

**071195831 [2007] RRTA 67 (26 April 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071195831

**DIAC REFERENCE(S):** CLF2006/129659

**COUNTRY OF REFERENCE:** Turkey

**TRIBUNAL MEMBER:** Luke Hardy

**DATE DECISION SIGNED:** 26 April 2007

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

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).

The Applicant, who claims to be a citizen of Turkey, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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.

The Applicant applied to the Tribunal for review of the delegate's decision.

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.

The Applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages. The Applicant was represented in relation to the review by a registered migration agent who attended the Tribunal hearing. Another person attended the hearing to provide social support.

### **RELEVANT LAW**

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.

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 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of 'refugee'**

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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**

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The Applicant, an ethnic Kurd who claims to have given support to Kurdish organisations such as HADEP, which became DEHAP and more recently DTP, claims fear of persecution in Turkey for reasons of "race" and "political opinion."

An historical background to the Applicant's claims appears in the following article:

The possibility that thousands of ethnic Kurds may soon flee Turkey to the countries of Western Europe has focused renewed attention on the problems of that stateless people.

On Friday, Ankara warned the countries of the European Union against offering political asylum to Kurds who have fled Turkey during the last few weeks. The Turkish government suggested that such offers would only encourage more Kurds to flee.

Meanwhile, Italian President Oscar Luigi Scalfaro said that Rome would take a "positive attitude" on requests for political asylum, a remark that prompted Germany and Austria to reimpose border controls less than 30 days after lifting them as they and several other European countries had agreed to.

But despite this expanded attention, there is little reason to think that either the Kurds, the Turks or the international community are likely to take any steps to resolve what has been one of the most contentious issues in the Middle East.

One reason for this is rooted in the nature of the Kurdish problem itself. Another reflects in the utility it has for a variety of outside powers.

And still a third is part of the international community's general reluctance to recognize claims of national self-determination that would lead to border changes.

Most of the world's 30 plus million Kurds live in Turkey, Iraq, Iran, Syria, Armenia, and Azerbaijan. They were promised an independent state carved out of the territory of these countries by the Treaty of Sevres in 1920.

But three years later, the international community in the Treaty of Lausanne reneged on this promise. And the Kurds have been fighting for a state of their own ever since.

Most of their efforts have been in Turkey where more than half of the world's Kurds live. During the past 13 years, this movement has been led by the Kurdish Workers Party (PKK), which has been engaged in a bloody struggle with the Turkish army.

But because the Kurds live astride many national borders, problems in one country soon become problems in quite another. Last week, for example, the Turkish army reportedly again sent its forces into northern Iraq as part of an effort to control the PKK.

And because the United States is maintaining a no-fly zone in that region as part of its effort to put pressure on Iraqi dictator Saddam Hussein, Washington is very much involved as well, albeit on a different side. Ankara has repeatedly denounced the PKK as a terrorist group and suggested that it is supported by Syria and Iran as part of a campaign to destabilize Turkey. Prior to the collapse of the Soviet Union, the Turkish authorities suggested Moscow was behind the PKK as well.

Repeated discussion of such links reflects both Turkey's domestic political situation and its international position.

On the one hand, Turkey's unwillingness to meet Kurdish demands even half way and its inability to help develop the regions where most Kurds live guarantees the existence of an unhappy people interested in gaining support from abroad.

Indeed, last Wednesday, Turkish State Minister Salih Yidirim told the daily Milliyet that Ankara lacks the funds to invest in these regions even though the Turkish army has said that such investments are necessary to end the insurgency. And on the other hand, Turkey's key location -- a link between Europe and the Middle East, NATO's eastern anchor, and a possible route out for Caspian oil and gas -- ensures that many countries will have an interest in exploiting its internal difficulties.

Indeed, many analysts in the Caucasus and the West have even suggested that Russia and Iran might be interested in playing up the Kurdish problem in order to make the Turkish pipeline route less attractive to Western investors.

And such commentators are quite likely to see the timing of the current Kurdish upsurge as anything but accidental: only a few months before an international consortium is to make some significant decisions on the location of future pipelines in this region.

