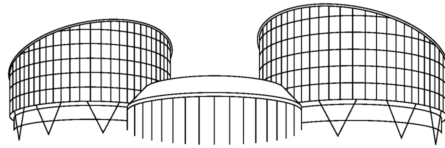

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BATYRKHAIROV v. TURKEY

(Application no. 69929/12)

JUDGMENT

STRASBOURG

5 June 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

In the case of Batyrkhairov v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Paul Lemmens,
Ledi Bianku,
Işıl Karakaş,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 15 May 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 69929/12) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Kazakhstani national, Mr Arman Batyrkhairov ("the applicant"), on 10 September 2012.

2. The applicant was represented by Mr A. Yılmaz, Ms S.N. Yılmaz and Mr Buhari Çetinkaya, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 12 December 2016 the complaints concerning the applicant's deportation to Kazakhstan and the allegedly poor conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre, the lack of effective remedies in respect of the above-mentioned complaints, the alleged unlawfulness of the applicant's detention at the Kumkapı Foreigners' Removal Centre, and the lack of communication of information to the applicant regarding the reasons for his detention – as well as the complaints concerning the lack of an effective remedy to challenge the lawfulness of his detention and to request compensation – were communicated to the Government, and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1980 and is detained in Atyrau, Kazakhstan.

A. The applicant's arrival in Turkey and the asylum procedure

5. According to the applicant's submissions, he left Kazakhstan in 2008 and lived in Saudi Arabia and Syria as a student until June 2011. He did not wish to return to his country as a number of people had been detained on charges of religious extremism in Kazakhstan and some of his friends had left the country after coming under pressure from the Kazakhstan government because of their political and religious identity.

6. In June 2011 the applicant arrived in Turkey. The Government submitted that subsequent to his arrival in Turkey, two entry bans were issued against him on the grounds that he was suspected of having provided logistical support to foreign nationals who were engaged in international terrorism.

7. On an unspecified date the applicant was taken into police custody and thereafter transferred to the Kumkapı Foreigners' Removal Centre with a view to his removal to Kazakhstan. As the applicant applied for asylum while in detention, on 28 October 2011 he was released pending the determination of his asylum application. On the same day he was notified that he should go and reside in Denizli province.

8. On 4 November 2011 the applicant lodged his asylum application again – this time with the Denizli Governor's Office. On the same day a police officer from Denizli Security Headquarters held a preliminary interview with the applicant. The applicant stated that he had learned that he was being sought for by the Kazakhstan authorities on terrorism charges and asked to be granted leave to stay in Turkey. He submitted that his removal to Kazakhstan would expose him to a risk of death. According to a report dated 22 November 2011 concerning the applicant's interview of 4 November 2011, the interpreter who was appointed by the police authorities noted that the applicant spoke Turkish.

9. On 28 November 2011 the applicant was notified that his asylum application had been rejected. According to the report of 22 November 2011, the police officer who had interviewed the applicant found that the latter had failed to submit any concrete evidence concerning his nationality, identity and the problems he had experienced in Kazakhstan. The officer, however, found it established that the applicant feared to be returned to his country and that it was known to the Turkish authorities that he would be prosecuted if returned to Kazakhstan.

10. On 29 November 2011 the applicant objected to the rejection of his asylum application. He once again submitted that he would be exposed to a real risk of death if he were to be removed to Kazakhstan.

11. According to the Government's submissions, on 26 December 2011 his objection was dismissed.

12. On 12 January 2012 the applicant lodged an application to be allowed to leave Turkey with the Denizli Security Headquarters and informed the police that he had been offered a visa to enter and live in Egypt.

13. On 18 January 2012 the police authorised the applicant to leave the country.

B. Extradition proceedings

14. According to a document dated 6 January 2012 sent by the Deputy Director of the General Police Headquarters to a number of police authorities, during a meeting held on 4 January 2012 the ambassador of Kazakhstan in Ankara requested the Turkish Interior Minister to extradite Kazakhstan nationals who had been involved in terrorist acts and in respect of whom Kazakhstan had issued wanted notices ("Red Notices") via Interpol. A formal extradition request in respect of such persons was submitted by the Kazakhstan embassy in Ankara to the Ministry of Foreign Affairs on 31 December 2011. According to the document prepared by the embassy, the applicant and four other persons were members of the "Islamic Jihad Union", a terrorist organisation which carried out terrorist attacks in the western region of Kazakhstan. They had been detained by the Turkish authorities upon receipt of a Red Notice via Interpol by Kazakhstan. The embassy pointed out that subsequent to their asylum claims, four of those persons, including the applicant, had been released from detention in Turkey. The Kazakhstan authorities considered that these five persons had been in the process of preparing a new terrorist attack in their country and that following their release four of them had organised a terrorist attack in the Atyrau province of Kazakhstan, in co-operation with another terrorist organisation, Jund al-Khilafa ("Soldiers of the Caliphate"). The embassy accordingly requested the Turkish authorities not to grant asylum to them and to extradite them to Kazakhstan.

15. On 19 January 2012, while he was waiting at Istanbul Atatürk Airport to board a flight to Egypt, the applicant was taken into police custody on the basis of the extradition request submitted to the Turkish authorities by the Kazakhstan embassy.

