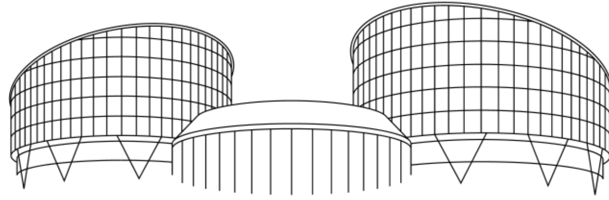

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KESHMIRI v. TURKEY (No. 2)

(Application no. 22426/10)

JUDGMENT

STRASBOURG

17 January 2012

FINAL

17/04/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Keshmiri v. Turkey**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 13 December 2012,

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

PROCEDURE

1. The case originated in an application (no. 22426/10) 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 an Iranian national, Mr Mansour Edin Keshmiri (“the applicant”), on 22 April 2010. The applicant was represented by Ms Sinem Uludağ, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

2. On 16 June 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

3. The applicant was born in 1958 and lives in Kırklareli.

A. Background to the case

4. In 1985 the applicant joined the People’s Mojahedin Organisation of Iran (“the PMOI”).

5. In 1986 he arrived in Iraq. He lived in the Al-Ashraf camp, where PMOI members were accommodated in Iraq, until he left the organisation in 2003. After leaving the PMOI he went to the Temporary Interview and Protection Facility (“TIPF”), a camp created by the United States forces in Iraq. This facility was subsequently named the Ashraf Refugee Camp (“ARC”).

6. On 5 May 2006, after being interviewed, the applicant was recognised as a refugee by the United Nations High Commissioner for Refugees (“the UNHCR”) Headquarters in Geneva during his stay in Iraq.

7. On an unspecified date the applicant arrived in Turkey on a false passport.

8. On 1 June 2008 the applicant was arrested by the Turkish security forces while attempting to leave for the island of Kos, Greece, from the port of Bodrum, on a false passport.

9. On an unspecified date the UNHCR branch office asked the national authorities to grant the applicant access to the asylum procedure in Turkey. This request was refused in view of the fact that the applicant’s presence in Turkey constituted a threat to national security given his membership of the PMOI.

10. On 1 August 2008 the applicant was transferred to the city of Van in eastern Turkey, apparently with a view to his deportation to Iran.

B. Procedure before the Court

11. On 1 August 2008 the applicant’s representative lodged an application with the Court, requesting it to stop the applicant’s deportation to Iran and arguing under Articles 2 and 3 of the Convention that his removal to Iran would expose him to a real risk of ill-treatment (application no. 36370/08).

12. On the same day, the President of the Second Section decided to indicate to the Government of Turkey, under Rule 39 of the Rules of Court, that the applicant should not be deported to Iran until further notice.

13. With reference to the interim measure under Rule 39 of the Rules of Court, the deportation proceedings were suspended and on 3 August 2008 the applicant was transferred to the Kırklareli Foreigners’ Admission and Accommodation Centre.

14. On 13 April 2010 the Second Section of the Court found that there would be a violation of Article 3 of the Convention if the applicant were to be removed to Iran or Iraq (see *Keshmiri v. Turkey*, no. 36370/08, § 28, 13 April 2010).

15. On 25 May 2010 the General Security Directorate of the Ministry of the Interior (“the Ministry”) decided that the applicant was to be released from the Kırklareli Foreigners’ Admission and Accommodation Centre and

issued with a temporary residence permit in Kırklareli. On 26 May 2010 the applicant was released accordingly. He is currently living in Kırklareli.

C. Proceedings before domestic courts

16. In the meantime, on 28 August 2009 a lawyer registered with the Istanbul Bar Association, Mr A. Yılmaz, had petitioned the Ministry for the applicant's release from the Kırklareli Foreigners' Admission and Accommodation Centre.

17. Upon the administrative authorities' failure to reply within sixty days, which is considered to be a tacit refusal of the request under section 10 of the Administrative Procedure Act (Law no. 2577 of 6 January 1982), on 25 November 2009 Mr A. Yılmaz brought an action before the Ankara Administrative Court. He requested that the court quash the decision of the Ministry not to release his client, which decision infringed his right to liberty as a recognised refugee, and order a stay of execution of that decision pending the proceedings.

18. On 13 January 2010 the Ankara Administrative Court rejected the request for a stay of execution. Mr A. Yılmaz appealed against that decision.

19. On 10 February 2010 the Ankara Regional Administrative Court declined to examine the appeal request.

20. On 16 March 2010 the Ankara Administrative Court dismissed the applicant's case. It held at the outset that the relevant legislation required the deportation of persons in the applicant's position, that is, persons who had entered Turkey illegally and whose presence in the country posed a danger to public order and security. If, however, deportation had become unfeasible for some reason, then the individuals concerned would be accommodated at a place designated by the Ministry until such time as the deportation proceedings could be finalised. The Administrative Court noted that in the instant case the applicant's deportation had come to a halt following the interim measure indicated by the European Court of Human Rights and he had therefore been placed in an accommodation centre in accordance with the law. By refusing his release, the administration had thus acted in accordance with the applicable laws. The administrative court also noted that granting temporary residence permits to persons awaiting deportation would render their monitoring and control very difficult.

