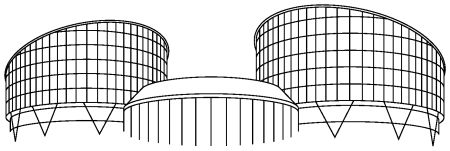

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AMERKHANOV v. TURKEY

(Application no. 16026/12)

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

In the case of Amerkhanov 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. 16026/12) 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 Samat Amerkhanov ("the applicant"), on 12 March 2012.

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

3. On 19 March 2012 at 4.22 p.m. the applicant's lawyer sent a fax message to the Court in which, relying on Rule 39 of the Rules of Court, he asked the Court to suspend the applicant's deportation to Kazakhstan, which was scheduled to take place at 7.45 p.m. on the same day.

4. On the same day at 6.51 p.m. the applicant's lawyer was informed that due to its late submission, the Court was not in a position to consider his request.

5. On 12 December 2016 the complaints concerning the applicant's deportation to Kazakhstan and the alleged 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, the absence of communication of information to the applicant on the reasons for his detention, and the complaints concerning the lack of an effective remedy by which 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

6. The applicant was born in 1989 and is detained in Atyrau, Kazakhstan.

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

7. According to the applicant's submissions, he lived in Atyrau, Kazakhstan until 2010. Between January and November 2010 the applicant was constantly harassed by the police, taken into police custody and ill-treated. In January 2010 he was asked to go to a police station as a friend of his had informed the police that the applicant had witnessed a fight between him and another friend of the applicant. On that day a statement was taken from him by the police. The next day he was once again invited to the police station, where, this time, he was beaten by the police. Subsequently, he was also accused of forcing a girl to worship in the Muslim manner and of raping her. He was eventually released from police custody. The applicant considered that he had been subjected to ill-treatment because he was a practising Muslim who worshipped and who wore a beard. On 27 November 2010 the applicant left Kazakhstan and arrived in Turkey. He then went to Syria twice and also to Georgia. On 21 May 2011 the applicant re-entered Turkey on a tourist visa.

8. On 9 June 2011 with a view to requesting a residence permit in Turkey, the applicant went to the Istanbul police headquarters, where he was arrested. The Government submitted that (i) subsequent to his arrival in Turkey 21 May 2011, an entry ban was issued in respect of the applicant, as he was considered to constitute a threat to national security, and (ii) he was detained with a view to his deportation.

9. On the same day the applicant was transferred to the Kumkapı Foreigners' Removal Centre.

10. On unspecified dates the applicant applied to the national authorities and to the United Nations High Commissioner for Refugees (UNHCR), asking to be recognised as a refugee.

11. On 15 June 2011 a police officer conducted an interview with the applicant in the context of his application to be granted asylum.

12. On 28 June 2011 the applicant was notified by the police that his asylum application had been rejected.

13. On 29 June 2011 the UNHCR issued an asylum-seeker certificate to the applicant.

14. On 5 July 2011 one of the applicant's representatives, Mr A. Yılmaz, lodged an objection to the decision to reject the applicant's asylum application with the police department responsible for foreigners, borders and asylum attached to the Istanbul police headquarters. The lawyer asked the authorities to review their decision and to conduct a second interview with the applicant.

15. On 11 July 2011 Mr A. Yılmaz lodged an application with the Istanbul Magistrates' Court for his client's release. The applicant's lawyer also stressed that the applicant was being kept in poor detention conditions. He received no response to his application.

16. On 16 August 2011 the police conducted a second interview with the applicant, during which he claimed that he would be exposed to a real risk of death and duress at the hands of the police if deported to Kazakhstan. In his statement, the applicant claimed that he had already been ill-treated by the police in Kazakhstan and that the authorities had imprisoned religious people like him on false accusations.

17. On 22 and 25 August 2011 Mr A. Yılmaz lodged two further applications with the police for his client to be released. He submitted that the applicant was being sought for by the Kazakhstan authorities for political reasons and that he would be persecuted on the basis of his religious convictions and subjected to torture and ill-treatment if deported to his country. In support of his petition dated 22 August 2011, the applicant's lawyer submitted a document showing that the applicant was being sought for by the public authorities in Atyrau on suspicion of having committed the offence of "hooliganism", proscribed by Article 257 § 3 of the Kazakhstan Criminal Code, as in force at the material time. He also submitted a copy of a page of a newspaper published in Kazakhstan in April 2011 according to which an arrest warrant had been issued in respect of the applicant.

