CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46860/99
by Abdullah TEKDEMİR
against the Netherlands

Application no. 49823/99
by Abdullah TEKDEMİR
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 1 October 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above applications lodged on 31 December 1998 and 25 June 1999 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Abdullah Tekdemir, is a Turkish national of Kurdish origin, who was born in 1949 and currently lives in the Netherlands. He is represented before the Court by Mrs G.E.M. Later, a lawyer practising in The Hague. The respondent Government are represented by their Agents, Mr R.A.A. Böcker and Mrs J. Schukking, of the Netherlands Ministry of Foreign Affairs.

A. The circumstances of the case

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

On 10 July 1995 the applicant left Turkey. He arrived in the Netherlands on 16 July 1995 where, on 18 July 1995, he applied for asylum or, alternatively, a residence permit on humanitarian grounds. On 26 July 1995, assisted by an interpreter, he was interviewed by an official of the Ministry of Justice about the reasons for his asylum request. By letter of 8 August 1995, the applicant submitted his corrections and additional remarks to the record of this interview.

The applicant stated that he had left his hometown for İstanbul on 10 March 1995. He had been apprehended and questioned by the authorities in 1991 on suspicion of having transported PKK members. He was released after having convinced the authorities of his innocence. He further stated that, on six occasions between August 1994 and March 1995, he had been apprehended and questioned by the authorities in relation to his son's refusal to do military service, and that he had been beaten during interrogation. However, this had not been his reason for leaving. He had left because he was being sought by the authorities. He explained that, together with another person, he had owned a bus, and on two occasions - i.e. in February and March 1995 respectively - the PKK had forced him to transport PKK members. The PKK members he had been forced to transport in March 1995 had carried out a bomb attack on the Gayreteppe Anti-Terror Branch office. According to the applicant, the authorities were looking for him since he had transported PKK members in 1995. As he had already been suspected of a similar act in 1991, the applicant decided to flee.

On 23 January 1996 the applicant filed an objection (*bezwaarschrift*) in which he complained that his request for asylum or a residence permit had not been determined speedily. On 23 January 1996 he submitted the grounds for his objection.

On 23 February 1996 the State Secretary of Justice (*Staatssecretaris van Justitie*) accepted the applicant's objection that his request for asylum or a residence permit had not been determined speedily, but rejected the applicant's request. The State Secretary noted that the applicant had

declared, *inter alia*, that together with another person, he had owned a bus and that on two occasions - i.e. in February and March 1995 respectively - the PKK had forced him to transport PKK members. Furthermore, between August 1994 and his departure from Turkey the applicant alleged that he had been questioned and beaten by Turkish officials on six occasions in relation to his son's evasion of military service, that he did not belong to or sympathise with any prohibited organisation in Turkey and that he had not undertaken any activities against the Turkish authorities. The State Secretary held that the mere fact of belonging to the Kurdish minority in Turkey was an insufficient ground for granting asylum and that it had not appeared that the applicant had attracted the negative attention of the Turkish authorities. Moreover, as the applicant had stated that the reason for his departure from Turkey was not the fact that he had been questioned on six occasions about his son, but that he feared that he was wanted by the Turkish authorities for having transported PKK members, the State Secretary held that the applicant's fear remained entirely unsubstantiated.

The State Secretary further decided that the applicant was not to be allowed to remain in the Netherlands pending the examination of a possible objection against this decision.

On 11 March 1996 the applicant filed an objection against the decision of 23 February 1996. On the same day, he filed a request with the President of the Hague Regional Court (*arrondissementsrechtbank*) for an injunction to suspend his expulsion pending the outcome of the proceedings on the objection.

On 6 June 1996 the State Secretary reminded the applicant that he was not allowed to await the outcome of the objection proceedings in the Netherlands. The applicant's request for an injunction was heard on 9 July 1996. The court's examination of the request was deferred for an indefinite period, given that uncertainties had arisen with respect to the position of Turkish Kurds.

The applicant's objection against the decision of 23 February 1996 was rejected on 12 December 1996 by the State Secretary. The latter stated that the applicant remained eligible for expulsion.

On 20 December 1996, the applicant filed an appeal with the Hague Regional Court sitting in Zwolle. The applicant further requested this court to issue an injunction against his expulsion pending the appeal proceedings.

In its judgment of 9 March 1998, the Hague Regional Court in Zwolle rejected the applicant's appeal and request for an injunction. It held, *inter alia*:

> "... There are no concrete indications that the Turkish authorities will persecute the <applicant> upon his return. It is true that, in 1991, he had been detained for two days on suspicion of having transported terrorists, but was able to convince the authorities of his innocence. He was later unconditionally released. It has not appeared nor has it been found established that he has encountered further problems in this connection.

<The applicant> further states that since August 1994 he was questioned six times in relation to the refusal of his son Yılmaz to perform his military service and that on the last occasion on 6 March 1995 the authorities had given him one week to report on his son. He did not do so; nor did he await the consequences of his failure to do so since he left for İstanbul.

In addition <the applicant> states that in February and March 1995 he had been forced to transport PKK fighters. During his stay in İstanbul, <the applicant> learned that in the meantime the authorities had become aware of this. His wife and children were questioned by the authorities because they were looking for <the applicant>. His children would have been ill-treated during those interrogations.

