

0908130 [2009] RRTA 1133 (23 December 2009)

DECISION RECORD

RRT CASE NUMBER: 0908130

DIAC REFERENCE(S): CLF2009/104012 OSF2006/001384

COUNTRY OF REFERENCE: Turkey

TRIBUNAL MEMBER: Mary Cameron

DATE: 23 December 2009

PLACE OF DECISION: Melbourne

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 [in] October 2006 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] August 2009. The delegate decided to refuse to grant the visa [in] October 2009 and notified the applicant of the decision and her 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] October 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

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

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

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. In support of her protection visa application the applicant submitted a statement of claims according to which she came to Australia subsequent to her arranged marriage to an Australian man. After her arrival in Australia she was subjected to terrible violence at the hands of her husband. According to her statement, should she return to Turkey the applicant's family will punish her and possibly kill her for bringing dishonour on the family. The family will kill her to retain their honour. According to the applicant's statement she will not be afforded police protection in Turkey, and that should she seek the help of the police, they will return her to her family.
21. The applicant's claims are expanded upon in a letter from a counsellor at the Asylum Seeker Resource Centre (ASRC). According to the letter the applicant was married in Turkey in March 2006 to a Turkish Australian resident. Her parents accepted her husband who, at the time, presented as a good and affectionate man. He had been previously married and had two daughters from that marriage. His children and former wife live in Melbourne.
22. According to the counsellor's letter the applicant is from a Kurdish family which is very traditional in its views about marriage. The applicant came to Australia on a spouse visa, but her husband withdrew his sponsorship. The applicant became 'unlawful' but was unaware of the fact until she sought legal advice. According to the counsellor's letter the applicant's husband was violent towards her soon after their marriage for three years. Her family knows little of this, but in any event would expect the applicant to stay with her husband regardless of the circumstances.
23. According to the counsellor's letter the applicant has stated that although members of her husband's family have witnessed the violence against her, nobody helped her. She was embarrassed. Her husband opened a take-away food shop where the applicant cooked as well as keeping house. She received no money and his family criticised her. According to the counsellor's letter the applicant's husband usually abused her when he was drunk. He punched her, kicked her and held her by the hair while he berated her. On one occasion the neighbours called the police but because there was no interpreter present, the police left without the applicant obtaining appropriate help. Her husband had sexual liaisons with other women. He forced the applicant to have sex with him, and when he did not want to have sex she was made to sleep on the bedroom floor. On the occasion that the applicant left her husband she had been beaten more severely than usual, and her injuries have been documented by a doctor. She is still suffering hearing loss as a result of the beating. It was on this occasion that the applicant telephoned a friend with whom she went to stay, and the friend and the friend's mother took her away.

24. The counsellor's letter sets out the applicant's psychological profile of sadness, fear and loss of confidence.
25. Accompanying the counsellor's letter is a medical report from [doctor's name deleted: s431(2)] in respect to the applicant, who consulted him on three occasions in mid-2009. According to the medical report the applicant gave a history of a serious and prolonged physical assault [in] May 2009 by her husband. This was against a background of regular physical abuse by him for several years. The applicant had gone back to Turkey on two occasions to escape the abuse but was forced to return to her husband. According to the medical report the applicant presented with tinnitus and hearing loss in her right ear, bruising to her face, back and legs and neck pain Her injuries were consistent with the reported assault.
26. Also accompanying the applicant's statement is a letter from her representative which restates key aspects of the applicant's claims; a copy of her marriage certificate; a copy of her passport; a substantial volume of country information in respect to honour killings in Turkey; a copy of an Interim Intervention Order issued by the Magistrate's Court of Victoria against the applicant's husband; and a Statutory Declaration of [Person A], with whom the applicant is living, stating that she herself had lived in Turkey until she was seventeen and is familiar with Turkish Kurdish traditions and Turkish Kurdish ideas of honour. According to her statement [Person A]'s mother had arranged for her to become engaged before she was sixteen to a man about whom she knew nothing. Subsequently she met a man with whom she fell in love, and they ran away together. Because her partner was an Australia citizen they were able to leave Turkey, although they remained in hiding until their departure.
27. According to [Person A]'s statement her mother and brothers could not leave their home because of the dishonour brought upon the family, and when they went out again people on the streets would refer to the matter. On one occasion her mother was attacked by a group of men including [Person A]'s former fiancée, who attacked her with a length of chain because she had not 'cleaned up their honour'. [Person A]'s brother became involved in the attack and stabbed his sister's former fiancée. The man died and her brother went to jail for eight years. According to her statement [Person A]'s family went through hell because of this experience, and even though it happened thirty years ago she still feels guilty about it.
28. According to [Person A]'s statement, her husband has protected her from her family, and had he not done so, she would have been killed. They now have four children and the protection of Australia. According to her statement [Person A]'s aim is to help the applicant because she knows, from her own experience, what will happen to the applicant if she returns to Turkey. She submits that the applicant's family is one of the worst in the state, and girls from such families are subjected to honour killings and the police do not get involved because these matters are seen as 'family issues'. Those who commit these murders often do not get sent to jail. According to [Person A]'s submission, should the applicant return to Turkey she will be killed. [Person A] has family in Turkey and the applicant's family have spoken about what will happen to the applicant if she returns there and [Person A] is very scared for her. The applicant's ex-husband has returned to Turkey and told her family that she will be forced to go back there because he has ensured she cannot get a visa to remain in Australia. Her family has made it clear that they will punish the applicant to reclaim the family honour.
29. Also accompanying the applicant's statement is the statement of [Person B], the daughter of [Person A] which attests to the physical, mental and sexual abuse of the applicant by her

