

**0804995 [2008] RRTA 360 (30 September 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0804995

**COUNTRY OF REFERENCE:** Turkey

**TRIBUNAL MEMBER:** Ms Philippa McIntosh

**DATE DECISION SIGNED:** 30 September 2008

**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, most recently arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa almost 2 years after arrival. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter dated the same day.
3. The delegate refused the visa application on the basis that the applicant was not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

## **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 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, who was not present at the hearing
22. Evidence before the Department
23. According to DIAC records the applicant first arrived in Australia on a temporary visa. He returned to Turkey over 1 year later and re-entered Australia about 2 months after. His extended visa was cancelled and the Migration Review Tribunal affirmed the decision to cancel his visa. He lodged the protection visa application just over three weeks later.
24. In the applicant's written and oral submissions to the DIAC he stated that he was an ethnic Turk. He stated that he was a Turkish national and a Moslem. He was unmarried.
25. In evidence of his identity and citizenship he submitted a certified photocopy of his Turkish passport, which had been extended. This passport had originally been issued in Turkey He claimed that the Turkish consulate had refused to extend it again.
26. He claimed to have taken part in leftist student politics while at university. During his interview with a DIAC officer (the interview) he said that he and his friends had supported local branches of the opposition Republican People's Party (CHP) and the Democratic Left Party (DSP), both of which were legal parties. He and his friends were not members of these parties. Their support was low key.
27. He was twice abducted and beaten up by local fascist thugs (one of whom he knew) to deter him from engaging in leftist politics. He did not report these events to the authorities.
28. His goal was to migrate to Australia. His stay in Australia was interrupted because of personal problems with his former girlfriend. As a result his visa was cancelled because he did not comply with the requirements. This prevented him from applying for migration.
29. At the interview he said that he had long admired Australia's democracy and lifestyle, and knew of them because he had family living in Australia His university problems had made him even more keen to migrate. In writing he stated that he did not want to return to Turkey because he had military service obligations outstanding there. He disagreed with the Turkish government's position on the Kurdish issue and its use of military force against the PKK. He

considered the USA had fuelled discontent among the Kurdish population and that Turkey was overly influenced by the USA. This had led to the conflict with the PKK. He did not wish to kill anyone, or be killed, in what was an unnecessary conflict. He had friends and acquaintances who returned from military service as damaged people.

30. At the interview he said that if Turkey were attacked he would defend it militarily if required.
31. According to biographical details provided by him on the protection visa application forms he had siblings living in Australia, and his parents lived in Turkey.
32. He had been a computer professional before arriving in Australia. He had lived at a single address in Turkey. He had been a student at a Turkish university and had gained a qualification in as a technician. He submitted evidence of that qualification.
33. He had been employed as a technician by 2 companies.
34. During the Tribunal hearing he gave further evidence. He said that most of his family were all currently living in City F, and that he was living with one of his siblings in Australia.
35. He confirmed that he had been called to perform his military service. He agreed that Turkish men become eligible to perform their military service on 1 January in the year in which they turn 19. He had not done his military service at that time because he had been granted a deferral by the relevant authorities because he was a student. He said that that deferral had expired a week after he arrived in Australia. The authorities agreed to extend it for a further year and, according to a document in Turkish issued to him by those authorities, his most recent deferral had expired early this year.
36. He agreed that he had first arrived in Australia on a temporary visa, having completed his studies at a Turkish university. As to why the Turkish authorities might have given him a passport of 2 years validity and allowed him to leave the country if he had not already done his military service, he said that he did not know but that he had made no special arrangements in order to be issued with that passport.
37. He agreed that he had returned to Turkey and re-entered Australia, remaining in Turkey for over two months.
38. As to his fears about returning to Turkey, he said that there was a list of conscripts at the airport and that, if he returned, airport staff would contact the military authorities in City F, so that he would be either charged with offences arising from his being due to do military service without gaining a further deferral, so may be jailed, or might be required to perform his military service for an extended period.
39. With regard to his past experiences as a university student, he told the Tribunal that he had come to Australia for political reasons after graduating. He had been assaulted while at university on two occasions by supporters of the extremist MHP, who held different political opinions to himself. Therefore he had come to Australia, in the hope that he could remain here.
40. As to why MHP supporters might have any interest in harming him in future, he said that every day soldiers were dying and that incidents involving the PKK were a "hot topic". The two parties he supported were regarded by the MHP as "separatist groups".