Whatever may be the case, <the applicant> has not made out a plausible argument that he is in fact wanted by the Turkish authorities for his alleged activities. There is no concrete information about his alleged persecution. The letters of family members submitted by <the applicant> cannot serve as such. These letters cannot be regarded as emanating from an objective verifiable source. Noting the fact that the applicant has already been residing in the Netherlands for a certain period of time, he could be expected to have substantiated his alleged fear of persecution by way of documents or other means. He has not done so, and that seriously undermines the plausibility of his allegations.

... it has not been established that the applicant has attracted the negative attention of the Turkish authorities. ... This leads to the conclusion that <the applicant> has not made out a plausible case that he can claim with justification admission to the Netherlands as a refugee.

... From what has been considered in relation to the applicant's request for asylum, it follows that ... in <the applicant's> case no facts or circumstances have appeared which can be considered grounds on which it could be held that he runs a real risk, if forcibly expelled to Turkey, of being subjected to treatment contrary to Article 3 of the Convention or comparable provisions in other treaties; he is not eligible, accordingly, for a residence permit on those grounds."

On 7 April 1998 an order for the applicant's expulsion was issued to the Aliens Police (*vreemdelingenpolitie*) in the applicant's place of residence.

The applicant's opposition (*verzet*) against the judgment of 9 March 1998 was rejected on 1 July 1998 by the Hague Regional Court sitting in Zwolle. The applicant's further request for an injunction against his expulsion pending the outcome of the opposition proceedings was rejected on 27 July 1998.

On 7 September 1998 the applicant left his then place of residence, which was known to the immigration authorities, for an unknown destination. On 4 October 1998, after a police officer had reported a public order disturbance, the applicant was apprehended and detained so that his residence status could be checked. When it appeared that his asylum request had been rejected, the applicant was placed in aliens' detention with a view to his expulsion. On 5 October 1998 the applicant filed a second request for asylum or, alternatively, a residence permit on humanitarian grounds. On

the same day he filed an appeal with the Hague Regional Court against the decision to place him in aliens' detention.

On 9 October 1998 the applicant was interviewed by an official of the Ministry of Justice about the reasons for his second asylum request. On that occasion the applicant stated that he based his second request on the same grounds as those advanced in support of his first asylum request.

On 14 October 1998 the Hague Regional Court rejected the applicant's appeal against the decision to place him in aliens' detention. It noted that the applicant's second asylum request was lodged after he had been placed in aliens' detention. The court held that *prima facie* the request did not appear to have much chance of success. Noting that the applicant did not hold either a valid residence permit or a valid proof of identity and that he did not have sufficient means of subsistence, the court ruled that the Netherlands authorities' fears that the applicant would seek ways to prevent his expulsion could not be considered unfounded. It noted in this connection that his presence in the Netherlands was illegal and that he had removed himself from the control of the immigration authorities. The court concluded that his placement in aliens' detention had been in accordance with the law. It further did not find it established that there were no prospects for the applicant's expulsion within a reasonable time. Given that the applicant could not be expelled pending a determination by the State Secretary on the applicant's second asylum request and that, according to the relevant statutory provision, this decision had to be taken within four weeks, the Regional Court held that in these circumstances it was not unreasonable to prolong the applicant's placement in aliens' detention until the decision had been taken.

On 29 October 1998 the State Secretary rejected the applicant's second request for asylum and ruled that the applicant was not allowed to await the outcome of a possible appeal in the Netherlands. On 30 October 1998 the applicant filed an appeal against this decision with the Hague Regional Court and requested this court to issue an injunction against his expulsion pending the examination of his appeal. In his submissions of 30 October 1998 the applicant mentioned that his cousin C.X. had been a vice-president of the political party HEP and had been murdered in 1994 by counter-guerrilla forces, that his other cousin B.X., who had played a leading role in politics, had also fled from Turkey.

On 6 November 1998, the applicant filed a second appeal with the Hague Regional Court against the decision to place him in aliens' detention. On 18 November 1998, the Hague Regional Court rejected this appeal. It held that, contrary to the applicant's arguments, his second asylum request had no apparent chance of succeeding and there were therefore prospects that he would be expelled within a reasonable time. Assuming that the request for an injunction against the applicant's expulsion would be examined diligently, the Regional Court considered that a continuation of the

applicant's placement in aliens' detention could not be regarded as unlawful or unreasonable.

On 22 January 1999 the applicant filed a third appeal with the Hague Regional Court against the decision to place him in aliens' detention.

On the same day, in the proceedings on a second asylum request lodged by A.X., a brother of B.X. and C.X. and to whom the applicant claimed to be related, the Hague Regional Court held that - in the light of new information submitted by A.X. about problems encountered in Turkey by the widow of his brother C.X. - the State Secretary could not have rejected A.X.'s second asylum request on the mere basis of a reference to the findings in A.X.'s first asylum proceedings. It considered that A.X. should be requested to substantiate his alleged family ties with C.X., who was a prominent leader of the HEP, and with C.X.'s other brother B.X., who had already been granted a residence permit in the Netherlands. Consequently, the Regional Court accepted A.X.'s appeal as well-founded and ordered the State Secretary to take a new decision on A.X.'s second asylum request. It further granted A.X.'s request for an injunction against his expulsion pending a new decision by the State Secretary.

On 11 February 1999, the Hague Regional Court rejected the applicant's third appeal against the decision to place him in aliens' detention. It held that, contrary to the applicant's arguments, his request for an injunction against his expulsion did not have a sufficient chance of succeeding. It therefore held that the State Secretary could consider that the applicant's placement in aliens' detention needed to be maintained.