husband; the applicant's husband's return to Turkey; and the likelihood that the applicant will be killed by her family if she returns to Turkey.

30. The delegate refused the visa application by a decision dated [in] October 2009.
31. The applicant appeared before the Tribunal [in] December 2009 to give evidence and present arguments. The Tribunal also received oral evidence from [Person A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Turkish and English languages.
32. The applicant confirmed that she was born on [date deleted: s431(2)] in Adana, Turkey, and is of Kurdish ethnicity and Muslim religion.
33. The Tribunal asked the applicant about the composition of her family and she stated that her parents are alive and live in Adana as do her two younger brothers, who are twenty seven and twenty eight years of age respectively. She stated that both of her brothers are married. The applicant told the Tribunal that she had always lived in Adana with her mother and father until she was married and came to Australia.
34. The Tribunal asked the applicant how many years of schooling she has had. The applicant stated that she completed primary school and went to high school for a couple of years before her parents stopped her. The Tribunal asked the applicant when she had stopped attending school. The applicant stated that she could not remember exactly but thought that she had finished school when she was about twelve. The Tribunal asked her whether she had worked after she left school and the applicant stated that she had done housework and later on had looked after her brother's children.
35. The Tribunal asked the applicant why her parents had not arranged for her marriage at an earlier age. The applicant told the Tribunal that one of her brothers had married at fifteen and the other a year later, but the applicant herself had strongly resisted an early marriage. She was engaged by arrangement to someone that she did not want to marry. Her resistance to this arrangement had led to her being severely punished by her family. She was regularly assaulted by both her parents and was under continuous pressure from her brothers. The applicant stated that she didn't want to get married, and that she wanted to study but she couldn't. The family then arranged for the applicant to marry the man who became her husband. The Tribunal asked the applicant to describe her introduction to her husband and their subsequent marriage. The applicant stated that the marriage was arranged by people other than her. She stated that her husband came to Turkey from Australia; her parents agreed to the marriage and the applicant married him.
36. The Tribunal asked the applicant when she had married and she stated that the marriage took place in Ankara in March 2006. The Tribunal asked the applicant whether she had agreed to the marriage. The applicant stated that the marriage was, in a sense, a punishment of the applicant for not marrying her cousin as had been arranged. She stated that her husband was a divorced man who already had two children. The applicant stated that it wasn't really a question of whether she agreed to it or not. She just married him. The Tribunal noted that there was evidence concerned with her spouse visa application indicating that the applicant had been happily married at least at the beginning of her marriage. The applicant stated that it had been happy for a few months.
37. The Tribunal asked the applicant what had led to the breakdown of her marriage. The applicant stated that her husband started drinking heavily and committed adultery. She stated

that she accepted the adultery but that her husband was increasingly violent and abusive towards her. The Tribunal asked the applicant why her husband did not leave the applicant if he wanted to be with someone else. The applicant stated that she didn't know, but that he used to drink an awful lot and the applicant wasn't allowed to talk to anyone about what was happening. The Tribunal asked the applicant how she spent her days. The applicant stated that she worked in her husband's take away food shop, and spent the rest of her time at home