16. On 23 January 2012 the Interpol-Europol department attached to the General Police Headquarters informed the Ministry of Justice and a number of security departments that a Red Notice had been issued by Kazakhstan

via Interpol in respect of the applicant on the basis of terrorism-related offences.

17. On 24 January 2012 the Bakırköy Magistrates Court ordered the applicant's detention within the context of the extradition proceedings for a period of forty days. The applicant was then placed in detention in Maltepe Prison, in Istanbul.

18. On 25 January 2012 the applicant lodged a petition with the Bakırköy Assize Court and challenged his detention. In his petition, he stated, *inter alia*, that a person who would be subjected to torture or other forms of ill-treatment in his country of origin should not be extradited to that country.

19. On 27 January 2012 the Bakırköy Assize Court dismissed the applicant's petition challenging his detention.

20. On 28 February 2012 the Bakırköy Assize Court rejected the extradition request submitted by the Kazakhstan authorities. During the hearing held on the same day the assize court did not find it necessary to appoint an interpreter for the applicant as he spoke Turkish. According to the reasoning contained in the court's decision, in his defence submissions the applicant had contended that he had been wrongly accused of being a member of al-Qaeda or Islamic Jihad and had asked the court not to extradite him to Kazakhstan. The Bakırköy Assize Court held that the applicant could not be extradited to Kazakhstan because the charge against him in Kazakhstan fell within the scope of one of the offence categories, precluding extradition, listed in Article 18 § 1 (b) of the Criminal Code, as in force at the material time (see paragraph 30 below). The court also ordered the applicant's release from detention. The decision of 28 February 2012 became final as no appeal was lodged against it.

C. The applicant's removal from Turkey

21. On 28 February 2012 the applicant was released from prison but was immediately transferred to the Kumkapı Foreigners' Removal Centre in Istanbul. According to a document dated 29 February 2012, the applicant was informed that he was being held pending the outcome of the deportation procedure conducted in this respect.

22. On 7 March 2012 the Deputy Director of General Security ordered the Istanbul Police Headquarters to deport the applicant.

23. On 12 March 2012, while in detention, the applicant appointed his representatives to undertake the necessary legal and procedural actions on his behalf before the domestic authorities and the Court by way of a issuing a power of attorney before a notary public.

24. According to the applicant's submissions, on 21 March 2012, when Mr Yılmaz, one of his representatives, went to the Kumkapı Foreigners' Removal Centre to meet him, he was orally informed by officers at the

centre that the applicant had been deported to Kazakhstan on 12 March 2012.

25. Upon a request by the applicant's lawyer, on 31 May 2012 the Istanbul Police Headquarters sent a letter to the applicant's lawyer informing him that the applicant had been deported to Kazakhstan on 12 March 2012.

26. In a letter dated 10 May 2014, Mr Yılmaz submitted that the applicant had been remanded in custody and placed in Atyrau Prison upon his return to Kazakhstan. The lawyer stated that he did not have information as to whether the applicant had been subjected to ill-treatment in Kazakhstan given that the applicant's family members had refrained from answering his questions regarding that matter during their telephone conversations with him.

D. The conditions of detention at the Kumkapı Foreigners' Removal Centre

1. The applicant's account

27. Between 28 February and 12 March 2012 the applicant was detained at the Kumkapı Foreigners' Removal Centre. The applicant claimed that the centre had been overcrowded at the time of his detention. He had not been allowed exercise outdoors or any other type of social activity throughout his detention. The applicant further alleged that there had been hygiene problems at the centre and that the quantity of the food provided had also been poor.

2. The Government's account

28. The Government submitted that the Kumkapı Foreigners' Removal Centre, where the applicant had been held, had a capacity of 300 persons and that a total of between 100 and 140 persons had been held during the period between 28 February and 12 March 2012. Detainees were accommodated on three floors: the first two floors were reserved for male detainees, and the third floor for females. There were four dormitory rooms on the first floor, respectively measuring 50, 58, 76 and 84 sq. m. On the second floor there were five dormitories measuring 50, 58, 69, 76 and 84 sq. m. There was a total of 120 bunk beds in the ten rooms reserved for male detainees and all rooms received natural light. There were also five showers and six toilets per floor, as well as a cafeteria measuring 69 sq. m, where breakfast, lunch and dinner were served daily on each floor. The detainees had the right to outdoor exercise if the physical conditions and the number of staff available allowed. A doctor was present on the premises every week and the detainees also had access to medical care in cases of

emergency. As for the hygiene in the facility, there were six cleaning staff working full time.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. A description of the relevant domestic law and practice, as in force at the material time, regarding the expulsion of foreign nationals can be found in *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-43, 22 September 2009).

30. The relevant parts of Article 18 § 1 of the Criminal Code, which was still in force at the material time, read as follows:

> "A foreign national accused ... of a criminal offence allegedly committed in a foreign country may be returned upon request to that country for prosecution ... However, an extradition request shall be rejected ...
>
> ...
>
> b) If the act [in question] is in the nature of a speech offence, a political offence or a military offence ..."

