

DATE OF DECISION: 11 September 2008

WRITER OF DECISION: R P G Haines QC

REPRESENTATIVE/COUNSEL FOR THE APPELLANT: P Thoman

ABSTRACTED BY: J Donald

NOTE:

The appellant's first appeal was dismissed by the Authority, differently constituted, in Refugee Appeal No 73965 (10 February 2005).

FACTS:

The appellant is an Alevi Kurd from the south-east of Turkey. She was forced to marry at age 17. Her husband travelled to NZ in 1997. The appellant and her two sons followed in 2000. The appellant's first refugee claim was based on her husband's alleged involvement in HADEP. She claimed she had been accused of supporting HADEP and the PKK and detained and questioned on four occasions. The appellant was found not credible when giving evidence in her husband's appeal. Her own appeal was dismissed on credibility grounds. Her sons were subsequently recognised as refugees on grounds relating to military conscription.

The appellant's second refugee claim was based on her fear that should she return to Turkey she would be killed by her husband, his family or her own family in an "honour killing". She was regularly subjected to violence, abusive language and psychological humiliation by her husband. His mental state deteriorated. In late 2006 the appellant woke to find her husband trying to strangle her and planning to take his own life. The appellant escaped, and during the confrontation which followed, told the husband their marriage was over and threw her wedding ring at him.

The following day, the husband's family in Turkey phoned and spoke to the appellant aware that she had terminated the marriage. Her father-in-law told the appellant that the husband's family were required to "cleanse their dignity" and that he would personally ensure the appellant was killed. A number of similar phone calls followed. The appellant also received a phone call from her husband in which he said he would kill her if she returned to Turkey. Once the appellant's family found out that she had left her husband, her father and brother also threatened to kill her.

In summary, the appellant's claim to refugee status is based on evidence that having terminated her relationship with an increasingly unstable, jealous and violent husband she is now at risk in Turkey of being killed not only by her husband and his family, but also by her own family in order to maintain their "honour".

LEGAL REASONING:

Country Information - Honour Killings in Turkey

Honour killings, honour crimes and honour suicides are prevalent in Turkey and in particular in the south-eastern Kurdish provinces. Violence against women is widely tolerated by community leaders and at the highest levels of the judiciary and government.

The Risk Issue "Well-Founded Fear"

The "well-founded" standard is any entirely objective one (see Refugee Appeal No 72668/01 [2002] NZAR 649 at [111] to [154]). The Authority found that there is little doubt that should the appellant return to the household of her parents, or that of her husband and parents-in-law, she will be killed or suffer serious harm. The same applies should she take up residence in Istanbul where one of her brothers lives.

The Harm Issue "Being Persecuted"

For many years the Authority has interpreted the "being persecuted" element of the refugee definition as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. Core norms of international human rights law are relied on to define the forms

of serious harm which are within the scope of "being persecuted" (see Refugee Appeal No 74665/03 [2005] NZAR 60; [2005] INLR 68 at [36] - [125]). "Being persecuted" is a construct of two separate but essential elements, namely the risk of serious harm and a failure of state protection.

The appellant's case is based on her risk of being killed or seriously harmed by non-state agents (her husband, his family, her father and her brother). This would be a violation of her right to life and her right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Even assuming that the infliction of such harm would not be condoned or tolerated by the Turkish State, the country information shows that the State either refuses or is unable to offer adequate protection to women in the predicament faced by the appellant.

The Reasons for the Risk of Harm - The Convention Grounds

The "for reasons of" clause of the refugee definition relates not to the word "persecuted" but to the phrase "being persecuted". The employment of the passive voice ("being persecuted") establishes that the causal connection required is between a Convention ground and the predicament of the refugee claimant. The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant's predicament rather than on the mind set of the agent of persecution. In this context the Authority has held that it is sufficient for the refugee claimant to establish that the Convention ground is a contributing cause to the risk of "being persecuted" (see Refugee Appeal No 72635/01 [2003] INLR 629 at [162] - [179]). It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted.

