



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KURKAEV v. TURKEY

(Application no. 10424/05)

JUDGMENT

STRASBOURG

19 October 2010

FINAL

19/01/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kurkaev v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 28 September 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10424/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Ruslan Kurkaev (“the applicant”), on 21 March 2005.

2. The applicant was represented by Mr H. K. Elban, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent. The Russian Government did not exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

3. On 29 September 2009 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1983 and lives in Istanbul.

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. The applicant was living in Grozny, Chechnya. Fearing for his life he left for Azerbaijan in August 2000, from where he flew to Istanbul on 4 September 2000.

7. On 23 June 2004 the applicant and a number of other individuals were taken into custody by police officers of the Anti-Terrorist Branch of the Istanbul Security Headquarters, within the framework of the security measures implemented for the 2004 NATO summit in Istanbul.

8. On 25 June 2004 the applicant was transferred to the Foreigners' Department of the Istanbul Security Headquarters with a view to deportation. On 29 June 2004 the Istanbul State Security Court issued a decision of non-prosecution, holding that there was no evidence to initiate criminal proceedings against the applicant or other individuals taken into detention in connection with the 2004 NATO summit.

9. The applicant then continued to be held in the Foreigners' Department of the Istanbul Security Headquarters under section 23 of Law no. 5683 as an administrative measure pending deportation proceedings.

10. On 25 September 2004 the applicant was released and since then has been living in Istanbul on renewable temporary residence permits.

II. CONDITIONS OF DETENTION

A. The applicant's account

11. The applicant alleged that he had been detained for a period of ninety-one days in an overcrowded room at the Foreigners' Department of the Istanbul Security Headquarters, which had no windows, hence no natural light. According to the applicant it had thirty-six beds for a number of asylum seekers varying from 100 to 200. Due to the large number of asylum seekers present in the establishment the applicant, on numerous occasions, had been forced to sleep on the ground without sheets or blankets. He had not been allowed to get any fresh air or exercise throughout his stay. The hygienic conditions were extremely poor, in particular the showering facilities. There were three toilets and two showers serving a minimum of one hundred asylum seekers. The food served was insufficient and was the same every day. In support of his complaints the applicant presented drawings of the facility and referred to the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in particular CPT/Inf (2002)8 dated 24 April 2002 and CPT/Inf (2000)17 dated 7 December 2000.

B. The Government's account

12. The Government stated that the applicant had been held in the men's section of the Foreigners' Department of the Istanbul Security Headquarters, which measured 220 square metres. There were three toilets, two showers, twenty bunk beds, a television, two telephones, two air conditioners and a

cafeteria. According to the Government all the rooms were sufficiently lit and ventilated. They were cleaned twice a day. Breakfast, lunch and dinner were served every day. Asylum seekers could be visited by their relatives in the visitors' room. Those who needed medical help were taken to the local State hospital and their medical expenses were born by the State.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law and practice concerning asylum procedures

13. A description of the relevant domestic law and practice concerning asylum procedures may be found in the case of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-44, 22 September 2009).

B. Relevant CPT reports

14. The relevant paragraphs of the CPT/Inf (2002)8 - Report concerning the CPT's visit to the Foreigners' Department of the Istanbul Security Headquarters (referred to as "the holding facility" or "detention unit" at "Istanbul Police Headquarters") from 2-14 September 2001 are as follows:

"63. The holding facility at İstanbul Police Headquarters was not overcrowded at the time of the visit (35 persons). Further, some limited renovation work (e.g. painting of walls) had been carried out shortly before the visit, and all the detainees had a bed and mattress. In addition, the ventilation system worked satisfactorily and the cell doors were unlocked, thereby enabling detainees to have ready access to the facilities in the corridor (e.g. drink dispenser, telephone, etc.) as well as to the sanitary facilities. However, in the same way as during the 1999 visit, it would appear that this relatively favourable state of affairs was atypical.

