

0900309 [2009] RRTA 425 (11 May 2009)

DECISION RECORD

RRT CASE NUMBER: 0900309

DIAC REFERENCE(S): CLF2008/129271

COUNTRY OF REFERENCE: Turkey

TRIBUNAL MEMBER: Rosa Gagliardi

DATE: 11 May 2009

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Turkey arrived in Australia [in] July 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2008. The delegate decided to refuse to grant the visa [in] January 2009 and notified the applicant of the decision and his review rights by letter dated [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] January 2009 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 applicant appeared before the Tribunal [in] March 2009 to give evidence and present arguments. The Tribunal also received oral evidence from: [Person 1], friend of the visa applicant; [Person 2], also friend of the visa applicant; and [the] son of the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
20. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
21. In making a decision in this matter, the Tribunal has had regard to the material located on the file of the Department (CLF2008/129271) as well as that of the Tribunal (0900309) as summarised below:

- Application submitting claims to be a refugee by the applicant demonstrating that he was born in 1931 and stating:

I am a Turkish citizen of Kurdish ethnicity and the Alevi Muslim religion. My passport states that I was born in a village called [village], in [province] near the city of Tunceli, in 1931 but I think I was born before then and am now about 80 years old. I am a widower. I arrived in Australia on [date] July 2008 on a tourist visa, to visit my family here. My tourist visa expires on [date] October 2008.

I fear that if I return to Turkey I will be attacked, beaten, kidnapped or even killed by the Turkish military who control my home area in South Eastern Turkey. The reason this will happen is because of my Kurdish nationality and ethnicity, because I am an Alevi Muslim, because I will be seen to support Kurdish independence and because my son was involved in political groups in Turkey before he fled to Australia several years ago and was found to be a refugee. Because of my age and lack of other family members in Turkey, there is no way I could live in any part of Turkey other than my home area and yet that is where the Turkish military and police treat Kurds like me the worst...

- Medical examination showing the applicant had a head injury [medical information deleted in accordance with s.431(2) of the Migration Act 1958 as it may identify the applicant] and suffered from memory loss, dated [date deleted: s.431(2)] October 2008;
- More fulsome Statutory Declaration by the applicant, dated [date deleted: s431(2)] October 2008, stating principally:

As I have stated previously, I fear that if I return to Turkey I will be attacked, beaten, kidnapped or even killed by the Turkish military who control my home area in Eastern Turkey. The reason this will happen is because of my Kurdish nationality and ethnicity, because I am an Alevi Muslim, because I will be seen to support Kurdish independence and because my son was involved in political groups in Turkey before he fled to Australia several years ago and was found to be a refugee. Because of my age and lack of other family members in Turkey, there is no way I could live in any part of Turkey

other than my home area and yet that is where the Turkish military and police treat Kurds like me the worst.

I was born and raised in my home village of [village]. The Kurdish name for our village is [village] My father was a farmer. He owned about 80 acres of land, on which he grew beans and other vegetables to feed the family, and raised cattle and sheep. We would also sell some produce from the farm at markets in the towns near our village. In about 1950, I married my wife, who came from a village close to [village] called, in Turkish, [village] and, in Kurdish, [village]. I completed my two years' compulsory military service between 1952 and 1954. I was a driver in the [village] army, based in Istanbul After I completed military service, I returned to [village].

In about 1964, after the birth of my two children, I needed more space for my family, so I bought a small parcel of land about 100m from my parents' house on which we built a house where I and my wife and children lived. I lived in this house until I came to Australia this year. Around this time, my father divided his land equally between his four sons, so I received 20 acres of land to work on. I have owned that land up until I came to Australia. A few times a year – in late summer or autumn – would travel over the mountains near [village] to the nearest city, called Erzincan, about 30-40 kilometres away, to sell produce from our land. We would sell fat and cream from our animals and things like that. Other than that, I lived in [village]

I was born and raised as an Alevi Muslim. Almost all the people in [village] are Alevi Muslims. There are some Armenian Christians, but they are not public about their religion. Of about [number] houses in the village, I think about [number] are Armenian. Alevi Muslims are different from other Muslims. We allow men and women to pray together and play musical instruments during our religious ceremonies. We meet once a week in different houses in the village for prayers and to hear someone preaching from the Koran. Occasionally a senior Alevi Muslim, called a Dede, would come on a special visit to lead our prayers. I pray at home once a day but it is not as strict as other Muslim prayer rituals. There are some parts of the Koran we do not agree with but we still use it as our religious book. I had a Koran at home but I can't read it because I don't read Arabic.

