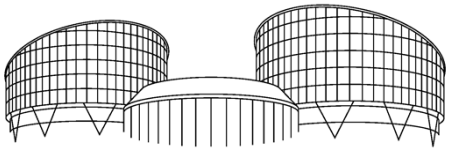

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF G.B. AND OTHERS v. TURKEY

(Application no. 4633/15)

JUDGMENT

STRASBOURG

17 October 2019

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 G.B. and Others v. Turkey,

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

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 4633/15) 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 four Russian nationals, Ms G.B. and her three children, namely Ms A.I., Mr M.Z. and Ms K.Z. ("the applicants"), on 22 January 2015.

2. The applicants were represented by Mr A. Yılmaz, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants complained, under Articles 3, 8 and 13 of the Convention, about the material conditions of their detention at the Kumkapı and Gaziantep Foreigners' Removal Centres and of the absence of any effective remedies whereby they could raise those complaints. They also complained, under Article 5 §§ 1, 2, 4 and 5 of the Convention, of the unlawfulness of their detention, the failure of the authorities to duly inform them of the reasons for their detention and the absence of domestic remedies by which they could effectively have the lawfulness of their detention reviewed and claim compensation for the violation of their rights under Article 5.

4. On 27 May 2015 notice of the complaints under Article 3, Article 5 §§ 1, 2, 4, and 5, Article 8 and Article 13 of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The applicants and the Government each filed observations on the admissibility and merits of the application. The Russian Government, who were informed of their right to intervene under Article 36 of the Convention, did not make use of that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1986, 2008, 2012 and 2013 respectively. The first applicant is the mother of the second, third and fourth applicants (also referred to as the "minor applicants"). They were being held in administrative detention at the time of lodging the present application with the Court. According to the latest information in the case file, they currently live in Baku, Azerbaijan.

A. The applicants' arrest and detention

7. On 17 October 2014 the applicants entered Turkey via Istanbul Atatürk Airport allegedly with a valid visa.

8. According to the official records, on 18 October 2014 the applicants were arrested in the province of Kilis by the Syrian border as they were attempting to cross the border illegally into Syria. They were first taken to the Elbeyli provincial gendarmerie command for verification of their identities. Later on the same day, they were transferred to the foreigners department at the Kilis Security Directorate.

9. On 19 October 2014 the Kilis governor's office issued an order for the deportation of the first applicant under section 54(1)(h) of Law no. 6458, for having attempted to leave the country illegally. It also ordered her detention under section 57(2) for the same reason.

10. On 22 October 2014 the applicants were transferred to the Kumkapı Foreigners' Removal Centre ("the Kumkapı Removal Centre") attached to the Istanbul Security Directorate.

11. On 23 October 2014 the Istanbul governor's office issued an order for the first applicant's deportation under section 54(1)(d) and (h) of Law no. 6458 and her detention during the deportation process in accordance with section 57 of the same Law. The order only made reference to the relevant provisions of Law no. 6458 on deportation and detention, without explaining on what grounds the decision to deport and detain the first applicant had been taken. There is no document in the case file to show whether and when that order was served on the first applicant.

12. On 3 December 2014 the first applicant objected to the deportation order before the Istanbul Administrative Court. There is no information in the case file as to the outcome of those proceedings.

13. In the meantime, on 7 November 2014 the applicants also sought international protection from the Turkish authorities, arguing that they had left Russia for fear of persecution due to their religious and political convictions and that their lives would be in danger if they were returned there. That request was rejected on 17 December 2014 by the Directorate

General of Migration Management ("the DGMM") attached to the Ministry of the Interior, which found that the applicants did not qualify for international protection. On 6 January 2015 the applicants challenged the decision of the DGMM before the Ankara Administrative Court, which rejected their case on 9 September 2015. An appeal lodged by the applicants against the administrative court's decision was dismissed by the Supreme Administrative Court on 20 June 2018.

B. Cases brought by the applicants before the Istanbul Magistrates' Court to challenge the lawfulness of their detention

14. On 11 November 2014 the applicants lodged an application with the Istanbul Magistrates' Court, challenging the lawfulness of their administrative detention at the Kumkapı Removal Centre and requesting their release. They argued, in particular, that

(i) the detention order had only made reference to section 57 of the Foreigners and International Protection Act (Law no. 6458), without specifying the reasons for detention, even though the competent authority was obliged by law to provide such reasons in its decision;

(ii) it was clear from section 68 of Law no. 6458 that administrative detention should have been the last resort in respect of them, in view of their asylum seeker status, yet the authorities had ordered their detention without considering any alternative preventive measures and without paying sufficient attention to the fact that the applicants were a mother and her three very young children;

(iii) the administrative detention entailed serious physical and mental suffering for the applicants, especially the second, third and fourth applicants on account of their young age, having particular regard to the adverse material conditions at the Kumkapı Removal Centre (see paragraphs 24-27 below), which amounted to inhuman and degrading treatment as established by the Court in cases such as *Yarashonen v. Turkey* (no. 72710/11, 24 June 2014).

15. On 20 November 2014 the applicants submitted a second request to complement their application, arguing that an official decision on administrative detention had been taken only in respect of the first applicant, and that there was no legal basis for the remaining applicants' detention.

16. On 26 November 2014, 2 and 26 December 2014 and 6 January 2015 the applicants lodged four more applications with the Istanbul Magistrates' Court to challenge the lawfulness of their detention on largely the same grounds as those noted above.

17. By decisions dated 21 November 2014, 2 and 9 December 2014 and 12 and 29 January 2015[1] the Istanbul Magistrates' Court dismissed the

1. The decision dated 12 January 2015 concerned the application lodged on 6 January

applicants' requests. In its initial decision of 21 November 2014, the magistrates' court found that according to the information obtained from the Istanbul governor's office, it had been decided to deport and detain the first applicant as (i) she posed a danger to public safety, and (ii) she had attempted to leave Turkey illegally. Her detention was, therefore, in accordance with the law. As for the remaining applicants, the Istanbul Magistrates' Court acknowledged the absence of any detention order in respect of them and dismissed their claims – regarding the unlawfulness of their detention – for that reason. The court did not respond to the applicants' remaining arguments. In its subsequent four decisions, it similarly declared the applicants' detention lawful, merely making reference to sections 54 and 57 of Law no. 6458. In two of those decisions (delivered on 2 December 2014 and 12 January 2015) the court held that the decision to deport the first applicant had been based on section 54(1)(d) alone (concerning the deportation of those posing a threat to public order and security or public health), while in the other decisions it did not even specify that. In the remaining two decisions the court stated that the applicants had entered Turkey without a valid visa, although the applicants consistently denied that assertion.

C. The applicants' transfer to the Gaziantep Removal Centre

18. On 22 January 2015 the applicants were transferred to the Gaziantep Removal Centre.

19. On 23 January 2015 the Gaziantep governor's office issued a deportation order in respect of all of the applicants, and also ordered their detention pending the deportation process, without specifying the provisions on which those orders were based. There is no document in the case file to show whether and when those orders were served on the applicants.

20. On 30 January 2015 the applicants applied to the Gaziantep Magistrates' Court, challenging the lawfulness of their administrative detention at the Gaziantep Removal Centre and requesting their release. They largely repeated the arguments that they had previously made before the Istanbul Magistrates' Court and stressed the unsuitability of the physical conditions at the Gaziantep Removal Centre, especially for small children. They also drew the court's attention to the fact that they were being detained despite the absence of any immediate prospect of expulsion, because the cases that they had lodged against the deportation decision and the decision refusing their asylum request were still pending before the administrative courts.

21. On 5 February 2015 the Gaziantep Magistrates' Court accepted the applicants' arguments and found that their administrative detention did not

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2015, and the decision dated 29 January 2015 concerned that lodged on 26 December 2014.

comply with the law. The court noted at the outset that the applicants had been detained for over three months in circumstances which were particularly unsuitable for small children. Moreover, although their deportation and detention were based on sections 54(1)(d) and 57(2) of Law no. 6458, no concrete evidence had been provided to support the allegation that they posed a threat to public order, safety or health, particularly bearing in mind that three of the applicants were children aged 2, 3 and 7. Similarly, no explanation had been given as to why their detention was called for under section 57(2) of Law no. 6458. The court also noted that the proceedings brought by the applicants against the decisions ordering their deportation and refusing their asylum request were still pending before the administrative courts. On the basis of those findings, the court declared the applicants' detention to be unlawful and ordered the applicants' release from the Gaziantep Removal Centre, unless their deportation could be carried out immediately.

22. As the authorities failed to release them, on 10 February 2015 the applicants applied to the DGMM, requesting their release from the Gaziantep Removal Centre in accordance with the decision of the Gaziantep Magistrates' Court dated 5 February 2015 and the interim measure ordered previously by the Court on 23 January 2015 (see below paragraph 39).

23. On the same date, the decision of the Gaziantep Magistrates' Court was served on the Gaziantep Security Directorate and the applicants were released from the removal centre on condition that they resided in Gaziantep and reported to a police station three times a week.

D. Conditions of detention at the Kumkapı and Gaziantep removal centres

1. The applicants' account

24. The applicants claimed that the Kumkapı Removal Centre had been severely overcrowded at the time of their detention there between 22 October 2014 and 22 January 2015. The centre had had an overall official capacity of 300 people at the relevant time, but had accommodated around 600 people. As proof of that claim, the applicants submitted a note prepared by their lawyer on 23 January 2015, recounting an exchange that he had had with an officer on duty, who had allegedly told him that some 600 people were being held at the removal centre at the material time.

25. The applicants argued that the overcrowding at the centre had led to problems of hygiene, which had been further exacerbated by the lack of regular cleaning of the rooms, toilets and showers, and by the fact that the bedding provided at the centre was never changed. The building was infested with insects. The first applicant claimed that her children had been bitten by insects and bedbugs, and two of them had suffered allergic reactions to those bites. On an unspecified date the applicants' room had

been disinfected, yet they had not been permitted to leave the room during the disinfection process.

26. The applicants further submitted that the centre had not been sufficiently lit, heated and ventilated, and that they had been exposed to tobacco smoke at all times of the day. There had been no regular provision for outdoor exercise, not even for children. There were no light switches in the rooms and the lights were kept on during the night, which had disturbed the applicants' sleep.

27. The applicants emphasised that the material conditions of detention at the Kumkapı Removal Centre were particularly unsuitable for the mental and physical health of children. Children were not provided with a play area or with age-appropriate activities, nor did they have regular access to fresh air. The quality and quantity of the food provided was also poor. In particular, they did not meet the nutritional requirements of children. The applicants' needs, such as baby food, milk and fruit, as well as nappies, baby cream, clothes and toys, had been met by their lawyers or next of kin, to the extent that their visits had been allowed. The applicants' lawyers' oral and written requests for the provision of the three children's basic needs, including their requests for urgent medical care, had been ignored by the authorities. In addition to their oral requests, on 14 November 2014 and 13 January 2015 the applicants' lawyer had written twice to the Istanbul Security Directorate to complain of the material conditions at the Kumkapı Removal Centre, and to request medical assistance and basic provisions required by the applicants, in particular the three children. In the letter of 13 January 2015 the lawyer had stressed that one of the children suffered from bronchitis and another one from allergies, and that they were in need of urgent medical care. It appears that the authorities did not respond to any of those requests. On 21 January 2015 the lawyer wrote to the DGMM to draw its attention to the hardships faced by the applicants on account of the material conditions of detention at the Kumkapı Removal Centre, and to request urgent medical assistance for the children, who had been suffering from a high fever for the past six days. The lawyer stressed that the authorities had taken no action to provide the children with the necessary medical care, despite the first applicant's numerous pleas. According to the information provided by the applicants, the children were not taken to a doctor until 27 January 2015.

28. On 22 January 2015 the applicants were transferred to the Gaziantep Removal Centre, where they were held until 10 February 2015. According to their account, the conditions at that centre were even worse than those at Kumkapı: they were held in a room measuring 10 sq. m, which did not receive enough sunlight, together with three other women and one child. There were people who slept in the corridors. The problems concerning the quality and the appropriateness of the food for children, the hygiene, the lack of outdoor exercise and the absence of a play area also existed at that

centre. The applicants were given milk, fruit and winter clothes by their lawyers.

2. The Government's account

29. The Government submitted that the Kumkapı Removal Centre where the applicants had initially been detained had a capacity of 300 persons. The detainees were accommodated on three floors: the first two floors were reserved for male detainees, and the third floor for females. There were four dormitories on the first floor, measuring 50, 58, 76 and 84 sq. m, and five dormitories on each of the second and third floors, measuring 50, 58, 69, 76 and 84 sq. m respectively. There were forty-four bunk beds on the first floor, seventy-six bunk beds on the second floor and seventy bunk beds on the third floor, and all the rooms were sufficiently lit and ventilated. There were also five showers and six toilets per floor, as well as a cafeteria measuring 69 sq. m on all floors, where breakfast, lunch and dinner were served daily. Children were given 500 ml of milk each day, and there was also a canteen in the centre where personal supplies were sold. The detainees had the right to outdoor exercise in suitable weather conditions, and the applicants had enjoyed that right during their stay in Kumkapı. An indoor and an outdoor play area were moreover provided for children, and facilities for resting, watching television, exercising and religious observance were also made available to all detainees. A doctor was present on the premises weekly and the detainees also had access to medical care in cases of emergency. Detainees were also allowed to meet with their first-degree relatives, lawyers and legal representatives. As for the hygiene in the facility, there were six cleaning staff working full time at the removal centre, and the building was disinfected whenever necessary. Hot and cold water was available around-the-clock, along with hygiene products such as liquid and bath soap.

30. The Government stated that as the first applicant had three small children, she had not been kept in the standard female dormitories on the third floor. Rather, she had been housed in a separate area on the same floor, called the "victims' ward", where there were no iron bars or locks on the doors, where the detainees were allowed to use the telephones at will and had access to hot and cold water at all times. The so-called victims' ward consisted of two rooms measuring 23.5 and 23 sq. m respectively and also included a 24 sq. m hallway and an 11 sq. m play area for children. The children were allowed to spend time in the play area with their parents or the sociologists and psychologists on duty at the removal centre, and they were never separated from their mothers.

31. As for the conditions at the Gaziantep Removal Centre, the Government informed the Court that the applicants had been accommodated in a separate room measuring 12 sq. m as a family. They had been provided with three meals per day as well as with milk for the children. There was

heating and twenty-four-hour access to hot water at the removal centre. Those held at the removal centre were allowed to go out to the yard at certain times of the day, and they were provided with medical care as necessary.

32. In support of their claims, the Government submitted some photographs taken at the Kumkapı and Gaziantep removal centres, showing a number of dormitories from the Gaziantep removal centre and the yards of both centres. Unlike in Kumkapı, there does not seem to be a play area in the Gaziantep Removal Centre's small concrete court yard. As for the conditions in the dormitory rooms, the rooms in the photographs are well lit and fairly clean, although some of them appear to be cramped. All of the rooms are equipped with iron-frame bunk-beds for adults, and there appear to be no other furniture – such as tables, chairs and closets – present in most of the rooms. The Government have provided no information as to which one of the rooms shown in the photographs the applicants had actually stayed in. The Government also submitted photographs of two common rooms with sofas and tables, and of one kitchen, one shower and one toilet at the Gaziantep Removal Centre, all of which also appear clean. In addition, they submitted video footage from the Kumkapı Removal Centre. One video shows an unidentified woman walking down the stairs of the centre with one baby and two older children and going outside to the car park where swings and a slide had been put in place, and another shows a woman making a phone call with an older boy by her side. The Government lastly sent three photographs taken at the Kumkapı Removal Centre, in which a small – unidentified – girl is seen holding a puzzle with a woman who, according to the note on the photograph, was a psychologist. There is no indication on the photographs as to when they were taken, but the videos indicate that they were taken on 18 and 22 January 2015.

