to my home. They were patrolling in our street and He shouted to me from the police car "so what happened to you, did you come back to furrier shop (he was referring me as a victim of a folk which has taken to the furrier shop to killed and peel off the skin) and they've stopped the car and he told me that" watch out so you don't get shot by unknown".*

*Visit to BDP: August 2010*

*I went to visit my friends in BDP (Peace and Democracy Party) in [Town 2] in August 2010 to talk with them and see what can I do for them. They've introduce me to the president of [Town 2] BDP [name]. He said he'll be very happy to see me with them. I was planning to be member of BDP and be useful for my community to defend our Kurdish rights in political platform. I saw my old friends like [names]. They were really happy to see me and told me that they will be really happy to see me join them and I could be very useful for my people.*

*Sixth Detention by police: August 2010*

*However after couple of days Police came to my house and took me under custody with no reason. And they took me to the Anti-terrorism headquarter at Izmir - Hatay, Bozyaka. Two policemen first tied my hands and started to questioning me about some people whom I don't even know and accused me with helping PKK organizations in US, Australia, and helping PKK, KCK and other Kurdish organisations. He asked me that am I planning to get a role in BDP and helping BDP financially from overseas funds of US, Australia and Europe, I told them that I have no connection with them what so ever and didn't help any organizations financially. The older policeman told me that he's worked in Special Operations in eastern Turkey at the mountains against PKK for years and made a collection from the ears that he cuts from dead PKK guerrilla's bodies. He was extremely furious and was beating me with no reason, he grabbed my testicles, squashed strongly I was screaming and denying but He didn't believe me then told me that "he'll add my ear in that collection" I felt like he's going to kill me somehow. Then he told me that he made the "travel arrangements with a one-way ticket" for Neslihan Uslu, Metin Andac, Hasan Aydogan and Mehmet Ali Mandal He*

*also will get a ticket for me to the hell as "a one way only". He was pulling my hair from the top and asking me do I know these Revolutionaries, I said no many times. I actually knew all about these four Revolutionaries that they were disappeared under custody in 1998. They have been taken from Cesme Alacati- Izmir [in] March 1998 and they've taken to the Counter Guerrilla's un-identified building in Izmir Foca Military Zone then they have been heavily tortured and then kept him in Counter Guerrilla's of Jitem underground stations and at the end of the April 1998 they have taken to a fisherman's town in Seferihisar-Izmir and loaded in a small boat with explosives and get killed by an explosion that caused the sank of the boat. He was referring one-way ticket as killing me like they killed these four Revolutionaries under custody.*

*The older one told me that "since you came back Turkey, you are in my lap and I will f ... (sworn) your life and make me paid for my betrayal to Turkey" and "he will bury me with his own hands" They whispered something and told me that they're going to take me to the hallway to get some "fresh air" but I felt very suspicious, the younger one told me in sarcastic way that "you'll love the view and I felt that they'll throw me out from the window of the 5th floor. I start to scream and gave them resistance but they were pushing me from both sides. The older one told the young one "we better not do it in day light so live it to the night". And then they tried to put me back in a cell by forcing. The younger one tried to twist my right hand wrist and push me in to cell but couldn't because he grabbed my hand instead of my wrist and twist my fingers, I felt no pain in the moment but realized afterwards when they throw me in the cell that my [finger's] last knuckle wasn't straight and I didn't know what was happened to my finger. He has threaten me and told me to not tell anyone If I had to then tell that it was an accident. If I go to the doctor to get a report for a formal complaint he'll come and make me pay for it and will prepare my one-way ticket soon ". Interrogation was about 2-3 hours long. They released me and older policeman told me that he is going to come and get me from my home to take me to one-way trip" soon.*

*After this incident occurred I couldn't stay in [Town 2] at my family's house hence I wasn't feeling safe and called my relative's at [Town 6] and stayed there till 6th of September 2010. I've showed my finger to the Doctor at [Town 6] Hospital but couldn't tell him what was the reason of it hence I was so scared from last incident and threats of police. They took and x-ray of my finger and told me that my tendon tie was broken. And he's prescribed me a splint to wear it. I've used it but my finger hasn't get back to its normal shape but unfortunately my finger has lost it's natural shape.*

