



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

CASE OF ABDURRAHIM INCEDURSUN v. THE NETHERLANDS

(Application no. 33124/96)

JUDGMENT

STRASBOURG

22 June 1999

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In the case of Abdurrahim Incedursun v. the Netherlands,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), as amended by Protocol No. 11¹, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mrs V. STRÁŽNICKÁ,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANTIRU,
Mr K. TRAJA,
Mrs S. BOTOCHAROVA,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 9 June 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention³, by a Turkish national, Mr Abdurrahim Incedursun (“the applicant”), on 28 October 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 33124/96) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 by Mr Abdurrahim Incedursun on 27 August 1996.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The applicant's application to the Court referred to former Article 48 of the Convention, as amended by Protocol No. 9¹, which the Netherlands had ratified. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 2 and Article 3 of the Convention and/or Protocol No. 6 to the Convention.

2. On 30 November 1998 the applicant designated the lawyer who would represent him (Rule 31 of former Rules of Court B²). Having originally been designated before the Commission by the letter X, the applicant subsequently agreed to the disclosure of his name.

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. In consultation with the President-elect of the new Court, Mr L. Wildhaber, the President further requested in a letter to the Government of 30 October 1998, pursuant to former Rule 38 § 1, that the applicant not be expelled from the Netherlands pending consideration of the case by the new Court.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mrs W. Thomassen, the judge elected in respect of the Netherlands (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, and Mrs E. Palm, Vice-President of the Court (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mrs V. Strážnická, Mr W. Fuhrmann, Mr K. Jungwiert, Mr M. Fischbach, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs M. Tsatsa-Nikolovska, Mr T. Pantiru, Mr E. Levits, Mr K. Traja and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

Notes by the Registry

1. Protocol No. 9 came into force on 1 October 1994 and was repealed by Protocol No. 11.

2. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

5. As Mr Wildhaber was unable to attend the deliberations on 9 June 1999, his place as President of the Grand Chamber was taken by Mrs Palm (Rule 10); Mr V. Butkevych, substitute judge, replaced him as a member of the Chamber (Rule 24 § 5 (b)). Mr Levits, who was also unable to attend the deliberations on 9 June 1999, was replaced by Mr J. Makarczyk, substitute judge.

6. On 11 January 1999, the Grand Chamber, pursuant to Rule 39, prolonged until 26 February 1999 the interim measure calling on the Government not to expel the applicant from the Netherlands.

7. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr E.A. Alkema, to take part in the proceedings before the Grand Chamber.

8. On 21 January 1999 the Agent of the Government informed the Registrar that contacts had been made with the applicant's representative with a view to reaching a settlement and asked the Court to make available the good offices of the Registry for this purpose. On 25 January 1999 the Grand Chamber acceded to this request.

9. A meeting between the parties took place in The Hague on 2 February 1999. The Registry was represented by Mrs M. de Boer-Buquicchio, Deputy Registrar, and Mr N. Mol, legal officer in the Registry.

The Government were represented by Mr R.A.A. Böcker, Agent, assisted by Ms J. Schukking, Mr J. Struyker Boudier, Mr B. Niehoff and Mr H. Vonk.

The applicant was represented by Mrs G.E.M. Later, counsel, assisted by Mr D. Gürses and Ms N. Doğan. The applicant was also present in person.

At the end of the meeting the representatives agreed on the terms of a settlement, the written and signed text of which was handed to the Deputy Registrar.

10. On 5 February 1999 the President of the Court cancelled the hearing scheduled for 25 February 1999.

AS TO THE FACTS

THE CIRCUMSTANCES OF THE CASE

11. The applicant is a Turkish national of Kurdish origin who was born in 1952 and currently lives in the Netherlands.

12. The applicant entered the Netherlands on 5 June 1995 and, on 7 June 1995, requested asylum or, alternatively, a residence permit for humanitarian reasons. As grounds for his request he claimed that he would be exposed to the risk of political persecution in Turkey for his known sympathies for the cause of the Kurdish people. He asserted that he had been politically active between 1984 and 1992 at the municipal level and that his brother I.'s political activities for the Kurdish people had made I., a founding member of the political party HEP (Halkin Emek Partisi – People's Labour Party; at present an illegal and dissolved pro-Kurdish party), a public figure nationwide. As a result of these political activities, the Turkish authorities had started to exert pressure on the applicant's family.

13. The applicant further asserted that he had been arrested in 1992 on five occasions and that he had been detained for periods varying from one week to twenty days in the course of which he had been questioned and ill-treated. Together with his brother I. and thirteen others, he had, he said, been prosecuted on charges of aiding and abetting the PKK (Workers' Party of Kurdistan). In 1994 he learned that, by judgment of 23 December 1992, the State Security Court of Diyarbakır had acquitted him and all other accused of these charges for lack of evidence. He further stated that, upon the advice of his family and a local official, he had since 1992 been living in hiding in different places in Turkey under false identities, that a number of persons, who had been prosecuted together with him in 1992, had been killed at some later point in time and that his brother I. had disappeared and was presumed dead. He had left Turkey upon the advice of his family, who had told him that the police in his home town regularly visited them and were looking for him.

14. On 25 July 1995 the State Secretary of Justice (*Staatssecretaris van Justitie*) rejected the applicant's requests holding that it had not been established that the applicant had substantial grounds to fear persecution in Turkey. On 23 August 1995 the applicant filed an objection (*bezwaarschrift*) against this decision with the State Secretary.

15. Pursuant to section 32 of the Aliens Act (*Vreemdelingenwet*), the State Secretary decided on 20 October 1995 that the applicant would not be authorised to stay in the Netherlands pending any appeal proceedings instituted by him and ordered him to leave the Netherlands within two weeks.