By letter of 16 February 1999 the Netherlands branch of Amnesty International requested the Immigration and Naturalisation Department of the Ministry of Justice to be given access to the applicant so as to conduct an examination of his physical condition and the specific circumstances of his case. Amnesty International further requested that the applicant should not be expelled during this examination. In this letter, Amnesty International expressed its concerns about the applicant's situation in that he belonged to a politically active family, that his cousin - vice-president of the political party HEP which together with the DEP party had merged into the political party HADEP - had been murdered in Turkey, that two of the applicant's sons had refused to do military service and that his son Mahır had been admitted to hospital in Turkey with a broken back. On 12 March 1999 the Netherlands Branch of Amnesty International repeated its request for access to the applicant.

On 10 March 1999, following a hearing held on 5 February 1999, the Hague Regional Court sitting in Zwolle rejected the applicant' appeal against the decision of 29 October 1998 as well as his request for an injunction against his expulsion. It ruled that the applicant's second request for asylum was not based on any new facts or circumstances, and recalled its decision of 9 March 1998 in which it had held that it had not been

established that the applicant was wanted by the Turkish authorities. Insofar as the applicant had argued that the Regional Court, on 9 March 1995, had unjustly held that it was for the applicant to substantiate his alleged fear of persecution, the Regional Court considered that a new asylum procedure was not meant to be a disguised form of appeal against a recent decision having obtained the force of *res iudicata*. According to the court, the applicant's submissions on this point did not concern facts or circumstances that could not have been raised in the course of the proceedings on his first asylum request. This was not altered by the applicant's allegation that this failing was caused by inadequate assistance by various legal aid advisers.

Insofar as the applicant could be considered as relying on the ruling of 22 January 1999 in the case of A.X., the Regional Court noted that in that decision A.X. had been ordered to prove his alleged family tie with C.X. The court considered that in the present case there was no reason to issue such an order as the applicant had never invoked a similar family tie in his first asylum request, insofar as a family tie with C.X. could be assumed at the outset. The Regional Court agreed with the State Secretary that it was strange that the applicant, who claimed to have travelled with A.X. to the Netherlands, had not relied on his kinship in the proceedings on his first asylum request.

The Hague Regional Court found nothing in the applicant's submissions that could lead to a different finding than the one reached on his first asylum request. It was noted in this connection that, during his first interview, the applicant had stated that he was not involved in politics, that he had been forced on two occasions to transport PKK supporters and that it had appeared that he had little knowledge about the Kurdish flag and anthem. As the applicant had based his second asylum request on *grosso modo* the same grounds as his first request, the Regional Court concluded that the appeal was ill-founded. The Regional Court did not find it established that the applicant, if expelled to Turkey, would face a real risk of treatment contrary to Article 3 of the Convention.

On 15 March 1999 the applicant filed a third request for asylum. On the same day, he filed a fourth appeal against the decision to place him in aliens' detention with a view to his expulsion. This appeal was rejected by the Hague Regional Court on 24 March 1999, holding *inter alia*;

> "The Regional Court is of the opinion that the submissions made on behalf of the alien cannot lead to the finding that the placement in aliens' detention must now be considered unlawful.
>
> It is established that the Hague Regional Court sitting in Zwolle, by decision of 10 March 1999, has declared the applicant's appeal ill-founded and that the second asylum proceedings of the alien have thereby ended.

In view of the foregoing, the alien is, in the court's opinion, eligible for expulsion. This is not altered by the fact that the alien has filed a third asylum request as it has not been established that this request would be automatically granted.

The Regional Court further finds that the decisions of Amnesty International and of the European Court <of Human Rights> concerning cousins of the alien in themselves do not imply that the alien is currently not eligible for expulsion, or that after a further review of his third asylum request would not be eligible for expulsion. Also, the intention to request the European Court for an injunction against the alien's expulsion does not imply that the prospects of expulsion should now be regarded as absent. Insofar as new asylum proceedings are running, a decision must follow within 28 days.

It has not appeared that the <State Secretary> has not been diligent as to the procedure for expediting the investigation.

Account has been taken of the fact that, in connection with the alien's second asylum request, the <State Secretary> could not present the alien earlier <to the Turkish authorities> but will now do so on 25 March 1999. The <State Secretary> cannot be held responsible insofar as this cannot take place in connection with the alien's third asylum request. As there is no indication that the applicant's presentation to the Turkish authorities is chanceless, the Regional Court is of the opinion that this investigation needs to be awaited.

It has further not been established that the alien has any mental/psychic problems such as would warrant the lifting of his placement in aliens' detention. The Regional Court further notes that the applicant's placement has at this stage not exceeded six months. The argument raised on this point therefore lacks foundation.

It has not been established that the application or execution of the placement in aliens' detention in respect of the alien is in violation of the Aliens Act (*Vreemdelingenwet*) or, after balancing all interests involved, in all reasonableness must be considered unjustified."

On 23 March 1999 the applicant was medically examined by an Amnesty International doctor. In the course of this examination, the applicant stated that, as a result of having been tortured in detention in 1994 and/or 1995, his feet were injured to such an extent that, after his release, he required medical treatment. He stated that he had received this treatment from Dr Halit Riza in the Bingöl State Hospital.

On 24 March 1999 the Netherlands branch of Amnesty International informed the Immigration and Naturalisation Department of the Ministry of Justice that, according to the findings of its doctor, the applicant had been subjected to torture.

On 25 March 1999 with the assistance of an interpreter, the applicant was interviewed by an official of the Ministry of Justice on the grounds given for his third request for asylum.

