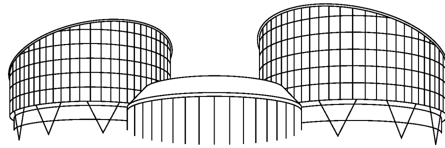

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF S.A. v. TURKEY

(Application no. 74535/10)

JUDGMENT

STRASBOURG

15 December 2015

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of S.A. v. Turkey,

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

Nebojša Vučinić, *President,*
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 24 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 74535/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr S.A. (“the applicant”), on 19 October 2010. The Vice-President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

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

3. On 21 May 2013 the application was communicated to the Government.

4. The Government objected to the examination of the application by a Committee. After having considered the Government’s objection, the Court dismisses it.

5. Having regard to the findings of the Court in the case of *I v. Sweden* (no. 61204/09, §§ 40-46, 5 September 2013), the Russian Federation was not notified of the present application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and resides in Sakarya.

7. The applicant is a Russian citizen of Chechen origin. He left his country in 1993 and arrived in Turkey, where he was granted a residence permit. He claimed that in view of the ongoing armed conflict in his country

of origin, he would face extrajudicial killing, imprisonment or death by torture if he were to be deported or extradited there.

8. On 9 May 2010, following an order issued by the Bakırköy public prosecutor, the police arrested the applicant at Istanbul Atatürk International Airport on suspicion of illegal entry into Turkey with a false passport.

9. At 8.15 a.m. on 10 May 2010 the applicant was questioned by the police at the airport. He was subsequently detained at the airport police facility for three days without any judicial order to that effect. He submitted that he had been kept in an overcrowded room.

10. On 12 May 2010 the police took the applicant to the Kumkapı Removal Centre for Foreigners ("the Kumkapı Removal Centre") pending his deportation.

11. The applicant alleged that he had been detained in unhygienic, unhealthy and overcrowded conditions at the Kumkapı Removal Centre.

12. On 29 September 2010 the applicant's lawyer lodged a complaint with the Istanbul public prosecutor's office against police officers from the foreigners' department of the Istanbul police headquarters alleging that he had been unlawfully detained by State officials. He also complained about the conditions of detention at the Kumkapı Removal Centre, particularly overcrowding, insufficient ventilation and poor hygiene.

13. On 30 September and 4 October 2010 the applicant's lawyer filed petitions with the Ministry of the Interior and the Istanbul governor's office requesting the applicant's immediate release, claiming that his detention was unlawful.

14. On 4 October 2010 the applicant's lawyer also applied to the Istanbul Magistrates' Court for the applicant's release, challenging the lawfulness of his detention.

15. On 13 October 2010 the police released the applicant from the Kumkapı Removal Centre on condition that he applied for the renewal of his residence permit.

16. On 6 December 2010 the Istanbul governor's office decided not to examine the applicant's complaint regarding his detention.

17. On 10 January 2011 the applicant's lawyer appealed against that decision. He pointed out, *inter alia*, that on 19 October 2010 he had requested to be provided with the content of the applicant's file and that on 8 November 2010 he had been given only a limited number of documents. He submitted that some documents had not been provided as they had been classified as "confidential" and that such practice by the police was not prescribed by law.

18. On 15 March 2011 the Istanbul Regional Administrative Court quashed the decision, holding that the governor's office had to decide on whether authorisation should be granted for the prosecution of police officers at the Kumkapı Removal Centre.

19. On an unspecified date the Istanbul governor's office decided not to authorise the prosecution of the police officers. Subsequently, on 13 September 2011 the Istanbul public prosecutor decided to terminate the investigation opened at the applicant's request. In his decision the public prosecutor noted that the applicant had been banned from entering Turkey and that he had been apprehended with a false passport. He further noted that the applicant had not been imprisoned but remanded in custody pending his deportation.

