

1009727 [2011] RRTA 142 (17 February 2011)

DECISION RECORD

RRT CASE NUMBER: 1009727

DIAC REFERENCE(S): CLF2010/72159

COUNTRY OF REFERENCE: Turkey

TRIBUNAL MEMBER: Vanessa Moss

DATE: 17 February 2011

PLACE OF DECISION: Perth

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 on [date deleted under s.431(2) of the *Migration Act 1958* as this information would identify the applicant] August 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] May 2010. The delegate decided to refuse to grant the visa [in] September 2010 and notified the applicant of the decision and his review rights by letter [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] November 2010 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 (CLF 2010/72159) relating to the applicant and the Tribunal's file relating to the applicant (1009727). 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.

Primary application

20. The applicant applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] May 2010. He received assistance from a registered migration agent to complete the visa application.
21. In his application the applicant stated that he was born in Istanbul, Turkey on [date deleted: s.431(2)] and is currently [age deleted: s.431(2)]. He speaks reads and writes Turkish and English. He is of Kurdish ethnicity and states his religion to be Islam. He has never been married or in a de facto relationship. He is a citizen of Turkey. He states that military service is compulsory in his country and he has not done it yet and he is against doing military service. He has never had a passport other than his current passport, which was issued [in] November 2008 and is valid for two years. He provided 3 different addresses in Istanbul where he has lived from April 2000 to February 2004, February 2004 to April 2009 and from April 2009 to August 2009 respectively. He left Turkey [in] August 2009. He has never travelled outside his home country before making his current journey to Australia. He has undertaken 18 years of education and has a Bachelor of Economics degree. Before coming to Australia he was a web designer. He listed continuous employment in Istanbul with a number of different employers over the period from September 2007 until August 2009. His parents and four siblings are in Turkey.
22. His detailed statement in response to questions 42-46 on the application form included the following claims in summary:
 - His parents are of Kurdish origin, and were born in the Malatya province in South East Turkey.
 - The main reason why he left Turkey is because he is against doing military service, which is compulsory in Turkey, and which he postponed. He does not want to wound or kill innocent people and he provides details of various instances that have contributed to his being opposed to war and the taking of human life as a way of solving conflicts, and his observations on the impact of wars. He is of Kurdish

origin and he does not want to fight in the war against his own people in the South East of Turkey.

- If he goes back to Turkey, he will be forced to do military service against his will.
- He believes he would be mistreated and penalized by the Turkish authorities for being against military service. Further he could be beaten /killed by ordinary people.
- Secondly he came to Australia to study English.
- As a Kurd he was abused and downgraded during his school life and subsequently, and he provides examples of this from his schooldays. He feared being sacked so hid his Kurdish origins. As a citizen of Turkey he never felt he was an equal citizen with everyone else.
- When he was [age deleted: s.431(2)], following a clash between PKK members and the Turkish police, in [location deleted: s.431(2)], Istanbul, his house was raided on the night of the clashes and his father was taken to the police station. His father was questioned about the clashes and released the next morning. The houses of many people of Kurdish background were raided, and the people were detained and questioned. They were treated like this for being of Kurdish background.
- When the police conduct searches, it is usually the Kurds that they stop and search, as the Kurds can be identified from their looks. Such things happened to him several times. He felt downgraded due to this treatment
- He became a member of the [location deleted: s.431(2)] branch of HADEP in 2002.
- He was detained by the police several times when he was in the party building. They were saying that it was a routine search and questioning. Once they kept him for 2 hours, another time for a whole night. In both cases, he (and others) were taken to Vatan Caddesi Police Department in [location deleted: s.431(2)], Istanbul. The police was putting pressure on him (and others) to give up membership of the party. He told them that he should be able to join any party freely. He was hit several times by one of the policeman and accused of being a PKK separatist
- After he was released he approached the Justice Department in [location deleted: s.431(2)], to make a complaint about the way he had been treated. The prosecutor said to him that he wouldn't be able to prove any wrongdoing by the police, and he would receive a penalty for making false allegations about the police. He understood that there was no way that he could seek justice, so he didn't go ahead with the complaint. HADEP was closed by the Turkish Constitutional Court about 7-8 months later.
- His maternal uncle was told by the PKK members that he should be supporting and making regular payments to PKK. His uncle tried to stay away from the PKK but in the end he was shot dead in his shop by the PKK members. This occurred when the applicant was [age deleted: s.431(2)].
- If he goes back to Turkey he would be asked to take up arms and fight with the PKK, which he opposes.

- He would never be able to get employment in the public service as he has not done military service. Even the private employers would discriminate against him and not employ him, and he would have difficulty in making a livelihood.
23. The applicant provided a certified copy of some pages from his Turkish passport (DIAC folios 1-7) with his visa application which indicates that he arrived in Australia [in] August 2009 as the holder of a student visa.
24. The applicant attended an interview with the delegate [in] September 2010 and a recording of that interview is on the DIAC file. In the DIAC reasons for decision the delegate notes that during the course of his interview the applicant reiterated the claims he made in his written application.
25. [In] September 2010 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.
26. In summary the delegate noted as follows:
- in respect of his claim that he will be arrested by the authorities for refusing to complete his military service the delegate noted;
 - that refusing to complete military service in Turkey is against the law and as such the applicant could be imprisoned for refusing to undertake military service;
 - in assessing whether there is persecution under the enforcement of a generally applicable law the delegate concluded that the punishment was not disproportionately severe;
 - the law regarding compulsory military service was for the purpose of achieving a legitimate state objective;
 - the law would not be applied differentially in the applicant's case due to him being Kurdish;
 - In respect of the applicant's claim that he will be abused, beaten and tortured whilst in prison for opposing his military service the delegate noted that such treatment constitutes persecution;
 - In respect of the applicant's claims that he will be beaten and discriminated against by people for opposing military service and that he will be unable to get a job the delegate;
 - was not satisfied that he would be denied the capacity to earn a livelihood and would not face economic hardship due to his political opinion or his race;
 - found that being beaten for his political opinion could constitute persecution;
 - In respect of his claim that he will be abused, beaten, tortured in prison for opposing military service the delegate:

- could not draw a causal connection between the risk of his mistreatment and his political opinion or his race;
- was not satisfied that the applicant would already be known to the authorities or have a profile that would attract particular attention due to his beliefs about conscientious objection or his political involvement if he were to be detained in the future for not completing military service;
- concluded that there was no evidence to indicate that Kurds suffer ongoing serious harm that would amount to persecution based on being Kurdish. She noted that there was also no country information to indicate that due to his Kurdish ethnicity he will be at risk of serious harm in prison if he were to be detained in the future for not completing his military service. She was not satisfied that the risk of being beaten or tortured in prison could be attributed to his political opinion or race, or that he would be of particular interest to the authorities if he were to go to prison. Therefore she was not satisfied that there was a real chance that the applicant would be abused, beaten or tortured whilst imprisoned due to a convention ground and that his fear in this regard is not well founded;
- In respect of the applicant's claim that he fears he will be beaten by people for opposing military service the delegate was not satisfied that there is a real chance that the applicant would be beaten by the general public in Turkey due to his political opinion and that his fear in this regard is not well founded.

