

**1212651 [2013] RRTA 391 (11 June 2013)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1212651
<b>DIAC REFERENCE(S):</b>	CLF2012/103605
<b>COUNTRY OF REFERENCE:</b>	Turkey
<b>TRIBUNAL MEMBER:</b>	Sean Baker
<b>DATE:</b>	11 June 2013
<b>PLACE OF DECISION:</b>	Melbourne
<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] May 2012 and the delegate refused to grant the visa [in] August 2012.

### RELEVANT LAW

3. 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 in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

#### Refugee criterion

4. 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 in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
5. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
6. 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.
7. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
8. 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)). Examples of 'serious harm' are set out in 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.

9. 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.
10. 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.
11. 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 '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.
12. 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.
13. Whether an applicant is a person in respect of 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**

14. 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 in respect of 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').
15. '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.

16. 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.

## **CONSIDERATION OF CLAIMS AND EVIDENCE**

### **Visa application**

17. The application included a statement in which the applicant claimed that:
18. He is [age deleted: s.431(2)] born in [Town 1], in [Turkey]. He said he was of the Turkish ethnicity and Muslim religion. He is not married and has no children. Most of his family continues to live in [Town 1] or nearby.
19. He claims to have left Turkey because he feared being killed by religious groups for being a homosexual.
20. He then details his personal history – he claims that on completion of his [military service] he began to realise he was attracted to males. Within three to four months following his service he began to attend social bars in Istanbul, met with men and engaged in sexual activity with them. He claims to have attended these bars approximately once or twice a month up until 2003.
21. Between 2003 and February 2012 he [worked] on a variety of ships. On some of these ships he claims to have had sex with other crew when the opportunity arose, despite the fear that he would be dismissed and handed to the police on return to Turkey. He claims that when these ships [docked] he would also have sex with men there.
22. Between his periods of working on ships he holidayed in Turkey where he had sex with men when he had the opportunity.
23. In March 2011 he left his shop and returned to Istanbul. He [met a man] as he was walking along the beach at night. They went to his car and made love in his car. They were aware that this activity was a crime in Turkey, but nevertheless continued to engage in making love. The police arrived and caught them having sex. The Police confirmed that these activities were illegal. They were then arrested by the police. On the way to the police station they were insulted and beaten. They were also verbally abused and physically assaulted when they arrived at the police station. The police locked them up overnight where they continued to be beaten and were finally released in the morning. No charges were laid.
24. The following morning they attended a private hospital to receive treatment for our injuries. They explained to the hospital what had happened and attempted to obtain a report from them about the mistreatment by the police, but hospital refused to support him or give him a report and advised them to leave.

25. A week following this incident the applicant went to a bar to have a drink. As he was leaving the bar a religious group approached him and recognised that he was a homosexual. The religious group began threatening him and attacked him. They advised that they would kill him. Because it was crowded he managed to flee from the scene in a taxi.
26. After the incident he began working on another ship and soon after my family found out that he was in fact a homosexual. They had found out that he was a homosexual through the friends that he trusted.
27. In February 2012 he left the ship and his [brother] and friends began threatening him. He was staying in a town called Gebze and his friends advised him to leave as they claimed that the religious groups would kill him.
28. Upon returning to [Town 1] he could not even attend the market on his own without being recognised and harassed by people on the street. He claims to have approached the [Town 1] police and told them that he felt insecure. They asked why he feared for his life and he told them it was because he was a homosexual. The police said that they could not protect him and threatened that they would kill him.
29. He fears that if he returns he will be killed by the religious groups who are operating throughout Turkey. People within the community and the religious groups have his details and he fears further harm from them if he returns.
30. He claims that his friends advise him that religious groups and people from his community are asking about his whereabouts. They have identified him as a homosexual and his friends advise that they will kill him if they find him. He claims that when he goes to the police for protection they are not providing him with protection as they too are the agents of the persecution. He claims that in Turkey if homosexuals are killed the police and the government are not interested in finding the people responsible.
31. He believes that as a homosexual he will be humiliated, killed, tortured and subject to cruel and inhumane treatment or punishment amounting to significant harm should he return to Turkey.
32. The applicant was interviewed by the delegate and gave answers consistent with his written claims. The delegate was concerned with a lack of detail in his description of his sexuality and the events that he claimed befell him in Turkey.

