

# FEDERAL COURT OF AUSTRALIA

**MIGRATION** – application for review of decision of the Refugee Review Tribunal refusing the grant of a protection visa – applicants citizens of Turkish Republic of Northern Cyprus – whether Tribunal misconceived what is comprehended by the notion of persecution – whether Tribunal’s conclusions were reasonably open to it.

*Migration Act 1958 (Cth) s 476(1)(e)*

*Prahastono v MIMA (1997) 77 FCR 260*

KEMAL KADIOGLU & ORS v MINISTER FOR IMMIGRATION AND  
MULTICULTURAL AFFAIRS

## NG 728 of 1998

## MOORE J

**SYDNEY**

**15 DECEMBER 1998**

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 728 of 1998

BETWEEN: KEMAL KADIOGLU

Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AFFAIRS

|                |                  |
|----------------|------------------|
| Respondent     |                  |
| JUDGE:         | MOORE J          |
| DATE OF ORDER: | 15 DECember 1998 |
| WHERE MADE:    | SYDNEY           |
|                |                  |

THE COURT ORDERS THAT:

1. The application is dismissed
2. The applicants pay the respondent's costs

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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| IN THE FEDERAL COURT OF AUSTRALIA |                |
| NEW SOUTH WALES DISTRICT REGISTRY | NG 728 of 1998 |

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| BETWEEN: | KEMAL KADIOGLU                                     |
|          | Applicant  |
| AND:     | MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS |
|          | Respondent   |

|        |                  |
|--------|------------------|
| JUDGE: | MOORE J          |
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| PLACE: | SYDNEY           |

### REASONS FOR JUDGMENT

This is an application for judicial review by Kemal Kadiroglu ("the applicant husband"), his wife Muzaffer Kadiroglu ("the applicant wife") and his two children of a decision of the Refugee Review Tribunal ("the Tribunal") of 29 June 1998. The Tribunal affirmed the decision of the delegate for the Minister for Immigration and Multicultural Affairs ("the Minister") refusing to grant protection visas to the applicants. The criterion for the grant of such a visa is that the applicant is a person to whom Australia has protection obligations under the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention").

It is convenient, for present purposes, to refer principally to the circumstances of the applicant husband rather than the applicant wife. Before entering Australia they both resided with their children in the north of Cyprus. The applicant husband arrived in Australia on 8 April 1995. The applicant wife and their daughter arrived in Australia on 23 May 1995. On 7 July 1995 they lodged a combined application for protection visas with the Department of Immigration and Multicultural Affairs as did their son on 7 August 1995 (having arrived in Australia on 25 July 1995). On 3 February 1997 a delegate of the Minister refused to grant the applications. Both the delegate and the Tribunal considered the circumstances of the applicants and the question of whether they were refugees. Part 1A(2) of the Convention contains for present purposes the definition of refugee. It provides:

(1) ... the term "refugee" shall apply to any person who;

...

(2) Owing to a 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 Tribunal's decision

After setting out the background in a summary form and discussing the legislative provisions, the Convention and the applicable law, the Tribunal considered the claims of the applicants. To place those claims in context it is necessary to refer to one matter discussed by the Tribunal later in its decision. The Tribunal referred to a United States Department of State Country Report on Human Rights Practices for 1997 which commenced with a discussion of the recent political history of Cyprus. The report said:

Prior to 1974, Cyprus experienced a long period of intercommunal strife between its Greek and Turkish Cypriot communities. The island has been divided since the Turkish military intervention of 1974, following a coup d'etat directed from Greece. Since 1974 the southern part of the country has been under the control of the Government of the Republic of Cyprus. The northern part is ruled by a Turkish Cypriot administration. In 1983 that administration proclaimed itself the "Turkish Republic of Northern Cyprus" ("TRNC"), which is recognized only by Turkey. The two parts are separated by a buffer zone patrolled by the United Nations Force in Cyprus ("UNFICYP"). A substantial number of Turkish troops remains on the island.