E. Application to the Constitutional Court (application no. 2014/19481)

33. On 15 December 2014 the applicants lodged an individual application with the Constitutional Court and brought all the complaints noted in paragraphs 24-27 above regarding the material conditions of their detention at the Kumkapı Removal Centre to that court's attention. They stressed that the conditions of detention in which they had been held for two months at that centre, which were unsuitable even for adults, were particularly unacceptable in the case of small children. The second, third and fourth applicants' special needs were not being met at the centre, despite numerous appeals to the authorities. They added that although there was a play room and a yard at the centre, they were not allowed to benefit from those facilities. In particular, they were deprived of basic human needs, such as access to outdoor exercise. Arguing that the conditions of

their detention had constituted ill-treatment, as well as violating their right to private and family life, the applicants requested that the Constitutional Court order their release from the Kumkapı Removal Centre by way of an interim measure. In support of their arguments, the applicants relied on the Court's judgments in the cases of *Yarashonen* (cited above) and *Musaev v. Turkey*, (no. 72754/11, 21 October 2014), as well as on the reports of the Human Rights Inquiry Committee of the Grand National Assembly of Turkey, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the Human Rights of Migrants, the European Commission and the Human Rights Institution of Turkey, where the adverse conditions of detention at the Kumkapı Removal Centre had been noted and criticised. The applicants also alleged that, apart from the unsuitable physical conditions at the Kumkapı Removal Centre, they had been deprived of their liberty in an unlawful manner and that they had not had an effective remedy to complain about the unlawfulness and the conditions of their detention. They emphasised in this connection that the numerous cases that they had brought before the Istanbul Magistrates' Court to challenge the lawfulness of their detention had been dismissed by that court on stereotypical grounds without any real assessment of the lawfulness issue.

34. On 29 December 2014 the applicants sent a letter to the Constitutional Court complaining about the failure of that court to deliver a decision on their interim measure request, despite the fact that two weeks had passed since they had made the request. The applicants pleaded in particular that the physical conditions of detention at the Kumkapı Removal Centre, where they had now been held for over two months, were putting the three small children's physical integrity in danger and damaging their health.

35. On 9 January 2015 the Constitutional Court rejected the applicants' request for an interim measure. It found that the applicants had failed to lay the basis of an arguable claim that there was an immediate and serious risk to their lives or their physical or mental integrity on account of the conditions of detention at the Kumkapı Removal Centre. The court considered that the applicants' allegations concerning the problems of hygiene and the lack of adequate food and fresh air at the centre, and their argument that such conditions constituted an actual and personal risk for them, were not sufficient to justify an interim measure. The Constitutional Court noted, however, that the State authorities were responsible for providing basic and urgent health services to persons held in removal centres.

36. On 24 May 2018 the Constitutional Court delivered its judgment on the applicants' case. After setting out the facts – where it noted, *inter alia*, that there had been no official order for the minor applicants' detention prior

to their transfer to Gaziantep – it moved on to assess the admissibility of the case. It reiterated at the outset the requirement to exhaust all administrative and legal remedies before lodging an application with the Constitutional Court. Referring to its decision in the case of *K.A.* (no. 2014/13044, 11 November 2015, see paragraphs 53-58 below), it stated that it had held in the past that there had been no effective remedies available in Turkish law to complain about the conditions of detention at foreigners' removal centres or the unlawfulness of foreigners' administrative detention. It then stressed, however, that it had recently changed that jurisprudence in the case of *B.T.* (no. 2014/15769, 30 November 2017, see paragraphs 59-62 below), where it had held that an action for a full remedy (*tam yargı davası*) before the administrative courts could provide an effective remedy in respect of complaints concerning both the conditions and the unlawfulness of the administrative detention of foreigners, provided, respectively, that (i) the individual was no longer being held in the conditions complained of, and (ii) the unlawfulness of the detention had already been established by a magistrates' court. The Constitutional Court held that there was no reason to depart from the findings in the *B.T.* case in the present circumstances, and therefore declared the applicants' complaints inadmissible for failure to lodge an action for a full remedy before the administrative courts. The Constitutional Court stressed, in respect of the applicants' complaint under Article 5, that their detention had already been declared unlawful by the Gaziantep Magistrates' Court on 5 February 2015.

37. The Constitutional Court also emphasised that although the aforementioned change of jurisprudence in the case of *B.T.* had been published in the Official Gazette on 16 February 2018, any such complaints lodged with the Constitutional Court before that date, without having first seized the administrative courts, would still be declared inadmissible on the grounds of non-exhaustion. That said, in the event that such applicants sought to have recourse to the administrative-law remedy at issue after the inadmissibility decisions delivered by the Constitutional Court in respect of them, the administrative courts would be required to assess compliance with the time-limit rules for bringing an administrative action in a manner that would not prejudice the right of access to a court.

F. Procedure before the Court

38. The applicants lodged their application with the Court on 22 January 2015 and also requested it to adopt an interim measure for their release from the Kumkapı Removal Centre, where they were allegedly being subjected to conditions of detention that amounted to inhuman and degrading treatment.

39. On 23 January 2015 the President of the Section to which the case had been allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government,

under Rule 39 of the Rules of Court, that the necessary measures be taken to ensure that the applicants' detention conditions were compatible with Article 3 of the Convention. The Government were further requested to inform the Court whether the conditions of the applicants' detention at the Kumkapı Removal Centre were compatible with Article 3 of the Convention and, in particular, whether those conditions could be considered appropriate for the second, third and fourth applicants in view of their young age. The Government were also invited to submit information, documents, photographs and video footage indicating the conditions of detention at the Kumkapı Removal Centre, including the capacity of the rooms and the number of occupants in the rooms at the material time, the hygiene conditions, and the opportunities for access to fresh air and daily exercise. The Government's responses to those questions have been outlined in paragraphs 29-32 above.

40. On the same date, the President of the Section also decided to grant priority to the application under Rule 41 of the Rules of Court.

41. On 27 May 2015 the Vice-President of the Section to which the case had been allocated decided to give notice of the application to the Turkish Government. On the same date, it was also decided to discontinue the application of Rule 39 of the Rules of Court.

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

1. Turkish Constitution

42. The relevant provisions of the Turkish Constitution read as follows:

Article 17

"...

No one shall be subjected to torture or ill-treatment; no one shall be subjected to punishment or treatment that is incompatible with human dignity.

..."

Article 19

"Everyone has the right to personal liberty and security.

No one shall be deprived of their liberty except for the ... apprehension or detention of a person who enters or attempts to enter the country illegally or against whom a deportation or extradition order has been issued.

...

Anyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.

...”

Article 40

“Anyone whose rights and freedoms recognised under the Constitution have been violated has the right to request prompt access to the competent authority.

...”

Article 125

“All actions or decisions taken by the authorities are amenable to judicial review ...

If the implementation of an administrative measure would result in damage which is difficult or impossible to compensate and the measure is also clearly unlawful, a stay of execution may be granted, stating reasons ...”

The administration shall be liable to make compensation for damage resulting from its actions or decisions.”

2. Administrative Procedure Act (Law no. 2577)

43. Section 2(1)(b) of the Administrative Procedure Act (Law no. 2577) provides that an action for a full remedy may be brought before the administrative courts on account of a violation of personal rights by an administrative action or measure.

3. Foreigners and International Protection Act (Law no. 6458)

44. The Foreigners and International Protection Act (Law no. 6458) entered into force on 11 April 2014. The provisions that are relevant to the present case read as follows:

Deportation
Section 52

“(1) Foreigners may be deported to their country of origin or a transit country or a third country by way of a deportation decision.”

Deportation decision
Section 53

“(1) A deportation decision shall be issued upon the instructions of the Directorate General or *ex officio* by governors’ offices.

(2) The decision and the reasons on which it has been based shall be notified to the foreigner, his or her legal representative or his or her lawyer. If the person in respect of whom a deportation order has been issued is not represented by a lawyer, he or she or his or her legal representative shall be notified of the consequences of the decision as well as the procedures and time-limits for appeal.

(3) A foreigner or his or her legal representative or lawyer may appeal to an administrative court against the deportation decision within fifteen days of the date of notification. The individual who has appealed against the decision shall also notify the authority that issued the deportation decision about the appeal. Appeals

to [administrative] courts shall be concluded within fifteen days. The decision of the [administrative] court on this matter shall be final. The foreigner shall not be deported before the expiry of the time-limit for lodging an appeal or, where an appeal has been lodged, until the finalisation of the proceedings, without prejudice to his or her right to request [the contrary]."

Individuals in respect of whom deportation decisions may be issued
Section 54

"(1) A deportation decision may be issued in respect of foreigners:

...

(d) who constitute a threat to public order or public security or public health,

...

(h) who have breached the terms of legal entry into Turkey or legal exit from Turkey,

..."

Administrative detention for deportation and the duration of detention
Section 57

"(1) Where foreigners who fall into one of the categories listed in section 54 of the present Act are apprehended by law-enforcement units, the governors' offices shall be notified immediately for a decision to be taken in respect of them. Deportation decisions shall be issued by the governors' offices in respect of foreigners for whom such a decision is deemed necessary. The assessment and decision-making period shall not exceed forty-eight hours.

(2) A [foreigner] in respect of whom a deportation decision has been issued shall be placed in administrative detention by a decision of the governor's office if [he or she] poses a risk of absconding or disappearing, has violated the rules for entry into and exit from Turkey, has used false or fabricated documents, has not left Turkey within the period granted without an acceptable excuse, or constitutes a threat to public order, public security or public health. Those in respect of whom an administrative detention order has been issued shall be transferred to a removal centre within forty-eight hours by the law-enforcement unit that apprehended them.

(3) The period of administrative detention in removal centres shall not exceed six months. However, if the deportation process cannot be completed owing to the failure of the foreigner to co-operate or provide correct information or documents regarding his or her country [of origin], this period may be extended for a maximum of [a further] six months.

(4) The need to continue administrative detention shall be reviewed monthly by the governor's office. Where necessary, reviews may be conducted earlier. If a foreigner's administrative detention is no longer deemed necessary, it shall be terminated immediately. Foreigners who have been released may be required to comply with such obligations as residing at a designated address and reporting to the authorities in the manner and period requested.

(5) The administrative detention decision, the extension of the period of administrative detention and the results of the monthly reviews shall be notified to the foreigner or his or her legal representative or lawyer, together with the reasons on which they are based. If the person in respect of whom a deportation order has been

issued is not represented by a lawyer, he or she or his or her legal representative shall be notified of the consequences of the decision as well as the procedures and time-limits for appeal.

(6) The person who has been placed in administrative detention or his or her legal representative or lawyer may appeal against the administrative-detention decision to the magistrates' courts. An appeal cannot stay the execution of the administrative detention. In the event that an [appeal] is submitted to the administration, it shall be transmitted to the competent magistrates' court without delay. The magistrates' court shall conclude the review within five days. [Its] decision shall be final. A person who has been placed in administrative detention or his or her legal representative or lawyer may lodge a further appeal with the magistrates' courts should the conditions for administrative detention have ceased to exist or changed.

(7) [Foreigners] who have lodged an appeal against a detention order, but who do not have the means to afford the services of a lawyer, shall be provided with legal aid at their request, in accordance with the relevant provisions of the Attorneys Act (Law no. 1136) of 19 March 1969."

Removal centres
Section 58

"(1) Foreigners subject to administrative detention shall be held in removal centres.

(2) Removal centres shall be operated by the Ministry ...

(3) The principles and procedures related to the establishment, management, outsourcing, and inspection of removal centres and the transfer to removal centres of foreigners subject to administrative detention for deportation purposes, shall be determined by regulation."

Services provided in removal centres
Section 59

"(1) In removal centres:

(a) emergency and primary healthcare services which a foreigner lacks the means to cover shall be provided free of charge,

(b) a foreigner shall be provided with the opportunity to access and to meet with his or her relatives, a notary public, a legal representative and a lawyer, as well as access to telephone services,

...

(ç) the bests interests of children shall be observed, and families and unaccompanied minors shall be accommodated in separate areas,

..."

Persons with special needs
Section 67

"(1) Persons with special needs[2] shall be given priority with respect to the rights and actions referred to in this Part.

2. Under section 3(l) of Law no. 6458, persons with special needs are unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents accompanied by

...”

Administrative detention of applicants [seeking international protection]
Section 68

“...

(2) The administrative detention of a person who has applied for international protection is an exceptional measure. He or she may only be subjected to administrative detention in the following circumstances:

...

(ç) when he or she poses a serious threat to public order or public security.

(3) The requirement for administrative detention shall be assessed on a case-by-case basis. In circumstances noted in subsection (2) above, an assessment as to whether the residence and reporting obligations stipulated in section 71 would be sufficient shall be carried out before ordering administrative detention. The governors' office[s] may determine alternatives to administrative detention. Administrative detention shall be ordered in circumstances where such [alternative] measures prove insufficient.

(4) The administrative detention decision, stating the [court's] reasons for ordering administrative detention and the duration of the detention, shall be notified in writing to the person subjected to administrative detention or his or her legal representative or lawyer. If the person subject to administrative detention is not represented by a lawyer, he or she or his or her legal representative shall be notified of the consequences of the decision as well as the appeal procedures.

(5) The period of administrative detention shall not exceed thirty days. ...

...

(7) The person who has been placed in administrative detention or his or her legal representative or lawyer may appeal against the administrative-detention decision to the magistrates' courts. The appeal shall not stay the execution of the administrative detention. In the event that the [appeal] is submitted to the administration, it shall be transmitted to the competent magistrates' court without delay. The magistrates' court shall conclude the review within five days. [Its] decision shall be final. The person who has been placed in administrative detention or his or her legal representative or lawyer may lodge a further appeal with the magistrates' courts, should the conditions for administrative detention have ceased to exist or changed.

...”

Residence and reporting obligations
Section 71

“(1) Administrative obligations may be imposed on [persons who have applied for international protection], such as an obligation to reside in a designated reception and accommodation centre, a specific location or province, or to report [to the authorities] as and when requested to do so.

...”

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their children, or individuals who have been subjected to torture, sexual assault or other serious psychological, physical or sexual violence, to the extent that they have applied for or have been granted international protection.

4. Regulation on the establishment, management, operation, outsourcing and inspection of reception and accommodation centres and removal centres (no. 28980)

45. The regulation on the establishment, management, operation, outsourcing and inspection of reception and accommodation centres and removal centres came into force on 22 April 2014, as required under, *inter alia*, section 58 of Law no. 6458. The relevant provisions of the regulation provide as follows:

Article 4

"(1) The following rules and procedures shall be observed in the establishment, operation and outsourcing of the centres and the provision of services under the present Regulation:

(a) the right to life shall be protected;

(b) a humane approach shall be taken;

...

(ç) those with special needs shall receive priority [treatment];

..."

Article 10

"...

(2) The director of the centre has the following duties and powers:

...

(ç) to make the necessary requests to the provincial directorate [of migration management] in respect of the needs of the centre;

...

(e) to take the necessary measures to ensure an environment compatible with health requirements at the centre;

...

(ğ) to take all structural and administrative measures within the context of the [relevant] legislation;

..."