### **Country information**

#### *Tolerance or acceptance of gay men in Turkey*

33. Homosexual acts in Turkey have been legal since 1858, as has the equal age of consent for homosexual and heterosexual acts; a law on gender recognition after gender reassignment treatment was enacted in 1988.<sup>1</sup> Despite this, according to the Global Gayz website, the human rights of lesbian, gay, bisexual, transsexual and intersex (LGBTI) individuals “is one of the most controversial human rights issues in Turkey...[h]omosexuality is not illegal...[h]owever, owing to conservative values embedded in Muslim-majority Turkish

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<sup>1</sup> Bruce-Jones, E, & Itaborahy, L. 2011, *State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults*, International Lesbian, Gay, Bisexual, Trans and Intersex Association website, May, p.8, 10, 17

society, homosexuality remains a taboo topic in public discourse”.<sup>2</sup> According to Amnesty International, authorities at best ignore the rights of lesbian, gay, bisexual and transgender people, and at worst single them out for discriminatory treatment.<sup>3</sup>

The most recent US Department of State (USDOS) human rights report on Turkey states that “[w]hile the law does not explicitly discriminate against lesbian, gay, bisexual, or transgender (LGBT) individuals”, non-governmental organisations (NGOs) working with LGBT individuals claim that “references in the law relating to ‘offences against public morality,’ ‘protection of the family,’ and ‘unnatural sexual behaviour’ were sometimes used as a basis for abuse by police and discrimination by employers ... LGBT individuals continued to suffer discrimination, intimidation, and violent crimes. LGBT groups claimed police harassed and practiced arbitrary arrest against transgender individuals during the year. Human rights organizations reported many prosecutions for “offending public morals.” ... The Black Pink Triangle (Siyah Pembe Ucgen) LGBT NGO alleged there were more than 100 incidents of violence against LGBT individuals in Izmir alone during the year”.<sup>4</sup>

34. Despite widespread criticism for such remarks, activists believe these comments are indicative of what they say is “increasing prejudice, discrimination and violence – even from police – against homosexuality and transgender people...[a] total of 45 gays and transgender people were killed over three years in ‘hate murders’”.<sup>5</sup> In November 2010, neither the ruling Justice and Development Party (AKP) nor the main opposition Republican People’s Party (CHP) expressed a desire to address LGBTI rights in any future draft constitution. An AKP spokesperson said that while “the AKP’s stance on human rights was clear...[it] has not considered the issue at all”.<sup>6</sup>
35. In December 2010, the High Board of Radio and Television (RTUK) fined Haberturk TV for “broadcasting a discussion of homosexuality”; the Board also warned ATV for depicting two men in bed together as a couple. According to USDOS, the RTUK president said that “because both programs presented homosexuality as ‘normal’, the RTUK assessed that they harmed the Turkish family structure...and constituted a breach of the society’s national and moral values”.<sup>7</sup>
36. According to *Pink News*, the European Parliament criticised Turkey for its record on LGBTI rights, and said that the country must prove that it can provide “genuine protection” to gay

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<sup>2</sup> ‘Global Gayz – Republic of Turkey, Middle East’ (undated), Global Gayz website <http://www.globalgayz.com/country/Turkey/TUR> – Accessed 10 May 2013

<sup>3</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.6 <http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 10 May 2013

<sup>4</sup> US Department of State 2012, *2011 Country Reports on Human Rights Practices – Turkey*, 24 May, <http://www.state.gov/j/drl/rls/hrrpt/2011/eur/186414.htm> Section 6 - accessed 10 May 2013.

<sup>5</sup> ‘Turkey’s gays, transsexuals decry increasing homophobia’ 2010, Google News website, source: *Agence France-Presse*, 3 April [http://www.google.com/hostednews/afp/article/ALeqM5i\\_mI\\_smXF4WPvvhQwkZqoC8ApXg](http://www.google.com/hostednews/afp/article/ALeqM5i_mI_smXF4WPvvhQwkZqoC8ApXg) – Accessed 11 June 2013.