But suggestions that these problems -- Kurdish-Turkish violence and an end to Kurdish refugees toward Europe -- might be solved by an independent Kurdistan as the international community once promised seem certain to fall on deaf ears.

In addition to flying in the face of the conservatism about border changes inherent in any international system based on states, the creation of an independent Kurdish state faces other obstacles as well.

- First, it would require that land be taken from several countries, not just one.

- Second, it could also destabilize the region.
- And third, it might lead other submerged groups around the world to demand independent statehood.

As a result, the Kurds are likely to remain what they have been for more than half a century: a political football some will try to put in play while others are likely to countenance further efforts to keep it out of play.

("Analysis from Washington - Kurds Continue to be Kicked Around," Internet Electronic Download sourced from [www.asbarz.com/archives/1998/980105pg.htm](http://www.asbarz.com/archives/1998/980105pg.htm), 5 January 1998; located on DIAC CIS file at CX32995)

Information relevant to the situation of the ethnic Kurdish minority in Turkey is reported in the "Turkey" chapter of the US Department of State's Country Reports on Human Rights Practices for 2006 (Washington DC, 2007):

Turkey, with a population of approximately 72.6 million, is a constitutional republic with a multiparty parliamentary system and a president with limited powers elected by the single chamber parliament, the Turkish Grand National Assembly. In the 2002 parliamentary elections, considered generally free and fair, the Justice and Development Party (AKP) won the majority of seats and formed a one party government. Civilian authorities generally maintained effective control of the security forces...

The government limited freedom of expression through the use of constitutional restrictions and numerous laws, including articles of the Penal Code prohibiting insults to the government, the state, "Turkish identity," or the institution and symbols of the republic...

In February 2005 demonstrators in Mersin Province claimed police shot and killed Umit Gonultas during a protest in support of Abdullah Ocalan, imprisoned leader of the terrorist Kurdistan Workers Party (PKK); however, interior ministry inspectors determined that police did not shoot Gonultas, and no court case was opened against the police. Prosecutors opened a case against nine members of the now-dissolved pro-Kurdish Democratic People's Party (DEHAP) for their role in a statement protesting the shooting. The DEHAP officials were charged with being members of an illegal organization; their trial was ongoing at year's end...

In November 2005 the Diyarbakir prosecutor charged three suspects in connection with the July 2005 killing of Hikmet Fidan, a former DEHAP vice chairman. The indictment alleged that the defendants turned Fidan over to the PKK, whose leaders ordered Fidan's killing because he criticized the PKK. By midyear all lawyers representing the Fidan family withdrew from the case due to alleged pressure from the PKK. At year's end there were no new developments in the case...

The law prohibits arbitrary arrest and detention; however, the government at times did not observe these prohibitions...

During the year police routinely detained demonstrators ... Police detained several members of the former DEHAP on various occasions ... Police continued to detain and harass members of human rights organizations and monitors (see section 4)...

Despite the May 2005 European Court of Human Rights (ECHR) ruling that imprisoned PKK leader Abdullah Ocalan did not receive a fair trial during the proceedings that led to

his 1999 conviction, the Ankara Heavy Penal Court, on May 5, denied Ocalan's attorneys' retrial request. On appeal, the Istanbul Heavy Penal Court upheld the lower court's decision...

Trial proceedings in the case against six juveniles charged with attempting to burn the national flag during celebrations of Nevruz (the Kurdish New Year) in March 2005 continued at year's end.

In December 2005 an Ankara court began the trial of 12 officials of the pro-Kurdish party Hak-Par for speaking Kurdish at a party convention and distributing Kurdish-language invitations to the convention. During the trial the prosecutor asked the judge to assist in opening a case to close down Hak-Par. The judge did not rule on that request by year's end.

The appeal of the December 2005 conviction of DEHAP official Ahmet Dagtekin for illegal speech for using Kurdish language and symbolism during a 2004 campaign event was ongoing at year's end....

Various NGOs estimated that there were from one to three million IDPs [Internally Displaced Persons] in the country remaining from PKK conflict, which began in 1984 and continued at a high level through the 1990s. The government reported that 378,000 residents migrated from the southeast during the conflict, with many others departing before the fighting...

Political parties and candidates could freely declare their candidacy and stand for election. The high court of appeals chief prosecutor could only seek to close political parties for unconstitutional activities by bringing a case before the Constitutional Court.