III. RELEVANT INTERNATIONAL MATERIALS

A. United Nations Documents

1. Concluding Observations of the United Nations Committee against Torture regarding Kazakhstan dated 12 December 2008 and 12 December 2014

31. In its Concluding Observations of 12 December 2008 on Kazakhstan (CAT/C/KAZ/CO/2) the UN Committee against Torture made the following observations:

> "...7. The Committee is concerned about consistent allegations concerning the frequent use of torture and ill-treatment, including threat of sexual abuse and rape, committed by law-enforcement officers, often to extract "voluntary confessions" or information to be used as evidence in criminal proceedings, so as to meet the success criterion determined by the number of crimes solved (arts. 2, 11 and 12) ...
>
> 8. The Committee is particularly concerned about allegations of torture or other ill-treatment in temporary detention isolation facilities (IVSs) and in investigation isolation facilities (SIZOs) under the jurisdiction of the Ministry of Internal Affairs or National Security Committee (NSC), especially in the context of national and regional security and anti-terrorism operations conducted by the NSC. The Committee notes with particular concern reports that the NSC has used counter-terrorism operations to target vulnerable groups or groups perceived as a threat to national and regional security, such as asylum-seekers and members or suspected members of banned Islamic groups or Islamist parties (art. 2) ..."

32. A document entitled "List of issues prior to the submission to the third periodic report of Kazakhstan" (CAT/C/KAZ/3), examined by the

UN Committee Against Torture at its forty-fifth session in November 2010 and published in February 2011, states, in so far as relevant:

> “ ...Article 2
>
> 3. According to information before the Committee since the consideration of the previous periodic report in 2008, torture and ill-treatment, including the threat of sexual abuse and rape, committed by law-enforcement officials, remain an issue of serious concern in the State party, and do not occur in isolated or infrequent instances.”

33. In its Concluding Observations of 12 December 2014 on Kazakhstan (CAT/C/KAZ/CO/3), the UN Committee against Torture made the following observations:

> “...7. While welcoming the measures taken by the State party aimed at strengthening laws and policies concerning its protection of human rights and prevention of torture and ill-treatment, described above, the Committee remains concerned at reports that those laws and policies are inconsistently implemented in practice. The Committee is particularly concerned about persistent allegations of torture and ill-treatment committed by law-enforcement officials, including the threat of sexual abuse and rape, in temporary detention isolation facilities (IVSs) and remand centres (SIZOs) under the jurisdiction of the Ministry of Internal Affairs and the National Security Committee for the purpose of extracting “voluntary confessions” or information to be used as evidence in criminal proceedings (art. 2)....”

2. The report of 16 December 2009 of the former United Nations Special Rapporteur on torture

34. From 5 until 13 May 2009 the former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak, undertook a visit to Kazakhstan. In his report of 16 December 2009, submitted to the Human Rights Council, Mr Nowak observed, *inter alia*, the following:

> “...Whereas the physical conditions and food supply in the prison colonies seem to have been brought into line with international minimum standards in recent years, one of the key requirements of international human rights law — that penitentiary systems put rehabilitation and reintegration rather than the punishment of the individual offender at their core — has not been achieved; the restrictions on contact with the outside world provided by law contradict that very principle. Another major issue of concern is the fact that the hierarchy among prisoners appears to lead to discriminatory practices and, in some cases, to violence.
>
> The same is true for pre-trial detention and custody facilities. The pre-trial facilities of the Ministry of the Interior, the Committee of National Security and the Ministry of Justice seem to have undergone improvements in terms of physical conditions and food supply; however the almost total denial of contacts with the outside world, often for prolonged periods, clearly contradicts the principle of the presumption of innocence and puts disproportional psychological pressure on suspects.
>
> On the basis of discussions with public officials, judges, lawyers and representatives of civil society, interviews with victims of violence and with persons deprived of their liberty, the Special Rapporteur concludes that the use of torture and ill-treatment

certainly goes beyond isolated instances. He received many credible allegations of beatings with hands and fists, plastic bottles filled with sand, police truncheons, and of kicking, asphyxiation with plastic bags and gas masks used to obtain confessions from suspects. In several cases, these allegations were supported by forensic medical evidence ...”

3. The United Nations Human Rights Committee’s thirty-fifth annual report

35. The UN Human Rights Committee’s thirty-fifth annual report adopted on 28 July 2011 (A/66/40 (Vol.I)), in so far as relevant to Kazakhstan, reads as follows:

“...(8) While the Committee appreciates the State party’s need to adopt measures to combat acts of terrorism, including the formulation of appropriate legislation to punish such acts, it regrets reports that law enforcement officials target vulnerable groups such as asylum-seekers and members of Islamic groups in their activities to combat terrorism (arts. 2 and 26).

The State party should adopt measures to ensure that the activities of its law enforcement officials in the fight against terrorism do not target individuals solely on the basis of their status or religious belief and manifestation. Furthermore, the State party should ensure that any measures to combat terrorism are compatible with the Covenant and international human rights law. In this regard, the State party should compile comprehensive data, to be included in its next periodic report, on the implementation of anti-terrorism legislation and how it affects the enjoyment of rights under the Covenant.

...

(14) While noting the adoption of an action plan for 2010–2012 on the implementation of recommendations of the Committee against Torture, the Committee expresses concern at increased reports of torture and the low rate of investigation of allegations of torture by the Special Procurators. The Committee is also concerned that the maximum penalty (10 years’ imprisonment) for torture resulting in death under article 347-1 of the Criminal Code is too low (art. 7).

