CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 49860/99
by Erdoğan ARSLAN
against the Netherlands

The European Court of Human Rights (First Section), sitting on 18 September 2001 as a Chamber composed of

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced on 25 June 1999 and registered on 26 July 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Erdoğan Arslan, is a Turkish national of Kurdish origin, born in 1969 and, at the time of introduction of the application, he was detained in the Netherlands for expulsion purposes. He is represented before the Court by Ms G.E.M. Later, a lawyer practising in The Hague.

A. The circumstances of the case

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

On 16 February 1999, following the apprehension of the Kurdish leader Abdullah Öcalan by the Turkish authorities, a protest demonstration took place in The Hague in the course of which protesters occupied the residence of the Greek Ambassador and members of the Ambassador's household were prevented from leaving the premises.

On 17 February 1999, the applicant was arrested and subsequently detained in police custody (*inverzekeringstelling*) on suspicion of having been involved in the events in the residence of the Greek Ambassador. On 19 February 1999, the investigating judge (*rechter-commissaris*) ordered the applicant's detention on remand (*inbewaringstelling*).

On 24 February 1999, a provisional order for the applicant's placement in aliens' detention (*voorlopig bevel tot vreemdelingenbewaring*) was issued, which was only to take effect upon the applicant's release from detention on remand. The provisional order was valid for 28 days.

Also on 24 February 1999, the applicant filed a request for asylum.

On 25 February 1999, the investigating judge ordered a prolongation (*gevangenhouding*) of the applicant's detention on remand.

On 22 March 1999, the State Secretary of Justice (*Staatssecretaris van Justitie*) declared the applicant's request for asylum inadmissible and ordered the applicant's expulsion from the Netherlands. The applicant was informed in this decision that he could file an appeal against this decision with the Hague Regional Court (*Arrondissementsrechtbank*), but that such an appeal would not have suspensive effect as to his expulsion from the Netherlands.

On 26 March 1999, the applicant was released from detention on remand, handed over to the aliens' police (*vreemdelingenpolitie*) and, on the basis of a new order, subsequently placed in aliens' detention for the purposes of his expulsion (*vreemdelingenbewaring*) under Article 26 § 1 (a) of the Aliens Act (*Vreemdelingenwet*).

On 27 March 1999, the applicant filed an appeal with the Hague Regional Court against the State Secretary's decision of 22 March 1999. As this appeal had been denied suspensive effect as to his expulsion, he further requested the Hague Regional Court to issue an injunction on his expulsion pending the appeal proceedings.

On 28 March 1999, the applicant filed an appeal with the Hague Regional Court against his placement in aliens' detention and requested compensation for the time he had spent in aliens' detention. On 8 April 1999, following a hearing held on 6 April 1999, the Hague Regional Court rejected the applicant's appeal and request for compensation.

On 17 June 1999, the applicant filed a second appeal with the Hague Regional Court against his placement in aliens' detention and he requested compensation for the time spent in aliens' detention.

On 1 July 1999, following a hearing held on 29 June 1999, the Hague Regional Court rejected this appeal. Insofar as relevant, it held:

> "The Regional Court considers at the outset that the lawfulness of the measure of placement in aliens' detention has, as such, already been determined in its decision of 8 April 1999. The present appeal concerns the question whether, after a balancing of all interests involved, a further continuation of the placement should reasonably be considered as unjustified.
>
> It appears that the alien, whilst being held in detention on remand, applied for asylum on 24 February 1999, and that, on 27 February 1999, he filed an appeal against the rejection of this request for asylum and also requested an injunction on his expulsion. At the hearing, it has been argued on behalf of the alien that this application, in view of the danger of persecution to which he, as a Kurd in Turkey, is exposed, warrants the immediate termination of his detention. The alien's representative has, in this respect, submitted that she has instituted proceedings in Strasbourg in which a complaint is made that the European Convention on Human Rights has been violated due to the continuation of the <applicant's> placement in aliens' detention.
>
> The court does not consider that the mere fact that a new application for asylum has been filed – as a result of which a presentation of the applicant to the Turkish authorities <in the Netherlands for the purpose of obtaining travel documents> cannot take place – consitutes sufficient grounds to warrant terminating the placement in aliens' detention. It is not possible to assess the chances of success of the request for an injunction on the <applicant's> expulsion at this stage, in view of the extensive arguments put forward by the alien which cannot be judged on their merits without further investigation. The Regional Court notes that, upon the <State Secretary's> request, the examination of the above request <for an injunction> will take place at a hearing within a couple of weeks. Having regard to the fact, moreover, that there is a risk that the alien – who resided here <in the Netherlands> illegally from 1993 to 1995 as well – may seek ways to evade immigration control, the continuation of the placement in aliens' detention at this stage can be regarded as justified.
>
> The appeal is therefore ill-founded. The placement in aliens' detention will not be terminated. There is no ground to award compensation, so that the request therefor is rejected."