Application for review

27. The applicant applied to the Tribunal [in] November 2010 for review of the delegate's decision.
28. [In] January 2011 the applicant provided to the Tribunal a detailed statement reiterating his claims, clarifying issues that arose during the DIAC interview, and responding to the delegate's decision including, in summary, the following:
 - After he was taken to the police station and beaten due to his membership of HADEP, he lived for one purpose; getting out of Turkey and living in another country. During the 7 years that he lived in Turkey after this incident, he was scared to express his views freely. Because of the pressures upon him he had to hide his Kurdish identity many times. He also had fears expressing his opinion about being anti-militarist.
 - He came to Australia with a student visa because it was the easiest one that he could obtain. He was very concerned about his life and his freedom.
 - He left Turkey with the intention of never returning. He does not see himself as a citizen of Turkey, but rather as a stateless person. He still uses his Turkish passport as an identity card, as he has no other ID. His Turkish passport expired [in] November 2010. Since coming to Australia he has not approached the Turkish authorities in Australia, nor applied to extend his passport.
 - Military service laws that are applied to everyone in Turkey do not conform with

human rights and freedoms and are not legitimate. He believes the authorities will continue putting him in prison and penalizing him until he does military service. He cites the example of a conscientious objector named Enver Aydemir who was taken to court 4 times and penalized.

- He believes that he would be penalized disproportionately for being a conscientious objector and a Kurd. There is a 'GBT' system in Turkey, and the authorities can see all the past of a person. If he returns to Turkey, then the judge who would make the decision on him can see that he was questioned by the police due to his HADEP membership, and that he escaped to Australia. Even if he wanted to extend his passport, he believes that the Turkish authorities in Australia would refuse it, as he hasn't done military service.
- He fears being killed in an army prison, and that it would be reported as a conscientious objector committing suicide. He cites the example of a Kurdish soldier named Ergin Isler who died during his military service in 2004 and it was reported as a suicide.
- He would have extreme difficulty in obtaining a job in the public service and in the private sector due to being a Kurd and a conscientious objector.
- In respect of his uncle's death 20 years ago, he states that it was the reason he developed the ideas he has today
- He believes he would be penalized by the Turkish authorities disproportionately due to his views as a Kurdish conscientious objector.

29. The applicant appeared before the Tribunal [in] January 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
30. The applicant was represented in relation to the review by his registered migration agent.
31. The applicant's sworn evidence at the hearing may be summarised as follows.
32. At the outset the Tribunal invited the applicant to present his arguments and evidence in support of his application. The applicant indicated that if he returns to Turkey he will be detained and interrogated for his failure to comply with his military obligations. He will be imprisoned and beaten and tortured because of his ethnicity and refusal to comply with military service. He will be repeatedly imprisoned for refusing to be conscripted. He gave examples of the treatment of Kurds by the military.
33. The Tribunal asked the applicant whether he had any difficulties obtaining his passport. He responded that at the time he obtained his passport he was told that as he had not undertaken his military service his passport was valid for only two years.
34. The Tribunal asked the applicant about his ethnicity and the applicant responded that his parents were both of Kurdish origin having been born in Eastern Turkey which is heavily populated by Kurdish people. He was asked how he identifies himself as being

Kurdish, and he responded that Kurds originate from the east of Turkey and that they are physically different and have darker skin. The Tribunal asked the applicant if he was walking down the street in Istanbul whether he would be able to be identified as Kurdish. He responded that he is definitely identifiable as being Kurdish even from a photo, because of his dark skin and because Kurds are hairier. He does not know if his name is Kurdish, and explained that when he was born it was forbidden to give Kurdish names to children. Nor was it possible for his parents to have Kurdish names. His father speaks Kurdish. His mother only understands Kurdish but does not speak it. His grandparents spoke Kurdish. He does not speak Kurdish and stated that most Kurds under forty cannot speak Kurdish. He explained that because he was born in Istanbul his parents were of the opinion there was no point in him learning Kurdish. He explained that in his childhood it was forbidden to listen to Kurdish music. He associates with other Kurds and did so as a member of HADEP since there were only Kurds in that party.

35. When the Tribunal asked the applicant to talk about instances in his life when he had been downgraded as a Kurd he reiterated an example from his schooldays which was provided in his statement to the Department.
36. When the Tribunal asked the applicant what difficulties he had encountered as a Kurd after he left school, he reiterated his claim regarding the harassment of HADEP members and his detention by the police. He stated that he became a member of HADEP in 2002 and attended meetings weekly for a period of about three months. He was a member of the youth corps of HADEP. When the Tribunal asked if he knew who the founder of HADEP was, he said he could not recall, but that it was a continuation of another Kurdish party. When he was asked by the Tribunal if HADEP had an emblem or a logo he said it did but he could not remember what it was but that the colours were red and green. When asked why he became a member of HADEP the applicant indicated that he felt the need to contribute to the political process, that he wanted to express his political opinion and HADEP espoused views close to his own. When asked if he had any evidence of his membership of HADEP he responded that he did not. When asked why it was banned he responded that HADEP was banned because it was involved in a separatist movement.
37. The applicant gave evidence of the two occasions that he had been detained by the authorities on account of his membership of HADEP. On each occasion he was taken from the HADEP building. On the first occasion he was taken to the local police station. He was asked why he became a HADEP member and told to stop going to the HADEP offices. He responded that HADEP was a legal party. He was scolded but not mistreated. He was not charged with any offence. He was released and did not have to sign any papers relating to his release. On the second occasion he was taken to the headquarters of the security department late one night. He was again asked why he became a member of HADEP and told to stop going to the HADEP building. He was slapped by one of the police officers who got angry with him. He had to sign a paper recording the questions and answers, the time he was taken from the HADEP building, and stating the time of his release at about 6am the following morning. He wanted it recorded that he was beaten up, but the person who was typing up the paper he signed said there was no evidence of this. He went to see the public prosecutor to complain about this treatment and he was told that unless he had proof of being physically abused, he would be prosecuted for slandering a public officer.

38. Following his second detention by the police he did not attend any further HADEP meetings, nor did he go to the HADEP building as he was scared. He stopped expressing his political opinion. He believes that his second detention may be recorded since on this occasion he was detained at the police headquarters.
39. The Tribunal asked the applicant whether he would have any problems if he returned to Turkey, on account of his being a member of HADEP in 2002. He responded that the process called GBT means that there is a database with information about his past, that can be accessed by using ID numbers, and that if he is detained by the military for evading military service, they will access the database and see that he was a member of HADEP, and a Kurd.
40. The Tribunal asked the applicant whether he was called up for military service at the time he finished high school, and he said he was not, because when you enrol in university, military service is automatically deferred. He stated that he had a year's break after finishing school before he began at university and as he was under 20 years old at the time he was not conscripted. The Tribunal enquired whether he was called up for military service at the time he completed his university studies and he responded that he received a letter in the mail stating that he had to attend the local conscription office. He went there and asked for a 2 year deferment, which university graduates have a right to. He stated that he thought his two year deferment expired around July 2010. The Tribunal asked whether, since he has been in Australia, his family have received any notice regarding his military service. He said that his parents would tell him if there was any letter, and they have not. However, he pointed out that he had lived separately from his parents, and his parents have also moved house since he graduated.
41. The Tribunal asked the applicant why he is against doing military service. He responded that it is his life philosophy that a human being does not have the right to end another's life. He is against weapons and armaments, and armaments can't solve problems. He went on to explain that recently he has begun questioning whether humans have the right to slaughter animals to feed themselves. He believes that this line of thinking will lead him to becoming a vegetarian and that his conscience tells him that humans should refrain from killing humans and animals.
42. The Tribunal asked the applicant how he will be treated by ordinary people for opposing military service. He stated that in Turkey people regard military service as important and a debt to the country and he would be abused and beaten up by nationalists if he disclosed his opinion about military service.
43. The Tribunal asked the applicant to explain his written statement to the Department that he "will be asked to take up arms and fight with the PKK, which I oppose" The applicant clarified that this meant he will be taken to the east of Turkey to fight against the PKK. He stated that he has not ever supported the PKK, nor had any links with them, nor been approached by them. He stated that in Perth he once went to a Kurdish Association. He found that they were supporting the PKK and collecting money for the PKK, and so he has not been back.
44. The applicant reiterated at the hearing his claims regarding his difficulties in finding employment if his views on military service are made known in Turkey.

