



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

Information Note on the Court's case-law 233

October 2019

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***G.B. and Others v. Turkey - 4633/15***

Judgment 17.10.2019 [Section II]

**Article 5**

**Article 5-4**

**Review of lawfulness of detention**

**Speediness of review**

Review mechanism wholly ineffective in a case of unlawful detention, in the immigration context, of a mother and her minor children: *violation*

*Facts* – The applicants were Russian nationals, comprising a mother (the first applicant) and her three children (the second, third and fourth applicants). The three minors were detained – without legal basis – for a period of three months in the Kumkapı Removal Centre, pending the determination of their asylum request and deportation procedure. The governor's office issued an order for the first applicant's detention. The applicants challenged the lawfulness of their administrative detention under Law no. 6458 on six occasions before the Istanbul Magistrates' Court without success, and also lodged an individual application with the Constitutional Court while they were still being detained. They were then transferred to the Gaziantep Removal Centre and eventually released following a decision of the Gaziantep Magistrates' Court, which declared their detention, on the basis of the latest order issued by the Gaziantep governor's office, as unlawful. The applicants regained their liberty while their case was still pending before the Constitutional Court.

*Law*

Article 5 § 4: Under sections 57(6) and 68(7) of Law no. 6458, foreign nationals who have been placed in administrative detention under the relevant provisions may challenge the lawfulness of their detention before the magistrates' courts, which should rule on it within five days by way of a final decision.

(a) *The situation as regards the second, third and fourth applicants (minor children)* – A literal reading of the law suggested that magistrates' courts only had jurisdiction to review the lawfulness of administrative decisions ordering the detention of a foreign national, thereby leaving individuals who had been detained without such a decision outside of their reach. This had been the case of the second, third and fourth applicants before the Istanbul Magistrates' Court.

Before their transfer to Gaziantep and their release following a decision of the Gaziantep Magistrates' Court, the applicants had been left in a legal limbo for a considerable amount of time without an effective remedy at their disposal. The scope of the Gaziantep Magistrates' Court's review that led to their release had been limited to the lawfulness of

the detention order delivered by the Gaziantep governor's office, and had not concerned the period during which they had been detained without an official decision in Istanbul.

(b) *The situation as regards the first applicant (mother)* – There had been no reason why the factors that ultimately led to the Gaziantep Magistrates' Court declaring the first applicant's detention unlawful, such as the absence of any explanation or evidence to justify her detention, as well as the absence of a final decision rejecting her asylum request, had not been, or could not have been, taken into account earlier by the Istanbul Magistrates' Court given that they had been present from the very beginning.

What had been more significant than the duration of the individual proceedings was the overall effect of the inadequate review conducted by the Istanbul Magistrates' Court in its successive decisions because it had led to an unjustified prolongation of the first applicant's detention, thereby significantly undermining the effectiveness of the review mechanism set out under Law no. 6458.

(c) *Individual application before the Constitutional Court* – The applicants had complained of both the unlawfulness of their detention and the failure of the Istanbul Magistrates' Court to review the lawfulness issue in an effective manner. They had drawn attention to the fact that they had been detained without consideration of alternatives to detention, despite their vulnerable position as a single mother and three young children, and that they had been kept in the dark about the underlying reasons for their detention.

The individual application remedy before the Turkish Constitutional Court was, in principle, capable of providing an appropriate remedy within the meaning of Article 5 § 4 of the Convention. Nevertheless the Constitutional Court had not examined the applicants' complaints concerning their right to liberty. Some three and a half years after the lodging of the individual application, the Constitutional Court merely found that since the applicants' detention had in the meantime been declared unlawful by the Gaziantep Magistrates' Court and that they had been released, they could seek compensation for their unlawful detention before the administrative courts.

The applicants had remained in administrative detention for some fifty days after lodging their application with the Constitutional Court, during which period that court had taken no action as regards their complaints. While the Court was in principle prepared to tolerate longer periods of review in proceedings before a constitutional court, on condition that the original detention order had been given by a court in a procedure offering appropriate guarantees of due process, constitutional courts were nevertheless similarly bound by the requirement of speediness. In the present case the Constitutional Court had failed to act with the speed that the special circumstances required.

