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MEMORANDUM OF LAW

I. Questions Presented

1. Whether S.V. can show a well-founded fear of persecution if he is returned to Turkey on account **imputed political opinion**?
2. Whether S.V. can show a well-founded fear of persecution if he is returned to Turkey on account of his **membership in a particular social group**?
3. Whether S.V. can qualify for relief from deportation from the United States under the withholding provisions of the INA or under the **Convention Against Torture**?

II. Short Answer

S.V.'s claim for asylum on either political opinion or particular social group grounds will likely be successful. The law governing his claim for Convention Against Torture relief is less settled, but he may be able to obtain this relief if he can marshal further objective evidence.

III. Facts

S.V., a native and citizen of Turkey, was until very recently studying to be a health professional at a major university in Turkey. He entered the United States without inspection on April 6, 2005. He left Turkey due to his fear that he would be tortured by the Turkish security forces who might interrogate him about a landmine explosion near his village in March 2005.

S.V. had no involvement with the landmine explosion. In March 2005, he was still at university and was planning to visit his family when the landmine exploded, killing one Turkish soldier and wounding another. S.V. is a Turkish Kurd, and has friends in his village who are active in a peaceful political opposition movement that seeks greater autonomy for the country's ethnic minorities. S.V. was not involved in the movement, though he felt some sympathy with its goals.

The Turkish security forces expelled about 125 villagers, and arrested another 18. Three of those arrested were allegedly subjected to various forms of torture. Among the arrested were a number of S.V.'s friends—and two of these friends were among those allegedly tortured. One of these two friends who alleged to have been tortured told him that the military interrogators tortured him to get information about who was involved in the landmine. This friend had no involvement and so was unable to tell the interrogators anything. He was released after his family bribed a guard to let him go. The friend told S.V. that the military had asked him about the activities of all of his friends—not just those in the opposition movement and not just those living in the village—including S.V.

The security forces let it be known that they would be continuing their search for members of the opposition. On April 4, 2005, S.V. fled Turkey on a flight to Toronto and crossed the border into the United States without inspection two days later.

IV. Discussion

S.V. has effected an entry without inspection and can thus file an affirmative asylum application within one year of entry, including applying for the relief of withholding of removal

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and also Convention Against Torture (CAT).[1] If his application is denied by the Asylum Officer, he may be referred to an Immigration Judge who will evaluate his application in the context of removal proceedings.

A. Asylum Standard

To be eligible for asylum, S.V. must prove he is a "refugee"—that is, he must prove he is unable or unwilling to return to Turkey "because of persecution or a well-founded fear of persecution on account of" at least one of five characteristics: race, religion, nationality, political opinion, or "membership in a particular social group." 8 U.S.C. § 1101(a)(42(A). Under S.V.'s facts, it is doubtful he can claim on any of the first three grounds, since there is no evidence of persecution of Kurds on account of these grounds. Therefore, his best claims are under *political opinion* and under *particular social group* grounds.

Persecution has been defined as "the infliction of suffering or harm upon those who differ…in a way regarded as offensive." Sangha v. I.N.S., 103 F.3d 1482, 1487 (9th Cir. 1997).

An applicant has a well-founded fear of persecution if: (1) the applicant has a fear of persecution in his or her country of nationality…on account of [the five enumerated grounds]; (2) there is a reasonable possibility of suffering such persecution if he or she were to return to the country; and (3) he or she is unable or unwilling to return to, or avail himself of the protection of that country because of such fear. 8 C.F.R. § 208.13(b)(2)(i) (2004). Under the INA, either past persecution or a well-founded fear of future persecution can satisfy the persecution element. Here, no facts indicate S.V. has suffered past persecution. To establish a well-founded fear of future persecution, therefore, S.V. must establish two prongs: 1) a *subjective* fear, that is, he genuinely fears persecution on return to Turkey, and 2) an *objective* fear. I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 450 (1987). To be objectively reasonable, "reasonable person in [S.V.'s] circumstances would fear persecution…" Balazoski v. INS, 932 F.2d 638, 640 (7th Cir. 1991). S.V. must "present specific, detailed facts showing a good reason to fear that [he] will be singled out for persecution." Milosevic v. I.N.S., 18 F.3d 366, 370 (7th Cir. 1994). There must be some reasonable possibility of persecution, but it does not have to be more likely than not. *Id.* The objective component is satisfied if S.V. presents credible, direct, and specific evidence that persecution is a reasonable possibility. His testimony alone can be deemed credible where corroborating evidence would be impracticable to obtain. *See* Kataria v I.N.S., 232 F.3d 1107 (9th Cir. 2000). A favorable factor toward a finding of an objectively well-founded fear includes promptness in vacating the country of persecution. Negative factors include on-going family safety in the country of persecution.