Article 11

"(1) The management of the centre has the following duties:

...

(g) to follow the accomplishment of the tasks and activities pertaining to the ... service standards determined by the Directorate General [of Migration Management] with respect to the operation of the centre;

..."

Article 14

"(1) The following services shall be provided at the centres:

(a) accommodation and nourishment;

...

(c) emergency and primary healthcare services which the foreigner lacks the means to cover;

(ç) psychological and social support activities;

(d) allocation of suitable areas to those with special needs;

...

(g) other services deemed appropriate by the Directorate General [of Migration Management].

(2) The standards concerning the provision of the services indicated in subsection (1) above shall be determined by the Directorate General [of Migration Management].

..."

Article 16

"(1) The centres should be inspected regularly by the provincial directorate [of migration management] to which they are attached, annually by the Directorate General [of Migration Management], and triennially by the Ministry [of the Interior] Inspection Board. Governors' offices may request an inspection from the Ministry at any time.

..."

5. Reports of national bodies on the material conditions of detention at the Kumkapı Removal Centre

46. At its meeting of 8 December 2011 the Human Rights Inquiry Committee of the Grand National Assembly of Turkey established a sub-committee to look into the problems encountered by refugees, asylum seekers and irregular migrants in Turkey, including the conditions in which they were detained pending their deportation. For that purpose, on 10 and 11 May 2012 two members of parliament ("MPs") visited a number of removal centres, including the Kumkapı Removal Centre in Istanbul. The findings in those reports have been noted in the case of *Yarashonen* (cited above, §§ 24-26).

47. Following continuing complaints regarding the material conditions of detention and the lack of outdoor exercise at the Kumkapı Removal Centre, on 2 May 2014 the National Human Rights Institution of Turkey ("the NHRI")[3], along with a number of representatives of various

3. The National Human Rights Institution of Turkey was designated as the "National Preventive Mechanism" (NPM), in compliance with the requirements of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) ratified by Turkey in 2011, by means of a cabinet

non-governmental organisations and academics, visited the Kumkapı Removal Centre. A report of their visit was issued on 6 November 2014.

48. According to the information provided to the NHRI by officials from the removal centre, the centre accommodated 350 persons as at the date of the visit. This number had been 384 only a couple of days before the visit. The centre was cleaned every two months by a company attached to the Istanbul metropolitan municipality, and the dormitories were cleaned by the detainees themselves. A medical doctor was available at the premises every Thursday, in addition to a nurse, who was present daily. In seasons when the weather allowed, the detainees were permitted to go out to the yard for fresh air after 5 p.m., but during winter months they were not allowed to go out, to prevent them from getting sick. The yard was used as a car park, and there was in reality no secure area where the detainees could enjoy fresh air.

49. According to the observations of the delegation that visited the centre, the dormitories were very dirty, damp, run down and overcrowded, and there were no pillows or bedding on the beds. The toilets, in particular, were extremely dirty, and there were not enough toilets and sanitary materials, including toilet paper, for all detainees. A strong smell was noted in the centre. Smoking was allowed in all of the dormitories, including those where babies were present, whereas, under section 59(1)(ç) of Law no. 6458, families with children had to be kept in a separate area. Bearing particularly in mind the presence of children in the centre, the conditions of detention could in no way be considered to be healthy or hygienic. An effective cleaning system, along with periodic disinfection, was necessary to improve the conditions, which were currently amenable to the spread of all types of diseases. The delegation further observed that the food served at the centre was not suitable for small children, and no special provision was made to meet their particular needs. As a result, the small children, along with many adults, suffered from digestive problems.

50. The visit report stressed that overcrowding continued to be a serious problem at the centre: although the official detention capacity was 300, there were often 400 to 500 people held at the centre. Moreover, even at its maximum *official* capacity, the personal space available to the detainees was below the standards set by the CPT.

51. The report also included accounts from detainees encountered at the centre on the date of the visit. According to those detainees, the place was infested with insects, which was evident from the bites on their bodies, and the centre was not fumigated or disinfected. Even those with children said that they were hardly ever allowed to go outdoors for fresh air and that they had never seen a doctor or a nurse at the centre, despite repetitive health

decree that entered into force on 28 January 2014. The National Human Rights Institution was replaced by a National Human Rights and Equality Institution established in April 2016.

complaints made by some of them. They also told the delegation, however, that ambulances were called in cases of emergency and that children were given access to hospitals when required.

52. In its concluding remarks, the report indicated that the Kumkapı Removal Centre did not have the capacity to provide minimum human-rights standards to the detainees held there, and recommended a transfer to new premises as soon as possible. It noted that despite the criticisms made in the 2012 report of the Human Rights Inquiry Committee (noted in paragraph 46 above), no improvements had been made in the material conditions of detention.

6. The Constitutional Court's decisions on the availability of domestic remedies in respect of complaints concerning material conditions of detention at foreigners' removal centres and the unlawfulness of the administrative detention

(a) Application no. 2014/13044

53. Between 11 August 2014 and 5 February 2015, a Syrian national, namely K.A., lodged three applications with the Constitutional Court complaining about, *inter alia*, the conditions of his detention at the Kumkapı Removal Centre – where he had been held between 26 April 2014 and 6 January 2015 – the unlawfulness of his detention, and the absence of any effective remedies whereby he could raise those complaints (application no. 2014/13044).

54. In observations submitted to the Constitutional Court, the Ministry of Justice stated, *inter alia*, that whereas there had previously been no effective domestic remedies that met the requirements of the Convention in respect of the complaints at issue, Law no. 6458 had been enacted to remedy that defect. It further stated that the applicant, K.A., had not brought his complaints concerning the material conditions of his detention to the attention of the relevant administrative authorities. K.A. denied the Ministry's allegations and argued that the complaints he had lodged with various authorities had been left unanswered.

55. On 11 November 2015 the Plenary of the Constitutional Court delivered its decision on the admissibility and merits of the case. The Constitutional Court first examined whether there had been effective remedies at K.A.'s disposal to complain about his conditions of detention. Referring mainly to the principles cited in the case of *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, §§ 93-119, 10 January 2012), and noting that K.A. had lodged his first two applications while still detained in the impugned conditions, the Constitutional Court held at the outset that in order to be considered effective, the domestic remedy in question had to be capable of ameliorating the conditions complained of, as well as providing the victim with an enforceable right to compensation for the damage that he

or she had suffered because of those conditions. It then went on to note that the newly enacted Law no. 6458 did not set out any standards of detention at foreigners' removal centres. Nor did it envisage any administrative or legal appeal mechanisms capable of assessing the conditions at removal centres and ordering the amelioration of those conditions or release from the centre, as appropriate. The Ministry of Justice had not mentioned the existence of any such remedies in their observations, either. Moreover, the magistrates' court had not examined K.A.'s complaints regarding the conditions of detention, despite the fact he had raised those complaints along with his allegations concerning the unlawfulness of his detention. In these circumstances, the Constitutional Court found that K.A. had not had an effective remedy at his disposal by which to raise his grievances concerning the conditions of detention at the Kumkapı Removal Centre, in breach of the right to an effective remedy under Article 40 of the Constitution.

56. The Constitutional Court further held that the material conditions of detention that K.A. had been subjected to at the Kumkapı Removal Centre (between 26 April 2014 and 6 January 2015) had constituted treatment incompatible with human dignity. It found, in particular, that the overcrowding at the Kumkapı Removal Centre, coupled with K.A.'s inability to go outdoors on a regular basis and the inadequacy of the communal indoor areas, had been in breach of Article 17 of the Constitution. In making that finding, the Constitutional Court mainly relied on (i) the Court's case-law, and in particular the judgment in *Yarashonen* (cited above, §§ 70-81); (ii) the standards of the CPT concerning the conditions of detention of foreign nationals; and (iii) the aforementioned report of the National Human Rights Institution of Turkey of 6 November 2014 on the conditions at the Kumkapı Removal Centre (see paragraphs 47-52 above).

57. The Constitutional Court also found a breach of Article 19 of the Constitution, holding that K.A.'s detention had been unlawful, that he had not been informed of the reasons for his detention and that he had not had an effective remedy whereby he could challenge the lawfulness of his detention. As regards the latter complaint, the Constitutional Court noted that the magistrates' court had failed to carry out an adequate examination of K.A.'s application, even though Law no. 6458 contained provisions protecting detainees against arbitrariness. Accordingly, the Constitutional Court found that K.A. had not had an effective remedy whereby he could have obtained a judicial review of the lawfulness of his detention.

58. On 20 January, 17 and 18 February, 9 June and 22 September 2016 the Constitutional Court rendered six more judgments in which it found breaches of Articles 17, 19 and 40 of the Constitution in relation to the respective applicants' detention at the Kumkapı Removal Centre (applications nos. 2013/655, 2013/1649, 2013/8735, 2013/8810, 2014/2841

and 2014/15824). The applications in all those six cases had been lodged after the release of the relevant individuals from the Kumkapı Removal Centre.

(b) Application no. 2014/15769

59. By way of a decision it delivered on 30 November 2017 in the case of *B.T.* (application no. 2014/15769), which similarly concerned the detention of a foreigner at the Kumkapı Removal Centre, the Constitutional Court departed from its findings in the *K.A.* case regarding the absence of an effective domestic remedy (i) to complain about the conditions of detention at foreigners' removal centres, and (ii) to challenge the unlawfulness of an administrative detention.

60. In that decision, the Constitutional Court noted at the outset that B.T. had lodged his individual application after his release from the removal centre. Therefore, a legal remedy which offered reasonable prospects of compensating him for the damage he had suffered as a result of the adverse material conditions of detention would be considered effective for the purposes of Article 40 of the Constitution. The Constitutional Court noted in this connection that section 2 of the Administrative Procedure Act provided a remedy whereby compensation for all damage arising from the acts and omissions of the administration could be claimed before the administrative courts – namely by lodging an action for a full remedy. The fact that that remedy had never been tried and tested by any foreigners in B.T.'s position did not mean that it did not offer reasonable prospects of success. Bearing in mind that the decisions ordering the detention of foreigners were administrative in nature, and the removal centres where they were held were operated and inspected by the Ministry of the Interior, there was no reason why B.T. could not bring an action for compensation against the Ministry on account of the conditions in which he had been kept at the Kumkapı Removal Centre. According to the Constitutional Court, there was no doubt that administrative courts had the capacity to determine whether the conditions of detention had been adequate or not and to compensate B.T. as necessary. The Constitutional Court further noted that administrative courts were better placed than it was to assess the conditions of detention at removal centres within their jurisdiction as, unlike the Constitutional Court, they could perform on-site inspections and obtain expert reports.

61. The Constitutional Court, sitting in plenary session, decided in the light of the foregoing that B.T. had failed to exhaust the available domestic remedies in relation to his complaints concerning the conditions of detention at the removal centre where he had been held.

62. As regards B.T.'s complaints concerning the unlawfulness of his administrative detention and the absence of effective remedies in that regard, the Constitutional Court held, unanimously, that while

administrative courts had no jurisdiction to assess the lawfulness of the administrative detention orders delivered pursuant to Law no. 6458, they could compensate any losses arising from an unlawful detention once such unlawfulness had been established by a magistrates' court. Since, on the instant facts, B.T.'s detention had been considered lawful by the Istanbul Magistrates' Court, B.T. could not be expected to bring an action before the administrative courts to claim compensation for damage sustained prior to lodging an individual application with the Constitutional Court. After laying out this ground rule as regards the exhaustion requirements in the context of claims concerning the unlawfulness of administrative detention, the Constitutional Court went on to find a violation in respect of all the complaints raised by B.T. concerning his right to liberty and security.

B. International material

1. CPT standards on the material conditions of detention in the immigration context

63. The standards of the CPT concerning the material conditions of detention of foreign nationals in the immigration context have been noted in cases such as *Yarashonen* (cited above, § 27) and *Alimov v. Turkey* (no. 14344/13, § 29, 6 September 2016).

2. CPT visits to Turkey in 2009 and 2015

64. In June 2009 and June 2015 the CPT visited a number of removal centres for foreigners in different provinces in Turkey, including the Kumkapı Removal Centre in Istanbul where the applicants in the present case were detained between 22 October 2014 and 22 January 2015. The relevant parts of the CPT's observations following its visit in June 2009, along with the Turkish Government's response to those observations, were noted in the case of *Yarashonen* (cited above, §§ 28-29). The relevant observations from its subsequent visit in June 2015, published on 17 October 2017, are as follows:

> "6. ...
>
> That said, the CPT must stress that the principle of co-operation set out in Article 3 of the Convention [the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] is not limited to facilitating the task of visiting delegations. It also requires that decisive action be taken in response to the Committee's recommendations. In this regard, the Committee is very concerned about the total lack of action to implement longstanding recommendations regarding the provision of outdoor exercise to immigration detainees at Ankara and Istanbul-Kumkapı Removal Centres (see paragraphs 28 to 30). The Committee urges the Turkish authorities to take decisive steps to address this issue, in accordance with the principle of co-operation which lies at the heart of the Convention.
>
> 7. ...

The first immediate observation was made concerning the provision of outdoor exercise at Ankara, Istanbul-Kumkapı and İzmir Removal Centres. At Ankara Removal Centre, no outdoor exercise whatsoever was provided to immigration detainees (including women and children). The situation was only slightly better at Kumkapı where outdoor exercise was offered at best once a week, for some 20 to 30 minutes... The delegation requested the Turkish authorities to take urgent measures to ensure that all foreign nationals held at Ankara, Istanbul-Kumkapı and İzmir Removal Centres are offered at least one hour of outdoor exercise every day.

...

14. In the course of the visit, the delegation visited seven removal centres for foreigners in different provinces.

...

Istanbul-Kumkapı Removal Centre had been visited by the CPT in 2009. The centre's official capacity had since been reduced from 560 to 380 places. At the time of the 2015 visit, it was accommodating 312 inmates, including 102 women and five children (none of them unaccompanied). The delegation was told that the average stay was about ten days; nevertheless, many of the inmates had been in the centre for prolonged periods of time (some 50 inmates between two and seven months).

...

18. As will be described later in this report, conditions of detention in some of the establishments visited could be considered to be inhuman and degrading, taking also into account the fact that many foreign nationals were kept under such conditions for prolonged periods of time [footnote: This has also been confirmed in recent judgments of the European Court of Human Rights; see, in particular, *Yarashonen v. Turkey* dated 24 June 2014 (application no. 72710/11) regarding Kumkapı Removal Centre ...].

...

21. The CPT is particularly concerned about the situation it found at *Ankara, Istanbul-Kumkapı* and *İzmir Removal Centres* where conditions of detention for foreign nationals were extremely poor [footnote: It should be noted that, following its visit to Kumkapı Removal Centre in May 2014, the NPM (National Preventive Mechanism set up under the Optional Protocol to the United Nations Convention Against Torture) made a very critical assessment of the conditions of detention at the centre and recommended that it be closed down]. Most of the dormitories in these centres were severely overcrowded and, as a result, inmates had to share beds or sleep on (often filthy) mattresses on the floor. Further, the general state of hygiene and cleanliness at İzmir and Kumkapı was rather poor; in particular, the communal sanitary facilities were invariably dirty [footnote: As regards Kumkapı Removal Centre, this was in sharp contrast with the situation observed by the CPT in this establishment in 2009 (cf. paragraph 45 of CPT/Inf (2011) 13)]. In addition, as at Edirne and Van, the delegation received numerous complaints about an infestation with bedbugs and other vermin.