41. He agreed that he had been a supporter of the Republican People's party (CHP) and the Democratic Left Party (DSP) in Turkey, both of which were legal mainstream parties. He agreed that he had not been a member of either one, saying that his father had discouraged him from joining any political parties. He had not supported any other political parties.
42. The Tribunal asked him to state what his political opinions were. He said he supported an independent Turkey. The USA threatened its independence. There were many different groups in Turkey, Turks, Kurds, Alevis and Sunni Muslims. Every day they were encouraged to be hostile to each other. Kurds were encouraged to kill Turkish soldiers. The Tribunal asked him what connection all this had with the USA, in his view, to which he responded that there was a big conflict in the Middle East and everyone knew what they were after. He said this was his "main opinion", and that the MHP did not agree with it. The Tribunal suggested to him that the MHP was a nationalist party, and that it was difficult to see why its members might pursue him because of the political opinions he had expressed. He said that after the coup in 1980 the nationalists had become stronger and there had been conflict between the parties. The Tribunal told him that it seemed unlikely, nevertheless, that members of the MHP would bother with him in future. He did not dispute this, saying that they had bothered him at university and he had wanted to start a new life in Australia because his siblings were here.
43. He agreed that his primary fear related to having to do military service and the problems arising from having no valid deferral. He said no one would want to join the army.
44. He said that he had supported the DSP and CHP from 1999 until the present. Since his arrival in Australia that support had taken the form of sharing his views with Turkish friends, as there were numerous people of Turkish background in Australia who shared his opinions.
45. As to the political activities in which he had been involved while at university, he said that "we organised discussion groups and tried to find the best way to increase our numbers. We met with senior students who were active supporters, who always wanted us to find new supporters".
46. With regard to the incidents in which he had been beaten up, he confirmed that this had happened on two occasions. In the first incident he was on campus, waiting for his girlfriend, when six or seven people attacked him. On the second occasion people had picked him up off the street in a car that had taken him to an office in downtown City F. They had wanted to shut him up, and had assaulted him for 1 to 1½ hours. Just before this he had received an SMS message from a friend warning him that some people had been looking for him in the university cafeteria. He said that he recognized one assailant during the first assault, but knew none of the assailants during the second. As to the purpose of the second assault, he said that perhaps, because it was a small town, someone had heard him and his friends talking in the university dormitory. There were sympathisers of all the political parties among the students.
47. He said that he had not lodged a report with the police about either incident, despite being hospitalised after the second one, because he was scared of making things worse.
48. He said he had never been detained, harmed or harassed by people working for the security forces, because of his political opinion. However on one occasion after the assaults he had heard that someone had made a complaint to the police about him and other students, presumably hoping to get them expelled. University management had informed him of this. Nothing had come of this complaint.