There have always been Turkish military in [Town A] and around our village. [Province] is in Eastern Turkey which has always been an area where the Turkish military have been fighting against Kurdish groups like the PKK who are fighting for an independent Kurdish state. The Turkish military have always treated local Kurds very badly because of this. They think we all support the Kurdish rebels, and suspect that we provide them with support. In the late 1930s, the army massacred many men in our area My father was taken by the military but luckily for him the local district governor intervened and stopped the killing of my father and the men he was with. Many men from other villages in our area were not so lucky.

In the early 1970s, the military set up a base in our village and our treatment got even worse. There has always been a military police station in our village, but not a military base. After about 1974, when there was a military coup in Turkey, we faced constant animosity from the military. There have been soldiers in our village ever since. They are always armed and treat us all very badly. They push us around and humiliate us whenever they can. The military base in our village is very close to my house, only about 10 metres away. There have been many times when the military have assaulted people in our village, mainly just because we are Kurds and Alevi, and they suspect we are supporting the PKK. Whenever the PKK attack someone anywhere in Turkey, the military take it out on us. There is a constant curfew, which the military enforce strictly so we are all too scared to go out in the evening or at night. They regularly search our land and houses, without permission. They often confiscate our produce, saying that they suspect that if we have too much, we will give to the rebels even though there is no evidence that we do that. We are often taken to the military base for questioning, or stopped and questioned in the street. This happens once or twice a week. Sometimes people are shot and killed and the military just say the person was a supporter of the rebels and no proper investigation is done.

In about 1993, the government wanted to have a mosque built in our village. The [Province] governor came to the village and announced this was going to happen. We objected – we wanted the government to spend money on other amenities for us – like water and electricity – rather than the mosque. Many of the young people – including my son – protested against this and were beaten and taken for interrogation by the military. The mosque was built but no one uses it. It's now part of the military base.

In 1994, in response to attacks by the PKK, the army used helicopters to burn dozens of villages in our area. Many people who couldn't escape in time were killed. A few houses in our village were burnt by the soldiers stationed in our village. My wife's home village, [village] was razed to the ground. This affected my wife very badly. She was crying every day and got very sick. One day I came home from the farm land and found she had collapsed. We took her to the local medical centre, where the doctor said she might have had a heart attack and said she had to go to a bigger medical centre in one of the nearby towns. We weren't allowed to travel because of the curfew but the local doctor tried to get permission for us to travel during the curfew because it was an emergency. Another man already had permission to travel because he had to transport his son's corpse and so we were allowed to take my wife in that car to the Tunceli hospital. We were stopped at so many checkpoints and the car, including the coffin with the corpse in it, was searched several times. A trip that should have taken 3 hours by car took 48 hours. At the hospital, we took my wife to see the doctor who started asking her questions and she died while talking to him. The next day, we wanted to take my wife's body back to our village as quickly as possible for her burial according to custom. Again, we had to seek permission to travel during the curfew and again we were stopped many times at checkpoints. It was a humiliating experience at a time when I was grieving over my wife's death and I feel that if we had not been stopped so many times on the way to the hospital my wife's life might have been saved.

In about 2001, my son, [name], fled to Australia because of the problems he was having with the Turkish military because he was actively involved in trade unions as well as being an Alevi Kurd. After he came to Australia, I was asked several times by the local military about [name's] whereabouts. They would take me to the base and ask if I'd heard from [name] and I would tell them I hadn't. [Name] was found to be a refugee in Australia and is now an Australian citizen. Attached to this statutory declaration and marked "A" is the decision of the Refugee Review Tribunal dated [date], finding that [name] is a refugee.

A few years ago, in late 2003, my problems with the military in our village worsened. I had planted several trees near my house to grow for wood to make a roof. One day, one of the soldiers from the base – a sergeant who was a nasty man – came to my house and told me I had to chop down my trees because they were obstructing the view from the military base. Other people in the village had been ordered to chop down trees (sic) for the same reason, but we knew it wasn't good one – it was just an excuse to push us around. I was very annoyed by this. I told the soldier these trees were my life. I said if they want to kill my trees, they can kill me. The soldier ordered that I had to go to the base, which I did. I again refused to cut down my trees and the military threatened to bomb my house if I didn't chop down the trees. Then I was sent away. The next day I went to see a lawyer in [Town A] He advised me that if I had witnesses to the threats the soldiers made I could take them to court but I didn't have any witnesses so I didn't think I do anything about it.

