“Implicit Withdrawal” of International Protection Applications in Turkey: Issues in Implementation and Recommendations

Legal Opinion Paper

December 2017

Mülteci Hakları Merkezi

Refugee Rights Turkey

LEGAL OPINION PAPER

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With the adoption of the Law on Foreigners and International Protection (No. 6458)[1], many legal concepts originating from the EU migration and asylum acquis were incorporated into Turkey's domestic legal framework in line with Turkey's efforts to harmonise its legislation within the context of the European Union accession process. One of these new concepts is the "implicit withdrawal" of an international protection application.

It is generally argued that the policy objective in treating an international protection application as withdrawn is to identify claimants whose behaviour demonstrates that either they are not serious about their international protection applications[2] or they show no real interest in pursuing their claim, because they fail to comply with procedural obligations; and, thus, to dismiss these applications without further consideration. However, the main focus of debates lingering over this concept is that, unlike cases where an international protection applicant explicitly withdraws his/her asylum claim, this policy is primarily based on the implicit or presumed will of the asylum claimant and entrusts the determining authority with the mandate to discontinue the examination of the claim.

As mentioned above, the Law on Foreigners and International Protection (LFIP) incorporated the term "implicit withdrawal of the application" from the 2005 EU Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status ("The Asylum Procedures Directive")[3].

Article 77 of the Law on Foreigners and International Protection states that the international protection application shall be considered withdrawn and the examination of the application shall be discontinued in cases where the applicant has not appeared for the interview three consecutive times without excuse (Article 77/1-b); has absconded from the place where he/she was held under administrative detention (Article 77/1-c); has failed to comply with

reporting duties three consecutive times without an excuse and has not shown up in the designated place of residence or has left the place of residence without authorisation (Article 77/1-ç); objects to the collection of personal data (Article 77/1-d); and refuses to comply with his/her obligations at registration and interview (Article 77/1-e).[4]

In addition to this provision in the LFIP, Article 79 of the Regulation on the Implementation of the LFIP ("The Regulation")[5] further states that, in cases where the application is considered withdrawn, the examination of the claim shall be discontinued and this decision will be registered in the central database of the Directorate General for Migration Management (Article 79/1); the applicant shall be notified of the decision (Article 79/2); the persons whose applications are considered to be withdrawn shall be removed, provided that the decision is final and there is not any other ground granting him/her a right to remain in Turkey (Article 79/4); a renewed application following this decision shall be adjudicated under the accelerated procedure (Article 79/5); and these applicants may be issued a ban on [re-]entry to Turkey (Article 79/6).

This Opinion Paper aims to invite attention on two frequently observed and reported issues arising from the current application of the "implicit withdrawal of the international protection application" under LFIP. The first issue concerns the requirement in practice for an applicant to file an administrative or a judicial appeal to challenge the previously issued "implicit withdrawal" decision, in order to regain access to the international protection procedure after implict withdrawal, as a de facto precondition. The second issue concerns the confiscation of the international protection applicant identity document pursuant to the notification of the "implicit withdrawal" decision before the latter becomes legally "final". It is argued that these two practices do not only make it more difficult for the persons concerned to access the safeguards and basic rights provided to international protection applicants under LFIP, they also put an additional burden on both administrative and judicial authorities who are already struggling with a considerable workload.

■ "Implicit withdrawal" of international protection applications, appeal mechanisms and other safeguards provided under LFIP:

In current practice, the most common grounds triggering the "implicit withdrawal" decisions in Turkey as per Article 77 of LFIP are failure to comply with reporting duties and leaving the assigned place of residence without authorisation.

One of the underlying reasons behind this phenomenon is the requirement for international protection applicants to reside in the province to which they are assigned[6], also known as the "satellite city" policy, which fundamentally aims to disperse the asylum seeker population in Turkey. Within the framework of this policy, persons seeking international protection in Turkey are assigned to various provinces that are designated as "satellite cities" and are required to reside in the assigned provinces until the completion of their asylum procedures[7]. The applicants are also under the obligation to report to the provincial authorities in regular intervals, and to register their domicile addresses under the centralized address-based registration system[8]. In line with this policy, international protection applicants who wish to travel to other provinces for any personal reasons are also required to obtain a 'travel permission document'[9] from the authorities in their designated province, which would allow them to leave their assigned province for up to 30 days, which can only be renewed once.

