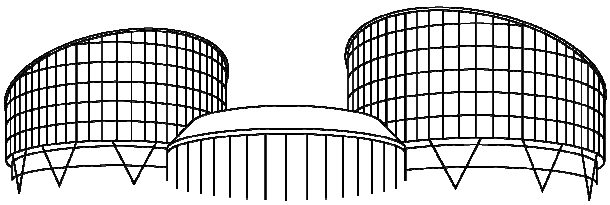

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF ABDOLKHANI AND KARIMNIA v. TURKEY

(Application no. 30471/08)

JUDGMENT

STRASBOURG

22 September 2009

FINAL

01/03/2010

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 Abdolkhani and Karimnia v. Turkey,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 1 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 30471/08) 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 two Iranian nationals, Mr Mohsen Abdolkhani and Mr Hamid Karimnia ("the applicants"), on 30 June 2008.

2. The applicants, who had been granted legal aid, were represented by Mrs D. Abadi, the director of Iranian Refugees Alliance Inc., a non-governmental organisation in New York, United States of America. Mrs Abadi was approved by the President of the Chamber to represent the applicants in the proceedings before the Court pursuant to Rule 36 § 4 (a) of the Rules of Court. The Turkish Government ("the Government") were represented by their Agent.

3. On 30 June 2008 the President of the Chamber to which the case was allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of Turkey, under Rule 39 of the Rules of Court, that the applicants should not be deported to Iran or Iraq until 4 August 2008. On 22 July 2008 the President of the Chamber decided to extend until further notice the interim measure indicated under Rule 39 of the Rules of Court.

4. On 24 September 2008 the President of the Chamber decided to give notice of the application to the Government. It was also decided that the admissibility and merits of the application would be examined together (Article 29 § 3) and that the case would be given priority (Rule 41).

5. The applicants and the Government each filed written observations on the admissibility and merits. In addition, comments were received from the Office of the United Nations High Commissioner for Refugees

("UNHCR"), which had been given leave by the President to intervene in the written procedure as a third-party (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1973 and 1978 respectively and are currently being held in the Gaziosmanpaşa Foreigners' Admission and Accommodation Centre in Kırklareli.

7. The applicants joined the People's Mojahedin Organisation in Iran ("the PMOI", also known as the "Mojahedin-e-Khalq Organization") in 1992 and 2001 respectively. They arrived in Iraq on unspecified dates. They lived in Al-Ashraf camp, where PMOI members were accommodated in Iraq, until they left the organisation in 2005 and 2006 respectively, because they disagreed with the PMOI's goals and methods. After leaving the PMOI, they 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").

8. On 5 May 2006 and 16 October 2007, after being interviewed, the applicants were recognised as refugees by the UNHCR Headquarters in Geneva during their stay in Iraq. As regards the first applicant, the UNHCR found that he had a well-founded fear of persecution in Iran on grounds of his political opinion, his character and the firm conviction with which he held his political opinions. In particular, having regard to the applicant's link to the PMOI for 10 years, to the treatment of members of the PMOI in Iran and to his explicit opinions on the need for a secular State in his country of origin, the UNHCR considered that the applicant had established to a reasonable degree that his situation would be followed up by the security agencies which would make his stay in Iran intolerable if he returned there.

9. As regards the second applicant, the UNHCR found that he had a well-founded fear of violations by Iranian authorities of, *inter alia*, his right to life through an arbitrary or unlawful deprivation of life, freedom from torture, ill-treatment, arbitrary arrest or detention, as well as his right to a fair and public trial. In particular, having regard to the applicant's membership of the PMOI and to his political opinions and the treatment of actual and suspected members of the PMOI and its sympathisers in Iran, the UNCHR considered that the evidentiary threshold of "reasonable likelihood" that the applicant would face treatment such as arbitrary detention and torture was satisfied.

10. In April 2008 the TIPF was closed down and the applicants, along with other former PMOI members, were transferred to northern Iraq.

11. On an unspecified date the applicants arrived in Turkey. They were arrested by security forces and, as they had entered Turkish territory illegally, were deported back to Iraq on 17 June 2008.

12. They immediately re-entered Turkey.

13. On 21 June 2008 they were arrested by road checkpoint gendarmerie officers from the Gökyazı gendarme station, in Muş, as their passports were found to be false.

14. On 21 June 2008 the applicants made statements to the gendarmerie officers. The applicants contended that they would be executed if returned to Iran, due to their opposition to the Iranian Government's policies, and that their lives had also been at risk in Iraq. They stated that they wished to go to Istanbul in order to request asylum and leave for Canada.

15. The applicants were subsequently placed in the foreigners' department at the police headquarters in the Hasköy district of Muş.

16. On 23 June 2008 the Muş public prosecutor filed a bill of indictment with the Muş Magistrates' Court, charging the applicants with illegal entry into Turkey.

17. On the same day the applicants were brought before the Muş Magistrates' Court. Noting that the applicants would be deported, the judge communicated the bill of indictment to the applicants and took their statements regarding the charge against them. The applicants submitted that they had left Iran as they faced a risk of death in that country and that they had come to Turkey illegally, with the assistance of a smuggler, in order to go to Canada where they had family. The magistrates' court convicted the applicants as charged but decided to defer the imposition of a sentence for a period of five years in accordance with Article 231 of the Code of Criminal Procedure. The applicants were subsequently taken back to the Hasköy police headquarters.

18. According to the applicants' submissions, on 28 June 2008 the national authorities once again attempted to deport them, this time to Iran. The applicants prevented their deportation by speaking Arabic and pretending not to understand Farsi. Consequently, the Iranian authorities refused to admit them to Iran. In their submissions to the Court, the Government made no mention of the purported deportation of the applicants to Iran. Instead, they noted that the applicants would be required to be deported to Northern Iraq, where they had come from.

19. On 30 June 2008 the director of the Muş branch of the Human Rights Association, Mr Vedat Şengül, went to the Hasköy police headquarters to visit the applicants at the request of the UNHCR Ankara office. According to Mr Şengül's submissions, on the day of his visit the first applicant had attempted to commit suicide as he had been told by a

police officer that he would be deported to Iran. The police had not allowed Mr Şengül to meet the applicants.

20. On 30 June and 1 and 2 July 2008 the applicants made further statements to the police and contended that they were former members of the PMOI. The first applicant noted that he had had English, Farsi and Arabic lessons as well as military training when he was in the organisation. He also stated that, while in the TIPF, he had been a photographer and taught Arabic. He said that he had not been involved in any armed activity. The second applicant stated that, apart from the aforementioned languages, he had also learned Turkish when he had been a member of the PMOI. He contended that he had lived in the TIPF for two years and had never been involved in any armed activity. Both applicants stated that they had come to Turkey in order to apply to the UNHCR, following advice by American officials to do so.

21. The applicants submitted identical petitions in Farsi to the police in Hasköy, which read as follows:

> "We entered Turkey with the assistance of a smuggler from the city of Diyana. We are refugees and used to reside in Erbil, Iraq. We came to Turkey in order to contact the UNHCR and ask it to process our [resettlement] cases. The UNHCR's headquarters in Iraq was blown up by terrorists and it no longer has an office there. We request to stay in Turkey temporarily so that our cases can be processed. Our friends advised us that the only way to contact the UNHCR was to come to Turkey. We need a lawyer before we communicate [with you] further."

22. The applicants signed these petitions. They also wrote down their UNHCR case numbers, the names of their parents and their dates of birth.

23. The applicants were held at the Hasköy police headquarters, in Muş until 26 September 2008, when they were transferred to the Kırklareli Foreigners' Admission and Accommodation Centre.

24. On 18 October 2008 the applicants drafted petitions addressed to the Kırklareli governor's office and sought temporary asylum in Turkey. According to the information in the case file, the applicants have not yet received any reply to their petitions.

25. On 15 December 2008 the second applicant married another Iranian asylum seeker held in the Kırklareli Foreigners' Admission and Accommodation Centre. The director of the Centre assisted them in obtaining their marriage certificate.

26. On 16 January 2009 the second applicant had a power of attorney notarised for Mr A. Baba, and subsequently Ms S. Uludağ, lawyers practising in Istanbul, to represent him in Turkey. The notary agreed to notarise the power of attorney on the basis of the aforementioned marriage certificate.

27. On 16 March 2009 the second applicant's lawyer filed a petition with the Ministry of the Interior, challenging the second applicant's detention.

According to the information in the case file, the second applicant has not yet received any reply to his petition.

28. On 25 March 2009, upon a request from the UNHCR, the Government of Sweden agreed to examine the applicants' cases for resettlement there. According to the information in the case file, that examination is still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

29. Article 125 of the Turkish Constitution provides, *inter alia*:

> "All acts or decisions of the authorities are subject to judicial review ...
>
> If the implementation of an administrative act would result in damage which is difficult or impossible to compensate, and at the same time this act is clearly unlawful, a stay of execution may be decided upon, stating the reasons therefor ..."

B. Administrative Procedure Act (Law no. 2577)

30. Section 2 of Law no. 2577 provides that anyone whose personal rights have been violated as a result of an allegedly unlawful administrative decision or act can bring an action for annulment of that decision or act.

Section 27(1) of the same Law stipulates that an application to the administrative courts does not automatically suspend implementation of the decision or act in question. Under section 27(2), the administrative courts can order a stay of execution if the decision or act in question is manifestly unlawful and if its implementation would cause irreversible harm.

C. Passport Act (Law no. 5682) and the Act on the Residence and Travel of Foreigners in Turkey (Law no. 5683)

31. Sections 4 and 8(5) of Law no. 5682, in so far as relevant, read as follows:

Section 4

> "Foreigners who come to the Turkish borders without a passport or identity documents or with an invalid passport or identity documents shall not be authorised to enter.
>
> Foreigners who claim that they have lost their passport or identity documents while travelling may be authorised, pending an investigation conducted by the Ministry of

the Interior, to enter ... and on condition that they can be accommodated at a place designated by the local governor. ...”

