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

SECOND SECTION

DECISION

Application no. 74785/10
Demyan YANKOVOY and Rezzak ALIYEV
against Turkey

The European Court of Human Rights (Second Section), sitting on 3 October 2017 as a Committee composed of:

Julia Laffranque, *President,*
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 22 December 2010,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Demyan Yankovoy and Mr Rezzak Aliyev, are Ukrainian and Azerbaijani nationals who were born in 1976 and 1975, respectively, and are currently incarcerated in Ukraine. They are represented before the Court by Mr A. Yılmaz, a lawyer practising in Istanbul. The Turkish Government ("the Government") are represented by their Agent.

A. The circumstances of the case

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

3. In 2001 the Ukrainian authorities requested the applicants' extradition from Turkey on the basis of a search warrant and ongoing criminal investigation. The applicants were suspected of membership of a criminal organisation and homicide.

4. The applicants were detained between 15 October 2001 and 4 February 2002 pending the completion of the extradition procedure. On 7 December 2001 the Istanbul Criminal Court held that the applicants' extradition had not been requested in connection with a military or political offence. On 4 February 2002 the Cabinet of Ministers approved their extradition to Ukraine, which was due to take place on 15 March 2002.

5. On 14 March 2002, the night before the extradition was to be carried out, the applicants committed homicide in prison. As a result, all the extradition proceedings were suspended and a criminal investigation was launched against them. The applicants were convicted of murder and sentenced to prison.

6. The applicants' release after serving their sentences was set for 27 November 2010. In an effort to resume the extradition proceedings, and acting in accordance with the extradition decision rendered on 4 February 2002, the prosecutor in charge applied to the Istanbul Magistrates' Court for an order for the applicants' provisional arrest pending their extradition.

7. On 22 November 2010 the Istanbul Magistrates' Court ordered that the applicants should be detained from 27 November 2010 until their extradition to Ukraine. The decision was made in accordance with Articles 16 and 18 of the European Convention on Extradition and Articles 100 and 101 of the Code of Criminal Procedure.

8. On 25 November 2010 the first applicant, Mr Demyan Yankovoy, lodged an application for asylum with the domestic authorities. He maintained in his application that he would be at a real risk of ill-treatment if he was extradited to Ukraine. He also contended that that risk was so real that he and the other applicant had felt forced to take the risk of committing a serious crime attracting a life sentence rather than being extradited to Ukraine. He received no answer to his application.

9. On 26 November and 2 December 2010 the first applicant lodged two objections against the decision of 22 November 2010 with the Istanbul Magistrates' Court, requesting his release. On 10 December 2010 his objections were dismissed.

10. On 11 January 2011 the first applicant was extradited to Ukraine.

11. In the meantime, on 14 December 2010 the second applicant, Mr Rezzak Aliyev, applied for asylum on the same grounds as the first applicant.

12. On 19 January 2011 a decision rejecting the second applicant's request for asylum was served on him. He subsequently filed an objection against that decision with the Ministry of the Interior.

13. On 23 February 2011 the Ministry of the Interior informed the second applicant that his request for asylum and subsidiary protection had been dismissed and that as a result his case had been closed.

14. On 25 February 2011 the second applicant was extradited to Ukraine.

B. Relevant domestic law

15. Article 18 of the Criminal Code, which was still in force at the material time, provided, in so far as relevant, as follows:

> "1. A foreigner accused or convicted of a criminal offence allegedly committed in a foreign country can be returned upon request to that country for prosecution or punishment. However, an extradition request shall be rejected:
>
> a. if the act does not constitute an offence under Turkish law,
>
> b. if the act is in the nature of a free-speech offence or related to political or military matters,
>
> c. if the offence has been committed against the security of the State of Turkey or with the intention of damaging the State of Turkey, a Turkish citizen or a legal entity incorporated under Turkish law,
>
> d. if the offence is within the jurisdiction of the Turkish courts,
>
> e. if the action is subject to the statute of limitations or an amnesty.
>
> 2. No citizen shall be extradited to a foreign country for an offence, except under obligations resulting from being a party to the International Criminal Court.
>
> 3. A request for extradition shall be rejected if there are strong suspicions that the person will be subjected to prosecution or punishment or torture and ill-treatment on account of race, religion, nationality, membership of a particular social group or political opinions after being extradited.
>
> 4. An assize court shall rule on an extradition request in the presence of the person, in accordance with the present provision and the provisions of any international treaty to which Turkey is a party. The assize court's decision is subject to appeal.
>
> 5. If the court finds that the extradition request is admissible, the implementation of the decision is subject to the discretion of the Cabinet of Ministers.
>
> 6. Measures of judicial control may be taken in respect of a person whose extradition has been requested in accordance with the provisions of the international treaty to which Turkey is a party.
>
> 7. Where a request for extradition is found admissible, detention of the person concerned can be ordered or other judicial control measures taken in accordance with the Code of Criminal Procedure.
>
> ..."

16. On 5 May 2016 Law on International Judicial Cooperation in Criminal Matters (Law no. 6706) entered into force. With the entry into force of that Law, Article 18 was repealed.