Consultation of the relevant register indicated that the facility frequently accommodated between 100 and 200 persons; the space available is totally inadequate for such numbers. Further, despite denials from staff, it subsequently became clear that, due to pressure of numbers in early July, detained foreign nationals had also been placed in the basement-level holding areas in building B; conditions in those areas are totally unsuitable for periods of detention exceeding a few hours. In addition, the information gathered indicated that the provision of mattresses and blankets was a very recent development.

It should also be noted that cells and sanitary facilities were in a poor state of repair and cleanliness. Moreover, detainees were still not offered any form of occupational activities (e.g. reading material, toys for children, etc.), and the CPT was particularly concerned to learn that no progress had been made as regards offering outdoor exercise.

64. At the end of the visit, the delegation called upon the Turkish authorities to attach a high priority to the implementation of already existing plans to extend the

holding facility at the Foreigners' Department at Istanbul Police Headquarters. In their reply of 19 December 2001, the Turkish authorities informed the Committee of progress made in this respect.”

15. The relevant paragraphs of the CPT/Inf (2006)30 Report concerning CPT's visit from 7 to 14 December 2005 are as follows:

“35. As already indicated (cf. paragraph 9), the situation observed by the CPT's delegation in the detention unit for immigration detainees at İstanbul Police Headquarters was the subject of an immediate observation under Article 8, paragraph 5, of the Convention. With a capacity – according to staff – of 90, the unit was holding more than double that figure (147 men and 43 women) on the day of the delegation's visit. The outrageous overcrowding and general sordidness of the conditions in the facility beggared belief, a state of affairs which is all the more serious in view of the fact that some of the detainees had been held there for more than six months.

The CPT first drew the Turkish authorities' attention to the unacceptable nature of the arrangements for immigration detainees at İstanbul Police Headquarters as long ago as 1997, and has subsequently reemphasised this point, most recently in the report on the September 2001 visit (cf. CPT/Inf (2002) 8, paragraphs 62 to 66). Some minor improvements have been made over the years. However, the facts found during the December 2005 visit have highlighted once again the fundamental inadequacy of the existing detention unit; above all, it is too small.

36. A solution to this long-standing problem might finally be in sight. By letter of 23 February 2006, the Turkish authorities confirmed that a much larger facility for this category of detainee, offering far better conditions, would be brought into service towards the end of 2006, once extensive renovation work at the site concerned (in the Eminönü District) had been completed.

The CPT calls upon the Turkish authorities to give a very high priority to the bringing into service of the above-mentioned facility; every attempt should be made to accelerate the completion of the ongoing renovation work.

As regards the material conditions and regime activities to be offered in the new facility and the staffing arrangements, the CPT recommends the Turkish authorities to take fully into account the standards set out in paragraph 29 of the 7th General Report on the CPT's activities (CPT/Inf (97)10).

37. The entry into service of the new facility will in any event not occur for some months. In the meantime, steps must be taken to alleviate the intolerable situation in the existing detention unit for immigration detainees at Istanbul Police Headquarters.

In their letter of 23 February 2006, the Turkish authorities state that during the transitional period, immediate measures have been taken to improve conditions at the existing facility, including as regards sanitary conditions and the provision of food. The CPT would like to receive further details of the measures concerned.

For so long as the existing detention unit for immigration detainees remains in service, the Committee recommends that every effort be made so that the official capacity of the facility is not exceeded. Further, immediate steps must be taken to ensure that all detainees are offered outdoor exercise on a daily basis; the current

situation, in which persons can spend weeks if not months without ever having access to the open air, is inadmissible.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

16. Relying on Article 5 §§ 1 and 4 of the Convention, the applicant complained that he had been unlawfully detained without the possibility of challenging the lawfulness of his detention. The Government contested these arguments.

A. Admissibility

17. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

18. The Government submitted that the applicant's detention was based on section 23 of Law no. 5683 and section 4 of Law no. 5682 and that he was being held pending deportation proceedings in accordance with Article 5 § 1 (f) of the Convention. The Government further submitted that a certain A.A., an Iranian who had entered Turkey illegally and who had been detained in the Kırklareli Accommodation Centre, had successfully challenged his detention and possible deportation before the administrative courts. He was consequently given a temporary residence permit. Therefore, according to the Government, administrative proceedings constituted an effective remedy for the purposes of Article 5 § 4 of the Convention.