Post hearing submission

45. Following the hearing the applicant provided a copy of a letter from his father dated [in] December 2010 (including translation) which refers to information regarding the treatment of Kurds generally in Turkey. Also provided were copies of two Turkish newspaper articles, one dated 25 January 2006 in respect of the European Court of Human Rights' finding concerning the mistreatment of Osman Murat Ulkut, a conscientious objector. The other is in respect of the arrest and imprisonment of a jailed conscientious objector, Enver Aydemir (whom the applicant had referred to in his oral evidence to the Tribunal). Further the applicant provided country information from Wikipedia and Amnesty International regarding the treatment of conscientious objectors in Turkey, which provides details of the arrest, mistreatment and forcible conscription into military service of conscientious objectors.

COUNTRY INFORMATION

Kurds in Turkey

46. In a paper "The Ethnic Identity of the Kurds in Turkey" Martin van Bruinessen provided the following overview of the Kurds in Turkey:

Soon after the establishment of the Republic of Turkey, its government embarked upon a radical programme of nation-building. Ethnic diversity was perceived as a danger to the integrity of the state, and the Kurds, as the largest non-Turkish ethnic group, obviously constituted the most serious threat. They were decreed to be Turks, and their language and culture were to be Turkish. All external symbols of their ethnic identity were suppressed. Use of the Kurdish language was forbidden in cities and towns. Turkish teachers were despatched to Kurdish villages with the teaching of Turkish as their chief objective. Distinctive Kurdish dress was forbidden. Personal and family names had to be Turkish; later, village names, too, were Turkicised. The closing down of *medreses* and the ban on the Sufi orders (*tarikats*), though not exclusively directed against the Kurds, were felt as major blows to Kurdish culture, in which these traditional institutions had a prominent place. In the 1930s, after the first Kurdish rebellions, large numbers of Kurds were deported to Turkey's western provinces, while other ethnic groups ... were settled in the Kurdish districts: all attempts to speed up the Turkicisation of the Kurds. These assimilation policies were backed up by a new historical doctrine according to which the Kurds were really Turks originally, but had by historical accident lost their language.

There was no official discrimination against those Kurds who agreed to be assimilated: they could reach the highest positions in the state apparatus. Those who refused, however, often met with severe repression. Publicly proclaiming oneself to be a Kurd has often (though not always) been treated as a major offence, an act of separatism. The assimilation policies were not without effect. Many individuals have for all practical purposes been Turkicised and do not consider themselves as Kurds any more. Most of the Kurds who migrated to the big cities up to the 1960s were rapidly assimilated, and their children do not know Kurdish any more (during the past decades, Kurdish migrants have been too numerous to be assimilated). In several rural areas, too, Turkish has to a considerable extent replaced Kurdish, at least outside the family situation.

In much wider areas, Kurds began calling themselves Turks, and it has long been hard to see how serious they were about it. In the relatively liberal atmosphere of the 1970s, when Kurdish nationalism flourished, it became apparent that this Turkicisation was only skin-deep.

From the late 1960s on, Kurdish nationalism, which in Turkey had until then remained restricted to a limited circle of intellectuals only, suddenly found itself a mass base. The military and political successes of the Iraqi Kurds under Barzani constituted one of the major influencing factors; large-scale migration to the cities, the increasing number of Kurdish

students, and the weakness and division of the central government combined to make the emergence and growth of a nationalist movement possible. This is not the place to discuss the history of that movement; the relevant fact is that it revived or created symbols of Kurdish ethnic identity that affected the way many Kurds saw themselves. Books on Kurdish history were published, and a large number of Kurdish literary, cultural and political magazines appeared. Due to the ban on the Kurdish language, it had long not been able to develop in accordance with the needs of the day. For political discourse, for instance, it was quite inadequate, and most discussions were still held in Turkish. Moreover, the differences between the various dialects were so great that communication was often difficult. Nationalists set out to remedy this situation: there were attempts to create a unified Kurdish (Kurmanji) language, and many neologisms were coined. This modernised Kurdish was disseminated through a variety of journals and many (clandestine) Kurdish literacy courses. A Kurdish national music was re-invented, and became rapidly well-known and popular through the cassette recorder. People started wearing Kurdish clothes again in many cases a fancy dress, based on that worn by the Iraqi Kurds. Kurdish folklore was also re-invented, including the celebration of Newroz, Kurdish New Year, which few remembered as ever having existed in Turkey, but which was the Iraqi Kurds' national holiday. ...

Towards the end of the 1970s, it seemed that this nationalist movement was changing the self-perception of a considerable section of the Kurds. People who had long called themselves Turks started re-defining themselves as Kurds; youngsters in the cities, who knew only Turkish, began to learn Kurdish again.

These developments were cut short by the military take-over of September 1980. The military authorities have taken tough measures against the Kurdish nationalist movement and have reverted to a rigorous policy of forced assimilation. The successes of the Kurdish nationalist movement may well prove to have been ephemeral only. It remains to be seen, however, whether the present government's efforts will be more successful in changing the ethnic map of Eastern Turkey.¹

47. The Kurds are concentrated in eleven provinces of Turkey's southeast, plus isolated Kurdish villages elsewhere. Kurds have been migrating to Istanbul for centuries, and since 1960 have migrated to almost all other urban centres as well. In 1995 estimates of the number of Kurds in Turkey ranged from 6 million to 12 million. Because of the size of the Kurdish population, the Kurds are perceived as the only minority that could pose a threat to Turkish national unity. There has been an active Kurdish separatist movement in southeastern Turkey since 1984.²

Military Service

48. Compulsory military service applies to all Turkish males between the ages of 19 and 40. However, men who have not completed military service by the age of 40 may still be called up after the age of 40. According to War Resisters International, students in Turkey may postpone compulsory military service until the age of 29, or the age of 35 for postgraduate students.³
49. Turkish citizens living abroad may apply for a postponement from military service for up to three years at a time until the age of 38. Those living abroad may also apply to serve a shorter term of compulsory service by paying a fee of 5,112 Euros. Turkish

¹ (Martin van Bruinessen, *Kurdish Ethno-Nationalism Versus Nation-Building States. Collected articles*. Istanbul: ISIS, 2000).

² Helen Chapin Metz, ed. *Turkey: A Country Study*. "Kurds". Washington: GPO for the Library of Congress, 1995)

³ War Resisters International 2008, 'Country Report – Turkey', 23 October

citizens who have been living overseas as a student, or on a legal work permit, for more than three years are eligible to shorten their military service term to three weeks, rather than the standard fifteen months. However, citizens living abroad who have not completed military service and who fail to apply for a postponement would be sent to a military training centre upon their return to Turkey and may face charges of draft evasion. Furthermore, they would be unable to renew their passports whilst overseas and would only be permitted to travel back to Turkey.⁴

50. A 2003 Economic Research Forum paper indicates that the ability to postpone and reduce compulsory military service is a major factor in Turkish males pursuing study and employment opportunities overseas.⁵