About a month later, there was a knock on the door of my house at about midnight. I opened the door and man I couldn't recognise in the darkness punched me hard with a clenched fist in the face. I fell to the floor and hit my head badly, which knocked me out. I woke up later and yelled out for help. I called out to one of the local guards. I asked who had been there but he said he didn't see anything. Nothing had been stolen from my house, so it wasn't a robbery. I was taken to the medical centre in [Town A], where I was examined and sent home. I was told I had internal bleeding in my head and by early 2004, I was suffering so badly from my head injury I was booked into hospital in Istanbul for an operation on my head. I was in intensive care for three days and in hospital for about a month. I have a medical report relating to my head injury, which I will provide once a certified translation of

the report has been obtained. Since that time, I have had a lot of trouble with my memory and thinking clearly as a result of this injury and my age.

I strongly suspect it was one of the soldiers at the base in our village who attacked me that night. I had challenged them by refusing to cut down my trees and also only a soldier would have been allowed to be out in the village at midnight because of the curfew. After this incident, I felt I had no choice but to cut down the trees on my land.

In September 2007, my house was shot at directly by the military. Bullets shot into my house and I had to hide under my bed. The shooting went on for about 4 hours. I don't know exactly why the military were doing this at the time. Mine wasn't the only house fired on but I had never been directly fired on before. Up until this time, I felt I had to stay in my house to keep it safe from the military. It is my home and I wanted to protect it. But after this shooting, and because I am getting old, I felt I couldn't put up with these sorts of attacks any longer. So my children started to arrange for me to come to Australia.

There is nowhere else I could live safely in Turkey. Both my children are in Australia. My wife passed away long ago. I have an adult grand daughter who lives with her family in Istanbul who I have stayed with sometimes on holidays but there is no way I could live with her permanently. I am an old man and so could not work or support myself anywhere else in Turkey. I am not entitled to any sort of pension from the government because I have never had a paid job. There is no form of housing assistance for the elderly in Turkey. Also, as a Kurd and Alevi Muslim I would always be treated with suspicion and be mistreated wherever I was in Turkey.

The only place I have to live in Turkey is my house in my village but I cannot stand the military in my village any longer. They can do what ever they want to us and it is only a matter of time before they attack me again, in the way they have done in the past, because I am Kurdish, an Alevi Muslim, because I am seen to be a supporter of the PKK and wanting Kurdish independence, and because my son was active in the trade union movement in Turkey and has been found to be a refugee in Australia. All these reasons added together mean I face danger if I continue to live any longer in my home area in Turkey. I've put up with this danger for a long time, but can't put up with it any longer.

My only family are here in Australia. They can look after me now, and I feel safe here with them.

- Report by the Republic of Turkey Department of Health [location deleted: s431(2)] Psychiatric Hospital, [deleted: s.431(2)] Neurosurgery clinic, dated 2004 (?), on the condition of the visa applicant, stating, *inter alia*:

Patient complaints: weakness in the right arm and leg, intermittent head aches and incoherent speech. History: intermittent presence of incoherent speech which has been present over the past 10-15 days and his state of mental confusion has increased in the last 3 days and an onset of weakness in the right arm and leg, in particular the right leg. The patient was admitted to undergo surgery following the findings of a CT scan which showed subdural hematoma (SDH) extending to the bilateral frontal left parietal.

Personal History: Received bodily injury on [date deleted: s431(2)]...

- Departmental decision dated [date deleted: s.431(2)] January 2009, finding in respect of the applicant, amongst other things:

I consider that the applicant is no more than an ordinary Turkish national of Kurdish ethnicity who has decided to leave his home country in order to visit his children in Australia. The fact that the applicant was able to obtain his passport in and to depart Turkey legally without any hindrance from the Turkish authorities indicates that he was checked by the Turkish authorities and was found not to be of adverse interest to the authorities at the time he left the country through an international airport.

I do not accept that the applicant has a profile which results in his being of adverse interest to the Turkish authorities on return. I do not accept that the applicant will be harmed or denied state protection by the Turkish authorities for reasons of his ethnicity, religion, political opinion or any other Convention reason. I do not consider it plausible that the applicant has a real chance of facing persecutory treatment as a result of his claims, if he returns to Turkey now or within the reasonably foreseeable future...

- Decision by the Refugee Review Tribunal dated 31 March 2003, as it was then constituted, in respect of the visa applicant's son, [name deleted: s431(2)]. The decision found, in part:

The country information refers specifically to members of the applicant's union having been targeted. It also describes how public employees in the south east have been targeted for unionising. While this is not precisely the applicant's situation, according to his account the police were observing unionists returning from the demonstration, and the applicant was identifiable as of Kurdish south eastern origins, which adds to the plausibility of the claim that he was detained on leaving the union branch headquarters. Local police were presumably also aware of the applicant's involvement in the [Province] cultural association...