19. The Court reiterates that it has already examined the same grievances in the case of *Abdolkhani and Karimnia* (cited above, §§ 125-135) and the Government's example of A.A. in the case of *Tehrani and Others v. Turkey* (nos. 32940/08, 41626/08 and 43616/08, §§ 74-79, 13 April 2010). It found in the former case that the placement of the applicants in the Kırklareli Accommodation Centre constituted a deprivation of liberty. The Court concluded that, in the absence of clear legal provisions establishing a procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of

liberty to which the applicants had been subjected was not “lawful” for the purposes of Article 5 § 1 of the Convention. The Court found in the latter case that the judicial review in the case of A.A. could not be regarded as a speedy reply to A.A.'s request; he had continued to be held in detention for another thirty days despite the court ruling regarding his release. It concluded that the Turkish legal system did not provide the applicants with a remedy whereby they could speedily obtain judicial review of the lawfulness of their detention within the meaning of Article 5 § 4 of the Convention.

20. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Abdolkhani and Karimnia* or *Tehrani and Others* judgments.

There has therefore been a violation of Article 5 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

21. The applicant complained about the conditions of detention at the Foreigners' Department of the Istanbul Security Headquarters.

A. Admissibility

22. The Government contended that the applicant had not exhausted the criminal and administrative remedies available to him. The Government added that the application should be declared inadmissible for failure to comply with the six-month rule contained in Article 35 § 1 of the Convention. According to the Government the applicant should have introduced his complaint within six months of his release on 25 September 2004, had he considered the domestic proceedings to be ineffective. However he had lodged his complaint on 4 April 2005.

23. The applicant reiterated his complaints. He maintained that the domestic remedies referred to by the Government were only available in theory and not effective in practice. In this connection he submitted a sample decision delivered by the Istanbul Administrative Court on 29 May 2006, in which the court rejected the objection of a certain O.İ., who had lodged a similar complaint about the conditions of detention at the Foreigners' Department of the Istanbul Security Headquarters, where he had been held for deportation purposes in September 2005. In line with the existing procedure, O.İ.'s complaint had been examined by the District Governorship, which had refused to start legal proceedings for lack of sufficient evidence.

24. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing

or putting right the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had the opportunity to put matters right through their own legal systems. However, the only remedies which must be tried under Article 35 § 1 of the Convention are those that relate to the breaches alleged and which at the same time are available and adequate. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they lack the requisite accessibility and effectiveness (see, among many others, *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001).

25. Furthermore, the Court reiterates that, in the area of exhaustion of domestic remedies, the burden of proof is on the Government to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof is satisfied it falls to the applicant to show that the remedy advanced by the Government had in fact been made use of, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Kalashnikov*, cited above).

26. In connection with the above, the Court observes that the applicant submitted a decision whereby the judiciary rejected the objections of a person who had unsuccessfully attempted to initiate legal proceedings with regard to the conditions of detention in the same facility where the applicant had been held. The Court notes that, in reply to the applicant's submissions, the Government have not pointed to any examples of cases where similar complaints were examined and conditions at a foreigners' department were improved following a legal decision.

27. The Court is therefore led to conclude that it is not established with sufficient certainty that there existed domestic remedies capable of affording redress to the applicant in relation to his complaint concerning the conditions of detention. It accordingly dismisses the Government's objection.

28. As to the Government's complaint concerning the six-month time-limit, the Court observes that the date mentioned by the Government is in fact the date of arrival of the application forms at the Court. The Court has held in its previous judgments that the date of introduction of an application is not the Registry's stamp which indicates the arrival date (see *Şahin Karakoç v. Turkey*, no. 19462/04, §§ 23-25, 29 April 2008) but is the date of the first communication from the applicant indicating an intention to lodge an application (see *Chalkey v. the United Kingdom* (dec.), no. 63831/00, 26 September 2002). In the present case duly completed application forms were transmitted to the Court by fax on 21 March 2005. The applicant was

released on 25 September 2004. Consequently, the Court finds that the applicant lodged his application within the six-month time-limit.

29. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

30. The Government submitted that the applicant's allegations were not substantiated and the conditions at the Foreigners' Department of the Istanbul Security Headquarters met all the basic needs of the foreigners who were temporarily held for deportation purposes. The applicant reiterated his complaints.

31. The Court reiterates that, according to the Convention organs' case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). The same holds true in so far as degrading treatment is concerned (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C). The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland* and *Costello-Roberts*, both cited above, loc. cit.). In this connection overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world may sometimes amount to inhuman or degrading treatment. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 45, ECHR 2001-II).

32. At the outset, the Court reiterates that it has found, as mentioned above, that the applicant has been deprived of his liberty (see paragraph 19 above). Given the fact that he had been held at a facility under State supervision and against his own will, the physical conditions in this centre must comply with the requirements of Article 3 of the Convention (see *Tehrani and Others*, cited above, § 45).

33. The Court observes that the applicant referred to CPT reports about the Foreigners' Department of the Istanbul Security Headquarters and further provided a detailed account of the conditions of his detention, supported by drawings of the facility. The Government in reply submitted general information regarding the detention facility (see paragraph 11 above), failing to provide details as to the number of persons held at any given period or whether they were allowed to spend any time outdoors.

34. The Court takes note of the relevant extracts of the two aforementioned CPT reports (see paragraphs 13 and 14 above) which indicate that the CPT visited the Foreigners' Department of the Istanbul Security Headquarters some time in 1999, in September 2001 and December 2005. The applicant was held in this facility between 25 June and 25 September 2004, which falls between the CPT's last two visits. The Court points out that the findings of the CPT provide a reliable basis for the assessment of the conditions in which the applicant was imprisoned (see *Kehayov v. Bulgaria*, no. 41035/98, § 66, 18 January 2005). Both of these reports strongly criticise the conditions of detention, which are described thus: "outrageous overcrowding and general sordidness in the facility beggared belief". The CPT further recommended in the second report that the official capacity of the facility should not be exceeded. Although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report. The applicant was detained for ninety days at the Foreigners' Department of the Istanbul Security Headquarters, which had been found to be overcrowded and fundamentally inadequate by the CPT. It appears that there were not enough beds or blankets for everybody. Additionally the Government do not specify whether the rooms had natural light or deny that the detainees were not allowed to spend time outdoors. Therefore it seems, as alleged by the applicant and supported by the second CPT report cited above, that the applicant did not have access to natural light or open air during the ninety days he was detained in the Foreigners' Department.

35. In the light of the above, the Court considers that the conditions of detention of the applicant at the Foreigners' Department of the Istanbul Security Headquarters, in particular the serious overcrowding and absence of adequate sleeping facilities, combined with the lack of access to open air and the inordinate length of the period during which he was detained in such conditions, went beyond the threshold of severity under Article 3 of the Convention and amounted to degrading treatment.

It follows that there has been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

37. The applicant did not claim pecuniary damage. As for non-pecuniary damage, he claimed 12,000 euros (EUR). In respect of costs and expenses the applicant submitted a lawyer's contract signed for 210 Turkish liras (TRY) per hour plus 18% VAT and indicated that thirty-six hours of work

had been carried out, amounting in total to TRY 9,261 (approximately EUR 4,823).

38. The Government contested these claims, stating that they were excessive and that only costs actually incurred could be reimbursed.

39. The Court considers that the applicant must have suffered non-pecuniary damage which cannot be compensated solely by the finding of violations. Having regard to the gravity of the violations and to equitable considerations, it awards the applicant the full sum claimed under this head.

40. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 3,500 in respect of costs and expenses.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 §§ 1 and 4 of the Convention;
3. *Holds* that there has been a violation of Article 3 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,500 (three thousand five hundred euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President