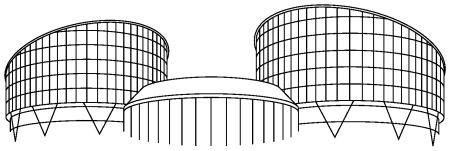

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ERKENOV v. TURKEY

(Application no. 18152/11)

JUDGMENT

STRASBOURG

6 September 2016

FINAL

06/12/2016

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

In the case of Erkenov v. Turkey,

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

Julia Laffranque, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Valeriu Griţco,
Ksenija Turković,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 5 July 2016,

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

PROCEDURE

1. The case originated in an application (no. 18152/11) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national of Chechen origin, Mr Ramazan Erkenov ("the applicant"), on 14 January 2011.

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

3. On 25 September 2014 the applicant's complaints under Article 3, Article 5 §§ 1, 2, 4, and 5 and Article 13 of the Convention regarding his detention at the Gaziantep Foreigners' Removal Centre were communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

4. The applicant 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 this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972. He was detained at the Gaziantep Foreigners' Removal Centre ("the Gaziantep Removal Centre") at the time of the events giving rise to this application. His current address is unknown.

6. In 2000 the applicant fled to Turkey because he was being searched for by the Russian authorities. It appears that shortly before his escape, he had lost his right leg in a bomb attack that struck a mosque in Chechnya.

7. Subsequent to his departure from Russia, criminal proceedings were brought against the applicant by the Russian authorities before the Cerkessk City Court on the following charges: (i) participation in an armed insurrection and membership of an armed organisation with the purpose of overthrowing the constitutional order and violating the territorial integrity of the Russian Federation and (ii) possessing firearms and ammunition. It appears that the Cerkessk City Court issued a detention order in respect of the applicant in his absence.

8. On 24 January 2008 the applicant was taken into police custody in Istanbul in the context of an operation against al-Qaeda. He was subsequently taken to Gaziantep, where he was placed in pre-trial detention at the Gaziantep H-Type Prison upon the order of the Gaziantep Magistrate's Court.

9. On an unspecified date criminal proceedings were commenced against the applicant before the Adana Assize Court.

10. On 28 January 2009 the Adana Assize Court ordered the applicant's release from the Gaziantep H-Type Prison. There is no further information in the case file as regards the outcome of the criminal proceedings.

11. Following his release from prison on 28 January 2009, the applicant was placed in detention at the Gaziantep Removal Centre, which is attached to the Gaziantep Security Directorate.

12. On an unspecified date the Russian authorities requested the extradition of the applicant. On 3 April 2009 the Gaziantep Assize Court refused that request, holding that the offences in question were of a political nature and that under international and national laws, alleged perpetrators of such offences could not be extradited.

13. On 23 October 2009 the applicant applied to the Gaziantep governor's office with a request for asylum. On 26 April 2010 the applicant was notified that his request had been rejected.

14. In the meantime, on 8 April 2010 the applicant submitted a petition to the Ministry of the Interior ("the Ministry"), where he requested to be released and to be granted a residence permit. The applicant's requests were dismissed by the Ministry. The applicant's objection to that decision was further dismissed by the Ministry on 10 June 2010.

15. On 24 July 2010 the applicant was released from the Gaziantep Removal Centre, on the condition that he leave Turkey within fifteen days. It appears that the applicant left Turkey shortly after his release.

16. According to the information in the case file, the applicant met with his lawyer a total of nine times between 3 March 2009 and 27 July 2010 during his detention at the Gaziantep Removal Centre.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. A description of the relevant domestic law and practice at the material time can be found in the cases of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, §§ 29-45, 22 September 2009), and *Yarashonen v. Turkey* (no. 72710/11, §§ 21-26, 24 June 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

18. Relying on Article 5 §§ 1, 2 and 4 and Article 13 of the Convention, the applicant complained that he had been unlawfully detained without having been given the opportunity to challenge the lawfulness of his detention and that he had not been duly informed of the reasons for the deprivation of his liberty. He further maintained, referring to Article 5 § 5 of the Convention, that he had had no right to compensation under domestic law in respect of these complaints.

Article 5 of the Convention provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

...

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."

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

A. Admissibility

20. The Court notes that the applicant's complaints under Article 5 §§ 1, 2, 4 and 5 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

21. The Court notes at the outset that the Government stated, as a general remark, that they were aware of the Court's case-law concerning the relevant provisions of the Convention. As regards the applicant's particular complaint under Article 5 § 1, they argued that he had been detained in accordance with section 23 of the Act on the Residence and Travel of Foreigners in Turkey (Law no. 5683), as in force at the material time, within the meaning of Article 5 § 1 (f) of the Convention. They moreover claimed, in response to the complaints under Article 5 §§ 4 and 5, that the applicant could have applied to the administrative courts, pursuant to Articles 36 and 125 of the Constitution, in order to challenge the lawfulness of his detention. The Government did not submit any particular observations regarding the complaint under Article 5 § 2.