II. RELEVANT LAW AND PRACTICE

20. A description of the relevant domestic law and practice that governed foreigners and asylum seekers at the material time and the relevant international material can be found in the cases of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-45, 22 September 2009) and *Yarashonen v. Turkey* (no. 72710/11, §§ 27-32, 24 June 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

21. Relying on Article 5 §§ 1, 2, 3 and 4 and Article 13 of the Convention, the applicant complained that he had been unlawfully detained at Istanbul International Airport and subsequently at the Kumkapı Removal Centre without the opportunity to challenge the lawfulness of his detention. He further complained that he had not been duly informed of the reasons for the deprivation of his liberty, nor had he been brought before a judge promptly. He further maintained, under Article 5 § 5 of the Convention, that under domestic law he had no right to compensation in respect of those complaints.

Article 5 of the Convention provides 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:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(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.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

22. The Court considers at the outset that the complaint under Article 13 falls to be examined solely under Article 5 § 4 of the Convention, which provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Amie and Others v. Bulgaria*, no. 58149/08, § 63, 12 February 2013) and that the complaint under Article 5 § 3 should be examined under Article 5 § 1 of the Convention.

A. Admissibility

23. The Government submitted that this part of the application should be rejected for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained in this connection that the applicant should have sought compensation in accordance with Article 141 of the Code of Criminal Procedure (Law no. 5271).

24. The applicant did not comment on that argument.

25. The Court reiterates that it has already examined and rejected a similar objection in *T. and A. v. Turkey* (no. 47146/11, §§ 55-56, 21 October 2014). The Court finds no particular circumstances in the instant case which would require it to depart from its conclusion in the above-mentioned case. It therefore dismisses the Government's objection in respect of domestic remedies.

26. The Court notes that the remaining complaints under Article 5 §§ 1, 2, 4 and 5 are not manifestly ill-founded within the meaning of Article 35

§ 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

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

27. The Court finds that in the light of the content of the case file and its findings in *T. and A.* (cited above, §§ 55-56), the applicant's detention cannot be described as falling within the scope of Article 5 § 1 (c) of the Convention and that he was deprived of his liberty in the context of immigration controls with a view to deporting him.

28. The Court has already examined a similar grievance in the cases of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 125-35, 22 September 2009) and *T. and A.* (cited above, §§ 58-61) in which it found that at the material time Turkish law contained no clear legal provisions setting out the procedure for ordering detention with a view to deportation, and that the applicants' detention had therefore not been "lawful" for the purposes of Article 5 of the Convention. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the above-mentioned judgments.

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

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

30. The general principles governing the elementary safeguard embodied in Article 5 § 2 of the Convention were set out in the case of *Abdolkhani and Karimnia* (cited above, § 136). The Court reiterates in this connection that by virtue of Article 5 § 2, anyone who is 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.

31. The Court observes that when the applicant was questioned by the police at the airport, he signed a record of statements according to which he had been informed of the reason for his arrest, namely suspicion that he had committed passport forgery and had attempted to enter the country illegally. Yet, as the Court has found, the applicant continued to be detained not on account of a criminal charge, but in the context of immigration controls (see paragraph 27 above). In this connection, the Court notes that there is no other document in the case file demonstrating that he was formally notified of the grounds for his administrative detention at the airport or subsequently at the Kumkapı Removal Centre. In the absence of such a document, the Court is led to the conclusion that the reasons for the applicant's detention

from 4 p.m. on 9 November 2010 onwards were never communicated to him by the national authorities.

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

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

33. The Court notes that it has found a violation of Article 5 §§ 4 and 5 of the Convention in a number of similar cases, in which it concluded that the Turkish legal system did not provide persons in the applicant's position with a remedy whereby they could obtain judicial review of the lawfulness of their detention, within the meaning of Article 5 § 4, and receive compensation for their unlawful detention as required under Article 5 § 5 of the Convention (see, among others, *Abdolkhani and Karimnia*, cited above, § 142; *Yarashonen v. Turkey*, no. 72710/11, §§ 48-50, 24 June 2014). In the absence of any examples submitted by the Government in which the administrative courts had speedily examined requests and ordered the release of an asylum seeker on grounds of the unlawfulness of his or her detention and had awarded him or her compensation, the Court sees no reason to depart from its findings in the aforementioned judgments.

34. Moreover, the Court has already found that the applicant was not duly informed of the reasons for the deprivation of his liberty (see paragraph 32 above). It considers that this fact in itself had the effect that the applicant's right of appeal against his detention under Article 5 § 4 was deprived of all substance (see *Abdolkhani and Karimnia*, cited above, § 141).