Two grounds are relevant to the appellant's case: political opinion and particular social group. They are not mutually exclusive and in fact overlap.

Political Opinion

Because the Convention protects both men and women, it must be given a gender-inclusive and gender-sensitive interpretation. The relevance of power structures to gender-based claims is often overlooked. Gender-based claims are often conceived of as "particular social group" cases because of a failure to recognise the gendered nature of political activities in countries of origin.

Honour is an important value in Turkish society and it enforces rigid control by men over women and their sexuality. It is about policing community norms and codes of behaviour, collective decisions and acts of punishment. The observance of honour is a societal concern and reflects the gendered inequality of power in eastern and south-eastern Turkey.

The political opinion ground must be oriented to reflect the reality of women's experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin. In the particular context, a woman's actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality. Such a situation is properly characterised as "political".

In orienting the "political opinion" ground to reflect the reality of women's experiences, care must be taken to avoid inadvertent favouring of the articulate claimant who is able to identify and explain the political nature of her opinion and activities. It may become the responsibility of the decision-maker to identify the unarticulated premise for the predicament of the claimant's exposure to the risk of serious harm.

The appellant's severance of her relationship with her husband was an unambiguous act of self-emancipation from an abusive relationship and the structures of power and inequality which had sanctioned that relationship from the moment the appellant had been forced into it. Her unilateral action in ending the marriage was seen by the respective families as a direct challenge to her role and duties and to their authority to control her behaviour for the benefit of their collective

communal identity and status. As such, it engaged the obligation under custom or law to police the collective code of honour by removing from the collectivity the stain of dishonour. This required the appellant's death. The appellant's challenge to inequality and the structures of power which support it was plainly "political". She is at risk of being persecuted "for reasons of" political opinion.

Particular Social Group

While it is unnecessary to examine the social group category, the claim succeeds on that ground too. The group in question is "women in Turkey".

The Internal Protection Alternative

States party to the Refugee Convention, including NZ, have used the internal protection alternative (IPA) (in other jurisdictions referred to as an internal flight alternative or internal relocation alternative) to withhold recognition of refugee status where risk of being persecuted exists in part, but not all, of the country of origin. The law in NZ has been settled since *Butler v A-G* [1999] NZAR 205.

The Textual Foundation for the Internal Protection Alternative

In the UK, Australia and the European Union, the textual foundation for the IPA is found in the "well-founded" element of the refugee definition. In NZ and Canada, it is found in the words "protection of that country", in other words, the analysis is one of "protection", not one of "risk". The Authority declined to follow *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 and *AH (Sudan) v Secretary of State for the Home Department* [2007] 3 WLR 832. It also declined to follow *SZATV v Minister for Immigration and Citizenship* (2007) 237 ALR 634 and *SZFDV v Minister for Immigration and Citizenship* (2007) 237 ALR 660 in which the "protection" element of the refugee definition was interpreted as "diplomatic protection".

Formulating the Test for Withholding Recognition of Refugee Status

The Authority emphasised that withholding of recognition of refugee status can only occur where:

- (a) the proposed internal protection alternative is accessible to the individual. This requires that access is practical, safe and legal;
- (b) in the proposed site of internal protection there is no risk of being persecuted for a Convention reason;
- (c) in the proposed site of internal protection there is no risk of being exposed to other forms of serious harm or of refoulement; and finally
- (d) in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State.

Application of the Internal Protection Alternative to the Facts

It is assumed without deciding that the appellant will have practical, legal and safe freedom of movement within Turkey. The Authority concludes that it is not possible to identify a site of internal protection where the appellant will not be at risk of being persecuted for a Convention reason. It is not possible to say that there is a place of protection in Turkey where there will be no new risk of the appellant being persecuted or of being exposed to other forms of serious harm. The appellant will face multiple layers of discrimination and there is a real risk that she may be driven to seek the assistance of her family despite the risk. The appellant will not enjoy a range of rights recognised by the Refugee Convention, including protection of physical security and access to the necessities of life, particularly food, housing and work.

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