DEHAP reconstituted itself as the DTP early in the year; nonetheless the Constitutional Court deliberations in the legal case seeking DEHAP's closure on charges of separatism were ongoing at year's end.

Court proceedings continued in the retrial of Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, former members of parliament whose April 2004 conviction on charges of being members of, or supporting, the PKK was overturned in 2004 by the high court of appeals.

During the year police raided dozens of DTP (formerly DEHAP) offices, particularly in the southeast, and detained hundreds of DTP officials and members. Jandarma and police regularly harassed DTP members through verbal threats, arbitrary detentions at rallies, and detention at checkpoints. Security forces also regularly harassed villagers they believed were sympathetic to DTP. Although security forces released most detainees within a short period, many faced trials, usually for supporting an illegal organization or inciting separatism.

On June 10, Aydin Budak, the DTP mayor of Cizre, was sentenced to one year and three months in prison, for partaking in "separatist propaganda." He stated in a speech that was aired on Roj TV that the isolation of Abdullah Ocalan was something "provocative." Cizre's appeal of the verdict was pending at year's end.

On July 27, the Erzurum Second Heavy Penal Court convicted and sentenced DTP Erzurum Provincial Chairman Bedri Firat to two years in prison for allegedly issuing propaganda supporting the PKK in a speech during Nevruz celebrations, by stating that Kurds were subject to genocide and for praising Abdullah Ocalan. Firat's appeal of the verdict was pending at year's end.

Former DEHAP Chairman and current DTP Vice Chairman Tuncer Bakirhan, who had been the subject of over 60 investigations, had 25 court cases concerning freedom of expression pending against him at year's end.

The trial continued in the case of 12 officials from the pro-Kurdish party Hak-Par for distributing Kurdish-language invitations to a March 2005 convention and speaking Kurdish during that convention. The defendants maintained that speaking in Kurdish is legal under the constitution and the European Convention on Human Rights...

The law provides a single nationality designation for all citizens and does not recognize ethnic groups as national, racial, or ethnic minorities. Citizens of Kurdish origin constituted a large ethnic and linguistic group. Millions of the country's citizens identified themselves as Kurds and spoke Kurdish. Kurds who publicly or politically asserted their Kurdish identity or publicly espoused using Kurdish in the public domain risked censure, harassment, or prosecution (see sections 2.a. and 2.b.).

The government maintained significant restrictions on the use of Kurdish and other ethnic minority languages in radio and television broadcasts and in publications...

A number of private Kurdish language courses closed during the year, citing a lack of students. Kurdish rights advocates said many Kurds could not afford to enroll [sic] in private classes. They also maintained that many potential applicants were intimidated because authorities required those enrolling in the courses to provide extensive documents, including police records that were not required for other courses. They maintained that the requirements intimidated prospective applicants, who feared police were keeping records on students taking the courses.

The Applicant claims that as a young Kurdish male living in Turkey, he faced constant harassment by police and soldiers in the form of being stopped in the street, being required to account for himself far in excess of demands on other Turkish nationals and being detained on a number of occasions for periods of several hours. He claimed he was intimidated during his national service and that he was detained for a period of days by the army after refusing orders to patrol a Kurdish area, on the grounds that he did not want to raise arms against Kurds.

The Applicant claimed he has a relative who is a member of the outlawed PKK who lives in another country. The Applicant claims he himself never associated with the PKK. He claims he informally supported HADEP and later DEHAP. His description of the kind of work he did involved participating in Newroz celebration planning. He emphasised at the hearing that although Newroz is a cultural event it is perceived by Kurds and Turks as an assertion of Kurdish political identity.

The Applicant cited events culminating in an assault as a turning point, after which he and his family decided it was not safe for him to remain any longer in Turkey. He claimed he was threatened and asked to spy on fellow Kurds on pain of the threats against him being carried out. He described this time as one in which he increasingly became a "psychological mess."

The Applicant's claims are laid out in submissions attached to his protection visa application to the Department. The Department's file also includes a professional psychological assessment arguing that he has a major depressive disorder consistent with past trauma and also post traumatic stress disorder and asserting that these conditions appear consistent with his claims to the reporting psychologist about the frequent and repeated harassment he claims

to have suffered as a young male adult Kurd in Turkey over several years. The psychologist's report includes referrals to competent agencies.