The Tribunal accepts that the local police sought to question or detain the applicant by visiting his home and his father's home in September and October 2001. It is plausible that they would do this without checking departure records. Although the applicant was a new and low-level HADEP member (and possibly joined with a view to augmenting protection claims planned to be made once he left the country), it is consistent with the country information that the police, as the applicant claimed, accessed his name at the local HADEP office and called on all HADEP members, and the claim is rendered the more credible by his existing record of detention.

- Further Statutory Declaration by the visa applicant, dated [date deleted: s431(2)] February 2009, and attaching three newspaper articles with English translations which describe the 2007 incidents when his and other houses were shot at by the police. The applicant states that he was quoted in the second article, although his surname is incorrectly stated as [name deleted: s.431(2)] Translations of the articles are reproduced below:

[Country information deleted: s431(2)]...

- Further submission by the visa applicant's representative, dated [date deleted: s431(2)] March 2009, stating that the applicant continued to rely on all the information provided to the Tribunal and submitting a wide range of country information supporting the applicant's claims of discrimination and harassment of persons of Kurdish ethnicity and Alevi Muslim religion;
- Statutory Declaration dated [date deleted: s431(2)] April 2009, by the visa applicant stating that he stated at hearing that he was bashed by the soldiers after he had already cut down the trees but that this was not correct and reinforcing that his head injury meant he had significant memory difficulties and that after the surgery it became even worse, and adding:

I wish to again emphasise that I don't think that I will be able to survive anywhere else in Turkey. I've never lived anywhere else. I'm also afraid of facing harassment and abuse by people, both the authorities and other Turkish people, in Western Turkey because I am an Alevi Kurd. At least in my village, the people I lived amongst were the same as me and I did not fear harm from them, only from the Turkish authorities. In some ways, I will feel more fearful in Western Turkey than in my own village.

I honestly state that my granddaughter in Istanbul is in no position to look after me and provide me with a place to live. She does not work. Her husband works in textiles, but does not have a stable job. They are struggling financially. My son (my granddaughter's father) has told me that my own granddaughter's husband even has to receive financial support from his own family from time to time. Furthermore, there is no obligation for my granddaughter's son to allow me to stay in their home...

- Photo of the applicant and his grand-daughter in Istanbul when the applicant was in hospital recovering from surgery to head in 2004

Evidence at hearing

The visa applicant recounted the events in [Town A] in a manner that largely reflected his written statements. He stated that the police who lived very close to his home considered that he was assisting the Kurdistan Workers' Party (PKK) but this was not true. The Tribunal asked whether the applicant might not have been particularly vulnerable because he was elderly and living on his own. The applicant stated that this was true but that it was directly due to his religion, ethnicity and because a member of his family had been involved in HADEP, that is, his son who was given refuge in Australia.

The applicant recounted the events involving the firing at his home and which were confirmed by country information in the articles submitted by the applicant.

The Tribunal observed that the applicant appeared to be an honest person who had gone about his own business tending his farm and that it was not quite clear why the Turkish authorities would have any particular interest in him. The applicant stated that the reason was because the authorities wanted to build a mosque in the area and the local people were not happy because they were Alevi. They preferred to have the money spent on education or other essential services. The applicant stated that those who spoke out, including his son, were "marked" by the authorities and they were taken to the police station and bashed. Ever since his son left Turkey the police kept going to his house to ask him where his son was and what he was doing. He stated that he thought that this was the reason that he too had been "marked" and penalised by the police.

The Tribunal stated observed that the applicant lived in a place in which the PKK and the police were always in conflict and he appeared to be caught in the crossfire. He stated that it did not matter where they might be - being Kurdish Alevi meant they would always be targeted. He emphasised that he had nothing to do with the PKK but that they accused him of this all the same.

The Tribunal stated that it had country information which demonstrated that in Istanbul, for example, Kurdish Alevi were able to live in harmony in the community and that to some extent they had integrated. The applicant stated this was not precisely true because he knew a lot of people who had been harmed because they did not attend a mosque. The Tribunal stated that it appeared that he had been looked after in hospital in Istanbul and that there had been no mistreatment by anyone. The applicant conceded this was the case.

The Tribunal then proceeded to outline the country information which was relevant to his case.

The Tribunal stated that it appeared that to obtain a passport the applicant would have had to go to a local official to check his identity. The Tribunal stated that if the authorities wanted to prevent him from departing they could have done so at the airport. The applicant stated

that when the shooting occurred, Ministers and human rights organisations had attended to investigate the situation and perhaps that was why he was able to obtain a passport. He stated that the police came to his home on many occasions.

