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. 49855/99
by İbrahim ÖZMEN
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 states that he is İbrahim Özmen, a Turkish national of Kurdish origin, born in 1978. At the time of introduction of the application, the applicant 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 involvement in the offence of unlawfully depriving a person of his of liberty.

Whilst in police custody, the applicant's provisional placement in aliens' detention (*voorlopige vreemdelingenbewaring*) was ordered, after he had been heard on this matter.

On 24 March 1999, the applicant filed an appeal with the Hague Regional Court (*Arrondissementsrechtbank*) against the decision to order his provisional placement in aliens' detention and he requested the court to award him compensation.

The applicant was released from custody on 26 March 1999 and handed over to the aliens' police (*vreemdelingenpolitie*), who placed him in aliens' detention for the purposes of expulsion (*vreemdelingenbewaring*) under Article 26 § 1 (a) of the Aliens Act (*Vreemdelingenwet*). Subsequently and on the same day, the applicant applied for asylum or, alternatively, a residence permit on humanitarian grounds. As a result of the lodging of this request, the legal basis for his placement in aliens' detention was changed to Article 26 § 1 (c) of the Aliens Act.

On 12 May 1999, following a hearing held on 8 April 1999, the Hague Regional Court sitting in Nieuwersluis rejected the applicant's appeal of 24 March 1999. It noted at the outset that the applicant did not hold a valid residence permit, that he lacked sufficient means of subsistence and that he had no fixed abode. In these circumstances, it accepted that the suspicions that the applicant would seek ways to evade his expulsion were not

unfounded. It further noted that an order for the applicant's expulsion had been issued.

Although the Regional Court found that the hearing of the applicant on the measure of his provisional placement in aliens' detention had fallen short of the requirements of Article 82 of the Aliens' Decree (*Vreemdelingenbesluit*) in that it had been conducted in too routinely a manner and it was not apparent that the applicant had realised what was at issue, it concluded that this had not harmed the applicant's material interests. On this point, the Regional Court observed that hearings pursuant to Article 82 of the Aliens' Decree were held so that the person concerned might have an opportunity to put forward facts or circumstances which could lead to the conclusion that the imposition of this measure was not called for. However, at the hearing before the Regional Court of 8 April 1999 it could not be established whether any such facts or circumstances had in fact existed. The Hague Regional Court further held that it had not appeared that it was highly likely that the applicant's asylum request would be granted. It concluded that the applicant's placement in aliens' detention was in accordance with the Aliens Act and, after having balanced all interests involved, could reasonably be regarded as justified. It consequently rejected the applicant's claim for compensation for the time spent in aliens' detention.

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 expulsions of Turkish nationals of Kurdish origin. On the same day, the applicant was released from aliens' detention.

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.

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 detention for the purposes of his expulsion from the Netherlands 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. He submits that, at the material time, criminal proceedings against him were pending and that, pursuant to Article 6 §§ 1 and 3 of the Convention, he had a right to attend those proceedings in person. He further submits that, at the material time, also a request for an injunction on his expulsion was pending. He is therefore of the opinion that his placement in aliens' detention was unlawful and that his request for compensation was wrongly rejected by the Hague Regional Court, 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 he was placed in provisional aliens' detention, a form of detention which is not provided for in Netherlands legislation on deprivation of liberty.

The applicant also complains that his appeal 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, as at the material time proceedings were pending on criminal charges brought against him as well as on a request for an injunction on his expulsion, there were no prospects for his imminent expulsion and that therefore, his placement in aliens detention was contrary to his rights under Article 5 §§ 1 (f), 4 and 5 of the Convention. He further

complains that his appeal against his placement in aliens' detention was not decided speedily as required under Article 5 § 4 of the Convention and that the measure of provisional placement in aliens' detention is not provided for in Netherlands legislation on deprivation of liberty.

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 "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.

It appears from the decision taken on 12 May 1999 by the Hague Regional Court that, at some unspecified point in time but in any event prior to 12 May 1999, an order for the applicant's expulsion had been issued.

Although it appears from the decision taken on 12 May 1999 that the applicant had filed a request for asylum on 26 March 1999 and that proceedings on this request were, on the first-mentioned date, still pending,

the Court notes that no further information on these proceedings has been submitted by the applicant despite a request by the Court's Registry on 18 September 2000 to inform the Court of any decision taken after 12 May 1999 that might be of relevance for the Court's examination of the applicant's case.

In these circumstances, the Court finds no indication that the duration of the proceedings on the applicant's expulsion should be considered as excessive for the purposes of Article 5 § 1 (f) of the Convention.

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).

The Court observes that, in its decision of 12 May 1999, the Hague Regional Court held that the applicant's placement in aliens' detention was lawful under the relevant statutory provisions and that there were sufficient grounds to justify this measure. Noting the reasons set out in this decision, the Court cannot consider it to be arbitrary.

In respect of the applicant's argument that there were no prospects for his immediate expulsion since, at the relevant time, there were criminal proceedings pending against him as well as a request for an injunction on his expulsion, the Court notes that these contentions have remained fully unsubstantiated in that no information about either set of proceedings has been submitted by the applicant.

The Court further observes that, since the decision taken by the Hague Regional Court on 12 May 1999, it does not appear that the applicant has sought to challenge the lawfulness of his continued placement in aliens' detention under Dutch law before the Hague Regional Court – a possibility which, under the relevant provisions of the Alien Act law, was open to him. The question whether or not the applicant's placement in aliens' detention continued to be lawful between 12 May 1999 and 31 August 1999 has therefore not been submitted to or determined by the competent domestic court. The Court is therefore of the opinion 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 complains that he was placed in provisional aliens' detention, which is not, as such, a measure provided for in Netherlands legislation on deprivation of liberty, the Court finds no indication that this complaint has been raised, either in form or substance, in the domestic proceedings. It follows that, as regards this part of the

application, the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

Insofar as the applicant relies on Article 5 § 4 of the Convention, the Court observes that the applicant's appeal against his provisional placement in aliens' detention was filed on 23 March 1999, that it was examined in the course of a hearing held on 8 April 1999 and that it was determined on 12 May 1999.

Although the Court accepts that the duration of these proceedings are longer than generally desirable under Article 5 § 4 of the Convention, it notes that the applicant had 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. It does not appear that, pending the Hague Regional Court's determination of the appeal, the applicant requested the Regional Court to expedite the handing down of its decision. In these circumstances, 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. Insofar as, on this point, the applicant relies on a decision taken by the Hague Regional Court sitting in Zwolle, the Court notes that this argument has remained fully unsubstantiated.

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