<sup>6</sup> ‘Turkey’s ruling, opposition parties dismiss need for gay rights’ 2010, *Hurriyet Daily News*, 2 November <http://www.hurriyetdailynews.com/n.php?n=homosexual-rights-is-not-an-issue-for-akp-and-chp-2010-11-02> – Accessed 10 May 2013

<sup>7</sup> US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Turkey*, 11 April, Section 6

people before it can join the European Union.<sup>8</sup> The Global Gayz website noted that “the desire of Turkey to join the European Union has forced the government to grant official recognition to LGBT rights organizations, respect a greater degree of the freedom of speech and the press and to entertain gay rights legislation”.<sup>9</sup> According to *Hurriyet Daily News*, however, in 2008 Turkey refused to sign a European Union-led declaration presented at the United Nations calling for all states to “take steps to stop the criminalization of homosexuality” Turkish NGOs and LGBTI groups called on the Turkish government to reconsider its decision, and while they acknowledged that homosexuality was ostensibly not a crime in Turkey, they noted that they “were not defined in the Turkish constitution’s prohibition of discrimination or the social or civil rights...[w]e are ignored and ignorance is the utmost violence”.<sup>10</sup> No information was located regarding the reasons behind Turkey’s refusal to sign the declaration.

37. Turkish LGBTI rights groups claim that “16 people were murdered in Turkey last year over their perceived sexual orientation, and violence is routine”.<sup>11</sup> According to Amnesty International, “[o]f the 16 suspected hate murders documented by LGBT organizations in Turkey during 2010...nine of the murders were gay men...[i]n one case the victim was a heterosexual male apparently perceived to be gay” The alleged perpetrators of all but one of the murders reportedly claimed that the victims “requested or initiated a sex act”, while in two of the cases, they claimed that the victims “attempted to rape them” Three of the murders involved extreme violence, such as multiple stab wounds and dismemberment.<sup>12</sup>
38. In January 2010, *Voice of America* reported that a 26-year-old gay man in Turkey was allegedly murdered by his father in what was thought to be the ‘first gay honour killing’. The father had reportedly driven over 900 kilometres to Istanbul to kill his son, who had “repeatedly filed complaints at the local prosecutor’s office that he was receiving death threats from his family”.<sup>13</sup> Amnesty International believes that the incident “has come to symbolize the authorities’ failure to respond to violence based on an individual’s sexual orientation or gender identity”.<sup>14</sup>
39. HRW noted that in several instances, “perpetrators of violence first had sexual encounters with gay victims”; while such individuals may engage in homophobic assaults, it must not be assumed that they do so as homosexuals. In one such case in 2001, a gay man met another

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<sup>8</sup> ‘European Parliament says candidate countries must offer gays protection’ 2010, *Pink News*, 12 February <http://www.pinknews.co.uk/2010/02/12/european-parliament-says-candidate-countries-must-offer-gays-protection/> – Accessed 11 June 2013

<sup>9</sup> ‘Global Gayz – Republic of Turkey, Middle East’ (undated), Global Gayz website <http://www.globalgayz.com/country/Turkey/TUR> – Accessed 11 June 2013

<sup>10</sup> ‘Turkey breaks company with EU in gay vote’ 2008, *Hurriyet Daily News*, 22 December <http://www.hurriyet.com.tr/english/domestic/10617078.asp?gid=244> – Accessed 11 June 2013

<sup>11</sup> ‘Amnesty International condemns Turkey over gay rights record’ 2011, *Al Arabiya News*, source: *Reuters*, 22 June <http://www.alarabiya.net/articles/2011/06/22/154328.html> – Accessed 11 June 2013.

<sup>12</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.31

<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 11 June 2013.

<sup>13</sup> ‘Death of gay activist brings Turkey’s attitude toward gays into focus’ 2010, *Voice of America*, 21 January <http://www1.voanews.com/english/news/europe/Death-of-Gay-Activist-Brings-Turkeys-Attitude-Toward-Gays-Into-Focus-82239372.html> – Accessed 11 June 2013.