However, as both international protection applicants and status holders are required to cover their own housing costs[10], and income earning opportunities may be limited in their assigned province of residence, many feel compelled to move to greater metropolitan areas to seek job opportunities, mostly in the informal sector. Thus, a significant number of international protection applicants leave their assigned satellite cities and thereby fail to comply with their reporting duties with provincial authorities; as a result, as per Article 77 of the LFIP the General Directorate of Migration Management considers their applications to be "implicity withdrawn".

As a consequence of the "implicit withdrawal" of the international protection application, the determining authority discontinues the adjudication of the asylum claim, upon which the person concerned will be subject to deportation proceedings following the finalization

of the implicity withdrawal decision. In other words, the implicit withdrawal of the international protection application results in the termination of the examination of the asylum claim on its merits, as the applicant is considered to demonstrate that he/she has shown no real interest in pursuing his/her claim; a separate deportation order will then likely issued to the applicant. Article 54[11] of the Law on Foreigners and International Protection also reiterates the implicit withdrawal of the international protection application constitutes a ground for deportation.

However, the Law on Foreigners and International Protection also provides a number of important safeguards for inviduals who may be subject to such an implicit withdrawal decision.

Firstly, both the Law on Foreigners and International Protection[12] and the Regulation[13] reiterate that the implicit withdrawal of the international protection application may only constitute a ground for deportation in the absence of any other ground for granting the applicant a right to remain in Turkey. Thus, Article 4 on the principle of non-refoulement and Article 55 on the persons who shall not be issued a deportation order should be given due regard and prevail over any removal decision.

Article 4 of the Law on Foreigners and International Protection is basically a reiteration of one of the core principles of international law - i.e. the principle of non-refoulement - and states that no one shall be returned to a place where he/she may be subjected to torture, inhuman or degrading punishment or treatment, or where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. Article 55, on the other hand, reads that a removal decision will not be issued with respect to foreigners, regardless of whether they are within the scope of Article 54 persons who may be issued a deportation order, when: a) there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned; b) they would face risk due to serious health condition, age or pregnancy in case of travel; c) they would not be able to receive treatment in the country to which they shall be returned while undergoing treatment for a life-threatening health condition; c) they are victims of human trafficking, who are

supported by the victims assistance programme; and d) they are victims of serious psychological, physical or sexual violence, until their treatment is completed.

Secondly, both the Law on Foreigners and International Protection and the Regulation emphasise that for the implicit withdrawal of the international protection application to constitute grounds for removal, it must become "final". The Law on Foreigners and International Protection states that a decision will become final if a request for administrative review or a judicial appeal against the decision has not been issued by the Directorate General for Migration Management; or, in the case of an appeal, if the judicial decision can no longer be appealed[14].

The Law on Foreigners and International Protection also allows for administrative and judicial appeals against decisions for implicit withdrawal of international protection applications. Under the administrative review procedure, the applicant or his/her lawyer or legal representative has the right to apply to the International Protection Assessment Commission within 10 days of the notification of the decision[15]. The right to seek an administrative review neither prejudices the applicant's right to appeal against the decision before the court nor stops the limitations period for filing a claim from running[16]. The Regulation further states that the International Protection Assessment Commission is required to deliver its decision at the latest within 15 days of the receipt of the request for review; this period may be extended for a maximum of five more days; and the decision of the Commission shall be communicated to the applicant or his/her lawyer or legal representative[17].

The applicant also has the right to request a judicial review within 30 days of the notification of the decision[18]. Although the Law on Foreigners and International Protection requires administrative courts to deliver a ruling within 15 days on appeals against inadmissible decisions and decisions taken under accelerated procedure[19], a similar time limit has not been set for appeals against implicit withdrawal decisions[20]. In addition, the Law on Foreigners and International Protection states that decisions made by administrative courts on appeals against inadmissible decisions and decisions taken under accelerated procedure are final[21]; however, a no such limitation is imposed in regards appeals against implicit

withdrawal decisions. Thus, pursuant to Article 45 of the Procedure of Administrative Justice Act[22], an applicant has the right to file an appeal before the regional court of appeals, a higher appeal court, within 30 days of the notification of the decision. Again, under the Procedure of Administrative Justice Act, the judgment of the regional court of appeals in this matter is not subject to appeal[23].

