

1003878 [2010] RRTA 746 (9 August 2010)

DECISION RECORD

RRT CASE NUMBER: 1003878

DIAC REFERENCE(S): CLF2009/142830 S08/297

COUNTRY OF REFERENCE: Turkey

TRIBUNAL MEMBER: Diane Barnetson

DATE: 9 August 2010

PLACE OF DECISION: Sydney

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 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.
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 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

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

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

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's relative. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
21. The applicant was represented in relation to the review by his registered migration agent.

Protection visa application

22. In the protection visa application the applicant indicated that he was born in a town in Turkey. He has lived in the same region for about 15 years. He attended high school in the same region before coming to Australia. His parents and sibling live in Turkey.
23. He indicated that he applied for a temporary visa to Australia. The details in the passport he provided show that the visa was granted.
24. He stated in a written submission with the application that he was a Kurdish national. He had never married. His father was an active supporter of pro-Kurdish movements and his mother was to a lesser extent. Most of his relatives have been either HADEP/DTP members or sympathisers and supported their candidates in elections.
25. His mother's relative joined the PKK. He had a high profile with the PKK. He was killed by Turkish security forces. Following his death there was increased pressure on his relatives. Many were monitored. Some received direct threats and especially young ones were targeted by police and gendarmes.
26. The applicant experienced injustices as a result of being Kurdish. He had problems learning Turkish. He was teased at school.
27. The review applicant's house was raided and searched by police one night. He was about 15 years old. His parents and family were questioned about the relative and the PKK.
28. He was attacked by fascist youths when he was at school. He was warned not to speak Kurdish. He was looked down on by his teachers. He failed some subjects because he was scared to attend school because he would be assaulted. He was also assaulted by

boys outside the school. His father decided to move him to another school. At one point he was with 3 other Kurdish friends from school. They were attacked by a group of about 10 fascist youths.

Review application

29. There were no further documents provided with the review application.

Additional information

30. The Tribunal has before it the applicant's file in relation to the temporary visa application he made. The temporary visa application completed by the applicant stated that he was attending high school: "still continuing". In the protection visa application he stated that he had attended high school until about a year prior to coming to Australia.
31. The file contains a letter from an educational institution, confirming his enrolment there.

Country information

32. The DTP is the *Demokratik Toplum Partisi* (Democratic Society Party), a Kurdish political party, which was formed after the closure or dissolution of its predecessor Kurdish parties, *Demokratik Halk Partisi* (DEHAP, or Democratic People's Party), and the *Halkın Demokrasi Partisi* (HADEP, or People's Democratic Party). The DTP won twenty seats in the 2007 parliamentary election in Turkey, after its members ran as independents in order to get around Turkish electoral law, which requires political parties to obtain at least ten percent of the vote in order to be represented in parliament. Like its predecessors, Turkish authorities are attempting to have the DTP banned, alleging that the party promotes separatism and supports the banned Kurdistan Workers' Party (PKK).

Hearing

33. At the hearing, the Tribunal took the applicant through his protection visa application. He said that he was assisted by a friend in City A, who helped with the translation. The applicant typed the answers himself.
34. He confirmed his date and place of birth, his addresses, employment.
35. He came to Australia on a temporary visa. He initially lived in City A. He came to City B after his study finished. His temporary visa expired, it was not cancelled.
36. He confirmed the date that he made his protection visa application. The Tribunal asked whether he was still on a temporary visa then. He said he was on a bridging visa, because he had issues with his temporary visa. The Tribunal asked what issues these were. He said that when he applied for his second visa he was living in City A. The Department lost his papers, it called him and he was told to bring the documents in. He told them he could not because his relative was overseas so he could not get the documents. He did take in his CV.