49. He said that after graduating he had returned to his home village, and while there had lodged his Australian visa application. He had not been involved in any political activities in the village. He had had no problems with the MHP while there because they did not know where he was from, but also because the village community would notice strangers.
50. He agreed that if he did not return to City F he would have no problems with the MHP, and that his political views were unexceptional in Turkey. He said that he had come to Australia to start a new life and be with his siblings here.
51. He did not dispute that he could resettle in some part of Turkey other than City F, and that he was young, single, intelligent and able to adapt to new environments. He emphasised that he had abided by Australian laws and the problem was just that the Australian visa had been cancelled because "some things happened". He had spent a lot of money in order to be able to come to Australia.
52. Of his military service, he confirmed that he was not a pacifist, as he would be prepared to defend Turkey if it was attacked. However he did not want to do military service in Turkey because he might be killed in combat or might be required to kill others in combat. He confirmed that there was no other reason for his wish not to do military service.
53. The Tribunal told him that it appeared that the requirement to do military service in Turkey was one made of all young men and that the possibility of killing others in combat was one faced by all soldiers. His reasons for not wanting to do military service did not appear to bring him within the definition of a refugee. He did not dispute this.
54. The Tribunal also told him that any penalties he might face as a result of the failure to perform military service after his deferral had expired did not appear to arise from any of the reasons listed in the Convention. He agreed with this.
55. Invited to add anything further he wished the Tribunal to consider, he stated that he had said everything he considered to be important.
56. Evidence from other sources
57. The April 2006 report from the U.K. Home Office observes (5.134-5.142) that according to Article 1 of the Military Act No.1111 (1927) every male Turkish citizen is obliged to carry out military service. The Netherlands report 2001 states that the obligation commences on 1 January of the year in which a male citizen becomes 19 years old, and ends on 1 January of the year in which he reaches the age of 40. On 17 July 2003 as part of reforms to increase the professionalism of the armed forces the standard length of military service was reduced from 18 months to 15 months. Some university graduates serving as officers are now conscripted for 12 months instead of the previous 16, while some privates will serve for six months instead of eight. This change has led to a 17 percent reduction in the number of conscripts in the Turkish armed forces.
58. A Netherlands report 2001 reported that "Persons of call-up age are not usually issued with passports, and cannot have passports renewed. In a small number of cases, and with the consent of the military authorities, a passport with a short period of validity is issued. The entry 'yapmiştir' (done) or 'yapmamıştır' (not done) in the passport indicates whether the holder has completed military service or not."

59. According to Article 35 of the Military Act No.1111 (1927) a number of provisions allow people liable to military service to defer their service, principally for educational reasons.
60. As recorded on the website of the Turkish Ministry of National Defence (undated, website accessed on 13 February 2006):

All recruitment procedures of our citizens, (residing abroad with the title of employee, employer, craftsmen or any other profession having the working or residence permit,) such as final military roll call, summons and conscription can be postponed by the Ministry of National Defence until the end of the year they completed the age of 38 (until December 31<sup>st</sup> of the year they completed the age of 38)... The military service of the undergraduate and postgraduate students who work as part time workers and as workers who are not subject to income tax and whose residence and working permit are given due to their status as students, can not be deferred.

61. The website of the Turkish Ministry of National Defence further recorded that:

[Dövizle Askerlik - Military service in foreign exchange] It is a kind of military service performed by our citizens who live and work in foreign countries for at least three years ... on condition that they make the payment [of 5,112 Euro or the total equivalent foreign exchange] until the end of the year they completed the age of 38 (until December 31<sup>st</sup> of the year they completed the age of 38) and that they perform one month basic military training.

62. In the report's section on "Evasion of military service and punishment" (5.143-5.145) it was noted that, as recorded in the report 'Refusing to Bear Arms: A world-wide survey of conscription and conscientious objection to military service' (Turkey: 2005 update) by War Resisters International:

Draft evasion and desertion are widespread. The exact number of draft evaders is not known, but the number is estimated to be approx. 350,000. Draft evasion is prompted by the risk of being sent to serve in South Turkey and poor conditions and human rights violations within the armed forces...Draft evasion and desertion are punishable under the Law on Military Service and the Turkish Military Penal Code. Turkish law actually makes a distinction between evasion of military registration, evasion of medical examination, evasion of enlistment and desertion. According to Article 63 of the Penal Code, draft evasion is punishable (in peacetime) by imprisonment of:

- One month for those who report themselves within seven days;
- Three months for those who are arrested within seven days;
- Between three months and one year for those who report themselves within three months;
- Between four months and 18 months for those who are arrested within three months;
- Between four months and two years for those who report themselves after three months;
- Between six months and three years for those who are arrested after three months;
- Up to ten years' imprisonment in the case of aggravating circumstances, such as self-inflicted injuries, using false documents (Articles 79-81 of the Penal Code).