The State party should take appropriate measures to put an end to torture by, inter alia, strengthening the mandate of the Special Procurators to carry out independent investigations of alleged misconduct by law enforcement officials. In this connection, the State party should ensure that law enforcement personnel continue to receive training on the prevention of torture and ill-treatment by integrating the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) of 1999 in all training programmes for law enforcement officials. The State party should thus ensure that allegations of torture and ill-treatment are effectively investigated, that perpetrators are prosecuted and punished with appropriate sanctions, and that the victims receive adequate reparation. In this regard, the State party is encouraged to review its Criminal Code to ensure that penalties on torture are commensurate with the nature and gravity of such crimes. ...”

B. Reports of the United States Department of State

36. In its 2011 Report on Human Rights Practices in Kazakhstan, the United States Department of State noted, *inter alia*, the following:

> "The law prohibits torture; nevertheless, the police and prison officials regularly beat and abused detainees, often to obtain confessions ...
>
> Human rights activists asserted that the legal definition of torture was too vague and did not meet UN standards and that the penalties for the crime were too lenient. The PGO, the Presidential Human Rights Commission, and the human rights ombudsman acknowledged that some law enforcement officers used torture and other illegal methods of investigation. Human rights and international legal observers noted investigative and prosecutorial practices that overemphasized a defendant's confession of guilt over collecting other types of evidence in building a criminal case against a defendant. Courts generally ignored allegations by defendants that officials had obtained confessions by torture or duress.
>
> At an October 2010 event hosted by the Office of the UN High Commissioner for Refugees (UNHCR) and several NGOs, Manfred Nowak, the UN special rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, stated that according to his assessment, torture in Kazakhstan was not widespread, although a culture of impunity allowed police to use extreme methods, such as heavy beating and asphyxiation, to obtain confessions. Nowak stated that police rarely investigated complaints of torture.
>
> ...Local NGOs reported that the government acknowledged publicly that torture was a problem."

37. In its 2012 Report on Human Rights Practices in Kazakhstan, the United States Department of State noted, *inter alia*, the following:

> "...The law prohibits torture; nevertheless, police and prison officials allegedly tortured and abused detainees, often in an effort to obtain or force confessions. For example, a representative from the Kazakhstan International Bureau for Human Rights reported seeing physical signs of torture, including scabbed skin, open wounds, bruises, and evidence of exposure to extreme cold on prisoners. The representative also asserted that authorities generally did not allow human rights observers to observe conditions in penal colonies. Members of the Public Monitoring Commission, a group comprised of NGO representatives, interviewed prisoners in a Kostanai penal colony. After the interview, authorities confiscated the group's notes and reportedly punished prisoners who had submitted complaints to the commission by beating them and placing them in punitive cells.
>
> According to local NGOs, torture most often occurred in pretrial detention centers in order to obtain confessions.
>
> Authorities charged two police officers from the Saragash District in South Kazakhstan with torture while trying to obtain confessions from three detainees accused of theft. The police officers allegedly placed plastic bags over the detainees' heads and subjected them to electric shocks.
>
> ...The Kazakhstani Commission on Human Rights, which advises the president on human rights issues, reported in 2011 that some law enforcement officers used torture and other illegal methods of investigation. The commission stated that there were no independent institutions to effectively investigate complaints of torture. ...

The human rights ombudsman reviewed prisoner and detainee complaints and concluded that law enforcement officers used abuse or torture to gain confessions ...”

C. Reports of Amnesty International

38. The chapter on Kazakhstan of the Amnesty International report “The State of The World’s Human Rights in 2010”, released on 27 May 2010, in so far as relevant, reads as follows:

> “...Confessions extracted under torture continued to be admitted as evidence in trials. Criminal proceedings failed to comply with international standards of fair trial. Torture and other ill-treatment by members of the security forces remained widespread, in particular by officers of the National Security Service in the context of operations in the name of national security, and the fight against terrorism and corruption.
>
> ...Torture and other ill-treatment
>
> In November the European Court of Human Rights ruled in the case of Kaboulov v. Ukraine that the extradition to Kazakhstan of any criminal suspect, including Amir Damirovich Kaboulov, would be in violation of Article 3 of the European Convention on Human Rights, as they would run a serious risk of being subjected to torture or inhuman or degrading treatment.
>
> Despite amendments to the criminal and criminal procedural codes to clamp down on abusive practices, torture and other ill-treatment remained widespread. Confessions reportedly extracted under torture continued to be admitted as evidence in criminal trials, and individuals continued to be held in unregistered detention for longer than the three hours allowed for in national law. The lack of a clear definition of detention remained unaddressed despite recommendations of the UN Committee against Torture in November 2008.
>
> Following his visit to Kazakhstan in May 2009, the UN Special Rapporteur on torture concluded that he “received many credible allegations of beatings with hands and fists, plastic bottles filled with sand and police truncheons and of kicking, asphyxiation through plastic bags and gas masks used to obtain confessions from suspects. In several cases, these allegations were supported by forensic medical evidence. ...”
>
> ”

39. The chapter on Kazakhstan in the Amnesty International report entitled “The State of The World’s Human Rights in 2011”, released on 13 May 2011, in so far as relevant, reads as follows:

> “...The authorities introduced a number of measures intended to prevent torture, including widening access to places of detention to independent public monitors and committing publicly to a policy of zero tolerance on torture.
>
> Kazakhstan’s human rights record was assessed under the UN Universal Periodic Review in February. In its presentation, the government delegation reiterated that the Kazakhstani authorities were committed to a policy of zero tolerance on torture, and that they ‘would not rest until all vestiges of torture had been fully and totally eliminated’.