#### *Airport 2010*

*I also have been stopped by police officer at the [airport] on the way back to Australia on September 2010. He looked at my passport and after 3-4 minutes and then told me to step at side and wait for him till he comes back. I asked to him "is there a problem and he said he'd see after make a phone call. He came back after 15 minutes, I was very nervous and asked him is there any problem, he said" no problem but "no matter where you go make sure you don't betray our country you know betrayers get lost here". I didn't even responded to him because it was an indirect threat and he knew or learned who I was after he went to the office and made this phone call. Once again I clearly understand that they labelled me and knew whom I am no matter where I go.*

#### *Third trip to Australia: September 2010*

## *Why I can't return to Turkey*

*My main goal was to go back to Turkey after I've graduated in Australia with a better education and adopt myself in to the system with hoping that something may change in positive way for us Kurds and Alevi's. I wanted to be active with my political view, and defend Kurds and Alevi's rights live in my home in peace.*

*However I unfortunately have realized that fascist and racist ideology has not changed but gained more power and changed and became in to Islamo-fascist with the hand of current government political party AKP (Justice and Development Party). Especially "Kurdish Expansion" idea was an idea that has been forced by EU to AKP Government and AKP has only abused Kurds with this idea. This was an operation to label Kurds but not give us any Natural Rights from our existence and it will never happen in the future. Governments may change in Turkey but Anti Kurdish, Anti Alevi, Anti-Armenian, Anti- Jewish and Fascist ideology will never give the right to us but will keep their power in politics, media, business, press and all other fields. As Current Prime minister Tayyip Erdogan states, "If you're not our side you'll be disposal". This mentality is the biggest legacy from Ottoman Empire whom killed thousands of Armenians, Alevi's and Kurds with systematic massacres.*

*Systematic assimilation, isolation project of Turkish government has moved forward by AKP and this project is being forced by AKP' s political power to the all nations of my country to obey AKP. And the people who have different ideology and ideas like us have being faced to isolation, exile, harassment, verbal and physical violence and torture. I've realised that this different but more powerful shape of discrimination was the worst ever we've been experienced.*

*I've realized a huge difference between the time when I left on 2005 and visited Turkey on 2007 and today. Islamo-fascist network of AKP has grown and generate a huge and strong network in every single corner of my country. They dictate their doctrine and you either follow or will be disposal in the system. Hence they change the new law system minorities will suffer more then ever and will be "AKP follower/supporter or will be punished"*

*I indented to be active in political platform via BDP to defend our rights for all Kurds in Turkey.*

*The threats from police, their physical and verbal violence and catastrophic change in my country's political platform left me no choice but seek protection in Australia. I'm too scared to go to Turkey for fear of persecution and get killed. My life will be in danger and my return to Turkey will generate risks against my family as well.*

*To being Kurdish and Alevi is my reality and I was planning to continue my political activities and therefore Police and local authorities will target me. I will be seeking Kurdish right in a democratic and political platform entire my life. If I try it in Turkey it's so obvious that they will definitely punish me with "their methods". I've no hopes that the conditions may be better in my country. My lawyer [Mr A] and my family advised me that I must not go back to Turkey but stay in Australia safe and free hence my life is under threat.*

*To be able to live as a free human being, to think free, to be able defend my Kurdish and Alevi rights, ideas and ideology freely and speak freely in a free society most and foremost live safely without any threats, I'm applying to Protection Visa as Political Asylum Seeker.*

*Why are you afraid to go back to Turkey*

*I am afraid that the police will persecute me and send me to prison with their groundless accusations or disappear me under custody. Some mystery killings have taken place in Turkey in the last 15-20 years. I am afraid that is what will happen to me. I think that was what the Turkish immigration officer at the airport was trying to threaten me when I was coming to Australia on September 2010. I am really afraid that the police will kill me and it will be covered up like many of unsolved murders in Turkey. I believe that what he meant when they told me as "he'll add my ear in his collection" at Anti-Terrorism headquarter at Izmir - Hatay Bozyaka.*

*A video has been showed on the news on 25 April 2011 in Turkey which was showing with a special forces team of Police group in Sivas was making a ceremonial walk with a group of 200-300 and was singing the March of Ultra Nationalist Ulkucu Group and they were calling them selves "Grey Wolves (Bozkurtlar). This clearly shows that their racist formation in Police is still active.*

*Barriers to Kurdish Politicians: Kurdish Independent 12 Candidates have been barred for 2011 Elections. And The Kurds have showed their reactions in many different points of Turkey and Turkish police has opened fire gun in Bismil and killed one protestor on 21 April 2011. That's what we get when we show our reaction against Turkish Government's wrong decisions about Kurds and our rights.*