Section 8(5)

“Persons who are forbidden to enter Turkey are ...

(5) Those who are perceived to have come for the purpose of destroying the security and public order of the Republic of Turkey or of assisting or conspiring with persons who want to destroy the security and public order of the Republic of Turkey.”

32. Sections 19 and 23 of Law no. 5683 read as follows:

Section 19

“Foreigners whose stay in the territory of Turkey is considered to be incompatible with public safety and the political or administrative requirements of the Ministry of the Interior shall be invited to leave Turkey within a fixed time-limit. Those who do not leave Turkey after the expiry of the time-limit may be deported.”

Section 23

“Persons who are to be deported but cannot leave Turkey due to their inability to obtain a passport or for other reasons are obliged to reside at places designated by the Ministry of the Interior.”

D. Attorneys Act (Law no. 1136)

33. Section 2(3) of Law no. 1136, as amended by Law no. 4667 of 2 May 2001, provides as follows:

“Judicial bodies, police departments, other public institutions and agencies, State economic enterprises, private and public banks, notaries, insurance companies and foundations are under an obligation to assist attorneys in carrying out their duties. These entities are obliged to submit requested information and documents to the lawyers for review, subject to any contrary provisions in the laws establishing these entities. Obtaining copies of such documents is subject to the presentation of a power of attorney. In pending cases, documents may be obtained from the court without waiting until the date of the hearing.”

E. The law and practice governing asylum seekers

1. 1951 Convention relating to the Status of Refugees

34. Turkey has ratified the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto. However, it maintains the geographical limitation provided for in Article 1 B of this Convention by

which it assumes the obligation to provide protection only to refugees originating from Europe.

2. 1994 Regulation

35. On 30 November 1994 the Regulation on the procedures and principles related to possible population movements and foreigners arriving in Turkey, either as individuals or in groups, wishing to seek asylum either from Turkey or requesting a residence permit in order to seek asylum from another country ("the 1994 Regulation"), came into force by a decision of the Council of Ministers no. 1994/6169. Under the 1994 Regulation, although formally excluded from the protection of the 1951 Geneva Convention, non-European asylum seekers may apply to the Turkish Government for "temporary asylum seeker status" pending their resettlement in a third country by the UNHCR.

36. Article 3 of the 1994 Regulation defines a refugee and asylum seeker as follows:

> "Refugee: A foreign national who, as a result of events occurring in Europe and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it;
>
> Temporary Asylum Seeker: A foreign national who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

37. On 16 January 2006 Articles 4, 5, 6, 7 and 30 of the 1994 Regulation were amended by a decision of the Council of Ministers (decision no. 2006/9938).

38. Articles 4, 5 and 6 of the 1994 Regulation now provide as follows:

Article 4

> "Foreign nationals entering Turkey legally to seek asylum or to request a residence permit in order to seek asylum in another country shall apply without delay to the governor's office of the city where they are present. Those who enter Turkey illegally are required to apply without delay to the governor's office of the province through which they entered the country.
>
> Those who fail to apply to the authorities within the shortest reasonable time shall state the reasons for failing to do so and shall co-operate with the competent authorities."

Article 5

"With regard to individual foreigners who either seek asylum from Turkey or request a residence permit in order to seek asylum from another country the governors' offices shall

a) identify the applicants and take their photographs and fingerprints.

b) conduct interviews with the applicants in accordance with the 1951 Geneva Convention relating to the Status of Refugees. For interviewing and decision making, staff shall be appointed at the governors' offices which are authorised to conduct interviews and to take decisions.

c) send the interview documents along with the comments of the interviewer and the decision made on the case of the applicant, in accordance with the authority granted under Article 6, to the Ministry of the Interior.

d) pending further instructions from the Ministry of the Interior, accommodate the foreigner in a centre or a guest house considered appropriate by the Ministry of the Interior, or authorise the foreigner to reside freely in a place which shall be designated by the Ministry of the Interior.

e) take further steps following instructions from the Ministry of the Interior."

Article 6

"Decisions on the applications of individual foreigners, either seeking asylum from Turkey or requesting a residence permit in order to seek asylum from another country, shall be adopted by the Ministry of the Interior in accordance with the 1951 Geneva Convention relating to the Status of Refugees and the Protocol of 31 January 1967 relating to the Status of Refugees and this Regulation.

When it considers it necessary, the Ministry of the Interior may transfer the decision-making authority to the governors' offices.

The decision taken by a governor's office or the Ministry of Interior shall be communicated to the foreigner through the governor's office.

Those foreigners whose applications are accepted shall be accommodated in a guesthouse deemed appropriate by the Ministry of the Interior or shall freely reside in a place which shall be designated by the Ministry of the Interior.

Those whose applications are not accepted may appeal to the relevant governor's office within 15 days.

For a speedier decision, the period for lodging an appeal may be reduced by the Ministry of the Interior, if deemed necessary.

The statement, other information and documents supporting the claim submitted by the applicant appealing the decision shall be sent to the Ministry of the Interior by the governor's office. Any appeal shall be decided by the Ministry of the Interior and the final decision shall be notified to the foreigner.

The situation of those whose appeals are rejected by a final decision shall be assessed within the framework of the general provisions regarding foreigners. Within this framework, those foreigners who are not eligible for a residence permit shall be notified that they must leave Turkey within a time-limit determined by the administration. Foreigners who do not leave the country shall be deported from Turkey by the governors' offices upon receipt of instructions from the Ministry of the Interior, or *ex officio* by the governors' offices where the direct decision-making authority has been transferred to them."

3. Circular no. 57

39. On 22 June 2006 the Minister of the Interior issued a Circular containing a directive regarding the procedures and principles to be applied when implementing the 1994 Regulation ("Circular no. 57") within the context of the process of Turkey's accession to the European Union. The Circular contains guidelines regarding, *inter alia*, asylum seekers' access to asylum procedures, the manner in which asylum applications and interviews should be processed, the procedure as to the review of decisions refusing temporary asylum, the residence of asylum seekers in Turkey and their transfers to other provinces, health assistance to asylum seekers, the education of their children and the relation between the Ministry of the Interior and the UNHCR.

40. Regarding the issue of access to the asylum and temporary asylum procedure, Circular no. 57 reiterates the content of Articles 4 and 5 of the 1994 Regulation. As to residence permits for asylum and temporary asylum seekers, section 11 of the Circular provides that persons who have applied for asylum or temporary asylum in Turkey, except for those listed in section 13, shall *ex officio* be granted a residence permit for six months which shall subsequently be extended *ex officio* for another six months.

41. Section 12 of Circular no. 57, in so far as relevant, provides as follows:

Procedure to be followed by the governors' offices following the decision of the Ministry of the Interior and legal assistance

"Applicants shall be informed by the governors' offices of the decision of the Ministry of the Interior regarding their requests. If the decision is positive, the refugee/temporary asylum seeker shall be granted a residence permit upon receipt of the instructions of the Ministry of the Interior.

Negative decision at first instance

If the first decision taken by the Ministry regarding the applicant's request is negative, the applicant shall be informed that she or he may lodge an objection against the decision within fifteen days in accordance with Article 6 of the 1994 Regulation.

The objection may be made in written form or at an interview, if the applicant requests one.

The residence permit of an applicant who has lodged an objection against the first decision given in his or her regard shall be extended and subsequent action shall be taken upon the instructions of the Ministry of the Interior.

The applicant can submit any information or document in support of his or her objection. The applicant may lodge an objection with the assistance of a legal representative or an adviser or directly through his or her representative.

If the applicant has not lodged an appeal, he or she shall be ordered to leave the country within fifteen days. A check shall be carried out to ensure that he or she has left by the end of this period.

If the person has not left within the specified period, action shall be taken to deport him or her pursuant to the general provisions regarding foreign nationals.

Final decision

The petition containing the applicant's objection or the information and documents concerning the additional interview shall be sent to the Ministry of the Interior and action shall be taken upon the latter's instructions.

If an applicant is given refugee or asylum seeker status following the examination conducted by the Ministry of the Interior, he or she shall be granted a residence permit upon the instructions of the Ministry.

An applicant whose objection has been rejected can leave the country voluntarily.

Residence permits as a result of subsidiary protection and protection for humanitarian considerations

The cases of applicants whose objections have been rejected by a final decision are assessed within the framework of the general provisions contained in Article 6 of the 1994 Regulation concerning foreigners.

This assessment concerns whether the applicant risks incurring serious harm, in the light of the European Convention of Human Rights, and whether it is necessary to grant him or her subsidiary protection.

Regard is also had to whether the applicant should be granted a residence permit for humanitarian reasons of health, education, family unity, etc., or if he or she has applied to the administrative courts.

Those who are not granted a residence permit within the context of subsidiary protection or protection for humanitarian reasons shall be notified of the decisions taken in their respect. They shall further be informed that they must leave the country within fifteen days, unless another time-limit is set by the Ministry of the Interior.

If the person has not left within the specified period, action shall be taken to deport him or her pursuant to the general provisions regarding foreign nationals.

If the foreigner does not leave the country and applies to the administrative court, the Ministry of the Interior shall be informed. Action shall be taken upon receipt of instructions from the Ministry..."

42. Section 13 of Circular no. 57, in so far as relevant, provides as follows:

Cases in which residence permits are not granted ex officio

"...In order to prevent abuse of international protection and to identify those who actually need international protection, those who belong to the categories below shall not be granted residence permits *ex officio*: ...

- Persons who claim asylum following their arrest by security forces; ...
- Persons who claim asylum following their arrest by security forces while leaving Turkey illegally;

...If the applicant's request is rejected following the first examination by the Ministry of the Interior and if the applicant does not lodge an objection, he or she shall be deported.

If the applicant wishes to object to the decision, he or she shall be given two days in which to do so. The objection and the documents relating to the objection shall be sent to the Ministry of the Interior as a matter of urgency. Action shall be taken upon receipt of instructions from the Ministry..."

43. Under section 3 of Circular no. 57, it is compulsory to provide identity documents for all applicants and asylum seekers/refugees residing in Turkey within 15 days of receipt of their applications.