Firstly, in cases where the detention order had not been issued by a judicial authority, the subsequent review by a court had to be followed with greater speed than might otherwise be found appropriate for the review of a detention order by a court. The original detention order in respect of the applicants had been – or should have been – issued by a governor's office, which was an administrative authority. The Istanbul Magistrate's Court, which had been the first-instance court tasked with reviewing the lawfulness of the administrative detention for the initial period of three months while the applicants were detained, had either not undertaken such a review at all or its review had been devoid of any effect. In those circumstances, it had fallen on the Constitutional Court to carry out its review much more promptly.

Secondly, in exceptional circumstances where the national authorities had decided to detain a child and his or her parents for immigration-related purposes, the lawfulness of such detention should have been examined with particular expedition at all levels. In the absence of any explanation as to why the Constitutional Court could not have examined

the lawfulness of the applicants' detention while they were in detention, which had been a not insignificant period, that court had not displayed the necessary diligence called for by the circumstances of the case. This was particularly so considering that the case had not been complex and the applicants had presented clear arguments challenging the lawfulness of their detention, which could easily be verified from the case file without the need for further investigation.

Thirdly, although the Constitutional Court had found that the unlawfulness of the applicants' detention had already been established by the Gaziantep Magistrates' Court and that compensation would therefore have provided them with an effective remedy, the magistrates' court decision had concerned solely the unlawfulness of the detention order delivered by the governor's office, and had not concerned the applicants' previous detention in Istanbul. The question of the lawfulness of this three-month period of detention had never been subject to an effective judicial review, which could also have undermined the applicants' prospects of receiving any compensation for that period.

(d) *Summing-up* – Both the Istanbul Magistrates' Court and the Constitutional Court had failed to conduct a review of the lawfulness of the applicants' detention in an effective and speedy manner. The review mechanism set out under Law no. 6458 appeared to have been wholly ineffective in a case where the detention of a minor, in the immigration context, had not been based on an administrative decision. Otherwise, however, the conclusion under this head should have been seen in the light of the particular circumstances of the instant case and should not have been taken as casting doubt on the general effectiveness of the judicial review mechanism under Law no. 6458 or that of the individual application procedure before the Constitutional Court.

*Conclusion:* violation (unanimously).

Article 13: The conditions of the applicants' detention had amounted to a violation of Article 3; their complaint in this regard was therefore "arguable" for the purposes of Article 13.

The Constitutional Court had not examined the admissibility and merits of the applicants' complaints during the period in which they had been detained, which had therefore undermined the remedial efficacy of the individual application mechanism in that particular context. Having particular regard to the apparent vulnerability of the three minor applicants and to the problems at the Kumkapı Removal Centre which were well-known to international bodies and domestic authorities, and to the fact that the Constitutional Court had been apparently acting as a first-instance court in the circumstances, that court could have been expected to show the necessary diligence in reviewing the applicants' complaints under Article 3.

Once the applicants had been released from detention, the Constitutional Court had held that "in the event of the release of the foreigner, the effective legal mechanism had been that of the action for a full remedy" before the administrative courts, which had the capacity to compensate the victims as necessary. The Constitutional Court had declared the applicants' complaint under Article 3 inadmissible for non-exhaustion of domestic remedies for that reason. While compensatory remedies might provide sufficient relief to those who had been released from detention, the applicants were still detained at the time of their application to the Constitutional Court. Therefore, a purely compensatory remedy available after release could not have provided them with an effective remedy in respect of their specific complaints under Article 3.

The individual-application mechanism before the Constitutional Court had not proven effective in respect of the applicants' complaints regarding the material conditions of detention at the Kumkapı Removal Centre. Nor had the Government suggested any other remedies that could have provided the applicants with sufficient redress at the material

time by putting an end to the ongoing violation of their rights under Article 3 rapidly, over and above providing a purely compensatory remedy.

*Conclusion:* violation (unanimously).

The Court also, unanimously, found a violation of Article 3 of the Convention on account of the conditions of the applicants' detention at the Kumkapı Removal Centre; a violation of Article 3 of the Convention on account of the conditions of the applicants' detention at the Gaziantep Removal Centre; and a violation of Article 5 § 1 of the Convention because the second, third and fourth applicants had been detained despite the absence of any official decisions ordering the deprivation of their liberty.

Article 41: EUR 2,250 to the first applicant, and EUR 20,000 to each of the second, third and fourth applicants, in respect of non-pecuniary damage.

(Voir aussi *Mehmet Hasan Altan c. Turquie*, 13237/17, 20 mars 2018, [Information Note 216](#))

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