



BARRIERS TO THE RIGHT TO EFFECTIVE LEGAL REMEDY:

THE PROBLEM FACED BY REFUGEES IN TÜRKİYE
IN GRANTING POWER OF ATTORNEY

OPINION PAPER

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BARRIERS TO THE RIGHT TO EFFECTIVE LEGAL REMEDY: THE PROBLEM FACED BY REFUGEES IN TURKEY IN GRANTING POWER OF ATTORNEY

Turkey's new Law on Foreigners and International Protection (No. 6458) was published in the Official Gazette on 13 April 2013 and came into full force as of 13 April 2014. The law radically overhauled the migration and asylum management system in Turkey by introducing a number of important procedural and substantive safeguards largely established by case law of the European Court of Human Rights and regulating issues that had long been neglected by policy-makers.

The most important among these safeguards are included in provisions on administrative detention and concerning the principle of non-refoulement. Yet, as is the case with many other legislative developments in the field of fundamental rights and freedoms, the role of legal professionals, particularly of lawyers, are critical to ensure the effective implementation of these safeguards stipulated under Law on Foreigners and International Protection.

Refugee Rights Türkiye is, however, concerned about barriers faced by lawyers in obtaining power of attorney, a requirement for invoking legal remedies established by the new law. According to Article 72 of the Notary Public Law, "notaries are under the obligation to fully establish identity, address, capacity and real needs of concerned persons." Article 90 of the implementation regulation of the said law provides additional guidance on methods for establishing the identity of a person and states that "in order to establish the identity of the persons requesting notarization and of those participating to the process, notaries shall seek identity card; or passport or driving license or identification card bearing a photograph or other identification documents issued by official authorities."

As it is clear from the above-cited provision of the implementation regulation of the Notary Public Law, the phrase "other identification documents" is a clear indicator that this list is not exhaustive. Moreover, the second paragraph of the same provision reads that "in case where a person fails to submit any of these documents or where the notary deems necessary, the identity of a person may also be established through the word of a witness." Despite these provisions, however, Refugee Rights Türkiye has observed first-hand and received reports indicating that notaries do not consider identity documents issued by the Turkish government under the Law on Foreigners and International Protection as "official identity documents" and do not accept witness statements to establish identity. As a result, they often refuse to issue or notarize power of attorneys to refugees, asylum-seekers and/or migrants, who are not in possession of an official identity card other than those issued by the Turkish government under the Law on Foreigners and International Protection.

In order to address this issue, the Turkish Union of Notaries published a communique No. 93 with an explanatory title, "Of Documents and IDs issued under the Law No 6458". Foreigners and International Protection" on 19 September 2014. This communique explicitly reiterated that all new forms of "residence permits," "stateless person identity cards," "international protection registration documents," "international protection applicant identity documents" and "international protection holder identity documents" issued under the Law No. 6458, are "official documents" and therefore their possession satisfies the obligation of the notaries to establish identity as per Article 72 of the Notary Public Law.

The communique further states that residence permits which had been issued before 11 April 2014 under the Law No. 5683 on the Sojourn and Movement of Aliens in Turkey shall be considered by notaries valid until they expire.

In reality, however, the communique has only been partially helpful to address barriers faced by refugees, asylum-seekers and migrants before obtaining power of attorney. Below are lingering challenges and proposed amendments aiming to ensure the right to effective legal remedy.

The first challenge is related to persons apprehended over the course of irregular entry to or exit from Turkey, particularly in the airport transit zones. A significant number of these persons are detained and their asylum claims are adjudicated under an accelerated procedure as per Article 79 of Law on Foreigners and International Protection. According to this provision, status determination interviews should be carried out no later than three days as of the date of application and the assessment should be finalized no later than five days after the interview. Moreover, the only available legal remedy against negative decisions under the accelerated procedure is judicial recourse; that is persons who were rejected under the accelerated procedure do not have an administrative appeal mechanism at their disposal and are therefore required to appeal against negative decisions as well as subsequent deportation orders directly before administrative courts.

One of the major challenges before invoking this right to appeal is obtaining a power of attorney. Article 69 of Law No. 6458 on Foreigners and International Protection regulates registration of international protection applications and requires competent authorities to refer to the applicant's statement where there is no information available concerning the identity of the applicant. This provision also states that the applicant shall be issued --without any charge-- an international protection registration document bearing his/her identity details. This registration document shall be valid for 30 days and enable the applicant to stay in Turkey.

Yet, Refugee Rights Turkey observed in a number of cases, international protection applicants are communicated rejection letters and subsequent deportation orders without being provided with a registration document. Absence of this document constitutes a barrier before obtaining a power of attorney. This problem is further compounded in cases where the applicant lacks any form of identity document and is arbitrarily denied access to international protection.