On 17 August 1999, the applicant filed a third appeal against his placement in aliens' detention.

On 31 August 1999, following a policy decision by the State Secretary to suspend temporarily the expulsion of Turkish nationals of Kurdish origin, the Hague Regional Court ordered the applicant's release from aliens' detention. The applicant was released on the same day. No further information has been submitted as to the proceedings on the applicant's third appeal against his placement in aliens' detention.

On 10 November 1999, the representative of the State Secretary informed the applicant's lawyer in the proceedings before the Hague Regional Court on the applicant's appeal filed on 27 March 1999 that the State Secretary would no longer seek the applicant's expulsion. On the assumption that, in these circumstances, the applicant would withdraw his request for an injunction on his expulsion an offer was made to compensate the court fees incurred by the applicant.

In its decision of 14 June 2000 on the applicant's appeal against the rejection of his request for asylum, and following a hearing held on 8 June 2000, the Hague Regional Court held that the State Secretary – in the decision of 22 March 1999 – had incorrectly indicated that an appeal could be filed with the Hague Regional Court. This would have been correct if the applicant's detention at that point in time had been based on the Aliens Act. However, as the applicant's detention at that time had been based on the Code of Criminal Procedure (*Wetboek van Strafvordering*), an objection (*bezwaar*) should have been filed with the State Secretary prior to an appeal to the Regional Court. Consequently, the Hague Regional Court declared the applicant's appeal inadmissible and stated that it would transmit the applicant's appeal to the Ministry of Justice with the request that it be considered as an objection. It further ordered the State Secretary to compensate the applicant for his legal costs incurred.

No further information has been submitted about the subsequent proceedings on the applicant's asylum request or about the outcome of the criminal proceedings against the applicant.

B. Relevant domestic law and practice

Article 26 of the Aliens Act, insofar as relevant, provides:

> "1. If the interests of public order, public policy or national security so require, the following categories of aliens may be detained:
>
> a. aliens whose expulsion has been ordered;
>
> b. aliens in respect of whom there are serious ground to believe that their expulsion will be ordered;

c. aliens who are not allowed to reside in the Netherlands by virtue of any of the provisions contained in Articles 8-10 <of the Aliens Act>, pending the decision on an application for a residence permit, a permanent residence permit or leave to enter as refugees.

2. An alien shall not be detained when, and detention shall be terminated as soon as, he intimates that he wishes to leave the Netherlands and is in fact in a position to do so.

3. Detention for the reasons set out in the first sentence of paragraph 1 and for the categories referred to under b. or c. of that paragraph shall not be of longer duration than one month.

..."

An alien whose expulsion has been ordered can, in principle, remain in aliens' detention for an unlimited period of time. The lawfulness of a placement in aliens' detention can, however, be challenged before a court. Where the court is of the opinion that there are no prospects of expulsion within a reasonable time, it can order that the measure of placement in aliens' detention be terminated.

It has been established in the case-law of the Legal Uniformity Division (*Rechtseenheidskamer*) of the Hague Regional Court that the interest of an alien to be released from aliens' detention increases with the passage of time. Where a placement in aliens' detention exceeds a period of six months, it is generally held that the alien's interest in being released is greater than the interest to keep him in detention for the purposes of expulsion. Depending on the specific circumstances of each case, this point in time may also be reached before or after six months have passed. It may be later where the alien frustrates the determination of his identity or nationality and it may be earlier where the alien concerned is unable to obtain travel documents for reasons beyond his control.

