CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40035/98
by Hoda JABARI
against Turkey

The European Court of Human Rights (Fourth Section) sitting on 28 October 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr V. Butkevych,
Mr J. Hedigan,
Mrs S. Botoucharova, *judges*,
Mr F. Gölcüklü, *ad hoc judge,*

and Mr M. V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 February 1998 by Hoda Jabari against Turkey and registered on 26 February 1998 under file no. 40035/98;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 17 April 1998 and the observations in reply submitted by the applicant on 9 June 1998;

Having regard to the observations in reply to the applicant's further complaints submitted by the Government on 25 November 1998, 9 February and 7 May 1999, and the applicant's observations in reply submitted on 17 June 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1973, is an Iranian national who is currently living in Istanbul. She is represented before the Court by Mr Selahattin Esmer, a lawyer practising in Ankara.

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

In 1995, at the age of 22, the applicant met a man ("X") in Iran while attending a secretarial college. She fell in love with him and after some time they decided to get married. However, X's family was opposed to their marriage.

In June 1997 X married another woman. The applicant continued to see him and to have sexual relations with him.

In October 1997 the applicant and X were stopped by policemen while walking along a street. The policemen arrested the couple and detained them in custody as X was married.

The applicant underwent a virginity examination while in custody. After a few days she was released from detention with the help of her family.

In February 1998 the applicant illegally fled to Istanbul, from where she tried to fly to Canada via France using a forged Canadian passport.

When the applicant arrived at the airport in Paris, the French police found her to be in possession of a forged passport.

On 4 February 1998 the applicant was put on a plane for Istanbul. Following her arrival at Istanbul airport at 1 a.m. on 5 February 1998 she was arrested by policemen on the ground that she had entered Turkey using a forged passport. Her passport was sent for examination.

On 6 February 1998 the applicant was transferred from a police station inside the airport to the Aliens Department of the Istanbul Security Directorate. She was brought before the Bakirköy Public Prosecutor on the ground that she had entered Turkey using a forged passport in contravention of the Passport Act 1950. The public prosecutor ordered her release finding she had not entered Turkey of her free will. The applicant was handed over to the Istanbul Security Directorate with a view to her deportation. When the applicant realised that she was going to be sent to Iran she told the Aliens Department that she was an Iranian national. The applicant lodged an asylum application with the Aliens Department. The police rejected her application as it had been submitted out of time. The applicant was informed that, under section 4 of the Asylum Regulations 1994, she should have lodged her application for asylum within five days of her arrival in Turkey.

The applicant contends that she was held in detention at the Aliens Department until 26 March 1998. Thereafter, following the intervention of the UNHCR, she was accommodated in a hotel in Istanbul.

On 12 February 1998 a staff member of the UNHCR, with the permission of the authorities, interviewed the applicant about her asylum request under the 1951 Geneva Convention Relating to the Status of Refugees ("the Geneva Convention"). On 16 February 1998 the applicant was granted refugee status by the UNHCR, on the basis that she

had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning or being whipped or flogged.

On 8 March 1998 the applicant lodged an application with the Ankara Administrative Court against the deportation order. She also asked for a stay of execution of the order.

On 16 April 1998 the Ankara Administrative Court dismissed the applicant's petitions on the ground that there was no need to suspend the deportation order since it was not tainted with any obvious illegality and that implementation of the order would not cause irreparable harm to the applicant.

On 4 November 1998 the Ankara Administrative Court ordered the applicant's release since there was no actual risk of her being deported in view of the fact that she had been granted a residence permit pending the outcome of her application under the European Convention on Human Rights.

COMPLAINTS

The applicant alleges that her expulsion to Iran would constitute a breach of Article 3 of the Convention. She maintains that she risks ill-treatment and death by stoning on account of her adultery.

In her letter of 9 June 1998, in reply to the Government's observations, the applicant submitted the following complaints:

The applicant complains that she did not have any effective remedy, within the meaning of Article 13 of the Convention, to challenge the decision whereby her application for asylum was rejected as being out of time.

The applicant maintains under Article 5 § 1 (f) of the Convention that she was unlawfully deprived of her liberty for fifty days with a view to deportation.

She also alleges that she was not given any possibility to challenge her detention as she was not brought before a judge at any time of her detention pending deportation.