35. In the light of the above, the Court concludes that there has been a violation of Article 5 §§ 4 and 5 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

36. Relying on Article 3 of the Convention, the applicant complained about the material conditions of his detention at Istanbul Atatürk International Airport and the Kumkapı Removal Centre, in particular the lack of outdoor exercise, overcrowding and related poor conditions of hygiene.

He further claimed under Article 13 that there had been no effective domestic remedies available to him to complain of the adverse detention conditions in the said facilities.

Articles 3 and 13 of the Convention provide as follows:

Article 3

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

Article 13

> "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."

A. Admissibility

37. The Government submitted that this part of the application should be rejected for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained in this connection that the applicant should have applied to the administrative or judicial authorities and sought compensation in accordance with Articles 36 and 125 of the Constitution.

38. The applicant contested the Government's argument, stating that no adequate remedy existed in relation to his complaint.

39. The Court considers that the issue of exhaustion of domestic remedies is closely linked to the merits of the complaint that the applicant did not have at his disposal an effective remedy by which to complain of the inhuman and degrading conditions during his detention. The Court therefore finds it necessary to join the Government's objection to the merits of the complaint under Article 13 of the Convention (see, among others, *Sergey Babushkin v. Russia*, no. 5993/08, § 34, 28 November 2013; and *Yarashonen*, cited above, § 54).

B. Merits

1. Article 13 of the Convention

40. As indicated in paragraph 37 above, the Government submitted that the applicant had had effective domestic remedies at his disposal: he could have applied to the administrative or judicial authorities for compensation in respect of his grievances about the conditions of his detention.

41. The applicant maintained that the domestic remedies referred to by the Government were only available in theory but were not effective in practice.

42. The Court notes that it has already examined and rejected similar submissions by the Government in comparable cases and found a violation of Article 13 of the Convention (see *Yarashonen*, cited above, §§ 56-66). Given the particular facts of the instant case, and in the absence of any examples submitted by the Government where recourse to an administrative or judicial authority led to the improvement of detention conditions and/or to an award of compensation for the anguish suffered on account of the adverse material conditions, the Court finds no reason to depart from its findings in the above-mentioned cases.

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

2. *Article 3 of the Convention*

(a) As regards the applicant's detention at the Kumkapı Removal Centre

44. The Government stated that the material conditions at the Kumkapı Removal Centre complied with the requirements of Article 3 of the Convention. They submitted in this respect that the centre had a capacity of 300 persons and that the total number of detainees had not exceeded that number during the applicant's stay. There were fifteen to twenty beds in each of the ten rooms reserved for male detainees and all rooms were sufficiently ventilated. The detainees had the right to outdoor exercise in suitable weather conditions, and breakfast, lunch and dinner were provided on a daily basis. A doctor was present on the premises every Thursday and the detainees also had access to medical care in cases of emergency. As for the hygiene conditions in the facility, there were six cleaning staff working full time at the centre, and the building was disinfected whenever necessary.

The registers showing the occupation rates in respect of male detainees on three different dates indicate as follows:

Date	Number of Male Detainees
31 May 2010	149
29 July 2010	160
12 August 2010	160

45. For his part, the applicant argued that he had been detained at Kumkapı Removal Centre for a period of more than five months. He claimed that he had spent the whole time in a poorly ventilated and overcrowded room measuring approximately 40-50 sq. m, which contained seventeen bunk beds and accommodated forty to fifty persons at all times. He further maintained that throughout his stay he had not been allowed to go outside for fresh air even once. No social or recreational activity had been offered indoors either. Moreover, the hygiene conditions in the centre had been extremely poor, which – coupled with the problems of overcrowding and insect infestation – had resulted in the spread of contagious diseases. The food served at the centre had also been inadequate.

46. The Court refers to the principles regarding conditions of detention established in *Yarashonen* (cited above, §§ 70-73).

47. Turning to the facts of the instant case, the Court notes that the Government have submitted no information on the size of the room where the applicant was held or on the number of persons accommodated in that room. They have provided only general information on the number of rooms allocated to male detainees; the number of beds in each room, which apparently varied between fifteen and twenty; the respective sizes of those rooms; and the number of occupants per floor on various dates during the period of the applicant's detention, without mentioning on which floor the applicant was held.