The applicant husband was born in southern Cyprus in 1947 and is of Turkish background. The applicant wife, whom he married in 1971, is of mixed Turkish and Greek parentage. After the 1974 war he and his family were forced to move to the northern part of Cyprus. He claimed that, since that time, he had been subjected to harassment and discrimination from the Turkish community in northern Cyprus because his wife is half Greek. He contended that he had been excluded by the Turkish from voting in two elections. He also contended he had been denied free farming land by the Turkish administration in the north and in 1983 he was removed from his small plot of land because his wife was part Greek. He claimed that his family was harassed as a result of his marriage and suffered discrimination. His youngest brother had been hit by a car in 1992 and hospitalized. Shortly after release from hospital this brother was involved in another hit and run car accident and killed. The applicant husband believed that his brother had been killed by the son of a police officer. He also said that his other brother had received death threats and had died in hospital after being involved in a suspicious car accident in 1993. The applicant husband provided illustrations of the discriminatory treatment he and his family suffered which included being prevented from working in stable jobs as a bricklayer because of pressure from the Turkish community on local employers. He said his children were often harassed at school for being Greek, especially on the anniversary of the 1974 war. He gave a particular example of this harassment in 1994 when his daughter was victimized by her teacher.

The Tribunal then summarized the submissions made by the applicants' legal adviser which included a further contention that the applicant husband had suffered persecution because of his active role as a member of the CTP (*Cumhuriyetçi Turk*

*Partisi* or Republican Turkish Party) which is the major opposition party in the Turkish Republic of Northern Cyprus ("TRNC"). The CTP seeks formal union of the island and the expulsion of the Turkish army and Turkish nationals who have settled on the island since the 1974 invasion. The Tribunal noted the submission in relation to the deaths of the applicant husband's two brothers that although the evidence was inconclusive, it was sufficient to raise a high probability that the applicant husband's family had been earmarked for harassment by TRNC authorities because of the brothers' active membership of the CTP, the family's close connections with the Greek Cypriot community and the specific connection to that community through the applicant husband's marriage.

After discussing the circumstances in which the applicant husband had come to Australia and lodged his application for a protection visa the Tribunal noted:

At hearing the applicant said he feared he would be killed if he returned to Cyprus, and that this would be for reasons of his marriage to his wife and his political opinion as a member of the CTP. He described his persecutors as mainly nationalist Turks who had come to live in TRNC since 1974, with the encouragement of the Turkish government. He feared he would be killed by these people, as he believed his brothers had been.

The Tribunal discussed in greater detail the contentions concerning the death of the applicant husband's brothers and the circumstances in which his land had been appropriated. It also discussed in more detail what was said by the applicant husband in relation to his political views and the consequences of holding them. The Tribunal then referred to evidence given by the applicant husband's brother-in-law about circumstances in Cyprus and the US State Department Report mentioned earlier. It also referred to other material concerning the political circumstances in Cyprus.

The Tribunal then set out the findings it made on the material before it and its reasons for affirming the delegate's decision. The first issue the Tribunal addressed was the status of the applicant husband. It concluded that the applicant husband was a citizen of Cyprus and his status as a refugee should be considered in the context of the possibility of him returning to Cyprus. The Tribunal accepted that the authorities in the TRNC may have perceived the applicant wife as ethnically Greek and the children may have been perceived in the same way. In relation to harassment and discrimination generally the Tribunal said:

I accept the applicant and his family members may have been subjected to the types of discrimination and harassment claimed by the applicant, resulting in his having difficulties in employment and his children experiencing problems at school. I note the independent evidence from US Department of State Country Reports (see page 14 above) suggests that Greek Cypriots in northern Cyprus experience some discrimination. However I **do not accept** that the instances of general discrimination

and harassment claimed by the applicant indicate a course of systematic conduct directed at the applicant and his family members, or **that the mistreatment to which the applicant was subjected was so serious as to amount to persecution in the Convention sense.**

(Emphasis added)

The Tribunal went on to deal with the applicant's contention that he had been denied a right to vote though the Tribunal's finding on this issue is not challenged in these proceedings. The Tribunal then dealt with the dispossession of the applicant husband from his land. It said:

In his written statement to the Department the applicant claimed he was denied free farming land by the Turkish administration and in 1983 was removed from his small plot of land because his wife was Greek. His evidence at hearing essentially confirmed this claim. I accept the applicant may have had the land he was allocated in the TRNC appropriated in the mid 1980's. **However I do not accept that as a result the applicant suffered harm so serious that the word persecution is apt.**

(Emphasis added)

The Tribunal then considered the applicant husband's former membership of the CTP and the possible consequences of that membership were he to return to Cyprus. The Tribunal then considered the phone calls that the applicant husband had received and said:

The Tribunal notes the applicant spoke at length during the Departmental interview about threatening telephone calls he had received since about 1985, which he claimed intensified after the deaths of his brothers and concerned him so much he decided to leave Cyprus. The applicant did not specifically refer to these threats at hearing, but I accept they remain his claims. However I am not satisfied on the evidence before me that such threats, to the extent they have occurred, are in themselves serious mistreatment amounting to persecution. **In addition I am not satisfied that such threats, stretching across more than ten years, provide an objective basis for the applicant's fear that he would be subjected to serious mistreatment and persecution if he returned to Cyprus.** His alleged persecutors have not harmed him physically during these years, and his explanation at hearing (see page 11) as to how he had managed to avoid such mistreatment did not satisfy the Tribunal's concerns.

(Emphasis added)

The Tribunal then addressed the deaths of the two brothers and concluded that the applicant husband's evidence regarding the alleged murder of his two brothers because of their membership of the CTP and their political opinion, as well as their connections to him and the Greek community, was little more than an assertion. The Tribunal said:

I am not satisfied on the evidence before me that the applicant's two brothers were killed for a Convention related reason, and therefore I do not accept their deaths provide an objective basis for the applicant's claimed fears that he faces death or other serious mistreatment for a Convention reason if he returns to Cyprus.

After considering further matters of detail which are unnecessary to refer to, the Tribunal concluded:

I have not accepted all the applicant's claims. **However I have accepted he has been subjected to some level of discrimination, harassment, other mistreatment and threats. I have found that none of these, on its own, was sufficiently serious to be persecution in the Convention sense.** The decision in *MILGEA v Che Guang Xiang* (unreported, Full Federal Court, Jenkinson, Spender & Lee JJ, 12 August 1994) makes it clear that in assessing whether the applicant has a well-founded fear of persecution for a Convention reason I must consider the totality of the applicant's evidence. That is, I must consider the cumulative effect of the whole of the applicant's evidence against the test of what the "real", as distinct from fanciful, "chances" would bring (per Drummond J in *Li Shi Ping & Anor v MILGEA* (1994) 35 ALD 557, at 581).

I have considered all the applicant's evidence as I am required to do, but I am not satisfied the applicant faces a real chance of being subjected to treatment amounting to persecution if he returns to Cyprus for reasons of his political opinion or for any other Convention reason. His claims to fear persecution for a Convention reason are not well-founded.

#### Issues and conclusions

As the submissions were developed in the appeal it became apparent that the issue raised by the applicants was narrow in compass. Counsel for the applicants contended that the Tribunal had incorrectly applied the law to the facts as found: see s 476(1)(e). This was said to arise because of repeated references by the Tribunal to various matters not being sufficiently serious to be comprehended by the notion of persecution. Those matters were the general harassment of the applicant husband and his family evidenced by his difficulty in securing employment and the difficulties experienced by his children at school, the threatening phone calls received in the

context of his brothers' deaths, and the taking of and denial of the right to farm his land. All but the last mentioned matter could clearly, in appropriate circumstances, constitute harassment or deprivation of the type which is comprehended by the notion of persecution. It is not entirely clear whether the expropriation or confiscation of property is a matter founding a claim of refugee status under the Convention: see Hathaway, *The Law of Refugee Status*, 1991, Butterworths at 111, 119-120 and 166 though I will, for present purposes, assume that it is.

Counsel for the applicants referred to passages from the judgments of Mason CJ and Dawson J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 in support of the submission that the Tribunal had misconceived what is comprehended by the notion of persecution. In my opinion, the treatment of the Tribunal of the circumstances of the applicant husband and his family on the facts it found does not manifest such a misapprehension. It is to be noted that the Tribunal found it unnecessary to address the reason why the applicant husband and his family were subjected to some discrimination, harassment, other mistreatment and threats. However the challenge to the Tribunal's decision was limited to its consideration of whether prior persecution had been demonstrated and whether a well founded fear of persecution had been made out.