4. National Action Plan

44. On 25 March 2005 the Government of Turkey adopted a National Action Plan for the adoption of the European Union *Acquis* in the fields of asylum and immigration. The National Action Plan envisages, *inter alia*, the adoption of a new asylum law.

5. Ruling of the Ankara Administrative Court of 17 September 2008

45. On 6 August 2008 the representative of A.A., an Iranian national recognised as a refugee under the UNHCR's mandate and who was held in a Foreigners' Admission and Accommodation Centre at the relevant time, lodged a case with the Ankara Administrative Court. He requested that the court annul the decision of the Ministry not to release his client and order a stay of execution of that decision pending the proceedings. On 17 September 2008 the Ankara Administrative Court ordered a stay of execution of the decision of the Ministry of the Interior and decided that A.A. should be released. On 17 October 2008 he was released.

III. RELEVANT INTERNATIONAL MATERIAL

A. Report of the UNHCR Resettlement Service of February 2008

46. In the report entitled "Information Regarding Iranian Refugees in the Temporary Interview Protection Facility (ex-TIPF/ARC) at Al-Ashraf, Iraq", submitted to the Court by the applicants, UNHCR noted, *inter alia*, the following:

> "... 14. ...The Iranian government's treatment of known or suspected members of or sympathisers with the PMOI has reportedly been extremely severe, with long prison sentences and thousands of executions in the years that followed the Islamic revolution. Execution of PMOI members continue to be reported on a sporadic basis, including extra-judicial killings in foreign countries. As a result many PMOI/NLA/NCRI members, or even supporters or family members, are likely to have a well-founded fear of persecution on political grounds. ...
>
> 18. Iranian ex-PMOI refugees are considered at particular risk in Iraq. The PMOI has been perceived by some in Iraq as having been affiliated with the former Iraqi regime of Saddam Hussein given the protection that the regime afforded. Others have alleged that PMOI/NLA units were involved in the crushing of the 1991 uprising by Iraqi Kurds and Shia groups which were supported by the Iranian authorities. Groups that were either allied to or perceived to have received preferential treatment from the regime of Saddam Hussein are subject to threats and violence, the Palestinians being on example.
>
> 19. With deepening links between the Islamic Republic of Iran and the current Shia-led government coalition in Iraq as well as links between the Iranian government and Shia-based militias, there is a growing concern that the safety of the ex-PMOI refugees is increasingly at risk. In a meeting with UNHCR in Jordan in August 2006, the Iraqi authorities stated their intention to expel PMOI/NLA and former PMOI/NLA members from Iraq within six months. In December 2007 UNHCR was informed that in recent months, threats had been made against the residents of Camp Al-Ashraf... While these credible threats have not been directed towards the refugees at the ARC, but rather at those being maintained at camp Al-Ashraf, UNHCR considers the refugees at the ARC to be in similar danger given their shared past affiliation with the PMOI/NLA. ...
>
> 23. Given the changes in bilateral relations between governments of Iraq and Iran noted above, as well as the perceived affiliation of ex-PMOI members with the former regime, local integration in Iraq, the country of asylum, is not a feasible durable solution for these refugees. This applies equally to the Northern Kurdish governorates (KRG). KRG also holds a hostile view towards former PMOI/NLA members given the group's perceived connections to the former regime and refused to consider further UNHCR's relocation request. ...
>
> 24. UNHCR currently does not facilitate or promote voluntary repatriation of refugees from Iraq to Iran. In the past International Committee of Red Cross ("ICRC") facilitated with limited logistic support the voluntary repatriation to Iran of some 200 PMOI/NLA members from camp Al-Ashraf who transited through the ARC. Very

little independent information is available as to what happened to these individuals, as neither ICRC nor UNHCR is able to monitor the situation of returnees. UNHCR received, however, credible reports that some of the returnees were forced/"invited" to make public confessions and accusations against the PMOI/NLA on television after their return. An organisation of victims of the PMOI composed of persons presented as former PMOI members (including returnees) called *Nejat* has been reporting to UNHCR that returnees did not face any problem upon return to Iran. None of these returnees either from Camp Al-Ashraf or from the ARC has approached any UNHCR offices. The Iranian authorities continue to designate in the media the PMOI members as "*Monafeqin*" (i.e. the "Hypocrites").

25. Reportedly, at one point in time Iran was prepared to accept the return of PMOI members from Iraq, with the exception of some 50 high profile members, if they expressed regrets for their past acts. This promise of amnesty, however, has not been officially reiterated by President Ahmadinajad. In 2004, in a letter from UNHCR to the Government of the Islamic Republic of Iran, UNHCR asked the Iranian authorities to confirm this verbally-declared amnesty as well as to provide unhindered and direct access by UNHCR to returnees. No reply was ever received. UNHCR has reiterated this request without success to the Government of Iran on various occasions in 2006, 2007 and most recently on 24 January 2008. Despite separation from family members remaining in Iran and years of limited freedom of movement in the ARC, the vast majority of former PMOI/NLA members preferred to remain at the ARC in Iraq, supervised by Multinational Forces – Iraq ("MNF-I"), than return to Iran. Recently, some have risked travelling to Northern Iraq or Turkey so as to get out of the ARC and seek asylum elsewhere. Some of those who tried to go to Turkey have been forcibly returned to Iraq. ...

31. Since November 2007, the US military has been facilitating ex-PMOI refugees to depart the ARC. Most of these refugees travelled to Northern Iraq, while some attempted to enter Turkey with one way *laissez passez* issued by Iraqi authorities with the assistance of the US military. Some of these refugees were also in possession of letters signed by a US Army Colonel, stating that:

> *"Mr. or Mrs. ... will be travelling out of the country with a Government of Iraq issued* Laissez Passez *and is authorised to do so. It is his/her intent to obtain a visa at the border and cross into Turkey. This action has been approved by MNF-I and the US Embassy Baghdad, in conjunction with the Government of Iraq."*

32. UNHCR does not support the issuance of these documents and is concerned that refugees leaving the ARC based on inaccurate information that they will be accommodated by UNHCR in northern Iraq or that they will be able to acquire visas to and enter Turkey. This is not the case. Refugees who leave ARC are at risk of being stranded in northern Iraq or subject to detention and deportation from another country, most notably Turkey. More than 35 ex-PMOI refugees have been detained in Turkey after leaving the ARC and entering Turkey illegally. 19 of them were deported to northern Iraq where many were detained in Mosul. 10 remain in detention in Turkey in precarious circumstances. Some former refugees are reportedly missing and UNHCR fears that they may have been deported to their country of origin. Another refugee from the ARC who arrived illegally to Germany has been allowed by a court decision to enter the country and to be protected against *refoulement*. ...

34. On 19 January 2008 Iran and Turkey signed a memorandum of understanding to enhance security cooperation and joint efforts to officially oppose drug trafficking and

terrorism. UNHCR is concerned that such an agreement could be used to *refoule* former ARC refugees stranded in detention in Turkey or at its borders. ...”

B. Press release issued by the UNHCR on 25 April 2008

47. On 25 April 2008 the UNHCR issued the following statement:

“UNHCR deplores refugee expulsion by Turkey which resulted in four deaths

GENEVA - Four men, including an Iranian refugee, drowned after a group of 18 people were forced to cross a fast-flowing river by the Turkish police at Turkey's south-eastern border with Iraq, witnesses have told the UN refugee agency.

The incident took place on Wednesday 23 April at an unpatrolled stretch of the border, near the Habur (Silopi) official border crossing in Sirnak province in south-eastern Turkey. According to eyewitnesses, the Turkish authorities had earlier attempted to forcibly deport 60 people of various nationalities to Iraq through the official border crossing. The Iraqi border authorities allowed 42 Iraqis to enter the country, but refused to admit 18 Iranian and Syrian nationals. The Turkish police then took the 18, which included five Iranian refugees recognised by UNHCR, to a place where a river separates the two countries, and forced them to swim across.

According to the witnesses interviewed by UNHCR, four persons, including a refugee from Iran, were swept away by the strong river current and drowned. Their bodies could not be recovered.

UNHCR is in contact with the surviving refugees through its office in Erbil, in northern Iraq. They are deeply traumatized by the experience, UNHCR staff reported.

UNHCR had sent previous communications to the Turkish government requesting that the five Iranian refugees, who had all been detained after attempting to cross into Greece in an irregular manner, not be deported. Despite UNHCR's requests, the refugees were put in a bus, together with other persons to be deported, and taken on a 23-hour trip to the Iraqi border last Tuesday. UNHCR had expressed in a number of communications sent to the Government of Turkey that it did not consider Iraq a safe country of asylum for these refugees.

UNHCR is seeking clarification from the Government of Turkey on the circumstances surrounding the forced expulsion of the refugees and the tragic loss of life.”

C. Country of Origin Information Report on Iran of the United Kingdom Border Agency

48. In its Country of Origin Information Report on Iran of 21 April 2009, the United Kingdom Border Agency noted, *inter alia*, the following:

“...Human Rights Watch, on 27 February 2006, reported that:

'Hojat Zamani, a member of the opposition Mojahedin Khalq Organization outlawed in Iran, was executed on February 7 at Karaj's Gohardasht prison, Human Rights Watch said today, after a trial that did not meet international standards.'

Amnesty International, in a public statement dated 27 February 2006, said:

'Executions in Iran continue at an alarming rate. Amnesty International recorded 94 executions in 2005, although the true figure is likely to be much higher. So far in 2006, it has recorded as many as 28 executions. Most of the victims were sentenced for crimes such as murder but one of those recently executed was a political prisoner, Hojjat Zamani, a member of the People's Mojahedin Organization of Iran (PMOI), who was forcibly returned to Iran from Turkey in 2003 and sentenced to death in 2004 after conviction [for] involvement in a bomb explosion in Tehran in 1988 which killed 3 people (see Urgent Actions AI Index EUR 44/025/2003, 5 November 2003 and MDE 13/032/2004). He was taken from his cell in Gohar Dasht prison and executed on 7 February 2006, though his execution was officially confirmed by Iranian officials only on 21 February.