<sup>14</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.29

<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 11 June 2013.

individual through the internet, and arranged to meet. After a sexual encounter, the man woke up to find he had been stabbed 17 times by the second individual, who at the end of the assault reportedly said “OK, I’m gay”. Despite what appeared to be an investigation conducted by ostensibly non-judgemental and professional police officers, the perpetrator was never located, a result that the victim believed was due to his sexuality.<sup>15</sup>

#### *Protection provided by Turkish police*

40. In 2011, Amnesty International stated that the LGBTI individuals to whom the group had spoken “consistently stated that they did not seek the assistance of the authorities to offer protection in the case of threats of violence or to report violent offences because they believed that due to their sexual orientation or gender identity the authorities would not assist them”.<sup>16</sup>
41. According to Amnesty International, “[g]ay, bisexual and transgender Turks face widespread discrimination and homophobia, often suffering beatings by the police which leave them too frightened to report hate crimes”.<sup>17</sup> In May 2010, Human Rights Watch (HRW) reported that “police beat five transgender members of Ankara-based NGO Pembe Hayat (Pink Life Lesbian, Gay, Bisexual, Transgender and Transsexual Solidarity Association) in the street in front of witnesses before detaining them” The five were charged with resisting arrest, but were acquitted at trial in October 2010.<sup>18</sup>
42. According to USDOS, during 2010 police provided protection to some LGBTI pride parades and celebrations held in Ankara, Istanbul and other cities. No incidents of violence were reported. Some human rights organisations reported that LGBTI events “with foreign participation generally occurred without incident while those without foreigners had much higher levels of police interference”.<sup>19</sup>
43. In 2008, HRW reported that Turkey should “urgently change law and policy to protect lesbian, gay, bisexual, and transgender (LGBT) people from extensive harassment and brutality on the streets, in homes, and in state-run institutions” HRW noted that despite a wide body of documented cases of LGBTI individuals being subject to acts of violence and intimidation, in most cases the “response by the authorities is inadequate if not non-existent”.<sup>20</sup> In a separate report, HRW reported that abuses against gay men are often “abetted and at times perpetrated by the police themselves”. Gangs reportedly go to cruising areas “looking for chances to inflict violence or robbery, and driven by prejudice against those who

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<sup>15</sup> Human Rights Watch 2008, *We Need a Law for Liberation – Gender, Sexuality, and Human Rights in a Changing Turkey*, Human Rights Watch website, May, p.6, 20-21

<http://www.hrw.org/sites/default/files/reports/turkey0508webwcover.pdf> – Accessed 11 June 2013.

<sup>16</sup> Amnesty International 2011, *Not an Illness Nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, Amnesty International website, 21 June, p.34

<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf> – Accessed 11 June 2013.

<sup>17</sup> ‘Amnesty International condemns Turkey over gay rights record’ 2011, *Al Arabiya News*, source: *Reuters*, 22 June <http://www.alarabiya.net/articles/2011/06/22/154328.html> – Accessed 11 June 2013.

<sup>18</sup> Human Rights Watch 2011, *World Report 2011 – Turkey*, Human Rights Watch website, 24 January <http://www.hrw.org/en/world-report-2011/turkey> – Accessed 11 June 2013.

<sup>19</sup> Human Rights Watch 2011, *World Report 2011 – Turkey*, Human Rights Watch website, 24 January <http://www.hrw.org/en/world-report-2011/turkey> – Accessed 11 June 2013.

<sup>20</sup> Human Rights Watch 2008, ‘Turkey: Homophobic Violence Points to Rights Crisis’, Human Rights Watch website, 21 May <http://www.hrw.org/news/2008/05/21/turkey-homophobic-violence-points-rights-crisis> – Accessed 11 June 2013.



are not ‘masculine’ enough”, while police rarely respond adequately, sometimes blaming or further harassing victims.<sup>21</sup>

44. In August 2006, Pink News reported an LGBTI-rights demonstration held in Bursa was disrupted by “an angry crowd of 200-250 people throwing stones” Security officers prevented demonstrators from leaving the local Rainbow Association centre for several hours, claiming that they would be unable to protect them. Demonstrators from Ankara and Istanbul were later escorted by police to the bus terminal, while local Rainbow Association members waited until the evening before they left the building, also under police escort.<sup>22</sup>

#### *Police brutality in Turkey*

45. Police brutality in Turkey has been well documented over many years.<sup>23</sup> There were some promising signs that, under pressure from EU countries, Turkey would make its police more accountable. Recent events appear to indicate that police are still allowed to exercise inappropriate violence with impunity.<sup>24</sup>

46. The United States Department of State:

Human rights organizations continued to report cases of alleged torture and abuse, especially while the alleged victim was in police custody but not in a place of detention, during demonstrations, and during transfer to prison. They alleged that torture and abuse largely occurred outside of detention centers in more informal venues where it was harder to document

Prosecutors investigated allegations of abuse and torture by security forces during the year but rarely convicted or punished offenders. Authorities typically allowed officers accused of abuse to remain on duty during their trial. In its October progress report on Turkey, the European Commission noted that law enforcement bodies regularly filed countersuits against persons who alleged torture or mistreatment. In many instances the courts gave such cases priority. Domestic human rights organizations claimed this practice deterred victims of abuse from filing complaints.