22. In the light of the remarks made in paragraphs 20 and 21, the CPT recommends that the Turkish authorities take the necessary measures to improve conditions of detention in the removal centres at Ankara, Edirne, Istanbul-Kumkapı, İzmir and Van. In particular, steps should be taken to ensure that:

- the accommodation areas, including communal sanitary facilities, are kept in an acceptable state of hygiene and that regular disinfection of the premises is carried out;

- the accommodation rooms have adequate lighting (including access to daylight) and ventilation and are suitably equipped;

- every foreign national has his/her own bed with a clean mattress and clean bedding;

...

Steps should also be taken in all the removal centres visited, in particular at Ankara, Istanbul-Kumkapı and İzmir, to reduce the official capacity and to ensure that future occupancy levels are always kept within the limits of the new capacity.

...

28. ..., it is a matter of grave concern that no outdoor exercise whatsoever was provided to inmates (including minors) at Ankara Removal Centre for weeks or even months on end. The situation was scarcely better at Kumkapı Removal Centre where outdoor exercise was provided at best once a week, for some 20 to 30 minutes...

In the CPT's view, such a state of affairs is unacceptable. The Committee considers it a fundamental obligation to allow all detained persons – including immigration detainees – at least one hour of outdoor exercise every day. The situation found at Ankara and Kumkapı Removal Centres is all the more disconcerting in that, during its previous visits, the CPT had already made immediate observations concerning the lack of outdoor exercise in these establishments. Clearly, the commitments subsequently given by the Turkish authorities to remedy the situation have not been followed up [footnote: The lack of outdoor exercise for male adult detainees at *Kumkapı Removal Centre* was the subject of an immediate observation during the CPT's 2009 visit to this establishment. The Committee was subsequently informed by the Turkish authorities that foreign nationals held at Kumkapı "are allowed to open air for an average of one hour per day and benefit from outdoor activities"].

29. At the end of the visit, the delegation therefore once again invoked Article 8, paragraph 5, of the Convention and made an immediate observation, requesting the Turkish authorities to take urgent measures to ensure that all foreign nationals held at Ankara, Istanbul-Kumkapı and İzmir Removal Centres are offered at least one hour of outdoor exercise every day.

...

31. The CPT was also concerned to note once again that, with very few exceptions, no sports or other recreational activities were organised for inmates in any of the removal centres visited... Further, at İzmir and Kumkapı, apart from the very limited possibility for outdoor exercise (see paragraph 28), inmates had to spend their days strolling around in the corridors or sitting in their dormitories.

To sum up, a considerable number of immigration detainees in each of the removal centres visited spent weeks or even months in a state of complete idleness.

32. The CPT considers that efforts should be made to introduce a basic minimum of activities for immigration detainees, such as providing access to television and other appropriate means of recreation (e.g. board games, table tennis, etc.), and to ensure access to reading material in the most frequently spoken foreign languages. The Committee recommends that the Turkish authorities take steps in all the removal centres visited to develop regime activities for foreign nationals, in the light of the preceding remarks; the longer the period for which persons are detained, the more varied the activities which are offered to them should be.

...

34. As regards the situation of accompanied minors, the CPT was concerned to note that, in most of the removal centres visited, hardly any specific arrangements had been made to care for the needs of young children, despite significant numbers of them being held in some centres. In particular, there were no designated staff to care for children in any of the establishments visited. Furthermore, with the exception of Edirne Removal Centre, none of the centres visited possessed a playground.

...

In their letter of 5 August 2015, the Turkish authorities indicated that "a fully-fledged playground for children has been created at Kumkapı Removal Centre...". Whilst acknowledging the steps taken so far, the CPT urges the Turkish authorities to redouble their efforts to provide young children with appropriate care.

35. Both Aydın and Van Removal Centres comprised a number of well-equipped "family rooms" for joint accommodation of parents and children. In practice, however, these rooms had never been used for the intended purpose.

...

40. ... the information gathered during the visit suggests that, in most of the removal centres visited, the attendance hours of a doctor were insufficient for the needs of the inmate population [footnote: At Kumkapı, the records showed that there had only been 13 medical consultations during the entire month of May 2015] ... Indeed, many inmates met by the delegation complained about insufficient attention to their health problems."

65. On an unspecified date in 2015 the Turkish Government responded to the CPT's observations set out in the previous paragraph. The following extracts are from the relevant parts of the Government's response:

"**Preliminary remarks**

...

Istanbul-Kumkapı removal centre will be closed down in 2016.

...

Conditions of detention in removal centres

Material conditions

Necessary legislative work has been carried [out] in order to address the hygiene conditions in the centres. In accordance with current rules and procedures, cleaning personnel are being employed at the removal centres through service purchasing for cleaning and hygiene conditions.

Legal arrangements have been made in order to ensure the provision of personal hygiene equipment to foreigners residing in the removal centres and necessary infrastructure [has been] established to ensure their [daily] access to hot water ...

...

Regime

Access to open air

As to the access to open air by the foreigners held in the removal centres, the legislative framework has been formulated under the 'Directive on Removal Centres

of DGMM'. And in line with this Directive, measures are taken to ensure that foreigners in the removal centres have access to open air [for] at least one hour a day, with the necessary security measures.

Outdoor exercise facilities have been arranged at İzmir, Adana and Kumkapı removal centres and foreigners have been given the opportunity to benefit from these facilities [for] at least an hour per day.

Playground facilities at the removal centres

There are playgrounds in removal centres. In some removal centres these playgrounds are in [a] closed area whereas in others, they are in the gardens.

Accommodation of parents and children/Family sections

In all removal centres in Turkey ... necessary arrangements are made to enable children to stay with their attendants. Children are sheltered with their parents in family sections."

3. Visit of the Council of Europe Special Representative of the Secretary General on migration and refugees to Turkey in 2016

66. The Council of Europe Special Representative of the Secretary General on migration and refugees, Mr Tomáš Boček, undertook an official visit to Turkey from 30 May to 4 June 2016. He visited, *inter alia*, the removal centre in Kumkapı and documented his observations and findings in a report dated 10 August 2016 (SG/Inf(2016)29). The relevant parts of the report read as follows:

"Kumkapı Removal Centre has two floors for male detainees and one for females. There is a separate living area with two rooms for families. The authorities explained that since January 2016, they had kept the occupancy at around 70% of the maximum capacity of the centre, which is 350. 240 people were present during my visit on 30 May 2016, of which four were accompanied children staying with their mother in one of the family rooms. There was no evidence of overcrowding in the sleeping area. Since the centre is located in the middle of a residential area, there is limited outdoor space – it is essentially a car parking area. There was a separate internal courtyard with a playground for children. The detainees complained that they did not have much access to fresh air. I was assured that the centre would be closed in the coming months as construction was underway to build two new centres in Istanbul ....

...

Generally speaking, it is clear from the facilities available that the possible detention of children in removal centres is anticipated. During my mission I encountered few. However, I consider this to be a serious matter. I believe the Turkish authorities need assistance in developing a proper system of alternatives to detention for migrant children."

4. Detention of minors in the immigration context

(a) The United Nations

67. The pertinent provisions of the United Nations Convention on the Rights of the Child of 20 November 1989, ratified by Turkey on 4 April 1995, provide as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37

"States Parties shall ensure that:

...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

68. In its "Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers"[4] issued in February 1999, the Office of the United Nations High Commissioner for Refugees (UNHCR) stated:

Guideline 6: Detention of Persons under the Age of 18 years

"All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time."

Those Guidelines have since been replaced by the "Guidelines on the Applicable Criteria and Standards relating to the Detention of

4. https://www.unhcr.org/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention.html

Asylum-Seekers and Alternatives to Detention"[5] issued in 2012, which sets out principles along similar lines as concerns the detention of minors accompanying their parents.

69. In the report he submitted to the United Nations Human Rights Council on 2 April 2012, the Special Rapporteur on the human rights of migrants, Mr François Crépeau, stated as follows[6]:

> "40. Migrant children are sometimes detained together with their parents when the latter are found to be in an irregular situation, justified on the basis of maintaining family unity. Not only may this violate the principle of the best interests of the child and the right of the child to be detained only as a measure of last resort, but it may also violate their right not be punished for the acts of their parents (art. 2, para. 2). This does not mean that the best interests of the child are served through splitting up the family by detaining the parents and transferring their children to the alternative-care system. The detention of their parents has a detrimental effect on children, and may violate children's right not to be separated from their parents against their will, as well as the right to protection of the family set forward in article 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. *A decision to detain migrants who are accompanied by their children should therefore only be taken in very exceptional circumstances. States must carefully evaluate the need for detention in these cases, and rather preserve the family unit by applying alternatives to detention to the entire family*." (emphasis added)

70. On 16 November 2017 the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as the "Committee on Migrant Workers") issued a joint general comment[7] on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, where they further developed the notions mentioned in the preceding paragraphs regarding the administrative detention of children and their families in an immigration context. The relevant parts of the joint general comment read as follows (footnotes omitted):

> "**B. Right to liberty**
>
> 5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of

5. https://www.refworld.org/docid/503489533b8.html
6. A/HRC/20/24 at https://undocs.org/en/A/HRC/20/24
7. Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/65/PDF/G1734365.pdf?OpenElement

children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

...

9. The Committees emphasize the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that "within the context of administrative immigration enforcement ... the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children".

10. Article 37 (b) of the Convention on the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.

11. *Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return. ... When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family* (emphasis added).

12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. ... Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

C. Due process guarantees and access to justice

...

15. The Committees are of the view that States should ensure that their legislation, policies, measures and practices guarantee child-sensitive due process in all migration and asylum administrative and judicial proceedings affecting the rights of children and/or those of their parents. ... They should have access to administrative and judicial remedies against decisions affecting their own situation or that of their parents, to guarantee that all decisions are taken in their best interests. ...Unless it is contrary to the child's best interests, speedy proceedings should be encouraged, provided that this does not restrict any due process guarantees."

(b) The Council of Europe

(i) Committee of Ministers and Parliamentary Assembly of the Council of Europe

71. The principles enunciated by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE) on the detention of irregular migrants or asylum seekers, and the special provisions concerning minors, have been noted by the Court in the judgment of *Popov v. France* (nos. 39472/07 and 39474/07, §§ 53-57, 19 January 2012).

72. In addition, on 3 October 2014 the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution (Resolution 2020 (2014)) concerning the alternatives to immigration detention of children. The relevant parts of that resolution read as follows:

> "1. The Parliamentary Assembly is very concerned to note that the immigration detention of children is a growing phenomenon in Council of Europe member States. Despite improvements in legislation and practice in some European countries, tens of thousands of migrant children still end up in detention every year. The practice is contrary to the best interests of the child and a clear and unequivocal child rights violation.
>
> ...
>
> 3. The detention of children on the basis of their or their parents' immigration status is contrary to the best interests of the child and constitutes a child rights violation as defined in the United Nations Convention on the Rights of the Child.
>
> 4. The Assembly is particularly concerned that detention, even for very short periods of time and in relatively humane conditions, has severe negative short- and long-term effects on children's physical and mental health. Children in immigration detention are particularly vulnerable to the negative effects of detention and can be severely traumatised. Also, there is a high risk of detained children being subjected to different forms of violence.
>
> ...
>
> 9. The Assembly considers that it is urgent to put an end to the detention of migrant children and that this requires concerted efforts from the relevant national authorities. The Assembly therefore calls on the member States to:
>
> 9.1. acknowledge that it is never in the best interests of a child to be detained on the basis of their or their parents' immigration status;
>
> 9.2. introduce legislation prohibiting the detention of children for immigration reasons, if it has not yet been done, and ensure its full implementation in practice;
>
> ...
>
> 9.6. continue efforts to make their legislation on foreign nationals conform with the best international standards, while taking into account the best interests of the child as enshrined in Article 3 of the United Nations Convention on the Rights of the Child and promoting various forms of internationally recognised alternatives to detention;
>
> 9.7. adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved;

...".

73. On 20 April 2015 PACE launched the "Parliamentary Campaign to End Immigration Detention of Children", thereby joining the "Global Campaign to End Immigration Detention of Children", which had been launched during the 19th Session of the United Nations Human Rights Council in 2012.

(ii) CPT

74. In addition to the general standards referred to in paragraph 63 above, in its 19th General Report the CPT remarked as follows as regards the additional safeguards for children deprived of their liberty in the context of immigration procedures:

> "**Additional safeguards for children**
>
> 97. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the "best interests of the child", as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.
>
> When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; ... Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained ..."

75. The CPT has also emphasised in a number of individual country reports that the accommodation of children accompanying their parent(s) together with other adults in a detention centre could have a negative psychological effect on the child's development and well-being, particularly when the child was young, and that where detention – which should only be a measure of last resort – could not be avoided, children should be accommodated with their parent(s) in a facility catering to their specific needs[8].

(iii) Council of Europe Commissioner for Human Rights

76. On 25 June 2010 the Council of Europe Commissioner for Human Rights issued a position paper on the rights of migrant children in an irregular situation (CommDH/PositionPaper (2010)6)[9]. The relevant part of the paper reads as follows:

> "**Minimising the detention of minors**

8. See, for instance, report to the Czech Government on the visit to the Czech Republic carried out by the CPT from 1 to 10 April 2014, published on 31 March 2015, paragraph 32; and Report to the Government of Cyprus on the visit to Cyprus carried out by the CPT from 23 September to 1 October 2013, published on 9 December 2014, paragraph 36**.**

9. https://rm.coe.int/ref/CommDH/PositionPaper(2010)6

> The use of detention for minors should be kept to the absolute minimum in accordance with the provisions of the UN Convention on the Rights of the Child. The Convention states, in article 37, that children should be deprived of their liberty only as a last resort and for the shortest appropriate period of time. While the detention of children for a matter of hours or days prior to a certain expulsion might exceptionally fall within the permissible scope of these provisions, anything much longer would be of serious concern.
>
> It should be stressed that detention cannot be justified solely on the basis of the child's or parents' irregular status under national migration law. As a principle, migrant children should not be subjected to detention. Any detention of children must be closely monitored and authorities need to ensure the utmost transparency with respect to such detention, keeping statistics that provide a detailed picture of the extent of their detention.
>
> In accordance with the principle of the best interest of the child, special arrangements must be made for living quarters that are suitable for children and which separate them from adults, unless it is considered in the child's best interest not to do so; the underlying approach to such a programme should be 'care' and not 'detention'.
>
> It is imperative that any decision to detain children be taken by a judicial authority, capable of independently weighing all the relevant considerations. Children should have access to legal aid, the opportunity to receive visits from friends, relatives, religious, social and legal counsel and their guardians. They should be provided with all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to recreation and play."

(iv) Council of Europe Special Representative of the Secretary General on migration and refugees

77. On 10 March 2017 the Council of Europe Special Representative of the Secretary General on migration and refugees, Mr Tomáš Boček, issued a Thematic Report on migrant and refugee children (SG/Inf(2017)13)[10]. It was emphasised in the report, *inter alia*, that immigration detention was never in the best interests of the child and that the lack of alternatives to detention was one of the most damaging structural problems affecting children, and needed to be addressed urgently.

(v) Other activities

78. The Council of Europe adopted an Action Plan on protecting refugee and migrant children in Europe (2017-2019) at the 127th Session of the Committee of Ministers in Nicosia, Cyprus, on 19 May 2017[11]. The action plan proposed, *inter alia*, immediate action to avoid resorting to the deprivation of children's liberty on the sole ground of their migration status, and further action to develop guidance on alternatives to immigration

10. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806fdd08
11. https://www.coe.int/en/web/children/-/council-of-europe-action-plan-on-protecting-refugee-and-migrant-children-adopted?desktop=true

detention and/or a compilation of good practices to be submitted to the Committee of Ministers.