In February, the government postponed the creation of an independent detention monitoring mechanism, the National Preventive Mechanism (NPM), for up to three years. However, in line with their obligations under the Optional Protocol to the UN Convention against Torture, the authorities continued to develop a legal framework for the NPM in close co-operation with domestic and international NGOs and intergovernmental organizations.

In April, the Prosecutor General's Office told Amnesty International that members of Independent Public Monitoring Commissions had been given unprecedented access to pre-trial detention centres of the National Security Service (NSS); four visits had been carried out in 2009 and eight in 2010.

Despite these measures, people in police custody reported that they were frequently subjected to torture and other ill-treatment, both before and after the formal registration of their detention at a police station. Law enforcement officials often failed to respect the existing law on detention, which requires that they register detainees within three hours of their arrest.

In October, the UN Special Rapporteur on torture criticized Kazakhstan for continuing to conceal the full extent of torture and other ill-treatment in its detention and prison system ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S REMOVAL TO KAZAKHSTAN

40. The applicant complained under Articles 3 and 13 of the Convention that he had been unlawfully deported to Kazakhstan despite the Bakırköy Assize Court's decision of 28 February 2012 and without any assessment of his claim that he ran the risk of being subjected to torture and other ill-treatment if returned to his country, even though such a risk existed at the relevant time.

Articles 3 and 13 of the Convention read as follows:

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

"Everyone whose rights and freedoms as set forth in [the] 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."

41. The Government contested those arguments.

A. Article 3 of the Convention

1. Admissibility

42. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. The parties' submissions

43. The applicant submitted that his deportation to Kazakhstan had exposed him to a real risk of ill-treatment on account of the charges brought against him in that country. In this regard, he contended that the administrative authorities had rejected his asylum claim without making an assessment of his claim that he would face a real risk of ill-treatment if removed to Kazakhstan. The applicant further submitted that he had not been served with the administrative decision in response to his objection to the decision rejecting his asylum claim. The applicant contended that he had been deported to Kazakhstan despite the Bakırköy Assize Court's judgment rejecting the extradition request. In his view, his deportation had been illegal under domestic law. The applicant submitted that he had not been served with the deportation order, and thus had not had the opportunity to challenge that order, before being deported to Kazakhstan.

44. The Government submitted that the applicant had been banned from entering Turkish territory as he had been suspected of providing assistance to persons involved in international terrorism. The Government further submitted that the police had been aware of the fact that the applicant was being sought by the Kazakhstan authorities and would be prosecuted in Kazakhstan if returned to that country after the Turkish authorities had assessed his asylum claim. The Government contended that the applicant had not been able to substantiate his claims regarding the risk of ill-treatment in the event of his deportation to Kazakhstan.

b. The Court's assessment

45. It is the Court's settled case-law that as a matter of international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Saadi*

v. Italy [GC], no. 37201/06, §§ 124-125, ECHR 2008; *F.G. v. Sweden* [GC], no. 43611/11, § 111, ECHR 2016; and *J.K. and Others v. Sweden* [GC], no. 59166/12, § 79, ECHR 2016). Besides, in view of the fact that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe and that it prohibits in absolute terms torture and inhuman or degrading treatment or punishment, a claim that there exist substantial grounds for fearing a risk of treatment contrary to Article 3 must be subjected to a close review and an independent and rigorous examination (see *Babajanov v. Turkey*, no. 49867/08, § 42, 10 May 2016, and the cases cited therein).

46. The Court considers that in view of the circumstances of the case and the applicant's complaints as formulated above, the central question to be answered in the present case is not whether the applicant ran a real risk of ill-treatment in Kazakhstan as such but whether the Turkish authorities carried out an adequate assessment of the applicant's claim that he would run a real risk of ill-treatment in case of deportation to Kazakhstan before he was deported from Turkey to Kazakhstan on 12 March 2012 (see *Babajanov,* cited above, § 43). Therefore, the Court's examination will be limited to ascertaining whether the State authorities fulfilled their procedural obligations under Article 3 of the Convention (see *F.G.* cited above, § 117).