38. The Tribunal asked the applicant if she was always in the company of her husband and the applicant stated that she was. The Tribunal asked the applicant how her husband could be involved with another woman if the applicant was always in his company. The applicant stated that her husband would sometimes disappear from the shop for two or three hours, and she was too scared to ask any questions. The Tribunal asked her how she could manage at the shop on her own if she did not speak English. The applicant stated that she could manage, and she would write down what the customers had to pay. The applicant became distressed and told the Tribunal that it was difficult for her to remember everything. The Tribunal explained that it was necessary for the Tribunal to ask questions, and reassured her that she was able to take what time she needed, and could request a break in the hearing at any time she needed one. The applicant told the Tribunal that she has been experiencing panic attacks, and told the Tribunal about the kind of verbal abuse to which she was subjected by her husband.
39. The Tribunal asked the applicant whether she had returned to Turkey during the course of her marriage. The applicant stated that this was correct. She stated that her husband had sent her to Turkey and later on had called for her to come back. The Tribunal asked her why her husband had sent her to Turkey in March 2007. The applicant stated that he sent the applicant back because they were having problems and also because the applicant's father was very sick. The applicant's husband also told her that he wanted peace and time to think. The applicant told the Tribunal that the second time she returned to Turkey she stayed there for six months, and that her husband had said that he would join her there but never did. She stated that her family did not suspect that her husband was abusive to her as she never spoke to them about it. She stated that the day she got back to Australia from Turkey her husband bashed her up. The applicant stated that her husband had sold their house without telling her and then they went to live in a rental property. She stated it was here that, seven months ago, he beat her badly and put her out on the street. The applicant stated that her friend picked her up from the street in her pyjamas. She stated that her husband then went to Turkey.
40. The Tribunal asked the applicant what she fears will happen to her if she returns to Turkey. The applicant stated that she will be assaulted and possibly killed by her family if she returns to Turkey. She stated that if she is not killed she will be sent away and forced to be a mistress to a married person on payment of a dowry. The applicant stated that she would rather die in Australia than return to Turkey.
41. The Tribunal queried whether the applicant could relocate to another part of Turkey away from the influence of her family in Adana. The applicant stated that this was impossible. She stated that she has no education and has never worked and could not make a living. She stated that, in any event her family would come looking for her and she would be in fear for the rest of her life. The applicant told the Tribunal that one of her brothers was in prison for ten years because he was involved in the killing of one of his cousins for reasons of honour, and because she ran away from home.

42. The Tribunal heard evidence from the witness [Person A]. The witness told the Tribunal that she knew the applicant when the applicant was a child in Turkey. She stated that she met the applicant again when the applicant came to Australia.
43. The Tribunal asked the witness whether she thought that the applicant had suffered domestic violence perpetrated by her husband. The witness stated that this was so, and that she had seen the injuries inflicted on the applicant by her husband. She stated that on the occasion that she collected the applicant from the street outside her residence the applicant was in torn pyjamas, and was cut and bruised, and her face and head were swollen
44. The Tribunal asked the witness whether the applicant's husband has tried to approach her since that time. The witness stated that her husband has not looked for her but that the applicant's brother had rung to find out what had happened.
45. The Tribunal asked the witness why the applicant is fearful of returning to Turkey. The witness stated that she knew why the applicant was scared because a similar thing had happened to the witness when she was young and had failed to marry as arranged by the family, and the situation will be the same for the applicant. The Tribunal told the witness that it was aware of country information indicating that women are subjected to harm in some parts of Turkey for failure to comply with traditional customs and practice, but indicated that the Tribunal needed to be satisfied that the applicant as an individual has a well founded fear of persecution should she return to Turkey. The witness stated that she knows the applicant's family, and knows what they are capable of doing. She stated that the applicant's brother has already killed a person and has been in jail for ten years.
46. The Tribunal asked the witness what she thought the applicant's family would do should the applicant return to Turkey. The witness stated that "It's a pattern" and that when a woman refused or left a marriage she would be punished in the name of the family honour. She stated that the applicant was punished for refusing to marry her cousin by being married to the man who became her husband. She stated that the next time they will subject her to physical violence and may sell her off to some man without even a marriage, because as a woman she will just be property. The witness stated that the applicant's husband had abused her in many ways and even made her wash his feet. The witness stated that she got angry with applicant for allowing it, but knew that it was because she herself is different because she has lived in Australia for so long. The witness told the Tribunal that the applicant's family is a very poor family with two sons and their wives living in the house with the applicant's parents. The witness stated that she has seen how the family lives and that they will not accommodate the applicant if she goes back there.
47. The witness told the Tribunal that the applicant faces physical violence and possible death if she goes back to Turkey. The Tribunal made reference to independent country information before the Tribunal which indicates that the Turkish authorities have made significant progress in protecting the rights of women and in prosecuting violence against women. The Tribunal queried why the applicant could not seek police protection in Turkey. The witness stated that maybe in the big cities progress had been made, but in regional areas customs and traditions are more compelling. The witness stated that even in Australia these traditional practices prevail, as was demonstrated by the impunity with which the applicant's husband mistreated her.
48. The witness told the Tribunal that when the applicant's husband had sent her back to Turkey, the village people had speculated and gossiped about her, and the applicant's mother did not