A number of human rights observers claimed that only a limited number of detainees reported torture and abuse because many feared retaliation or believed complaining to be futile. Human rights organizations documented several cases of prison guards beating inmates and maintained that those arrested for ordinary crimes were as likely to suffer torture and mistreatment in detention as those arrested for political offenses, such as speaking out against the government. They also noted that LGBT persons, particularly gay men, were subject to abuse and harassment by police on “moral” grounds.

The HRF received 553 allegations of incidents of torture. Of these, 220 allegedly occurred during the year and the rest occurred in previous years. The Jandarma reported that it received 62 allegations of torture, while the TNP reported 26

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<sup>21</sup> Human Rights Watch 2008, *We Need a Law for Liberation – Gender, Sexuality, and Human Rights in a Changing Turkey*, Human Rights Watch website, May, p.5

<http://www.hrw.org/sites/default/files/reports/turkey0508webwcover.pdf> – Accessed 11 June 2013.

<sup>22</sup> ‘Turkish gay groups demand protection’ 2006, Pink News website, 11 August

<http://www.pinknews.co.uk/news/articles/2005-2200.html/> – Accessed 11 June 2013.

<sup>23</sup> Closing ranks against accountability, 2008, Human Rights Watch,

<http://www.hrw.org/en/reports/2008/12/05/closing-ranks-against-accountability> - accessed 11 June 2013.

<sup>24</sup> ‘Police brutality threatens restart of EU-Turkey talks’, 2013, EU Observer,

<http://euobserver.com/enlargement/120417> - accessed 11 June 2013.

allegations, 25 of which it dismissed, with one case continuing at year's end. In addition the Jandarma Human Rights Violation Research and Evaluation Center received 178 complaints, of which it investigated 10 cases and dismissed 168.<sup>25</sup>

### **Consideration**

47. The applicant appeared before the Tribunal [in] May 2013 to give evidence and present arguments. The Tribunal also received oral evidence from [name deleted: s.431(2)]. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
48. The applicant was represented in relation to the review by his registered migration agent.
49. The applicant gave evidence consistent with his written claims and his interview with the delegate.

### **Identity and country of reference**

50. On the basis of the applicant's passport, a certified copy of which is on the Departmental file, and which he showed me at the hearing, I find he is a citizen of Turkey, and have assessed his claims on this basis. I find, on the basis of his evidence at hearing that he does not have the right to enter and reside in any third country. On the basis of his evidence at hearing I further find that he identifies as Turkish and as a Muslim, although non-practising.

### **Claims of homosexuality**

51. The applicant explained that he had finished primary school and gotten part way through college before leaving school to work laying carpets in Istanbul. He then completed his military service.
52. I asked the applicant a series of questions about his claimed homosexuality. The applicant gave inconsistent answers. For example, when asked which bars he went to in Istanbul to meet men, he gave an example of one bar. I asked him why he only went to one bar and he said that he didn't know the area much then. I then asked him if since then he had been to other bars in Istanbul and he said not besides that. I asked him again why he only went to one bar and he said he was a regular and didn't know any other bar. On another occasion he said that he had told two straight friends, [Mr A] and [name deleted: s.431(2)], and of course he told his gay friends later on. When asked who these gay friends were he clarified that he meant the people he had one night stands
53. His responses about his realisation that he was homosexual were vague and undetailed, he said that when he realised it had no effect on him, that he felt normal when he came to this realisation. He said that some media were for it and some against, that it was not talked about at home or school, but that he knew it would be a hard life as a gay person in Turkey as Turkey is against us'.

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<sup>25</sup> US Department of State 2012, *Country Reports on Human Rights Practices for 2012 – Turkey*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204348#wrapper> Section 1 - accessed 11 June 2013.