The applicant contends under Article 5 § 2 and Article 6 § 3 (a) of the Convention that she was not informed of the reasons for her arrest and of any charge against her.

PROCEDURE

The application was introduced with the European Commission on Human Rights on 26 February 1998 and registered on the same day.

On 26 February 1998 the Commission decided, pursuant to Rule 36 of its Rules of Procedure, that it was desirable in the interests of the parties and the proper conduct of the proceedings not to return the applicant to Iran until the Commission had had an opportunity to examine the application. The Commission further decided to bring the applicant's complaints

under Article 3 of the Convention to the notice of the respondent Government and to invite them to submit written observations on their admissibility and merits.

The Government's written observations were submitted on 17 April 1998. In her letter of 9 June 1998, in reply to the Government's observations, the applicant submitted further complaints under Article 5 §§ 1 (f), 2 and 4, Article 6 § 3 (a) and Article 13 of the Convention.

On 30 October 1998 the Commission resumed its examination of the admissibility of the application and decided, in accordance with Rule 48 § 2 (b) of its Rules of Procedure, to bring the applicant's further complaints to the notice of the respondent Government and to invite them to submit written observations on their admissibility and merits.

On 30 October 1998 the Commission granted the applicant legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

On 25 November 1998 the Government submitted their written observations, in reply to the applicant's further complaints, in which they raised an objection to the extension of the complaints by the applicant.

On 3 February 1999, referring to the Commission's decision of 30 October 1998 to apply Rule 36 of the Commission's Rules of Procedure to the above application, the President of the Fourth Section decided, in accordance with Rule 39 of the Rules of Court, to indicate to the Government that it was still desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to deport the applicant to Iran until further notice. The President also noted that the Government had not addressed the issues raised in the questions annexed to the Commission's letter of 30 October 1998.

By letter of 9 February 1999 the Government reiterated their objection to the applicant's new complaints.

On 23 March 1999 the Court rejected the Government's preliminary objection to the introduction of the applicant's new complaints in the context of her original application and requested the Government to submit written observations on the admissibility and merits of these complaints.

On 23 March 1999 the Court also decided to prolong until further notice the interim measures indicated to the Government on 3 February 1999.

On 7 May 1999 the Government submitted their written observations on the applicant's further complaints after an extension of the time-limit.

On 17 June 1999 the applicant submitted observations in reply also after an extension of the time-limit.

THE LAW

1. The applicant maintains that her deportation to Iran would violate her rights under Article 3 of the Convention, which provides:

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

The Government state that the applicant failed to comply with the Asylum Regulations 1994 and observe also that she entered the country illegally using a false passport. In their supplementary observations of 7 May 1999 the Government maintain that the applicant did not raise her complaint before a domestic court and on that account she must be considered to have failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

The applicant states that under Turkish asylum law there is no appeal against a refusal to examine an asylum request which has not been submitted to the authorities within five days of the asylum seeker's arrival in Turkey. The authorities refused to adjudicate on her request precisely because she had not complied with this rule. Furthermore, she applied to the Ankara Administrative Court on 6 March 1998 with a view to the suspension of the decision ordering her deportation to Iran. Her application was rejected on 16 April 1998 on the ground that the decision was not clearly unlawful and that she would not face any irreparable harm on account of the implementation of the decision. The applicant stresses in this connection that the domestic court which heard her application was unable to take a decision with immediate suspensive effect. In these circumstances she maintained that she had exhausted domestic remedies even if those remedies could not be considered an effective means of redressing her Article 3 complaint.

The Court notes that, although the prohibition of torture or inhuman or degrading treatment contained in Article 3 of the Convention is absolute in expulsion cases as in other cases, applicants invoking that Article are not for that reason dispensed as a matter of course from exhausting domestic remedies that are available and effective. It would not only run counter to the subsidiary character of the Convention but also undermine the very purpose of the rule set out in Article 35 § 1 of the Convention if the Contracting States were to be denied the opportunity to put matters right through their own legal system. It follows that, even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner (see the Bahaddar v. the Netherlands judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 263, § 45).