The Applicant presented at the hearing with a number of symptoms including a nervous cough and fidgeting (also referred to in the psychologist's report). He also presented with hyper-vigilance. A major disruption to the hearing occurred when, seeking to assist him through a moment of stress, the Applicant's adviser put a hand on his arm, whereupon he reacted as one would react in a moment of tremendous fright. None of this behaviour struck the Tribunal as being in any way disingenuous. The Tribunal did indicate to the Applicant and his adviser that whereas the Applicant's symptoms might be found to be attributable to some form of past trauma, the appropriate question for the Tribunal was whether or not the Applicant faces a real chance of Convention-related persecution in the reasonably foreseeable future.

At the hearing, the Tribunal raised a number of factual concerns with the Applicant. Firstly, his account of repression and harassment went back some years but he did not move to leave Turkey until recently. His reply, which was not altogether coherent, appeared to indicate that the year of his departure saw a convergence of a sense of urgency combined with the ability on his family's part to do something about it. He claimed that his family took charge of helping him leave Turkey.

The Tribunal expressed concern about the Applicant, in the claimed circumstances, being issued a passport by authorities in his home district, and also expressed concern about his apparent delay in using it to get out of Turkey until some months later when he came to Australia. In reply, the Applicant argued that it takes about three days to have a passport issued in Turkey and that when he applied he contacted the appropriate office after three days and was told his application had not been received. He claimed this was evidence of the authorities working against him. He claimed he then paid an intermediary to lodge a fresh application and that this was how he was issued a passport.

The Tribunal put to the Applicant that it seemed hard to conceive that the authorities would need to invent a story about an unreceived application if they simply did not want him to have a passport. The Tribunal put to him that the authorities did in any event issue a passport very soon after the lost application was discussed. The Tribunal put to the Applicant that his account of how he obtained his passport did not of itself seem to suggest that the authorities were minded to deny him freedom of movement. The Applicant disagreed.

The Applicant appeared to give inconsistent evidence here in that, in the course of claiming ignorance of precise details, he said that his family took control of getting him out of Turkey, whereas he also claimed that he personally contacted the passport office to check on the progress of his passport application.

The Tribunal asked the Applicant to address its concerns about his apparent delay in using the passport. In reply, he said he had to wait several months because his family took the initiative and helped him apply for a student visa in Australia and because one of the requirements was for funds in his bank account to have sat in that account for at least three months.

The Tribunal put to the Applicant that his family's choice of visa, sought for the purposes of getting him out of Turkey before he faced further persecution, did not appear consistent with the claimed urgency of his situation. The Tribunal put to the Applicant that with the money

evidently available, his family might have helped remove him much more quickly from Turkey to some other Convention signatory state. The Applicant said in response that he could not have left at the time because he could not afford it. The Tribunal then reminded him of the funds sitting in his account. The Applicant then changed his explanation for not leaving sooner, claiming that he chose the remotest country. The Tribunal then put to the Applicant that up to this point he had generally claimed that his family had made all the important decisions about his fate. In response he said he made those decisions *with* his family.

The Applicant told the Tribunal that he went into hiding in another town when the trouble arose that precipitated his application for a passport. The Tribunal put to the Applicant that the passport was issued in the town here he claimed at the hearing to have usually resided. The Applicant indicated that he nevertheless lived away from his home region and only returned briefly to pick up the passport.

The Applicant claimed that he never formally joined HADEP or DEHAP. However, he produced to the Tribunal a receipt for membership of DTP, which he claims to have paid recently, some time after evidently deciding to leave Turkey for the sake of his life. The Tribunal asked him to explain this arguably late and hitherto uncharacteristically *formal* commitment to Kurdish politics. Addressing the Tribunal's concerns, he said that going from informal support to formal membership was not so important in his view. He said he just felt like making a contribution to the party.