let her set foot outdoors but made her do domestic work. The witness stated that she knows that the applicant's husband has been back to Turkey and will have told the applicant's family that she has run away from him. The witness stated that the applicant suffered at her husband's hand for three years and waited for the situation to improve but she was now in a terrible situation. The witness told the Tribunal that the applicant cannot be safe from harm in Turkey.

Country Information

Honour Killings

49. A 2004 report by the Norwegian Country of Origin Information Centre states that honour killings occur throughout Turkey, however they "appear to be more frequent in the Black-Sea Region and in Kurdish inhabited areas in the Southeast, where tribal customs play an important role in everyday life". The report states that "the number of unreported or undetected cases was significantly higher than the official numbers. Honour killings are often hushed up and some women who have apparently committed suicide have in fact been killed or even forced to kill themselves by their family." (UK Home Office 2007, *Country of Origin Report – Turkey*, December, Section 22.38)
50. In 2005 *BBC News* reported that honour killing continued to enjoy popular support in Turkey. Reporting the findings of a study in the predominantly Kurdish city of Diyarbakir by an unnamed Turkish university, *BBC News* states that "when asked the appropriate punishment for a woman who has committed adultery, 37% replied she should be killed. Twenty-five percent said that she deserved divorce, and 21% that her nose or ears should be cut off." ('Honor' crime defiance in Turkey' 2005, *BBC News*, 19 October)
51. In a 2005 paper entitled 'In the name of fathers: Honour killings and some examples from South-eastern Turkey', Aysan Sev'er from the University of Toronto examines a 2002 case in which a man and his brothers stabbed his ex-wife to death claiming that he had dishonored him, despite the fact that he had remarried and had children (Sev'er, A. 2005, 'In the name of fathers: Honour killings and some examples from South-eastern Turkey', University of Toronto Department of Social Science, p.6)
52. In a 2007 incident, a woman left her husband in eastern Turkey and "moved in with her divorced daughter". According to *Hurriyet, Zaman*, both the woman and her daughter were killed by the son/brother in the name of honour; "the 19 year old son brutally killed his mother and his sister by beating them on the head with a bat, with his three young nephews watching. Upon his arrest the 19 year old said that he had killed the women to clean the honor of his family." ('Honor killings in Turkey claimed lives of mother, daughter' 2007, Middle East Media Research Institute, source: *Hurriyet, Zaman*, 10 August –)
53. The *Honour Killings Report 2007*, produced by the Human Rights Presidency (İNSAN HAKLARI BAŞKANLIĞI), a division of the Department of the Turkish Prime Ministry, states that "honor killing... still happens in our country and is serious communal problem. Every year, over 200 people are killed in this scope. According to reports of Boards in 81 provinces, there is no serious change between 2006 and 2007. Number of victims in 2003 is 159, in 2006 233, in 2007 231. In last 5 years, total amount of these victims became over 1100." (Human Rights Presidency 2007, *Honour Killings Report*, 25 June)

54. According to a March 2009 article in *The Independent*, honour killings in Turkey have reached “record levels”, with “more than 200 a year”. The article also examines so-called ‘honour suicides’, where individuals are forced to kill themselves in the name of restoring family honour. The author, Ramita Navai, argues that the rise in honour suicides is due to the 2005 reforms to the penal code in Turkey that introduced mandatory life sentences for perpetrators of honour killings. The article also argues that “most honour killings happen in the Kurdish region”:

So-called “honour killings” in Turkey have reached record levels. According to government figures, there are more than 200 a year – half of all the murders committed in the country. Now, in a sinister twist, comes the emergence of “honour suicides” The growing phenomenon has been linked to reforms to Turkey’s penal code in 2005. That introduced mandatory life sentences for honour killers, whereas in the past, killers could receive a reduced sentence claiming provocation. Soon after the law was passed, the numbers of female suicides started to rocket.

55. Most honour killings happen in the Kurdish region, a barren land ravaged by years of war and oppression. Rural communities here are ruled under a strict feudal, patriarchal system. But as Kurds have fled the fighting between separatist rebels and Turkey’s government, the crime is spreading across the country into its cities and towns. According to a recent government report, there is now one honour killing a week in Istanbul.