In light of above-summarised regulations, a negative ruling of the regional court of appeals shall render the decision of implicit withdrawal of the international protection application "final" within the meaning of the Law on Foreigners and International Protection. It is also important to recall that the separate removal decision, which may follow the implicit withdrawal decision, can only be issued on the basis of the mentioned "final" decision and can also be separately challenged in court.

Thirdly, according to the Regulation, even if the decision of "implicit withdrawal" of the international protection application becomes "final" within the meaning of the Law on Foreigners and International Protection, it may not constitute grounds for removal unless the authorities duly notify the applicant of this final decision.[24]

The first issue in current practice: The de facto requirement to challenge the implicit withdrawal decision as a precondition for renewed access to the international protection procedure

As explained above, the Law on Foreigners and International Protection provides both administrative and judicial remedies for international protection applicants to challenge the decision of implicit withdrawal of the international protection application. However, the Law does not include any provision which expressly requires the applicant to utilize these remedies as a precondition for a new request to be processed after the fact of implicit withdrawal. In other words, seeking an administrative review or filing an appeal before the court is not compulsory; these remedies are optional as a right available to the person concerned. Thus, the exercise of one this right is solely at the discretion of the applicant.

Moreover, as per the Law on Foreigners and International Protection, applicants whose international protection applications was previously determined to have been withdrawn are free to file

a renewed international protection application if they wish so. In other words, a previous implicit withdrawal decision does not bar a person from reapplying at a later time, which would in that case be processed as a new application. This principle is confirmed under Article 79 of the Law on Foreigners and International Protection, which states that an application made after the implicit withdrawal of an international protection application shall be adjudicated under accelerated procedure. The Regulation also reiterates this provision[25].

However, it is observed and reported that in current practice applications made after the fact of such a preceding implicit withdrawal decision are not processed on the grounds that the person has failed to utilize the legal remedies provided by the LFIP to challenge the preceding implicit withdrawal determination. When applicants seek to file another international protection application, in the period following the notification of an implicit withdrawal decision, they are verbally informed that they should as a first step exhaust the appeal mechanisms as set forth in the LFIP against the implicit withdrawal and that only then they would be allowed to initiate a new application.

As previously explained, the option for international protection applicants to challenge a negative decision is a safeguard and a right subject to their discretion under the LFIP. It is not at all defined as a compulsory obligation that must be exhausted for the person concerned to be allowed to initiate a new international protection application. Unless otherwise provided under law, a failure to exercise a right or remedy should not prevent a party from exercising another right. Thus, in situations where the person concerned does not have any valid grounds under the provisions of Article 77 of LFIP to challenge the implicit withdrawal determination or have not opted to appeal the decision, this should not be construed in any way as a legal barrier for processing the renewed application. Indeed, as explained, no such precondition is laid down under the provisions of the LFIP.[26]

Moreover, requiring applicants to challenge the preceding implicit withdrawal decision as such a de facto precondition also generates an unnecessary burden on administrative and/or judicial authorities. In any event, should the applicant believe that he/she

has an appropriate or reasonable ground to challenge the implicit withdrawal decision, which indeed may have been erroneous, he/she has the right to request an administrative or judicial review. But in where they do not, such an obligatory appeal step is unncessary. It does not only delay the individual's renewed access to the international protection procedure, it also has an adverse impact on the efficiency of the justice system given the heavy work load of the judiciary in Turkey.

Therefore any international protection applications made by persons who were previously subject to an implicit withdrawal decision and have not opted to exercise their right to appeal it, should still be processed as a new application as stipulated by the letter of Article 79 of the LFIP.

Furthermore, as reiterated in both the Law on Foreigners and International Protection and the Regulation, although – as per above-mentioned Article 79 of LFIP – such new applications following an implicit withdrawal decision are to be designated to the accelerated procedure, this should not be construed in any manner as preventing a full examination of the substance of the claim; and if there is reason to believe that the claim requires a more detailed assessment, it may be removed from the accelerated procedure and referred to the regular procedure, which allows for a more comfortable processing time table.