Conscientious Objectors

51. Turkey does not recognise conscientious objection from military service, and does not grant exemptions from military service on these grounds. A brochure produced by the Turkish Armed Forces in 1999 states that “[i]n our laws there are no provisions on exemption from military service for reasons of conscience. This is because of the pressing need for security, caused by the strategic geographical position of our country and the circumstances we find ourselves in. As long as the factors threatening the internal and external security of Turkey do not change, it is considered to be impossible to introduce the concept of ‘conscientious objection’ into our legislation”.⁶
52. Turkish citizens who refuse to undertake military service as conscientious objectors face criminal prosecution and imprisonment of up to three years under Article 63 of the Turkish Military Penal Code, which prescribes punishment for draft evasion. Those continuing to refuse to serve after being released are often subject to repeated prosecutions and convictions.⁷ Conscientious objectors “who attract media attention or publish articles about their refusal to perform military service may also be [imprisoned] under Article 318 of the Turkish Criminal Code for ‘alienating the people from the

⁴ Immigration and Refugee Board of Canada 2010, *TUR103457.E – Compulsory military service for Turkish citizens living abroad*, 26 May, European Country of Origin Information Network website http://www.ecoi.net/local_link/141308/241855_en.html – Accessed 13 December 2010 – ‘Dutch Turkish nationals and Turkish compulsory military service’ 2008, Nederlands Immigratie en Naturalisatiedienst website, 9 July http://www.ind.nl/en/inbedrijf/actueel/Nederlandse_Turken_en_Turkse_dienstplicht.asp – Accessed 13 December 2010 – ‘Conscription in Turkey’ (undated), Middle East Explorer website <http://www.middleeastexplorer.com/Turkey/Conscription-in-Turkey> – Accessed 13 December 2010 – UK

Home Office 2008, *Operational Guidance Note – Turkey*, 2 October, p.12 –

⁵ Tansel, A. and Demet Gungor, N. 2003, ‘Brain Drain’ from Turkey: Survey Evidence of Student Non-return’ Working Paper 0307, Economic Research Forum website, p.13 <http://www.erf.org/CMS/getFile.php?id=165> – Accessed 13 December 2010

⁶ War Resisters International 2008, ‘Country Report – Turkey’, 23 October

⁷ US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Turkey*, 11 March, Section 2c - ‘European Parliament Resolution on the EU Commission’s 2009 Progress Report on Turkey’ 2010, European Parliament website, 10 February, Section 27

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0025+0+DOC+XML+V0//EN> – Accessed 13 December 2010 – UK Home Office 2008, *Operational Guidance Note – Turkey*, 2 October, p.12 – UK Home Office 2010, *Country of Origin Information Report – Turkey*, August, p.46 – War Resisters International 2008, ‘Country Report – Turkey’, 23 October – Department of Foreign Affairs and Trade 2006, *DFAT Report 571 – RRT Information Request: TUR30990*, 7 December

armed forces”⁸ In 2006, the European Court of Human Rights ruled that Turkey should “amend its legislation to prevent the ‘civil death’ of conscientious objectors repeatedly prosecuted and convicted for their refusal to carry out military service”. However, Turkey has failed to implement this ruling.⁹ The Human Rights Watch Report went on to note that these provisions of the Turkish Military Penal Code conflict with international human rights law, which recognises conscientious objection as a fundamental right. Article 18 of the International Covenant on Civil and Political Rights (ICCPR), and Article 9 of the European Human Rights Convention (ECHR), both ratified by Turkey, safeguard freedom of thought, conscience and religion. The United Nations, in its interpretation of ICCPR article 18, affirmed that the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief and urged member states to offer alternative civilian service. (General Comment No. 22: July 30, 1993.) The Council of Europe has urged that anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service (Recommendation R(87)8 of the Committee of Ministers of the Council of Europe.)¹⁰

53. Conscientious objectors are also named on a list of conscription evaders and, as a result, face limitations in civil services such as applying for an identification card or opening a bank account.¹¹ War Resisters International reports that the conscript registration system is one of the most effective in the country, and that the Turkish authorities strictly monitor draft evaders and deserters. Draft evaders and deserters are unable to legally depart Turkey as they would be identified by immigration officers, and may be arrested by police officers during routine traffic checks. Police and security forces also conduct house searches for draft evaders and deserters.¹²
54. According to the War Resisters International website, there were more than 750 conscientious objectors in Turkey between December 1989 and May 2009.¹³ The most well-known conscientious objector in Turkey is Osman Murat Ülke, who was the first Turkish citizen to be imprisoned for his conscientious objection. Ülke was arrested in October 1996 and spent a total of 30 months in prison over the following years on various charges relating to his refusal to undergo military service.¹⁴ Halil Savda, another well-known conscientious objector, declared his objection in November 2004

⁸ War Resisters International 2008, ‘Country Report – Turkey’, 23 October – ‘Turkey lags behind fellow Council of Europe members on recognition of right to conscientious objection’ 2006, Human Rights Watch, 13 September, http://hrw.org/english/docs/2006/09/13/turkey14533_txt.htm – Accessed 13 July 2007

⁹ ‘Amnesty International – Urgent Action: Further Information on UA: 175/10: New Risk For Turkish Conscientious Objector’ 2010, Amnesty International website, 1 September

¹⁰ War Resisters International 2008, ‘Country Report – Turkey’, 23 October – ‘Turkey lags behind fellow Council of Europe members on recognition of right to conscientious objection’ 2006, Human Rights Watch, 13 September, http://hrw.org/english/docs/2006/09/13/turkey14533_txt.htm – Accessed 13 July 2007

¹¹ Oral, D. 2010, ‘Refusing to line-up: Conscientious Objection in Turkey’, *Studentische Untersuchungen der Politikwissenschaften & Soziologie*, Vol. 2, No. 2, Humboldt University Berlin website, July, p.108 <http://www2.hu-berlin.de/stups/sites/default/files/sommer-2010/didem-oral-refusing-line-conscientious-objection-turkey.pdf> – Accessed 13 December 2010

¹² War Resisters International 2008, ‘Country Report – Turkey’, 23 October

¹³ Oral, D. 2010, ‘Refusing to line-up: Conscientious Objection in Turkey’, *Studentische Untersuchungen der Politikwissenschaften & Soziologie*, Vol. 2, No. 2, Humboldt University Berlin website, July, p.108 <http://www2.hu-berlin.de/stups/sites/default/files/sommer-2010/didem-oral-refusing-line-conscientious-objection-turkey.pdf> – Accessed 13 December 2010

¹⁴ War Resisters International 2008, ‘Country Report – Turkey’, 23 October

and was subsequently arrested, detained, and prosecuted in a military court. He was tried three times and imprisoned for a total of 17 months. Savda was assaulted by military officials throughout his detention before being diagnosed as unfit for military service due to “anti-social behaviour and lack of masculinity and Turkishness”.¹⁵

55. Psychiatric tests are often used on conscientious objectors in order to claim that they have an “advanced anti-social personality disorder” and are therefore “unsuitable for military service in times of peace and war”. In December 2009 another conscientious objector was forced to undergo a psychiatric test after being arrested, beaten, and detained after refusing to complete military service on religious grounds, and refusing to wear the military uniform.¹⁶ Savda argues that the Turkish authorities are “issuing these ‘rotten reports’ (not fit for military service reports) to imprisoned conscientious objectors” in order to ignore and silence the claims of conscientious objectors, “keep public opinion in the dark and obstruct the recognition and public discussion of conscientious objection”.¹⁷
56. Furthermore, Human Rights Watch has reported the prosecutions of journalists under Article 318 of the Turkish Criminal Code, which proscribes “alienating the public from the institution of military service”, for publishing newspaper articles on the right to conscientious objection and the lack of an alternative civilian service.¹⁸ Nevertheless, War Resisters International reported in 2008 that treatment of conscientious objectors has become less harsh in recent years, possibly due to increasing international media attention.¹⁹
57. Amnesty International reported in 1999 that traditionally, military conscripts were deliberately sent to fight away from their home region. Many Kurds migrated from the southeast to urban areas in the west of the country and, as a result, a Kurdish conscript from the west may have been sent to fight against Kurds in the southeast.²⁰ In 2005, War Resisters International reported that many postings of conscripts are now determined by random computer selection and, therefore, all conscripts may be sent to fight against Kurds in the southeast.²¹

