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. 49866/99
by Serdal ÇİÇEK
against the Netherlands

The European Court of Human Rights (First Section), sitting on 28 August 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, Serdal Çiçek, is a Turkish national of Kurdish origin, born in 1979 and was expelled from the Netherlands to Turkey shortly before the introduction of the application. He is represented before the Court by Mrs 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 19 January 1999, the applicant was apprehended and detained for the purposes of establishing his identity, nationality and residence status. On 20 January 1999, an order for his expulsion was issued and he was placed in aliens' detention for the purposes of expulsion (*vreemdelingenbewaring*) under Article 26 § 1 (a) of the Aliens Act (*Vreemdelingenwet*).

On 21 January 1999, the applicant filed an asylum request and was consequently placed in aliens' detention under Article 26 § 1 (c) of the Aliens Act. On the same day, he filed an appeal with the Hague Regional Court (*Arrondissementsrechtbank*) against his placement in aliens' detention and requested this court to award him compensation.

By decision of 4 February 1999, following a hearing held on 2 February 1999, the Hague Regional Court rejected the applicant's appeal of 21 February 1999 as well as his request for compensation. It held that it had not been argued and that it had not appeared that the applicant's apprehension and placement in aliens' detention had been unlawful. It found established that the applicant did not have a valid residence title or any identity papers and that he did not have sufficient means for his subsistence or to finance his return journey. The Regional Court considered that the serious suspicion expressed by the State Secretary of Justice (*Staatssecretaris van Justitie*) to the effect that the applicant would seek to find ways of avoiding his expulsion were not unfounded. Since the applicant's statements about the date of his arrival in the Netherlands were contradictory, the Regional Court rejected the applicant's account that he had only arrived on 16 January 1999 as not credible. The Regional Court concluded that the applicant's placement in aliens' detention was in the interest of public order.

As regards the applicant's request for asylum, the Regional Court held that there were no indications that this should be considered as standing chances of success. The applicant's mere contention that he was a deserter was held to be insufficient for a finding that his request for asylum might be

successful. The Regional Court concluded that the State Secretary could correctly adopt the position that, pending the proceedings on the asylum request, the applicant should remain in aliens' detention.

On 10 February 1999, the State Secretary of Justice declared the applicant's request for asylum inadmissible on the basis of Article 15b § 1 (f) of the Aliens Act. In accordance with Article 18a of the Aliens Act, the State Secretary further ordered that the applicant's freedom of movement be restricted by assigning him to an asylum seekers centre, this order was to be suspended until the measure of the applicant's placement in aliens' detention was lifted otherwise than through a departure from the Netherlands. The applicant filed an appeal against this decision with the Hague Regional Court.

As the applicant's appeal was denied suspensive effect by the State Secretary as to his expulsion, the applicant requested the President of the Hague Regional Court on 12 February 1999 for an injunction on his expulsion pending the appeal proceedings.

By decision of 9 April 1999, following a hearing held on 2 April 1999, the Acting President of the Hague Regional Court rejected the appeal and the request for an injunction. The Acting President held, insofar as relevant:

> "4. The president finds that the <State Secretary> has correctly declared the asylum request inadmissible pursuant to Article 15b § 1 (f) of the Aliens Act. He considers on this point that the applicant has made contradictory statements as to the date of entry to the Netherlands. According to the formal record of findings (*proces-verbaal van bevindingen*) of 29 January 1999 drafted under oath of office (*ambtseed*) by the Haaglanden police, the applicant stated that he had been in the Netherlands for three months. During the questioning in relation to his placement in aliens' detention on 20 January 1999, the applicant stated that he had been in the Netherlands for about one week, whereas during the proceedings on the appeal filed against the order on deprivation of liberty under Article 26 of the Aliens Act he stated that he had arrived in the Netherlands on 16 January 1999. ... Since the applicant has only filed the request at issue on 21 January 1999 after having been apprehended on 19 January 1999, whereas it has by no means been established on what date the applicant has arrived in the Netherlands, the president finds that the <State Secretary> has declared the request for entry ... inadmissible on reasonable grounds.
>
> 5. The inadmissibility of the asylum request ... does not dispense the <State Secretary> from the obligation to examine whether the facts and circumstances submitted by the applicant form an obstacle to expelling the applicant to his country of origin if this would be contrary to Article 33 of the Convention relating to the status of refugees ...
>
> 6. The president agrees with the <State Secretary> that it has not been established that the applicant can be considered as a refugee within the meaning of the Convention <relating to the status of refugees>. It is considered at the outset that there are serious doubts about the sincerity of the applicant's request for asylum. The applicant submits to fear persecution from the side of the Turkish authorities on grounds of evasion of military service. However, the applicant has only invoked the protection of the Convention <relating to the status of refugees> two days after he had been apprehended, during a public transport check, for travelling without having a valid