Although no appeal lies against a decision by the Regional Court in proceedings concerning requests for release from detention for expulsion purposes, an appeal to the Court of Appeal (*Gerechtshof*) is available in relation to a decision taken in the context of such proceedings on a request for compensation for the time spent in detention for expulsion purposes. Furthermore, an appeal may be admitted in which the complaint is made that in the decision challenged a fundamental principle of law has been disrespected (cf. The Hague Court of Appeal, 12 November 1998, *Nederlandse Jurisprudentie* 1999, nr. 127)

There is no time-limit for the filing of an appeal against a decision of placement in aliens' detention and in principle a person placed in aliens' detention may file as many appeals against this decision as he sees fit. When the lawfulness of a decision of placement in aliens' detention has been determined for a first time, the examination of any subsequent appeal in this respect will be limited to the lawfulness of the continuation of the placement

in aliens' detention as from the date of the last judicial decision taken on this point.

In a decision taken on 21 April 1999 on an appeal filed by a Mr K. against his placement in aliens' detention, the Hague Regional Court sitting in Zwolle held that the State Secretary had failed to reply sufficiently clearly to the court's request for clarification on the question whether or not, in the State Secretary's replies to questions put in Parliament, he had meant to indicate that illegal aliens of Kurdish origin who, like Mr K., had been involved in the events in the residence of the Greek Ambassador in The Hague, would not be expelled pending the criminal proceedings against them. On the basis of this finding, the Regional Court held that is was not clear whether Mr K. could be expelled within a reasonable time and that, therefore, K.'s placement in aliens' detention should be regarded as having been unlawful from the start. The Hague Regional Court sitting in Zwolle further awarded Mr K. compensation for the time spent in aliens' detention.

On 27 July 1999, the State Secretary of Justice requested the Hague Regional Court to suspend until 15 August 1999 its examination of appeals, including requests for injunctions on expulsions, filed by asylum seekers of Kurdish origin, in view of a recent report of one such asylum seeker having encountered serious problems after his expulsion to Turkey. As the veracity of this report was not certain, the Minister of Foreign Affairs had been requested to investigate the matter and to submit his findings as to the origin, background and veracity of the report before 15 August 1999.

On 31 August 1999, the State Secretary informed the Dutch Parliament that, in view of reports on what had happened to two asylum seekers who had been expelled to Turkey, a policy decision had been taken to suspend temporarily the expulsion of Turkish nationals of Kurdish origin.

On 16 December 1999, the State Secretary informed the Dutch Parliament that the results of an investigation into the facts on the basis of which the expulsion of Turkish nationals of Kurdish origin had been temporarily suspended had led to the lifting of that suspension.

COMPLAINTS

The applicant complains that his placement in aliens' detention was contrary to his rights under Article 5 §§ 1 (f), 4 and 5 of the Convention, in that there were no real prospects for his imminent expulsion during his detention given the fact that proceedings on his request for an injunction were ongoing. He further complains that the provisional order for his placement in aliens' detention was contrary to Article 5 of the Convention since such provisional orders are not provided for in Netherlands legislation on deprivation of liberty. He also complains that his request for

compensation for the time spent in aliens' detention was wrongly rejected, the more so since – in its decision taken in a similar case – the Hague Regional Court sitting in Zwolle had declared the placement in aliens' detention of a Mr K. unlawful and had awarded him compensation.

The applicant further complains that his first appeal filed against his placement in aliens' detention was not decided speedily as required by Article 5 § 4 of the Convention.

THE LAW

The applicant complains that, given the duration of his detention and the lack of prospects for his imminent expulsion, this detention for the purposes of his expulsion from the Netherlands violated his rights under Article 5 §§ 1 (f), 4 and 5 of the Convention. He further complains that his first appeal against his placement in aliens' detention was not decided speedily as required under Article 5 § 4 of the Convention.

Article 5 of the Convention, insofar as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Court notes that, as from 26 March 1999, the applicant was detained "with a view to deportation" within the meaning of Article 5 § 1 (f) of the Convention. The Court recalls that this provision does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c) of the Convention. Indeed, all that is required under Article 5 § 1 (f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law. However, any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due

diligence, the detention will cease to be permissible under Article 5 § 1 (f) of the Convention (Chahal v. United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions*1996-V, pp. 1862-1863, §§ 112-113).

It must therefore be determined whether the duration of the expulsion proceedings in the applicant's case was excessive. The Court notes that the applicant was placed in aliens' detention from 26 March 1999 until his release on 31 August 1999.

The Court observes that the applicant's request for asylum of 24 February 1999 was determined by the State Secretary of Justice on 22 March 1999, that in its decision of 1 July 1999 the Hague Regional Court noted that the applicant's request for an injunction would be examined within a couple of weeks and that, on the basis of a change in policy, the applicant was released from detention on 31 August 1999.