22. The applicant maintained his allegations.

23. The Court has already examined similar grievances in a number of recent cases and found violations of the relevant provisions on account of the absence of clear legal provisions in Turkish law establishing the

procedure for ordering detention of foreigners and providing remedies for the judicial review of the lawfulness of such detention and receipt of compensation (see, for instance, *Yarashonen*, cited above, §§ 37-50; *Musaev v. Turkey*, no. 72754/11, §§ 27-41, 21 October 2014; and *Aliev v. Turkey*, no. 30518/11, § 52-69, 21 October 2014). It notes that the Government have not provided any arguments or information that would require the Court to depart from its findings in those judgments.

24. There has accordingly been a violation of Article 5 §§ 1, 2, 4 and 5 of the Convention on the facts of the instant case.

II. ALLEGED VIOLATION OF ARTICLE 3 TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION IN CONNECTION WITH THE MATERIAL CONDITIONS OF THE APPLICANT'S DETENTION

25. Relying on Article 3 of the Convention, the applicant complained about the material conditions at the Gaziantep Removal Centre, alleging in particular that he had been detained for eighteen months in unhygienic conditions with no sufficient natural light and ventilation; he had not been allowed to go outdoors, even once, during the entire period of his detention; and no social activities had been offered during that time. He also submitted under Article 13, in conjunction with Article 3, that there had been no effective domestic remedies available to him through which to lodge complaints regarding his detention conditions.

Articles 3 and 13 of the Convention provide as follows:

> Article 3
>
> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
>
> Article 13
>
> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Article 3 of the Convention

1. The parties' submissions

26. The Government submitted that conditions at the Gaziantep Removal Centre had been compatible with human dignity and that the applicant had failed to support his allegations with relevant evidence. They claimed in this connection that the removal facility in Gaziantep comprised a building with two floors accommodating fifty persons. There was a toilet on each floor and the removal centre was cleaned by the staff periodically.

The building had several windows, which provided ample access to natural light, and the foreigners at the removal centre were allowed outdoors for fresh air and daily exercise in the courtyard. In support of their submissions, the Government provided photographs of the removal centre, including the various rooms, the sanitary facilities, the kitchen and the courtyard. According to the photographs, a television and a fan were made available in some of the rooms. The Government also submitted a note from the Security Directorate of the Ministry of the Interior regarding the material conditions at the Gaziantep Removal Centre.

27. The applicant stated in response that following his release from prison on 28 January 2009, he had first been placed in detention at the Küsget police headquarters, where he had been kept until July 2009. The room where he had been held at the Küsget police headquarters, which had only measured about ten square metres, had been located in the basement, had insufficient ventilation and lighting and been very dirty. He had subsequently been transferred to the Gaziantep Removal Centre, where he had not been allowed to exercise in the open air or engage in any social activities and where he had been kept in very unhygienic conditions. He claimed that the photographs submitted by the Government did not reflect the reality and that it was evident that the rooms and the furniture had been renovated and rearranged for the purpose of the photographs.

28. The applicant stated that on 11 March 2015 his lawyer had travelled to Gaziantep to visit the removal centre, but he had not been allowed to check the rooms and other facilities. He had therefore interviewed a number of former detainees of the removal centre and lawyers to obtain information regarding the material conditions there. According to the information provided by the interviewees, whose identities were not disclosed, the detainees had not been allowed to use the courtyard (contrary to the Government's submission). Moreover, the photographs submitted by the Government suggested that the rooms had been recently painted, as the walls had previously been very dirty.

29. In addition to the complaints submitted in his application form, the applicant claimed in his observations that the food provided at the Gaziantep Removal Centre had been insufficient and non-nutritious; the conditions for sleeping and resting had been unsatisfactory and the rooms overcrowded; there had been no doctors, psychologists or other health care staff or social workers on site; he had had no communication with the outside world; he had not been offered sufficient medical assistance, despite having contracted an infectious disease; and he had faced particular hardships as a disabled person with a prosthetic leg.

2. The Court's assessment

(a) Preliminary issues

30. The Court notes firstly that while in his application form the applicant claimed to have been detained at the Gaziantep Removal Centre from 28 January 2009 to 24 July 2010 and complained exclusively of the material conditions there, he argued in the observations subsequently presented to the Court on 12 March 2015 that he had in fact been held at the Gaziantep Removal Centre only from July 2009 onwards, and that he had been detained at the Küsget police headquarters during the preceding period. He also submitted some complaints regarding his conditions of detention at the Küsget police headquarters. The Government, for their part, did not comment on this matter.