ticket. This course of action does not indicate that the applicant finds himself in a situation requiring his immediate flight.

7. … the president considers that the general situation for members of the Kurdish population in Turkey is not such that the fact that an alien belongs to the Kurdish population group in Turkey makes him automatically a refugee. The applicant must therefore make it plausible that there are facts and circumstances relating to his person which justify his fear for persecution within the meaning of <the Convention relating to the status of refugees>.

8. In the president's opinion, the applicant has failed to do so. The applicant has not made it plausible that he has attracted the negative attention of the authorities of his country of origin. The applicant has declared that he has never been a member of any political party or movement or that he has been engaged in political activities in his country of origin. He has submitted that he was a sympathiser of the HADEP party, but it has not been argued nor has it appeared that through this he has attracted the negative attention of the Turkish authorities.

9. As regards the applicant's submissions in relation to his refusal to fulfil his military obligations in Turkey ... the applicant has attained the age of twenty on 1 January 1999, which is the military age in Turkey. … the president finds it sufficiently established that the applicant must fulfil his military obligations and that he is considered in Turkey as having refused to do his military service.

10. <This aspect of the case> must be examined in the light of the criteria formulated in the ... decision taken by this court <on 2 July 1998>, in which it was held that a draft evader or deserter is a refugee, if he

a. has a well–founded fear of disproportionate or discriminatory punishment or execution of the punishment for refusing military service on grounds of his race, religion, belonging to a particular social group or political conviction, or if, on the basis of the above grounds, he has a well–founded fear for a different discriminatory or disproportionate punishment or execution of a punishment;

b. has refused <to fulfil military obligations> because he has serious insurmountable conscientious objections on grounds of his religious of other deep-rooted conviction prescribing a refusal to do military service, and where there is no possibility in his country of origin to fulfil instead of military service a non-military service;

c. has reached the decision to refuse military service or to desert, because he does not want to become involved in a (sort of) military action that has been condemned by the international community as being contrary to the basic principles of humane behaviour or that is in violation of fundamental norms applying during an armed conflict.

As regards the category under a. ... the president considers that it cannot be derived from information known *ex officio* that the punishment of Turkish draft evaders of Kurdish origin is different from that of other Turkish draft evaders. The applicant cannot, therefore, be classified as falling within this category.

As regards the category under b. ... the president considers that the applicant has only submitted during the appeal proceedings that his refusal to do his military service

is connected with his Kurdish origins, without further substantiating this contention. The president finds that what has been submitted on this point is not sufficient for accepting this as a form of conscientious objection within the sense as meant here. ...

As regards the category under c. the president considers that it has not appeared in the present case that a condemnation by the international community has in fact been made of the military actions in south-east Turkey on grounds of being contrary to the basic principles of humane behaviour or on grounds of a violation of fundamental norms applying during an armed conflict. Also in this respect, the applicant's appeal on grounds of having refused military service fails.

11. ... Having regard to the considerations under 6, 7, 8, 9 and 10 it has not been established that a forcible return of the applicant to Turkey is contrary to Article 3 of the Convention."

On 12 May 1999, after having been notified of this decision on 7 May 1999, the applicant filed a second request for asylum or, alternatively, a residence permit on humanitarian grounds. This request was declared inadmissible by the State Secretary on 27 May 1999. On 28 May 1999, the applicant filed an appeal against this decision with the Hague Regional Court, which did not have suspensive effect as to his expulsion.

On 10 June 1999 and accompanied by Dutch police officers, the applicant was expelled to Turkey. Upon his arrival at the İstanbul airport he was handed over by the Dutch police officers to the Turkish authorities.