On 12 April 1999 the State Secretary rejected the applicant's third asylum request. The applicant was further informed that he was not allowed to remain in the Netherlands pending the outcome of a possible appeal.

By letter of 13 April 1999, the Netherlands branch of Amnesty International informed the Immigration and Naturalisation Department of the Ministry of Justice that it considered that the applicant's case had been insufficiently examined and, for that reason, it could not be excluded that the applicant, if expelled to Turkey, would be exposed to a real risk of human rights violations contrary to the 1951 Geneva Convention Relating to the Status of Refugees. It further transmitted a copy of the provisional report dated 7 April 1999 of the doctor who had examined the applicant on 23 March 1999.

On 14 April 1999 the applicant filed an appeal with the Aliens Division of the Hague Regional Court against the decision of 12 April 1999. He further requested the Regional Court for an injunction against his expulsion pending the outcome of the appeal proceedings.

On 28 April 1999 the applicant filed a fifth appeal with the Hague Regional Court against the decision to place him in aliens' detention.

On 25 May 1999 the Netherlands branch of Amnesty International transmitted the report dated 9 May 1999 on the applicant's medical examination of 23 March 1999 to the Immigration and Naturalisation Department of the Ministry of Justice. According to this report, the applicant's account of ill-treatment was consistent and understandable and the doctor's findings on the basis of the medical examination were consistent with long-term effects of the acts of torture described by the applicant.

On 28 May 1999 the Hague Regional Court rejected the fifth appeal filed by the applicant against the decision to place him in aliens' detention with a view to his expulsion. It held, *inter alia*:

> "The Regional Court considers as regards the issue of diligence <as to the applicant's expulsion> that the alien could not be expelled earlier on grounds of the requests filed by him for admission as a refugee and <requests for an> for the issue of an injunction against his expulsion.
>
> It is true that the <applicant's> placement in aliens' detention has now exceeded a period of six months. However, the Regional Court is of the opinion that the applicant is partly to blame for this long duration. Indeed, a third request for asylum has been filed in the meantime and as long as no decision has been taken on that request, no acts can be undertaken aimed at the alien's expulsion. In the court's opinion, the <State Secretary> cannot be blamed for the fact that these matters a long time.
>
> Noting the contents of the case-file and the <State Secretary's> submissions during the hearing, the Regional Court finds that *in casu* there are sufficient prospects for the applicant's expulsion. Account has been taken in particular of the fact that the alien was presented to the Turkish authorities on 25 March 1999 and that the latter have taken the application for an laissez-passer into consideration.
>
> Therefore, at this juncture the Regional Court sees no reason for finding that the placement in aliens' detention, in all reasonableness, can no longer be regarded as justified."

On 24 June 1999 the applicant filed a sixth appeal against the decision to place him in aliens' detention. This appeal was rejected by the Hague Regional Court on 8 July 1999.

By letter of 8 July 1999 the applicant's lawyer requested the Hague Regional Court to adjourn the hearing on the applicant's appeal and injunction request filed on 14 April 1999 scheduled for 9 July 2000, as for various reasons set out in her letter she had not yet had an adequate opportunity to prepare satisfactorily the case with the applicant

On 27 July 1999 the State Secretary requested the Hague Regional Court to suspend the examination of appeals, including requests for injunctions against expulsions filed by asylum seekers of Kurdish origin, as it had appeared that two such asylum seekers had encountered serious problems after they had been expelled to Turkey.

On 17 August 1999 the applicant filed a seventh appeal against the decision to place him in aliens' detention.

On 31 August 1999 the State Secretary informed the Dutch Parliament that, given 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 Hague Regional Court heard the applicant's appeal of 17 August 1999, declared it founded and lifted the detention order. The applicant was consequently released from aliens' detention.

On 1 October 1999, following a hearing held on 9 July 1999, the Acting President of the Hague Regional Court rejected the applicant's appeal against the decision of 12 April 1999 as well as the applicant's request for an injunction against his expulsion. The President held:

> "6. It must be assumed at the outset that the situation in Turkey is not such that aliens coming from that country can be considered in general and automatically as refugees. The applicant must therefore make out a plausible case that there exists facts and circumstances directly relating to him personally that justify his fear of persecution within the meaning of refugee law.
>
> The applicant has not succeeded in doing so. In agreement with the <State Secretary> the President finds that no credence can be attached to the alleged acts of torture. These acts were raised by the applicant for the first time in the context of his third asylum request as an essential basis for that request, whereas it remains unexplained why he scarcely devoted any attention to this <element> during his interviews held on 26 July 1995 and 9 October 1998. Also, in the context of his opposition to the decision of the Regional Court of 9 March 1998 he entirely passed over the acts of torture which he now puts forward. The medical reports submitted do not enhance the credibility of his allegations. The note of the medical adviser contains only a reproduction of the subjective (not objectively verifiable) account of the applicant, and his conclusion that the scars "could fit" the alleged acts of torture does not provide a decisive answer.
>
> The question to what extent the applicant's account is comparable to that of his two cousins has already been examined in the decision of this court of 10 March 1999.

Unlike the cited cousins, the applicant has not or hardly been politically active, so that no reliance on the principle of equality can be placed. It has also not been established that the applicant would have become involved in any way with the political acts of his cousins.

7. Having regard to the above, the President finds that the <State Secretary> in the challenged decision has justly maintained his refusal to grant the applicant asylum.

8. Pursuant to Article 3 of the Convention it must be examined whether it is plausible that the applicant will face a real risk of being subjected to torture, or to inhuman or degrading treatment or punishment.