In *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260 Hill J surveyed the law as to what might constitute persecution and the approach to be taken by a judge in judicial review proceedings to conclusions reached by the Tribunal about whether a well founded fear of persecution had been demonstrated in any particular factual context. His Honour said at 271:

As I have already noted, where there is a matter of fact and degree involved, as there almost invariably will be when the question arises whether particular conduct amounts to persecution, the Tribunal will be the final arbiter. It is difficult not to feel



sympathy for the applicant. It is difficult to be other than moved by his evidence that his life was “basically hell”. But it is of little avail to the applicant that a judge of this Court feels moved. The Court is not empowered to decide the merits of an applicant’s claim for refugee status. Its jurisdiction is much narrower. It is empowered only to consider whether the Tribunal, in determining that it was not satisfied that the applicant was a person to whom Australia had Convention responsibilities committed a reviewable error.

See also *Ye Hong v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Tamberlin J, 2 October 1998, unreported).

In my opinion, the judgment exercised by the Tribunal and the assessment it made of each of the matters identified by counsel, and their cumulative effect, was an assessment open to it. The difficulties experienced by the applicant family in the form of general harassment and intimidation may well be of a character that, in certain circumstances and if sufficiently serious, might give rise to a well founded fear of persecution. However in this case the Tribunal’s conclusion on this issue was plainly open to it on the facts before it. Similarly, as discussed by Hill J in *Prahastono*, difficulties experienced in gaining or obtaining employment can, but will not necessarily, establish a well founded fear of persecution. Again, this was a matter that the Tribunal was properly able to view, in the factual context of the case, as not sufficiently serious to found a conclusion that the applicant husband or his family were refugees. The same can also be said, in my opinion, of the view the Tribunal took of the removal of the applicant husband from land he had been farming. The applicant husband had given evidence that it was not land he owned, but rather, land which he had simply occupied from 1980 to 1983 and had cleared and commenced to farm. His complaint was that he was not allowed to continue to occupy and farm the land and was not allocated 15 acres which was an entitlement enjoyed by others who had migrated to Northern Cyprus. It was a complaint the Tribunal was entitled to view as being not of sufficient gravity to constitute “persecution” in the Convention sense.

The approach of the Tribunal to the threatening phone calls is more problematic. If it had found, as a matter of fact, that the deaths of the applicant husband’s brothers were or may have been politically motivated then that would plainly colour any consideration of the threatening phone calls that the applicant husband received and which seemingly increased in frequency after the death of one of the brothers. It is not clear what findings the Tribunal made as to when the calls commenced, how often they were made, whether there had been any increase in their frequency after the brother’s death, or whether they related to the brother’s death. Nonetheless it was common ground in these proceedings that the Tribunal accepted that the calls had been made over a considerable period of time. Of significance, however, was the refusal of the Tribunal to accept the contention of the applicant husband that his brothers had been killed because of their political opinion or because of connections to the Greek community or himself. The Tribunal refused to accept this contention after examining material which had been tendered on behalf of the applicant husband designed to establish that there were connections of this type. In refusing to accept

that these features attended the deaths of the brothers, it was open to the Tribunal to treat the threatening phone calls with less gravity than might otherwise have been the case. The Tribunal was, in my opinion, entitled to approach the matter in the way it did and its approach does not manifest any misconception of what is comprehended by the notion of persecution.

The applicants have failed to demonstrate reviewable error and the application should be dismissed with costs.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore

Associate:

Dated: 15 December 1998

|                               |                                 |
|-------------------------------|---------------------------------|
| Counsel for the Applicant:    | M Sahade                        |
| Solicitor for the Applicant:  | Nicholas G Pappas & Co          |
| Counsel for the Respondent:   | G T Johnson                     |
| Solicitor for the Respondent: | Australian Government Solicitor |
| Date of Hearing:              | 7 December 1998                 |
| Date of Judgment:             | 15 December 1998                |