The Court further observes that whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It notes in this connection that the authorities in the instant case never considered the merits of the applicant's claim that she risked persecution if removed to Iran. Any examination of that claim was blocked on account of the operation of the five-day rule contained in the Asylum Regulations 1994. In the Court's view the rigid application of the rule denied the applicant any opportunity of persuading the authorities of the merits of her case and failed to have regard to the predicament in which she found herself at the time, being linguistically handicapped and without access to a lawyer or other support. It is also to

be observed that on 5 and 6 February 1998 she was preoccupied by the criminal investigation into the origins of the forged passport which she used to travel to Paris. The Court would also note, that to the extent that time began to run as of the date of her first arrival in Turkey *en route* to Canada, the applicant was denied any possibility of submitting an asylum request for the consideration of the authorities after her forced return to Turkey on 5 February 1998. For these reasons the Court considers that the applicant cannot be reproached for her failure to comply with the five-day rule and cannot be considered to have failed to have exhaust domestic remedies on that account.

The Court also notes that the applicant unsuccessfully sought to challenge the deportation order before the Ankara Administrative Court and to have its implementation suspended. In these circumstances the applicant can be taken to have exhausted all other avenues of redress which were available to her under domestic law in respect of the decision to deport her.

For the above reasons the Court dismisses the Government's objection under this head.

The applicant states that she committed adultery in Iran and left the country before criminal proceedings could be taken against her. She submits that she would probably have been prosecuted and sentenced to a form of inhuman punishment. In support of her assertion the applicant relies on, *inter alia*, reports prepared by Amnesty International which refer to cases of women in Iran having been stoned to death for having committed adultery. She stresses that she has been granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution as she belonged to a particular social group, namely women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution.

She further claims that, bearing in mind the established case-law of the Court, stoning to death, flogging and whipping, which are penalties prescribed by Iranian law for the offence of adultery, must be considered forms of prohibited treatment within the meaning of Article 3 of the Convention.

The Government maintain in reply that when becoming a Contracting Party to the 1951 Geneva Convention Relating to the Status of Refugees ("the Geneva Convention"), Turkey had availed itself of the geographic preference option in the Convention to give preference to asylum seekers from European countries. However, for humanitarian reasons the authorities issue temporary residence permits to non-European asylum seekers like the applicant who are recognised as refugees by the UNHCR pending their resettlement in a third country.

The Government reiterate that the applicant has failed to comply with the prescribed time-limit and point out that the applicant entered Turkey using a forged passport in breach of domestic law. In this regard, the Government submit that her complaint should be rejected as being manifestly ill-founded.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of

Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant invokes Article 5 § 1 (f) with regard to the unlawfulness of her detention and the conditions under which she was held. She maintains that she was never informed of the reasons for her detention, in contravention of Article 5 § 2 and Article 6 § 3 (a) of the Convention and was never brought before a judge to enable her to challenge the legality of her detention, contrary to Article 5 § 4 of the Convention. The provisions relied on by the applicant provide:

Article 5

"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.
…
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him ...

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.
..."

Article 6 § 3

"Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
..."

The applicant asserts that she was unlawfully deprived of her liberty between 4 February and 26 March 1998, a total of fifty days, with a view to her deportation. During that time she was kept in a detention area in appalling conditions at the Aliens Department of the Security Directorate. She states that the detention area was divided into two sections or "cells" each of which was overcrowded, badly ventilated and lacking in hot water. The doors were usually closed. In the first two weeks she suffered from pneumonia and had to pay for her own medication. She was never informed why she was being kept in detention and had no access to a lawyer or to an interpreter.

The applicant maintains that her detention was unlawful under both domestic and Convention law. She argues that the authorities had refused to consider her asylum request since she had not registered with them within the five-day period contained in the Asylum Regulations 1994. She was brought before the public prosecutor on 6 February 1998 as she was deemed to have entered the country illegally and was fined under the Passport Act 1950.

However, she was not subsequently released, but placed in detention pending her deportation in the absence of a judicial decision and without the possibility of challenging her detention. The applicant draws attention to the fact that even if the Asylum Regulations 1994 had been applicable to her situation, her detention would still have been unlawful since the Regulations do not provide for keeping an asylum seeker in detention. In her submission, when she was recognised by the UNHCR on 16 February 1998 as a refugee, she found herself in a legal vacuum since the authorities could no longer hold her since to deport her to Iran would have engaged their responsibility under the Geneva Convention and the European Convention on Human Rights.

The Government reassert in their supplementary observations that the applicant is estopped from introducing these complaints at this stage of the proceedings since they were lodged after her original application which, they stress, was confined to a single complaint under Article 3. The new complaints cannot be considered in any way related to that complaint.

