Refugee Rights Turkey

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A PRESSING NEED:

THE LACK OF LEGAL REMEDY IN CHALLENGING MATERIAL CONDITIONS OF FOREIGNERS UNDER ADMINISTRATIVE DETENTION IN TURKEY

OPINION PAPER

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Introduction

Detention of foreigners, including persons seeking international protection, has long been a key human rights concern in Turkey. Although both the Constitution of the Republic of Turkey and the European Convention of Human Rights have specific provisions to safeguard the right to liberty and security, this particular problem was finally addressed in the judgment of the European Court of Human Rights ('ECHR') in its decision Abdolkhani and Karimnia v. Turkey on 22 September 2009. The key finding of the ECHR decision was the need for an overhaul of Turkish legislation and practice in the field of migration and asylum. In the ensuing years, the ECHR continued to deliver a set of similar judgments[i] against Turkey, all making direct references to Abdolkhani and Karimnia v. Turkey.

Following the adoption of Law No. 6458 on Foreigners and International Protection — Turkey's first law on asylum and migration— immigration detention has been finally provided with a solid legal ground and dubbed as 'administrative detention' under the new legislation.

Law No. 6458 on Foreigners and International Protection introduced a number of critical procedural safeguards related to immigration detention, all largely established in line with the case law of ECHR. Important safeguards incorporated into the new law include grounds for administrative detention, maximum allowable periods, an administrative mechanism for the review of the legality of the detention, the requirement to provide notification of all decisions related to the administrative detention, and a judicial remedy.

Yet, notwithstanding this positive development, Refugee Rights Turkey is concerned that there is still great room for improvement within this reformed system, particularly in the area of immigration detention. This opinion paper will limit its focus to just one of these issues, namely, the lack of a legal remedy in challenging the material conditions of immigration detention facilities in Turkey. As outlined in this opinion paper, Refugee Rights Turkey is concerned that there is neither an administrative nor judicial legal remedy available for detained foreigners to challenge material conditions. Moreover, the recent dramatic increase in the number and capacity of detention centres in Turkey makes the need for a legal remedy all the more pressing.

Immigration Detention under Law No. 6458 on Foreigners and International Protection

The right to a legal recourse against all administrative actions and acts is enshrined in Article 125 of the Constitution of the Republic of Turkey ('Constitution'). Similarly, every person alleging an infringement of constitutional rights and freedom has the right to request prompt access to competent authorities under Article 40 of the Constitution.

In 2001, Turkey also made an amendment to Article 40 of the Constitution in order to facilitate prompt access to a competent authority. With this amendment, the state assumed an additional responsibility and now all branches of government are required to indicate available legal remedies, the name of competent authorities, and time caps on all proceedings.

As previously mentioned, Law No. 6458 established both administrative and judicial mechanisms for the review of the legality of immigration detention. The new law primarily introduced two types of immigration detention: administrative detention for the purpose of removal and administrative detention of international protection applicants.

Administrative detention for the purpose of removal is regulated under Article 57 of the new law. This provision provides an exhaustive list of grounds for detention of persons in removal proceedings and introduces a maximum 12 month (6+6) limit to this end. Governorates, who are entrusted with the authority to make administrative detention decisions, are also required to carry out reviews of the necessity of detention. Governorates perform this role through routine monthly reviews. In addition, should the governorates be made aware of any other compelling issues, they are not required to wait 30 days and have the authority to immediately halt administrative detention of a foreigner. Moreover, the said provision further requires authorities to provide notice to detainees and their legal representative of the administrative detention decision, the basis for an extension of the detention as well as the results of the monthly reviews. In cases where a detainee is not represented by a lawyer, the authorities are required to inform the detainee of the impact of decisions, what the appeal procedure is, and time limits for filing an appeal.

Article 57 also established judicial review for the legality of administrative detention. The competent authority responsible for implementing this is the Judge of the Criminal Court of Peace. Either the detainee or his/her legal representative or lawyer has the right to appeal against the detention decision before the Judge of the Criminal Court of Peace at any stage of the administrative decision. The Judge of the Criminal Court of Peace is required to deliver

its ruling latest within 5 days of the date of appeal. The decision of the Judge of the Criminal Court of Peace is also final. Although it has not been specifically noted in the said provision, all courts in Turkey are under the obligation to deliver their decisions with a justification as per Article 141 of the Constitution. Detainees or their legal representatives or lawyers are also entitled to make a separate appeal to the Judge of the Criminal Court of Peace should the administrative detention grounds no longer apply or have changed. Alternatively, as the decision is final and thus available remedies are considered to be exhausted, detainees may lodge an individual application before the Constitutional Court of Turkey to challenge detention decisions.