¹⁵ ‘A conscientious objector in Turkey’ 2009, *The Guardian*, 16 April
<http://www.guardian.co.uk/world/2009/apr/16/turkey-human-rights?INTCMP=SRCH> – Accessed 15 December 2010 – ‘Turkey: Alleged ill-treatment of conscientious objector by military personnel must be investigated’ 2007, Amnesty International website, 8 February,
<http://web.amnesty.org/library/Index/ENGEUR440042007?open&of=ENG-TUR> – Accessed 13 July 2007 – Attachment 15

¹⁶ ‘Turkey must set free conscientious objector’ 2010, Amnesty International website, 11 January

¹⁷ ‘A conscientious objector in Turkey’ 2009, *The Guardian*, 16 April
<http://www.guardian.co.uk/world/2009/apr/16/turkey-human-rights?INTCMP=SRCH> – Accessed 15 December 2010

¹⁸ Cartner, H. 2006, ‘Letter calling for release of Kurdish activists İbrahim Güçlü, Zeynel Abidin Özalp and Ahmet Sedat Oğur’, Human Rights Watch website, 6 June <http://www.hrw.org/en/news/2006/06/06/letter-calling-release-kurdish-activists-brahim-g-l-zeynel-abidin-zalp-and-ahmet-sed> – Accessed 15 December 2010; ‘Turkey lags behind fellow Council of Europe members on recognition of right to conscientious objection’ 2006, Human Rights Watch, 13 September, http://hrw.org/english/docs/2006/09/13/turkey14533_txt.htm – Accessed 13 July 2007

¹⁹ War Resisters International 2008, ‘Country Report – Turkey’, 23 October

²⁰ ‘Evidence of persecution of conscripts on the increase’ 1999, Amnesty International website, 27 August,
<http://web.amnesty.org/library/Index/ENGEUR440551999?open&of=ENG-2EU> – Accessed 18 July 2007

²¹ UK Home Office 2007, *Country of Origin Information Report – Turkey*, 12 March, p.42

58. Furthermore, conscripts may be required to serve in the ‘gendarmerie’, a rural police force that has been active in the suppression of Kurds in the southeast. In 2002, a paper on asylum seekers from Turkey claimed that approximately 38 percent of all conscripts were serving in the gendarmerie.²² Nevertheless, in 2008 it was reported in *DefenseNews* that “by the end of next year no conscript soldiers will be involved in anti-terrorism operations in units on both sides of Turkey’s border with Iraq, where the military is fighting the outlawed Kurdistan Workers Party (PKK)”.²³
59. Amnesty International reports that “[i]t is not uncommon for Turkish citizens of Kurdish origin to be reluctant or unwilling to do their military service because they do not wish to participate in the conflict in the southeast of Turkey. A number of such individuals have gone so far as to leave Turkey in order to avoid conscription into the armed forces”.²⁴ Similarly, War Resisters International claims that “[t]here is a sizeable group of conscripts of Kurdish origin who refuse to perform military service because they do not want to fight against their own people. Many Kurdish draft evaders have, in fact, left Turkey and applied for asylum abroad”.²⁵
60. The US Department of State reported in March 2010 that “Kurds who publicly or politically asserted their Kurdish identity or publicly espoused using Kurdish in the public domain risked censure, harassment, or prosecution” It is likely that a Kurd who publicly asserts their Kurdish identity in conscientious objection to military service would face similar mistreatment by the authorities.²⁶ Furthermore, the high level of respect given to the military in Turkey may increase this likelihood. Additionally, War Resisters’ International has reported discriminatory treatment of Kurdish conscripts within the military, particularly those suspected of having separatist sympathies.²⁷

People’s Democracy Party (HADEP)

61. The People’s Democracy Party (HADEP) was established in 1994 and was the only legal political party permitted to represent Kurdish interests. HADEP was banned by the Constitutional Court in March 2003 on charges of “separatism and supporting terrorism” for its alleged links to and support of the Kurdistan Workers Party (PKK), although it has denied any such support. In addition, 46 members of HADEP received individual bans from participating in politics for five years.²⁸

²² McDowall, D. 2002, ‘Asylum Seekers from Turkey II’, Asylum Aid, European Country of Origin Information Network website, November, pp.71-73 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010 – ‘Evidence of persecution of conscripts on the increase’ 1999, Amnesty International website, 27 August, <http://web.amnesty.org/library/Index/ENGEUR440551999?open&of=ENG-2EU> – Accessed 18 July 2007

²³ War Resisters International 2008, ‘Country Report – Turkey’, 23 October

²⁴ ‘Evidence of persecution of conscripts on the increase’ 1999, Amnesty International website, 27 August, <http://web.amnesty.org/library/Index/ENGEUR440551999?open&of=ENG-2EU> – Accessed 18 July 2007

²⁵ UK Home Office 2007, *Country of Origin Information Report – Turkey*, 12 March, p.42

²⁶ US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Turkey*, 11 March, Section 6

²⁷ UK Home Office 2007, *Country of Origin Information Report – Turkey*, 12 March, p.34

²⁸ Immigration and Refugee Board of Canada 2004, *TUR42991.E – Turkey: The situation and treatment of members, supporters and sympathizers of leftist parties, particularly the People’s Democratic Party (HADEP) and Democratic People’s Party (DEHAP) (January 2003 – September 2004)*, 21 September – Attachment 21; Sansal, B. (undated), ‘Political parties in Turkey’, All About Turkey website <http://www.allaboutturkey.com/parti.htm> – Accessed 16 December 2010 – Attachment 22; ‘Turkey’ 2010, *Political Handbook of the World Online Edition*, CQ Press Electronic Library – Attachment 23; ‘Turkey cracks

62. In anticipation of the ban on HADEP, 35 mayors who were members of the party joined the related pro-Kurdish Democratic People's Party (DEHAP) in 2002.²⁹ In order to pre-empt a similar proposed ban on DEHAP, the party was voluntarily dissolved in late 2005, one month after party members created the Democratic Society Party (DTP) as DEHAP's successor.³⁰ The DTP was subsequently banned in December 2009 for its alleged links to the PKK.³¹ Whilst the parties were active, HADEP and DEHAP members and supporters were often harassed, tortured, and detained by police on charges of supporting separatism.
63. In 2002, the Netherlands Ministry of Foreign Affairs reported that Turkish authorities viewed HADEP as the political wing of the PKK. It is argued that although "HADEP has no direct ties with the PKK, [it] relies largely on the same supporters".³² A 2002 Asylum Aid report on asylum-seekers from Turkey similarly states that HADEP had no known connection with the PKK, although many HADEP supporters were sympathetic to the alleged separatist group.³³ *The Economist* also argued in 2002 that "thousands of Kurds who vote for Hadep do also continue to sympathise with the long-violent PKK" In addition, HADEP refused to label to PKK as a terrorist group.³⁴ As a result, HADEP supporters were often considered to be separatists by the Turkish authorities, despite no party policy indicating separatist ambitions. HADEP members and supporters were thus at risk of torture and detention, including those with a low profile.³⁵
64. A 2002 report by the Netherlands delegation of the European Union Council indicates that "large numbers of HADEP members were arrested" and mistreated in the previous year, on charges of "separatist propaganda and supporting the PKK" While membership of HADEP is not an offence, members were often prosecuted "for activities or comments construed by the authorities as separatist in nature". Additionally, "HADEP sympathisers who make their sympathies clearly known may also face harassment by local authorities and security forces, particularly in south-east Turkey".³⁶ Furthermore, Asylum Aid argues that "[b]y supporting HADEP one declares oneself to be Kurdish, or supportive of recognition of Kurdish identity and rights. At

down on Kurdish parties' 2003, *Dawn*, 13 March <http://archives.dawn.com/2003/03/14/top7.htm> – Accessed 10 December 2010 – Attachment 24