Evidence by [Person 1]

[Person 1] stated that she was concerned because her brother living in the area where the visa applicant had lived, had not been truthful to her about the seriousness of the situation in [Town A] so as not to concern her. She stated that she therefore went to visit her brother recently to see for herself how her brother was living and his condition. She stated that family and friends in Australia were very concerned about her making the journey to [Town A] given the volatile situation there. She stated that when she got to the house of her brother it was evident that the authorities had opened fire on his house as she was able to see the marks on the walls. She stated the area was heavily fortified by police and the military and she personally felt frightened for her safety.

Evidence by [Person 2] taken over the telephone

[Person 2] had been a neighbour from the review applicant's village and had recently returned from a sojourn in the [applicant's] province. He stated that police continued to raid houses in the area and that the situation had recently deteriorated. [Person 2] stated that the Tribunal should take into account that the applicant was fragile, elderly and sick and had no close relatives in the area where he had his property for farming. He stated that the visa applicant's health had also deteriorated and compared to how he looked and acted previously it was evident that his condition had worsened. He stated that the visa applicant was frightened by the police as he was under great pressure from them. He stated that the newspapers had reported what had happened and that one of the largest in Turkey, the Hurriyat, had recounted the events involving the shooting at homes in 2007, including quoting the visa applicant. He stated that it was well known in the area what had happened to the visa applicant. The Tribunal asked why he thought that the visa applicant in particular was being targeted by the authorities. He responded that all Kurdish people in that area were targeted.

Evidence by the son of the visa applicant, [name deleted: s431(2)]

[Name] stated that the applicant had had his operation to the head a couple of months after the time that the authorities came to his house and intimidated him and gave him a blow which knocked him to the floor. [Name] highlighted that the Turkish version of the hospital report clearly stated that his father had had trauma to the head. This was confirmed by the interpreter at hearing who viewed the report.

[Name] stated that his father could not continue to live alone in the zone of the fighting as his health became progressively worse. He added that whilst the visa applicant did have a grand daughter in Istanbul who had accommodated him a few times, particularly after his operation to the head in 2004, she had her own family and that she and her husband struggled to maintain their own family and she was not in a position to have another person be dependent on her and her husband.

FINDINGS AND REASONS

22. The Tribunal finds that on the basis of the material before it, the applicant is a Turkish citizen and the Tribunal does not have any evidence that the applicant has the right to enter and reside in a safe third country under section 36(3) of the *Migration Act 1958*. He has two adult children living in Australia and no close relatives living in his hometown of [Town A], in the Province of [province deleted: s.431(2)]. He is a 78 year old widower.
23. The applicant claims fears that he will be attacked, beaten, kidnapped or even killed by the Turkish military and police because of his Kurdish nationality and ethnicity, because he is an Alevi Muslim, and because he will be seen to support Kurdish independence movement, in particular the PKK (imputed political opinion) and because he is a member of a particular social group, his family, being his son, who was involved in the trade union movement in Turkey prior to fleeing to Australia several years ago.
24. The Tribunal finds that, if it accepts the applicant's claims, that the Convention grounds of ethnicity and religion, imputed political opinion and a member of a particular social group, being his family, are the essential and significant reasons for the harm feared as outlined in subdivision AL of the *Migration Act 1958*.
25. The Tribunal also finds that the applicant's claims are largely consistent with those of his son, [name deleted: s431(2)] who was deemed to be a refugee by the Refugee Review Tribunal in 2003 due to his political opposition to the authorities in the local area.
26. The applicant's specific claims are that if he returns to Turkey he will be attacked, beaten, kidnapped or even killed by the Turkish military that control his home area in South Eastern Turkey. This is because of his son's past conflict with the authorities. He also claims that in late 2003 there was a threat made on his life; in 2004 he was punched and suffered a head injury due to a fall, and in September 2007 his house was fired upon by the military/police
27. The Tribunal found the visa applicant to be an honest witness. He was able to corroborate the events concerning the shooting by the authorities on civilian houses in 2007 in [Town A] through independent sources, such as newspapers, one in which he was quoted. The applicant was also able to corroborate, through hospital records, that he had trauma to his head and that he was required to have an operation due to internal bleeding in 2004, several months after he claims to have had a blow to the head which caused him to fall and injure himself seriously.
28. The Tribunal also found the witnesses to be reliable and they too confirmed the applicant's account of events in [Town A]. Given the applicant's credibility overall, the Tribunal is prepared to accept that the authorities in his home town inflicted the blow as part of their general harassment of Kurdish Alevi, particularly those with family members who have had a profile as dissidents in the area.