31. The Court observes secondly that in his reply to the Government's observations, the applicant raised new complaints also regarding the conditions of his detention at the Gaziantep Removal Centre, as noted in paragraph 29 above.

32. The Court cannot establish from the documents in its possession where the applicant was detained between January and July 2009. However, in any event, any complaints concerning the material conditions at the Küsget police headquarters, as well as the complaints noted in paragraph 29 above (including the complaint concerning the hardships faced as a disabled person), were not part of the original complaints included in the applicant's application form, and nor do they constitute an elaboration on those original complaints on which the Government have already commented. They therefore raise new issues that were presented to the Court for the first time on 12 March 2015. Accordingly, the Court must reject them, pursuant to Article 35 §§ 1 and 4 of the Convention, for having been lodged outside the six-month time-limit (see *Ashot Harutyunyan v. Armenia*, no. 34334/04, § 99, 15 June 2010, and *A.D. and Others v. Turkey*, no. 22681/09, § 127, 22 July 2014).

(b) Allegations concerning the conditions of detention at the Gaziantep Removal Centre

33. The Court refers to the principles established in its case-law regarding conditions of detention (see, in particular, *Yarashonen*, cited above, §§ 70-73, and the cases cited therein). 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 in question to suffer distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

34. The Court notes that the applicant and the Government are in dispute as to the factual elements surrounding the conditions of the applicant's

detention. The Government claimed that the applicant had been held at the Gaziantep Removal Centre in conditions compatible with human dignity and that, in particular, he had had sufficient access to natural light and fresh air, that the premises had complied with basic sanitary standards and that he had had daily access to outdoor exercise. The Government supported their submissions with a note from the Security Directorate of the Ministry of the Interior attesting to the material conditions at the Gaziantep Removal Centre, as well as with photographic evidence. According to the photographs provided by the Government, the removal centre, which was equipped with a kitchen, sanitary facilities, a courtyard and several rooms of different sizes, appeared to comply with the basic hygiene standards, and clean bedding was available on the bunk beds. All the rooms pictured in the photographs received plenty of daylight, as there was at least one large window in each room and none of the windows were obstructed by metal shutters or grids that would prevent the inflow of air or light. There were two wooden tables and benches in the courtyard by the building, and the courtyard appeared to be of a decent size.

35. The applicant, for his part, claimed that, contrary to the Government's allegations, he had not been allowed outside the removal centre during his entire stay there. He did not, however, comment on the photographs submitted by the Government, except to say that they did not reflect the reality. In this connection, he did not submit that he had not been kept in one of the well-lit rooms displayed in the photographs, and nor did he explain how it was that the large windows in those rooms had not sufficiently allowed in fresh air and natural light. The applicant similarly failed to comment on the state of the sanitary facilities or the general cleanliness of the premises, as photographed by the State authorities. Instead, he referred to some interviews that his representative had said that he had conducted with a number of lawyers and former detainees of the removal centre in question, who had stated only that there was no practice of allowing detainees access to the courtyard and that the walls in the photographs submitted by the Government looked freshly painted, without commenting on other alleged shortcomings complained of by the applicant.

36. 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 applicant's own words are insufficient to prove his allegations (see *Khodorkovskiy v. Russia*, no. 5829/04, § 106, 31 May 2011). While the Court acknowledges that information about the physical conditions of detention falls within the

knowledge of the domestic authorities and that, accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection (see *Aden Ahmed v. Malta*, no. 55352/12, § 89, 23 July 2013), they are nevertheless expected to corroborate their allegations as much as the circumstances allow them (see *Kyriacou Tsiakkourmas and Others*, cited above, § 283). In similar situations the Court has considered, for example, written statements by fellow detainees provided by applicants in support of their allegations (see *Visloguzov*, cited above) or documents showing that relevant issues had been brought to the attention of the domestic authorities as sufficient evidence to declare the complaint well-founded (see *Daniliuc v. Romania* (dec.), no. 7262/06, § 53, 2 October 2012, and *Aleksandr Vladimirovich Smirnov v. Ukraine*, no. 69250/11, § 47, 13 March 2014). The Court will now examine whether the applicant has substantiated his allegations with sufficient and relevant evidence, as required.