B. Asylum Grounds

1. Imputed Political Opinion Grounds

S.V. is not a member of the opposition political movement, but is "not unsympathetic" to its goals. Because the opposition movement is at least in part Kurdish, and because the landmine blew up in S.V.'s Kurdish region village, the Turkish security forces may consider him a political opponent. The facts indicate that 125 villagers were expelled, indicating that the government is at least somewhat bent on revenge. In Bolanos-Hernandez v I.N.S., the court found that because the noncitizen refused to join a guerilla group's cause and infiltrate the

[1] As a preliminary matter, since S.V. entered the United States without inspection and did not present himself at a port of entry, the **Safe Third Country regulations** pursuant to the bilateral U.S.-Canada treaty do not appear to apply to bar relief for him. *See* 8 C.F.R. § 208(a)(2)(A). If he is finally put in removal proceedings, these regulations will bar asylum relief, but not withholding or CAT relief. If there are "serious grounds for believing he committed a serious nonpolitical crime outside the U.S." or committed terrorist activity, all these forms of relief are barred. 8 C.F.R. § 208(b)(2)(A)(iv)-(v).

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government on their behalf, guerillas were "likely to consider him a political opponent." 767 F.2d 1277, 1286 (9th Cir. 1984). Here, however, the Turkish government will not persecute S.V. for his decision to remain neutral and "focus on his studies," but rather because they believe he is *not* neutral. The focus is on the mind of the persecutor: if the persecutor attributed a political opinion to the victim and acted upon this opinion, this imputed view *becomes the applicant's political opinion* as required under the INA. Sangha v. I.N.S., 103 F.3d 1482 at 1487. Here, the Turkish Security forces arguably "acted" upon the imputed political opinion by rounding up a number of S.V.'s friends, and he will argue that this was directed against him as well but for his flight. Further, they asked his tortured friend specifically about any friends he had, not just those living in the village, which encompasses S.V. in the targeting action.

Applying the well-founded fear standard, S.V. can satisfy the subjective prong by testifying credibly that he genuinely fears persecution. His fear of persecution by the Turkish security forces on account of imputed political opinion is also *objectively* reasonable, given that the Turkish security forces let it be known they would be continuing their search for members of the opposition, and that, given the alleged torture, a reasonable person would not wait around to present evidence that he was in fact *not* a member of the opposition since the circumstances indicate the Security forces are imputing political opinion to those sought for rounding up.

The fact that S.V. left the country within a month after learning of the torture weighs in favor of finding an objectively well-founded fear. Lim v. I.N.S. 224 F.3d 929, 936 (9th Cir. 2000). The ongoing safety of his family who still live in the village undercuts his claim, but does not totally vanquish it. Id.

(i) Nexus

The primary animus for the persecution of the opposition by the Security forces is objectively to "prosecute" the act of terrorism. Courts have held, however, that "mixed motive" persecution, where part of the motive is to punish a victim for a protected ground, also satisfies the 'on account of' requirement. Borja v. I.N.S., 175 F.3d 732 (9th Cir. 1999). The motivating factor here for the Government is the political opinion imputed to its victims, ie., their opposition stance. Here, the targeting of the opposition movement is objectively also an attempt to rein in their political views on regional autonomy. The government's motives are not the focus, however; rather, S.V. must show some evidence that they are looking for him because of *his own* imputed political opinion. Unlike Elias-Zacarias, who could present only very flimsy facts, here S.V. can provide very vivid descriptions of the torturing conduct. The actions of the Security forces thus satisfy the 'on account of' element.

(ii) Relocation

There is no realistic possibility of internal relocation for S.V. within Turkey because the national security forces let it be known that they would be continuing their search country-wide. It is reasonable to assume under these facts that the Turkish government can reach all parts of the territory it governs, including Turkish Cyprus which has close ties to the Turkish government.

(iii) Country Conditions

Country conditions are an important factor in assessing the credibility of S.V.'s fear. Here, we will need to examine various Country Reports to see if torture by security forces is completely unknown in Turkey.

2. Particular Social Group Grounds

The BIA has interpreted persecution on account of membership in a particular social group (PSG) to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). It can also include groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake that association. Hernandez-Montiel v I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that gay

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men with female sexual identities in Mexico constitute a PSG). S.V. needs to demonstrate that he is going to be persecuted on account of his membership in a "small, readily identifiable" group. *See* Id. The BIA narrows PSG by requiring that membership in the group be "innate to the victim's identity." Matter of Melvin Hernandez. (binder p. 603).

One possible way to define his PSG is *the group of friends who live or used to live in a minority village in Sirnak whom the government seeks to torture because of suspicions of involvement with the March 2005 landmine used against the government.* This definition satisfies the PSG requirements that the characteristic be immutable, because no matter what S.V. does, his former status as a member of that circle of friends cannot be erased. The definition is also unlike the impermissible formulation in Sanchez-Trujillo of "working class, urban males of military age who maintained political neutrality in El Salvador," 801 F.2d 1576 (9th Cir. 1986), which did not constitute a PSG because it encompassed a broadly defined segment of the population. Here, the S.V's tortured friend had a finite number of friends, who are readily identifiable. Friendship bonds are mutable and not innate to identity. However, one's status as a former friend *is* immutable and innate to identity: S.V. could not choose now to change it. Thus, S.V. should be able to survive the BIA's PSG test.