²⁹ Immigration and Refugee Board of Canada 2004, *TUR42991.E – Turkey: The situation and treatment of members, supporters and sympathizers of leftist parties, particularly the People's Democratic Party (HADEP) and Democratic People's Party (DEHAP) (January 2003 – September 2004)*, 21 September – Attachment 21

³⁰ 'Turkey' 2010, *Political Handbook of the World Online Edition*, CQ Press Electronic Library – <http://ntssyd\REFER\Research\INTERNET\Global\Political-Handbook\2010\Turkey.mht>

³¹ Sansal, B. (undated), 'Political parties in Turkey', All About Turkey website <http://www.allaboutturkey.com/parti.htm> – Accessed 16 December 2010 – Attachment 22

³² UK Home Office 2005, *Country of Origin Information Report – Turkey*, October, p.126 – Attachment 25

³³ McDowall, D. 2002, 'Asylum Seekers from Turkey II', Asylum Aid, European Country of Origin Information Network website, November, pp.53-55 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010 – Attachment 20

³⁴ 'Turkey and its Kurds: A turn for the worse' 2002, *The Economist*, 31 January <http://www.economist.com/node/966557> – Accessed 10 December 2010 – Attachment 26

³⁵ McDowall, D. 2002, 'Asylum Seekers from Turkey II', Asylum Aid, European Country of Origin Information Network website, November, pp.53-55 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010 – Attachment 20

³⁶ Netherlands Delegation of the Council of the European Union 2002, 'Official general report on Turkey', January, European Country of Origin Information Network website, p.134 http://www.ecoi.net/file_upload/1329_1202731567_nz117-00840tur.pdf – Accessed 10 December 2010 – Attachment 27

the most basic level, therefore, HADEP supporters are consequently more at risk of torture than those who do not claim to be Kurds”.³⁷

65. Statistics indicate that HADEP was specifically targeted by security forces whilst it was active, despite being a legal political party. In 2001, HADEP members accounted for 94 percent of known political party detainees. Nevertheless, the detentions of many HADEP members were not recorded and many detainees were not charged, although reports of torture were widespread. Suspected members and supporters were also targeted by the police.³⁸ In addition, the Netherlands Ministry of Foreign Affairs reported in 2002 that relatives of active HADEP members may have been closely monitored by the Turkish authorities.³⁹
66. A number of specific cases of HADEP members being attacked, detained, and tortured were reported between 1999 and 2003 by various sources. *The Political Handbook of the World* states that in 1999, “a shadowy far-right group, Turkish Avenger Brigade (Türk İntikam Tugayı—TİT), issued death threats against pro-Kurdish activists and politicians and claimed responsibility for attacks on various HADEP buildings”.⁴⁰ In 2000, it was reported that over the past few years, HADEP party officials and members were arrested, beaten, and detained, while party offices were closed down.⁴¹ In 2001 and 2002, security forces also prevented the opening of HADEP party offices, and conducted raids on other offices, seizing material and arresting HADEP members.⁴²
67. In February 2000, three HADEP mayors in the south-east reported being tortured by the Turkish authorities. In 2002, it was reported in *The Economist* that at least 30 HADEP mayors in predominantly Kurdish areas of south-eastern Turkey were “routinely harassed, their offices sometimes ransacked by security forces. Many have been repeatedly detained. Others have been accused, often with scant evidence, of taking orders from the PKK”.⁴³ The Netherlands delegation of the European Union Council similarly reported in 2002 that “HADEP mayors are frequently ignored by provincial authorities and security forces. HADEP mayors in south-east Turkey complain that those bodies make little attempt to cooperate with them at local level”.⁴⁴

³⁷ McDowall, D. 2002, ‘Asylum Seekers from Turkey II’, Asylum Aid, European Country of Origin Information Network website, November, pp.53-55 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010 – Attachment 20

³⁸ McDowall, D. 2002, ‘Asylum Seekers from Turkey II’, Asylum Aid, European Country of Origin Information Network website, November, pp.53-55 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010 – Attachment 20

³⁹ UK Home Office 2005, *Country of Origin Information Report – Turkey*, October, p.126 – Attachment 25

⁴⁰ ‘Turkey’ 2010, *Political Handbook of the World Online Edition*, CQ Press Electronic Library – Attachment 23

⁴¹ Zaman, A. 2000, ‘Turkey/Hadep’, Global Security website, source: *Voice of America*, 30 June <http://www.globalsecurity.org/military/library/news/2000/06/000630-kurd1.htm> – Accessed 10 December 2010 – Attachment 28

⁴² Netherlands Delegation of the Council of the European Union 2002, ‘Official general report on Turkey’, January, European Country of Origin Information Network website, p.133 http://www.ecoi.net/file_upload/1329_1202731567_nz117-00840tur.pdf – Accessed 10 December 2010 – Attachment 27

⁴³ ‘Turkey and its Kurds: A turn for the worse’ 2002, *The Economist*, 31 January <http://www.economist.com/node/966557> – Accessed 10 December 2010

⁴⁴ Netherlands Delegation of the Council of the European Union 2002, ‘Official general report on Turkey’, January, European Country of Origin Information Network website, p.133 http://www.ecoi.net/file_upload/1329_1202731567_nz117-00840tur.pdf – Accessed 10 December 2010

68. In 2000, a large number of HADEP members were arrested and detained for protesting against the death penalty issued to PKK leader Abdullah Ocalan.⁴⁵ In 2001, *BBC News* reported that 70 HADEP members claimed to have been detained by police, some after raids on party offices.⁴⁶ In January 2002, 59 members of HADEP's youth branches were arrested by security forces for supporting the proposed introduction of Kurdish language courses in schools and universities. In the same year, police arrested a further 90 HADEP members in various regions throughout Turkey.⁴⁷ In January 2003, four HADEP members were arrested and detained for demonstrating in support of the PKK.⁴⁸ In February 2003, two youth members of HADEP were detained by police in Bahcelievler and interrogated over propaganda being spread about the PKK. One of the men was tortured and sexually assaulted in detention after refusing to become a police informant.⁴⁹
69. The US Department of State reported that in 2002, the Turkish authorities "continued to harass the pro-Kurdish People's Democracy Party (HADEP), as well as the closely related Democratic People's Party (DEHAP), through various methods including police raids and detentions, although there were fewer instances than in previous years" Members of both HADEP and DEHAP were detained and tortured by police, while party offices continued to be raided, and suspected sympathisers were harassed by security forces.⁵⁰ The Immigration and Refugee Board of Canada (IRB) provides further information on the harassment, arrest, and detention of DEHAP members, supporters, and sympathisers between January 2003 and September 2004.⁵¹

FINDINGS AND REASONS

70. The applicant travelled to Australia on a Turkish passport and claims to be a national of Turkey. The Tribunal accepts that the applicant is a national of Turkey and has assessed his claims against Turkey as his country of nationality.
71. The Tribunal accepts that the applicant is a Kurd and that he has Kurdish ancestry. He gave evidence, which is accepted by the Tribunal, that his parents were both of Kurdish origin having been born in the Malatya province in South East Turkey He gave evidence that he did not speak Kurdish however his father and grandparents spoke Kurdish, and whilst his mother does not speak Kurdish she understands it. The applicant's evidence