*AKP's power in Judicial System and their punishments to dissidents: Recently*

*Turkish award winning journalists Ahmet Sik and Nedim Sener has been arrested with reason of writing a book about Fetullah Gulen's organization in Turkish Police forces with name of Imam's (referring Fetullah Gulen) Army". They have been arrested for the book that they've not even published yet and most amazingly Public Prosecutor of this case has destroyed the draft of the book and all other copies. They destroyed the main evidence of the case but built a case based on it. If anyone talks about how this organization has taken the control of Police, Special Forces, Judicial System, they either go to the jail with some sort of "created reasons of Turkish Police and Judicial System" or get punishment by other organizations.*

*Corruption in Judicial System and Creating Evidences: Turkish Tax Authorities imposed a record tax fine of \$2,5 Billion against Dogan Media Group. Once again Prime minister Erdogan has proved his saying of "If you're not our side you'll be disposal".*

*Turkey has been a country where a fair judgment is a utopian dream and all authorities have been seized by Erdogan and Fetullah Gulen's Islamo fascist organization. And this corruption choses victims from minority groups like Kurds and Alevis.*



*As I am intending to be politically active in DTP, I'll continue to defend the rights of Kurd's and Alevi's in Turkey. It means that I'll high likely to persecute and get killed by Turkish police or Special Forces.*

*Why didn't you claim asylum before in USA or Australia?*

*Turkish police and local authorities have persecuted me before. And I thought after this while they've forgot about me and I could have life without persecution and fear.*

*However, last incident showed me that my life is under danger. I always kept my hope that conditions may change in Turkey or they may forget about me. I love my country, my family and all the nations of my country whom respects to democracy and human rights. I always wanted to return Turkey especially after I finish my studies and then work and live in Turkey in peace.*

*The current Government's pro-Islamic system's influence and effects in the life everything went worse. They never accept Cem Houses as worship of Alevi's, and never get funds from government like mosques do. And they will never accept Cem*

*houses nor let them receive from the funds of Government. Turkish government is building mosques in Alevi villages despite their resistance. Compulsory religion subjects which only include sunni Islamic elements are still being taught at schools to Alevi children regardless of the judgments of the Court of European Human Rights. They have their sunni and Turkish fascist motives which give no chance to minorities to seek their rights, these have been spread throughout the country.*

*Especially in the police force and Turkish National Intelligence Organization (MIT) therefore they became more powerful and dangerous than ever. Alevi and Kurdish people are not the only people whom have been targeted also Non-muslim and non Turkish people are targeted like; Catholic Priest Father Andrea Santoro has killed in*

*Trabzon in 2006, a 17 year old youngster has been trained for this assassination from Ulkucu group (Ultra Nationalists), And Armenian Journalist Hrant Dink has shot and killed in front of his news paper Agos building by another Ulkucu Militant on 2007, he was only promoting peace for Armenian and Turks. After three months of Dink's murder three Christian Missionaries were slaughtered in [Town 1], after [Town 1] massacre there were number of attacks and attempts to kill Christians in Izmir, Samsun, Diyarbakir and Antalya. These organized murders all have been set up by Turkish Government and killers were from Ulkucu group. They especially chose under age young people so they can go to the Children Courts instead of Normal Courts so they can be sentence with very low range.*

*Time taken to lodge my protection visa application*

*I did not lodge a protection visa application when I first came to Australia because I wanted to make some enquiries and get advice about what I should do about my immigration status. I also knew that I had a valid student visa until August 2011, so I did not need to rush my decision.*

*About a month or two after arriving, I spoke to the Turkish and Kurdish association. They made some suggestions and recommendations; I receive some immigration advice, which I have received in February and March 2011.*

#### *Family members*

*Since I have been to Australia, police have visited my family home and asked where I am and why I haven't returned yet. I am suspicious that my family's telephone conversations might be being taped.*

#### *My Alevi faith*

*When I was living in Turkey, I would go approximately once a month to the [Town 2] Cemevi, near where I have lived for about the last 10 years, to the Cem worship. I'm also a member of [Town 2] Alevi Bektasi Cultural Association. Since arriving in Australia, I didn't have many friends but after a while I met my current friends in [an Alevi Cultural Centre], I've been a member and try to attend their meetings and organizations. A certificate of my membership is also attached to this statement. I have met other Kurdish people by becoming involved in the Turkish and Kurdish association. I'm a member of Turkish and Kurdish association and membership certificate is attached to this statement.*