Human Rights in Turkey Generally

29. The country information about the situation in Turkey generally in terms of Kurdish Alevi is mixed, although specific country information relating to the applicant's home area is unambiguous in highlighting that the area is particularly vulnerable to clashes by the PKK and the local authorities. Human Rights Watch 2009, 'World Report 2009', HRW website,

January <http://www.hrw.org/world-report-2009> states the following in terms of the human rights situation in Turkey generally:

A grave political crisis in 2008 halted progress in human rights reforms in Turkey for much of the year. The ruling Justice and Development Party (AKP) narrowly escaped closure in July, with the Constitutional Court instead fining it for anti-secular activities. The government failed to honour its post-election pledge to engage in meaningful consultation on a new constitution, needed to strengthen respect for rights.

With reform stalled, the protection of human rights continues to be eroded. Human rights defenders and journalists critical of the state face prosecution, although they continue to raise their voices loudly. Police abuse increased, with particular concern for excessive use of force at public demonstrations and fatal shootings of civilians. Widespread impunity for abuses by the police and other security forces remains.

The pro-Kurdish Democratic Society Party also faced possible closure by the Constitutional Court for activities and speeches deemed by the prosecutor to constitute separatism. The court's January 2008 ruling against the closure of the pro-Kurdish Rights and Freedoms Party set a precedent: statements about the Kurdish problem fall within the boundaries of free speech.

Critical and open debate increased, even as restrictions on free speech continue. In May the government made what amount to cosmetic amendments to article 301 of the 2005 Penal Code criminalizing statements that "publicly denigrate Turkishness" or state institutions, following intense pressure from the European Union. While the Ministry of Justice must now grant permission for investigations under article 301, in a number of cases it did so in 2008.

Prosecutors used other articles of the penal code, press law, and anti-terror law to prosecute speech in 2008, and hundreds of journalists, writers, publishers, academics, human rights defenders, and officials of Kurdish political parties and associations were tried and sometimes convicted, in some cases at the initiative of the government. The courts restricted access to numerous websites – including YouTube-during 2008...

Human Rights Defenders

The trial continued of 19 people accused of the January 2007 murder of Turkish-Armenian journalist and human rights defender Hrant Dink. At this writing, there has yet to be a breakthrough in uncovering a conspiracy behind the killing. Reports by the Parliamentary Human Rights Investigative Commission in July, and by the Prime Ministry Inspectorate in November, point to multiple failures by state authorities to act on intelligence reports about plans to murder Dink, and support the Dink family lawyers' demand for criminal investigation of the Trabzon and Istanbul police. At this writing, the trial of two junior Trabzon gendarmerie members is ongoing, and permission has been granted for criminal investigation of six other gendarmerie members...

The decision by an Istanbul court in May 2008 to close Lambda Istanbul, a group working on behalf of lesbian, gay, bisexual, and transgender people, highlighted the hostile environment for the LGBT community in Turkey. The case was initiated by the Istanbul governor's office, which claimed the group's aims were "against law and morality", a view the court supported. Lambda has appealed.

Torture, Ill-Treatment, and Killings by Security Forces

Police torture and ill-treatment is on the rise since 2007. It occurs during arrest, outside places of official detention, and during demonstrations, as well as in detention centers. There were continuing reports of ill-treatment and cruel, inhuman, and degrading conditions in prisons, and of fatal shootings of civilians by police officers. Engin Ceber, age 29, died in a hospital in Istanbul on October 10 after being beaten in police custody and in prison.

During banned Newroz (Kurdish new year) celebrations in March, police used excessive force, including indiscriminate beatings, against demonstrators and children; and two people in Van and one in Yuksekove were shot dead. Police beat demonstrators indiscriminately at a May Day protest in Istanbul, and used excessive force to disperse all peaceful assembly in and around the offices of the trade union confederation DISK. The absence of a meaningful domestic investigation into the violence precipitated DISK to apply in August to the European Court of Human Rights. The application was pending at this writing.

Impunity

Turkish courts continued to show excessive leniency toward police and other members of the security forces charged with abuse or misconduct, contributing to impunity, the persistence of torture, and the unwarranted resort to lethal force.

There was no progress in bringing to justice members of security forces responsible for the deaths of 30 prisoners during a series of prison transfers in December 2000. Two soldiers also died during the operation. In June 2008 the trial of soldiers for ill-treatment of guards for misconduct during transfer from Bayrampasa prison, where 12 of the prisoners died, exceeded the statute of limitations and collapsed. The main investigation into the deaths in that prison has yet to be concluded...

Attacks on Civilians

Against a background of escalating armed clashes between the military and the Kurdistan Workers' Party (PKK), attacks on civilians continued. Attacks included a suspected PKK bombing in Diyarbakir on January 3, killing six (four of them children); bombings on July 27 in Istanbul, killing 17; and on July 9 outside the US consulate in Ankara, killing six. In the latter two cases the identities of the perpetrators remain unclear.