“Families who move here are suddenly faced with modern, secular Turkey,” said Vildan Yirmibesoglu, the head of Istanbul’s department of human rights. “This clash of cultures is making the situation worse as the pressure on women to behave conservatively is become more acute. And of course there are more temptations.” (Navai, R. 2009, ‘Women told: ‘You have dishonoured your family, please kill yourself’’, *The Independent*, 27 March <http://www.independent.co.uk/news/world/europe/women-told-you-have-dishonoured-your-family-please-kill-yourself-1655373.html> – Accessed 2 December 2009)

56. The US Department of State’s *Country Reports on Human Rights Practices 2008 – Turkey* reports that there were “1000 honor killings between 2003 and July 2008, mainly in conservative Kurdish families in the Southeast or among migrants from the southeast living in large cities.” The report states that ‘disobedience’ was “determined to be the most frequent justification of honour killing.” (US Department of State 2009, *Country Reports on Human Rights Practices 2008 – Turkey*, 25 February)
57. A 2007 UN Population Fund report entitled *The Dynamics of Honor Killings in Turkey* states that “[i]f a married woman wants to divorce her husband or leaves her husband this is also considered ‘dishonorable conduct’ which deserves punishment.” The report refers to four examples of women in Turkey being killed following separation or divorce from their husbands. The report also examines examples of women who have been killed following a divorce after they have begun a relationship with a new partner. The report states that “The case of a divorced woman is not very different from a married woman (if not worse) because her body and sexuality are under very strict control by her former husband as well as her family and relatives”:

If a married woman wants to divorce her husband or leaves her husband this is also considered ‘dishonorable conduct’ which deserves punishment. At the same time respondents in Şanlıurfa told us that there were cases in which men divorce their first wives when they want to have a second wife and the second wife insists on official marriage. In those cases sometimes the men send their first wives to a lawyer to open a divorce case (Şanlıurfa,

female, unknown age, judge). There were also cases in which the women's family and relatives forced the woman to divorce if they decided that the husband's conduct was improper or that he couldn't fulfill his responsibilities to the family. However, if a woman decides on her own to divorce, then this is considered a devious step.

Four cases under this category resulted in murder. In one case, a woman who returned to her family when her husband was at military service was killed by her husband's brother. In another case, a woman who left home and went to another city to get a divorce from her husband was killed by her 19 year old son. In a third case a woman given as 'berdel' to a deaf and dumb man was killed by him after getting a divorce.

...The case of a divorced woman is not very different from a married woman (if not worse) because her body and sexuality are under very strict control by her former husband as well as her family and relatives. Since she is divorced, she has done something unacceptable and she is looked upon as somebody with the potential to go against the rules and take devious steps. (Kardam, F. 2005, *The Dynamics of Honor Killings in Turkey*, United Nations Population Fund, January, pp.32-33)

58. A November 2009 article in the *Hurriyet Daily News* echoes many of the observations made in the 2007 United Nations Population Fund report. The author, Sevim Songün, states that divorce is tied to the concept of *namus* in Turkey, however while it is deemed shameful to a family when a female member gets divorced, it is not necessarily the case for a male member of the family. Furthermore, "[a] divorced woman who escapes murder at the hands of the family of her former husband does not always escape a deadly end. She may be murdered by her own family, because a divorced woman in the east generally goes back to her parents, meaning increased expenses at home or a further division of the inheritance with the family's male members":

Though a family is ashamed when one of its female members gets divorced, that is not necessarily so when a male member is divorced. Divorce is very much related to *namus* in Turkey, and this may led to killings.

Some scholars underscore, however, that honor killings should not be reduced to culture or tradition, as economic reasons may sometimes lay behind them. Divorce is not just about "moral values," or *namus*, usually translated as honor; it also has economic consequences, especially for the families of the women. A divorced woman who escapes murder at the hands of the family of her former husband does not always escape a deadly end. She may be murdered by her own family, because a divorced woman in the east generally goes back to her parents, meaning increased expenses at home or a further division of the inheritance with the family's male members.