The Tribunal asked the Applicant to explain how he came to be in possession of the receipt. In reply, the Applicant said his relative sent it to him. The Applicant indicated that his relative lived in a different district from the one where he himself was residing at the time he joined DTP. The Tribunal thus asked him how his relative had been able to send him the receipt. The Applicant said he had not been able to carry it out of Turkey himself, implying he had been afraid of it being discovered, but he did not explain physically how his relative came into possession of it and passed it on. The Applicant did not ultimately give a clear and detailed, plausible explanation as to how the receipt was issued to him, passed out of his possession and then, so recently passed back into it again.

The Applicant said that joining DTP was not significant because it is a legal organisation in Turkey. He essentially claimed that his Kurdish ethnicity is enough to keep the authorities harassing him and accusing him unjustly of anti-state and anti-social activities.

The Tribunal considered information relevant to the question of "third country protection." In October 2005 UNHCR provided the following general advice on the processes and problems faced by persons originally from southern or central Iraq who might seek to relocate to the northern area of Iraq administered by the Kurdistan Regional Government (KRG):

In view of the ongoing power struggle, the Kurdish authorities aim at keeping the area 'Kurdish' and are in principle reluctant to accept any increase of non-Kurdish populations in their areas of influence. For these reasons, the KRG authorities are implementing strict controls on the presence of non-Kurdish persons in their areas. Depending on the applicant, especially his or her ethnic and political profile, he/she may well not be allowed to relocate to the three Northern Governorates for security or political reasons. While certain factors seem to lead clearly to denial of admission, (e.g. former Ba'ath Party membership or a criminal record), at times decisions seem to be taken in a discretionary manner and it is difficult to establish clear criteria to predict who will be admitted or rejected.

...In view of the ongoing power struggle, the Kurdish authorities aim at keeping the area 'Kurdish' and are in principle reluctant to accept any increase of non-Kurdish populations in their areas of influence. For these reasons, the KRG authorities are implementing strict controls on the presence of non-Kurdish persons in their areas. Depending on the applicant, especially his or her ethnic and political profile, he/she may well not be allowed to relocate to the three Northern Governorates for security or political reasons. While certain factors seem to lead clearly to denial of admission, (e.g. former Ba'ath Party membership or a criminal record), at times decisions seem to be taken in a discretionary manner and it is difficult to establish clear criteria to predict who will be admitted or rejected.

...The three Northern Governorates of Dohuk, Erbil and Sulaymaniyah are not easily accessible, as travel by road in Iraq is extremely dangerous. There are continuous reports of security incidents on the roads leading from major Iraqi cities to the North, including armed fighting, highway robbery and car-jacking, ambushes and hostage taking, landmines and UXOs.

20. In order to access the three Northern Governorates from another part of Iraq, all Iraqis, including Kurds, must go through checkpoints at the unofficial borders (the so-called 'green line') between Central Iraq and the KRG-administered area. Other areas along the unofficial border have been heavily mined in the past decade and are regularly patrolled by Kurdish security forces. Such conditions make it nearly impossible for persons to cross into Northern Iraq through the countryside without endangering themselves. Therefore, entry through the few major roads and their checkpoints is, practically, the only option available.

21. The Kurdish parties have introduced strict security measures at their checkpoints and will reject anybody who:

- does not originate from the respective Governorate and does not have a Kurdish sponsor to guarantee his/her entry and stay (Governorates of Erbil and Dohuk), or
- may be considered to pose a security risk (fear from terrorist attacks), or
- is found to have had links to the former government (the Ba'ath Party, the government, the security apparatus, etc.).

22. At times, the fact that a person originates from an area known to have been supportive to the former government (e.g. Fallujah or Baqouba) might be enough for that person to be rejected. In view of the high level of insecurity in Kirkuk and Mosul and the fear that the conflict might spill over to the North, persons not originating from the three Northern Governorates are generally met with suspicion. In particular, persons of Arab origin may find it difficult to have access to the region, as they might easily be considered as 'terrorists' or former Ba'athists.

23. Every person who does not originate from the respective Governorate and is allowed to enter will have to apply for a residence permit in order to legalize his/her stay.<sup>213</sup> Applicants need to submit a petition and the necessary documentation (ID card, citizenship certificate, etc.) to the Security Department (in Sulaymaniyah Governorate) or

to the Governorate Office/Department of Internal Affairs, which will then refer the request to the Security Department (Erbil and Dohuk Governorates). They will have to undergo a security screening in which their reasons for relocation will be investigated. A search will be conducted to see if they have a prior criminal record or were previously Ba'ath party members; the presence of either of these factors will lead to the denial of a residence permit and an investigation or prosecution.