- **The second issue in current practice: Confiscation of identity documents prior to finalization of the "implicit withdrawal" and access to rights and entitlements**

A second issue that arises in the current implementation of the implicit withdrawal decisions is the confiscation of the International Protection Applicant Identity Document ("identity document") from the applicant prematurely before the implicit withdrawal decision has become "final" within the meaning of LFIP. It has been observed and reported in current practice that, in some provinces, Provincial Directorate of Migration Management (PDMM) authorities confiscate the identity document immediately after the notification of the implicit withdrawal decision.

This de facto practice is in discord with the provisions of LFIP.

According to the Implementing Regulation of the LFIP, the International Protection Applicant Identity Document shall continue to be valid "unless it is cancelled"[27]. Moreover, as explained previously, since the international protection applicant status of the individual shall not cease unless the decision that renders the international protection as withdrawn becomes "final", there are no legal grounds for either the confiscation or the cancellation of the identity document upon the initial "implicit withdrawal" decision itself before it becomes "final" either upon the expiration of the appeal window or – if the applicant chooses to appeal the decisiona – upon a negative decision at appeal stage.

The current practice of confiscation of the identity documents immediately pursuant to an implicit withdrawal decision before the decision become "final" effectively bars the individual concerned from accessing any of the rights and services granted to international protection applicants.

Firstly, since the International Protection Applicant Identity Document is a prerequisite for the applicants' access to education, healthcare, social assistance and other rights and entitlements that are set out under the LFIP, the confiscation of this document takes away the applicant's ability to access these rights and entitlements. Secondly, as explained in the previous section, the implicit withdrawal decisions can be challenged before the administrative courts and the regional court of appeals, but since the appeal process takes a considerable amount of time, the individuals concerned would find themselves in limbo for a prolonged period without the safeguard of an identity document establishing their legal status in Turkey as international protection applicant and without access to any of the basic rights and services to which they were entitled before.

In this conjunction, such premature confiscation of identity documents also gives rise to a conflict with Article 90 of the LFIP. This provision reads that international protection applicants who have failed to comply with obligations set out in LFIP and applicants whose application was rejected may be restricted from accessing rights and services with the exception of the right to education and the right to healthcare. This provision further states that such restrictions will be evaluated on a case by case basis and

that the decision will be communicated to the applicant or his/her legal representative or lawyer in writing. Yet, since confiscation of identity documents means that these applicants shall no longer be in possession of a document with which they can demonstrate their eligibility to access rights and entitlements and thus it becomes an obstacle to exercising these rights, including the right to education and the right to healthcare services. Therefore this practice de facto results in exceeding the scope and the effect of the sanctions foreseen in Article 90 of the LFIP.

Thirdly, the confiscation of identity documents from individuals who do not have any other identification document to demonstrate their legal presence in Turkey, puts these individuals at risk of detention in case of a stop and search by law enforcement authorities. In such case, the law enforcement officials in turn would refer the foreign national in question to the Provincial PDMM for further determination and processing.[28] At minimum, it would take the already burdened PDMM authorities time and effort to identify the person concerned and establish their status as an international protection applicant pending the finalization of the implicit withdrawal decision; and at worst, the person concerned may find themselves at risk of an undue deportation order.

Finally, confiscation of identity documents would pose yet another obstacle to accessing the right to a legal remedy, specifically for persons who do not have any other identification document, who often have significant difficulties in granting power of attorney[29]. In this regard, the Turkish Union of Notaries' Communique No. 93, with the explanatory title "Of Documents and IDs issued under Law No. 6458", explicitly names the "International Protection Applicant Identity Document" among official documents fit for recognition by notaries, and states that their possession satisfies the obligation of the notaries to establish identity under the Notary Public Law. By the same token, in the absence of such an "international protection applicant identity document", the person concerned won't be able to notarize a power of attorney and thereby authorize a lawyer to represent them for the purpose of appealing such an implicit withdrawal decision.

Conclusion and Recommendations

A right is, by definition, an interest in a claim that is recognised and protected by the legal order and thus, unless otherwise stated, a failure to exercise a right or remedy should not prevent a party from exercising or benefitting from another right. In this vein, international protection applicants whose application was considered "implicitly withdrawn" as per Article 77 of the LFIP certainly have a right to appeal that decision. That right however should not be unduly construed as an "obligation" to exhaust that remedy as a de facto precondition for gaining renewed access to the international protection procedure. In cases where the person concerned either does not have valid grounds to appeal the "implicit withdrawal" decision or does not wish to pursue that remedy for any other reason, they should still be given the opportunity to file a renewed international protection claim as foreseen and allowed for under Article 79 of the LFIP. Moreover, this de facto requirement on such applicants to utilize the relevant administrative and/or judicial appeal mechanisms unnecessarily also puts additional processing burden on the DGMM and the competent courts who are already burdened with a significant workload.