21. The applicant appealed against the judgment of the Ankara Administrative Court. He claimed that he had been held at the Kırklareli Foreigners' Admission and Accommodation Centre since 3 August 2008 against his will and that this deprivation of liberty had no basis in domestic law and lacked any legal safeguards. He moreover argued that he had not been released from detention despite the judgment of the European Court of Human Rights, which had ruled that his deportation would constitute a

violation of Article 3 of the Convention. He also claimed that the administration had failed to submit any evidence in support of its allegation that he posed a threat to public order and security.

22. It appears that the appeal proceedings are still pending before the Supreme Administrative Court. However, in the meantime, the applicant was released from the Kırklareli Foreigners' Admission and Accommodation Centre on 26 May 2010 upon the order of the Ministry (see paragraph 15 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. A description of the relevant domestic law and practice, as well as the international material, may be found in the case of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-51, 22 September 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

24. The applicant complained under Article 5 § 1 of the Convention that his detention at the Kırklareli Foreigners' Admission and Accommodation Centre had been unlawful and arbitrary. He also complained under Article 5 § 4 and Article 13 of the Convention that there had been no effective domestic remedy at his disposal whereby he could obtain a speedy judicial review of the lawfulness of his detention.

25. The Court considers that the complaint concerning the lack of effective domestic remedies should be examined under Article 5 § 4 of the Convention, which provides a *lex specialis* in relation to the more general requirements of Article 13 (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009).

A. Admissibility

26. The Government argued that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They maintained in this connection that he could have sought compensation under Article 141 of the new Code of Criminal Procedure (Law no. 5271) for his allegedly unlawful detention. In the alternative, he could have brought an administrative action for the annulment of the administrative act that he complained of, in accordance with Article 125 of the Constitution. The Government also argued that if the applicant had considered that there

were no effective remedies in respect of his complaints under Article 5 of the Convention, he should have lodged his application with the Court much earlier than 22 April 2010. They argued that the applicant had thus failed to comply with the six-month rule fixed by Article 35 § 1.

27. As regards the Government's preliminary objection concerning non-exhaustion of the domestic remedies provided under Law no. 5271, the Court notes that Article 141 of the said Law concerns detention of persons during criminal investigation or prosecution. Bearing in mind that there were no criminal proceedings against the applicant, and in the absence of any examples provided by the Government where the indicated provision was applied successfully in situations similar to the applicant's, the Court considers the remedy under Article 141 of Law no. 5271 to be inappropriate and ineffective in the circumstances. The Court, therefore, rejects the Government's preliminary objection under this head.

28. As to the preliminary objection that the applicant failed to apply to the administrative courts as envisaged under Article 125 of the Constitution, the Court notes that the applicant did seek the annulment of the administrative decision before the administrative courts, contrary to the Government's allegations, and that the proceedings are still pending before the Supreme Administrative Court. The question whether this remedy can be regarded as effective under the Convention is closely linked to the substance of the applicant's complaint under Article 5 § 4 of the Convention. The Court therefore joins the Government's objection on this point to the merits.

29. The Court further reiterates that the six-month time-limit imposed by Article 35 § 1 of the Convention requires applicants to lodge their applications within six months of the final decision in the process of exhaustion of domestic remedies (see, amongst many examples, *Salmanoğlu and Polattaş v. Turkey*, no. 15828/03, § 72, 17 March 2009). The Court, however, notes once again that the administrative proceedings which the applicant instituted for the annulment of the administrative decision refusing his release from the Kırklareli Foreigners' Admission and Accommodation Centre are still pending before the Supreme Administrative Court. The Court therefore considers that the application lodged on 22 April 2010 complied with the six-month time-limit under Article 35 § 1 of the Convention. It thus likewise dismisses the Government's preliminary objection in this connection.

30. Moreover, the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

B. Merits

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

31. The Government submitted that the applicant had not been detained but merely "sheltered" in a foreigners' admission and accommodation centre for surveillance pending the deportation proceedings, which was an administrative measure for public security. The Government contended that this practice was based on section 23 of Law no. 5683 and section 4 of Law no. 5682. The Government maintained that such a surveillance measure was essential to keep illegal immigration and human trafficking under control, and was moreover in compliance with Article 5 § 1 (f) of the Convention.

