

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

SECOND SECTION

CASE OF ATHARY v. TURKEY

(Application no. 50372/09)

JUDGMENT

STRASBOURG

11 December 2012

FINAL

11/03/2013

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



In the case of Athary v. Turkey,

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

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
Dragoljub Popović,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 20 November 2012,

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

PROCEDURE

1. The case originated in an application (no. 50372/09) 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 an Iranian national, Mr Hamid Athary ("the applicant"), on 18 September 2009.

2. On the same date the President of the Chamber to which the case was allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of Turkey, under Rule 39 of the Rules of Court, that the applicant should not be deported to Iran until further notice. On 10 May 2012 the President of the Chamber decided to lift the interim measure, as the applicant had been granted a residence permit in the Netherlands and had moved to that country on 14 April 2010.

3. The applicant was represented by Ms Sinem Uludağ, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

4. On 11 March 2010 the application was communicated to the Government. It was 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

5. The applicant was born in 1973 and lives in the Netherlands.

6. The applicant was a political dissident in Iran. On 17 December 2004 he went to Turkey. Subsequently he requested asylum from the Turkish authorities and applied to the United Nations High Commissioner for Refugees ("the UNHCR") for recognition of his refugee status.

7. On 11 March 2005 the applicant was notified that he had been granted a temporary residence permit to live in the city of Konya pending the asylum proceedings. The applicant did not follow the instructions and settled in Istanbul.

8. On 30 July 2007 the applicant was arrested in connection with a drug-related crime. He was subsequently convicted of that crime and sentenced to eighteen months' imprisonment.

9. On 25 August 2007 the UNHCR recognised the applicant's refugee status and on 6 February 2008 it informed the national authorities of its decision. The UNHCR also requested that the applicant be issued with a temporary residence permit pending the completion of the procedure for his resettlement once the criminal proceedings against him had ended.

10. On 29 December 2008 the applicant was released from prison and placed in the Kumkapı Foreigners' Removal Centre attached to the Istanbul police headquarters.

11. On an unspecified date the national authorities decided that the applicant could not be granted asylum seeker status in Turkey. The applicant was notified of this decision on 2 January 2009 and submitted an objection on the same date.

12. On 22 July 2009 the applicant's objection was dismissed. He was then denied a temporary residence permit on 24 July 2009.

13. In a letter dated 7 September 2009 the Ministry of the Interior asked the Governor of Istanbul to deport the applicant. The letter did not specify to which country the applicant should be deported.

14. On 14 September 2009 the UNHCR asked the Turkish authorities to grant the applicant a temporary residence permit – on humanitarian grounds, if not as an asylum seeker.

15. On 5 October 2009 the Ministry of the Interior instructed the Istanbul Governor not to proceed with the applicant's deportation, on humanitarian grounds, and to continue holding the applicant at the Kumkapı Centre until the UNHCR had completed the procedure for his resettlement. The Ministry of the Interior added that, given the applicant's conviction for drug-related crimes, the decision had been based on the threat he posed to public order and health.

16. On 10 March 2010 the UNHCR informed the national authorities that the Netherlands had granted the applicant refugee status and asked them to allow the applicant's departure to that country.

17. On 14 April 2010 the applicant left Turkey.

18. In the meantime, on an unspecified date in 2010, the applicant had brought a case before the Ankara Administrative Court challenging his detention at the Kumkapı Centre.

19. On 1 June 2010 the Ankara Administrative Court dismissed the case, holding that the administrative authorities' decision to detain the applicant had been in accordance with the law: he had been detained with a view to protecting public order and public security pending his possible deportation and the judgment of the European Court of Human Rights.

II. RELEVANT INTERNATIONAL TEXTS AND DOMESTIC LAW AND PRACTICE

20. A description of the relevant domestic law and practice may be found in the case of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-44, ECHR 2009-... (extracts)).

21. Paragraphs 32 and 33 of the UNHCR Detention Guidelines of 2012 (Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention) provide as follows:

> "32. (...) detention for the sole reason that the person is seeking asylum is not lawful under international law. Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.
>
> 33. As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected. However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed."