17. The wording of Article 100 of the Code of Criminal Procedure (Law no. 5271) can be found in *Lütfiye Zengin and Others v. Turkey* (no. 36443/06, § 27, 14 April 2015). Articles 100 and 101 of the Code provide for the reasons, conditions and the procedure for ordering and

extending pre-trial detention in the context of criminal investigations and proceedings brought against individuals in Turkey.

B. Relevant international law

18. The European Convention on Extradition, which was signed in Paris on 13 December 1957 and which came into force on 11 May 1986, provides as follows:

Article 1 - Obligation to extradite

"The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order."

Article 16 - Provisional arrest

"1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law. ...

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition ... It shall not, in any event, exceed 40 days from the date of such arrest."

Article 18 - Surrender of the person to be extradited

"1. The requested Party shall inform the requesting Party by the means mentioned in Article 12, paragraph 1, of its decision with regard to the extradition.

2. Reasons shall be given for any complete or partial rejection.

3. If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.

4. Subject to the provisions of paragraph 5 of this article, if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.

5. If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree a new date for surrender and the provisions of paragraph 4 of this article shall apply."

COMPLAINT

19. The applicants complained under Article 5 of the Convention that the Istanbul Magistrates' Court's decision of 22 November 2010 ordering their detention with a view to extradition had been unlawful.

THE LAW

20. The Government submitted that the second applicant had failed to exhaust the domestic remedies available to him since, unlike the first applicant, he had not objected to the decision of 22 November 2010. They further submitted that the applicants' detention from 27 November 2010 onwards had been based on Article 18 of the Criminal Code, which had still been in force at the material time, and Articles 100 and 101 of the Code of criminal Procedure.

21. The applicants submitted that the second applicant had not been able to contest the decision of 22 November 2010 since it had never been served on him. They also argued, contrary to the Government's submissions, that their detention had had no legal basis in domestic law.

22. The Court does not consider it necessary to examine the Government's objection regarding the second applicant since the application is in any event inadmissible for the reasons set out below.

23. The Court first reiterates that in order to ascertain whether the period of detention in question was compatible with Article 5 § 1 (f) of the Convention, it must ascertain whether the deprivation of liberty, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), was "lawful". 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 national law and lays down the obligation to conform to the substantive and procedural rules of national law (see *Gallardo Sanchez v. Italy*, no. 11620/07, § 36, ECHR 2015, and *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 91, ECHR 2016 (extracts)).

24. In the present case, the Court observes that on 22 November 2010 the Istanbul Magistrates' Court ordered the applicants' detention under Articles 16 and 18 of the European Convention on Extradition and Articles 100 and 101 of the Code of Criminal Procedure from 27 November 2010 until their extradition. The Court notes that Articles 16 and 18 of the European Convention on Extradition do not appear to be relevant to the applicants' legal status on the date their detention was ordered given that the Cabinet of Ministers had already decided to extradite them to Ukraine (see paragraphs 4 and 18 above).

25. On the other hand, according to Article 18 of the Criminal Code, which was still in force at the material time, a person could be detained or other judicial control measures could be taken under the Code of Criminal Procedure where a request for extradition had been found admissible; that is to say, even before an extradition decision had been taken by the Cabinet of Ministers (see paragraph 15 above). The Court notes that Articles 100 and 101 of the Code of Criminal Procedure provide for the reasons, conditions and the procedure for ordering and extending pre-trial detention

in the context of criminal investigations and proceedings brought against individuals, but not of extradition proceedings. Nevertheless, once the extradition proceedings were completed and a request for extradition was found admissible, Article 18 allowed for the detention of a person under Articles 100 and 101 of the Code of Criminal Procedure.

26. The Court therefore finds that the applicants' detention under Articles 100 and 101 of the Code of Criminal Procedure from 27 November 2010 onwards had a legal basis in domestic law, that is under Article 18 of the Criminal Code, which was still in force at the material time (compare R.M. v. Turkey, no. 81681/12, § 56, 13 June 2017). In those circumstances, the Court does not discern any evidence to suggest that the applicants' detention pending extradition from 27 November 2010 onwards did not comply with domestic law. It also finds no indication that the detention in question pursued an aim other than that for which it had been ordered.

27. Next, the Court reiterates that any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as extradition proceedings are in progress and that if those proceedings are not being conducted with due diligence, the detention will cease to be permissible (*Quinn v. France*, 22 March 1995, § 48, Series A no. 311, and *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports of Judgments and Decisions* 1996-V).

28. In that connection, the Court observes that the two applicants were detained pending their extradition to Ukraine for forty-five days and ninety-one days respectively. The periods in question do not appear to be unreasonable. Furthermore, the applicants did not claim before the Court that there had been a lack of expedition on the part of the national authorities. There is also nothing in the documents submitted by the parties showing that there were unjustified delays in the period from 27 November 2010 onwards.

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

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 October 2017.

Hasan Bakırcı
Deputy Registrar

Julia Laffranque
President