37. The applicant's representative explained that the applicant was confused about the sequence of visas. He applied for a temporary visa but the Department lost his papers. They put him on a bridging visa. He was refused a temporary visa because at the time he did not meet the criteria. He applied for protection just before the refusal of the temporary visa; he was still on a bridging visa then.
38. He stayed with his relatives in City A when he arrived in Australia. He had two other relatives in City B. His parents and his sibling were in Turkey. His father has always been a service provider and his mother a housewife.
39. The applicant had not worked in Turkey and had worked at his relative's business in City A.
40. He has only had one passport. It was issued in order to travel to Australia. He had not travelled outside Turkey before and has not returned to Turkey since arriving in Australia. He has had contact with his family by phone.
41. The applicant told the Tribunal that his relative was [Name]. This has caused problems as the police have searched the relative's home and questioned his family and had them under surveillance. The applicant never met the relative as he was very young when the relative joined the PKK.
42. The applicant told the Tribunal that on New Year he was with three friends when plainclothes police arrived. They were accused of making PKK propaganda. The applicant said that they were only singing in Kurdish. They searched the house. They were taken to car and blindfolded. He was taken into a building; he thought it was an apartment building. Someone led him by the arm; he was still blindfolded. He was interrogated about the DTP. Then he was taken still blindfolded in a car to his suburb. This was the main reason I came to Australia.
43. When he was in high school he was beaten by an army member at the school. He left school after this.
44. At a later time a friend was preparing banners for Newroz. The applicant went to help him. He later heard that the friend had been taken by police. His friend's father told the applicant's father that the police had asked the friend about the applicant. He denied knowing him. The applicant went to live with relatives. It was then that his father wanted the applicant to come to Australia.
45. The Tribunal asked when he became involved in the DTP. He said this was after he stopped school. He had some involvement before that through his father; his father took him along when he was at school. His father was a member. The DTP has now closed down.
46. The applicant's father wanted him to come to Australia. He went to an agency that did all the paperwork for the temporary visa.
47. The Tribunal asked the applicant why he applied for protection when he did. He said that he got a phone call from his family. They told him his friend had been taken and had informed police of the applicant's name. The police went to his family's home and

asked for him. His family told him that he should not go back to Turkey. This is when he contacted his uncle in City A and came to City B.

48. The Tribunal asked why he did not stay in City A. He said that there was no-one there to help him. His relatives there did not want to help him. His father contacted them several times, they said they would fix it but did not do anything. So he came to City B. He has not had any contact with his uncles in City A since coming to City B.
49. The witness identified himself as one of the applicant's relatives. He was called "[name]" by the applicant. He confirmed that he had written the statutory declaration which was provided to the Department.
50. He said that he had been in Australia for 20 years and had been back to Turkey twice, the most recent being a few years ago. The witness' sibling was getting married and the applicant's mother was there.
51. The witness explained the association between the applicant and the deceased relative. The Tribunal asked whether he was aware of the applicant having any problems in Turkey. He said that he only met the applicant in Australia. His mother called him and said that her son was in City A and he wanted to come to City B. His City A uncles cannot help him. She said that she could not talk on the phone, as someone might be listening in.
52. Then the applicant arrived and told the witness what had been happening in Turkey. He said that a friend was possibly in gaol. The applicant said that the friend gave the applicant's name to the authorities.
53. The witness said that the applicant's mother said to him that they are in fear and they did not want the applicant to come back to Turkey. The police are searching for him.
54. The Tribunal asked the witness whether there had been any mention of problems when he was in Turkey. He said that everyone has problems and no-one speaks about them. He said that the applicant speaks a little Kurdish language as he does.
55. The representative said that she wished to clarify the issue regarding the applicant's "continuing" education. She said that he was still officially a student at school when he wrote that. He was not attending however.
56. The Tribunal asked the applicant what he did between the time he stopped attending school and when he came to Australia. He said that he went to the DTP meetings with friends, about twice a week, reading and watching videos there. They also learned folk dances.
57. The Tribunal raised with the applicant the fact that there had been a significant delay in his arrival in Australia and his application for protection. It explained the significance of this in relation to the Tribunal's assessment of his claims. He said that he had planned to finish his studies and stay out of trouble in Australia and then go back to Turkey. However, when his father rang to tell him about his friend he decided to stay here. He thought that the police would forget about him but they did not. He has become more fearful of returning to Turkey.