The Court further observes that, on 14 June 2000, the Hague Regional Court declared the applicant's appeal against the State Secretary's decision of 22 March 1999 inadmissible on procedural grounds, referred the case to the Ministry of Justice for further processing and that no further information has been submitted as to the subsequent proceedings on the applicant's request for asylum.

In these circumstances and insofar as can be established on the basis of the applicant's submissions, the Court cannot find that, during the period of the applicant's placement in aliens' detention, there were no prospects for his expulsion or that the pending proceedings were not pursued with the required diligence.

As to the question whether the applicant's placement in aliens' detention pending these proceedings was lawful for the purposes of Article 5 § 1 (f) of the Convention, the Court recalls that where the lawfulness of detention is at issue, including the question whether a "procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (Chahal v. United Kingdom judgment, loc. cit., § 118).

Insofar as the applicant complains that a provisional order for his placement in aliens' detention was issued even though Netherlands legislation on deprivation of liberty does not provide for such an order, the Court notes that the applicant was detained from 17 February 1999 to 26 March 1999 under the relevant provisions of the Code of Criminal Procedure as he was suspected of having committed criminal offences. The Court has found no indication that the applicant's subsequent placement in aliens' detention was in fact based on the provisional order issued on 24 February 1999.

Even assuming that this had been the case, the Court notes that it does not appear from the applicant's submissions that he raised this argument in his two appeals against his placement in aliens' detention. The Court is therefore of the opinion that, as regards this point, the applicant has failed to exhaust the domestic remedies that were available to him under Dutch law (cf. Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 66).

As to the lawfulness of the applicant's placement in aliens' detention, the Court observes that, in its decisions of 8 April 1999 and 1 July 1999, the Hague Regional Court rejected the applicant's argument that his placement in aliens' detention was unlawful. Considering that the applicant has failed to submit a copy of the decision of 8 April 1999 and having regard to the reasons stated in the decision of 1 July 1999, the Court is of the opinion that, insofar as can be established on the basis of the applicant's submissions, it cannot be said that the applicant's placement in aliens' detention was arbitrary.

Insofar as the applicant relies on the decision taken by the Hague Regional Court sitting in Zwolle in the case of a Mr K., the Court considers that, under the terms of Article 19 of the Convention, it cannot act as a court of appeal from domestic courts in that it cannot entertain complaints that a domestic court has taken a wrong decision because it is said to be inconsistent with a decision taken by another domestic court.

However, even assuming that a discrepancy between the outcome of the appeal filed by Mr K. and that filed by the applicant could give rise to an issue under Article 5 of the Convention, the Court notes that the decision in the case of Mr K. was taken on 21 April 1999 whereas the hearing before the Hague Regional Court on the applicant's second appeal was held on 29 June 1999. It would thus have been possible for the applicant to submit the decision in the case of Mr K. in the proceedings on his second appeal against his placement in aliens' detention. As it does not appear that he did in fact do so, the Court considers that, also on this point, the applicant has failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

The Court further observes that no further information has been submitted by the applicant on his third appeal against his placement in aliens' detention filed on 17 August 1999. Therefore, as to the question whether the applicant's continued placement in aliens' detention was lawful between 1 July 1999, when the Hague Regional Court determined his second appeal, and 31 August 1999, when he was released, the Court considers that this part of the application has remained fully unsubstantiated.

Insofar as the applicant relies on Article 5 § 4 of the Convention in respect of his first appeal against his placement in aliens' detention, the Court observes that, following the filing of this appeal on 28 March 1999,

the lawfulness of his placement in aliens' detention was determined by the Hague Regional Court on 8 April 1999.

The Court cannot find that the duration of these proceedings fell short of the requirement of "speedily" set out in Article 5 § 4 of the Convention. Furthermore, noting the possibility under the Aliens Act of challenging the lawfulness of a placement in aliens' detention before the Regional Court at any point in time, the Court finds no indication that the applicant's rights under Article 5 § 4 of the Convention have been disrespected.

Insofar as the applicant relies on Article 5 § 5 of the Convention, the Court notes that this provision guarantees an enforceable right to compensation only to those who have been the victims of arrest or detention contrary to Article 5 of the Convention. In the absence of any such finding in the present case, the Court is of the opinion that no issues arise under this provision of the Convention.

It follows that the application must be rejected under Article 35 §§ 1 and 3 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Elisabeth PALM
President