Having regard to consideration 6. it has not been established that the forced return of the applicant to Turkey would result in a violation of Article 3 of the Convention.

9. Neither have compelling reasons of a humanitarian nature appeared on grounds of which the <State Secretary> could in all reasonableness not deny a residence permit."

On 16 December 1999 the State Secretary informed the Dutch Parliament that, given the results of an investigation into the facts forming the basis for the temporary suspension of expulsion of Turkish nationals of Kurdish origin, the suspension of expulsion of persons belonging to this category had been lifted again.

B. Relevant domestic law and practice

The admission, residence and expulsion of aliens were regulated at the material time by the 1994 Aliens Act (*Vreemdelingenwet*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the 1994 Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*). On 1 April 2001 the 2000 Aliens Act entered into force, replacing the 1994 Aliens Act.

The Netherlands authorities pursue a restrictive immigration policy in view of the high population density in the Netherlands and the problems to which this gives rise. Admission is only granted on the basis of treaty obligations such as under the Geneva Convention Relating to the Status of Refugees of 28 July 1951, if the individual's presence serves an essential Dutch interest or if there exist compelling reasons of a humanitarian nature.

This policy is laid down, *inter alia*, in the 1994 Aliens Act Implementation Guidelines, which is a body of directives drawn up and published by the Ministry of Justice.

Under Article 15 of the 1994 Aliens Act, aliens may be admitted as refugees if they come from a country where they have well-founded reasons to fear persecution on the grounds of their religious, ideological or political convictions or their nationality, or on grounds of membership of a particular racial or social group. In Dutch law, the term "refugee" is interpreted on the basis of the categories of persons referred to in Article 1 of the Geneva

Convention Relating to the Status of Refugees of 28 July 1951, as amended by the Protocol of 31 January 1967.

Pursuant to Article 32 § 1 (a) of the 1994 Aliens Act, an alien who has applied for admission as a refugee cannot be expelled pending proceedings on an objection filed against a first negative decision, unless it is clear beyond reasonable doubt that there is no danger of persecution within the meaning of Article 15 of the 1994 Aliens Act. If the Minister has decided that expulsion should not be suspended pending the objection proceedings, expulsion may nevertheless by prevented by obtaining an interim measure to this effect from the President of the Hague Regional Court.

An appeal against a rejection of an objection against a refusal to grant admission as a refugee may be filed with the Hague Regional Court. No further appeal lies against the final decision taken by this court.

An alien who has been granted entry to the Netherlands but is not or is no longer eligible for admission is obliged to leave the country pursuant to Article 15d § 2 of the 1994 Aliens Act. If he or she does not leave voluntarily, expulsion may follow (Article 22 § 1 of the 1994 Aliens Act).

Article 26 of the 1994 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:
>
> a. alien 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 residence 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 refugee.
>
> 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 the Hague Regional Court. If this court concludes that there are no prospects of expulsion within a reasonable time, it may order that the measure of placement in aliens' detention be lifted.

According to Dutch case-law, the interest of an alien in being 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 in

keeping him in detention for the purposes of expulsion. Depending on the specific circumstances of each case, it may be the case that this point in time is attained at an earlier or later point in time than the six months period have passed. It can be later where the alien frustrates the determination of his identity or nationality and it can be sooner where the alien concerned is unable to obtain travel documents for reasons beyond his control.

Article 34a of the 1994 Aliens Act provides as follows:

> "1. A measure taken under this Act which has the effect of a limitation on freedom of movement or deprivation of liberty shall, for the purposes of Article 8:1 § 1 of the Administrative Law Act, be considered as being on a par with a decision.
>
> 2. The court shall examine a first appeal against a decision having the effect of a deprivation of liberty within two weeks, either during the preliminary examination under Article 8:44 § 1 of the Administrative Law Act or during a court hearing.
>
> 3. If the appeal is directed against a decision referred to in the second paragraph, the court shall determine the time of the trial proceedings without delay and in any event not later than two weeks after the date of transmission of the appeal. In deviation from Article 8:42 § 2 of the Administrative Law Act, the delay referred to in that Article cannot be prolonged.
>
> 4. The Regional Court hands down its written decision, unless immediately at the court hearing a decision is handed down orally, within two weeks following the close of the investigation <at the hearing>. By way of deviation of Article 8:66, second paragraph, of the General Administrative Law Act, the delay referred to in that provision cannot be extended.
>
> 5. Where the court finds that the applicant or execution of the measure is contrary to the law or after weighing the interests involved cannot in all reasonableness be regarded as justified, it declares the appeal <filed> under this provision founded and orders that the measure be lifted or a change effected to the manner of its execution."

Although no appeal lies against a decision of the Regional Court on the lawfulness of detention under the Aliens Act, 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 unlawful detention for expulsion purposes. Furthermore, appeals have been admitted in cases where it was alleged that, in the proceedings before the Regional Court, fundamental legal principles (*fundamentele rechtsbeginselen*) have been disrespected (cf. The Hague Court of Appeal, 12 November 1998, *Nederlandse Jurisprudentie* 1999, nr. 127; The Hague Court of Appeal, 7 April 2000, *Jurisprudentie Bestuursrecht* 2000, nrs. 147; and The Hague Court of Appeal, 18 May 2000, *Jurisprudentie Bestuursrecht* 2000, nr. 142).

There is no time-limit for filing an appeal against an order for 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.