22. Article 18 (1) of the European Union Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status provides as follows:

> "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2, 3 AND 13 OF THE CONVENTION IN RELATION TO THE THREATENED DEPORTATION OF THE APPLICANT

23. The applicant complained under Articles 2 and 3 of the Convention that his removal to Iran would expose him to a real risk of death or ill-treatment. He further maintained, under Article 13 of the Convention in conjunction with Articles 2 and 3, that he had had no effective remedy before the national authorities to prevent his deportation.

24. The Government contested the applicant's allegations.

25. The Court observes that this part of the application was related to the applicant's possible deportation from Turkey to Iran. The Court further observes that the Turkish Government complied with the interim measure indicated by the Court relating to the applicant's removal to Iran, and halted the deportation. Furthermore, on 14 April 2010 the applicant left Turkey and arrived in the Netherlands. In these circumstances, the Court considers that the applicant can no longer claim to be a victim of a violation of Articles 2, 3 and 13 of the Convention, within the meaning of Article 34 (see, *mutatis mutandis*, *Alipour and Hosseinzadgan v. Turkey*, nos. 6909/08, 12792/08 and 28960/08, §§ 49-52, 13 July 2010, and *D.B. v. Turkey*, no. 33526/08, § 43, 13 July 2010).

26. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

27. The applicant complained under Article 5 §§ 1, 2 and 4 of the Convention that he had been unlawfully deprived of his liberty, that he had not been informed of the reasons for his detention and that he had not had an effective remedy in domestic law whereby he could effectively challenge the lawfulness of his detention.

A. Admissibility

28. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

29. The Government maintained that the applicant had been sheltered at the Kumkapı Foreigners' Removal Centre until his departure from Turkey and that in the light of the Ankara Administrative Court decision of 1 June 2010, the deprivation of liberty could not be considered to be unlawful.

30. The applicant submitted that his detention at the Kumkapı Foreigners' Removal Centre between 29 December 2008 and 14 April 2010 had been arbitrary given that it had no legal basis. He referred to the Court's judgment in the case of *Abdolkhani and Karimnia* (cited above) in this respect.

31. The Court reiterates that it has already examined the same grievance in the case of *Abdolkhani and Karimnia* (cited above, §§ 125-35), in which it found that the placement of the applicants in the Kırklareli Centre constituted a deprivation of liberty. In the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the Court concluded that the deprivation of liberty to which the applicants in that case had been subjected had not been "lawful" for the purposes of Article 5 of the Convention. The Court further notes that detention of a person for the sole reason that he or she seeks asylum is not compatible with the referred purposes.

32. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the above-mentioned judgment.

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

2. Alleged violation of Article 5 § 2 of the Convention

33. The Government maintained that the applicant had been detained at the Kumkapı Centre because he had not been eligible for the status of asylum seeker. They further submitted that he had been notified of the decision to reject his asylum claim on 2 January 2009 and that he had objected to that decision on the same date by way of a handwritten petition in Turkish, a fact that also demonstrated that the applicant spoke Turkish.

34. The applicant submitted that when he had been transferred to the Kumkapı Centre, he had not been informed of the reasons for his detention. He noted that on 2 January 2009 he had been informed of the decision to reject his asylum claim but not the reasons for his detention, and that his petition of the same date only concerned that refusal. He also stated that his request for a residence permit had not been evaluated and rejected until 24 July 2009.

35. The Court reiterates that by virtue of Article 5 § 2, anyone who is arrested must be told, in simple, non-technical language that can be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. The Court notes that there is no call to exclude the applicant in the present case from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, §§ 413 and 414, ECHR 2005-III, and *Abdolkhani and Karimnia,* cited above § 136).

36. In the instant case, the Court observes that the applicant was transferred to the Kumkapı Centre following his release from prison on 29 December 2008. The Government have not submitted any document to the Court demonstrating that the applicant had been notified of the reasons for his transfer and his continued detention on the day of the transfer or shortly after his placement in the Kumkapı Centre. The Government's submission that the applicant had been notified of the rejection of his asylum claim cannot be taken as notification of the reasons for his arrest, given that the refusal of an asylum request does not automatically give rise to an individual's detention under Turkish law. Besides, by the time the applicant was notified, he had already been detained for five days. The absence of any document in the case-file to show that the applicant had been informed of the grounds for continuing his detention leads the Court to the conclusion that the reasons for his detention from 29 December 2008 were not communicated to him by the national authorities.

