

LSH  
Heard at: Field House

GS (Article 3-Persecution-  
Military Service) Turkey CG  
[2004] UKIAT 00041

On 19 February 2004

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

8 March 2004

**Before:**

**Mr G Warr (Chairman)  
Mr N H Goldstein**

**Between**

**APPELLANT**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

**Representation:**

For the appellant: Mr P Collins, of Counsel, instructed by  
Spence & Horne, Solicitors

For the respondent: Mr J McGirr, Home Office Presenting Officer

**DETERMINATION OF APPEAL**

1. The appellant, a citizen of Turkey, has been granted permission to appeal to the Tribunal against the determination of an Adjudicator (Mr P M S Mitchell) who dismissed his appeal on asylum and human rights grounds.
2. The grounds of appeal challenge the Adjudicator's findings that there was no Refugee Convention reason in the case in relation to which reliance is placed on the decision of the Tribunal in **Aydogdu [2002] UKIAT 06709**. It was submitted that this was a

case that did not appear to have been drawn to the Adjudicator's attention at the hearing or relied on before him.

3. The Vice President, Miss B Mensah, in granting permission rightly recognised that the Adjudicator could not be criticised in this regard not least in light of paragraph 14 of his determination that the appellant's claim on the basis of conscientious objection was not pursued at the hearing and at paragraph 23 of the determination where the Adjudicator further noted that Counsel had **conceded** there was no Refugee Convention reason for the appellant's wish not to perform military service.
4. Mr Collins was candid in explaining to us that it "was very difficult to see whether I was right to give that concession, but that is the decision I came to at the time of the hearing, that was view I took".
5. We have decided to dismiss this appeal.
6. It is apparent that Counsel's concession before the Adjudicator was advisedly and properly made.
7. It was further apparent upon a reading of the determination that for reasons amply supported by the evidence the Adjudicator concluded at paragraph 22:

"...The appellant is not suspected as a separatist by the authorities and that his claim of being detained is below the level of credibility for I cannot understand how he could escape so easily and than remain at large for so long in the Country after his 'escape'".

8. Significantly the Adjudicator noted at paragraph 23 of his determination as follows:

". It has been conceded that in the light of the House of Lords and Court of Appeal case of **Sepet [2003] UKHL 15** that there was no Convention reason for the appellant's concession. The appellant is not a conscientious objector. He has not said he is unwilling to kill others only that he does not wish to kill Kurds."

9. The Adjudicator therefore found that the appellant was nothing more than a military draft evader and continued at paragraph 24 of his determination in the following way:

"...The appellant's claim now is purely what would happen to him if he was returned to Turkey. The answer seems to be he would be charged with evasion of military service. He would be found guilty and receive a penalty of between four months and two years imprisonment. If the sentence was for more than six

months, part of the sentence may be served in a civilian prison. It has been suggested that the civilian prisons are harsh and that when he started his military service, the regime there, would also be harsh. He may also be subjected to harsher treatment because of his ethnicity and his failure to serve his country".

10. The Adjudicator went on to take account of the background material and concluded that there was no evidence that the appellant would be subjected to inhuman or degrading treatment if he served a period of imprisonment and that such treatment would not amount to persecution because of his ethnicity. The sentence would not be disproportionate and not in breach of the appellant's his rights under the ECHR.
11. At paragraph 26 of his determination the Adjudicator re-stated that the appellant was not at real risk of persecution, arrest or ill treatment upon his return because it was not credible even to the lower standard that he was thought to have any connection with separatist groups. Indeed there was no evidence that he was even known to the authorities. The appellant's family history did not support his claim. The Adjudicator concluded that the appellant would be "dealt with as a straightforward draft evader".
12. In the light of Counsel's concession and the findings of the Adjudicator, Counsel was constrained to argue before us that all draft evaders were at risk for a Refugee Convention reason and for this purpose he essentially relied on a decision of the learned former President Mr Justice Collins in **Faith Akcan [2002] UKIAT 01111**. Counsel informed us that upon his interpretation of that decision the Tribunal found that military drafter evaders would be subjected to treatment which crossed the threshold necessary to engage Article 3 of the ECHR.
13. With respect to Counsel he would appear to have overlooked the learned former President's conclusions at paragraph 12 in which he stated inter alia as follows:

"...This appellant has no particular reason to stir up concern in the authorities so as attract interrogation. Once his account is rejected, his credibility is not accepted, he is not someone in whom the authorities are likely to have any particular interest".
14. Mr Justice Collins in **Akcan** continued:

"In those circumstances we do not accept that there is a real risk that he would be the subject of treatment which contravenes **either of the Conventions** were he to return as a failed asylum seeker". (The typed emphasis is ours).