47. The Court observes that the applicant consistently claimed before the domestic authorities that he would be exposed to a real risk of death or ill-treatment if removed to Kazakhstan. He provided the domestic authorities with information about his personal situation and the reasons for his fear of ill-treatment and death. Besides, the document containing the Kazakhstan authorities' extradition request demonstrated that the applicant was of interest to the Kazakhstan authorities as a suspected terrorist, although he never admitted to any affiliation with any terrorist organisation. The Court further observes that as can be seen from the information and material publicly available to the administrative authorities at the relevant time, various parties had independently made allegations of ill-treatment by the law-enforcement officials in Kazakhstan; the instances of ill-treatment had not occurred in "isolated or infrequent instances"; and law-enforcement officials "targeted members of Islamic groups in their efforts to combat terrorism" in that country (see paragraphs 31-39 above). Hence, the Court finds that the domestic authorities were aware or ought to have been aware of facts indicating that the applicant could be exposed to a risk of ill-treatment upon his returning to Kazakhstan. Therefore, they were under an obligation to address the applicant's arguments and to carefully assess the risk of ill-treatment if the applicant were to be removed to Kazakhstan, in order to dispel any doubts about possible ill-treatment (see *F.G.,* cited above, § 127, and *Babajanov*, cited above, § 45).

48. Against this background, the Court observes that the Government were explicitly requested to make submissions as to whether the domestic authorities had assessed the presence of a real risk of ill-treatment prior to the applicant's removal to Kazakhstan; whether a deportation order had been issued for his removal; and whether the applicant had had access to a lawyer with a view to challenging the deportation decision before the domestic courts. They were also asked to provide copies of the documents relevant to the applicant's application for asylum, including the assessment made by the domestic authorities, the deportation order and the formal notification of his removal.

49. The Government submitted only a document containing the applicant's submissions to the domestic authorities, the police report concerning the interview held with the applicant, a copy of the notification made to the applicant about the rejection of his asylum claim and copies of other notification documents. They failed to submit the documents containing the assessment made by the authorities regarding the applicant's asylum claim and his objection of 29 November 2011. Nor was the applicant notified of the decision dismissing his objection. Besides, there are no documents in the case file to show that the authorities issued a formal deportation order and that the applicant was notified of that order. The Government also failed to respond to the Court's question regarding the assessment of the presence of a real risk of ill-treatment at the domestic level. The Government only submitted that the authorities had been aware of the terrorism-related charges against the applicant; that the applicant's asylum claim had been assessed; and that the applicant had not been able to substantiate his allegations of possible ill-treatment.

50. All of the above leads the Court to conclude that the applicant, an asylum seeker, was deported to Kazakhstan, a non-member State of the Council of Europe, in the absence of a legal procedure providing safeguards against unlawful deportation and without a proper assessment of his asylum claim. In this regard, the Court emphasises that, in view of the importance attached to Article 3 of the Convention, the absolute character of the right guaranteed by Article 3 and the irreversible nature of the potential harm if the risk of ill-treatment materialised, it is for the national authorities to be as rigorous as possible and to carry out a careful examination of allegations under Article 3, in the absence of which the domestic remedies cannot be considered to be effective (see *Babajanov*, cited above, § 48).

51. Lastly, the applicant was deported to Kazakhstan by the police despite the existence of a judicial decision – that is to say the Bakırköy Assize Court's judgment refusing the Kazakhstan authorities' extradition request on the grounds that the applicant had been charged in that country with one of the offences, precluding extradition, listed in Article 18 § 1 (b) of the Criminal Code, which was still in force at the material time (that is to say, a speech offence, a political offence or a military offence – see

paragraphs 20 and 30 above). The Court considers that as such, the applicant's removal to Kazakhstan constituted circumvention of the domestic extradition procedure (see, *mutatis mutandis*, *Savriddin Dzhurayev v. Russia*, no. 71386/10, § 204, ECHR 2013 (extracts)).

52. In sum, in the absence of an examination by the national authorities of the applicant's claim that he would face a real risk of treatment contrary to Article 3 if removed to Kazakhstan and of a legal procedure providing safeguards against unlawful deportation, the Court considers that the applicant's deportation to Kazakhstan on 12 March 2012 amounted to a violation of Article 3 of the Convention (ibid, § 49; also compare *Kaboulov v. Ukraine*, no. 41015/04, §§ 110-115, 19 November 2009; *Baysakov and Others v. Ukraine*, no. 54131/08, §§ 46-52, 18 February 2010; *Dzhaksybergenov v. Ukraine*. no. 12343/10, §§ 32-38, 10 February 2011; *Sharipov v. Russia*, no. 18414/10, §§ 31-38, 11 October 2011; *Yefimova v. Russia*, no. 39786/09, §§ 197-213, 19 February 2013; and *Oshlakov v. Russia*, no. 56662/09, §§ 78-92, 3 April 2014).

B. Article 13 of the Convention

53. Having regard to the reasoning which has led it to conclude that Article 3 of the Convention was breached in the present case, the Court finds nothing that would justify a separate examination of the same facts from the standpoint of Article 13 of the Convention. It therefore deems it unnecessary to rule separately on either the admissibility or the merits of the applicant's complaints under this head (*Babajanov*, cited above, § 52).

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

54. Relying on Article 5 § 1 of the Convention, the applicant complained that he had been unlawfully detained at the Kumkapı Foreigners' Removal Centre. He further complained under Article 5 § 2 that he had not been duly informed of the reasons for being deprived of his liberty at the removal centre. Under Article 5 § 4 and Article 13, the applicant submitted that he had not been able to have his detention at the removal centre reviewed by a court. Lastly, he maintained under Article 5 § 5 of the Convention that he had had no right to compensation under domestic law in respect of the above-mentioned complaints.