The applicant claims that he was blindfolded, placed in a car and driven to a place where he was detained for a period of two months. During his detention there, the applicant claims that he was interrogated about his knowledge of persons belonging to the PKK and that, during these interrogations, he was subjected to various forms of ill-treatment including beatings, kicking, hosing with pressurised cold water, squeezing of his testicles and branding with a hot iron. After his release from detention, the applicant returned to the Netherlands on 8 October 1999.

On 12 October 1999, the applicant was medically examined by a doctor of Amnesty International, who found, *inter alia*, eleven scars on his back in the form of a horseshoe with a diameter of about 11 centimetres. These scars were found to be healing first to second degree burn wounds. The doctor concluded that a connection between the scars on the applicant's back and his account of torture was very plausible and that the applicant's psychological and physical condition could very well fit a recently suffered serious trauma.

By letters of 17 November 1999 and 17 January 2000, the applicant requested the State Secretary to withdraw the decision of 27 May 1999 and to grant him asylum or a residence permit on the basis of Article 3 of the Convention. On 25 January 2000, the State Secretary advised the applicant to file a fresh request for asylum or a residence permit. On 26 January 2000,

the applicant filed an objection (*bezwaar*) with the State Secretary against the contents of the letter of 25 January 2000.

On 3 May 2000, as the State Secretary had failed to determine the applicant's objection timely, the applicant filed an appeal with the Hague Regional Court.

In its decision of 4 August 2000, the Regional Court noted that, on 30 May 2000, the State Secretary had in fact withdrawn the decision of 27 May 1999, but that no new decision on the applicant's second request for asylum or a residence permit on humanitarian grounds had been taken by the State Secretary. It ordered the State Secretary to do so within six weeks after the notification of the decision. On 9 August 2000, the parties were notified of the decision of 4 August 2000.

On 8 January 2001 the applicant filed a new appeal with the Hague Regional Court since no decision had yet been taken by the State Secretary. These proceedings are currently still pending.

B. Relevant domestic law and practice

Article 15b of the Aliens Act, insofar as relevant and as in force at the relevant time, provides:

> "1. A request for admission as refugee will not be granted on grounds of inadmissibility when: ...
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> f. the alien does not hold a travel document required for entering the Netherlands, unless he has, with indication of the place of entry to the Netherlands, immediately applied to a public official, entrusted with border control or control of aliens, claiming to have well–founded reasons to fear persecution within the meaning of Article 15 <of the Aliens Act>.

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

> "1. Where the interests of public order, public peace or of national security so require, the following persons can be placed in aliens' detention:
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> a. aliens whose expulsion has been ordered;
>
> b. aliens in respect of whom there are serious reasons for expecting that their expulsion will be ordered;
>
> c. aliens who are not entitled to residency in the Netherlands under Articles 8-10 <of the Aliens Act>, pending a determination of a request for a temporary or permanent residence permit or a request for admission as refugees.
>
> 2. Placement in aliens' detention will not be ordered when – and will be terminated as soon as – the alien indicates that he wants to leave the Netherlands and has the possibility to do so.
>
> 3. A placement in aliens' detention under the first paragraph under b. or c. shall in no case exceed four weeks."

An alien who does not have any identity papers and 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 lifted.

According to Dutch case-law, 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, it may be that this point in time is reached at an earlier or later point in time than after six months have passed. It may be later where the alien frustrates the determination of his identity or nationality and it may be sooner where the alien concerned is unable to obtain travel documents for reasons beyond his control.

Article 34a of the Aliens Act provides:

> "1. A measure taken under this Act to the effect of a restriction or deprivation of liberty shall, for the application of Article 8:1 § 1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), be considered on a par with a decision (*besluit*) <within the meaning of that provision>.
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> 2. On a first appeal against a decision to the effect of a deprivation of liberty, the Regional Court shall hear the alien within two weeks, either during the preliminary phase of the proceedings under Article 8:44 of the General Administrative Law Act, or at the court hearing itself.
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> 3. If the appeal is directed against a decision referred to in the second paragraph, the Regional Court shall set the time of the hearing without delay and in any event not later than two weeks after the day on which the appeal notice has been sent. Notwithstanding the provisions of Article 8:42 § 2 of the General Administrative Law Act the time–limit referred to in that provision shall not be extended.
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> 4. The Regional Court shall give judgment in writing within two weeks after the hearing is closed, unless it immediately gives an oral judgment during the hearing. Notwithstanding the provisions of Article 8:66 § 2 of the General Administrative Law Act, the time–limit referred to in that provision shall not be extended.
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> 5. If the Regional Court finds that the application or execution of the measure is in conflict with this Act or, having balanced all interests involved, cannot reasonably be considered to be justified, it shall declare an appeal under this provision well–founded and order the discontinuation of the measure or an alternate method of execution."