24. In the Dohuk and Erbil Governorates, applicants for a residence permit need to either establish political links to the region or provide evidence they have fled a threat to their life; otherwise applications for a residence permit will be denied due to the serious lack of shelter in the Governorates. In all three Governorates, applicants must have a Kurdish sponsor residing in the respective Governorate in order to be granted a residence permit. The sponsor must have a good reputation and is required to know the applicant (for example as a family member or employer). At the recommendation of the Security Department, applicants are then granted residence permits for a sixmonth- long stay. Even if granted residency, new arrivals are closely watched by the security services. After expiration of the residence permit, it can be renewed for another period of six months. Non-Kurdish persons who do not have a sponsor and/or have a criminal or Ba'ath Party record are not allowed to take up residence in the three Northern Governorates. In such cases, the individuals are obliged to leave the Governorate.

25. It is important to note that political concerns to maintain the 'Kurdish character' of the Northern Governorates may well come into play and may lead to the rejection of Arabs attempting to relocate to the North, thereby making internal flight or subsequent relocation there unrealistic for such individuals.

26. Persons of Kurdish ethnicity would usually be admitted by the PUK authorities. The KDP authorities have informed UNHCR that persons of Kurdish origin will be allowed to relocate to the three Northern Governorates as long as UNHCR provides them with assistance, particularly shelter assistance.

...37. In short, the major factor to be considered is whether the claimant has family, community and/or political links in the proposed area of relocation that could permit his or her economic survival and integration. If a person has previously resided in the three Northern Governorates for a considerable length of time without protection problems, he or she would, in general, be deemed integrated into the local community and could be expected to relocate to that area.

38. An individual who has neither family links nor links to the community in the area of proposed internal relocation and whose relocation would take place without prior acceptance by the local tribal/clan leaders might be exposed to a serious risk of rejection by the community, which could result in physical insecurity and/or undue hardship.

... Given the current ethno-political uncertainties in the three Northern Governorates, it is highly probable that any Iraqi, including any Kurd, who tried to relocate to an area from where he/she did not originate (and who could therefore not benefit from an informal support network) would face difficulties in obtaining access to both the labour market and accommodation (UN High Commissioner for Refugees, 'Guidelines Relating to the Eligibility of Iraqi Asylum-Seekers', October 2005, p.51, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=4354e3594>).

The foregoing information suggests that Kurds who are not originally from Iraq's north are not, in practice, guaranteed entry to, and security within, the KRG. It would appear likely from this information that the same would be true for Kurds entering from other borders, such as the border with Turkey.

The Applicant has provided letters from competent Australia-based Kurdish cultural organizations attesting to his Kurdish ethnicity and to his support for, and participation in, Kurdish cultural and other activities.

## **FINDINGS AND REASONS**

The Tribunal accepts on the evidence before it that the Applicant is a Turkish national of Kurdish ethnicity. The Tribunal accepts that the authorities and the population at large in Turkey would easily recognise the Applicant as a Kurd.

The Tribunal accepts that ethnic Kurds in Turkey face *discrimination* for reasons of "race," and that some ethnic Kurds, depending on their personal circumstances have suffered and could face persecution for reasons of being Kurds or for reasons of identifying or being identified with the assertion of Kurdish identity.

The Tribunal has some difficulty with the Applicant's account of having been ordered by his army superiors to police other Kurds. However, the Tribunal's concerns appear to be more about the wisdom of the order and do not, despite other credibility concerns in this case, lead it to the view that the Applicant's account of the orders is itself incredible. It is conceivable that the order was some kind of test, setting the Applicant up, as it were, to fail one way or the other. It is easier to consider the facts in this way if one accepts, as the Tribunal does, that the Applicant was generally bullied during his time in the army.