..."*Namus*" killings are thought to be particular to eastern Turkey, since we are accustomed to hearing about such cases happening there. Although not called honor killings, murders of women in the west should be condemned as strongly as honor killings. (Songün, S. 2009, 'Killing in the name of 'honor'', *Hurriyet Daily News*, 20 November <http://www.hurriyetdailynews.com/n.php?n=column-2009-11-20> – Accessed 7 December 2009)

State Protection

59. A 2003 report by the World Organisation Against Torture entitled *Violence against women in Turkey – A report to the Committee against Torture*, states that there are "a few government-run women's shelters in the urban centers", however "these shelters are insufficient and

ineffective in guaranteeing the right to life of threatened women". The report adds that "Family members who threaten the lives of their female relatives are neither arrested nor prosecuted for making such threats":

The Turkish government has taken some steps to address the needs of women in danger of being victimized by these practices. There are a few government-run women's shelters in the urban centers, however, and according to the Special Rapporteur on violence against women, these shelters are insufficient and ineffective in guaranteeing the right to life of threatened women. According to information received by OMCT, in most cases when a potential victim tries to take refuge with the police, instead of sending her to a women's shelter, or taking other protective measures, they reportedly hand her over to the family, requiring only that the family guarantee not to harm the girl or woman. Family members who threaten the lives of their female relatives are neither arrested nor prosecuted for making such threats. (World Organisation Against Torture 2003, *Violence against women in Turkey – A report to the Committee against Torture*, p.353)

60. A 2004 report by Amnesty International entitled *Turkey: Women confronting family violence* is highly critical of the level of protection provided by police to women at risk of honour killings. The report cites the example of 'Zeynep', who was apparently stabbed "at least 52 times" in front of her son and "at least 10 police officers". According to Amnesty International, the police officers were suspended, however "returned to duty after the Ministry of the Interior determined that they had no case to answer". The report also argues that "Violence against women is widely tolerated and even endorsed by community leaders and at the highest levels of the government and judiciary":

"Zeynep's partner stabbed her at least 52 times, in front of her seven-year-old son. He was not the only witness. At least 10 police officers watched the assault, which was photographed and videotaped by journalists. "They could have intervened, but apparently they did not have permission. What sort of permission is this! I find them guilty. When I saw the police had arrived I was pleased, obviously they will save me. But they did not do anything," "Zeynep" said. After her partner was charged with attempted murder, his relatives threatened to kill "Zeynep" and her lawyers. The 10 police officers were initially suspended but returned to duty after the Ministry of the Interior determined that they had no case to answer.

...Violence against women is widely tolerated and even endorsed by community leaders and at the highest levels of the government and judiciary. The authorities rarely carry out thorough investigations into women's complaints about violent attacks or murders or apparent suicides of women. Courts still reduce the sentences of rapists if they promise to marry their victim, despite recent moves to end the practice.

...A 16-year-old boy and his 23-year-old brother killed their recently divorced sister in Elazig in October 2002, because she had been "coming home late". In their statement to police, they said, "We have cleansed our honour. We are not sorry."

...Research from Australia, Canada and the USA demonstrates that a significant number of women are killed at or around the time of separation from a violent partner. Women leaving a violent situation must take into consideration a number of factors not the least of which are economic. They must consider whether they can provide for themselves and their children, and whether or not violence away from the perpetrator will be worse than violence at the hands of the perpetrator. Women can be very skilled at making these judgments, despite the lack of support from state and society. For this and other reasons, leaving a violent partner is

usually a process, not a one-off act. (Amnesty International 2004, *Turkey: Women confronting family violence*, 2 June)

61. In its 2007 annual report on Turkey, Amnesty International states that a 2004 “Law on Municipalities” stipulates that towns with more than 50,000 people “need” shelters for “women victims of domestic violence”. It is not clear from the report whether the law can be interpreted as mandating the building of shelters, nor who is to pay for the construction and running costs of the shelters:

There was little progress in implementing the provision in the 2004 Law on Municipalities, which stipulated the need for shelters for women victims of domestic violence in towns with a population of more than 50,000. Women’s organizations called for additional funds from the government to implement the law. A circular from the Prime Minister in July, outlining measures to combat violence against women and children, and to prevent so-called “honour killings”, represented a step towards acknowledging an entrenched and endemic problem. In December, Parliament passed revisions to the Law on the Protection of the Family, widening its scope. (Amnesty International 2007, *Amnesty International Report 2007 – Turkey*, 25 May, p.4)