Pursuant to Article 86 of the Aliens Decree, the Minister of Justice must send a notification to the competent court when an alien has spent four weeks in aliens' detention where the person concerned has not himself filed an appeal against this decision. This notification is considered on a par with a first appeal within the meaning of Article 34a § 2 of the 1994 Aliens Act.

COMPLAINTS

1. The applicant complains that, in view of his personal circumstances, his expulsion would be contrary to his rights under Article 3 of the Convention as well as under Article 2 of the Convention and Protocol No. 6. He submits that he has been tortured, that his son has been tortured on account of his acts and that his cousin C.X., a prominent HEP leader, has been killed. He further submits that, in the proceedings on his second asylum request, his submissions in relation to his family were disregarded because he had not relied on this element in earlier proceedings.

2. The applicant complains that his detention for the purpose of his expulsion from the Netherlands is contrary to his rights under Article 5 §§ 1 (f), 4 and 5 of the Convention. He submits that, pending the outcome of the proceedings on his request for asylum and an injunction against his expulsion, there were no real prospects for his expulsion at short notice.

3. The applicant further complains under Article 3 in conjunction with Article 13 of the Convention that the record of his interview on his first asylum request was not made available to him in a language that he understands, that he was not provided with adequate legal assistance before the Regional Court during its examination of the refusal of the applicant's first request for asylum, that during his interview on his second asylum request, he was given the possibility to clarify further his case in the presence of his lawyer, that there were problems with the assisting interpreter, that he was given insufficient possibilities to prepare his case and that the asylum request was rejected without his being given a prior opportunity to discuss further his account or, if need be, to correct and/or complete his account.

THE LAW

1. The applicant complains that, in view of his personal circumstances, his expulsion would be contrary to his rights under Articles 3 and 2 of the Convention, which provisions guarantees the right to life, and Protocol No. 6 to the Convention, which prohibits capital punishment.

Article 3 of the Convention reads:

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

The Government submit in the first place that there are serious doubts as to the reliability of the applicant's account. In their contention, it may be expected that asylum seekers provide the authorities of a receiving State with a full and faithful account of the reasons for their asylum request. During the proceedings on the applicant's second, and in particular third, asylum request the applicant supplemented or altered the motives which he had provided during the procedure on his first request. He did so on several significant points, in particular his family ties with the X. family, his alleged detention and torture and his alleged activities for the HEP. For the Government, it is difficult to understand why the applicant did not raise these points earlier since they constituted an essential part of his reasons for fleeing Turkey. As the applicant failed to provide a satisfactory explanation for these additions and changes, no credence could be attached to his later arguments.

As to the applicant's family ties with A.X. and his brothers B.X. and C.X., the Government find it striking that the applicant did not mention this matter when interviewed on 26 July 1995, especially as he had entered the Netherlands on 16 July 1995 together with A.X., who based his own asylum request on the problems encountered by his brother C.X. The applicant on the other hand made no mention at that stage of any problems which he had encountered as a consequence of his family ties with the X. family. This argument was only raised for the first time in his second asylum request filed three years later. Moreover, the applicant explicitly stated on 26 July 1995 that he had no relatives or acquaintances living in the Netherlands, whereas his cousin A.X. stated at that time that his brother B.X. was residing in the Netherlands. On 26 July 1995 the applicant described A.X. as a travelling companion and a distant relative who he did not know very well.

Given that the applicant does not have the same family name as A.X. and B.X., the Government find it unlikely that the applicant will be taken to be associated with A.X. and B.X. by the Turkish authorities. As it has not been established persuasively either that the applicant has been politically active in Turkey - an argument raised for the first time in his third asylum request and only as regards peripheral political activities – the Government consider

that it has not been established that the applicant, if expelled to Turkey, will run a real risk of being exposed to treatment incompatible with Article 3 of the Convention on account of his kinship with the X. brothers and/or on account of his alleged political activities.

The Government further submit that inquiries conducted through the Netherlands Embassy in Turkey into the applicant's circumstances on the basis of the statements made by him in the asylum proceedings in the Netherlands resulted in the following findings:

– no criminal proceedings against the applicant are pending in his place of origin, nor is he wanted by the local Turkish authorities;

– the applicant's son Yılmaz is registered as having evaded military service, as he availed himself of the official arrangement to pay the Turkish authorities 15,000 German Marks in order to reduce his military obligations to one month but failed to pay a third instalment in good time; this failure resulted in his registration as a person having evaded military service;

– there are no known cases of intimidation by the Turkish police of the families of men who refuse to do military service;

– nothing is known about a bomb attack allegedly carried out in March 1995 on the Gayreteppe Anti-Terror Branch office; and

– the records of the Bingöl State Hospital, where the applicant claims to have been treated in 1995 for foot injuries caused by torture, contain no reference to the applicant; nor has Dr Halit Riza, who is alleged to have treated the applicant for these injuries, ever worked there.

The Government are therefore of the opinion that there are no well-founded reasons to assume that the applicant would face a risk of being subjected to treatment in breach of Article 3 of the Convention if he were to be expelled to Turkey.

The applicant submits that it was already known in the proceedings on his first asylum request that his son Mahır had his back broken as a result of torture. A medical statement was submitted to this effect, but was not accepted by the Hague Regional Court as it did not appear from this statement that the injury had been caused by torture. It was also submitted in these proceedings that the applicant's sons and cousins were regularly apprehended, questioned and ill-treated on account of the absence of the applicant and his two sons. It was further known that the applicant came from Bingöl, a Kurdish bastion, and that the Anti-Terror Branch was looking for him there. Finally, it was known at the outset that he was related to A.X.