Hojjat Zamani's execution has fuelled fears that other political prisoners may be at risk of imminent execution. According to unconfirmed reports that have been circulating since early February, a number of political and other prisoners who are under sentence of death have been told by prison officials that they would be executed if Iran should be referred to the UN Security Council over the resumption of its nuclear programme... These [prisoners] are said to have included other members of the PMOI, which is an illegal organization in Iran. The National Council of Resistance of Iran, of which the PMOI is a member, was the source of evidence in 2002 revealing Iran's nuclear programme to the outside world.'

...

According to the Danish FFM of January 2005:

'UNHCR in Teheran reported that 58 members of the Iranian opposition organisation MKO had voluntarily returned to Iran. Their return was organised by ICRC. UNHCR had no information indicating that these persons had been legally persecuted.

UNHCR in Ankara reported that non-profiled members of Mujaheddin Khalq had returned to Iran but had no information indicating that these persons had been persecuted or legally persecuted.

The Organisation for defending Victims of Violence's international department reported that many members of Mujaheddin Khalq had returned to Iran without experiencing problems of a penal character.

IOM in Teheran confirmed that members of Mujaheddin Khalq had returned to Iran, mainly from Iraq. The source was not aware that they had been subjected to any reprisals. IOM had monitored the return of a number of failed asylum seekers from the UK. According to the source, none had been persecuted.'

...

The USSD report for 2007 states that: 'There were reports that the government held some persons in prison for years charged with sympathizing with outlawed groups, such as the terrorist organization, the Mujahedin-e-Khalq (MEK)... The government offered amnesty to rank-and-file members of the Iranian terrorist organization, MEK, residing outside the country. Subsequently, the ICRC assisted with voluntarily repatriating at least 12 MEK affiliates in Iraq under MNF-I protective supervision during the year.' ...”

D. Press releases issued by Amnesty International

49. In two press releases issued on 7 September 2006 and 20 March 2009, Amnesty International reported that a number of political prisoners in Iran, including two PMOI members, namely Valiollah Feyz Mahdavi and Abdolreza Rajabi, had died in custody in suspicious circumstances and that no effective investigation had been conducted into their death.

E. Recent developments regarding PMOI members in Iraq

50. In December 2008 and March 2009 the Iraqi National Security Advisor and Iraqi government spokesman respectively made statements, according to which the Iraqi government was intending to deport the PMOI members in Al-Ashraf Camp to their country of origin or to a third country, and asked the international community to find places for them other than Iraq[1].

Subsequently, on 14 April 2009 the Chair of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe (PACE) issued a press statement and urged the Iraqi government not to forcibly return to Iran the residents of Al-Ashraf Camp who would risk persecution there, not to expel these persons to another country that might send them to Iran afterwards, nor to forcibly displace them inside Iraq.[2]

On 24 April 2009 the European Parliament adopted a resolution[3] on the humanitarian situation of Al-Ashraf Camp residents which reads, in so far as relevant, as follows:

“The European Parliament

... B. - whereas in 2003 US forces in Iraq disarmed Camp Ashraf's residents and provided them with protection, those residents having been designated "protected persons" under the Geneva Conventions, ...

1. See http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7794842.stm and http://www.reuters.com/article/middleeastCrisis/idUSLK258722
2. See http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4559.
3. See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0311+0+DOC+XML+V0//EN&language=EN

D. - whereas following the conclusion of the US/Iraqi Status of Forces Agreement, control of Camp Ashraf was transferred to the Iraqi security forces as of 1 January 2009,

E. - whereas, according to recent statements reportedly made by the Iraqi National Security Advisor, the authorities intend gradually to make the continued presence of the Camp Ashraf residents "intolerable", and whereas he reportedly also referred to their expulsion/extradition and/or their forcible displacement inside Iraq,

1. - Urges the Iraqi Prime Minister to ensure that no action is taken by the Iraqi authorities which violates the human rights of the Camp Ashraf residents and to clarify the Iraqi government's intentions towards them; calls on the Iraqi authorities to protect the lives and the physical and moral integrity of the Camp Ashraf residents and to treat them in accordance with obligations under the Geneva Conventions, in particular by refraining from forcibly displacing, deporting, expelling or repatriating them in violation of the principle of *non-refoulement*;

2. - Respecting the individual wishes of anyone living in Camp Ashraf as regards his or her future, considers that those living in Camp Ashraf and other Iranian nationals who currently reside in Iraq having left Iran for political reasons could be at risk of serious human rights violations if they were to be returned involuntarily to Iran, and insists that no person should be returned, either directly or via a third country, to a situation where he or she would be at risk of torture or other serious human rights abuses; ..."

Meanwhile, on 26 January 2009 the Council of the European Union decided to exclude the PMOI from the list of individuals, groups and entities involved in terrorist acts, in accordance with the judgment of the European Court of Justice dated 4 December 2008 in Case T-284/08.

F. Report of the United Nations Working Group on Arbitrary Detention

51. On 7 February 2007 the United Nations Working Group on Arbitrary Detention issued a report on its mission to Turkey (Report of the Working Group on Arbitrary Detention on its Mission to Turkey, Report of 7 February 2007, A/HRC/4/40/Add.5). Regarding the detention of foreigners awaiting expulsion in Turkey, the UN Working Group noted the following:

"... 86. Foreigners who are in Turkey without the documents necessary to allow them to stay lawfully in the country can be, and are in great numbers, arrested by the police or the Gendarmerie. After a brief period in police custody they are taken to a so-called "guest house" for foreigners run by the Ministry of the Interior, where they are - in spite of the welcoming name of these institutions - to all effect locked up awaiting expulsion. However, no written decision to this effect is issued to them.

87. Article 23 of the Law on the Residence of Foreign Citizens, providing that foreigners who have been issued an expulsion decision but cannot be immediately expelled, shall reside in a location assigned to them by the Ministry of the Interior, does not constitute a sufficient legal basis for this practice. Neither this law, nor any

other, provides further details as to the preconditions for, modalities of or maximum duration of assignment to a residence for foreigners awaiting expulsion. As this is not a measure adopted within the criminal process, judges of the peace have no jurisdiction to rule on challenges against such measures. It would appear that administrative tribunals are competent. However, this remedy appears not to be exercised in practice. Challenges to the expulsion decision may have an impact also on the question of detention, but they simply do not constitute the remedy against the fact of deprivation of liberty required by article 9 (4) of ICCPR.

88. It is important to stress that this has nothing to do with the criminal proceedings which can be initiated against a foreigner for illegal entry into Turkey. Such proceedings are not regularly pursued and, in case of a guilty finding, result in a fine, not deprivation of liberty.

89. Another aggravating aspect is that, according to information provided by the police, not only foreigners who are actually the subject of an expulsion decision are assigned to guest houses (i.e. deprived of their liberty), but also so assigned are many who - in the opinion of the police - are likely to receive an unfavourable outcome in expulsion proceedings initiated against them. This practice violates even article 23 of the Law on the Residence of Foreign Citizens.

90. To sum up, there is no remedy for the foreigners awaiting expulsion to challenge their detention, and no control over the detention by a judicial authority. It may be true that in some cases the person to be deported spends only a few days at the guest house. But in others, where there are difficulties obtaining valid travel documents (as appears to be the case for many African migrants), the detention can last months and even more than a year..."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS AND ADMISSIBILITY

A. The alleged lack of victim status

52. The Government submitted that the applicants had entered Turkish territory illegally and had been deported to Iraq, where they had come from, pursuant to the national legislation prior to their arrest on 21 June 2008. They maintained that, despite this, the applicants did not have victim status within the meaning of Article 34 of the Convention as no deportation order was issued in their respect.

53. The applicants submitted that they had been deported to Iraq and that the authorities had attempted to deport them to Iran without serving any

deportation orders on them. They therefore argued that they had had victim status even though there had been no actual deportation order.

54. The Court notes at the outset that the Government were explicitly requested by the Court to submit information concerning the legal basis of the applicants' deportation to Iraq on 17 June 2008 and the alleged attempted deportation on 28 June 2008 to Iran. They were further asked to submit a copy of the deportation orders as well as documents proving that the orders had been served on the applicants. The Government failed, however, to submit this documentation. Furthermore, the Government maintained that the applicants had entered Turkey illegally and were deported back to Iraq prior to their arrest by the security forces. Thus, the Court finds that the applicants were deported by the national authorities on at least one occasion, to Iraq on 17 June 2008, without a deportation order or without one having been served on the applicants.

55. In the light of the above, the Court considers that the absence of deportation orders cannot lead to a conclusion that the applicants did not risk, and still do not risk, being deported to Iraq or Iran by the Turkish authorities. The Court therefore concludes that the applicants have victim status within the meaning of Article 34 of the Convention and it rejects the Government's objection.

B. The alleged failure to exhaust domestic remedies

56. The Government further contended that, had there been a deportation order, the applicants could and should have applied to the administrative courts in accordance with Article 125 of the Constitution. They argued that, pursuant to Turkish law, foreigners who are to be deported may apply to the administrative courts and request the suspension of the deportation proceedings as well as the annulment of the administrative decisions. If the courts accept their request for a stay of execution, the administrative authorities suspend the deportation proceedings. The Government concluded that the applicants had failed to exhaust the domestic remedies available to them, within the meaning of Article 35 § 1 of the Convention.

57. The applicants submitted that they could not have challenged a decision which has not been served on them.

58. The Court notes that it has already held in its judgment in the case of *Gebremedhin [Gaberamadhien] v. France* (no. 25389/05, § 66, ECHR 2007-V) that, where an applicant seeks to prevent his or her removal from a Contracting State, a remedy will only be effective if it has automatic suspensive effect (see also *Čonka v. Belgium*, no. 51564/99, § 79, ECHR 2002-I). Similarly, in the case of *N.A. v. the United Kingdom* (no. 25904/07, § 90, 17 July 2008), the Court further held that judicial review, where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which

in principle applicants will be required to exhaust before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal.