(c) Inter-American Court of Human Rights

79. Relying, *inter alia*, on the report of Mr François Crépeau mentioned in paragraph 69 above, on 19 August 2014 the Inter-American Court of Human Rights issued an Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection[12]. The relevant paragraph provides as follows (footnotes omitted):

> "158. ... In this way, in the case of children who are with their parents, keeping the family together owing to the child's best interest does not represent a sufficient reason to legitimate or justify the exceptional admissibility of the deprivation of liberty of children together with their parents, because of the prejudicial effects on their emotional development and physical well-being. *To the contrary, when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children*." (emphasis added)

5. CPT standards on complaints mechanisms available to persons deprived of their liberty

80. In its 27th General Report published in April 2018, the CPT stated that complaints mechanisms constituted a fundamental safeguard against torture and inhuman or degrading treatment of persons deprived of their liberty by a public authority, including those detained in immigration detention centres. For the purposes of the report at issue, the term "complaints" referred to all formal complaints lodged by, or on behalf of, persons deprived of their liberty about decisions, actions or lack of official action on a variety of issues, including poor material conditions, lack of activities or insufficient provision of healthcare[13].

81. The CPT noted that the major shortcomings observed across the Council of Europe Member States in this area included an insufficient legal basis for a complaints procedure, the lack of, or inadequate provision of information about complaints bodies or procedures, undue delays in initiating the examination or investigation of complaints, and the lack of thoroughness in the examination or investigation of complaints[14].

82. In its report prepared following the visit to Turkey in June 2015 (noted in paragraph 64 above), the CPT made the following observations:

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12. Advisory Opinion OC−21/14 at http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf

13. See the introductory paragraph to the section on "Complains mechanisms" on page 25 of the 27th General Report of the CPT.

14. See paragraph 69 of the 27th General Report of the CPT.

> "61. Finally, the CPT wishes to stress that effective complaints and inspection procedures are important tools for the prevention of ill-treatment by staff and, more generally, for ensuring satisfactory conditions of detention in removal centres. Foreign nationals should have avenues of complaint open to them, both within and outside the DGMM, and be entitled to confidential access to an appropriate authority. In addition to addressing the individual case involved, the CPT considers that a careful analysis of complaints can be a useful tool in identifying issues to be addressed at a general level.
>
> At the time of the visit, the relevant legislation did not provide for any formal complaints and inspection procedures. The Committee recommends that the Turkish authorities take the necessary steps to ensure that effective complaints and inspection procedures are formally established and implemented in practice."

THE LAW

I. ADMISSIBILITY

A. The parties' arguments

83. In their observations submitted on 27 October 2015, the Government referred at the outset to the individual application remedy before the Constitutional Court, which had entered into force on 23 September 2012. Accordingly, anyone claiming that a public authority had violated one of his or her fundamental rights as protected by the Constitution and secured under the Convention and the Protocols thereto could apply to the Constitutional Court. Where the Constitutional Court found a violation, it would order the necessary measures to be taken to end the violation and redress its effects, in accordance with section 50(1) of Law no. 6216 on the establishment and rules of procedure of the Constitutional Court. Under Article 153 § 6 of the Constitution, the decisions of the Constitutional Court were binding on all State bodies, including judicial organs. The Constitutional Court also had the authority to order an interim measure pursuant to section 49(5) of Law no. 6216 and section 73(1) of its Internal Regulations, if there was a serious threat against an applicant's life or physical or mental integrity. The Government stressed that the effectiveness of the Constitutional Court remedy in respect of the alleged violations of the rights and freedoms protected by the Convention had been acknowledged by the Court in cases such as *Uzun v. Turkey* ((dec.), no. 10755/13, §§ 67 and 69-70, 30 April 2013).

84. Turning to the particular circumstances of the present case, the Government stated that following the dismissal of the applicants' objections to their administrative detention by the Istanbul Magistrates' Court, the applicants had lodged an individual application with the Constitutional Court on 15 December 2014 complaining about the conditions and unlawfulness of their detention, and the absence of any effective remedies in respect of those complaints. The Government argued that as the examination on the merits of those complaints was still pending before the

Constitutional Court, the complaints should be declared inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

85. The applicants argued in response that they had exhausted the available remedies in connection with the complaints they had submitted to the Court. Accordingly, in addition to the appeals they had made to various administrative authorities, they had challenged the lawfulness of their administrative detention six times before the magistrates' courts, in accordance with the procedure set out under section 57(6) of Law no. 6458, and had also lodged an individual application with the Constitutional Court.

86. On 10 March 2016, along with their comments on the applicants' claims for just satisfaction, the Government informed the Court of the recent decision in the case of K.A., which had been adopted by the Plenary of the Constitutional Court on 11 November 2015. That court had found for the first time that conditions at a foreigners' removal centre had constituted treatment incompatible with human dignity, in breach of Article 17 § 3 of the Constitution. It had also found a violation of K.A.'s rights protected under Article 5 §§ 1, 2 and 4 of the Convention (see paragraphs 53-58 above). The Government claimed that the effectiveness of the remedy before the Constitutional Court in respect of complaints arising from the conditions and unlawfulness of foreigners' detention had thus been confirmed.

87. On 1 November 2018 the applicants informed the Court of the Constitutional Court's decision of 24 May 2018, declaring their case inadmissible for failure to exhaust domestic remedies (see paragraph 36 above). The applicants' letter was sent to the Government on 12 November 2018 for information and any further comments they may have wished to make. The Government did not, however, submit any comments in respect of that new development in the applicants' case.

B. The Court's assessment

88. The Court reiterates that an applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001). Nevertheless, the Court accepts that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, 1 February 2011; *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, § 48, 7 March 2017; *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017; *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 107, 20 March 2018; and *Şahin Alpay v. Turkey*, no. 16538/17, § 86, 20 March 2018).

89. The Court notes that, as indicated above, the applicants lodged an individual application with the Constitutional Court on 15 December 2014 and that court delivered its judgment on the admissibility of their case on 24 May 2018.

90. The Government's objection as to the non-exhaustion of that remedy must therefore be dismissed. The question as to whether that remedy had in fact been effective in the particular circumstances of the present case will be discussed as part of the merits of the applicants' complaints under Articles 13 and 5 § 4 of the Convention.

91. It is also important to stress at this juncture that in its decision of 24 May 2018, the Constitutional Court declared the applicants' complaints inadmissible for failure to exhaust available remedies by lodging an action before the administrative courts, following a change in its case-law in November 2017 (see the reference to the case of B.T. in paragraphs 59-62 above). As noted in paragraph 87 above, the Government did not submit any comments on that decision, despite having been invited to do so by the Court.

92. The Court reiterates that Article 35 § 1 of the Convention provides for a distribution of the burden of proof and that it is incumbent on the Government claiming non-exhaustion to clearly identify the means of redress to which the applicant had failed to have recourse (see, for instance, *Hajibeyli v. Azerbaijan*, no. 16528/05, § 41, 10 July 2008).

93. In the absence of any arguments by the Government as to the requirement to exhaust the administrative-law remedy referred to by the Constitutional Court in the present application, the Court is not in a position, of its own motion, to extend the scope of the Government's preliminary objection. In these circumstances, and without prejudice to a future assessment of the effectiveness of the administrative-law remedy referred to by the Constitutional Court, the Court will not take it into account for the purposes of its assessment under Article 35 § 1 as to the exhaustion of domestic remedies in the present case.

94. In the light of the foregoing, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies. It further finds that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. They are not inadmissible on any other grounds. The Court therefore declares those complaints admissible.

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

95. The applicants complained that the material conditions of their detention, first at the Kumkapı Removal Centre (between 22 October 2014 and 22 January 2015) and subsequently at the Gaziantep Removal Centre

(between 23 January and 10 February 2015), as noted in paragraphs 24-28 above, had amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention. They also argued, under the same provision, that the second, third and fourth applicants – aged six, two and one at the material time – had been denied timely medical assistance despite the health problems they had encountered while in detention. They lastly complained, under Article 13, that there had been no effective domestic remedies available to them to complain of a violation of their rights under Article 3.

Articles 3 and 13 of the Convention read as follows:

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

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Alleged violation of Article 3 of the Convention

1. The parties' arguments

96. The applicants argued in their observations that the material conditions of detention at the Kumkapı Removal Centre had not shown any improvement since the Court's finding of a violation in the case of *Yarashonen v. Turkey* (no. 72710/11, §§ 74-81, 24 June 2014), and that the Government had not submitted any evidence to the contrary. The applicants maintained that the Kumkapı Removal Centre had been severely overcrowded at the time of their detention there, accommodating about 600 people despite its official capacity of 300. The overcrowding at the removal centre had been unacceptable, even based on the figures provided by the Government. In this connection, the information submitted by the Government on the sizes of the rooms on each floor and the number of bunk beds per floor showed that inside the rooms, the personal space per detainee was approximately 3.04 sq. m, 2.21 sq. m and 2.40 sq. m on the first, second and third floors respectively, which was well below the CPT standards. Moreover, contrary to the Government's allegations, the applicants had stayed in a separate room as a family only for a very short while in the Kumkapı centre. For the remaining period of their detention at the Kumkapı and Gaziantep removal centres, they had stayed with other women and children in very crowded rooms.

97. The applicants further argued that their special needs – as three small children and their mother – had been ignored at both the Kumkapı and the Gaziantep removal centres. They stressed that during their approximately three-month stay at Kumkapı, they had been allowed to go out for fresh air only once.

98. The Government reiterated their account of the detention conditions at the Kumkapı and Gaziantep removal centres (see paragraphs 29-32 above). They stated that, according to the information and documents provided by the Directorate General of Security, the applicants had been held in a separate room alone as a family, at both the Kumkapı and the Gaziantep removal centres, as required under section 59(1) of Law no. 6458. The Government added, however, that they were aware of the relevant case-law of the Court, as set out in the cases of *Yarashonen* (cited above) and *Musaev v. Turkey* (no. 72754/11, §§ 58-61, 21 October 2014), where the Court had found a violation of Article 3 on account of the material conditions of detention at the Kumkapı Removal Centre. They would therefore leave the assessment of the applicants' complaints under Article 3 to the Court's discretion.

2. The Court's assessment

99. The Court refers to the general principles established in its case-law regarding conditions of detention (see, for instance, *Kudła v. Poland* [GC], no. 30210/96, §§ 90-94, ECHR 2000-XI; *Kalashnikov v. Russia*, no. 47095/99, § 97 et. seq., ECHR 2002-VI; and *Artimenco v. Romania*, no. 12535/04, §§ 31-33, 30 June 2009). It reiterates, in particular, that under Article 3 of the Convention, the State must ensure that a person is detained in conditions which are consistent with respect for human dignity and that the manner and method of executing the detention measure do not cause the individual to suffer distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. When assessing conditions of detention, account must be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions must also be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005, and *Aden Ahmed v. Malta*, no. 55352/12, § 86, 23 July 2013).

100. In assessing the compliance of the physical conditions of detention with Article 3, the Court takes into account factors such as the personal space available in the detention area, the availability of outdoor exercise, access to natural light or air, ventilation, and compliance with basic sanitary and hygiene requirements (see, for instance, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 222, ECHR 2011, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 143-59, 10 January 2012). The Court notes in particular that the prison standards developed by the CPT make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader

programme of out-of-cell activities (see *Ananyev and Others*, cited above, § 150).

101. As regards minors, more specifically, the Court observes that Article 37 (c) of the Convention on the Rights of the Child provides that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age". The Court has already had occasion to rule on the detention of children in custodial facilities in an immigration context in cases such as *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (no. 13178/03, §§ 50-59, ECHR 2006-XI), *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, §§ 55-63, 19 January 2010), *Rahimi v. Greece* (no. 8687/08, §§ 85-86, 5 April 2011), *Popov v. France* (nos. 39472/07 and 39474/07, §§ 91-103, 19 January 2012), *A.B. and Others v. France* (no. 11593/12, §§ 110-15, 12 July 2016), *Abdullahi Elmi and Aweys Abubakar v. Malta* (nos. 25794/13 and 28151/13, §§ 105-15, 22 November 2016), and *S.F. and Others v. Bulgaria* (no. 8138/16, §§ 78-93, 7 December 2017). The Court considered in each of those cases that the extreme vulnerability of children – whether or not they were accompanied by their parents – was a decisive factor that took precedence over considerations relating to the child's status as an illegal immigrant. It found that the unsuitable living conditions imposed on the children concerned had caused them great emotional and mental suffering and had thus exceeded the threshold of seriousness for the purposes of Article 3 of the Convention.

(a) Conditions of detention at the Kumkapı Removal Centre

102. As pointed out by both parties, the Court has already found a violation of Article 3 of the Convention in a number of cases on account of the material conditions of detention at the Kumkapı Removal Centre – in particular because of the clear evidence of overcrowding and lack of access to outdoor exercise – during the period between late 2010 and early 2012 (see, for instance, *Yarashonen*, cited above, §§ 74-81; *Musaev v. Turkey*, no. 72754/11, §§ 60-61, 21 October 2014; *Alimov v. Turkey*, no. 14344/13, §§ 71-85, 6 September 2016; *Batyrkhairov v. Turkey*, no. 69929/12, §§ 80-84, 5 June 2018; and *Amerkhanov v. Russia*, no. 16026/12, §§ 87-89, 5 June 2018).

103. The Court is aware that the applicants' detention at the Kumkapı Removal Centre – between October 2014 and January 2015 – does not correspond to the period reviewed in the aforementioned judgments. The Court also notes, however, that visits conducted by the National Human Rights Institution of Turkey and the CPT to the Kumkapı Removal Centre in May 2014 and June 2015, respectively, clearly show that the problems highlighted during earlier visits – such as overcrowding, lack of outdoor

exercise and poor state of hygiene – had remained unresolved (see paragraphs 47-52 and 64 above).

104. In its visit report published on 17 October 2017, the CPT specifically expressed concern about the "total lack of action to implement longstanding recommendations regarding the provision of outdoor exercise" at the Kumkapı Removal Centre (see paragraph 64 above). The CPT also emphasised that hardly any specific arrangements had been made to care for the needs of young children held at the removal centres that they had visited, including the one in Kumkapı.

105. In its visit report published on 6 November 2014, the National Human Rights Institution of Turkey similarly noted that despite the criticisms made in the 2012 report of the Human Rights Inquiry Committee of the Grand National Assembly of Turkey, no improvements had been made in the material conditions of detention at the Kumkapı Removal Centre and that the centre did not have the capacity to provide minimum human rights standards to detainees (see paragraph 52 above). More specifically, the report included strong criticisms regarding, in particular, the unhygienic conditions at the Kumkapı Removal Centre and noted with concern that smoking was allowed in all of the dormitories, including those where babies were present. The report stressed that bearing in mind the presence of children in the centre, the conditions of detention could in no way be considered to be healthy or hygienic. It further noted that the food served at the centre was not suitable for small children, and no special provision was made to meet their particular needs.

106. In the case of K.A. mentioned in paragraphs 53-56 above, the Constitutional Court itself acknowledged the persisting problems of overcrowding and the lack of regular outdoor exercise at the Kumkapı Removal Centre during a period – April 2014 to January 2015 – which partly overlapped with the applicants' detention there.