In relation to his second asylum request, the applicant submits that, on 4 October 1998, he was apprehended together with A.X. He had not been prepared for or received assistance for his interview about the reasons for his second asylum request. Moreover, in the proceedings on his second and third asylum request, he had not been provided with sufficient time and facilities to discuss his case with his lawyer.

As regards the investigation conducted by the Netherlands authorities in Turkey, the applicant submits that it does not appear from the Government's submissions how and these inquiries were carried out and who was contacted. The conclusion was reached that he was not being sought by the local authorities. However, in the applicant's opinion this finding does not imply that he is not wanted by the authorities. Moreover, the fact that there are no criminal proceedings currently pending against him cannot be taken to imply that he is not being sought, or that he has no political record or that he would not encounter any problems upon his return. On this point, the applicant submits that on 15 June and 28 July 2001 his son Orhan was apprehended and questioned about his father. This would appear to indicate the contrary. Furthermore, although it might have been discovered that there was no trace of any criminal proceedings against his cousin C.X., it is nevertheless the case that C.X. was killed by counter-guerrilla forces.

The applicant further submits that, according to the Government, his son Yılmaz is recorded as having evaded military service, and the applicant has failed to provide any information about his fate or whereabouts. In fact, his son Yılmaz is currently lawfully residing in a third country. In addition, the applicant's other son Tarik was detained for 10 months in connection with a failure to comply with his military obligations. Tarik has now gone into hiding. The applicant refutes the Government's submission that family members of men who have evaded military service are not intimidated by the Turkish authorities. If a person evades military service, it is often assumed in Turkey that such a person belongs to the PKK. As stated on various occasions by Amnesty International, family members of PKK activists encounter serious problems in Turkey. An official report (*ambtsbericht*) of April 2001 of the Netherlands Ministry of Foreign Affairs also states that it is likely that family members of (suspected) PKK members are monitored, questioned and interrogated by the authorities, because they themselves may be regarded as potential suspects. Against this background, the applicant points out that his family connection with the X. brothers is not disputed, and that it is likely that the local authorities are aware of this connection.

As regards Dr Halit Riza, the applicant submits that the information collected by the respondent Government is incorrect. Dr Halit Riza Unal was a well-known doctor practising in Bingöl and Karakoçan. He reportedly died about one and a half years ago. Furthermore, the absence of records in a State Hospital concerning medical treatment for injuries resulting from torture cannot be regarded as strange, given the manner in which these kinds of problems are handled in Turkey.

The applicant finally submits that it appears from his medical examinations that he has been subjected to treatment in Turkey in violation of Article 3 of the Convention, which findings are of relevance in assessing the risks attendant on his expulsion to Turkey. Furthermore, the fact that

certain points were either not raised or insufficiently raised may be due to the trauma which he experienced and the situation in which asylum seekers find themselves. As to the latter point, the applicant emphasises that he was kept in detention during the proceedings on his second and third asylum request.

The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see the Ahmed v. Austria judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, §§ 38-39, and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, §§ 73-74).

In determining whether it has been shown that the applicant runs a real risk, if deported to Turkey, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case. A mere possibility of ill-treatment is not in itself sufficient (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 36, § 107, and p. 37, § 111, the HLR v. France judgment of 29 April 1997, *Reports* 1997-III, p. 758, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

The Court notes that, according to the applicant's account given in support of his first asylum request, the direct cause of his flight from his region of origin and subsequently his country of origin was the fear of being arrested for having transported PKK members in February and March 1995. This asylum request was rejected in a final decision taken by the Hague Regional Court on 9 March 1998.

Immediately after his apprehension and placement in detention for the purposes of his expulsion, the applicant filed a second asylum request on 5 October 1998. It was only in the course of these proceedings that he raised and relied on his kinship with the brothers A.X. and B.X., one of whom had obtained a residence permit and the other a favourable ruling in the proceedings on his asylum request. The applicant's second request was rejected on 10 March 1999 by the Hague Regional Court, finding that it was

not based on any new facts or circumstances that could not have been raised in the proceedings on his first asylum request.

On 15 March 1999, the applicant filed a third request, basing himself on a claim that he had been tortured in Turkey. The applicant had not raised this argument in his previous asylum requests. This third asylum request was rejected in a decision of 1 October 1999 in which it was held that the applicant's account of having been tortured lacked credence and that his personal situation was not comparable to the situation of the brothers X.

The Court considers that the fact that the applicant supplemented and significantly altered the motives for seeking asylum in the course of his three consecutive asylum requests can reasonably be regarded as undermining the credibility of his claim. The Court further finds that the applicant's stated reasons for fearing treatment contrary to Article 3 of the Convention if returned to Turkey have not only remained unsubstantiated but are, in addition, contradicted by the findings made by the Netherlands authorities in their investigation carried out in Turkey. Insofar as the applicant disputes these findings, the Court considers that the points made by the applicant are insufficiently substantiated and cannot be said to weaken the Government's findings.

Insofar as the applicant relies on his kinship with A.X. and B.X., the Court has found no indication that the applicant would have attracted the negative attention of the Turkish authorities on account of this family connection. It further has found no basis for holding that the applicant's personal situation can be considered comparable to the situation of either A.X. or B.X.