59. The Court observes that an application to the administrative courts, made pursuant to Article 125 of the Constitution, seeking the annulment of a deportation order does not have automatic suspensive effect. An administrative court would have to make a specific staying order (see *Jabari v. Turkey*, no. 40035/98, § 49, ECHR 2000-VIII). Therefore, even assuming that the applicants were to be served with deportation orders and would have the possibility of challenging them before the administrative courts, they would not be required to apply to the administrative courts in order to exhaust the domestic remedies within the meaning of Article 35 § 1 of the Convention. The Court accordingly rejects the Government's objection.

C. Compliance with other admissibility criteria

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

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

61. The applicants complained under Articles 2 and 3 of the Convention about their deportation to Iraq on 17 June 2008, the authorities' attempt to deport them to Iran on 28 June 2008 and their current threatened deportation to one of the two aforementioned countries, alleging that they would be exposed to a clear risk of death or ill-treatment if deported. They maintained that their removal to Iran would expose them to a real risk of death or ill-treatment. In particular, as former members of the PMOI, they run the risk of being subjected to the death penalty in Iran. The applicants further submitted that, in Iraq, they would be subjected to ill-treatment as in that country they are considered by the authorities to be allies of the former Saddam Hussein regime.

62. The Court finds it is more appropriate to examine the applicants' complaints from the standpoint of Article 3 of the Convention (see *N.A. v. the United Kingdom* cited above, § 95, 17 July 2008; *Said v. the Netherlands*, no. 2345/02, § 37, ECHR 2005-VI). Article 3 reads as follows:

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

63. The Government contested the applicants' arguments.

A. The parties' submissions

1. The Government

64. The Government maintained that the applicants were members of the PMOI, an organisation which had been designated as a terrorist organisation by the United States of America and the European Union. Therefore, allowing members of this organisation, including the applicants, to stay in Turkey would create a risk to national security, public safety and order. They contended that the applicants had been deported back to Iraq, in accordance with the national legislation, when they had first arrived in Turkey. They further maintained that the applicants would again be deported to Iraq, where they had come from. However, the Government were currently complying with the interim measure indicated to them under Rule 39 of the Rules of Court. In that connection, they noted that the Iraqi Government had demonstrated considerable progress in the field of security and that therefore Iraq, which was controlled and administered by the Coalition Forces, was safe. They concluded that the applicants' deportation to Iraq would not expose them to any risk.

2. The applicants

65. The applicants submitted that the authorities had attempted to deport them to Iran on 28 June 2008 without any record of the removal, and that the Government had not addressed the risks which they might face in their country of origin. Relying on the Court's judgment in the case of *Chahal v. the United Kingdom* (15 November 1996, § 96, *Reports of Judgments and Decisions* 1996-V), the applicants asked the Court to make its own assessment regarding the risks to which they might be exposed in Iran. They contended that they would be ill-treated, and even executed, in Iran as former members of the PMOI. The applicants relied on their recognition as refugees by UNHCR on this account.

66. In this connection, the first applicant submitted that he had joined the PMOI while performing his military service between 1992 and 1994. In 1995, while trying to assist a PMOI member to flee the country, he had been arrested, detained for one day and ill-treated before managing to escape. He had subsequently fled to Iraq. He had not participated in any military operation on behalf of the PMOI despite having undergone military training. When he had begun disagreeing with the organisation's goals and methods, he had been summoned and questioned. In 2001 he had been ill-treated and detained for four months in a building in Al-Ashraf camp. In October 2005 he had finally left the PMOI and gone to the TIPF. Consequently, the UNHCR had recognised him as a refugee

67. The second applicant had left Iran in 2000 and went to Turkey as it was intolerable for him to live under the theocratic regime in Iran. While in

Iran, he had been arrested between 20 and 30 times for breaking various dress and social/moral codes. He had joined the PMOI in 2001 and gone to Iraq. After he had joined the PMOI, the Iranian authorities had put pressure on his family, which had resulted in his mother having a heart attack and caused his father to have a stroke and lose his speech. The applicant had asked to be dismissed from the organisation – as he found it dictatorial – two months after his arrival in Iraq. As a result, he had been detained for three months in Al-Ashraf camp. In 2006 he had been transferred to the TIPF. Subsequently, the UNHCR had recognised him as a refugee

68. The applicants further maintained that they would not be safe in Iraq. They contended, firstly, that there was generalised violence in Iraq. Moreover, as former members of the PMOI they risked being persecuted by the current Iraqi Government and even being deported from Iraq to Iran if they were removed from Turkey. They noted that the TIPF had been closed down in April 2008 by the United States forces and that, therefore, they would not be able to go back to where they had come from. They also noted that the control of Al-Ashraf camp, where PMOI members lived, had been transferred to the Iraqi Government in December 2008 and that several human rights organisations had expressed concern for the security of the residents of this camp in the absence of multinational forces. The applicants finally submitted that there existed no readmission agreement between Turkey and Iraq concerning Iranian nationals and that the Iraqi authorities had systematically refused the readmission of former PMOI refugees to Iraq. The applicants noted in this respect that there had been cases where the Turkish authorities had carried out deportations in an illegal manner, including the applicants' deportation of 17 June 2008 when they had been forced to cross the border into the Diyana region of Iraq.

B. The third party's submissions

69. The UNHCR submitted that certain former PMOI members, including the applicants, had been recognised as refugees under their mandate. They contended that 24 former members of the PMOI who had been recognised as refugees under the UNHCR's mandate had been deported back to Iraq from Turkey and that three of them had been directly removed to Iran. The UNHCR submitted in this connection that these deportations and attempted deportations had been carried out without due regard to the fact that these persons had been recognised as refugees by the UNHCR. They claimed that the respondent Government had informed them that they did not acknowledge recognition under the UNHCR's mandate elsewhere than in Turkey. The UNHCR maintained that, whilst recognition under their mandate was not legally binding on States per se, it must not be disregarded without proper justification and must be accorded high

persuasive authority in assessing the existence of a well-founded fear of persecution.

70. The UNHCR explained that, regarding removal to a first country of asylum, a prior assessment was required as to whether the individual was protected against *refoulement* and whether he or she was permitted to remain in that country and to be treated in accordance with recognised basic human rights standards until a durable solution was found. As regards Iraq, the UNHCR noted that that State was neither a party to the 1951 Convention relating to the Status of Refugees nor to its 1967 Protocol. In view of the highly volatile security situation in Iraq as well as the continuing internal and external displacement of persons due to violence, there was a real risk of serious human rights violations if refugees were returned there.

71. The UNHCR submitted that former PMOI refugees faced further security risks in Iraq in addition to being affected by the general conditions of insecurity in the country. Former members of the PMOI were perceived as having been affiliated to the former Saddam Hussein regime which had protected them in the past. A small group of former PMOI refugees in northern Iraq had not been issued with refugee cards, but only granted temporary residence permits which had to be renewed on a monthly basis. Their stay in northern Iraq was tolerated by the authorities on the assumption that the UNHCR would resettle them in another country. However, as resettlement prospects faded, so did the tolerant attitude of the Northern Iraq authorities.

C. The Court's assessment

1. General principles

72. The Court reiterates at the outset that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, § 67; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI). The right to political asylum is not explicitly protected by either the Convention or its Protocols (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 35, ECHR 2007-I). 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 individual 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, § 125, 28 February 2008).

73. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

74. Owing to the absolute character of the right guaranteed by Article 3, the existence of the obligation not to expel is not dependent on whether the risk of ill-treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials. What is relevant in this context is whether an applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her (see *Salah Sheekh*, cited above, § 147).

75. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe the existence of that practice and his or her membership of the group concerned (see *Saadi*, cited above, § 132). In such circumstances, the Court would not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection afforded by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh*, cited above, § 148).

76. If the deportation has already occurred, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition or deportation. The Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition or deportation (see *Mamatkulov and Askarov*, cited above, § 69). If an applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi*, cited above, § 133).

2. Application of the above principles to the present case

77. The Court observes at the outset that the applicants complained about their deportation to Iraq on 17 June 2008 and that the respondent

Government accepted in their submissions to the Court that the applicants had been deported to Iraq when they had first arrived in Turkey. The Government also confirmed that the applicants would be deported to Iraq, from where they had entered Turkish territory, pursuant to the national legislation. The Court would assess, under normal circumstances, the existence of the risk with reference to the date of the applicants' first deportation on 17 June 2008, together with the risk which they may face if expelled to Iraq now. However, given that the applicants immediately returned to Turkey after the first deportation and that they are currently held in a Foreigners' Admission and Accommodation Centre in Turkey, the Court considers that it does not need to examine any further the first incident. The Court will therefore proceed to assess the existence of any risk in Iraq faced by the applicants if they were now to be deported.

78. The Court further notes that the applicants alleged that the Turkish authorities had also attempted to deport them to Iran on 28 June 2008. The Government, however, did not address this allegation in their submissions. Short of drawing conclusions from the Government's silence, the Court will nevertheless take the applicants' allegation into account and also examine whether the applicants would be exposed to a risk of treatment in breach of Article 3 if they were now to be deported to Iran, their country of origin.

79. In this latter context, the Court first has regard to the information contained in the Report of the United Kingdom Border Agency (Country of Origin Information Report) on Iran, dated 21 April 2009 (“the Home Office Report”) and the UNHCR's submissions that there have been cases of expulsion of former and current PMOI members from Turkey directly to Iran (see paragraphs 46 and 48 above). The Home Office Report recorded information provided by Amnesty International and Human Rights Watch that a PMOI member who had been returned to Iran in 2003 by the Turkish authorities had been executed on 7 February 2006. The same report further cited the United States State Department Report of 2007, according to which some persons had been held in prison for years in Iran, charged, *inter alia*, with being sympathisers of the PMOI.