107. The findings in the aforementioned reports and the Constitutional Court decision largely coincide with the applicants' allegations regarding the conditions in which they were detained at the Kumkapı Removal Centre. The Government have failed to present evidence capable of refuting those allegations.

108. The Government submitted a limited number of photographs and video footage of mostly of the communal areas at the Kumkapi Removal Centre, without indicating when the relevant photographs had been taken. However, they did not provide information as to the size and capacity of the different rooms where the applicants had been held throughout their detention, or the number of occupants held in those rooms together with the applicants, despite being expressly requested to do so by the Court. They merely provided general information on the size of the different dormitories on each floor and the number of bunk beds in those dormitories. That information alone allows the Court to draw alarming conclusions regarding

the problem of severe lack of personal space at the Kumkapı Removal Centre, as indicated by the applicants in paragraph 96 above.

109. Moreover, although the Government argued that the applicants had not been placed in the standard female dormitories but in a separate area called the "victims' ward", which at the Kumkapı centre allegedly included a play area, they did not provide any further information on those special wards, such as photographs. The Council of Europe Special Representative of the Secretary General on migration and refugees, Mr Tomáš Boček, noted the presence of a separate living area with two rooms for families, as well as a separate internal courtyard with a playground for children, at the Kumkapı Removal Centre during his visit in the summer of 2016 (see paragraph 66 above). However, there was no mention of such a separate area reserved for families or any playground in the aforementioned reports of the National Human Rights Institution of Turkey or the CPT. Indeed, the NHRI was critical of the fact that families with children were not being kept in a separate area, despite the requirement to that effect in section 59(1)(ç) of Law no. 6458, and the CPT expressly indicated in its report that there was no play area for children at the Kumkapı Removal Centre at the material time. In these circumstances, while the Court does not rule out the possibility that special accommodation arrangements had been made for families at the Kumkapı Removal Centre after the visits of the NHRI and the CPT, the Government have not demonstrated that the applicants were provided with such arrangements in keeping with their special needs during the period of their detention at that centre.

110. The Government have similarly failed to refute the applicants' remaining allegations regarding other aspects of their detention at the Kumkapı Removal Centre, such as the allegation that they were rarely allowed to go outside for fresh air, that they were constantly exposed to cigarette smoke from other detainees and that their special nutritional and other needs, particularly in the case of the minor applicants, were not met. In particular, while the Government claimed that the detainees were allowed to go outdoors "in appropriate weather conditions", they did not state whether the applicants had benefited from that right or how often such authorisation had been granted. In any event, as the Court has stressed in many cases, access to outdoor exercise is a fundamental component of the protection afforded to persons deprived of their liberty under Article 3 and as such it cannot be left to the discretion of the authorities (see, for instance, *Yarashonen*, cited above, § 78). As for the issue of passive smoking, which the Court has found problematic even in respect of adult detainees (see, for instance, *Florea v. Romania*, no. 37186/03, §§ 57-62, 14 September 2010), the Government have not submitted any comments whatsoever.

111. The Court considers that the above findings, coupled with the length of the detention at issue and the feelings of anxiety that its indefinite term may have caused, are largely sufficient to conclude that the conditions

of the applicants' detention caused them distress which exceeded the unavoidable level of suffering inherent in detention and attained the threshold of severity required to bring their treatment within the scope of Article 3. The Court would stress that the manifestly adverse conditions of detention at the Kumkapı Removal Centre, which have led to findings of violation even in respect of adult applicants, were particularly unsuitable for the applicant children in view of their extreme vulnerability and were completely at odds with the widely recognised international principles on the protection of children (see, *mutatis mutandis*, *Popov*, cited above, § 96 and the international texts noted in paragraphs 67-79 above). In these circumstances, the Court does not consider it necessary to examine the applicants' remaining complaints under Article 3 regarding their detention at the Kumkapı Removal Centre, such as the failure of the authorities to provide the minor applicants with the necessary medical assistance in a timely manner (see *Alimov*, cited above, § 84, and *Boudraa v. Turkey*, no. 1009/16, § 36, 28 November 2017).

112. The Court is well aware that Turkey is experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers, and it does not underestimate the burden and pressure this situation places on it. The Court is particularly aware of the difficulties involved in the reception of migrants and asylum seekers and of the disproportionate number of asylum seekers when compared to the capacities of the State. However, having regard to the absolute character of Article 3, such difficulties cannot release a State from its obligations under that provision (see, for a similar assessment, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 184, 15 December 2016, and *Boudraa*, cited above, § 30).

113. The Court concludes, accordingly, that there has been a violation of Article 3 of the Convention on account of the material conditions in which the applicants were detained at the Kumkapı Removal Centre.

(b) Conditions of detention at the Gaziantep Removal Centre

114. The Court notes that the applicants were kept at the Gaziantep Removal Centre for another two weeks following their transfer from the Kumkapı Removal Centre on 22 January 2015. The material conditions at the Gaziantep centre were allegedly worse than at Kumkapı.

115. The Court reiterates that in cases which concern conditions of detention, applicants are expected in principle to submit detailed and consistent accounts of the facts complained of and to provide, as far as possible, some evidence in support of their complaints (see *Visloguzov v Ukraine*, no. 32362/02, § 45, 20 May 2010, with further references; *Kyriacou Tsiakkourmas and Others v. Turkey*, no. 13320/02, § 279, 2 June 2015; and *Story and Others v. Malta*, nos. 56854/13, 57005/13 and 57043/13, § 110, 29 October 2015). The Court, however, also notes that in practice it may be very difficult for a detainee to collect evidence

concerning the material conditions of his detention and it may thus be permissible, under certain circumstances, to shift the burden of proof from the applicant to the Government in question, especially where the Government alone have access to information capable of corroborating or refuting allegations (see, among other authorities, *Kokoshkina v. Russia*, no. 2052/08, § 59, 28 May 2009; *Zakharkin v. Russia*, no. 1555/04, § 123, 10 June 2010; and *Khodorkovskiy v. Russia*, no. 5829/04, § 106, 31 May 2011). In such circumstances, a failure on the part of a Government to submit the relevant information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Ananyev and Others*, cited above, § 123, and *Alimov*, cited above, § 74).

116. While the Court has not been able to obtain information from reliable sources – such as national bodies, the CPT or reputable non-governmental organisations – as regards the physical conditions at the Gaziantep Removal Centre, in particular with regard to the special needs of children, it notes that the Government have not submitted sufficient material evidence to refute the applicants' allegations concerning the conditions at that centre, such as copies of the logs recording the number of detainees held there at the material time and the precise capacity of the rooms where the applicants were held – even though such information had been expressly requested from them –, sketch map of the detention facility and information regarding the food served at the centre. Although they sent photographs of some of the rooms from the Gaziantep Removal Centre, it is not at all clear in which one of those rooms the applicants had actually stayed and with how many other people. This information was of primordial importance as some of those rooms appear to be too small for occupation even by the applicants alone. Importantly, the Government have also not explained if and how the Gaziantep Removal Centre had been equipped with the essential infrastructure required for the detention of young children with their parents. To the contrary, the photographs they have submitted suggest that the minor applicants were made to sleep on iron-frame bunk-beds with sharp edges, which could be dangerous for children their age (see *Popov*, cited above, § 95 for a critique on this particular point), and that they were not provided with any indoor or outdoor play areas . The Government have similarly failed to provide satisfactory information as to whether the applicants were allowed to spend sufficient time outdoors on a daily basis.

117. Having regard to the foregoing, and noting in particular that the detention of minor immigrants even for very short periods of time in unsuitable conditions gives rise to issues under Article 3 (see the cases referred to in paragraphs 101 above and 134 below), the Court finds that there has been a violation of Article 3 of the Convention on account of the material conditions in which the applicants were detained at the Gaziantep Removal Centre as well.

B. Alleged violation of Article 13 of the Convention taken in conjunction with Article 3

1. The parties' arguments

118. The applicants complained of a violation of Article 13 of the Convention, arguing that they had had no effective domestic remedies in respect of the violation of Article 3 of which they were victims. They stressed that in addition to the complaints that they had raised before the administrative authorities and the magistrates' courts, on 15 December 2014 they had lodged an individual application with the Constitutional Court to complain of their conditions of detention, and had requested an interim measure to ensure immediate relief from those conditions. However, the Constitutional Court had dismissed their request for an interim measure twenty-four days later on the grounds that the conditions of their detention at the Kumkapı Removal Centre did not amount to ill-treatment within the meaning of Article 3. The applicants did not find that response sufficiently speedy. Moreover, given that the reasoning of the Constitutional Court had involved an assessment of the well-foundedness of their claims, the applicants were highly doubtful that the decision on the merits would yield a different outcome. They added that the Constitutional Court had not yet delivered any decisions where it had found a violation of Article 3 on account of the material conditions of detention at a foreigners' removal centre, despite the numerous applications it had received to that effect.

119. As indicated in paragraphs 83-84 above, the Government claimed that the individual application procedure before the Constitutional Court had provided the applicants with an effective remedy within the meaning of Article 13, as the Constitutional Court had the authority to rule on the merits of their complaints and to award compensation in the event that it found a violation. The Government did not, however, submit any examples from the Constitutional Court's case-law at that stage as proof of its capacity to respond effectively in the relevant context.

120. In additional submissions dated 10 March 2016, the Government argued that contrary to the applicants' allegations, the interim measure decision delivered by the Constitutional Court on 9 January 2015 had not prejudiced the merits of their case, which was still under examination before the Constitutional Court. The Government further informed the Court of the Constitutional Court's recent decision in the case of *K.A.* (application no. 2014/13044), where it had found, *inter alia*, that the material conditions of detention of the individual concerned at the Kumkapı Removal Centre had amounted to ill-treatment (see paragraph 86 above), thereby proving its competence to rule on such claims.

121. The applicants argued in response that the Constitutional Court's decision in the K.A. case was an exceptional one and that it had rejected all other similar complaints lodged by foreigners detained at removal centres.

122. In a letter dated 9 February 2018, the applicants drew the Court's attention to the fact that the Constitutional Court had already departed from the approach adopted in the case of K.A. (see the explanations in paragraphs 59-62 above regarding the change of jurisprudence of the Constitutional Court in the case of B.T. (application no. 2014/15769)).

123. In a subsequent letter dated 1 November 2018, the applicants informed the Court that on 24 May 2018 the Constitutional Court had delivered an inadmissibility decision in respect of their individual application, for failure to lodge an action for a full remedy before the administrative courts, in line with its decision in the case of B.T. The applicants argued that it was unclear why the Constitutional Court had decided to depart from its jurisprudence established in the K.A. case, and expressed doubts about the capacity of the impugned administrative-law remedy to provide effective relief in the present context, given its very general scope and purpose. The applicants further argued that unlike in the case of B.T., where the applicant had already been released from detention at the time of lodging his complaint and could therefore find relief in an award of compensation, they had lodged their complaints with the Constitutional Court while they were still being detained at the Kumkapı Removal Centre, a distinction which had been overlooked by the Constitutional Court.

124. The applicants' letter was sent to the Government for any further comments they may have wished to make. As noted in paragraph 87 above, the Government did not submit any comments.

2. The Court's assessment

125. The Court refers to its settled case-law to the effect that Article 13 guarantees the existence of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, for instance, *Stanev v. Bulgaria* [GC], no. 36760/06, § 217, ECHR 2012).

126. In this connection, the Court reiterates at the outset its finding that the conditions of the applicants' detention amounted to a violation of Article 3 (see paragraphs 112 and 117 above). The applicants' complaint in this regard is therefore "arguable" for the purposes of Article 13 of the Convention.

127. The Court notes that similar complaints brought by foreign nationals held in administrative detention in Turkey have in the past resulted in the finding of a violation of Article 13 of the Convention, in conjunction with Article 3, on account of the failure of the Turkish Government to show the existence of effective domestic remedies at the material time that complied with the requirements of Article 13 in the relevant context (see, for instance, *Yarashonen*, §§ 56-66, and *Amerkhanov*, §§ 81-84, both cited above). However, in its subsequent decision in the case of *Z.K. and Others*

v. Turkey, the Court acknowledged for the first time that an individual application before the Constitutional Court had the capacity to provide an effective remedy for grievances under Article 3 concerning conditions of detention at a foreigners' removal centre, and held that that remedy therefore had to be exhausted before lodging an application with the Court ((dec.), no. 60831/15, §§ 41-49, 7 November 2017).

128. The Court also deems it important to stress at this juncture that in April 2014, the new Foreigners and International Protection Act (Law no. 6458) came into force, entailing a complete overhaul of the legal framework on migration and asylum matters in Turkey. However, according to the information available to the Court, neither Law no. 6458 nor the regulations implementing it designated any specific remedies for complaints concerning conditions of detention at foreigners' removal centres. Indeed, Law no. 6458 limited the jurisdiction of the magistrates' courts to an assessment of the lawfulness of the deprivation of liberty alone. In their observations the Government did not mention the availability of any specific remedies in that respect, but maintained that an individual application before the Constitutional Court would provide the applicants with effective redress, within the meaning of Article 13, in respect of their complaints under Article 3.

129. The Court reiterates that the assessment of the effectiveness of any domestic remedy for the purposes of Article 13 of the Convention depends on the nature of the applicant's complaint under the Convention. In the area of complaints about inhuman or degrading conditions of detention, the Court has already observed that two types of relief are possible: (i) an improvement in the material conditions of detention, and (ii) compensation for the damage or loss sustained on account of such conditions. If an applicant has been held in conditions that are in breach of Article 3, a domestic remedy capable of putting an end to the ongoing violation of his or her right not to be subjected to inhuman or degrading treatment is of the greatest value. However, once the applicant has left the facility in which he or she endured the inadequate conditions, he or she should have an enforceable right to compensation for the violation that has already occurred (see *Sergey Babushkin v. Russia*, no. 5993/08, § 40, 28 November 2013).

130. The Court notes that although the applicants were eventually released on 10 February 2015 on account of the unlawfulness of their detention, they had lodged their applications with the Constitutional Court and subsequently with the Strasbourg Court on 15 December 2014 and 22 January 2015, respectively – that is, while they were still being detained in the inadequate conditions described above. The timing and the content of their applications before both instances leave no doubt that the applicants sought immediate relief from the unacceptable conditions in which they were being held, as opposed to a purely compensatory award, and that they complained of the absence of any effective remedies in domestic law that

could deliver that result. The Court will, therefore, assess whether – apart from a remedy providing compensation – the applicants had available to them a *preventive* remedy capable of putting an end to the ongoing violation of their right not to be subjected to inhuman or degrading treatment (see, *mutatis mutandis*, *Shahanov v. Bulgaria*, no. 16391/05, § 55, 10 January 2012; *Gorbulya v. Russia*, no. 31535/09, §§ 38 and 56, 6 March 2014; *Vasilescu v. Belgium*, no. 64682/12, § 70, 25 November 2014; and *Abdullahi Elmi and Aweys Abubakar*, cited above, § 67).

(a) Availability of an effective remedy within the meaning of Article 13 of the Convention during the course of the applicants' detention at the Kumkapı Removal Centre

131. The Court notes in this regard that, as mentioned earlier, the applicants lodged an individual application with the Constitutional Court to complain of the conditions of their detention and the absence of any effective remedies to raise those complaints. Having regard to the scope of its jurisdiction and the powers entrusted to it – including the power to order interim measures in the event of an imminent risk of irreparable harm and to secure redress for violations – and the binding nature of its decisions, the Court considers that the individual-application procedure before the Constitutional Court had, in principle, the capacity to offer the applicants effective redress (see *Z.K. and Others*, cited above, §§ 43-49 for a similar finding). The Court also considers, however, that that mechanism did not function effectively in the present circumstances.