Although no appeal lies against a decision from 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 filing an appeal against a decision of placement in aliens' detention and in principle a person placed in aliens' detention can 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.

COMPLAINTS

1. The applicant complains that his placement in aliens' detention in 1999 for the purpose of his expulsion from the Netherlands was contrary to his rights under Article 5 §§ 1 (f), 4 and 5 of the Convention in that, pending the proceedings before the Hague Regional Court on his first request for asylum, there were no real prospects for his imminent expulsion. He submits that his placement in aliens' detention was therefore unlawful and that, on this basis, he is entitled to compensation.

2. The applicant further complains that the fact that, to date, no decision has been taken on his second request for asylum or a residence permit constitutes treatment contrary to Article 3 of the Convention.

THE LAW

1. The applicant complains that, given the lack of prospects for his imminent expulsion pending the proceedings on his first asylum request, his detention for the purpose of his expulsion from the Netherlands was contrary to his rights under Article 5 §§ 1 (f), 4 and 5 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 the applicant was detained from 20 January 1999 until 10 June 1999 "with a view to deportation" within the meaning of Article 5 § 1 (f) of the Convention pending the determination of the applicant's first and second asylum requests. Bearing in mind what was at stake for the applicant and the interest that he had in his asylum claim being thoroughly examined by the domestic authorities, the Court considers that the asylum proceedings at issue, taken either separately or together, were conducted with the diligence required for the purposes of Article 5 § 1 (f) of the Convention (Chahal v. United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, §§ 112-113).

The Court has examined the question whether the applicant's placement in aliens' detention until 4 February 1999, when the Regional Court rejected his appeal against the placement order, was lawful for the purposes of Article 5 § 1 (f) of the Convention in the light of the relevant criteria established in the Court's case-law (cf. Chahal v. United Kingdom, *loc. cit.*, §§ 112-113) and has found no indication that the applicant's detention until 4 February 1999 was contrary to his rights under Article 5 § 1 (f) of the Convention.

As to the applicant's detention after 4 February 1999, the Court notes that, since the decision of 4 February 1999, the applicant has not challenged the lawfulness of his detention before the Hague Regional Court – a possibility which was open to him under domestic law. It follows that, as regards this period, the applicant has failed to exhaust the domestic remedies that were available to him under Dutch law.

Insofar as the applicant relies on Article 5 § 4 of the Convention, the Court observes that the applicant's appeal against his placement in aliens' detention was filed on 21 January 1999 and that it was determined by the Regional Court on 4 February 1999. The Court cannot find that the duration of these proceedings fell short of the requirement of "speedily" under 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 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 this part of the application must be rejected under Article 35 §§ 1 and 3 of the Convention.

2. The applicant further complains that the fact that, to date, no decision has been taken on his second request for asylum or a residence permit constitutes treatment contrary to Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court considers at the outset that neither Article 3 nor any other provision of the Convention guarantees the right of political asylum or a right that decisions on requests for asylum must be taken within a reasonable time. On this point, the Court recalls that such proceedings fall outside the scope of Article 6 § 1 of the Convention (cf. *Maaouia v. France* [GC], no. 39652/98, § 40, to be published in ECHR 2000-X).

Although the Court would not deny the desirability, given the humanitarian aspects of the applicant's case, of the applicant's request for asylum or a residence permit being determined as soon as possible, it does not consider that the fact that, so far, this has not taken place is sufficient for a finding that the minimum level of severity required under Article 3 of the Convention (cf. *Bilgin v. Turkey*, no. 23819/94, 16.11.2000, § 101) has been attained.

It follows that this part of the application must also be rejected under Article 35 § 3 of the Convention as being manifestly ill-founded.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Elisabeth PALM
President