37. The Court firstly notes that the applicant contacted the office of the Gaziantep governor and the Ministry of the Interior on a couple of occasions during his detention at the Gaziantep Removal Centre (see paragraphs 13 and 14 above), but it appears that on neither of those occasions did he complain of the physical conditions of his detention. Nor did the applicant's lawyer, with whom he was in close contact throughout his detention (see paragraph 16 above), lodge a complaint with any authorities regarding the conditions in which the applicant was held.

38. The Court secondly notes that apart from the allegation regarding the lack of access to outdoor exercise, which requires no further explanation, the applicant did not detail his complaints regarding the allegedly adverse material conditions at the Gaziantep Removal Centre – not even in response to the photographic evidence submitted by the Government, which appears to refute his allegations. The applicant claimed that on 11 March 2015 (that is to say, after the submission of the Government's observations) his legal representative had attempted to visit the Gaziantep Removal Centre in order to be able to provide a first-hand account of the conditions of detention there, but had been denied access. The Court notes, however, that there is no written record of such a denial of access to the removal centre in the case file, and nor is there any evidence of any complaints having been made to the relevant State authorities in this regard.

39. The Court thirdly notes that while the applicant claimed that his lawyer had interviewed a number of lawyers and former detainees in relation to the conditions at the Gaziantep Removal Centre, he did not, once again, submit any written statement or other tangible evidence supporting that submission, and offered no explanation as to why such evidence could not be provided. In these circumstances, the probative value of these interviews is questionable.

40. The Court fourthly notes that the applicant's submissions regarding the conditions of detention at the Gaziantep Removal Centre cannot be verified by other credible sources either, such as reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") or findings of reputable non-governmental organisations, which are often used by the Court to provide a reliable basis for the assessment of conditions of detention (see, for instance, *Kehayov v. Bulgaria*, no. 41035/98, § 66, 18 January 2005, and *Kurkaev v. Turkey*, no. 10424/05, § 34, 19 October 2010). The Court notes that Human Rights Watch and the CPT observed some of the problems raised by the applicant (such as lack of access to daily outdoor exercise and unhygienic conditions) in certain removal centres that they visited in June 2008 and 2009 respectively (see *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08, § 52, 13 April 2010, and *Yarashonen*, cited above, § 28, respectively). However, the problems noted in those reports were specific to the facilities visited, which did not include the Gaziantep Removal Centre, and the Court does not have sufficient evidence in its possession to allow it to conclude that these were systemic problems that affected all removal centres.

41. The Court acknowledges the serious nature of the allegations made by the applicant. However, in the light of the foregoing, it is not in a position to conclude that the applicant has made a *prima facie* case as regards the degrading conditions of his detention at the Gaziantep Removal Centre. The Court particularly stresses in this connection that the applicant had the opportunity to meet with his lawyer a number of times during the course of his detention (see paragraph 16 above) and was thus in a position to submit more tangible evidence regarding the material conditions at the Gaziantep Removal Centre.

42. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Article 13 of the Convention

43. The Court recalls that Article 13 requires the State to provide an effective legal remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII).

44. Given that the complaint about the conditions of detention at the Gaziantep Removal Centre was declared inadmissible as being manifestly ill-founded (see paragraph 44 above), the Court finds that the applicant did not have an "arguable claim" under Article 3 for the purposes of Article 13 of the Convention.

45. Accordingly, this complaint is also manifestly ill-founded and must be declared inadmissible within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 45,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contested that claim as excessive.

49. The Court considers that the applicant must have suffered non-pecuniary damage in relation to his complaints under Article 5 of the Convention, 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 the applicant EUR 7,500 under this head.

B. Costs and expenses

50. The applicant also claimed EUR 4,956 for lawyer's fees and EUR 392 for other costs and expenses incurred before the Court, such as travel expenses, stationery, photocopying, translation, postage and communication. In that connection, he submitted a time sheet showing that his legal representatives had carried out forty-two hours of legal work, a legal services agreement concluded with his representatives, invoices in respect of translation and postage expenses, and the electronic aeroplane ticket for his representative's travel to Gaziantep on 11 March 2015 indicating the payment made for the ticket. The remaining expenses were not supported by any documents.

51. The Government contested those claims, deeming them unsubstantiated. They claimed in particular that the invoices in relation to the postage and travel expenses did not indicate that they had been incurred in relation to the present application.

52. 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 5,200 covering costs under all heads. The Court also notes, in response to the Government's allegations mentioned in the preceding paragraph, that the invoices submitted in relation to postage expenses do refer to the applicant's name, and the electronic ticket indicates both the name of the applicant's representative and the date of travel, which match the information in the case file.

C. Default interest

53. 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 complaints under Article 5 §§ 1, 2, 4, and 5 admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, 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 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 6 September 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Julia Laffranque
Deputy Registrar	President