⁴⁵ Zaman, A. 2000, 'Turkey/Hadep', Global Security website, source: *Voice of America*, 30 June <http://www.globalsecurity.org/military/library/news/2000/06/000630-kurd1.htm> – Accessed 10 December 2010

⁴⁶ 'Hadep members detained in Turkey' 2001, *BBC News*, 25 May http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1352000/1352415.stm – Accessed 10 December 2010

⁴⁷ McDowall, D. 2002, 'Asylum Seekers from Turkey II', Asylum Aid, European Country of Origin Information Network website, November, pp.53-55 http://www.ecoi.net/file_upload/ds497_02652tur.doc – Accessed 10 December 2010

⁴⁸ Immigration and Refugee Board of Canada 2004, *TUR42991.E – Turkey: The situation and treatment of members, supporters and sympathizers of leftist parties, particularly the People's Democratic Party (HADEP) and Democratic People's Party (DEHAP) (January 2003 – September 2004)*, 21 September

⁴⁹ International Helsinki Federation for Human Rights 2003, 'Report focused on torture and inhuman and degrading treatment or punishment in selected Osce states', European Country of Origin Information Network website, 7 November <http://www.ecoi.net/190288:trkei/328810.327884.9806.eth.327896/prosecution-of-hadep-dehap-members-and-sympathizers.htm> – Accessed 10 December 2010

⁵⁰ US Department of State 2003, *Country Reports on Human Rights Practices for 2002 – Turkey*, 31 March, Introduction, Sections 1c, 3

⁵¹ Immigration and Refugee Board of Canada 2004, *TUR42991.E – Turkey: The situation and treatment of members, supporters and sympathizers of leftist parties, particularly the People's Democratic Party (HADEP) and Democratic People's Party (DEHAP) (January 2003 – September 2004)*, 21 September

in this regard is consistent with the country information regarding the Turkicisation of the Kurds following the establishment of the Republic of Turkey.

72. The applicant's main claim is his fear of persecution on grounds of his objections to military service. He claims that he will be mistreated by both the authorities and the public for being a Kurdish conscientious objector. He does not want to fight in the war against his own people. Further, he claims that he will not be able to obtain employment in the public or private sectors on account of being a Kurdish conscientious objector. He also claims to have experienced discrimination on account of his being Kurdish. He claims to have experienced persecution arising from his membership of a Kurdish political party HADEP.

HADEP

73. The Tribunal accepts that the applicant was, for a short time, a member of the youth corps of the Kurdish political party HADEP. Whilst he was unable to give details of its founder, its logo, and incorrectly gave its logo colours as red and green (when they are blue and yellow), he was able to articulate well his motivation for becoming a member, and that it had grown out of another Kurdish party. The applicant's oral evidence to the Tribunal in respect of his arrest at the HADEP offices and his detention by the authorities was consistent with the evidence he gave to the Department at interview and in his written statement. The Tribunal accepts that he was detained by the authorities as claimed and notes that this is consistent with the country information that HADEP was specifically targeted by security forces whilst it was active, despite being a legal political party. The Tribunal accepts that his treatment by the authorities amounts to persecution. Given the Tribunal's findings below, that the applicant has a well-founded fear of persecution on grounds of his objections to military service, the Tribunal has not considered his risk of persecution in the reasonably foreseeable future for reasons of his past membership of HADEP.

Military Service

74. The evidence provided by the applicant at the hearing before the Tribunal confirmed his objection to compulsory military service laws in Turkey. The applicant describes himself as a conscientious objector and in his statement provided to the Department sets out in detail the events that have led him to be against military service, wars and the taking of human life as a way of solving conflicts. The evidence before the Tribunal indicates that the applicant's views began to develop in his childhood and have been grounded in the experiences of various family members, his own witnessing of violent incidences, and his observations of the futility of war on the world stage. During the hearing the applicant explained his philosophy of life that a human being does not have the right to end another's life, and that war is not the way to solve conflict. He also explained that he had recently begun to question whether humans have the right to slaughter animals to feed themselves, and that this line of thinking will lead him to becoming a vegetarian. The Tribunal accepts that the applicant is against compulsory military service and that he is against fighting and war on moral grounds.
75. The Tribunal notes the country information indicating that Turkey does not recognise conscientious objection from military service, and does not grant exemptions from military service on these grounds. On the basis of the country information cited above

the Tribunal accepts that the applicant would be required to undertake military service if he were to return to Turkey, and that such service is against his political opinion.

76. It is well established that enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention,⁵² for the reason that enforcement of such a law does not ordinarily constitute discrimination.⁵³ As Brennan CJ stated in *Applicant A*:

*... the feared persecution must be discriminatory. ... [It] must be "for reasons of" one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of "refugee".*⁵⁴

77. Whether a law is properly characterised as a law of general application turns on identifying those members of the population to whom it applies.⁵⁵ In some circumstances, it may be necessary to look behind a law that is generally expressed, to establish whether the law itself is in truth discriminatory in its intent or whether it has a discriminatory impact on members of a group recognised by the Convention.
78. While the implementation of laws of general application does not ordinarily constitute persecution, there is no rule that the implementation of such laws can *never* amount to persecution. A law of general application is capable of being implemented or enforced in a discriminatory manner.⁵⁶
79. Where laws of general application are selectively enforced, in that the motivation for prosecution or punishment for an ordinary offence can be found in a Convention ground, or the punishment is unduly harsh for a Convention reason, then Convention protection may be attracted.
80. The Tribunal observes that the significance (for Convention purposes) of an objection to undertaking compulsory military service has been the subject of developing legal treatment in recent years.⁵⁷
81. In Australian law, enforcement of laws providing for compulsory military service, and for punishment for desertion or avoidance of such service, will not ordinarily provide a

⁵² *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 per McHugh J at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467.

⁵³ *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]

⁵⁴ *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, at 233.

⁵⁵ See *Weheliye v MIMA* [2001] FCA 1222 (Goldberg J, 31 August 2001), at [50].

⁵⁶ *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [21], *Applicant S v MIMA* (2004) 217 CLR 387 at [42].

⁵⁷ *Davidov v SSHD* [2005] ScotCS CSIH_51 (Scottish Court of Session, 23 June 2005) per Lord Hamilton, delivering the opinion of the Court, at [5].

basis for a claim of persecution within the meaning of the Refugees Convention.⁵⁸ This is primarily because it lacks the necessary selective quality.⁵⁹

82. Without evidence of selectivity in its enforcement, conscription will generally amount to no more than a non-discriminatory law of general application. Whether this is the proper conclusion, however, will depend on the evidence in the particular case.⁶⁰ The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (the Handbook) provides some guidance on the issue. The Handbook states:

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. ... The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, ie. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such

⁵⁸ See eg *Mijoljevic v MIMA* [1999] FCA 834 (Branson J, 25 June 1999) at [23], referring to *Murillo-Nunez v MIEA* (1995) 63 FCR 150; *Timic v MIMA* [1998] FCA 1750 (Einfeld J, 23 December 1998); also Hathaway, *The Law of Refugee Status* at [5.6.2]

⁵⁹ For example *Mpelo v MIMA* [2000] FCA 608 (Lindgren J, 8 May 2000) at [33], *MIMA v Shaibo* [2000] FCA 600 (Lindgren J, 10 May 2000) at [28], *Trpeski v MIMA* [2000] FCA 841 (Mansfield J, 6 June 2000) at [27] and *Aksahin v MIMA* [2000] FCA 1570 (French J, 3 November 2000).