The administrative detention of international protection applicants is, on the other hand, regulated under Article 68 of the Law No. 6458 on Foreigners and International Protection. This provision also provides an exhaustive list of grounds for detention and regulates the maximum allowable period as 30 days. Similarly, governorates have the authority to halt administrative decision at any stage should a compelling situation arise. Article 68 also requires authorities to provide notice of the administrative detention decision and the time period, together with reasons, to the detainee or his/her legal representative or lawyer. In cases where the detainee is not represented by a lawyer, the authorities are required to inform the detainee about the consequences of the decision, the procedure and time limits for appeal. Finally, the judicial review of the legality of the detention of international protection applicants is identical with the mechanism afforded to the persons detained for removal purposes.

In sum, administrative and judicial review mechanisms pertaining to immigration detention focus only on the legality of the detention. However, the availability of a specific administrative or judicial remedy to challenge material conditions as well as notification of this right, together with the competent authorities and time periods, is also a key requirement under Article 40 of the Constitution.

The Constitutional Court of Turkey and the Case of K.A.

The lack of a legal remedy for challenging material conditions has been one of the lingering issues, dating back to the period before the adoption of the Law No. 6458 on Foreigners and International Protection. For instance, prior to adoption of the new law, in many cases[ii] lodged before the ECHR, applicants have not only sought remedies for unlawful detention; but also raised their grievances concerning material conditions in removal centres and other places of detention. Moreover, in the majority of these cases[iii], ECHR ruled that the minimum threshold of severity have been reached and thus found a violation incompatible with Article 3 of the European Convention of Human Rights.

Following the Constitutional amendments in 2010, the Constitutional Court of Turkey ('The Constitutional Court') was also entrusted with the authority to receive individual applications alleging violations of rights and freedoms guaranteed both under the Constitution and European Convention of Human Rights. From this date onwards, the Constitution Court has received and adjudicated a significant number of applications and interim measure requests from foreigners, including persons seeking international protection, in Turkey. The lack of a legal remedy in challenging material conditions of administrative detention in Turkey, however, first came up in the case of K.A., Application No: 2014/13044.

The case originated from the application of a Syrian national, K.A., who had been detained in Kumkapi Removal Centre in Istanbul for a period of 8 months and 10 days. During his detention, the applicant applied to the Judge of the Criminal Court of Peace to seek his release, and in at least two of these applications, he complained about material conditions at the detention facility that reportedly caused physical and psychological suffering. Yet, none of these applications were able to obtain a favourable outcome with respect to the applicant.

Based on these complaints, the Constitutional Court decided to examine the merits of the case in light of Article 17 of the Constitution, enshrining both the right to life and the prohibition of torture and ill-treatment, in conjunction with Article 40.

In a unanimous decision delivered on 11 November 2015, the Constitutional Court made references to the relevant case law of ECHR and underlined the critical importance of the subject matter of the case. That is, the Constitutional Court recalled that the right guaranteed under Article 17 of the Constitution and Article 3 of the European Convention of Human Rights is of an absolute nature. The Constitutional Court further stated that there is a

compelling requirement for a legal remedy to be of a compensatory nature and an effective mechanism should be available to put a rapid end to the ill treatment.

Having recalled these fundamental requirements, the Constitutional Court found that mechanisms established under the Law No. 6458 on Foreigners and International Protection 'failed to foresee any specific administrative or judicial remedy which sets the standards of detention conditions and includes monitoring and review of the conditions' and 'which could review the compatibility of detention conditions with Article 17 of the Constitution and have a power to fix the condition or halt the detention in the event of an infringement'. In other words, for the first time, the highest court in Turkey ruled that there is not any specific administrative or judicial remedy available for persons under administrative detention to challenge their material conditions. The corresponding meaning of this violation in the ECHR lingua is a violation of Article 3 in conjunction with Article 13.

In the ensuing period, the Constitutional Court continued to issue judgments for similar complaints. These cases include the case of F.A. and M.A[iv] , the case of A.V. and Others[v] , the case of T.T.[vi] , the case A.S.[vii] , the case of I.I.[viii] , and the case of I.S. and Others[ix] . While the applicants in the case of I.S. and Others were also mostly detained in Kumkapı Removal Centre in Istanbul and in what was then officially called 'Adana Reception and Accommodation Centre'; in the remaining cases, applicants were mostly detained in Kumkapı Removal Centre in Istanbul.

With the single exception of the case of I.I., of which the Constitutional Court found the case inadmissible due to time limitations, the Constitutional Court found all other cases admissible. In all these cases, the Constitutional Court ruled that there had been a violation of Article 17 of the Constitution with respect to material conditions. Furthermore, and again in all these cases, the Constitutional Court made a direct reference to its judgment in the case of K.A. and concluded that there had been a violation of Article 17 in conjunction with Article 40 of the Constitution.