The Court is of the opinion that the applicant's submissions concerning his personal situation as well as the general situation of the Kurdish community in Turkey do not disclose that he would be exposed to individual risk in Turkey of a kind which would be incompatible with Article 3 of the Convention. The Court further finds that it does not appear from the applicant's submissions that he has been sentenced to death in Turkey, that he is facing any criminal proceedings in Turkey on charges carrying a sentence of capital punishment or that he has received death threats.

In these circumstances, the Court finds that no substantial grounds have been established for holding that the applicant, if expelled, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention or that his expulsion would be in violation of his rights under Article 2 of the Convention or Protocol No. 6.

It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains that, given the duration of his detention and the lack of prospects for his expulsion pending the proceedings on his

asylum requests, his detention for the purpose of his expulsion from the Netherlands is 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 Government submit that, when placed in aliens' detention, the applicant filed a second and third request for asylum. Pending the Minister's decision on these two requests, the applicant could not be expelled and this factor resulted in a considerable delay in processing the expulsion procedure. Furthermore, during the period in which the applicant was detained, it was always open to the applicant to contest before the Regional Court the lawfulness of his placement in aliens' detention. In fact, he availed himself of this possibility on seven occasions. The Regional Court examined his complaints about the alleged unlawfulness of his detention and on all seven occasions ruled on them speedily, including the question as to whether his expulsion was being handled with due expedition. The Government are therefore of the opinion that the applicant's rights under Article 5 §§ 1 and 4 of the Convention have been respected.

The applicant submits that, although an order for his expulsion had already been issued after the rejection of his first asylum request, no steps aimed at his expulsion were in fact taken. He was allowed to remain in the Netherlands pending the outcome of all of the proceedings during which a court twice ruled on the lawfulness of his expulsion, the last occasion being 1 October 1999. As nothing was being done to activate the applicant's expulsion, it is incomprehensible that the courts found his placement in aliens' detention to be at all times lawful.

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 Article 5 § 1 (f) requires 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 pursued with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) of the Convention (see the Chahal v. United Kingdom judgment, cited above, pp. 1862-1863, §§ 112-113). It must therefore be determined whether the expulsion proceedings in the applicant's case were conducted with due diligence.

The Court notes that the applicant's expulsion was ordered on 7 April 1998 and that his second request for asylum of 5 October 1998 was determined by the State Secretary of Justice on 29 October 1998. The applicant's appeal against this decision was examined by the Hague Regional Court on 5 February 1999 and determined on 10 March 1999. The applicant's subsequent and third asylum request of 15 March 1999 was determined by the State Secretary of Justice on 12 April 1999. His appeal to the Hague Regional Court against that decision was determined on 1 October 1999.

Having regard to the issue to be determined in these proceedings, i.e. whether the applicant had well-founded fears of being subjected to persecution within the meaning of the Geneva Convention Relating to the Status of Refugees and/or treatment contrary to Article 3 of the Convention, the Court considers that it is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all of the relevant issues and evidence. Against this background and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the domestic authorities, the total duration of these two sets of proceedings, taken either separately or together, cannot be regarded 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 in 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 (see the Chahal v. United Kingdom judgment, cited above, § 118).

The Court observes that, in its six decisions taken between 14 October 1998 and 8 July 1999 respectively, the Hague Regional Court rejected the applicant's argument that his placement in aliens' detention was unlawful

under the relevant statutory provisions and concluded that in all reasonability there were sufficient grounds for justifying the deprivation of the applicant's liberty. Noting the reasons given by the Regional Court in these decisions for this finding, the Court cannot consider these decisions to be unreasonable or arbitrary or otherwise contrary to the applicant's rights under Article 5 § 1 (f) of the Convention.

Insofar as the applicant relies on Article 5 § 4 of the Convention, the Court observes that, following appeals filed by the applicant, the lawfulness of his placement in aliens' detention was examined and determined by the Regional Court on seven occasions, i.e. in its decisions of 14 October 1998, 18 November 1998, 11 February 1999, 11 March 1999, 28 May 1999, 8 July 1999 and 31 August 1999 respectively. The Court has found no indication in the case-file which supports a finding that the duration of these proceedings fell short of the requirement of "speedily" set out in Article 5 § 4 of the Convention. Furthermore, noting the possibility under the Aliens Act to challenge the lawfulness of a placement in aliens' detention before the Regional Court at any point in time, a possibility relied on by the applicant on seven occasions during his detention, 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 issue arises under this provision.

It follows that this part of the application must be also rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant finally complains under Article 3 in conjunction with Article 13 of the Convention that the record of his interview on his first asylum request was not made available to him in a language that he understands, that he was not provided with adequate legal assistance before the Regional Court during its examination of the rejection of his first request for asylum, that during his interview on his second asylum request, he was not given the possibility to clarify further his case in the presence of his lawyer, that there were problems with the assisting interpreter, that he was given insufficient possibilities to prepare his case and that this asylum request was rejected without being given a prior opportunity to discuss further his account or, if need be, to correct and/or complete his account.

Article 13 of the Convention 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 Court observes that the applicant's requests for asylum were determined following proceedings in the course of which he was provided with ample opportunity to state his case and to submit whatever he found relevant for the outcome. In these circumstances, the Court has found no indication that the procedure in itself or the decision to expel him gave rise to an arguable issue under Article 3 of the Convention. With these considerations in mind, the Court further finds that no issue arises under Article 13 of the Convention, since this provision applies only in respect of grievances under the Convention which are arguable (see the Anne-Marie Andersson v. Sweden judgment of 27 August 1997, *Reports* 1997-IV, p. 1417, § 40).

It follows that also this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.P. COSTA
President