80. According to the Report of the UNHCR Resettlement Service, execution of PMOI members in Iran continued on a sporadic basis, including extra-judicial killings in foreign countries. In that connection, the UNHCR made reference to a press release by Amnesty International dated 7 September 2006, according to which a PMOI supporter had died in suspicious circumstances in an Iranian prison. According to another press release by Amnesty International, dated 20 March 2009, another member of PMOI had died in prison on 30 October 2008, once again in suspicious circumstances.

81. In contrast, the Home Office Report stated that since 2005 a number of PMOI members previously residing in Al-Ashraf Camp had been voluntarily returned to Iran under the supervision of the International

Committee of the Red Cross ("the ICRC"). However, according to the Report of the UNHCR Resettlement Service, there was little independent information available as to what had happened to these individuals (200 in number) since neither the UNHCR nor the ICRC had been able to monitor the situation of returnees. The UNHCR had received contradictory accounts about these people. While some sources indicated that the returnees had not faced any problem, certain other credible sources had stated that some of the returnees had been forced to make public confessions and accusations against the PMOI. In these circumstances the Court is unable to draw firm conclusions about the likely fate of PMOI members returning to Iran. Nevertheless, it is significant that there is a lack of reliable public information concerning such a large group of persons. Furthermore, the Court cannot overlook the fact that the UNHCR have not had access to the returnees in Iran, and that the Iranian Government's promise of amnesty for PMOI members has never been realised.

82. The Court must also give due weight to the UNHCR's conclusions regarding the applicants' claims, before making its own assessment of the risk which the applicants would face if they were to be removed to Iran (see *Jabari*, cited above, § 41, and *N.A. v. the United Kingdom*, cited above, § 122). In this connection, the Court observes that, unlike the Turkish authorities, the UNHCR interviewed the applicants and had the opportunity to test the credibility of their fears and the veracity of their account of circumstances in their country of origin. Following these interviews, it found that the applicants risked being subjected to an arbitrary deprivation of life, detention and ill-treatment in their country of origin (see paragraphs 8 and 9 above).

83. In the light of the above, the Court finds that there are serious reasons to believe that former or current PMOI members and sympathisers could be killed and ill-treated in Iran and that the applicants used to be affiliated to this organisation. Moreover, in the light of the UNHCR's assessment, there exist substantial grounds for accepting that the applicants risk a violation of their right under Article 3, on account of their individual political opinions, if returned to Iran.

84. As regards the alleged risks in Iraq, the Court observes at the outset that the Government have not responded to the applicants' submission that there was no readmission agreement between Turkey and Iraq concerning Iranian nationals and that the Iraqi border authority had systematically refused the readmission of former PMOI refugees to Iraq. In the absence of any submission on the part of the Government concerning the legal framework of deportation of non-Iraqi nationals to Iraq, the Court is led to the conclusion that the removal of Iranian nationals to that country is carried out in the absence of a proper legal procedure.

85. The Court observes in this connection that the UNHCR and a number of other sources, such as Amnesty International, have reported that

there are cases where non-Iraqi nationals have been deported to Iraq forcibly and illegally by the Turkish authorities. In their submissions to the Court, the UNHCR referred to their press release of 25 April 2008, according to which witnesses reported that the Turkish authorities had attempted to deport sixty persons to Iraq through the official border crossing on 23 April 2008. As the Iraqi border authorities only accepted Iraqi nationals and had refused to admit eighteen non-Iraqi refugees, the latter had been forced to cross a fast-flowing river by the Turkish police. Four of these persons had been drowned in the river and their bodies could not be recovered.

86. The Report of the UNHCR Resettlement Service of February 2008 further states that in 2007 a total of nineteen ex-PMOI refugees were deported to northern Iraq, where many of them were arrested by Iraqi security forces and subsequently placed in detention in Mosul. According to the Report, a number of these ex-PMOI members went missing and the UNHCR feared that they might have been deported to Iran by the Iraqi authorities. The Court finds the UNHCR's concerns reasonable having regard, in particular, to the fact that Iraq is not a party to the 1951 Geneva Convention.

87. In this connection, the Court considers that the policy of the Iraqi Government of providing one-way travel documents to former members of the PMOI (see paragraph 46 above), the recent statement of the Government of Iraq regarding their intention to end the PMOI presence in Iraq, which received an immediate reaction from both the European Union Parliament and the Chair of the Refugee Committee of the Parliamentary Assembly of Council of Europe(see paragraph 50 above), together with the changing nature of the relations between the Iraqi and Iranian Governments and the hostility of the Kurdish regional governorates towards the PMOI reported by the UNHCR (see paragraph 46 above), demonstrate a strong possibility of removal of persons perceived to be affiliated with PMOI from Iraq to Iran.

88. The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III; *Salah Sheekh*, cited above, § 141).

89. Given that the applicants' deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants' removal to Iran by the Iraqi authorities, the Court considers that there are substantial grounds for believing that the applicants risk a violation of their rights under Article 3 of the Convention if returned to Iraq.

90. The Court finds in these circumstances that the evidence submitted by the applicants and the third party together with the material obtained *proprio motu* is sufficient for it to conclude that that there is a real risk of the applicants being subjected to treatment contrary to Article 3 of the Convention if they were to be returned to Iran or Iraq. The Court also notes in this connection that the Government have not put forward any argument or document capable of dispelling doubts about the applicants' allegations concerning the risks they might face in Iran and Iraq (see *Saadi*, cited above, §§ 128 and 129).

91. Finally, as to the Government's argument that allowing PMOI members, including the applicants, to stay in Turkey would create a risk to national security, public safety and order, the Court reiterates the absolute nature of Article 3 of the Convention. The Court has already held that it was not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State was engaged under Article 3, even where such treatment was inflicted by another State. The conduct of the person concerned, however undesirable or dangerous, cannot be taken into account (see *Chahal*, cited above, § 81; *Saadi*, cited above, § 138). Moreover, the Court recalls that the applicants left the PMOI in 2005 and 2006 respectively and were recognised as refugees by the UNHCR. It therefore rejects the Government's argument.

92. Consequently, the Court concludes that there would be a violation of Article 3 of the Convention if the applicants were to be removed to Iran or to Iraq.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

93. The applicants complained under Article 13 of the Convention that they did not have an effective domestic remedy whereby they could raise their allegations under Articles 2 and 3 of the Convention. In particular, they were prevented from lodging an asylum claim and from challenging their threatened deportation. Article 13 provides as follows:

> "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."

94. The Government contested the applicants' arguments.

A. The parties' submissions

1. The Government

95. The Government submitted at the outset that Turkey was on the transportation routes between Asia, Africa and Europe, and that therefore

the Turkish authorities were overwhelmed with illegal immigrants. They further submitted that, while struggling against illegal immigration, the authorities have taken all steps to protect persons who need international protection. In that connection, amendments were introduced to the 1994 Regulation and Circular no. 57 was issued. Furthermore, a new asylum law was envisaged with a view to harmonising the national legislation in the context of the process of accession to the European Union.

96. In their submissions of 14 and 17 November 2008, the Government contended that the applicants had failed to file an application for asylum and temporary asylum in accordance with the 1994 Regulation when they had first arrived in Turkey before their initial deportation. They noted that, pursuant to the 1994 Regulation and Circular no. 57, foreigners arriving in Turkey illegally were required to apply to the national authorities within a reasonable time and ask for asylum or temporary asylum, failing which they would be deemed illegal immigrants in Turkey. The Government asserted that the national authorities examined whether a foreigner risked ill-treatment in his or her country of origin within the context of the asylum procedure. The Government therefore considered the applicants as illegal immigrants who could be deported from Turkey pursuant to the national legislation. They further noted that many illegal immigrants who had been arrested while trying to leave Turkey, heading for other destinations in Europe, applied for asylum and subsequently to the Court with the sole purpose of preventing their deportation.

97. In their submissions of 31 March 2009, the Government maintained that the national authorities processed all applications notwithstanding the fact that some of the applicants had not applied to the authorities within a reasonable period of time, without justification, although they had had the opportunity to apply. They noted that persons who claimed asylum after being arrested for illegal entry, illegal presence or attempted illegal departure from Turkey were also granted a residence permit and international protection. In that connection, they referred to the case of M.B., who had lodged an application against Turkey before the Court (application no. 32399/08).

98. The Government further maintained that the competent authority which received and assessed the asylum applications had been the Ministry of the Interior, which took into consideration the advisory opinions of the Ministry of Foreign Affairs and the UNHCR. They submitted that if his or her asylum or temporary residence request was rejected, an applicant had the opportunity to file an objection against the first-instance decision pursuant to section 12 of Circular no. 57. Asylum seekers could also apply to the administrative courts requesting the annulment of the negative decision given in respect of their asylum request and of the decision to deport them. In that connection the Government submitted that an Iranian national, A.A., who had illegally entered Turkey, had challenged the

deportation decision taken in his respect before the administrative courts and had been given temporary residence in Karaman following his application to the Court (application no. 23980/08).

99. The Government contended that the domestic authorities complied with the time-limits in processing asylum and temporary asylum applications, whereas refugee status determinations conducted by the UNHCR in Turkey took several months and sometimes years. They also drew the Court's attention to the fact that, between 2006 and 2008, the UNHCR had settled only two persons in a third country.

100. The Government finally submitted that the applicants could have had access to legal assistance while in detention had they asked for it. They noted in that connection that an asylum seeker detained in the Kumkapı guest house had recently had access to a lawyer and provided him with a power of attorney. They further asserted that authorisation for the UNHCR's access to detained asylum seekers was given by the competent authorities if sufficient reasons for such access were given.

2. The applicants

101. The applicants maintained that they had sought asylum and temporary residence permits on numerous occasions and that the authorities automatically and consistently refused them access to the asylum procedure. They had never been interviewed and their claims that they would be at risk of persecution, ill-treatment and death if deported had never been assessed by the authorities. The applicants further claimed that they had been denied judicial review of the decision to deport them as they had not been served with the deportation orders. They noted that judicial review in Turkey was in any case ineffective, given that the administrative courts did not have the authority to examine the merits of the administrative authorities' decisions refusing asylum. The applicants finally maintained that they had been denied access to a lawyer when they had been in the Hasköy police headquarters. In Kırklareli Foreigners' Admission and Accommodation Centre their efforts to have official legal representation had failed since they had not had valid identity documents. As they had been refused leave to file asylum applications by the authorities, they had not been able to obtain identity cards under section 3 of Circular no. 57.