132. In this connection, when the applicants lodged their complaints with the Constitutional Court on 15 December 2014, they specifically drew that court's attention to the widely documented problems at the Kumkapı Removal Centre and the plight of the three minor applicants. They reiterated their complaints on 29 December 2014 and urged the Constitutional Court to decide their case, stressing once again that the unsuitable detention conditions were putting the minor applicants' physical integrity seriously in danger (see paragraphs 33 and 34 above). On 9 January 2015 the Constitutional Court dismissed their request for an interim measure, holding that the material conditions of their detention did not constitute an immediate and serious risk to their lives or their physical or mental integrity. The applicants continued to be detained for almost another month after that decision, during which period the Constitutional Court did not rule on the admissibility or the merits of their case.

133. In the Court's opinion, the Constitutional Court's unfavourable decision on the applicants' interim-measure request does not alone compromise the overall effectiveness of the remedy before that court. The interim measure mechanism has a very specific purpose and there is no reason to consider that the Constitutional Court's decision to dismiss such a

measure would prejudice or predetermine its assessment of the merits of the case.

134. The Court considers it nonetheless of importance that the Constitutional Court did not examine the admissibility and merits of the applicants' complaints during the period in which they were detained, which undermined the remedial efficacy of the individual application mechanism in this particular context. The Court notes that after lodging their application with the Constitutional Court, the applicants continued to be detained in highly unsuitable conditions for a not insignificant period. Having particular regard to the apparent vulnerability of the three minor applicants and to the well-known problems at the Kumkapı Removal Centre – which had been flagged up not only by international bodies but also by domestic authorities (see paragraphs 46-52 above) – and to the fact that the Constitutional Court was apparently acting as a first-instance court in the circumstances, that court could have been expected to show the necessary diligence in reviewing the applicants' complaints under Article 3. The Court stresses in this connection that the detention of children in adverse conditions for even very short periods of time, and even where they had been accompanied by an adult, has been found to amount to a violation of Article 3 (see, for instance, *Muskhadzhiyeva and Others*, cited above, § 63; *Popov*, cited above, 103; and *A.B. and Others*, cited above, § 115). Accordingly, having regard to the fundamental importance of the interest at stake, a legal mechanism with the capacity to provide a more urgent reaction was called for in the circumstances.

135. The Court notes that once the applicants were released from detention, for reasons unrelated to the inadequate conditions of their detention, all that the Constitutional Court could do was recognise the inadequacy of those conditions retrospectively and award damages to the applicants in compensation for the harm already sustained, or refer them to another remedy with the capacity to do the same. The Constitutional Court opted for the latter option: in a decision it delivered on 24 May 2018, the Constitutional Court held – relying on its findings in the recent case of B.T. – that "in the event of the release of the foreigner, the effective legal mechanism was that of the action for a full remedy" before the administrative courts, which had the capacity to compensate the victims as necessary (see paragraphs 36 and 60 above). It declared the applicants' complaint under Article 3 inadmissible for non-exhaustion of domestic remedies for that reason.

136. While the Court agrees with the Constitutional Court that compensatory remedies may provide sufficient relief to those who have been released from detention, it notes that, unlike the applicant in the case of B.T., the applicants in the present case were still being detained at the time of their application to the Constitutional Court. Therefore, a purely compensatory remedy available after release, whether before the

Constitutional Court or elsewhere, could not have provided them with an effective remedy in respect of their specific complaints under Article 3 (see, *mutatis mutandis*, *Vasilescu*, cited above). The Court reiterates that the special importance attached by the Convention to Article 3 requires that the States Parties establish, over and above a compensatory remedy, an effective mechanism in order to put an end to the kind of treatment prohibited by Article 3 rapidly. Otherwise, the prospect of future compensation would legitimise particularly severe suffering in breach of this core provision of the Convention and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements (see *Ananyev and Others*, cited above, § 98).

137. The Court considers, in the light of the foregoing, that the individual-application mechanism before the Constitutional Court has not proven effective in respect of the applicants' complaints regarding the material conditions of detention at the Kumkapı Removal Centre in the particular circumstances of the present case. Nor have the Government suggested any other remedies that could have provided the applicants with sufficient redress at the material time by putting an end to the ongoing violation of their rights under Article 3 rapidly, over and above providing a purely compensatory remedy. There has, accordingly, been a violation of Article 13 of the Convention, in conjunction with Article 3.

(b) Availability of an effective remedy within the meaning of Article 13 of the Convention during the course of the applicants' detention at the Gaziantep Removal Centre

138. Having regard to its above finding of a violation of Article 13 of the Convention, in conjunction with Article 3, in relation to the period in which the applicants were detained at the Kumkapı Removal Centre, the Court does not consider it necessary to examine whether the applicants had available to them an effective remedy, within the meaning of Article 13, to complain of the conditions of their subsequent detention at the Gaziantep Removal Centre.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

139. The second, third and fourth applicants complained under Article 5 § 1 that their administrative detention had been unlawful, noting in particular that there had been no official decision ordering their detention. All four of the applicants further complained under the same provision that they had been detained at the Gaziantep Removal Centre until 10 February 2015, despite the fact that the Gaziantep Magistrates' Court had ordered their release on 5 February 2015.

140. Relying on Article 5 §§ 2 and 4 of the Convention, the applicants alleged that they had not been duly informed of the reasons for the

deprivation of their liberty and that they had not had any effective remedies by which to challenge the lawfulness of their detention.

141. The applicants lastly complained under Article 5 § 5 that they had had no right to compensation under domestic law for the violation of their rights under Article 5.

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

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

1. Administrative detention of the second, third and fourth applicants

143. The second, third and fourth applicants claimed that they had been deprived of their liberty despite the absence of an official decision ordering their detention.

144. The Government claimed in their observations that a decision had been taken on 19 October 2014 for the detention of the applicants for the purpose of their deportation.

145. The Court refers to its general principles under Article 5 § 1 of the Convention relating to the control of the liberty of aliens in an immigration context (see, for instance, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-64, ECHR 2009, and *Abdolkhani and Karimnia v Turkey*, no. 30471/08, §§ 128-30, 22 September 2009).

146. The Court reiterates in this regard that the Contracting States are entitled to control the entry and residence of non-nationals on their territory at their discretion, but stresses that this right must be exercised in conformity with the provisions of the Convention, including Article 5. In proclaiming the right to liberty, paragraph 1 of Article 5 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 (see, *mutatis mutandis*, *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III). Detention must be lawful in both domestic and Convention terms: the Convention lays down an obligation to comply with the substantive and procedural rules of national law, and requires that any deprivation of liberty be in keeping with the purpose of Article 5, which is to protect individuals from arbitrariness (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 96, and the cases cited therein).

147. The Court notes that before the entry into force of Law no. 6458 in April 2014, it had found many violations on account of the absence of clear legal provisions in Turkish law establishing the procedure for administrative detention of foreign nationals (see, for instance, *Abdolkhani and Karimnia*, cited above, §§ 125-35). The new law now provides a clear legal basis and sets out the procedure governing detention in an immigration context. Sections 57(2) and 68(3) provide that the detention of a foreign national pending his or her deportation or the assessment of his or her application for international protection should be based on a decision of the local governor's office (see paragraph 44 above).

148. Although the parties have not commented specifically on this matter, it appears from the information available to the Court that the detention of minors accompanying their parents is also governed by the aforementioned sections 57(2) and 68(3) of Law no. 6458.

149. Turning to the circumstances before it, the Court notes that it is not disputed between the parties that the second, third and fourth applicants were deprived of their liberty from 18 October 2014 until 10 February 2015 within the meaning of Article 5 of the Convention. The Court further notes that the detention order dated 19 October 2014 referred to by the Government concerned only the detention of the first applicant and did not mention in any way the remaining applicants. According to the documents in the case file, the first and only detention order in respect of the minor applicants was that issued on 23 January 2015 by the Gaziantep governor's office following their transfer from Istanbul to Gaziantep. This was also acknowledged by the Constitutional Court in its decision of 24 May 2018 (see paragraph 36 above).

150. In these circumstances, the Court finds it established that the second, third and fourth applicants were not detained in accordance with the procedure prescribed by Law no. 6458, at least not for the period between 18 October 2014 and 23 January 2015. It therefore concludes that there has been a violation of Article 5 § 1 of the Convention in respect of the detention of those applicants during the relevant period.

151. Having made this finding, the Court does not need to examine other aspects of the minor applicants' detention that fell foul of the requirements of Article 5 § 1 of the Convention. It nevertheless reiterates that the

detention of young children in unsuitable conditions, as found in paragraphs 111 and 112 above in the context of Article 3, may on its own lead to a finding of a violation of Article 5 § 1, regardless of whether the children were accompanied by an adult or not (see, for instance, *Mubilanzila Mayeka and Kaniki Mitunga*, §§ 102-05, and *Muskhadzhiyeva and Others*, § 74, both cited above). The Court also notes that various international bodies, including the Council of Europe, are increasingly calling on States to expeditiously and completely cease or eradicate the immigration detention of children (see paragraphs 67-79 above). The Court has found that the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1 (f) only where the national authorities can establish that such a measure of last resort was taken after verification that no other measure involving a lesser restriction of their freedom could be implemented (see, for instance, *Popov*, cited above, § 119; and *A.B. and Others*, § 123).

2. The applicants' detention after 5 February 2015

152. The applicants claimed that despite the ruling of the Gaziantep Magistrates' Court of 5 February 2015, whereby it annulled as unlawful the decision to detain them, they had not been released from the Gaziantep Removal Centre until 10 February 2015.

153. The Government claimed that a certified copy of the Gaziantep Magistrates' Court decision of 5 February 2015 had been received by the Gaziantep Removal Centre on 10 February 2015, following which the applicants had been released. The Government nevertheless concluded their observations by stating that they were aware of the relevant case-law of the Court on the matter in question and left the assessment of the applicants' complaint to the Court's discretion.

154. The Court refers at the outset to the general principles noted in paragraphs 145 and 146 above concerning the lawfulness of the deprivation of liberty and, in particular, the aim of Article 5 to protect individuals against arbitrariness. In this connection, it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his or her liberty despite the existence of a court order for his or her release (see *Assanidze v. Georgia* [GC], no. 71503/01, § 173, ECHR 2004-II). While the Court recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable, the national authorities must nevertheless attempt to keep such delay to a minimum (see *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports of Judgments and Decisions* 1997-IV). Administrative formalities connected with release cannot justify a delay of more than a few hours (see, for instance, *Ruslan Yakovenko v. Ukraine*, no. 5425/11, §§ 68 and 69, ECHR 2015, where a delay of two days led to a violation of Article 5 § 1).

155. Having regard to the extent of the delay in releasing the applicants in the present case (five days), and to the absence of any satisfactory explanation by the Government to justify such an extensive delay, the Court finds that the applicants were arbitrarily detained between 5 and 10 February 2015, in breach of the provisions of Article 5 § 1 of the Convention.

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

1. The parties' arguments

156. The applicants argued at the outset that they had not been duly informed about either the decision ordering their detention or the available objection mechanism, and that they had been able to raise objections against their detention only after the appointment of their lawyers.

157. The applicants further complained that although Law no. 6458 provided for a legal mechanism for reviewing the lawfulness of the administrative detention of foreigners, that mechanism had failed to function effectively in their case. Over the course of their almost four-month detention, they had resorted to that remedy a total of six times, and the review conducted by the Istanbul Magistrates' Court following their first five attempts had been completely ineffective.

158. In the case of the second, third and fourth applicants, the Istanbul Magistrates' Court had failed to declare their detention unlawful, despite the fact that they were being detained without a detention order. As for the first applicant, the Istanbul Magistrates' Court had confined itself to reiterating the formal grounds of her detention, without examining the underlying lawfulness, and had dismissed her claims on irrelevant and/or stereotypical grounds. The court had never considered the alternatives to administrative detention that could be applied in her case, although such alternatives were provided for by Law no. 6458. The applicants argued that this was actually a systemic problem and that the magistrates' courts rarely issued any favourable decisions in respect of foreigners challenging their administrative detention.

159. The applicants stated that it was only after their sixth attempt that the Gaziantep Magistrates' Court had conducted a proper review of their claims, had found their detention unlawful and ordered their release. They stressed that the Gaziantep Magistrates' Court had based its finding on the arguments that the first applicant had been raising from the outset. The applicants also drew the Court's attention to the fact that the decision resulting in their release had only come after the Court had delivered an interim-measure decision in respect of them.

160. The applicants lastly argued that the Istanbul Magistrates' Court had taken between seven and thirty-four days to rule on their requests, and

had thus exceeded the five-day time-limit set out under Law no. 6458 for reviewing the lawfulness of foreigners' detention.

161. The Government submitted that the individuals in respect of whom a decision on administrative detention with a view to removal was rendered were provided with an opportunity to appeal against such a decision before the magistrates' courts by virtue of section 57(6) of Law no. 6458. The magistrates' courts had the competence to review a high number of applications expeditiously and order release. In view of the fact that the applicants themselves had been released following the decision of the Gaziantep Magistrates' Court, the Government considered that Article 5 § 4 had not been violated on the facts of the instant case. In support of their arguments, the Government submitted statistical data regarding the applications received in August 2015 by magistrates' courts across Turkey from foreigners under administrative detention, which showed that 100 applications out of a total of 400 had resulted in the release of the foreigners in question. The Government further argued, as part of their preliminary objections, that the individual-application remedy before the Constitutional Court could provide effective redress in respect of all alleged breaches of the fundamental rights and freedoms protected under the Convention.

162. The applicants maintained their argument that the review mechanism provided for by Law no. 6458 did not offer effective safeguards against unlawful detention in practice, and stated that the statistics provided by the Government concerned a period after their release.

2. The Court's assessment

163. 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 a 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, for instance, *Abdolkhani and Karimnia*, cited above, § 139).

164. The Court notes, as indicated in paragraph 147 above, that the lacuna in Turkish law regarding the detention of foreign nationals in the context of immigration controls has been remedied by Law no. 6458, which not only provides a legal basis for such detention, but also sets out a legal mechanism for reviewing its lawfulness. Under sections 57(6) and 68(7) of Law no. 6458, foreign nationals who have been placed in administrative detention under the relevant provisions may challenge the lawfulness of

their detention before the magistrates' courts, which should rule on the lawfulness of the detention within five days by way of a final decision.

165. The Court notes that following the procedure set out in the relevant law, the applicants challenged the lawfulness of their administrative detention on six occasions before magistrates' courts, and also lodged an individual application with the Constitutional Court in that regard. They were eventually released following a decision of the Gaziantep Magistrates' Court, which declared their detention – on the basis of the latest order issued by the Gaziantep governor's office – unlawful. Therefore, in principle, the applicants had the possibility of using a remedy by which to obtain a decision on the lawfulness of their detention. It remains to be determined whether the remedies available in domestic law actually satisfied the requirements of Article 5 § 4 on the particular facts of the instant case.

166. Before embarking on its examination, the Court would stress that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, all judicial-review proceedings concerning the lawfulness of detention must be conducted with particular expedition. That said, in the Court's opinion, given the particular circumstances of the present applicants – a single mother with her three very young children – their request under Article 5 § 4 was particularly urgent.