54. However, the applicant was able to give details about his sexual encounters, how he managed to have sex on board a ship with a small crew, and the places that he would go to pick up men. These responses are plausible.
55. I also found the witness to be a truthful and credible person, and he attested to the sexuality of the applicant in some detail, and described seeing the applicant with other men and visiting a gay bar with the applicant, although he did not describe himself as homosexual.
56. On the basis of the evidence from the witness and the detail of some of his encounters, I am unable to discount that the applicant may be homosexual or may at some point have identified as a homosexual. If he were to return to Turkey, I consider that he would identify himself as a homosexual.

### **Claims of past harm by the applicant**

57. The applicant claims that he was arrested by police on March 2011 for having sex in a public place. He was able to describe this event in considerable detail, including the arrest, detention, being abused and attacked by the police. He claimed that his shin was [cut] and he had injuries on his face. He said that he was released without charge. The applicant claimed that he then sought medical treatment from a private hospital, where they refused to give him a report on his injuries once he told them he had been attacked by the police.
58. The applicant also claims that a week after this he went to the bar he frequented in Istanbul. He said his leg was not healed but he was able to step on it. He said that the bar was known for the main population being gay, and someone triggered something and when he was walking out he came across this crowd that were attacking 'us'. He quickly jumped in a taxi and left. I asked if they attacked just him and he said no, there were other people who were being attacked, he doesn't know what happened to them. I put to him that this did not sound like he was targeted and he said they were targeting 'us', the gays. He said he did not go to the bar after that incident. I asked how he felt after the police assault and the incident outside the bar and he said he got scared, that the threats were constant, he feared being killed and this stopped him from going outside. I asked him what threats he was referring to and he said he was told he was going to be killed and friends were telling him about the threats. I asked him what threats there were before February 2012. The applicant did not give a response but said that he was scared and had to leave.
59. He said that after he went back to Turkey he started receiving threats and harassments from his family and people in the community insulting him.
60. He said that he moved from Gebze to [Town 1] as his mother was living in [Town 1]. I asked where his brothers were living and he said [Town 1] as well. I pointed out that he claimed he was being threatened by his brothers but he moved to the same place as them. He said this was true but he didn't have anywhere else to go. He said that when he got threats in Gebze he moved to [Town 1].
61. I asked who he had received threats from in Gebze and he said from the religious groups. He said that they know him personally, as they are looking at photos. I asked what photos and he said that his friend had his photo and they would say this is a poofteer guy. I asked how the religious groups would have got his photo and the applicant said he did not know but obviously his friend must have shown them. He said these were normal photos you would take with friends, not compromising photos. I asked then how the religious groups would

know he was homosexual from this photo and he said that his friends told them. I asked which friends he meant and he said it had to start with [Mr A] and then through his friends.

62. I put to the applicant that he had said before that [Mr A] had warned him to leave Gebze, and now he was saying that [Mr A] had shown photos of him to others and identified him as homosexual, and I did not accept that someone would take actions that would lead the applicant to be harmed and also warn the applicant to leave a potentially dangerous situation.
63. The applicant then referred to a friend, [Mr B], who he had not mentioned before, and said that [Mr B] had warned him. He said that [Mr B] was telling him that they were going to kill him; that these groups were asking around for him. I asked him where they were looking around for him and the applicant replied vaguely that these people have groups everywhere, but he knew they were looking for him in Gebze.
64. I then asked the applicant about his claim that he went to the police in [Town 1] to seek protection. He said that he had no other choice as his brother was threatening him and every time he stepped out of the house, people knew and were constantly yelling insults at him. I put to him that I found him seeking protection from the police implausible given what happened during his last interaction with the police. He said that he was getting threats and he had no choice.
65. I then put to him that I found it implausible that he would move from Gebze, an urban area, to [Town 1], which is rural, and which he described as nationalist and with a population that was mostly religious. He said he had no choice as his mother was in [Town 1]. I put to him that he could have gone to somewhere on the coast which was more liberal. He responded vaguely that there are a lot of deaths and he was not game enough.
66. I asked the applicant what he feared on return. He said that at the moment they would kill him, when he speaks to his mum she says his brother is angry and threatening towards him. He said he feared the religious groups or his brother or community members
67. The applicant claims he was detained and mistreated by the police after having homosexual sex in public. I find that I must accept that this occurred; the applicant was able to discuss this incident, where it occurred and what happened in a clear and detailed manner. He showed a familiarity with the location of the police in the area of the 'beat' in [a certain suburb]. Whilst arresting and charging someone for having sex in public may be a law of general application, the treatment that I accept the applicant experienced at the hands of the police is not. Such treatment is consistent with the country information above. Whilst I have concerns that the applicant claimed that this happened at the police station, rather than on the way there or in an alternative place of detention, I do accept that this occurs in Turkey, despite some increased monitoring. I accept that this event happened as the applicant has described.
68. The applicant further claims that he was attacked by a group outside a bar in Istanbul. This is less supported by the country information, and I consider it likely that there was perhaps a demonstration by a religious group opposed to drinking, mixing of the sexes and homosexuality, and the applicant may have been there during this. I consider that there may have been a demonstration, perhaps even scuffles between these protesters and people entering and leaving the bar. I do not accept that the applicant, or even the homosexual patrons of this bar more generally were targeted. His evidence clearly indicates that he was peripherally involved in this incident