B. The third party's submissions

102. The UNHCR submitted that in Turkey it conducted Refugee Status Determinations (“RSDs”) parallel to the domestic procedure for temporary asylum since, as a result of Turkey's geographical limitation to the 1951 Geneva Convention, non-European nationals were in need of international protection. The UNHCR had established a presence in Turkey in 1960 and had been conducting RSDs there since the mid 1980s. They maintained that

RSDs by the UNHCR were perceived by the national authorities as a measure of burden sharing by the international community. Furthermore, the UNHCR was implicitly recognised in the 1994 Regulation, which provided a resettlement and assistance role for it.

103. The UNHCR contended that all applicants registered with them in Turkey were informed of the domestic procedure for seeking temporary asylum and referred to the national authorities in accordance with the 1994 Regulation. If the UNHCR decided to recognise a person as a refugee under the UNHCR's mandate, a refugee certificate was issued and the UNHCR began to examine resettlement options for the person in question. They maintained that usually the Turkish authorities waited until the UNHCR reviewed a case before taking a decision on whether to grant a temporary residence permit. The national authorities generally agreed to grant temporary protection to those who were recognised as refugees by the UNHCR. However, the UNHCR observed that in the following cases the national authorities tended to refuse to grant temporary residence permits: where a file was reopened after an initial rejection by the UNHCR; applications by persons whose claims were considered by the authorities to be in "bad faith", such as those submitted when arrested for lack of legal status in Turkey; applications by persons applying for asylum at international airports; asylum claims by persons who had been recognised under the UNHCR's mandate as refugees outside Turkey; and applications by those whose stay in Turkey was considered to be a threat to national security.

104. The UNHCR claimed that there had been instances of denial of protection to persons recognised as refugees under the UNHCR's mandate. In respect of five Iraqi refugees recognised by the UNHCR and deported to Iraq, the Turkish authorities had invoked national security reasons for their removal. These persons were denied access to the temporary asylum procedure in Turkey and were at risk of direct or indirect *refoulement* as they were detained and subject to deportation either to the previous country of asylum or to the country of origin. This had been the case of former PMOI members.

105. They further submitted that the UNHCR in Turkey had encountered serious difficulties in meeting persons detained in Turkey who had been recognised as refugees under the UNHCR's mandate, as was the case for other detained persons who were considered to be threats to national security. The UNHCR noted that on 14 October 2008 they had been orally informed by the representatives of the Ministry of the Interior that the Ministry would not grant the UNHCR access to detained refugees in respect of whom the Court had indicated an interim measure under Rule 39 of the Rules of Court.

106. The UNHCR further submitted that advocates had *de jure* access to detained asylum seekers but often faced obstacles in practice. In some

detention facilities, such as Kumkapı Foreigners' Admission and Accommodation Centre, they enjoyed unimpeded access to asylum seekers, whereas in other centres access was problematic. Finally, as detained foreigners were not always provided with a formal deportation order prior to their removal, it was frequently the case that the deportation could not effectively be challenged before the national courts as no formal administrative decision had been taken.

C. The Court's assessment

107. The Court reiterates at the outset that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (see *Chahal*, cited above, § 145).

108. Given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect (see *Muminov v. Russia*, no. 42502/06, § 101, 11 December 2008; *Gebremedhin [Gaberamadhien]*, cited above § 66; *Jabari*, cited above, § 39).

109. In the present case the Court observes at the outset that, within the framework of the asylum and temporary asylum procedure governed by the 1994 Regulation and Circular no. 57, non-European asylum seekers who have been arrested after having entered Turkey illegally, such as the applicants, can seek temporary asylum in Turkey pending their resettlement in a third country. Pursuant to this secondary legislation, this group of persons must be notified of the decision taken in their respect and can lodge objections against the decision taken at first instance within two days if the decision is negative. The applicants and the third party noted that this group of persons were generally prevented from having access to the temporary asylum procedure, whereas the Government contested this allegation, referring to the case of M.B. who had been granted a residence permit in Turkey following his arrest for illegal entry into Turkish territory. They also

noted that A.A. had obtained a residence permit by challenging his deportation in the administrative courts.

110. The Court does not consider it necessary to compare the case of M.B. to that of the applicants or draw inferences from it as the Government did not submit any argument demonstrating that the circumstances of the cases were similar. Nor did they submit any documents in support of their submissions. As regards A.A., the Court notes that this person applied to the administrative courts and challenged the lawfulness of his detention in a foreigners' admission and accommodation centre. The case he lodged with the administrative court did not concern his threatened deportation.

111. The Court observes that, when the applicants first entered Turkey, they were deported to Iraq without their statements being taken by border officials (see paragraph 11 above) and apparently without a formal deportation decision being taken. The Government submitted that the applicants had failed to request asylum when they first entered Turkish territory. The Court is not persuaded by the Government's argument, which was not supported by any documents. In the absence of a legal procedure governing the applicants' deportation and providing procedural safeguards, even if they had sought asylum when they entered Turkey, there are reasons to believe that their requests would not have been officially recorded.

112. The Court further observes that when the applicants re-entered Turkish territory and were arrested, they made oral and written submissions to the police and clearly indicated that they were refugees under the UNHCR's mandate. They explained their background, their affiliation to the PMOI in the past, the nature of their activities within that organisation and their departure from it. They also requested a residence permit on the basis of temporary asylum and explicitly asked for a lawyer (see paragraph 21 above). The applicants even stated before the Muş Magistrates' Court, which tried and convicted them for illegal entry into Turkey, that they had left their country of origin as they risked being killed in Iran. The judge merely noted that the applicants would be deported. However, the applicants were not notified either of the decision to deport them or of the reasons for the planned deportation. The magistrates' court did not take statements from them regarding the risks which they would allegedly face if deported to Iraq or Iran.

113. The Court is struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran. It considers that the lack of any response by the national authorities regarding the applicants' allegations amounted to a lack of the “rigorous scrutiny” that is required by Article 13 of the Convention.

114. Moreover, the applicants were not given access to legal assistance when they were arrested and charged, despite the fact that they explicitly requested a lawyer. Their inability to have access to a lawyer continued

following their placement in the police headquarters in Hasköy. The Government did not contest the allegation that the director of the Muş branch of the Human Rights Association, an advocate, was refused authorisation by the police to meet the applicants on 30 June 2008. In these circumstances and having regard in particular to the fact that the applicants requested a lawyer as early as July 2008, the Court cannot accept the Government's argument that they could have had access to legal assistance had they asked for it, at least as regards the period that the applicants spent in the Hasköy police headquarters.

115. A remedy must be effective in practice as well as in law in order to fulfil the requirements of Article 13 of the Convention. In the present case, by failing to consider the applicants' requests for temporary asylum, to notify them of the reasons for not taking their asylum requests into consideration and to authorise them to have access to legal assistance while in Hasköy police headquarters, the national authorities prevented the applicants from raising their allegations under Article 3 within the framework of the temporary asylum procedure provided for by the 1994 Regulation and Circular no. 57.

116. What is more, the applicants could not apply to the administrative and judicial authorities for annulment of the decision to deport them to Iraq or Iran as they were never served with the deportation orders made in their respect. Nor were they notified of the reasons for their threatened removal from Turkey. In any case, judicial review in deportation cases in Turkey cannot be regarded as an effective remedy since an application for annulment of a deportation order does not have suspensive effect unless the administrative court specifically orders a stay of execution of that order (see paragraph 59 above).

117. In the light of the above, the Court concludes that, in the circumstances of the case, the applicants were not afforded an effective and accessible remedy in relation to their complaints under Article 3 of the Convention as their allegation that their removal to Iran or Iraq would have consequences contrary to this provision was never examined by the national authorities. There has accordingly been a violation of Article 13 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

118. The applicants complained under Article 5 § 1 (f) of the Convention that their detention was unlawful. They further contended under Article 5 § 2 of the Convention that they had not been informed of the reasons for their detention from 23 June 2008 onwards. They finally maintained under Article 5 § 4 of the Convention that they were not able to challenge the lawfulness of their detention. Article 5 §§ 1 (f), 2 and 4 read as follows:

"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."

119. The Government contested that argument.

A. The parties' submissions

120. The Government submitted, as regards the applicants' allegations under Article 5 § 1 of the Convention, that individuals who claimed asylum after being arrested for illegal entry, illegal presence or attempted illegal departure from Turkey were not detained but sheltered in foreigners' admission and accommodation centres in Turkey. They contended that "detention" was the deprivation of liberty in accordance with a court decision whereas the applicants were accommodated in the Kırklareli Foreigners' Admission and Accommodation Centre. The reason for the applicants' placement in this centre, which could not be defined as detention or custody, was the authorities' need for surveillance of the applicants pending the deportation proceedings. The Government contended that this practice was not different from the practices in other countries and that it was based on section 23 of Law no. 5683 and section 4 of Law no. 5682.

121. The Government did not make any submissions as regards the applicants' allegations that they had not been informed of the reasons for their detention and that there had not been a remedy whereby they could challenge the lawfulness of their detention in the Kırklareli Foreigners' Admission and Accommodation Centre.

122. The applicants submitted that their detention in the Hasköy police headquarters, between 23 June and 26 September 2008, and in the Kırklareli Foreigners' Admission and Accommodation Centre, from 26 September 2008 to date, did not have a proper legal basis. They contended that it was not founded on any deportation order. Nor had the authorities submitted any other ground for their already excessively long detention. They also noted

that they could not properly communicate with the outside world. In their submissions, the applicants referred to the report of the UN Working Group on Arbitrary Detention in Turkey, according to which section 23 of Law no. 5683 did not constitute a sufficient legal basis for the detention of prospective deportees.