#### *Review application*

27. No other information was provided with the review application.

#### *Independent information*

28. Information before the Tribunal from a range of sources, including Immigration and Refugee Board of Canada 2010 and a report of the European Parliament 2010, *European Parliament resolution on Turkey's progress report 2009*, the DTP is a pro-Kurdish political party which succeeded the DEHAP and HADEP and largely maintained the HADEP's membership and policies. On 11 December 2009, the DTP was banned by the Turkish Constitutional Court on charges that it undermined the state's unity. The court reportedly found the DTP to be linked to the PKK and 37 DTP members were banned from politics for five years. The European Union has expressed regret over the court's decision to ban the DTP and in March 2009, the Venice Commission of the Council of Europe found that Turkey's legislation governing the closure of political parties is not compatible with the European Convention on Human Rights. Following the ban, the DTP regrouped as the Peace and Democracy Party (*Baris ve Demokrasi Partisi* or BDP).
29. According to a variety of sources, including the report of the US Department of State 2011, Kurds in Turkey are subjected to some forms of discrimination by the Turkish authorities; primarily this discrimination is in the form of laws aimed at curbing expressions of Kurdish autonomy, such as the use of the Kurdish language or any activity deemed to advocate Kurdish political independence. Although millions of Turkish citizens identify themselves as Kurds and speak Kurdish, Turkish law provides a single nationality designation for all citizens and does not recognise national, racial or ethnic minorities. The US State Department's 2010 report on human rights practices in Turkey states that 'Kurds who publicly or politically asserted their Kurdish identity or

promoted using Kurdish in the public domain risked censure, harassment, or prosecution'. Freedom House states that minorities in Turkey – particularly Kurds – have faced restrictions on language, culture and freedom of expression, and 'alleged collaboration with the Kurdistan Workers' Party (PKK) is still used as an excuse to arrest Kurds who challenge the government'.

30. A 2002 report compiled by David McDowell of the UK-based group Asylum Aid states that there is 'a widespread assumption particularly among the security forces that the Alevi Kurds are dangerous leftists'. However, no information was found to suggest that Turkish citizens of Kurdish ethnicity who are at risk of harassment or harm by non-state actors are withheld state protection by authorities. For example, police have reportedly intervened to break up fights at demonstrations in Istanbul where Kurds have been attacked by ultra-nationalists.
31. Regarding the day-to-day treatment of Kurds, American academic Anne Secor writes that as a minority group, Kurds living in Istanbul are the subject of discrimination in their day-to-day activities. For example, where Kurds are identified as being Kurdish based on their names or use of Kurdish language, they face discrimination in areas including schooling, employment and accommodation. However, the UK Home Office August 2011 Operational Guidance Note for Turkey asserts that 'although Turkish citizens of Kurdish ethnic origin may face some unequal treatment or discrimination both from the authorities and the general population this does not generally reach the level of persecution'
32. According to Human Rights Watch, the Turkish government's "democratic opening", announced in 2009 to address the minority rights of Kurds in Turkey, has not progressed and 'the non-resolution of the Kurdish issue remains the single greatest obstacle to progress on human rights in Turkey' Amnesty International supports this assessment and judges that steps taken by the government towards improving human rights in Turkey continue to fall short of the fundamental change that is required, with Kurdish political activists, journalists and human rights defenders among those most frequently prosecuted. In addition, the Diyarbakir Branch of The Human Rights Association (IHD) recently reported that 29,366 rights violations occurred in the Turkey's Kurdish region in 2011 – an increase from the previous year's 23,520 violations.

### *Hearing*

33. At the hearing the Tribunal took the applicant through his protection visa application. He confirmed that the details in that were correct. He arrived in Australia in 2005 on a working visa. An agency in Istanbul found work for him in Australia and organised his visa. He worked at [a Hotel]. He left Australia at the end of the visa, in 2007. He came back the same year on a student visa to [study]. He started his studies and finished the course in 2010. He went back to Turkey in June 2010 and came back to Australia in September 2010, on the same student visa. This was valid to August 2011. He applied for a protection visa [in] March 2011. By then he had finished his studies. He did not apply for another student visa. His plan was to finish his study and return to Turkey.
34. He had travelled to the USA in 2001 and stayed there for 22 months while he undertook [an internship].