16. On 30 October 1995 the applicant requested the President of the Aliens Division (*Vreemdelingenkamer*) of the Regional Court (*Arrondissementsrechtbank*) of The Hague to grant an interim measure (*voorlopige voorziening*) allowing him to await the outcome of the objection proceedings in the Netherlands.

The President of the Aliens Division rejected the applicant's request for an interim measure on 19 March 1996. Noting the applicant's acquittal in 1992 and the fact that the applicant had remained in Turkey until 1995, the President did not find it established that the Turkish authorities still considered the applicant as an important political opponent in whom they were actively interested.

Having made this finding and as no other legal rules appeared to have been violated, the President concluded that the State Secretary's decision of 20 October 1995 could not be regarded as unreasonable. As the applicant's objection did not stand a reasonable chance of success and as a further investigation was not held to be able to contribute to the examination of the applicant's case, the President, in pursuance of section 33b of the Aliens Act, also decided the merits of the applicant's objection against the State Secretary's decision of 25 July 1995 and rejected it as ill-founded.

17. On 30 May 1996 the applicant requested the State Secretary of Justice to review (*herziening*) his request for asylum, or alternatively for a residence permit on humanitarian grounds.

18. After having considered the applicant's arguments, the State Secretary of Justice rejected the revision request on 5 August 1996, finding no reasons for a revision of the previous rejection of the applicant's requests.

19. On 26 August 1996 the applicant filed an objection against the decision of 5 August 1996. On the same day he submitted a new request to the President of the Aliens Division of the Regional Court of The Hague to grant an interim measure allowing him to await the outcome of the objection proceedings in the Netherlands.

20. The President of the Aliens Division rejected the applicant's request for an interim measure on 19 December 1996. The President found that no new facts or circumstances had become apparent.

Referring to the previous decision of 19 March 1996, the President of the Aliens Division held that there could be no reasonable doubt that there was no danger of persecution within the meaning of section 15(1) of the Aliens Act. No indication was found for the assumption that the objection of 26 August 1996 would stand a reasonable chance of success and the President, in pursuance of section 33b of the Aliens Act, also decided the merits of the applicant's objection of 26 August 1996 and rejected it as ill-founded.

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Incedursun applied to the Commission on 27 August 1996. He alleged, *inter alia*, that his expulsion to Turkey would expose him to a real risk of being subjected to inhuman or degrading treatment and of possibly being killed. He relied on, *inter alia*, Articles 2 and 3 of the Convention and on Protocol No. 6.

22. The Commission declared the application (no. 33124/96) partly inadmissible on 25 February 1997 and adjourned its examination of the applicant's complaints under Articles 2 and 3 of the Convention and Protocol No. 6. By decision of 20 October 1997, the Commission declared the applicant's complaints under Articles 2 and 3 of the Convention and Protocol No. 6 admissible. In its report of 9 July 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that the applicant's expulsion to Turkey would not be in violation of Article 2 of the Convention, Protocol No. 6 or Article 3 of the Convention¹.

AS TO THE LAW

23. On 2 February 1999 the Court received the following text signed by the parties:

"The Government of the Netherlands and the applicant, Mr Abdurrahim Incedursun, have now reached the following settlement, on the basis of respect for human rights as defined in the Convention, in order to terminate the proceedings before the European Court of Human Rights on the following terms:

(a) The Government of the Netherlands is prepared to grant Mr Abdurrahim Incedursun, with reference to the present settlement, a Netherlands residence permit without restrictions;

(b) In addition, the Government of the Netherlands will pay to the applicant, *ex gratia*, the sum of NLG 21,480 ex VAT for legal costs incurred in the proceedings before the European Commission of Human Rights and the European Court of Human Rights minus the amount already awarded to the applicant under the legal aid scheme established under the Convention system;

(c) Mr Abdurrahim Incedursun declares that, subject to the fulfilment of what is stated under (b), he has no further claims against the State of the Netherlands based on the facts of the application filed by him.

Both the Government of the Netherlands and Mr Abdurrahim Incedursun undertake to inform the Court forthwith of the fulfilment of the conditions stated under (a) and (b).

1. *Note by the Registry.* A copy of the Commission's report is obtainable from the Registry.

The Government of the Netherlands declares that the above settlement can in no way be interpreted as a recognition on its behalf that a violation of the provisions of the Convention and Protocol No. 6, invoked by the applicant, would occur if he were to be deported to Turkey.”

24. By letters of 12 May 1999 and 17 May 1999 respectively, the applicant’s representative and the Government informed the Court that the terms of the settlement had been carried out.

25. The Delegate of the Commission was consulted and raised no objection to the case being struck out of the Court’s list.

26. The Court takes formal note of the agreement reached by the Government and Mr Incedursun. It would nevertheless be open to the Court, having regard to its responsibilities under Article 37 § 1 *in fine* of the Convention, to decide to continue its examination of the case if it were not satisfied that the settlement in question was based on respect for human rights as recognised in the Convention or its Protocols (Rule 62 § 3). However, that is not so in this case.

27. In this connection, the Court points out that in several previous cases the Court has had occasion to rule on the responsibility under the Convention of a Contracting State where the complaint was that there were substantial grounds for believing that the person concerned, if expelled or extradited, would face a real risk of being subjected to inhuman or degrading treatment in the country of destination (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 90-91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, § 69; the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 36, §§ 107-08; and the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1859, §§ 95-97). In doing so, the Court specified the nature and extent of the Contracting States’ obligations under the Convention in that regard.

28. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing on 22 June 1999 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Signed: Elisabeth PALM
President

Signed: Maud DE BOER-BUQUICCHIO
Deputy Registrar