58. The Tribunal asked whether the applicant could live safely in another, predominantly Kurdish area of Turkey. The applicant said that there was a civil war in Turkey. Wherever they are, Kurds are not safe. Even if he went back to live in another area, he would be picked up at the airport, he would not get anywhere.
59. The Tribunal asked why he would be picked up by police at the airport. He said that it was because his friend had given his name to police. They would know he was Kurdish from his accent. There are hundreds of young Kurds in prison for speaking Kurdish.
60. The representative told the Tribunal that the civil war had reignited in Kurdish areas of Turkey recently. She undertook to provide information about this to the Tribunal.
61. The Tribunal raised with the applicant the fact that he said in his temporary visa application that at the time of his application his schooling was "continuing". However, he told the Tribunal that he had ceased school after the incident there about one year prior. The Tribunal explained the effect this may have on the Tribunal's assessment of his credibility and of his claims. The applicant responded by saying that his student status was still continuing at the time. He had just stopped attending. He had not really finished, he did not have a diploma.
62. The Tribunal referred the applicant to the receipt relating to his membership of the DTP and pointed out that there was no specific date on it for the applicant's membership. The applicant said that the date recorded was when the DTP was established.
63. The applicant's representative sent the Tribunal a written submission, responding to the issue of the applicant's temporary visa application, in relation to the information about his student status at the time of that application. She also provided information about returning asylum seekers:

128. In its most recent report on Turkey, The UK Home Office (2009, paras. 31.12-13) observes that the criminal records of Kurdish asylum seekers who are returned to Turkey are checked on entry just like those of other Turkish nationals. The records may concern criminal convictions by a Turkish court, but can also be related to official judicial preliminary inquiries or "investigations by the police or jandarma". Under some circumstances the Turkish border authorities interrogate the person concerned.

Questioning is often intended to establish or check personal particulars, reasons for and time of departure from Turkey, grounds for seeking asylum, reasons why the application was rejected, any criminal records at home and abroad and possible contacts with "illegal organisations" abroad. If, however, there is no "definite suspicion", as a rule the person is released after an average six to nine hours' detention. Anyone suspected of having committed criminal offences is transferred to the relevant investigative authority. In Istanbul this is mostly the Police Headquarters, which is located near the airport- Persons "suspected" of membership of (among others) the PKK left-wing radical organisations or "anyone suspected of giving support or shelter to one of those organisations" is handed over to the Anti-Terror Branch, which is housed in the Police HQ mentioned above. Torture or ill-treatment of suspects at the Police Anti-Terror Branch cannot be ruled out. From time to time, asylum seekers rejected from western Europe claim to have been maltreated or tortured after their arrival in Turkey.

64. The representative also provided information about the situation for Kurds in Turkey: The RRT in February 2010 (0905517, 25 February 2010) referred to the U State Report on Turkey and accepted that Kurds who assert their Kurdish identity or publicly espouse using Kurdish in the public domain risk censure, harassment or prosecution. In the same case it

referred to treatment of the applicant being unpredictable because the authorities continue to show an unwillingness to "draw the line between militants and sympathisers." It is this unpredictability, along with the other events that forms part of his fears of returning to Turkey, which may also explain why the authorities came looking for the Applicant in 2009, when his father told him to stay in Australia.

In another RRT decision [2008]RRTA 237 (17 June 2008), the Member referred, inter alia, to Kurds being at risk of arbitrary detention because they were suspected of supporting Kurdish nationalism and in that case it was "something as innocent as a relative's social function" that may have attracted the Turkish army.

The very recent outbreak of hostilities in Turkey would have increased that level of suspicion:

"Turks, Kurds clash after deadly attack on police"⁴

ISTANBUL | Tue Jul 27, 2010 7:21 am EDT

(Reuters) - Police fired tear gas to break up clashes between Turkish and Kurdish protesters in southern Turkey Tuesday after a deadly attack on police in the area fueled ethnic tensions.

The fighting followed similar ethnic clashes in northwest Turkey a day earlier. The interior minister blamed provocateurs for the violence as Turkey prepares for a September referendum on constitutional reform and a parliamentary election next year.

Monday evening gunmen in a van shot four Turkish police officers, opening fire on their vehicle in the town of Dortyol in the southern province of Hatay.