Similarly, the confiscation of the "international protection identity document" in such cases, before the "implicit withdrawal" decision becomes legally "final", de facto results in exceeding the scope and the effect of the sanctions foreseen in the LFIP and generates discord with the principle enshrined in the Turkish Constitution that stipulates the administrative authorities to refrain from infringement on the "essential core" of a right. For the persons concerned, such legally premature confiscation of the identity document establishing their status as international protection applicant leaves them in a limbo where they are unable to access any of the basic rights, safeguards and services guaranteed for all applicants under the LFIP.

Recommendations

- In cases where persons who were previously subject to an "implicit withdrawal" decision pursuant to Article 77 of the LFIP approach the DGMM and express continued need for international protection in Turkey, seek renewed access to the international

protection procedure, but do not contest the legality of the previous "implicit withdrawal" decision itself, they should be allowed to launch a renewed application as envisioned by Article 79 of the LFIP without the requirement to utilize and exhaust the remedies to challenge the previously issued "implicit withdrawal" decision.

- International protection applicants subject to such an "implicit withdrawal" decision under Article 77 of the LFIP should be allowed to hold on to their "international protection identity documents" until a time when and if the "implicit withdrawal" decision becomes legally "final".

- Where international protection applicants who launch a renewed international protection application after a previous "implicit withdrawal" decision are processed under the accelerated procedure foreseen by Article 79 of LFIP, the new application should not be construed in any manner as preventing a full examination of the substance of the claim; and, if there is reason to believe that the substantive examination of the claim requires a more detailed assessment, the option of referring the case from the accelerated procedure to the regular procedure should be considered.

- Where an international protection applications is duely determined to have been "implicitly withdrawn", the decision becomes legally "final" and the person concerned is subject to consideration for a deportation order, the legal assessment on the person concerned shoud duely take into account the obligations of nonrefoulement under Article 4 of LFIP and humanitarian non-removal grounds under Article 55 of the LFIP.

Notes

1. Law on Foreigners and International Protection, Official Gazette, dated 11.4.2013 and No. 28615.

2. The term "implicit withdrawal of the application" for the purposes of this Opinion Paper concerns the "international protection procedure" in Turkey, basically applicable to non-Syrian asylum seekers. As per Turkey's Temporary Protection Regulation, Syrian nationals as well as refugees and stateless persons arriving from Syria are subject to a separate "temporary protection regime" and the Temporary Protection Regulation does not include any provision on implicit withdrawal. Thus, for the purposes of this Opinion Paper, the practices described concerning the "implicit withdrawal of the application" applies to persons arriving in Turkey from countries of origin other than Syria, who are subjected to the international protection procedure in Turkey – as distinct from the temporary protection procedure in place for refugees from Syria. For details about the international protection procedure in Turkey, applicable to non-Syrian asylum seekers, you can refer to our legal information booklet: "International Protection Procedures in Turkey: Questions and Answers", available at: http://mhd.org.tr/images/yayinlar/MHM-14.pdf . The basic features of the temporary protection regime for refugees from Syria, on the other hand, are explained in out legal information booklet, "Temporary Protection Regime in Turkey: Questions and Answers", available at: http://mhd.org.tr/images/yayinlar/MHM-2.pdf

3. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A32005L0085 (accessed December 17, 2017). As is the case with many other directives under the Common European Asylum System, Directive 2005/85/ EC was recently subjected to a substantial recast in 2013. While the LFIP was based on the above listed 2005 version of the Directive, the releavnt provisions of the recast Directive 2013/32/EU regulating the asylum procedures did not affect any changes in regards the definition and procedural rules governing "implicit withdrawal" of an asylum claim.