167. The Court notes in this connection that, as mentioned above, there is a broad consensus in international law against the administrative detention of minors in the context of immigration controls, in keeping with the principle of the "best interests of the child" (see paragraphs 67-79). Against that background, the Court considers that in circumstances where minors have nevertheless been deprived of their liberty, particular expedition and diligence are required on the part of the domestic courts in reviewing the lawfulness of their detention.

168. The Court further notes that the move in international law towards adopting alternative measures to the administrative detention of migrants appears to concern not only children, but also their parents. The Advisory Opinion of the Inter-American Court of Human Rights and the joint general comment of the Committee on the Rights of the Child and the Committee on Migrant Workers have both stated that "when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family" (see paragraphs 79 and 70 above, respectively). The PACE in its Resolution 2020 has similarly called on Member States to adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members in non-custodial, community-based contexts while their immigration status is being resolved. In addition, the UN Special Rapporteur on the human rights of migrants emphasised that States must carefully evaluate the need to detain migrants who are

accompanied by their children (see paragraphs 72 and 69 above, respectively). The Court itself has acknowledged, albeit as part of discussions under Article 8, that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children (see *Popov*, cited above, § 147).

169. The Court will, therefore, examine the effectiveness of the different domestic remedies at the applicants' disposal for obtaining a review of the lawfulness of their detention with those particular considerations in mind.

(a) Judicial review mechanism before the magistrates' courts

(i) The situation of the second, third and fourth applicants

170. The Court reiterates at the outset its findings under Article 5 § 1 regarding the second, third and fourth applicants, who were detained between 18 October 2014 and 23 January 2015 without any official decisions ordering the deprivation of their liberty (see paragraph 150 above).

171. The Court next considers that the wording of section 57(6) of Law no. 6458 invoked by the Government is somewhat ambiguous as to whether the judicial review procedure before the magistrates' courts can provide an effective remedy to individuals who have been detained without an official order, such as the minor applicants in question. A literal reading of the relevant provision suggests that magistrates' courts only have jurisdiction to review the lawfulness of administrative decisions ordering the detention of a foreign national, thereby leaving individuals who are being detained without such a decision outside of their reach. Indeed, the reaction of the Istanbul Magistrates' Court *vis-à-vis* the persistent appeals of the applicants in the present case would appear to support that literal reading.

172. The Court notes in this connection that the second, third and fourth applicants attempted to challenge the lawfulness of their detention before the Istanbul Magistrates' Court and expressly argued, on at least two accounts, that there was no legal basis whatsoever for their detention (see paragraphs 14-16 above). In its first decision dated 21 November 2014, although the Istanbul Magistrates' Court acknowledged the absence of a detention order in respect of the minor applicants, it did not rule on the lawfulness of their detention at the removal centre, apparently precisely because there had been no decision ordering their placement there in the first place (see paragraph 17 above). In its subsequent decisions, the court confined its examination to the lawfulness of the first applicant's detention, without acknowledging in any way the distinct circumstances of the minor applicants. In these circumstances, the Court cannot but find that the judicial review mechanism provided for by Law no. 6458 does not appear to be

capable of remedying situations of unlawful deprivation of liberty such as that in which the second, third and fourth applicants found themselves.

173. The Court is mindful of the fact that the applicants' detention was eventually regularised (following their transfer to Gaziantep) and that they were subsequently released following a decision of the Gaziantep Magistrates' Court. This does not, however, change the fact that they were left in a legal limbo for a considerable time without an effective remedy at their disposal. The Court further emphasises that the scope of the Gaziantep Magistrates' Court's review that led to their release was limited to the lawfulness of the detention order delivered by the Gaziantep governor's office, and did not concern the period during which they had been detained without an official decision in Istanbul.

(ii) The situation of the first applicant

174. The Court reiterates that Article 5 § 4 does not guarantee a right to a judicial review of such scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person in accordance with Article 5 § 1 (see, for instance, *Khlaifia and Others*, cited above, § 128). It is, therefore, not enough for a court to confine itself to the existence of formal grounds for detention, without assessing the underlying lawfulness of the detention on the basis of those grounds (see, *mutatis mutandis*, *Jėčius v. Lithuania*, no. 34578/97, § 101, ECHR 2000-IX).

175. The Court notes in this regard that in the decisions of the Istanbul Magistrates' Court upholding the first applicant's detention as lawful, that court did not in any way engage in a review of the procedural and substantive conditions essential for the "lawfulness" of the deprivation of liberty or the legitimacy of the purpose pursued in ordering her detention (see, for instance, *Khlaifia and Others*, cited above, § 128, and *Kadem v. Malta*, no. 55263/00, § 41, 9 January 2003). Nor did it make any reference to her grievances about the unlawfulness of her detention (see, *mutatis mutandis*, *Jėčius*, cited above). Instead, it repeatedly declared the first applicant's detention lawful using a brief and stereotypical formula, merely enumerating the legal provisions invoked by the administration to detain her.

176. While Article 5 § 4 does not impose an obligation on a court examining an objection against detention to address every argument contained in the detainee's submissions, its guarantees would be deprived of their substance if the court treated as irrelevant, or disregarded, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (see, *mutatis mutandis*, *Ilijkov*

v. Bulgaria, no. 33977/96, § 94, 26 July 2001). The Court also notes that if the court fails to give adequate reasons, or gives repeated stereotyped decisions which provide no answer to the arguments of the applicant, this may disclose a violation by depriving the guarantee under Article 5 § 4 of its substance. The Court notes that in the instant case, not one of the five decisions delivered by the Istanbul Magistrates' Court contained any indication that that court had taken into consideration the arguments submitted by the first applicant (see, *mutatis mutandis*, *Svipsta v. Latvia*, no. 66820/01, § 130, ECHR 2006-III (extracts)).

177. The Court is further struck by the fact that the factual elements that ultimately led to the Gaziantep Magistrates' Court declaring the first applicant's detention unlawful – such as the absence of any explanation or evidence to justify her detention, as well as the absence of a final decision rejecting her asylum request – had been present from the very beginning, as she had made virtually the same complaints in all of her applications to the magistrates' courts (see paragraphs 14-16 and 20 above). The Court does not see why those factors that rendered her detention unlawful in the eyes of the Gaziantep Magistrates' Court had not been, or could not have been, taken into account earlier by the Istanbul Magistrates' Court.

178. In these circumstances, although the first applicant was ultimately able to obtain her release through the use of the review mechanism provided for in section 57(6) of Law no. 6458, the Court is unable to find that that mechanism functioned in a manner that responded to the particular exigencies of her situation, as recognised in paragraphs 166-169 above.

179. In the light of the above finding, the Court does not consider that it is necessary to examine separately the applicant's argument regarding the failure of the Istanbul Magistrates' Court to conduct the review proceedings speedily within the five-day time-limit set under Law no. 6458. The Court would nevertheless like to stress that in the instant case, what is more significant than the duration of the individual proceedings is the overall effect of the inadequate review conducted by the Istanbul Magistrates' Court in its successive decisions. In the Court's opinion, that court's conduct has led to an unjustified prolongation of the first applicant's detention, thereby significantly undermining the effectiveness of the review mechanism set out under Law no. 6458.

(b) Individual application before the Constitutional Court

180. The Court notes that when the applicants were not able to obtain a ruling from the Istanbul Magistrates' Court on the lawfulness of their detention, they lodged an individual application with the Constitutional Court on 15 December 2014 – while they were still being detained at the Kumkapı Removal Centre – and complained, *inter alia*, of both the unlawfulness of their detention and the failure of the Istanbul Magistrates' Court to review the lawfulness issue in an effective manner (see

paragraph 33 above). They drew the Constitutional Court's attention to the specific circumstances of their case, including the fact that they were being detained without consideration of alternatives for detention, despite their vulnerable position as a single mother and three young children, and that they had been kept in the dark about the underlying reasons for their detention.

181. The Court notes at the outset that it has found Article 5 § 4 of the Convention to be applicable to proceedings before domestic constitutional courts and has held in other contexts that the individual application remedy before the Turkish Constitutional Court was, in principle, capable of providing an appropriate remedy within the meaning of Article 5 § 4 of the Convention (see, for instance, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, §§ 159-67, 20 March 2018).

182. Turning to the facts before it, the Court notes that the Constitutional Court did not examine the applicants' complaints concerning their right to liberty either in its decision of 9 January 2015 where it dismissed their interim measure request, or at any other subsequent stage during the course of their detention. In a decision it delivered some three and a half years after the lodging of the individual application, the Constitutional Court merely found that since the applicants' detention had in the meantime been declared unlawful by the Gaziantep Magistrates' Court and they had been released, they could seek compensation for their unlawful detention before the administrative courts.

183. The Court indeed acknowledges that the applicants regained their liberty while their case was still pending before the Constitutional Court. It also does not rule out the possibility that they could receive some compensation for their unlawful detention from the administrative courts. The question nevertheless still remains as to whether the Constitutional Court provided the applicants with an effective remedy within the meaning of Article 5 § 4 of the Convention when they were actively seeking to secure a court ruling on the lawfulness of their detention. The Court reiterates that to be considered effective under Article 5 § 4, a remedy must be made available during a person's detention with a view to that person obtaining a speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release (see, for instance, *Suso Musa v. Malta*, no. 42337/12, § 51, 23 July 2013).

184. The Court notes that the applicants remained in administrative detention for some fifty days after lodging their application with the Constitutional Court, during which period that court took no action as regards their complaints. While the Court is in principle prepared to tolerate longer periods of review in proceedings before a constitutional court – on condition that the original detention order had been given by a court in a procedure offering appropriate guarantees of due process (see, *mutatis mutandis*, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 255,

4 December 2018), the constitutional courts are nevertheless similarly bound by the requirement of speediness under Article 5 § 4 (ibid., §§ 254 and 256; *Smatana v. the Czech Republic*, no. 18642/04, § 123, 27 September 2007; and *Knebl v. the Czech Republic*, no. 20157/05, § 102, 28 October 2010), which must be assessed in the light of the circumstances of each case. The Court considers, for the reasons indicated below, that the Constitutional Court failed to act with the speed that the special circumstances of the present case required.

185. The Court reiterates firstly that in cases where the detention order was not issued by a judicial authority, the subsequent review by a court must follow with greater speed than might otherwise be found appropriate for review of a detention order by a court (see, for instance, *Shcherbina v. Russia*, no. 41970/11, §§ 65-68, 26 June 2014). The original detention order in respect of the applicants in the present case was – or should have been – issued by a governor's office, which is an administrative authority. The Istanbul Magistrate's Court, which was the first-instance court tasked with reviewing the lawfulness of the administrative detention for the initial period of three months while the applicants were detained in Istanbul, had either not undertaken such a review at all – in the case of the second, third and fourth applicants – or its review had been devoid of any effect. In those circumstances, it fell on the Constitutional Court to carry out its review much more promptly.

186. The Court reiterates, secondly, that the special circumstances of the applicants required particular vigilance on the part of the Constitutional Court. The Court has already noted above the developments in international law, according to which the protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort (see paragraphs 68-80 above; see also *Popov*, cited above, § 141). In these circumstances, it goes without saying that in exceptional circumstances where the national authorities nevertheless decide to detain a child and his or her parents for immigration-related purposes, the lawfulness of such detention should be examined with particular expedition at all levels. In the absence of any information in the case file to explain why the Constitutional Court could not have examined the lawfulness of the applicants' detention while they remained in detention – which was a not insignificant period – the Court cannot hold that that court displayed the necessary diligence called for by the circumstances of the case. This is particularly so considering that the case was not complex and the applicants had presented clear arguments challenging the lawfulness of their detention, the accuracy of which could easily be verified from the case file without the need for further investigation.

187. Thirdly, the Court deems it important to emphasise that although the Constitutional Court found that the unlawfulness of the applicants'

detention had already been established by the Gaziantep Magistrates' Court and that compensation would therefore provide them with an effective remedy, it failed to note that the magistrates' court decision concerned solely the unlawfulness of the detention order delivered by the Gaziantep governor's office, and did not concern the applicants' previous detention in Istanbul. This effectively meant that the question of the lawfulness of the applicants' detention during their initial three months in Istanbul was never subject to an effective judicial review as required under Article 5 § 4 of the Convention, which could also undermine their prospects of receiving any compensation for that initial period.

(c) Conclusion

188. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of the applicants' rights under Article 5 § 4 of the Convention on account of the failure of both the Istanbul Magistrates' Court and the Constitutional Court to conduct a review of the lawfulness of their detention in an effective and speedy manner. The Court notes, once again, that the review mechanism set out under Law no. 6458 appears to be wholly ineffective in a case, such as the present one, where the detention of a minor in the immigration context is not based on an administrative decision. Otherwise, however, the conclusion under this head should be seen in the light of the particular circumstances of the instant case and should not be taken as casting doubt on the general effectiveness of the judicial review mechanism under Law no. 6458 or that of the individual application procedure before the Constitutional Court.

C. Remainder of the applicants' complaints under Article 5 of the Convention

189. Relying on Article 5 §§ 2 and 5 of the Convention, the applicants complained that they had not been duly informed of the reasons for their deprivation of liberty and that they had had no right to compensation under domestic law in respect of the violation of their rights under Article 5.

190. In view of its finding of a violation of Article 5 §§ 1 and 4 of the Convention above, the Court does not consider it necessary to examine the applicants' remaining complaints under that provision (see, *mutatis mutandis*, *Zülküf Murat Kahraman v. Turkey*, no. 65808/10, § 48, 16 July 2019).

IV. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

191. The applicants complained that their detention – as a mother and her three young children – in inappropriate conditions for a considerable

period of time had amounted to a violation of their right to private and family life under Article 8 of the Convention. They further claimed under Article 13 that they had had no effective remedies in respect of their complaints under Article 8.

192. Having regard to its findings under Articles 3, 5 § 1 and 13 above, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 8, taken alone and in conjunction with Article 13 (see, for instance, *Mahmundi and Others v. Greece*, no. 14902/10, § 75, 31 July 2012).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

193. 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

194. The applicants claimed 20,000 euros (EUR) each in respect of non-pecuniary damage.

195. The Government contested that claim as excessive.

196. The Court considers that the applicants must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations. Having regard to the seriousness of the violations in question and to equitable considerations, it awards (i) the first applicant EUR 2,250, and (ii) each of the second, third and fourth applicants the requested sum in its entirety (that is EUR 20,000 each) under this head.

B. Costs and expenses

197. The applicants claimed EUR 7,906 for lawyer's fees and EUR 592 for other costs and expenses incurred before the Court. In support of their claims they submitted a timesheet showing that their legal representative had carried out sixty-seven hours' legal work on the application submitted to the Court, as well as some invoices documenting their transportation, translation and postal expenses.

198. The Government argued that the applicants' claims under this head, except for the postal and translation expenses, must be rejected for being unsubstantiated and excessive.

199. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,500 covering costs and expenses under all heads.

C. Default interest

200. 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. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicants' detention at the Gaziantep Removal Centre;

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

5. *Holds* that there is no need to examine the applicants' complaints under Article 13 of the Convention, in conjunction with Article 3, in respect of the conditions of their detention at the Gaziantep Removal Centre;

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

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

8. *Holds* that there is no need to examine the complaints under Article 5 §§ 2 and 5 of the Convention;

9. *Holds* that there is no need to examine the complaint under Article 8 of the Convention, alone or in conjunction with Article 13;

10. *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 the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,250 (two thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the first applicant;

(ii) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to each of the second, third and fourth applicants;

(iii) EUR 5,500 (five thousand five hundred euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

11. *Dismisses* unanimously, the remainder of the applicants claim for just satisfaction.

Done in English, and notified in writing on 15 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President