62. In June 2009 the European Court of Human Rights awarded the applicant in the case *Opuz v. Turkey* “30,000 euros (EUR) in respect of non-pecuniary pecuniary damage and EUR 6,500 for costs and expenses” following the court’s decision that the state of Turkey failed to adequately protect the applicant and her mother from harm by the applicant’s husband. According to *Deutsche Welle World*, “[t]he 37-year-old applicant had repeatedly appealed for protection by the authorities, warning that both her life and that of her mother were in danger. But despite injuries from several earlier incidents of abuse, Turkish authorities failed to react.” (World Organisation Against Torture 2003, *Violence against women in Turkey – A report to the Committee against Torture*, p.353)
63. According to the European Commission’s *Turkey 2006 Progress Report*, “issues related to gender equality and women’s rights receive growing public attention in Turkey. The legal framework is broadly satisfactory. However, in practice women’s rights are not always protected, in particular in the poorest areas of the country. ‘Honour crimes’ need to be investigated more systematically and where appropriate followed-up with prosecution and convictions.” (Amnesty International 2007, *Amnesty International Report 2007 – Turkey*, 25 May, p.4)

FINDINGS AND REASONS

64. The applicant travelled to Australia on a valid Turkish passport and states that she is a national of Turkey. She has provided evidence of her background in Turkey. The Tribunal finds that she is a national of Turkey and therefore for the purposes of the Convention the Tribunal has assessed her claims against Turkey as her country of nationality.
65. The applicant claims to be a Kurd. On the basis of the evidence before it including the applicant’s identity documents, her oral evidence at hearing, and the evidence of the witness [Person A], the Tribunal is satisfied that the applicant is of Kurdish background.
66. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings on the claims the applicant has made. This may involve an assessment of

the applicant's credibility. In assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. That said, the Tribunal is not required to accept uncritically any or all allegations made by the applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Moreover the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J: *Selvaduri v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547. If the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make a finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true.

67. It has been submitted explicitly or impliedly, that the applicant is a member of particular social groups comprised of Turkish Kurdish women or married Turkish Kurdish women
68. The leading recent Australian authority on the particular social group question is *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 ("*Applicant S*"). In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out at paragraph [36] the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:

Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group" As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.

69. In the same case Justice McHugh summarized the issue similarly;

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.

70. In *MIMA v Khawar* (2002) 210 CLR 1, the High Court recognized that women in a given society could constitute a particular social group for the purposes of the Convention. In that case Gleeson CJ found that it was open to the Tribunal to determine that "women in Pakistan" constituted a particular social group.
71. Gender based groups have been considered in a number of cases, particularly in the context of claims of domestic violence. Australian courts have accepted that "single women in India", "married women in Tanzania", "young Somali women", and "women or divorced women who had converted to Christianity in Nepal" may constitute particular social groups for the purposes of the Convention. In contrast, in *Lek v MILGEA (No.2)* Wilcox J held that "young single women" in China did not constitute a particular social group. In *Jayawardene v MIMA*, Goldberg J doubted that a group such as "single women" or "single women without

protection in Sri Lanka” constituted a particular social group for the purposes of the Convention. The Court in *MIMA v Kobayashi & Anor* held that the evidence before the Tribunal provided no basis for finding that “women in Japan” or “unwed mothers in Japan” were persecuted groups. In *Applicant S469 of 2002 v MIMIA* Bennett J found that it was open on the evidence before the Tribunal to find that females in Thailand did not constitute a particular social group for the purposes of the Convention.

72. It is apparent from the independent country information before the Tribunal that Turkish Kurdish women in Turkey, and particularly married Turkish Kurdish women are differentially treated on the basis of their gender. The Tribunal accepts that Turkish Kurdish women and married Turkish Kurdish women constitute particular social groups within the meaning of the Convention and that the applicant is a member of these groups.
73. The applicant has submitted that her actions in fleeing her husband and seeking to separate from the marriage will cause her to be the subject of honour based violence or honour killing at the hands of her family if she were to return to Turkey.
74. The applicant has provided detailed oral evidence to the Tribunal which is consistent with her written submissions in support of the review application. Her claims are supported by the submissions of her long standing friends [Person A] and [Person B], and by the oral evidence of [Person A] at the Tribunal hearing. [Person A] presented as an informed, forthright and credible witness and the Tribunal gives significant weight to her evidence.
75. The applicant has provided detailed evidence that she has been subject to prolonged and severe physical, sexual and psychological violence by her estranged husband. That evidence is supported by the evidence of [Person B and Person A], and by medical reports. The applicant has given evidence that she left her husband after a particularly severe beating in May 2009, and has not seen him since then. The applicant’s husband is the subject of an intervention order in respect to the applicant. The Tribunal accepts the applicant’s evidence in respect to this matter.
76. Both the applicant and the witness at hearing provided consistent evidence in respect to the traditions and practices of conservative Turkish Kurdish families, such as the applicant’s family, in southern Turkey. The applicant’s evidence in respect to these claims was detailed and consistent with her written submissions and with the evidence of the witness. The applicant and the witness at hearing provided evidence that the applicant has suffered physical abuse and confinement by her family for resisting their arrangements for her marriage. The applicant and the witness at hearing both volunteered evidence that the applicant’s brother has spend a period of time in jail for participating in an honour killing of a family member. The witness gave evidence of her own experiences consequent to defying her families wishes regarding her marriage, her personal knowledge of the applicant’s family, and their past violence and abuse of the applicant.
77. Given the Tribunal’s findings above, it accepts the applicant has been subjected to serious harm amounting to persecution in the past from her immediate family in Turkey and from her husband. The Tribunal finds on the evidence before it that the violence that the applicant fears should she return to Turkey arises for the reason that she has defied her family by separating from her husband, in an act that may considered ‘dishonourable conduct’ in the context of Turkish Kurdish tradition. The Tribunal finds that the harm the applicant fears, principally from her family members, and possibly her husband’s family members, is not for a Convention reason (being her membership of a particular social group of Turkish Kurdish