It is important to note that these judgments also found their echoes before the ECHR. On 13 September 2016, the ECHR published six decisions[x] concerning Turkey. Applicants in all these cases were previously detained at Kumkapi Removal Centre and raised identical grievances with the applicants in the case of K.A. as well as in other aforementioned cases. The government of Turkey, on the other hand, has opted for a friendly settlement in all six cases, indicating an admission of the problem outlined in this opinion paper.

Conclusion

According to the official data[xi] provided by the Directorate General of Migration Management (DGMM), the official body responsible for the asylum and migration management in Turkey, there were 19 removal centres with a capacity of 6780 persons at the time of writing. Five of these removal centres are based in Erzurum, Gaziantep, Izmir, Kayseri and Kirklareli provinces of Turkey. The centres were initially envisioned to serve as 'Reception and Accommodation Centres' for persons seeking international protection in Turkey. However, within the context of EU-Turkey Readmission Agreement and the subsequent adoption of EU-Turkey Joint Action Plan in 2015 (also known as 'EU-Turkey Deal'), all these centres were transformed into removal centres with EU approval. In addition, the DGMM also stated that the last remaining reception and accommodation centre with a capacity of 750 in Van province shall also be transformed into a removal centre by 2017.

Turkey is also planning to build 3 'container-type' removal facilities in Osmaniye, Aydin and Istanbul, with a total capacity of 6600 persons, as well as 9 additional removal centres, with a total capacity of 3120 persons in 2017. In other words, according to the official data of the DGMM, Turkey shall have a total of 32 removal centres/facilitates with a capacity of 17,250 by 2017.

In this context, Refugee Rights Turkey recalls that Turkey is a State Party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment since 1989. Refugee Rights Turkey is therefore of the opinion that the standards of the Committee on the Prevention of Torture ('CPT Standards'), which serve as guidance to state parties, could be of a critical importance in addressing the pressing issues outlined in this legal paper. CPT standards should also be consulted in the review and development of legislation concerning asylum and migration management. Efforts should be taken in order to ensure a full compliance in practice.

Refugee Rights Turkey further notes that Turkey is also a State Party to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT') and thus, Turkey is required to establish a national preventive mechanism under the OPCAT. Recently, Turkey entrusted this role to the national Human Rights and Equality Institution ('TİHEK') following the adoption of the Law on Human Rights and Equality Institution on 20 April 2016. However, there are a set of concerns[xii] regarding TİHEK's compliance with the Paris Principles, an internationally recognised set of principles that aim to guarantee minimum standards to ensure the independence of

domestic human rights institutions. Moreover, the appointment of members to the Human Rights and Equality Board, TİHEK's decision-making body, is yet to be completed and the institution is therefore not in a position to assume such a critical role.

Refugee Rights Turkey strongly believes that immigration detention should be the measure of last resort, to be used in exceptional cases only. Refugee Rights Turkey also believes that detention of vulnerable persons should be, in principle, avoided. Refugee Rights Turkey therefore encourages the use of alternatives to detention and an effective implementation of alternative measures. In line with this understanding, Refugee Rights Turkey reiterates that both national and international civic stakeholders working on such alternatives could play a valuable role to this end.

Recommendations

Refugee Rights Turkey believes that the dramatic increase in the number and capacity of detention centres, the forthcoming 'container-type' removal centres, and the lack of an operational preventive mechanism, are among the factors that make the need for a legal remedy and an effective monitoring system more pressing than ever and therefore calls on authorities to:

•Promptly establish specific and effective legal remedies and mechanisms for the monitoring of all immigration detention places;

•Use the immigration detention only as a measure of last resort and avoid detention of vulnerable persons;

•Review all legislation, particularly those on immigration detention, in light of CPT Standards and other applicable international standards and ensure that any forthcoming regulation should, as a principle, first aim to guarantee full compliance with these norms and standards;

•Take steps to ensure that national human rights institutions comply with the Paris Principles, in consultation and in collaboration with experienced civic stakeholders.

•Recall that there are alternatives to immigration detention. Authorities should continue to collaborate with experienced civic stakeholders to increase the availability and implementation of these alternatives to detention.