55. The Government contested those arguments.

56. The Court considers at the outset that the complaint under Article 13 falls to be examined under Article 5 § 4 of the Convention alone, which provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Yarashonen v. Turkey*, no. 72710/11, § 34, 24 June 2014).

Article 5 in so far as relevant reads:

> “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 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.”

A. Admissibility

57. Referring to the document dated 29 February 2012 (see paragraph 21 above) the Government submitted that the applicant had been informed that he was being held pending the outcome of the deportation procedure conducted in his respect.

58. The applicant claimed that he had not been informed of the reasons for his detention, as required by Article 5 § 2 of the Convention. He submitted that he did not have a sufficient knowledge of the Turkish language.

59. On the basis of the document dated 29 February 2012 submitted by the Government, the Court observes that the applicant was notified in Turkish of the reason for his detention at the Kumkapı Foreigners’ Removal Centre. Given the view of the interpreter who attended the applicant’s interview with the police authorities and the Bakırköy Assize Court that the applicant had sufficient knowledge of Turkish (see paragraphs 8 and 20 above) and given that the applicant was able to raise his claims before both the police and the judicial authorities using the Turkish language, the Court does not see any reason to conclude that the applicant did not speak Turkish.

60. Accordingly, the applicant’s complaint under Article 5 § 2 of the Convention is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

61. The Court notes that the applicant’s remaining complaints under Article 5 §§ 1, 4 and 5 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

62. The Government did not make any submissions under this head.

63. The applicant argued that his detention had had no legal basis in domestic law.

64. The Court has already examined a similar grievance in the case of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 125-135, 22 September 2009) in which it found that in the absence of clear legal provisions in Turkish law establishing the procedure for ordering detention with a view to deportation, the applicants' detention was not "lawful" for the purposes of Article 5 of the Convention. There are no particular circumstances which would require the Court to depart from its findings in that judgment.

65. There has accordingly been a violation of Article 5 § 1 of the Convention in the instant case.

2. Alleged violation of Article 5 §§ 4 and 5 of the Convention

66. The Government submitted that the applicant could have applied to the administrative courts under Article 125 of the Constitution in order to challenge the lawfulness of his detention and seek compensation. They also submitted that the applicant could have sought a stay of execution in respect of his detention under section 27 of the Administrative Procedure Act (Law no. 2577).

67. The applicant submitted that there had been no effective remedy via which to challenge the lawfulness of his detention at the Kumkapı Foreigners' Removal Centre and that he had had no right to compensation under domestic law in respect of his complaints under the other paragraphs of Article 5 of the Convention.

68. The Court notes that it has found a violation of Article 5 §§ 4 and 5 of the Convention in the past in a number of similar cases, where it concluded that the Turkish legal system did not provide persons in the applicant's position with a remedy whereby they could obtain judicial review of the lawfulness of their detention, within the meaning of Article 5 § 4, and receive compensation for their unlawful detention, as required under Article 5 § 5 of the Convention (see *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08, § 79, 13 April 2010; *Abdolkhani and Karimnia*, cited above, § 142; *Dbouba v. Turkey*, no. 15916/09, §§ 53-54, 13 July 2010; *Yarashonen*, cited above, § 48; *Musaev v. Turkey*, no. 72754/11, § 39, 21 October 2014; and *Alimov v. Turkey*, no. 14344/13, § 50, 6 September 2016). In the absence of any examples submitted by the Government in which the administrative courts had speedily examined

requests and ordered the release of an asylum seeker on the grounds of the unlawfulness of his or her detention and had awarded him or her compensation, the Court sees no reason to depart from its findings in the aforementioned judgments.

69. There has accordingly been a violation of Article 5 §§ 4 and 5 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF DETENTION AT THE KUMKAPI FOREIGNERS' REMOVAL CENTRE

70. The applicant complained under Articles 3 and 13 of the Convention about the conditions of detention at the Kumkapı Foreigners' Removal Centre between 28 February and 12 March 2012 and of the absence of any effective domestic remedy whereby he could raise his allegations concerning the conditions of his detention.

Articles 3 and 13 of the Convention read as follows:

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

> "Everyone whose rights and freedoms as set forth in [the] 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."

71. The Government contested those arguments.

A. Admissibility

72. The Government submitted that this part of the application should be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They maintained in this connection that the applicant should have applied to the administrative or judicial authorities and sought compensation under Articles 36 and 125 of the Constitution in relation to his grievances.

73. The applicant contested the Government's argument, stating that no adequate remedy had existed in relation to his complaints, which also explained the Government's failure to submit any examples demonstrating how the legal provisions in question would have provided effective redress in practice.

74. The Court considers that the issue of exhaustion of domestic remedies is closely linked to the merits of the applicant's complaint that he did not have an effective remedy at his disposal by which to complain of inhuman and degrading conditions during his detention. The Court therefore finds it necessary to join the Government's objection to the merits of the

complaint under Article 13 of the Convention (see *Yarashonen*, cited above, § 54; *Musaev*, cited above, § 45; and *Alimov*, cited above, § 56).

75. The Court further finds that the applicant's complaints under Articles 3 and 13 of the Convention concerning the conditions of his detention at the Kumkapı Foreigners' Removal Centre and the lack of effective remedies in that respect are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. They are not inadmissible on any other grounds. The Court therefore declares these complaints admissible.