4. It is worth noting that Article 77 of the LFIP incorporates the provisions of the 2005 EU "Asylum Procedures Directive" (2005/85/ EC) with a number of discrepancies. Under Article 20 of the Asylum Procedures Directive, for a failure to comply with reporting obligations or leaving without authorisation the place where the applicant lived or was held to constitute a ground for the implicit withdrawal of an asylum claim, the person should have also failed to contact the competent authority within a reasonable time. The Asylum Procedures Directive also does not stipulate 'objecting to the collection of personal data' among grounds for implicit withdrawal of an asylum claim and rather regulates that a refusal to comply with an obligation to have his/her fingerprints taken in accordance with the relevant legislation as a ground for accelerated procedure as per Article 23 (4-n). Similarly, in the Directive a 'refusal to comply with obligations at registration and interview' is not listed as

a ground for implicit withdrawal under the Asylum Procedures Directive. As is the case with the refusal to comply with the obligation to have the applicant's fingerprints taken, this refusal is also stipulated a ground for accelerated procedure under Article 23 (4-k) of the Asylum Procedures Directive. However, it must also be noted that the Asylum Procedures Directive states that a failure to respond to requests to provide information essential to asylum application would constitute a ground for implicit withdrawal.

5. Regulation on the Implementation of the Law on Foreigners and International Protection, "The Regulation", Official Gazzette dated 17.3.2016 and No. 29656.

6. Law on Foreigners and International Protection, Article 71;

7. The Regulation also reiterates that a failure to go to a satellite city within the prescribed time limit would constitute a ground for the implicit withdrawal of an international protection application. See: The Regulation, Article 72/2

8. Law on Foreigners and International Protection, Article 71; The Regulation, Article 110/3 and Article 110/5.

9. The Regulation, Article 91.

10. Law on Foreigners and International Protection, Article 95.

11. Law on Foreigners and International Protection, Article 54/1-(i).

12. Law on Foreigners and International Protection, Article 54/1-(i).

13. The Regulation, Article 79/4.

14. Law on Foreigners and International Protection, Article 3/1-(ö).

15. Law on Foreigners and International Protection, Article 80/1-(a).

16. However, The Regulation states that should the applicant also seek a judicial remedy against implicit withdrawal of the international application decision while the procedures before the International Protection Assessment Commission are pending, the Commission shall decide to terminate the adjudication of the appeal before the Commission. See: The Regulation, Article 101/3.

17. The Regulation, Article 100/3 and Article 100/4.

18. Law on Foreigners and International Protection, Article 80/1-(ç) and The Regulation, Article 101/2.

19. Law on Foreigners and International Protection, Article 80/1-(d).

20. In its decision (E:2016/37 and K:2016/35) upon the application of the Ankara 1st Administrative Court, the Constitutional Court of Turkey ruled that since there is not any express provision regulating the actual date of a commence of the said 15 days-time in which the Court is required to deliver its decision, the general rule laid under Article 20 of the Procedure of Administrative Justice Act shall apply and this 15 days-time shall start to run once the case has become ready for the decision and thus the 15 days-time is merely of a regulatory nature.

21. Law on Foreigners and International Protection, Article 80/1-(d).

22. Procedure of Administrative Justice Act, Official Gazzette, 20.1.1982 dated and No: 17580.

23. Procedure of Administrative Justice Act, Article 46.

24. As per Article 100 of the Law on Foreigners and International Protection, all notification formalities related to the law shall be carried out pursuant to the provisions of the Notification Law (No. 7201). The Regulation further states that notifications could also be carried out via email in accordance with the Electronic Notitication Regulation. See: The Regulation, Article 120/3

25. The Regulation, Article 79/5.

26. Law on Foreigners and International Protection, Article 79/1-(f).

27. The Regulation, Article 90.

28. As per Article 53/2 of the Regulation, where law enforcement authorities identify a foreign national who cannot prove his/her identiy, they are instructed to inform the Directorate General of Migration Management.

29. For a detailed analysis of challenges faced, see: Refugee Rights Turkey, 'Barriers to the Right to Effective Legal Remedy: The Problem Faced by Refugees in Turkey in Granting Power of Attorney', February 2016.

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This paper has been prepared by Refugee Rights Turkey within the framework of a project supported by Heinrich Böll Stiftung Turkey. The views expressed in this paper belong to the author – Refugee Rights Turkey – and do not necessarily reflect the opinions of Heinrich Böll Stiftung Turkey.

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