18. On 13 September 2011 the applicant was released from the Kumkapı Foreigners' Removal Centre. The applicant was ordered to go and live in the province of Sakarya pending the determination of his asylum application.

19. On 29 September 2011 the applicant went to Sakarya, where he lived until 15 March 2012.

20. On 24 October 2011 the applicant was granted a residence permit, valid until 20 May 2012.

21. On 3 November 2011 the Interpol-Europol Department attached to the General Police Headquarters requested the Foreigners, Borders and Asylum Department (also attached to the General Police Headquarters) to provide information regarding the applicant, noting that he was sought for

by the prosecuting authorities and the Interpol bureau of Kazakhstan as he was suspected of having committed an offence in that country. On 1 December 2011 the deputy head of the Foreigners, Borders and Asylum Department informed the Interpol-Europol Department that the applicant had requested asylum and was residing in Sakarya and that on 24 October 2011 a further entry ban had been issued in respect of him after the applicant had been prosecuted for "hooliganism". The Foreigners, Borders and Asylum Department requested the Interpol-Europol department not to provide any information to the Kazakhstan authorities, in the interests of the safety of the applicant and his family members in Kazakhstan.

22. On 15 March 2012 the applicant was served with a document informing him that his asylum application had been rejected on 2 March 2012 and that he could not benefit from subsidiary protection either. The document informed him that he was banned from entering Turkish territory and that if he attempted to enter Turkish territory, he would be deported. On the same day the applicant was detained.

23. On 16 and 19 March 2012 Mr A. Yılmaz lodged two applications with the Ministry of the Interior requesting that his client be released. The lawyer noted that he had received a phone call from the applicant, who had stated that he would be deported to Kazakhstan, where he would be subjected to torture.

24. On 19 March 2012 the applicant was deported to Kazakhstan.

25. In a letter dated 27 May 2013, Mr Yılmaz submitted that the applicant had been transferred to the custody of Kazakhstan's security forces upon his return to Kazakhstan and had then been remanded in custody in Atyrau Prison. The lawyer stated that he did not have information supported by any document as to whether the applicant had been subjected to ill-treatment in Kazakhstan.

B. The proceedings before the administrative courts

26. On 22 March 2012 Mr A. Yılmaz lodged an application with the Ankara Administrative Court for the annulment of the decisions of the Ministry rejecting the applicant's asylum application and to deport the applicant from Turkey. He requested a stay of execution of the decision to deport the applicant, pending the proceedings before the Ankara Administrative Court. In support of his petition, the applicant's lawyer submitted a number of documents to the Ankara Administrative Court, including a document downloaded from the Atyrau police department website, according to which an arrest warrant had been issued in respect of the applicant. The document, which was also submitted to the Court, contained the applicant's name, photograph and the charge brought against him ("hooliganism", under Article 257 § 3 of the Kazakhstan Criminal Code). He also submitted the newspaper page (see paragraph 17 above),

which he had already submitted to the police on 22 August 2011 and according to which an arrest warrant had been issued in respect of the applicant.

27. On 11 May 2012 the Ankara Administrative Court rejected the request for a stay of execution in respect of the applicant's deportation.

28. On 13 February 2013 the Ankara Administrative Court dismissed the application lodged by the applicant on 22 March 2012. In its judgment, the administrative court noted that according to information obtained from the National Intelligence Organisation (*Milli İstihbarat Teşkilatı*), the applicant was involved in international terrorism and had carried out terrorist activities when he had been in Turkey. The Ankara Administrative Court further noted that the applicant's asylum application had been rejected as the administrative authorities had found that there had not been any basis for the applicant's fear of persecution and that he had not met the conditions for being considered a refugee. On the basis of the documents in the case file, the Administrative Court concluded that the administrative decision to reject the applicant's asylum application and to deport the applicant from Turkey had been lawful.

29. Following an appeal by the applicant, on 27 April 2016 the Supreme Administrative Court upheld the judgment of 13 February 2013.