## **FINDINGS AND REASONS**

63. The applicant has provided his Turkish passport in evidence. The Tribunal is satisfied, and finds, that he is a national of Turkey and has considered his claims in relation to that country.
64. The Tribunal accepts that he supported two political parties in Turkey, being the Republican People's Party (CHP), currently the main opposition party (Turkey: "Analysts: Sharp decline in support for opposition endangers democracy", Zaman News Agency, 5 September, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=152223&bolum=100,CX209517>) and the Democratic Left Party (DSP), both of which are legal, mainstream parties.



65. The applicant expressed general and somewhat vague political views to the Tribunal, from which the Tribunal infers that he does not hold strong or sophisticated political opinions. That is consistent with his evidence that he was willing to comply with his father's wishes by never becoming a member of either of the political parties he supported. Nevertheless the Tribunal considers plausible that, while a university student, he was assaulted on two occasions by people in City F who did not share those views. The Tribunal has regard to his evidence that on the first occasion he was assaulted on campus and on the second occasion he attributed his assault to the fact that supporters of some other political party had overheard him expressing views in the university dormitory that they did not share. The Tribunal is satisfied that these problems were all connected to his period as the university student.
66. He gave evidence that after finishing university he returned to his home village, from where he left Turkey two months later. He told the Tribunal that he was not threatened or harmed in his home village. He also did not claim to have been threatened or harmed in any way during his return visit to Turkey for two months.
67. He did not dispute that the problems he had all occurred in City F and that, if he did not return to that particular town, he would not be at risk of harm in Turkey because of his political opinions. The Tribunal considers that to be the case.
68. The applicant does not claim that ordinary supporters of the DSP or CHP face a real chance of serious harm in Turkey because of their political opinions. The Tribunal is satisfied that, if he does not return to City F, a town he had permanently left, in any case, before his initial departure from Turkey, he can express his political views to an extent commensurate with his level of political commitment, without facing any real chance of harm amounting to persecution.
69. As to his military service, the Tribunal accepts that according to Article 1 of the Military Act No.1111 (1927) every male Turkish citizen is obliged to carry out military service. The Tribunal accepts, as the applicant himself agreed, that this is a law of general application that applies to the applicant.
70. As to his fear of some penalty for his failure to perform his military service after his period of official deferral expired this year, the Tribunal is satisfied that he does not regard himself as a conscientious objector or pacifist, and would not be perceived as such if he returns to Turkey. The Tribunal accepts his assessment of his reception on return – that is, that on re-entry he will be identified as a person due for military conscription and will either be penalised or required to perform his military service, or indeed both.
71. Enforcement of laws providing for compulsory military service, and for punishment for avoidance of such service, do not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention. This is primarily because it lacks the necessary selective quality. Without evidence of selectivity in its enforcement, conscription will generally amount to no more than a non-discriminatory law of general application. In the present case, the Tribunal has accepted that the applicant may face some penalty for failing to report to do his military service despite not having been granted a further deferral. However the Tribunal is also satisfied, and he does not dispute, that the punishment feared will not be imposed discriminatorily for a Convention reason, such as his political opinion or membership of a particular social group such as “conscientious objectors”.

72. The Tribunal accepts that he does not want to be killed or to kill others in combat. However there is no independent evidence to suggest that individuals who hold these views are treated any differently or that any punishment imposed upon them is enforced in a discriminatory manner by the Turkish authorities.
73. For the reasons set out above, the Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason if he returns to Turkey.
74. The Tribunal accepts that the applicant's only siblings reside in Australia, and that he has made some financial sacrifices in order to be able to stay here, in the hope of being allowed lawfully to find employment and ultimately to settle in Australia. However these are not matters over which the Tribunal has jurisdiction.

### **CONCLUSIONS**

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

### **DECISION**

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

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act</i> 1958. Sealing Officers ID: PRRTIR</p>
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