15. Mr Justice Collins further noted at paragraph 11, that Counsel further relied upon the concern that after return the appellant might well be interrogated and that because the Turkish police were accustomed to torture, he might well suffer torture. Mr Justice Collins continued:

“The problem with that is that, quite apart from his draft evasion, there is no reason why he should be interrogated. If he were to be, so would any other returning Turkish Kurd although there is some evidence to what has happened to some who had returned, the fact is that the only statistics available show, out of some thousands who are returned, some seventy at most have complained about particular ill-treatment”.
16. Counsel further sought to rely upon paragraph 6.108 of the CIPU Country Assessment dated October 2003 which in fact refers to a report sourced from the Netherlands Ministry of Foreign Affairs of July 2001 which states that if it is established that where a returnee has evaded registration/examination or failed to report as having deserted, he is subjected to questioning and transferred to the military authorities within 48 hours at the latest.
17. We however find it noteworthy that the paragraph continues as follows:

“...Persons who have evaded registration/examination or failed to report are regularly released after questioning and instructed to report to the military registration office within a few days. The direct superiors of the conscript concerned are not always aware that he has evaded military service. However, such acts are known to the most senior officers within the unit. In many cases, deserters are not returned to the unit from which they escape but are posted to another unit in the same army”.
18. It is relevant that a military deserter would normally be released and instructed to report to their military registration office. This appellant is of course not a deserter but as found by the Adjudicator a simple draft evader. Interestingly, Paragraph 6.109 of the same report echoes the findings of Mr Justice Collins at paragraph 11 of his decision in **Akcan**.
19. Counsel further referred us to paragraphs 5.97 and 5.98 of the CIPU report that sets out the penalties for evasion of Military service in peacetime for which there is a sliding scale of imprisonment. He submitted that the appellant fell into the category of a person who reported voluntarily after three months and would be sentenced to a period of four months to two years imprisonment. Counsel further submitted that the appellant might fall into the final category namely that of a person arrested

after three months who would be sentenced to six month to three years heavy imprisonment.

20. Paragraph 5.98 however goes on to note the Dutch Ministry of Foreign Affairs Report that military judges in general impose minimum sentences. The sentences for desertion are higher than those for evasion and registration/examination or enlistment. As a general rule, normal prison sentences of less than one year can be commuted into a fine. In an individual case the Judge determines in his judgment whether or not the prison sentence will be commuted into a fine. It is noteworthy that the report goes on to state:

“. Prison sentences for evasion and registration/examination or enlistment or for desertion are generally commuted into fines which must be paid after the end of military service”.

21. It is appropriate to note that the report continues:

“...Heavy prison sentences handed down for evasion lasting longer than three months without giving oneself up may not be commuted into fines.”

22. Significantly the qualifying word is “may” and of course it would be open to this appellant to voluntarily report upon return.

23. We further note that paragraph 5.92 of the CIPU records that on 17 July 2003 as part of reforms to increase the professionalism of the Armed Forces, the standard length of military service was reduced from 18 months to 15 months, a change which led to a reduction in the number of conscripts in the Turkish Armed Forces.

24. Mr Collins submissions further overlook paragraph 5.99 which records that the enforcement of final judgments in cases relating to evasion and military service (including desertion) takes place in military prisons if the sentence is six months or less and in normal prisons if the sentence is, more than six months. The report continues:

“...As a rule the sentence is first enforced and then the conscript completes (the remainder of) his military service”.

25. CIPU further notes at paragraph 5.100 the 1999 report by the German Federal Agency for the Recognition of Foreign Refugees in which it is stated:

“. In practice, in Turkish military jurisdiction it is apparent that the Courts readily aim for minimum penalties and impose fines (commuted low custodial sentences). The military courts despite the situation in the South East of Turkey obviously see no

reason for punishing non-entry to military service more severely than before” .

26. Apart from that which is self evident from this report, it is important to appreciate that the situation on the ground has significantly changed since 1997.
27. We find that Counsel’s submissions that military draft evaders per se, such as indeed this appellant, are at risk of persecution for a Refugee Convention reason in Turkey, is neither supported by the background material that we have examined nor indeed by the case law upon which Counsel has relied.
28. Accordingly, in our view the decision of the Adjudicator was correct and this appeal must be dismissed.

**N H Goldstein  
Vice President**