In an alternative submission, the Government contend that the applicant, even though her asylum requested had been rejected, was kept under surveillance at the guest house of the Aliens Department of the Istanbul Security Directorate. They state that this was not a form of detention and claim that the applicant had nowhere else to go. She remained there for humanitarian reasons and in view of the authorities' respect for the interim measures which the Commission had indicated to them and pending her resettlement to a third country in view of the UNHCR's decision to recognise her as a refugee. It took time to find her alternative accommodation and when a hotel was eventually found the applicant was installed there as from 26 March 1998. Prior to that, she was interviewed with the assistance of an official interpreter. At all stages the applicant was able to consult with her lawyer, enjoyed good accomodation and was not deprived of her liberty. The Government stress in this connection that, while staying in the guest house, the applicant was able to apply to the European Commission of Human Rights, the UNHCR and the Ankara Administrative Court without restriction. They maintain that if she had a complaint about the conditions under which she was kept, it would have been open to her to have sued the authorities before the administrative courts, especially since she was assisted by a Turkish lawyer at that stage.

The Government further maintain that no deportation order has in fact been issued against the applicant. This was confirmed when, on 4 November 1998, the 4th Administrative Court in Ankara rejected her requests for annulment of the order since there was no administrative act to annul.

In the Government's view, by making these false complaints the applicant was guilty of an abuse of the right of application and her complaints should be rejected on that account under Article 35 § 3 of the Convention.

The applicant, with reference to Article 5 § 2 and 6 § 3 (a) of the Convention, maintains that she was she was not given adequate information as to the reasons for her arrest at the airport. She submits that she was questioned at the airport in bad English about the facts of her case and how she came to be in a possession of a forged passport. When placed in detention, her personal details were checked. Following her release by the public prosecutor, she underwent a new form of detention at the Aliens Department of the Security Directorate. However she was never informed of the legal justification, if any, for her continued detention. The applicant maintains that she was never informed that the authorities had rejected her application. Had she been released from detention, the UNHCR would have

found her accommodation and provided her with financial assistance pending her resettlement in a third country. She further contends that it was only after the intervention of the UNHCR that she was able to consult a lawyer and was transferred to a hotel in Istanbul.

The applicant disputes the Government's argument that she could have taken proceedings in respect of her illegal detention. She insists that her only concern at the time was to avoid deportation to Iran, not to obtain compensation.

The Government dispute the truth of the applicant's allegations. They state that the applicant was interviewed at the airport about her passport and was detained for two days while the passport was examined by the responsible authorities. The public prosecutor ordered her release on 6 February 1998 and her detention ended. Subsequently she was taken to the Aliens Department of the Security Directorate and accommodated at their guest house. Her asylum application was rejected after she had been interviewed in accordance with the requirements of the Geneva Convention. However, in view of the interim measures applied by the Commission and the UNHCR's ruling, a hotel was eventually found for her and she was settled there.

The Government state that the applicant cannot rely on Article 5 § 4 since she was never detained after being released on 6 February 1998 by the public prosecutor.

The Court recalls that in their observations of 25 November 1998 the Government challenged the admissibility of these complaints on the grounds that they were extraneous to the original application. However, on 23 March 1999 the Court decided that the new allegations arose out of the same set of facts on which her Article 3 complaint was based, namely her deportation from Turkey to Iran. The Government were informed accordingly and requested to submit observations on these complaints. It reiterates that the Government's estoppel argument cannot be accepted.

The Court observes that the applicant was detained between 5 and 6 February 1998 on suspicion of being in possession of a forged passport and of having entered Turkey illegally. She was released by the public prosecutor on 6 February 1998. For the Court, that period of detention finds its justification in the provisions of the Passport Act 1950 and is compatible with the requirements of Article 5 § 1 (c) of the Convention. The applicant has not disputed this. The Court also considers that, having been found by the airport police in Paris to be in possession of a forged passport, she must have been aware from the circumstances of her arrest at Istanbul airport on 5 February 1998 and from her interview with the police there that she was being detained on suspicion of having committed an offence under the Passport Act 1950. For these reasons the Court considers that the applicant's detention up until the time of her release by the public prosecutor does not disclose any appearance of a violation of the provisions of Article 5 of the Convention.