B. Merits

1. Article 13 of the Convention

76. As indicated in paragraph 72 above, the Government submitted that the applicant had had effective remedies in respect of his grievances concerning the conditions of his detention.

77. The applicant reiterated his complaints and arguments, as set out in paragraph 73 above.

78. The Court notes that it has already examined and rejected similar submissions by the respondent Government in comparable cases and found a violation of Article 13 of the Convention (see *Yarashonen*, cited above, §§ 56-66; *Musaev*, cited above, §§ 53-55; *T. and A. v. Turkey*, no. 47146/11, § 86, 21 October 2014; and *Alimov*, cited above, §§ 63-67). In the absence of any examples submitted by the Government of instances where recourse to an administrative or judicial authority led to the improvement of detention conditions and/or to an award of compensation for the anguish suffered on account of adverse material conditions, the Court finds no reason to depart from its findings in the above-mentioned cases.

79. The Court therefore rejects the Government's objection concerning the non-exhaustion of domestic remedies and concludes that there has been a violation of Article 13 of the Convention, in conjunction with Article 3, on account of the absence of an effective remedy to complain about the inadequate conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre.

2. Article 3 of the Convention

80. The Government submitted that the conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre had complied with the requirements of Article 3 of the Convention.

81. The applicant maintained his allegations.

82. The Court notes that in their submissions the Government provided information regarding the conditions of detention at the Kumkapı Foreigners' Removal Centre, in particular regarding the capacity of the

rooms and the number of occupants held in them between 28 February and 12 March 2012. However, they did not submit any document in support of their submissions even though they were explicitly requested to do so when notice of the application was given.

83. The Court further notes that it has already found a violation of Article 3 of the Convention on account of the material conditions of detention at the Kumkapı Foreigners' Removal Centre – in particular because of the clear evidence of overcrowding and the lack of access to outdoor exercise – in a number of cases brought before it by applicants who had been detained there in 2010, 2011 and 2012 (see *Yarashonen*, cited above, § 81; *Musaev*, cited above, § 61; and *Alimov* cited above, § 85). The Court notes that it paid special attention in the aforementioned cases to the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), members of the Grand National Assembly of Turkey, and the UN Special Rapporteur on the human rights of migrants regarding the problem of overcrowding and the lack of outdoor exercise at the centre following visits there in June 2009, May 2012 and June 2012, respectively (see *Yarashonen*, cited above, §§ 25, 28 and 30). The Court observes that the Government have not presented any evidence capable of justifying a departure from those conclusions. The Court is therefore led to conclude that the conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre – coupled with the possible anxiety caused by uncertainty as to when the detention would end – are sufficient to conclude that the conditions of his detention caused the applicant distress that exceeded the unavoidable level of suffering inherent in detention and attained the threshold of degrading treatment proscribed by Article 3 (ibid., § 80).

84. There has therefore been a violation of Article 3 of the Convention on account of the material conditions in which the applicant was detained at the Kumkapı Foreigners' Removal Centre.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

86. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

87. The Government contested that claim as excessive.

88. Ruling on an equitable basis, the Court awards the applicant EUR 6,500 in respect of non-pecuniary damage.

B. Costs and expenses

89. The applicant also claimed EUR 4,661 in respect of lawyer's fees and EUR 345 for other costs and expenses incurred before the Court, such as travel expenses, stationery, photocopying, translation and postage. In that connection, he submitted a time-sheet showing that his legal representatives had carried out thirty-nine hours and thirty minutes' legal work, a legal services agreement concluded with his representatives, and invoices for the remaining costs and expenses.

90. The Government contested those claims, deeming them unsubstantiated.

91. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,345 covering costs for the proceedings before the Court.

C. Default interest

92. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* the Government's objection as to the non-exhaustion of domestic remedies in relation to the conditions of detention at the Kumkapı Foreigners' Removal Centre to the merits of the complaint under Article 13 of the Convention and *dismisses* it;

2. *Declares* the complaint under Article 3 concerning the applicant's deportation to Kazakhstan on 12 March 2012, the complaints under Article 5 §§ 1, 4 and 5 of the Convention concerning the alleged unlawfulness of the applicant's detention at the Kumkapı Foreigners' Removal Centre, the alleged lack of domestic remedies via which to challenge the lawfulness of his detention at the removal centre and obtain compensation, and the complaints under Articles 3 and 13 of the Convention concerning the conditions of the applicant's detention at the

Kumkapı Foreigners' Removal Centre between 28 February and 12 March 2012 admissible;

3. *Holds* that there is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention concerning the applicant's deportation to Kazakhstan on 12 March 2012;

4. *Declares* the remainder of the application inadmissible;

5. *Holds* that there has been a violation of Article 3 of the Convention on account of the applicant's deportation to Kazakhstan on 12 March 2012;

6. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

7. *Holds* that there has been a violation of Article 5 §§ 4 and 5 of the Convention;

8. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre;

9. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 3 on account of the absence of effective remedies to complain about the conditions of detention at the Kumkapı Foreigners' Removal Centre;

10. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,345 (three thousand three hundred and forty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President