While the identity of the gunmen was unclear, local suspicions appeared to be directed at Kurdish militants -- the shooting triggered clashes between Turks and Kurds.

State-run Anatolian news agency said some of the protesters chanted slogans in Kurdish in support of the jailed leader of the Kurdistan Workers Party (PKK) guerrilla group, which has recently stepped up attacks against security forces.

Turkish protesters subsequently attacked and set fire to the local offices of the pro-Kurdish Peace and Democracy party (BDP) and Kurdish workplaces in Dortyol, broadcaster NTV reported.

In the wake of the attack on the police, Interior Minister Besir Atalay pledged to wipe out the presence of militants in the Amanos mountains of Hatay, near the border with Syria.

"The governors, regional commanders and police are here... I say clear the Amanos (mountains). Do what you have to do," Atalay said at a ceremony for the dead police officers in the southern city of Adana Tuesday.

Six soldiers were killed in a PKK rocket attack in the Iskenderun area of Hatay at the end of May.

The clashes in Hatay came a day after Turks and Kurds rioted at Inegol in the northwestern province of Bursa after a quarrel in a coffee house. Five people were stabbed in that fight.

Hundreds of people subsequently threw stones at the local municipality building, demanding that police hand over the attackers. They set fire to cars and set up barricades in clashes which continued through the night.

"Civil war rehearsal," a headline in Taraf newspaper said of the clashes in Inegol. Anatolian agency said 51 people have been detained in connection with those clashes.

"Some people want to feed animosity between our brothers. Don't allow this. This means serving terrorism," Atalay said.

There has been an upsurge in fighting between security forces and the PKK since the rebels ended a 14-month ceasefire at the end of May, accusing the government of not being serious in its bid to boost Kurdish minority rights.

The PKK took up arms against the state in 1984 and more than 40,000 people have been killed in the conflict.

From the Financial Times:

Erdogan defiant after Kurdish rebels kill 125

By Delphine Strauss in Ankara

Published: June 20 2010 16:22 | Last updated: June 20 2010 23:14

Kurdish rebels will "drown in their own blood", Turkey's prime minister warned on Sunday after the worst attack on Turkish forces in a year.

Eight soldiers died when fighters from the Kurdistan Workers party (PKK) attacked an army post in Hakkari province, on the border with Iraq, early on Saturday, the general staff said. A ninth victim was found later, two more soldiers were killed by a landmine, and one died in an attack on Saturday night in the eastern province of Elazig.

"They will not win, they will gain nothing," said Recep Tayyip Erdogan in the southeastern city of Van as he stood by the coffins of those killed, at a ceremony attended by ministers and senior commanders.

"These kinds of bloody attacks will not change the integrity of our country, of our nation ... The blood of martyrs is in every piece of this territory," he said.

Mr Erdogan, who will join a security summit in Ankara on Monday, faces criticism for his government's failure to prevent an escalation in violence. He launched an initiative last year to broaden rights for Turkey's Kurdish minority, aiming to end a 26-year conflict that has claimed more than 40,000 lives.

FINDINGS AND REASONS

65. The Tribunal accepts that the applicant is a citizen of Turkey, as shown in his passport. He is outside that country at this time.
66. The Tribunal is required to determine whether the applicant has a well-founded fear of persecution in Turkey and, if so, whether this is for one or more of the convention reasons. When determining whether an applicant is entitled to protection in Australia, a decision-maker must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility. When assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are genuinely credible but unable to substantiate all of their claims. That said, the Tribunal is not required to

accept uncritically any or all allegations made by the applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Indeed the Tribunal is not obliged to accept claims that are inconsistent with independent evidence regarding the situation in the applicant's country of nationality. *Randhawa v Milgea (1994) 52.FCR.437 at 451, per Beaumont J, Selvadurai v MIEA and ANOR (1994) 34.ALD.347 at 348 per Heerey J and Kopalapilli v MIMA (1998) 86.FCR.547.*