It is the applicant's submission that she should have been released immediately rather than being kept in detention until 26 March 1998 when she was transferred to an Istanbul hotel. The Government dispute that the applicant was detained during that period. The Court considers however that for the reasons set out below it does not have to examine whether the applicant's concrete situation at the guest-house of the Aliens Department of the Security Directorate between 6 February 1998 until her transfer to the hotel amounted to a deprivation of her liberty within the meaning of Article 5 § 1 of the Convention or is be construed as a restriction on her liberty of movement (see, for example, the Amuur v. France judgment of

25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 848, § 42) since the complaints are in any event inadmissible.

It observes that the applicant was liable to deportation under the Asylum Regulations 1994 since she was an illegal entrant whose asylum request could not be considered on account of her failure to comply with the five-day rule. Irrespective of the classification of her stay at the guest house, the Court considers that there was a basis in law for detaining her in the days following the decision of the public prosecutor not to charge her with an offence under the Passport Act 1950. It does not accept the applicant's arguments that she was not informed of the reasons for being placed in the guest house. It observes in this respect that in order to avoid being deported to Iran, the applicant revealed her true identity and country of origin to the Aliens Department. However, on being told that her asylum request could not be examined on account of her failure to respect the five-day rule, the applicant must be taken to have been aware of the fact that she was liable to be deported to Iran and that she was placed in the guest-house while awaiting deportation. It further notes that after being placed in the guest-house the applicant had contacts with the representatives of a non-governmental organisation who notified the branch office of the UNHCR of her situation. She was interviewed by an official of the UNHCR on 12 February 1998 and was recognised by the UNHCR as a refugee on 16 February 1998. Furthermore, she had consultations with a lawyer who submitted her application to the Commission on 28 February 1998. For the Court these factors confirm that the applicant can be taken to have known of the reasons for her initial placement in the guest house after her release by the public prosecutor. It is also significant that at some stage her lawyer initiated proceedings before the Ankara Administrative Court to challenge her deportation.

The Court also observes that although the applicant challenged the administrative act of deportation, she did not take any steps to challenge the legality of her situation in the guest-house. It would have been open to the applicant to argue before a domestic court that the Asylum Regulations 1994 did not provide a legal basis for the detention of a non-European asylum seeker especially one who has been recognised by the UNHCR as a refugee within the meaning of Article 1 of the 1951 Geneva Convention. The applicant raises this issue for the first time without affording the domestic authorities the opportunity to pronounce on the legal basis for her detention. The applicant cannot maintain that this avenue of redress was not available to her having regard to the fact that she had a lawyer acting on her behalf for the purposes of the proceedings before the Commission and the Ankara Administrative Court. It observes also that the issue before the latter court was of an entirely different nature and on that account it cannot be maintained that the rejection of her request for annulment of the deportation order doomed to failure any challenge to the legality of her detention.

In view of the above considerations, the Court considers that, as regards her alleged detention between 6 February 1999 and 26 March 1998, the applicant failed to exhaust domestic remedies and her complaints under Article 5 §§ 1 (f) and 4 of the Convention must be rejected as inadmissible under Article 35 §§ 1 and 4 of the Convention. It further considers that the applicant's complaints under Article 5 § 2 and Article 6 § 3 (a) are inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. The applicant further complains that she did not have an effective remedy, within the meaning of Article 13 of the Convention, to challenge the decision whereby her application for asylum was rejected as being out of time. Article 13 provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The applicant states that she was not given an opportunity to explain to the authorities why she feared deportation to Iran. In this connection she declares that there was no appeal against the rejection of an asylum request for non-compliance with the five-day rule. Her appeal to the Ankara Administrative Court could not be considered an effective remedy since that court could not suspend the deportation decision at that stage with immediate effect. The court did not give detailed reasons for its decision not to suspend the deportation order since the decision was an interim one and a separate decision would have been required.

The Government acknowledge that the Ankara Administrative Court rejected the applicant's request for suspension of the deportation order. However, they maintain that the applicant applied to the Convention institutions before the court rendered its final judgment. The Ankara Administrative Court in November 1998 rejected her request on the ground that there was no deportation order in force.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's' complaints concerning the alleged treatment to which she would be subjected if she were to be expelled to Iran and the lack of an effective remedy to challenge her expulsion;

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Matti Pellonpää
President