The nexus analysis and the relocation analyses for S.V.'s PSG are the same as above for Imputed Political Opinion. The Turkish Security forces are seeking to interrogate the group of friends in some part on account of their PSG membership status, and relocation is not possible.

C. Withholding of Removal

The standard for withholding is higher than for asylum—S.V. must show a "clear probability"—ie, more likely than not, see I.N.S. v. Stevic, 467 U.S. 407 (1983), that he will be persecuted on account of a protected ground. In Bolanos, the court held that "[T]he mere fact that a threat was made may not be sufficient to establish a clear probability of persecution." Bolanos, 767 F.2d 1277. Here, S.V. was not persecuted, and no *per se* threats were levied against him personally during the interrogation of his friend. A court will probably also look to other factors to find he has not met the higher withholding burden, such as: 1) the apparent safety of S.V.'s family in Turkey, and 2) the period of harmlessness he experienced himself after the landmine blast before leaving Turkey. *See* Lim, 224 F.3d 929 at 936. S.V.'s claim under these facts will thus not be successful in obtaining withholding of removal relief.

D. Convention Against Torture Relief

Under U.S. law, the burden of proof is on the applicant for CAT relief to establish it is more likely than not that he would be tortured if removed to the proposed country of removal, and the applicant's testimony may be sufficient to sustain the burden of proof without corroboration. The definition of 'torture' under U.S. law is narrower generally than the international definition. For an act to constitute torture, it must be (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. 8 C.F.R. § 208.18(a).

The BIA has looked to international human rights cases for further refining of the torture definition, and noted that courts have found that some conduct amounts only to cruel, inhuman, or degrading treatment (CIDT), which is treated separately in the torture convention, and does not require a signatory of the convention to protect a potential victim of torture. Matter of J.-E.-, 23 I&N Dec. 291 (BIA 2002) (citing Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978)).

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The BIA in Matter of J.-E. examined a Haitian aggravated felon who would be reincarcerated upon removal to Haiti. The BIA found that some isolated instances of mistreatment in Haitian prisons rise to the level of torture within the meaning of U.S. regulations. As for burden of proof, the BIA found that four non-exhaustive factors were relevant in determining whether an applicant for CAT relief had satisfied the preponderance test for his or her torture claim: 1) evidence of past torture inflicted upon applicant; 2) evidence of safe relocation; 3) evidence of gross, flagrant, or mass violations of human rights; and 4) other relevant information on country conditions.

Here, the conduct of interrogation by the Security forces is clearly state action that is intentionally inflicted. S.V. can give testimony to establish that the Security forces are torturing his friends by giving details that show it is "severe" and rises above mere CIDT. The purpose of the torture is illicit, falling squarely within one of the illustrations in the regulation, namely, "obtaining information." 8 C.F.R. § 208.18(a). The fact that three victims have been allegedly tortured indicates that public official or other person acting in official capacity have consented or acquiesced to the torture.

S.V. must satisfy his burden of proof that torture is more likely than not under the four-factor test. The second, third, and fourth factors probably weigh against finding torture under the present facts—we need more country-specific information as to whether security forces routinely torture detainees or interogees. As for the first factor, past torture of the applicant, it is true that S.V. has not been tortured in the past. However, unlike J.-E.-, S.V. has personal knowledge of the torture conditions from his friend, not mere newspaper reports. The dissent by member Rosenberg in Matter of J.-E.- advocates focusing on the specific evidence presented in each case rather than relying on blanket conclusions. Matter of J.-E.-, 23 I&N Dec. 291 (Rosenberg, Dissenting). If S.V.'s testimony is convincing enough, and if he can marshal other objective evidence, a court might find him qualified for CAT relief.

V. Conclusion

This case could be looked at as a "prosecution vs persecution" case, and raises political and philosophical questions about a nation's ability to eradicate terrorism. However, assuming everything S.V. has described is true, S.V.'s fear of persecution in Turkey because of imputed political opinion or because of membership in a particular social group seems objectively well-founded. It is entirely possible that later events transpire such that his fear is no longer well-founded, such as the capture of the landmine terrorist or a changed political scene. In this regard, his claim would be stronger if the security forces were seeking him based on a thirst for revenge that is more specific and long-lasting. However, the present facts indicate that S.V.'s flight was genuine and under Cardozo-Fonseca's articulated standard his fear is objectively well-founded enough to qualify for asylum but probably not for the higher standard of withholding of removal. Finally, the present evidence regarding torture may be too slight to satisfy the preponderance test of U.S. law, but based on other evidence he may be able to meet his burden, probably varying greatly based on the forum where he finally files his claim. The facts do not indicate any bars to relief, though if he enters removal proceedings, the Safe Third Country regulations may bar him from asylum only, but not from withholding or CAT relief. He should file his I-589 asylum application within one year.