35. The applicant said that he [lived] with his family except for the summer of 2003, when he lived in [District 5] for three or four months. [Family details deleted: s431(2)]. He does not have any family in Australia. He lives with a flatmate here. He has just started a job with [a certain firm].
36. He worked at a hotel in Turkey in the front office, from about May 2003 to August 2003. He worked at different hotels. He started working in about May 1993 at a [radio station]. He worked there to 1994. He was at high school and worked after school hours. He was paid. During holidays he worked at a hotel. After he finished university he worked at a hotel. He did so again after he [came back from USA].
37. The Tribunal asked the applicant why he feared returning to Turkey. He said it was because of what he went through before he came here. He was under a serious threat. In 2010 he visited his friends in the BDP in [Town 2] branch. He saw old friends there and met other people as well. About 2-3 days later the police came to his [house] and picked him up and took him into detention. He was treated badly. They alleged that he was helping the PKK and KCK, financially as well. They broke his [finger] and threatened to kill him. They told him not to tell anyone about his treatment. This was [in] August 2010; he was detained for 2-3 hours. The Tribunal asked how the authorities knew he had visited the BDP. He said either they were watching the branch or him. He said that he had no trouble leaving Turkey, but on the last occasion when he arrived in 2010 the police were checking his passport and told him to stand aside, took the passport and went inside. They were gone for about 20 minutes, then questioned about his travel and threatened him. He was able to get on the plane and leave.
38. The Tribunal asked why the applicant delayed seeking protection when he had travelled to Australia on three separate occasions. He said that the danger only became serious on his last departure from Turkey in 2010. He did not see that there was as much need for protection before that.
39. The Tribunal indicated that he was given a student visa 24 June 2008, valid to August 2011. He left Australia in June 2009 and [returned in August 2009]. He left again in June 2010 and came back in December 2010. There was a gap of six months between his arrival in December 2010 and applying for protection in March 2011. If, as he says, it was the incident in 2010 which led to his application for protection, why was there a delay. He said that applying was not easy. He had to consult with friends about the process. Then he found out about [a migration advisory centre], who would help him without charge. He contacted them at the end of 2010. They were very busy and took his details and told him that because his visa was still valid there was no reason to panic. They said they would get back to him later. He saw them in February 2011.
40. The Tribunal asked whether the applicant had any kind of involvement in Turkish political affairs in Australia. He said he was a member of the Turkish-Kurdish Association. He attends meetings. He does so because they are his people. He also is involved in the Alevi Association as well, because they represent his beliefs.
41. The Tribunal referred to a document headed "My actual words" The applicant said that this was the transcript of the voice speech he made on radio himself. He wrote it himself.

42. The Tribunal referred to a report from [a Doctor], dated [November] 2010, in relation to the applicant's finger. This appeared to refer to "mallet finger"; the applicant was uncertain of the term.
43. The Tribunal referred to a letter from the Australia-Alevi Cultural Centre in [suburb deleted; s.431(2)], the letter from the [Alevi Cultural Centre] in [suburb deleted: s.431(2)] These were dated 2010 and 2011. The Tribunal asked whether the applicant was still involved with the organisations. He said that he was.
44. The Tribunal asked whether he had been in contact with his family in Turkey. He said that he does not hear from them often; about once a week. The last thing his father told him was that he would prefer to hug his dead body than have him away; one day they would see each other. The applicant was clearly distressed at this point. His father's health is not good. He referred to a medical certificate he provided in relation to his father, showing his father had a heart problem. He has since had a bye-pass operation, but he is still having problems.
45. Following the hearing, the applicant sent the Turkish copy of his father's medical report, together with articles relating to Kurds in Turkey at this time.

## **FINDINGS AND REASONS**

46. The Tribunal accepts on the evidence before it that the applicant is a citizen of Turkey. He is outside that country at this time.
47. The Tribunal is required to determine whether the applicant has a well-founded fear of persecution in Turkey and, if so, whether this is for one or more of the convention reasons. When determining whether an applicant is entitled to protection in Australia, a decision-maker must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility. When assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are genuinely credible but unable to substantiate all of their claims. That said, the Tribunal is not required to accept uncritically any or all allegations made by the applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Indeed the Tribunal is not obliged to accept claims that are inconsistent with independent evidence regarding the situation in the applicant's country of nationality. *Randhawa v Milgea (1994) 52.FCR.437 at 451, per Beaumont J, Selvadurai v MIEA and ANOR (1994) 34.ALD.347 at 348 per Heerey J and Kopalapilli v MIMA (1998) 86.FCR.547.*
48. The Tribunal is required to make a determination as to whether the applicant has a well-founded fear of persecution for a Convention-related reason if he were to return to Turkey.
49. The Tribunal has taken into consideration the evidence that the applicant has provided to the Department that formed the applicant's claims for protection, along with the material submitted to the Tribunal at review.
50. Having considered all the information before it and, having had the opportunity to obtain information about the claims from the applicant at a hearing, the Tribunal is of