123. The applicants contended that, following their conviction by the Muş Magistrates' Court on 23 June 2008, they had continued to be detained in the Hasköy police headquarters but had not been informed of the reasons for their further incarceration.

124. The applicants submitted that they did not have an effective remedy within the meaning of Article 5 § 4 for a speedy review of the lawfulness of their detention. They noted that the case of the Iranian national, A.A., although not referred to by the Government in the context of their submissions under Article 5, was not comparable to their situation since that person had been served with an actual deportation order and was due to leave Turkey imminently on the basis of a visa from Sweden. In addition, it had taken almost two months to decide the case brought by that person, a delay which could not meet the "speedy judicial review" required by Article 5 § 4. His release had also been delayed; this person had been detained for a period of one month following the administrative court's decision.

B. The Court's assessment

1. Existence of a deprivation of liberty

125. The Court notes that the Government contested the submission that the applicants were deprived of their liberty within the meaning of Article 5 of the Convention. The Court reiterates that, in proclaiming the right to liberty, Article 5 § 1 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Amuur v. France,* 25 June 1996, § 42, *Reports* 1996-III).

126. In the present case the applicants were arrested by gendarmerie officers on 21 June 2008 and detained in the gendarmerie station until 23 June 2008 on the criminal charge of illegal entry into Turkey. On the latter date, they were convicted as charged but the execution of their sentence was deferred. Subsequently, on the same date they were placed in the Hasköy police headquarters where they were held until 26 September 2008, until their transfer to the Kırklareli Foreigners' Admission and

Accommodation Centre, which is administered by the foreigners department of the Kırklareli police headquarters. The Court therefore observes that the applicants have been held by the police since 23 June 2008.

127. The Court further observes that the applicants have not been free to leave the Hasköy police headquarters or the Kırklareli Foreigners' Admission and Accommodation Centre. Besides, they are only able to meet a lawyer if the latter can present to the authorities a notarised power of attorney. Furthermore, access by the UNHCR to the applicants is subject to the authorisation of the Ministry of the Interior. In the light of these elements, the Court cannot accept the definition of "detention" submitted by the Government, which in fact is the definition of pre-trial detention in the context of criminal proceedings. In the Court's view, the applicants' placement in the aforementioned facilities amounted to a "deprivation of liberty" given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law. It therefore concludes that the applicants have been deprived of their liberty.

2. Compliance with Article 5 § 1

128. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in the context of immigration controls (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162 and 163, 19 February 2009; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...).

129. Article 5 § 1(f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified as long as deportation or extradition proceedings are in progress. However, if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (see *A. and Others*, cited above, § 164).

130. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. It requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or

detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention (see *Amuur*, cited above, § 50).

131. In the present case the applicants alleged that they were not detained with a view to deportation and that in any case their detention did not have any legal basis in domestic law. The Government submitted that the applicants were not detained within the meaning of Turkish law but were accommodated pursuant to section 23 of Law no. 5683 and section 4 of Law no. 5682 pending deportation proceedings.

132. The Court notes at the outset that the applicants' detention in the Hasköy police headquarters between 23 and 30 June 2008, before Rule 39 was applied by the Court, may be considered as a deprivation of liberty with a view to deportation as the Muş Magistrates' Court noted in its judgment of 23 June 2008 that the applicants would be deported (see paragraph 17 above). In this connection the Court must ascertain whether the applicants' detention actually had a legal basis in domestic law.

133. The Court observes that the legal provisions referred to above by the respondent Government provide that foreigners who do not have valid travel documents or who cannot be deported are obliged to reside at places designated by the Ministry of the Interior. These provisions do not refer to a deprivation of liberty in the context of deportation proceedings. They concern the residence of certain groups of foreigners in Turkey, but not their detention. Nor do they provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention. The Court therefore finds that the applicants' detention between 23 and 30 June 2008 did not have a sufficient legal basis.

134. The same considerations are also applicable to the applicants' detention from 30 June 2008 onwards. The Government have failed to submit any argument or document indicating that the applicants' detention to date has had a strictly defined statutory basis in domestic law. What is more, following the Court's application of the Rule 39 measure on 30 June 2008, the Government could not have removed the applicants without being in breach of their obligation under Article 34 of the Convention (see *Gebremedhin [Gaberamadhien]*, cited above, §§ 73 and 74). Therefore, any deportation proceedings carried out in respect of the applicants would have had to be suspended with possible consequences for the continued deprivation of the applicants' liberty for that purpose. While it is true that the application of Rule 39 does not prevent the applicants from being sent to a different country – provided it has been established that the authorities of that country will not send them on to Iran or Iraq – the Government did not make any submission to this effect either.

135. In sum, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation

and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness (see *Nasrulloyev v. Russia*, no. 656/06, § 77, 11 October 2007; *Chahal*, cited above, § 118; *Saadi v. the United Kingdom*, cited above, § 74). The national system failed to protect the applicants from arbitrary detention and, consequently, their detention cannot be considered "lawful" for the purposes of Article 5 of the Convention.

The Court concludes that there has been a violation of Article 5 § 1 of the Convention.

3. Compliance with Article 5 § 2

136. The Court reiterates that Article 5 § 2 contains the elementary safeguard that any person arrested should know why he or she is being deprived of liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of Article 5 § 2 any person arrested must be told, in simple, non-technical language that can be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. The Court notes there is no call to exclude the applicants in the present case from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, §§ 413 and 414, ECHR 2005-III).

137. The Court observes that the applicants were arrested on 21 June 2008 and subsequently detained in police custody. On the same day they signed a document according to which they had been informed of the reason for their arrest. On 23 June 2008 they were convicted of illegal entry. Yet they were not released from the Hasköy police headquarters. Thus, from 23 June 2008 onwards they have not been detained on account of a criminal charge, but in the context of immigration controls. The Court must therefore assess whether, from that date, the applicants were informed of this detention in accordance with the requirements of Article 5 § 2 of the Convention.

138. The Court notes that the Government were explicitly requested to make submissions as to whether the applicants had been informed of the reasons for their detention and to provide the relevant documents in support of their response. The Government failed to do so however. In the absence of a reply from the Government and any document in the case file to show that the applicants were informed of the grounds for their continued detention, the Court is led to the conclusion that the reasons for the applicants' detention from 23 June 2008 onwards were never communicated to them by the national authorities.

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

3. Compliance with Article 5 § 4

139. 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 to allow the individual to obtain speedy judicial review of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005; *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII; *Chahal*, cited above, § 127).

140. The Court observes that the Government failed to make any submission relevant to the present case demonstrating that the applicants had at their disposal any procedure through which the lawfulness of their detention could have been examined by a court.

141. Moreover, the Court has already found that the applicants have not been informed of the reasons for the deprivation of their liberty from 23 June 2008 onwards and that they were denied access to legal assistance during their detention in the Hasköy police headquarters (see paragraph 114 above). It considers that these facts in themselves meant that the applicants' right to appeal against their detention was deprived of all effective substance (see *Shamayev and Others*, cited above, § 432). The Court therefore considers that the second applicant's request to the national authorities for release (paragraph 27 above) cannot provide him with a remedy possessing the guarantees required by Article 5 § 4 of the Convention.

142. Accordingly, the Court concludes that Turkish legal system did not provide the applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention, within the meaning of Article 5 § 4 of the Convention (see *S.D. v. Greece*, no. 53541/07, § 76, 11 June 2009[1]).

There has therefore been a violation of Article 5 § 4 of the Convention.

1. The judgment is not final yet.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. 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. Pecuniary Damage

144. The applicants claimed 517 euros (EUR) in respect of pecuniary damage. They alleged that the police had confiscated all their personal belongings when they had been arrested and never returned 480 US dollars (USD), their mobile phone SIM cards, two belts and a pair of sunglasses.

145. The Government contested this claim, noting that there was no mention of these items in the body search report drawn up when the applicants were arrested.

146. The Court rejects this claim, having regard to the fact that it has not been established that the applicants had in fact been in possession of the aforementioned items when they were arrested.

B. Non-pecuniary Damage

147. The applicants claimed a total of EUR 60,000 in respect of non-pecuniary damage they had suffered as a result of the violations of their rights under Articles 2, 3 and 13 of the Convention. They further claimed EUR 100 for each day that they have spent in detention since 23 June 2008 as compensation for non-pecuniary damage sustained as a result of the violation of Article 5 §§ 1, 2 and 4 of the Convention.

148. The Government contested these claims, submitting that the applicants' allegations of violations of the aforementioned Articles were baseless.

149. The Court considers that the applicants must have suffered non-pecuniary damage which cannot be compensated solely by the finding of violations. Having regard to the gravity of the violations and to equitable considerations, it awards the applicants EUR 20,000 each under this head.

C. Costs and expenses

150. The applicants also claimed EUR 6,950 for the costs and expenses incurred before the Court. In this connection they submitted a time sheet indicating ninety hours' legal work carried out by their legal representative and a table of costs and expenditures.

151. The Government contested this claim, noting that only costs actually incurred could be reimbursed.

152. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award to the applicants, jointly, the sum of EUR 3,500 for their costs before it. From this sum should be deducted the EUR 850 granted by way of legal aid under the Council of Europe's legal aid scheme.

D. Default interest

153. 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. *Declares* the application admissible;

2. *Holds* that the applicants' deportation to Iran or Iraq would be in violation of Article 3 of the Convention;

3. *Holds* that no separate issue arises under Article 2 of the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention, in relation to the applicants' complaints under Article 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 §§ 1, 2 and 4 of the Convention;

6. *Holds*

(a) that the respondent State is to pay the applicants 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 Turkish liras at the rate applicable at the date of settlement:

(i) EUR 20,000 (twenty thousand euros) each in respect of non-pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 3,500 (three thousand five hundred euros) jointly in respect of costs and expenses, less the EUR 850 (eight hundred and

fifty euros), granted by way of legal aid, plus any tax that may be chargeable to the applicants;

(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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President