The Tribunal finds that the mistreatment the Applicant claims received during his national service was at least in part, on the information provided, a legitimate response to insubordination, however distasteful or repugnant one might regard the orders given to him at the time. However, as briefly indicated above, the Tribunal also accepts that even prior to the Applicant's detention for resisting such orders, he was bullied in the army for reasons of his ethnicity. The Tribunal is concerned that the Applicant's momentary insubordination may have given him a potential political profile in the eyes of the authorities that a lifetime of peaceful nondescript behaviour might be incapable of erasing.

The Tribunal accepts the Applicant's evidence that he has been frequently bullied and harassed by authorities for reasons of his ethnicity and due to imputations regarding his potential as a Kurd to be involved in activities opposed to the state, notwithstanding his evident innocence of such activities.

The Tribunal accepts that the Applicant has never been associated with any illegal Kurdish organisations such as the PKK. To the extent that any claimed affiliation with HADEP, DEHAP and DTP could be viewed as affiliations with groups viewed by the state as hostile to the state, the Tribunal accepts that all these organisations were initially recognised by the state as legitimate organisations, and that they have suffered from significant political pressure in a country whose leadership prefers, and seeks to effect, if only for the sake of stability, the appearance of an homogenous, Turkish population.

The Tribunal accepts the position put to it in expert evidence that the Applicant's psychological condition is consistent with long-term harassment back in Turkey. For want of evidence to the contrary, the Tribunal accepts that the Applicant's psychological condition has been caused or at least significantly exacerbated by mistreatment relating to his ethnicity and imputed political opinion.

The Tribunal finds that it cannot rely on the Applicant's claims about his predicament with Turkish authorities reaching a critical or acute stage. Implausibility and inconsistency undermine his evidence to the effect that he and/or his family engineered his removal from Turkey to avoid being killed over such matters as a refusal to spy for officials who approached him. Whilst not accepting that the Applicant's predicament at that time was acute, the Tribunal is nevertheless prepared to accept that it was chronic enough for the Applicant and his family to engineer his departure in the way that they did.

The Tribunal has some difficulties with the fact that the Applicant came to Australia as a student, as to do so, by his evidence, involved a considerable waiting time in Turkey where his troubles surrounded him. However, the Tribunal is prepared to accept that he and his family acted on the best information available to them, and that they might not have known of or, on what they themselves might have known or believed, placed much faith in Australia's protection processes.

The Tribunal gives no weight to the evidence of the Applicant having joined the DTP. Aside from the Tribunal having concerns as to how and when the evidence of this action appeared, the Applicant himself said that his action in joining the DTP, a legal organisation in Turkey, is insignificant.

The Tribunal accepts that as a Kurdish male, with a past record of insubordination in the army, the Applicant could go on being suspected unjustly of political agitation in Turkey and continue to face such harassment over time as to amount cumulatively to persecution. The Tribunal is concerned that the Applicant's psychological condition, which appears capable of responding to inexpensive but long term treatment in Australia and other places away from the source of his fears, would impede any attempt on his part to avoid the appearance of "guilt" in the eyes of curious or inquisitive authorities in Turkey, and would consequently place him at greater risk of persecution.

Although the Tribunal has, as shown, some concerns as to the Applicant's overall reliability as a witness in this matter, it considers it appropriate to make allowances in this specific case for the Applicant's evident anxiety levels.

The Tribunal is satisfied that the Applicant faces a real chance of persecution in Turkey for reasons of "race" and imputed "political opinion." Accordingly the Tribunal is satisfied that the Applicant's fear of being persecuted for Convention-related reasons in Turkey is well founded.

The Tribunal is not satisfied that the Applicant is relevantly entitled to protection by any other state. The Tribunal has considered the fact that the Applicant's flight to Australia probably involved transfers at airports in other countries, possibly elsewhere in the EU. The Tribunal considers it unreasonable to expect this particular Applicant, with his particular psychological and emotional pressures, to have varied the itinerary set for him, with the help of his family, and presented himself for protection at transit points along the way to Australia. Supposing he transited at Athens airport, there is no evidence before the Tribunal to suggest

that as a Turkish national he would have avoided refoulement to Turkey from Greece. The Tribunal finds that the Applicant is not excluded by s36(3) of the Act.

## **CONCLUSIONS**

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) for a protection visa.

## **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.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. PRCFSA</p>
--