67. The Tribunal is required to make a determination as to whether the applicant has a well-founded fear of persecution for a convention-related reason if he were to return to Turkey.
68. The Tribunal has taken into consideration the evidence that the applicant has provided to the Department that formed the applicant's claims for protection, independent information and the material submitted to the Tribunal at review.
69. Having considered all the information before it and, having had the opportunity to obtain information about the claims from the applicant at a hearing, the Tribunal is of the view that that the applicant is a reliable and credible witness. The claims which he has made have remained consistent. There is nothing to indicate that he has exaggerated or embellished his claims. His claims are also supported by the evidence of his witness, to the extent that this witness had personal knowledge of the applicant and his family.
70. The applicant claims to be a Kurd. Based on his evidence and that of his witness, the Tribunal accepts that this is the case.
71. The applicant claims that that his relative was [name]. This has caused problems as the police have searched the relative's family's home and questioned his family and had them under surveillance. The applicant never met him as he was very young when he joined the PKK.
72. The witness, who is a relative of the applicant, gave evidence which supported this claim. There are documents on the Department file which show the relationships between the applicant's family and that of the deceased relative.
73. Given the evidence of the applicant and the witness, the Tribunal is satisfied that the applicant is a distant relative of the deceased person and that this relative's home and family have been under surveillance.
74. The applicant claims that, because of his being a Kurd, he experienced difficulties at school. Whilst at school an army person attacked him at school, as a consequence of which he left school.
75. The Tribunal notes that the discrepancy in the applicant's evidence about his schooling, in the temporary visa application and the protection visa application, has been explained by the applicant and his representative. They state that he was still officially a student but was simply not attending. This means that both statements are accurate, one is the official position and the other the actual. The Tribunal accepts this explanation and so draws no adverse inferences from the difference in evidence.
76. The Tribunal is satisfied that the applicant was attacked at school as he claims.

77. The applicant claims that on New Year he was with three friends when plainclothes police arrived. They were accused of making PKK propaganda. The applicant said that they were only singing in Kurdish. They searched the house. They were taken to a car and blindfolded. He was taken into a building; he thought it was an apartment building. Someone led him by the arm; he was still blindfolded. He was interrogated about the DTP. Then he was taken still blindfolded in a car to his suburb.
78. The Tribunal accepts the applicant's evidence as being reliable on this claim and is satisfied that the events occurred as he has stated.
79. The applicant claims that at a later time a friend was preparing banners for Newrooz. The applicant went to help him. He later heard that the friend had been taken by police. His friend's father told the applicant's father that the police had asked the friend about the applicant. He denied knowing him. The applicant went to live with relatives.
80. The Tribunal is satisfied that these claims are true.
81. The applicant claims to have been involved in the DTP, as had his father. This was since he left school. Though the receipt for the DTP which the applicant provided does not show his actual membership date, it does have a seal which appears to be genuine. The Tribunal is satisfied that the applicant was a member of the DTP and involved in activities of that group.
82. The Tribunal considered whether the applicant would be able to live safely in another, predominantly Kurdish area of Turkey. The applicant claimed that he could not; he would be picked up at the airport. Further there is a new outbreak of war involving the Kurds which would put him at risk wherever he was.
83. The information provided by the applicant's representative indicates that Kurds face arbitrary detention; that there have been ongoing clashes between the authorities and Kurds. There is also information that people may be interrogated by security forces on arrival in Turkey and those suspected of being involved in the PKK are handed over to the Ani-terrorist branch, where torture or ill-treatment of suspects cannot be ruled out.
84. Given these facts, the Tribunal is of the view that, as he has been under the notice of authorities and he has a relationship to the relative, the applicant would be at risk of harm in any area of Turkey. He could not avoid harm by relocating to another area of Turkey.
85. The Tribunal finds that the applicant would experience serious harm as defined in the Migration Act upon return to Turkey. The Tribunal accepts that the applicant would face a real chance of persecution for a Convention-based reason if he was to return to Turkey. It follows that the applicant does have a well-founded fear of persecution for a Convention-based reason.
86. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999.
87. Under these provisions, where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he

or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

88. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.
89. There is no information before the Tribunal to indicate that the applicant has a right to enter and reside in a third country.

CONCLUSIONS

90. 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

91. 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.