69. I do not accept that the applicant was targeted for threats in Gebze by religious groups. His claims in relation to this are vague, contradictory and unclear. He has given implausible information about who would have told these groups he was homosexual, how they would know, and how they have targeted and threatened him. I do not accept that the applicant has been targeted for harm by religious groups for his homosexuality or any other reason.
70. Consequently I do not accept that the applicant fled to [Town 1]. I do accept that he relocated from Gebze to [Town 1] in 2012 after serving on the ship, but consider that this was for other reasons, unconnected to any threat of harm.
71. I accept that the applicant's family may be unhappy with him because of his sexuality and identity as a homosexual. I accept that his brother may have threatened him. The witness confirmed these threats and as stated above I found the witness to be credible.
72. I do not accept that the applicant approached the police in [Town 1] for protection and was rebuffed and threatened by the police. Such an approach goes against the clear comments from the homosexual community in Turkey that they choose not to make complaints to the police because of the risk of being harmed by the police, and against the applicant's personal experience of being harmed by the police. I consider that the applicant has invented this element of his claim to, in his eyes, strengthen his claims.
73. I find that the applicant has been detained by the police, and in the process of this detention quite seriously assaulted. I do not accept any of the other claims of past harm by the applicant.

#### **Well-founded fear and the reasonably foreseeable future**

74. I have considered what will happen to the applicant in the reasonably foreseeable future if he returns to Turkey.
75. The applicant gave evidence, which I accept, of his sexual history. The applicant stated that he would have sex with men and usually only once. He has detailed a long sexual history in Turkey, on board ships, and at ports where the ship would dock. He has claimed that he conducted most of this sexual activity discreetly. However, on two occasions he has chosen to have sex with men in public places. I think that in relation to these things, the applicant is telling the truth. This is a crime in Turkey, as it is in Australia.
76. I find that if the applicant returned to Turkey he would continue his practice of having sex with men on a casual basis, and on occasions would choose to have sex in public.
77. The applicant is known to police. Although he was not charged, his details were taken by them. If the applicant were to come to the attention of the police in Turkey, I find that there is a reasonable chance that they would be aware that he had previously been detained. I find that there is more than a remote chance that during this detention, regardless of whether the applicant was charged, he would be mistreated and abused by the police.
78. I find that this mistreatment and abuse would be on the basis of something that the police perceived about the applicant, his sexuality, as there is evidence that police view such as 'against public morality', although homosexuality may not be illegal, and membership of a particular social group of homosexuals, who are identified by Turkish society by their attraction to members of the same sex. If the applicant was detained by the police, I find that

there is more than a remote chance that they would seriously harm the applicant, by serious physical ill-treatment or harassment or threat to his life, for reasons of his membership of a particular social group. I find that such persecution would involve systematic and discriminatory conduct as it would be non-random and directed.

79. I find that there is more than a remote chance that this will happen to the applicant on return to Turkey, now or in the reasonably foreseeable future.
80. As the harm feared is from a state actor, I do not consider that the applicant can relocate to another part of Turkey - his behaviour would bring him to the attention of the police anywhere in Turkey.

### **Conclusions**

81. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

### **DECISION**

82. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.