the view that that the applicant is a reliable and credible witness. His claims throughout have been consistent. There is nothing to indicate that he has attempted to exaggerate or embellish any of the claims which he has made. His explanation of the delay in claiming protection in Australia appears reasonable. The report from STAARTS dated [May] 2011 indicates that the applicant displays symptoms which are consistent with post-traumatic stress, depression and anxiety. This is reiterated in a report dated [November] 2011, and that report indicates that he is not able to undertake paid employment.

51. The applicant has based his claims for protection on his ethnicity, being a Kurd; on his political involvement; and on his religion, as an Alevi.

*Kurdish ethnicity and political activity*

52. The Tribunal accepts that the applicant is of Kurdish ethnicity. The Tribunal considers that merely being a Kurd is not sufficient to give rise to a well-founded fear of being persecuted in Turkey. However, the applicant in effect claims that he falls into the category of Kurds who face harm because of their political activity.
53. The applicant claims that he has come to the attention of the authorities since his school days in the 1990's. He worked for pro-Kurdish radio and was detained in 1994. He was detained a further three times between then and December 1998. Following his return from America, he was again detained in 2003.
54. In 2010 he went back to Turkey from Australia. In August that year he visited friends from the BDP and later was detained by police. He was treated badly. They alleged that he was helping the PKK and KCK, financially as well. They broke his [finger] and threatened to kill him. They told him not to tell anyone about his treatment. This was [in] August 2010; he was detained for 2-3 hours.
55. The Tribunal is of the view that, given the past incidents, the applicant would be viewed by the Turkish authorities as a supporter of pro-Kurdish political parties. In that case, while there is some information indicating that the human rights situation in Turkey has improved to some degree, it has not done so to the extent that there is no real chance that the applicant would continue to experience the kind of persecution that he has in the past.
56. Having considered all these factors together, the Tribunal finds that there is a real chance that the applicant would experience serious harm, including physical harm and detention, within the meaning of s.91R(1)(b) of the Migration Act upon return to Turkey, because of his Kurdish ethnicity together with his political opinion. The Tribunal therefore accepts that the applicant would face a real chance of persecution, involving systematic and discriminatory conduct, the essential and significant reason being his political opinion, if he was to return to Turkey.
57. Having reached this conclusion, the Tribunal has not considered the applicant's further claim in relation to his religion.
58. As the harm feared is from an instrument of the state, the Tribunal is satisfied that the applicant would not be afforded state protection in Turkey.

59. The Tribunal considered whether the applicant would be able to live safely in another, predominantly Kurdish, area of Turkey. Many Kurds in Turkey have moved from the traditional Kurdish areas in the east where the PKK is active and the government is active against them, to cities in the west of Turkey. However, the country information indicates that even in the western part of Turkey there are risks that politically active Kurds could be detained by the authorities and ill-treated. As the harm feared is from the government, the applicant would be at risk of harm in any area of Turkey and therefore has a well-founded fear of being persecuted for a Convention reason throughout Turkey.
60. It follows that the applicant does have a well-founded fear of persecution for a Convention-based reason.
61. Subsection 36(2) of the Act, which refers to persons to whom Australia has protection obligations, is qualified by subsections 36(3), (4), (5) and (5A) of the Act. They provide as follows:

*Protection obligations*

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

62. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4), (5) or (5A) are satisfied, in which case the s.36(3) preclusion will not apply.
63. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].
64. In determining whether these provisions apply, relevant considerations include: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; and whether s.36(3) does not apply because of the operation of s.36(4), (5) or (5A).
65. There is no information before the Tribunal to indicate that the applicant has a right to enter and reside in a third country.

## **CONCLUSIONS**

66. 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).

## **DECISION**

67. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s36(2)(a) of the Migration Act.