Key International Actors

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*At this writing, the European Court of Human Rights has issued 210 judgements against Turkey in 2008 for torture, extrajudicial execution, unfair trial, and other violations. In the November Grand Chamber judgment in *Demir and Baykara v Turkey* - of major significance for furthering workers' rights in Turkey and across Europe - the court held that interference in the right of municipal civil servants to unionize and the cancellation of a collective bargaining agreement violated the rights of freedom of assembly and association under the European Convention. In a September interim resolution about the implementation of European Court judgements, the Committee of Ministers of the Council of Europe called on Turkey "to ensure effective investigations into members of security forces alleged to have committed violations".*

30. In terms of the applicant's specific residential location in Turkey in [province deleted: s.431(2)] regarding persons seeking protection from fear of persecution by the authorities, the UK Home Office 2008, 'Operational guidance note: Turkey', UK Home Office website, 2 October:
[\[http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/turkeyogn?view=Binary\]](http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/turkeyogn?view=Binary) states:

Internal relocation Though claimants would not ordinarily be able to relocate to a different area of Turkey to escape the threat of persecution where the alleged source of that persecution is state-sponsored, the IAT (Immigration Appeals Authority) found in IK[2004] UKIAT 00312 that the risk to a specific individual in most circumstances will be at its highest in his home area for a variety of reasons, and particularly if it is located in the areas of conflict in the south and east of Turkey.

31. Country information submitted by the applicant and referred to in the "Claims and Evidence" above, confirms that the applicant's local area is particularly prone to fighting where most of the recent clashes with insurgents (PKK) have taken place and this makes the applicant particularly vulnerable due to his politically implied political opinion, that is, as a supporter of PKK, and his membership of a particular social group (his connection to his family, his son who was involved in the trade union movement).

The situation of Kurds and Alevis in Turkey

32. In assessing whether claimants who make claims based solely on their ethnicity (Kurds) and (Alevis) the Tribunal has had reference to the following statements by the UK Home Office 2008, 'Operational guidance note: Turkey', UK Home Office website, 2 October. In respect of Kurds:

A claimant of Kurdish ethnicity is unlikely to encounter ill-treatment by the authorities amounting to persecution solely on the grounds of their ethnicity. In cases where Kurdish ethnicity is cited as the sole basis of a claim, internal relocation to another area to escape this threat is viable. It is unlikely that there would be any real risk that such a claimant would attract adverse attention from the authorities resulting in persecution within the meaning of the 1951 Convention or under the ECHR, even if he registered with the Mukhtar in the new location. Where Kurdish ethnicity is cited in conjunction with other aggravating factors, such as draft evasion or separatist/terrorist activity then case owners should consider the viability of internal relocation in line with the guidance provided in the appropriate sections of this OGN.

33. In respect of claims by Alevi, the UK Home Office states:

A claimant of the Alevi faith is unlikely to encounter ill-treatment by the authorities amounting to persecution solely on the grounds of religious belief. In cases where membership of the Alevi faith is cited as the sole basis of claim, internal relocation to another area to escape this threat is viable...

34. The Tribunal accepts that the applicant is a Kurdish Alevi. It accepts that the applicant lives in a geographical location that makes him prone to harassment and systematic discrimination as well as physical harm by the authorities. The Tribunal also accepts that the harm inflicted on the applicant, by way of the blow which caused him to fall and have severe head injuries, most likely perpetrated by the state authorities, falls within the meaning of "serious harm" for

the purposes of the Convention, particularly as the applicant is elderly and vulnerable. The Tribunal also accepts that the applicant's situation is "aggravated" because his son has participated in HADEP activities. The Tribunal accepts that the applicant has a well-founded fear. Below is a brief summary of what the pro-Kurdish People's Democratic Party (HADEP) stands for:

...(HADEP), was established in 1994 as a successor to the successively banned HEP, DEP and OZDEP. HADEP campaigned for greater cultural rights for Kurds and a peaceful solution to the Kurdish issue. It never resorted to nor supported violence. However, the Turkish authorities regarded HADEP as the PKK's political wing. In March 2003 HADEP was banned by the Constitutional Court... [See UK Home Office 2008, 'Operational guidance note: Turkey', UK Home Office website, 2 October].

35. In terms of the treatment of relatives of persons involved in political parties, the UK Home Office website, 2 October states:

Relatives of members of Kurdish political parties need not fear persecution by the Turkish authorities solely because one or more of their relatives is a member of any party. However, in certain cases, first or second degree relatives of HADEP/DEHAP/DTH members who are active at local level are closely watched by the State because of their relatives' activities...