⁶⁰ There must be evidence to support such a conclusion: see *MIMIA v WALU* [2006] FCA 657 (Nicholson J, 30 May 2006).

convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (ie. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

83. The Court in *Mehenni v MIMA*⁶¹ noted that the Handbook does not suggest that the mere requirement that a person serve, in opposition to genuine religious convictions, in itself necessarily amounts to persecution for a Convention reason. What must be demonstrated is that the punishment feared be imposed discriminatorily for a Convention reason, such as religion or political opinion, or membership of a particular social group such as “conscientious objectors”.
84. Having regard to the country information cited in this decision, the Tribunal finds that this law of general application is being used in a discriminatory way against recruits of Kurdish ethnicity, whereby these recruits are being sent into battle against Kurdish opposition groups and as recruits, are being subject to various degrees of ill-treatment. This has been corroborated in War Resisters International reports in 2008
85. The Tribunal has had regard to two recent decisions of this Tribunal differently constituted (RRT case 1004564, RRT 0904167) in which the Tribunal had regard to the case law in respect of conscription. In RRT case 0904167 the Tribunal noted as follows:

“relevantly to the present, I have observed the case in Applicant N403 v MIMA [2000] FCA 1088 where Hill J held at [23]:

The draft laws as implemented in Australia during the Vietnam War permitted those with real conscientious objections to serve, not in the military forces, but rather in non-combatant roles. Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason

⁶¹ (1999) 164 ALR 192 at [19].

they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the conscientious belief, which could be political opinion, not merely the failure to comply with the law of general application. It is, however, essential that an applicant have a real, not a simulated belief.

In *Erduran v Mina* [2002] 122 FCR 150, Justice Gray considered the issue where the applicant, a Turkish Kurd, was a conscientious objector to military service in Turkey. His decision in *Erduran* was subsequently reversed by the Full Court, but for reasons other than His Honour's analysis and construction of the issue in question.

In *VCAD v MIMIA* [2004] FCA 1005, Gray J's analysis *Erduran* of refusal to undergo military service was accepted by both sides as well as for the purposes of that case, by her Honour Justice Kenny.

It is convenient for the present purposes to provide her Honour Justice Kenny's reference in *VCAD* to Gray J's analysis and what he said in respect of his own decision:

In *Erduran* at 153-4 Gray J held that the Tribunal erred in failing to consider whether the applicant had a conscientious objection to military service, which was based on his religious or political convictions. His Honour observed that whilst there was "a line of authority establishing that the liability of a person to punishment for failing to fulfil obligations for military service does not give rise to persecution for a Convention reason", there was "also a line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well-founded fear of persecution for a Convention reason".

Turning to the consideration by the High Court of the case of Mr Israelian which is reported as *Minister for Immigration and Multicultural Affairs v Yusuf*; [2001] 206 CLR 323, Gray J said at 156:

Nothing in those passages suggested that the High Court was intending to overrule the second line of authority to which I have referred. The specific finding of the Tribunal in relation to Mr Israelian, that he was not opposed to all war and that his opposition to a particular war did not have an ethical, moral or political basis, made any discussion of that line of authority irrelevant ...

It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion.

Even the absence of the political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious

objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason.

It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs*; [2000] 105 FCR 548 at 563 per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.”

86. The Tribunal in RRT case 0904167 goes on to cite a line of authorities and concludes that “I have accepted that the applicant in the present case has expressed his fear of the compulsory military service on the basis of not only his objection to the possibility that, if he were to undergo that military service, he may have to fight against people of his own race as in the case considered by Gray J in VEAZ but importantly that he is a pacifist”.
87. In the case before this Tribunal the applicant has enunciated his objections to military service, and to wars and the taking of human life. He has given detailed evidence of the development of his views from [age deleted: s.431(2)] which views are grounded in the experiences of various family members, his own witnessing of violent incidences, and his observations of the futility of war on the world stage.
88. The Tribunal accepts that the views espoused by the applicant in this case are those of a pacifist, and that they can be construed either as a form of political opinion or alternatively that pacifists in Turkey objecting to compulsory military service are capable of constituting a particular social group within the meaning of the Convention.
89. Based on this reasoning, it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.
90. The Tribunal in this case is satisfied that the applicant is a member of a particular social group as identified in Applicant S, namely that he is a pacifist who opposes in principle all war or violence and this is the characteristic and attribute that is common to all pacifists. The Tribunal further finds that the characteristic or attribute common to all members of the group is not a shared fear of persecution and the Tribunal finds in this case that the possession of the characteristic ‘pacifism’ clearly distinguishes the group from society at large, because clearly every member of society is not a pacifist.
91. The Tribunal has had regard to country information cited above with reports of the punishment for evading or refusing to undergo military service. That information indicates that a person who is a conscientious objector and fails to register for military service is likely to face a term of imprisonment.
92. The evidence given by the applicant, and which is accepted by the Tribunal, indicates that his exemption from military service expired in mid 2010. The country information is consistent with the applicant’s claims that if he were to return to Turkey he would be required to undertake military service and upon refusing to do so on grounds of conscientious objection, he would at the very least face a term of imprisonment. The War Resisters International website makes reference to a conscientious objector, Halil Savda, who upon declaring his objection to military service was subsequently arrested,

detained, prosecuted in a military court and imprisoned and assaulted by military officials throughout his detention. The country information also indicates that Kurdish conscripts in the Turkish army are subjected to discriminatory treatment especially if they are suspected of having separatist sympathies.

93. The Tribunal finds that the essential and significant for the reason for the persecution that the applicant fears is based on his membership of a particular social group, namely, a pacifist required to undergo compulsory military service in Turkey which is a Convention reason. The Tribunal further finds that the applicant's objection to military service can also be construed as a political opinion, namely a political objection to all forms of violence and military conflict and a belief in negotiation as a form of resolving conflicts. The country information that has been cited in this decision indicates that evasion of military service in Turkey attracts prison sentences and other deprivations to liberty. On the basis of this country information, the Tribunal is satisfied that the persecution involved serious harm to the applicant and involves systematic and discriminatory conduct.
94. In considering whether the discriminatory treatment in the enforcement of the Turkish conscription law is appropriate and adapted to achieving some legitimate object of Turkey, the Tribunal notes the ruling in 2006 of the European Court of Human Rights that Turkey should amend its legislation to prevent the 'civil death' of conscientious objectors, and the country information cited above that indicates that the Turkish conscription laws conflict with international human rights law. The Tribunal finds that in these circumstances the discriminatory punishment for desertion or draft evasion can be regarded as persecution, for the reason that enforcement of the law may not be appropriate and adapted to achieving a legitimate national objective. Further, the country information indicates that the penalties incurred by conscientious objectors may amount to repeated prosecutions and convictions and in these circumstances the Tribunal finds that the harshness of the penalties are disproportionate to the offences committed.
95. The Tribunal finds that the serious harm capable of amounting to persecution that the applicant would face upon his return to Turkey would be inflicted by the State of Turkey, and thus State protection is not available to the applicant.
96. The Tribunal finds that the applicant has a well-founded fear of persecution for the purposes of the Convention if he were to return to Turkey now, and that this would extend into the reasonably foreseeable future.
97. The Tribunal finds that it would not be reasonable for an individual in the applicant's position to relocate elsewhere in Turkey the prospect of the applicant being able to internally relocate within Turkey is not available to him due to the circumstances of the case.
98. There is no evidence before the Tribunal that the applicant has the right to enter and reside in a third country for the purposes of s.36(3) of the Act.
99. Having made these findings in respect of the applicant's main claim, the Tribunal has not gone on to consider the remainder of the applicant's claims relating to discrimination in employment, and discrimination on the basis of his being Kurdish.

CONCLUSIONS

100. 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

101. 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.