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

1. The applicant's account

30. Between 9 June and 13 September 2011 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 outdoor 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

31. 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 150 persons had been held during the period between 9 June and 13 September 2011. 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, 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 and cleaning products, such as soap, were provided on a regular basis.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

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*

33. 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) ..."

34. 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."

35. 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

36. 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

37. 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

38. 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.

..."

39. 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

40. 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."

41. The chapter on Kazakhstan of 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

42. The applicant complained under Articles 3 and 13 of the Convention that he had been deported to Kazakhstan 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."

43. The Government contested those arguments.

A. Article 3 of the Convention

1. Admissibility

44. The Government submitted that the applicant had failed to apply to the administrative courts for the annulment of the entry bans issued in respect of him. They further submitted that the applicant should have applied to the Constitutional Court following the Supreme Administrative Court's decision of 27 April 2016. The Government concluded that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention.

45. The applicant submitted that the remedy before the administrative courts referred to by the Government was not an effective one. He further submitted that, contrary to the Government's argument, it would not have been possible for him to lodge an individual application with the Constitutional Court, as that remedy was only available in respect of events occurring after 23 September 2012.

46. The Court observes at the outset that the first remedy suggested by the Government – that is to say, an application to the administrative courts for the annulment of the entry bans issued in respect of the applicant – does not relate to the applicant's complaint under Article 3, as formulated above. Moreover, the applicant raised the substance of his complaints before both the administrative authorities and the administrative courts. The Court therefore dismisses this part of the Government's objection.

47. As regards the second limb of the Government's preliminary objection – concerning the applicant's failure to seek a remedy via an individual application before the Constitutional Court – the Court notes that the remedy in question entered into force on 23 September 2012 following constitutional amendments. Having examined the main aspects of the new remedy, the Court found that the Turkish Parliament had entrusted the Constitutional Court with powers that enabled it to furnish, in principle, direct and speedy redress for violations of the rights and freedoms protected by the Convention, in respect of all decisions that had become final after 23 September 2012, and held that this was a remedy to be used (see *Hasan Uzun v. Turkey* (dec.), no. 10755/13, §§ 68-71, 30 April 2013). The Court notes that unlike in the case of *Hasan Uzun*, at the time that the applicant was deported to Kazakhstan on 19 March 2012, the "individual application" remedy before the Constitutional Court had not been introduced. The applicant could not, therefore, have sought that remedy before asking the Court, under Rule 39 of the Rules of Court, to suspend his deportation to Kazakhstan on 19 March 2012. He was also not required to make use of that remedy after its entry into force on 23 September 2012, as argued by the Government, given that in the context of the deportation of foreign nationals, only a judicial review that operates as a bar to removal could be regarded as an effective remedy (see *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 58, 22 September 2009, and the cases cited therein). Accordingly, the Court also rejects this limb of the Government's objection.

48. 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

49. 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 had the opportunity to challenge the order for his deportation before being deported.

50. The Government submitted that the applicant had been banned from entering Turkish territory as he had been suspected of having been involved in international terrorism and that the applicant's involvement in terrorism had been confirmed by the National Intelligence Organisation (*Milli İstihbarat Teşkilatı*). The Government further 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. The Government indicated that the Ankara Administrative Court had carried out an assessment of the applicant's claims before dismissing the case.

b. The Court's assessment

51. 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).

52. 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 19 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).

53. 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. Moreover, the Turkish authorities knew that the applicant was of interest to the Kazakhstan authorities. The Court further observes that as can be seen from the information and materials publicly available to the administrative authorities at the relevant time there were then numerous 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 33-41 above). Hence, the Court finds that the domestic authorities were aware or ought to have been aware of facts that indicated 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 was 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).

54. 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 request for asylum, including the assessment made by the domestic authorities, the deportation order and the formal notification of his removal.

55. The Government failed to submit any document showing that the administrative authorities had conducted an assessment of the applicant's asylum claim in the light of the principles embodied in Article 3 of the Convention. Nor did they demonstrate that the applicant had been notified of the content of the decision rejecting his asylum claim. Moreover, 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. In their observations, the Government only submitted that the applicant had been suspected of involvement in international terrorism; that he had not been able to substantiate his allegations of possible ill-treatment; and that his claims had been assessed by the Ankara Administrative Court.