Where claimants cite family members who are known to be active or suspected of supporting a separatist/terrorist group, the harassment experienced may be directly connected to the fact that the applicant lives in an area where PKK or other separatist/terrorist groups are known to be active and where members of the claimant's family are known to the authorities as supporters or sympathisers. Simply sharing the same surname as a relation who is a known or suspected member of a separatist group may give rise to adverse interest from the authorities of a localised nature where the claimant and family may be seen as troublemakers. However in such circumstances, provided the applicant has no outstanding arrest warrant and has not personally been prosecuted for an offence, internal relocation to another area would be a viable alternative in accordance with IK. It is unlikely that there would be any real risk that such a claimant would attract adverse attention from the authorities resulting in persecution within the meaning of the 1951 Convention or under the ECHR, regardless of his identity or family background, even if he registered with the Mukhtar in the new location.

36. As the visa applicant claims fear of ill treatment/persecution by the state authorities, it is clear that the applicant cannot apply for protection to these authorities, particularly in [Town A], [province deleted: s.31(2)] Province.
37. The Tribunal finds, therefore, that on the basis of past events, including the assessment of relevant country information, that the applicant would face a real chance of serious harm were he to return to his *home town* in [Town A], now or in the reasonably foreseeable future, based on his imputed political opinion (affiliation with PKK), his religion, his ethnicity, and membership of a particular social group, being a member of his son's family, who has now been granted refugee status in Australia on the basis of his pro-Kurdish activities in [Town A].
38. The country information strongly suggests, however, that a person with the profile of the applicant could ordinarily relocate within Turkey without difficulty. The applicant's problems stem mostly from his residential location, his son's past activities there, and his

Kurdish and Alevi background. However, the Tribunal finds that these elements of the visa applicant's profile alone, without more, do not preclude him from relocating to another area of Turkey. It is clear that at a national level the applicant does not have a profile as he was able to leave the country without difficulty and it is unlikely that the authorities would pursue him to another area of Turkey such as Istanbul.

39. The High Court has confirmed as a general proposition that, depending on the circumstances of the particular case, it may be reasonable for an applicant to relocate in their country to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution [See *SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* (2007) 237 ALR 660 (Gummow, Kirby, Hayne, Callinan & Crennan JJ, 30)].
40. It is widely accepted that even where the feared persecution is localized, however, as is the case in this matter, a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him or her to do so [See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992 at [91]. The issue of relocation is therefore not an absolute one and the Tribunal is required to take into account the country conditions as well as the applicant's own particular circumstances.
41. The range of factors that may be relevant in any particular case to the question of whether relocation is reasonably available will be largely determined by the case sought to be made out by an applicant. Thus, factors that are expressly raised by an applicant putting specific arguments against relocation, such as objections to the place of relocation, problems in going to it, or financial difficulties associated with travelling to or residing in the new place, would need to be considered. Obviously, however, even without the matter being separately addressed in this way, a decision maker could not properly find that an applicant should avoid persecution by moving to a plainly unsuitable location in his or her home country [See *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 443; per Whitlam J at 453. See also *Woldie v MIMA* (unreported, Federal Court of Australia, Foster, Lee & RD Nicholson JJ, 16 July 1998)].
42. The Tribunal has taken into account the circumstances of the applicant as he has made these out, that is:
 - The applicant's age; frailty and the consequences of the blow he received to the head resulting in, amongst other things, loss of memory, make him particularly vulnerable without family or other supervision in other parts of Turkey;
 - The applicant would face a significant sense of dislocation moving from a rural community to a larger city where he would be living socially isolated, apart from a grand-daughter in Istanbul who has a family of her own. Apart from Istanbul there is no where in Turkey where the applicant could even consider relocating, however, his grand-daughter has a family of her own to look after and her own financial circumstances are precarious. Furthermore, the visa applicant's grand-daughter's accommodation would not reasonably permit another adult with significant illnesses to live there;
 - The applicant has always worked in a rural environment and is not in receipt of a pension. He would also not be eligible for various social services. He will have no means of supporting himself and does not have the ability to look for work;

- The applicant also fears social alienation in that it would be evident that he is an Alevi/Kurd and that he would find it hard to assimilate in a more pluralistic environment.
43. Taking into account the applicant's circumstances individually as well as cumulatively, the Tribunal finds that it would not be reasonable for the visa applicant to commence a new life without close family support in a new area of Turkey and that it would, therefore, not be reasonable for him to relocate from the local area that presents itself as an immediate danger in terms of serious harm.

CONCLUSIONS

44. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

<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 1958</i>. Sealing Officer's I.D. RCHADW</p>
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