48. In view of the limited nature of the information provided by the Government, it is not possible to establish with any certainty the personal space available to the applicant in the room. In these circumstances, the Court has no option but to make an approximate assessment of floor space per detainee, by dividing the total area of the rooms allocated to the male detainees (674 sq. m) by the total number of those detainees. Accordingly, taking into account the numbers provided by the Government, on 30 May 2010, when the male detainee population was at its lowest (a total of 149), the personal space per male detainee was approximately 4.5 sq. m, which is marginally higher than the recommended minimum area of 4 sq. m. The Court notes that the floor area per detainee dropped to 4.21 sq. m on 29 July 2010 and 12 August 2010, when the total number of male detainees recorded by the Government increased to 160. In the light of those figures, which in reality should be significantly lower in view of the fixtures in the rooms, it is reasonable to consider that the applicant did not have sufficient personal space in his dormitory, even on the basis of the more favourable data provided by the Government.

49. The Court further reiterates that it has previously found a violation of Article 3 of the Convention on account of the material conditions of detention at Kumkapı Removal Centre – in particular the clear evidence of overcrowding and the lack of access to outdoor exercise, as also reported by the CPT – during a period shortly after the applicant's period of detention in the facility (see *Yarashonen*, cited above, §§ 74-81). Since the Government have not presented any evidence or arguments to justify a departure from that finding and taking into account the length of the applicant's unlawful detention, the Court is led to conclude that the conditions of his detention at Kumkapı Removal Centre caused him distress which exceeded the unavoidable level of suffering inherent in detention and attained the threshold of degrading treatment proscribed by Article 3 (see *Yarashonen*, cited above, § 80).

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

(b) As regards the applicant’s detention at Istanbul Atatürk Airport

51. Given that the applicant was detained at Istanbul Atatürk Airport for a brief period of time and in view of its finding of a violation of Article 3 of the Convention on account of the conditions of detention at Kumkapı Removal Centre, the Court considers that that there is no need to give a separate ruling on his complaints under this head (see, among others, *T. and A.*, cited above, §100).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant further complained that he had not been permitted to see his family during his detention. He relied on Article 8 of the Convention.

53. The Court observes that the applicant failed to demonstrate that his family members had actually attempted to see him and been prevented. He did not send any documentation showing that he had requested to meet his family and had challenged any decision dismissing his demand.

54. The Court therefore considers that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. Article 41 of the Convention provides:

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

A. Damage

56. The applicant did not submit a claim for compensation for pecuniary damage. As regards non-pecuniary damage, he claimed 50,000 euros (EUR) in respect of the breach of his Convention rights.

57. The Government contested that claim as excessive.

58. The Court considers that the applicant must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations. In view of the seriousness of the violations in question and equitable considerations, it awards the applicant EUR 10,000 under this head.

B. Costs and expenses

59. The applicant also claimed EUR 6,136 in respect of lawyers' fees and EUR 845 for other costs and expenses incurred before the Court and the domestic authorities, such as stationery, photocopying, translation and postage. In that connection, he submitted a time-sheet showing that his legal representatives had carried out fifty-two hours' legal work charged at an hourly rate of EUR 100 (plus applicable VAT), a legal services agreement concluded with his representatives, and invoices for the remaining costs and expenses.

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

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 3,845, covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

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

2. *Declares* the applicant's complaints under Article 5 §§ 1, 2, 4 and 5 of the Convention regarding his right to liberty, and his complaints under Articles 3 and 13 of the Convention regarding the conditions of his detention at Istanbul Atatürk Airport and at Kumkapı Removal Centre, as well as the lack of effective remedies concerning those conditions, admissible and the remainder of the application inadmissible;

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

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

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

6. *Holds* that there is no need to examine the applicant's complaints under Articles 3 and 13 of the Convention regarding the conditions of his detention at Istanbul Atatürk Airport;

7. *Holds*
(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 3,845 (three thousand eight hundred and forty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Deputy Registrar

Nebojša Vučinić
President