56. The Court cannot attach any importance to the examination conducted by the Ankara Administrative Court, given that the applicant was deported to Kazakhstan long before that court rendered its judgment. In any case, the Ankara Administrative Court, upon the applicant's lawyer's application for judicial review, limited its examination to the issue of whether the applicant met the legal conditions for becoming a refugee. It did not provide any reasons for concluding that the applicant's fear of ill-treatment had been unsubstantiated. The Court also observes that while the applicant was informed of the rejection of his asylum claim, neither he nor his lawyer were ever officially notified of the decision to deport the applicant to Kazakhstan, thus depriving the applicant of the opportunity to challenge his deportation in a timely manner.

57. 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).

58. In sum, in the absence of an adequate 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 19 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

59. 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 VIOLATION OF ARTICLE 5 OF THE CONVENTION

60. 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.

61. The Government contested those arguments.

62. 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

63. The Court notes that these complaints 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

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

65. The applicant argued that his detention, which had lasted ninety-seven days, had had no legal basis in domestic law.

66. The Court has already examined a similar grievance in the case of *Abdolkhani and Karimnia*, cited above, §§ 125-135, 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.

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

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

68. The Government submitted that the applicant had been informed of the reasons for his detention between 9 June and 13 September 2011.

69. The Court notes that the Government have not submitted any documents demonstrating to the Court that the applicant was notified of the reasons for his detention at the Kumkapı Foreigners' Removal Centre. The absence of any such document in the case file leads the Court to the conclusion that the reasons for the deprivation of his liberty were not communicated to the applicant by the national authorities (see *Moghaddas v. Turkey*, no. 46134/08, § 46, 15 February 2011; *Athary v. Turkey*, no. 50372/09, § 36, 11 December 2012; and *Musaev v. Turkey*, no. 72754/11, § 35, 21 October 2014).

70. There has accordingly been a violation of Article 5 § 2 of the Convention.

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

71. 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).

72. 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.

73. 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*, cited above, § 39; 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.

74. 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

75. The applicant complained under Articles 3 and 13 of the Convention about the conditions of detention at the Kumkapı Foreigners' Removal Centre between 9 June and 13 September 2011 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."

76. The Government contested those arguments.

A. Admissibility

77. 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 and judicial authorities, requested that the alleged poor conditions be improved, and sought compensation under Article 125 of the Constitution in relation to his grievances.

78. 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.

79. 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).

80. 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

81. As indicated in paragraph 77 above, the Government submitted that the applicant had had effective remedies in respect of his grievances concerning the conditions of his detention.

82. The applicant reiterated his complaints and arguments, as set out in paragraph 78 above.

83. 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.

84. 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

85. 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.

86. The applicant maintained his allegations.

87. 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 9 June and 13 September 2011. 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.

88. 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 of 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 which exceeded the unavoidable level of suffering inherent in detention and attained the threshold of degrading treatment proscribed by Article 3 (ibid., § 80).

89. 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

90. 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

91. The applicant claimed 35,000 euros (EUR) in respect of non-pecuniary damage.

92. The Government contested that claim as excessive.

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

B. Costs and expenses

94. The applicant also claimed EUR 9,558 in respect of lawyer's fees and EUR 370 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 eighty-one hours' legal work, a legal services agreement concluded with his representatives, and invoices for the remaining costs and expenses.

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

96. 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 3,370 covering costs for the proceedings before the Court.

C. Default interest

97. 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 19 March 2012, the complaints under Article 5 §§ 1, 2, 4 and 5 of the Convention concerning the alleged unlawfulness of the applicant's detention at the Kumkapı Foreigners' Removal Centre, the alleged failure of the authorities to inform the applicant of the reasons for his detention, the alleged lack of domestic remedies whereby he could 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 9 June and 13 September 2011 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 19 March 2012;

4. *Holds* that there has been a violation of Article 3 of the Convention on account of the applicant's deportation to Kazakhstan on 19 March 2012;

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

6. *Holds* that there has been a violation of Article 5 § 2 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 3,370 (three thousand three hundred and seventy 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
Registrar

Robert Spano
President