There has therefore been a violation of Article 5 § 2 of the Convention.

3. Alleged violation of Article 5 § 4 of the Convention

37. The Government submitted that the applicant could have applied to the administrative courts in order to object to the decision to hold him at the Kumkapı Centre – and indeed had done so. They therefore considered that the applicant had had a remedy whereby he could challenge the lawfulness of his deprivation of liberty.

38. The applicant maintained that he had written to the Ministry of the Interior on 1 November 2009 requesting his release from the Kumkapı

Centre. As the administrative authorities had not responded to his request within sixty days, he had lodged a complaint with the Ankara Administrative Court on 21 January 2010. Noting that the Administrative Court had not rendered a judgment in the case until 1 June 2010, by which time he had already been released from the Kumkapı Centre and had left for the Netherlands, the applicant contended that the review of the lawfulness of his detention had not been sufficiently speedy.

39. The Court reiterates that the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12). A remedy must be made available during a person's detention to allow that person to obtain a speedy judicial review of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Z.N.S. v. Turkey*, no. 21896/08, § 60, 19 January 2010; *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005; and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII).

40. In the present case, the Court reiterates that the applicant was not informed of the reasons for the deprivation of his liberty (see paragraph 36 above). It therefore considers that the applicant's right to appeal against his detention was devoid of all effective substance at the beginning of his detention (see *Abdolkhani and Karimnia*, cited above, § 141).

41. The Court further observes that the applicant nevertheless complained to the Ankara Administrative Court about his detention. Yet, seven months elapsed between the date on which he first asked to be released and the date of the judgment of the national court. It took the Ankara Administrative Court more than four months to rule on the applicant's request. In this connection, the Court refers to its findings under Article 5 § 1 of the Convention about the lack of legal provisions governing the procedure for detention in Turkey pending deportation. The proceedings in question did not raise a complex issue. The Court considers that the Ankara Administrative Court was in an even better position than the Court to observe the lack of a sufficient legal basis for the applicant's detention. It therefore finds that the judicial review in the present case cannot be regarded as a "speedy" response to the applicant's petition (see *Z.N.S.,* cited above, § 62, and *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08, § 78, 13 April 2010).

42. Accordingly, the Court concludes that the Turkish legal system did not provide the applicant with a remedy whereby he could obtain a speedy judicial review of the lawfulness of his detention, within the meaning of

Article 5 § 4 of the Convention (see *S.D. v. Greece*, no. 53541/07, § 76, 11 June 2009, and *Abdolkhani and Karimnia*, cited above, § 142).

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

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

43. The applicant alleged under Article 14 of the Convention that the unlawfulness of his detention stemmed from his foreign nationality, and he would not have faced it were he a Turkish citizen.

44. The Court considers that this part of the application should be declared admissible. However, in the light of its aforementioned findings of violation of Article 5 §§ 1, 2 and 4 of the Convention, the Court is of the view that it has examined the main legal question raised in the present application. It therefore concludes that there is no need for a separate ruling in respect of this part of the application (see, *mutatis mutandis*, *Saygılı and Bilgiç v. Turkey*, no. 33667/05, § 36, 20 May 2010, and *Güveç v. Turkey*, no. 70337/01, § 135, ECHR 2009 (extracts)).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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."

A. Damage and costs and expenses

46. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

47. The Government contested this claim as unsubstantiated and excessive.

48. 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, the Court awards the applicant EUR 9,000 in respect of non-pecuniary damage.

49. The applicant did not claim any costs and expenses. Accordingly, no award is made under that head.

B. Default interest

50. The Court considers it appropriate that the default interest rate 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 complaints under Articles 2, 3 and 13 of the Convention inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 2 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds* that it is not necessary to examine the applicant's complaint under Article 14 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President