End notes

[i]These decisions are Z.N.S. v. Turkey, Application No: 21896/08, 10 January 2010; Tehrani and Others v. Turkey, Application No: 32940/08, 41626/08, 43616/08, 13 April 2010; Ranjbar and Others v. Turkey, Application No: 37040/07, 13 April 2010; Charahili v. Turkey, Application No: 46605/07, 13 April 2010; Dbouba v. Turkey, Application No: 15916/09, 13 July 2010; D.B. v. Turkey, Application No: 33526/08, 13 July 2010; Alipour and Hosseinzadgan v. Turkey, Application No: 6909/08, 12972/08 and 28960/08, 13 July 2010; Kurkaev v. Turkey, Application No: 10424/05, 19 October 2010; Moghaddas v. Turkey, Application No: 43134/08, 15 February 2011; Keshmiri v. Turkey No (2), Application No: 22426/10, 17 January 2012; Athary v. Turkey, Application No:50372/09, 11 December 2012; Ghorbanov and Others v. Turkey, Application No: 28127/09, 3 December 2013; Asalya v. Turkey, Application No: 43875/09, 15 April 2014; Yarashonen v. Turkey, Application No: 72710/11, 24 June 2014; A.D. and Others v. Turkey, Application No: 22681/09, 22 July 2014; T. and A. v. Turkey, Application No: 47146/11, 21 October 2014; Musaev v. Turkey, Application No: 72754/11, 21 October 2014; Aliev v. Turkey, Application No: 30518/11, 21 October 2014; S.A. v. Turkey, Application No: 74335/10, 15 December 2015; Babajanov v. Turkey, Application No: 49867/08, 10 May 2016; Erkenov v. Turkey, Application No: 18152/11, 6 September 2016 and Alimov v. Turkey, Application No: 14344/13, 6 September 2016.

[ii]Cases where applicants raised their grievances concerning material conditions in removal centres and other places of detention include Z.N.S. v. Turkey, Application No: 21896/08, 10 January 2010; Tehrani and Others v. Turkey, Application No: 32940/08, 41626/08, 43616/08, 13 April 2010; Charahili v. Turkey, Application No: 46605/07, 13 April 2010; Alipour and Hosseinzadgan v. Turkey, Application No: 6909/08, 12972/08 and 28960/08, 13 July 2010; Abdolkhani ve Karimnia 2 v. Turkey, Application No: 50213/08, 27 July 2010; Asalya v. Turkey, Application No: 43875/09, 15 April 2014; Yarashonen v. Turkey, Application No: 72710/11, 24 June 2014; T. and A. v. Turkey, Application No: 47146/11, 21 October 2014; Musaev v. Turkey, Application No: 72754/11, 21 October 2014; Aliev v. Turkey, Application No: 30518/11, 21 October 2014; S.A. v. Turkey, Application No: 74335/10, 15 December 2015 and Alimov v. Turkey, Application No: 14344/13, 6 September 2016.

[iii]These cases where ECHR found a violation incompatible with Article 3 of the European Convention of Human Rights are Tehrani and Others v. Turkey, Application No: 32940/08, 41626/08, 43616/08, 13 April 2010; Charahili v. Turkey, Application No: 46605/07, 13 April

2010; Abdolkhani ve Karimnia 2 v. Turkey, Application No: 50213/08, 27 July 2010; Asalya v. Turkey, Application No: 43875/09, 15 April 2014; T. and A. v. Turkey, Application No: 47146/11, 21 October 2014; Musaev v. Turkey, Application No: 72754/11, 21 October 2014; Aliev v. Turkey, Application No: 30518/11, 21 October 2014; S.A. v. Turkey, Application No: 74335/10, 15 December 2015 and Alimov v. Turkey, Application No: 14344/13, 6 September 2016.

[iv]Application No: 2013/655, Decision Date: 20 January 2016.

[v]Application No: 2013/1649, Decision Date: 20 January 2016.

[vi]Application No: 2013/8810, Decision Date: 18 February 2016.

[vii]Application No: 2014/2841, Decision Date: 9 June 2016.

[viii]Application No: 2014/15876, Decision Date: 21 September 2016.

[ix]Application No: 2014/15824, Decision Date: 22 September 2016.

[x]These decisions are Bakhtiiarova and Durmuş v. Turkey, Application No: 74585/12; Cristina v. Turkey, Application No: 13907/13; Lemghari and Hajjaj v. Turkey, Application No: 12778/12; Muhammed v. Turkey, Application No: 12778/12; Musayev v. Turkey, Application No: 20295/13 and S.B. v. Turkey, Application No: 38287/11.

[xi]Directorate General of Migration Management, Removal Centres, http://www.goc.gov.tr/icerik6/removal-centers_915_1024_10105_icerik

[xi] The lack of a consultative process with civic stakeholders in the drafting of the law, the lack of compliance with minimum safeguards required for ensuring operational independence and the independence in the selection and appointment of members, the lack of a comprehensive and clear definition of discrimination and exclusion of several discrimination grounds are among these concerns. For a more detailed assessment of the Law on Human Rights and Equality Institution, please refer to (in Turkish): İnsan Hakları Ortak Platformu (Human Rights Joint Platform), Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu Tasarısı Hakkındaki Görüşlerimiz, 17 Şubat 2016, http://www.ihop.org.tr/2016/02/18/turkiye-insan-haklari-ve-esitlik-kurumu-kanunu-tasarisi-hakkindaki-goruslerimiz/

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