32. The applicant submitted that his detention at the Kırklareli Foreigners' Admission and Accommodation Centre had not had a proper legal basis and that it had been entirely arbitrary. He noted in particular that following the judgment of the Court in *Keshmiri v. Turkey* (no. 36370/08, § 28, 13 April 2010), where it found that there would be a violation of Article 3 of the Convention if he were to be removed to Iran or Iraq, it was clear that there would be no further deportation proceedings against him. He had continued, nevertheless, to be kept in detention after the aforementioned judgment.

33. The Court has previously established in similar cases that the legal provisions referred to by the Government to justify the applicant's detention do not concern a deprivation of liberty in the context of deportation proceedings, but merely concern regulation of the residence of certain groups of foreigners in Turkey. Nor do such provisions provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention (see *Abdolkhani and Karimnia*, cited above, §§ 125-135). The Court therefore finds that the applicant's detention at the Kırklareli Foreigners' Admission and Accommodation Centre did not have a sufficient legal basis.

34. The Court moreover notes that any deprivation of liberty under Article 5 § 1 (f) of the Convention will be justified as long as deportation proceedings are in progress. Following the Court's application of the interim measure on 1 August 2008, however, the respondent Government could not have removed the applicant to Iran without being in breach of their obligation under Article 34 of the Convention, and any deportation proceedings carried out in respect of the applicant would therefore have had to be suspended (*Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 73 and 74, ECHR 2007-V). The Court recalls in that respect that the fact that expulsion proceedings are provisionally suspended as a result of the application of an interim measure does not in itself render the detention of the person concerned unlawful, provided that the authorities still envisage

expulsion at a later stage, so that "action is being taken" although the proceedings are suspended, and on condition that that the detention must not be unreasonably prolonged (see *S.P. v. Belgium* (dec.), no. 12572/08, 14 June 2011). In the present case, however, the applicant's detention continued for many months after the interim measure was applied and during that time no steps were taken to find alternative solutions. What is more, the Court clearly declared in the judgment of *Keshmiri* (cited above) that the applicant's deportation to Iran or Iraq would entail a violation of Article 3 of the Convention. While it is true that the applicant could be sent to a different country, the Court notes that the Government have not made any submission to this effect either. Consequently, the applicant's detention was unreasonably prolonged.

35. In view of the foregoing, the Court concludes that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's detention at the Kırklareli Foreigners' Admission and Accommodation Centre.

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

36. The Government submitted that an application to the administrative courts for the annulment of a decision to place an individual in a foreigners' admission and accommodation centre was an effective remedy within the meaning of Article 5 § 4 of the Convention, although it could not be expected to yield a favourable outcome each time.

37. The applicant maintained that he had applied to the Ankara Administrative Court in order to be released from the Kırklareli Foreigners' Admission and Accommodation Centre. The administrative proceedings, however, had not been speedy and rigorous, and the case was still pending before the Supreme Administrative Court.

38. The Court reiterates that the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12). A remedy must be made available during a person's detention which allows that person to obtain a speedy judicial review of its lawfulness, and which is capable of leading to the person's release.

39. The Court, firstly, observes that the applicant's representative lodged a case with the Ankara Administrative Court on 28 August 2009 requesting the annulment of the decision of the Ministry of the Interior not to release his client and the ordering of a stay of execution of that decision pending the proceedings. The request was refused by the Ankara Administrative Court on 16 March 2010 and, according to the information in the case file, the appeal proceedings are still pending before the Supreme Administrative Court. The administrative proceedings have thus already lasted more than two years.

40. The Court notes that it has found violations of Article 5 § 4 of the Convention in cases raising issues similar to the one in the present case. The Court notes in particular the case of *Z.N.S. v. Turkey* (no. 21896/08, §§ 58-63, 19 January 2010), where judicial review proceedings which lasted two months and ten days before administrative courts were considered not to have been "speedy" within the meaning of Article 5 § 4 of the Convention. Bearing in mind that the proceedings in the instant case have been pending for a much longer period, and that the Government have provided no explanation to justify this excessive delay, the Court finds that the Turkish legal system did not provide the applicant with a remedy whereby he could obtain speedy judicial review of the lawfulness of his detention, within the meaning of Article 5 § 4 of the Convention (see *Z.N.S.*, cited above, § 63).

41. The Court therefore dismisses the Government's objection that the applicant failed to exhaust domestic remedies and concludes that there has been a violation of Article 5 § 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage and costs and expenses

42. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

43. The Government contested this claim as unsubstantiated and excessive.

44. The Court considers that the applicant must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations. Having regard to equitable considerations, the Court therefore awards the applicant EUR 9,000 in respect of non-pecuniary damage.

45. The applicant did not claim any costs and expenses. Accordingly, no award is made under that head.

B. Default interest

46. The Court considers it appropriate that the default interest 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* to the merits the Government's objection on non-exhaustion of the administrative remedy and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 5 §§ 1 and 4 of the Convention;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President