The Code of Administrative Procedure (Law No. 2577) does not have any direct clause on filing an administrative court case without a power of attorney. Instead, Article 31 of the Code relegates this issue to the Code of Civil Procedure (Law No. 6100). However, Article 76 of the Code of Civil Procedure requires the lawyer to submit either the notarized original or the true copy of the power of attorney to the court. Article 77 of the said law further states that where the lawyer fails to comply with this requirement, he/she shall not be able to initiate a court case or engage in any part of the proceedings. In such cases, however, the judge has the discretion to grant permission to the lawyer lacking a notarized power of attorney to file a case or take part in the proceedings if any delay would cause harm to the parties. While doing so, the judge shall also set a specific time limit for the submission of the power of attorney and notify the parties that a failure to produce the required document within the set time limit shall lead the judge to declare the case and the proceedings null and void.

Thus, even though theoretically it is possible to file a case without a power of attorney on an exceptional basis, it is incumbent upon the lawyer to ultimately fulfill the legal duty of submitting a notarized power of attorney for the case to proceed. The Council of State's Plenary Session of Administrative Law Chambers also confirmed this requirement in its judgment E: 1998/813 and K: 1999/312 in which the Council had ruled that a case should be refused if the party concerned fails to submit the power of attorney within the specified time limit.

A second barrier to obtaining a power of attorney is related to the form of the identity documents issued under the Law on Foreigners and International Protection. That is, on the reverse side of an "international protection registration document" and "international protection holder identity document", it is explicitly stated that these identity documents are only valid within [the administrative boundaries of] the province where they had been issued. Refugee Rights Turkey is in the opinion that this restriction is undue and impractical. For instance, under Article 77 of the new Law on Foreigners and International Protection, international protection applications of persons who had failed to comply with the reporting duty three subsequent times without excuse are considered implicitly withdrawn. Thus, when these persons are apprehended by law enforcement authorities in another province, it is not possible for these individuals to grant a power of attorney if they do not have any other valid identity document.

Moreover, in some cases, it has been observed that identity documents of apprehended individuals are confiscated by the authorities. As stated above, these individuals are subjected to the accelerated procedure and according to Article 76 of the Law on Foreigners and International Protection, neither these persons nor their family members are provided an "identity document." The (re)admission of these persons to the international protection system constitutes a new administrative act and this act requires competent authorities to issue a new "international protection registration document". In practice, however, it is observed that in some cases individuals are not provided this document and therefore they are unable to grant a power attorney to their legal representatives unless they possess other forms of identity documents including passport or identity document issued by the country of origin authorities.

A third challenge in obtaining a power of attorney is related to Syrian nationals as well as refugees and stateless persons arriving from Syria. These individuals are under "temporary protection" as per the first temporary provision of the Temporary Protection Regulation published in the Official Gazette on 22 October 2014. Article 22 of the Temporary Protection Regulation states that persons under temporary protection shall be provided a "temporary protection identity document" upon the completion of their registration with competent authorities. There are a significant number of persons originating from Syria who are yet to register or still possess another form of identity document- known as a "Foreigner Identity Document"- previously issued by the authorities.

Refugee Rights Turkey believes that both the "foreigner identity document" and the "temporary protection identity document" are indisputably official documents as they are issued by competent authorities, and bear the sign and stamp of these authorities. Thus, there should be no reluctance on the part of public notaries to rely on the official nature of these documents. However, it is observed and reported that in many cases, persons under temporary protection are requested to present their passports or identity documents issued in Syria, and those who fail to do so, are denied to give power of attorney to their legal representatives.

CONCLUSION AND RECOMMENDATIONS

Refugees, asylum-seekers and migrants in Turkey face the significant challenges summarized above in their quest to access the right to effective remedy as established under the Law on Foreigners and International Protection. Refugee Rights Turkey recalls that the freedom to claim rights (Article 36) and the right to request prompt access to the competent authorities where constitutional rights and freedoms have been infringed (Article 40) are guaranteed under the Constitution of the Republic of Turkey.

Moreover, the right to access a legal remedy is further guaranteed under the International Covenant on Civil and Political Rights (Article 2/3 and Article 14/1) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13), both of which Turkey is a State Party.

Refugee Rights Turkey therefore calls on authorities to:

- Adopt and widely circulate a new regulation or communique which explicitly asserts the official nature of all forms of identity documents issued under the Law on Foreigners and International Protection and the Temporary Protection Regulation;
- Extend the validity of all forms of identity documents issued under the Law on Foreigners and International Protection and the Temporary Protection Regulation to encompass all provinces of Turkey;
- Ensure that all persons making an application for international protection, including those under administrative detention and those detained at border crossing points and airport transit zones, are provided with an “international protection registration document” without delay, and
- Ensure that all individuals under temporary protection are provided temporary protection identity documents without delay.

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