women or married Turkish Kurdish women) but rather because of her actions in separating from her abusive husband.

78. However, women suffering violence in such situations as the applicant may nevertheless, depending on the circumstances, come within the scope of the Convention: *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1. A majority of the High Court in *Khawar* held that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. The applicant has contended, and it appears from the evidence, that she will not be afforded protection by the Turkish authorities from harm at the hands of her family for the essential and significant reason of her membership of particular social groups including ‘Turkish Kurdish women’ and ‘married Turkish Kurdish women’.
79. Importantly, s.91R(1)(c) of the Act refers to systematic and discriminatory conduct. Mere inaction will not suffice. However discriminatory inaction will not amount to mere inaction. This is also the position under the Convention as interpreted by Australian Courts
80. Sources indicate that separation and divorce initiated by women in Turkey is considered to bring dishonour and shame to families. There are several documented cases where a divorce initiated by a woman in Turkey has led to the woman being killed by her relatives, and country information suggests that separated or divorced women can be at risk of harm from their own families.
81. On the basis of the country information available to it, the Tribunal is satisfied that honour killings remain prevalent in Turkey, particularly in Kurdish communities, including Adana, where the applicant’s family resides. Independent country information before the Tribunal indicates that human rights groups remain critical of the level of state protection provided to woman at risk of being harmed in the name of honour, and that police inaction, judicial sympathy with the perpetrator, and the paucity of shelters are all cited as indicative of inadequate state protection.
82. As noted in the country information set out above, a 2003 report by the World Organisation Against Torture found that “family members who threaten the lives of their female relatives are neither arrested nor prosecuted for making such threats” and in most cases when a potential victim of violence tries to take refuge with the police, instead of sending her to a women’s shelter, or taking other protective measures, they reportedly ‘hand her over to the family’ requiring only an undertaking that she not be harmed. Similarly an Amnesty International Report of 2004 was highly critical of the protection provided by Turkish police to woman at risk of honour killing, and finding that violence against women is widely tolerated and even endorsed by community leaders and at the highest levels of the government and judiciary.
83. While country information indicates that the Turkish government has taken some steps to improve state protection for women who are the victims of violence, it also indicates that these steps have not been sufficient to protect women from violence, especially in poorer areas of the country, and in Kurdish inhabited regions. On the evidence before it the Tribunal finds that the applicant will not be afforded protection by the Turkish authorities. The Tribunal further finds that this lack of state protection amounts to a selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. The Tribunal finds accordingly, and with reference to *Khawar*, that the applicant comes within the scope of the Convention.

84. The Tribunal has considered whether it would be reasonable for the applicant to relocate to another part of Turkey where she would be free from the harm that she fears. The applicant has provided evidence that she believes that her family members will have the motivation and the ability to find her if she returns to Turkey, and were she to try to locate within that country she would be condemned to a lifetime of fear that she would be found. In addition the applicant has given evidence of her limited education, her lack of any work experience or ability to access an income, her lack of any family support and her general vulnerability. On a consideration of this evidence and with reference to the country information set out above, the Tribunal considers that it would not be reasonable to expect the applicant to be able to relocate within Turkey.
85. The Tribunal is satisfied that the applicant would face a real chance of being persecuted if she returned to Turkey now or in the reasonably foreseeable future. The applicant's fear of persecution is well founded and for a Convention reason, and she is therefore a refugee within the meaning of the Convention.

CONCLUSIONS

86. 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

87. 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</i> 1958.</p>
--

<p>Sealing Officers ID: RCHADW</p>
