Lagging Behind the Caselaw: Ongoing Challenges in Granting Power of Attorney

Legal Opinion Paper

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Introduction

The right to a legal remedy is one of the fundamental constitutive elements of the rule of law. This right enables individuals to claim the protection of their rights and appropriate reparative measures, including restitution and compensation, when these rights are violated. Thus, the right to a legal remedy is both a prerequisite and a safeguard for other rights and freedoms.

A key safeguard to ensure the access to the right to a legal remedy is the availability of legitimate means and procedures. This availability is also embedded in the right to access to justice, and enshrined both in Article 36 of the Constitution of the Republic of Turkey and other various international human rights treaties of which Turkey is a State Party.[1] Similarly, Article 40 of the Constitution of the Republic of Turkey also safeguards the right to a legal remedy. However, as the European Commission for the Efficiency of Justice (CEPEJ)[2] has emphasized, the access to justice also encompasses the right to have an equal access to judicial services, and therefore requires procedural standards and other rules and practices governing judicial system to not pose a barrier before or hamper access to the justice system, particularly for indigent or other disadvantaged groups.

Thus, in order to ensure an efficient exercise of the right to a legal remedy and the right to access to justice, the state should take measures to provide a sufficient awareness and knowledge on the availability and the scope of these rights, particularly to vulnerable and disadvantaged individuals, and facilitate their access to legal representation, legal counselling and legal advice. These efforts should also include refugees and other vulnerable migrants.

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1 Relevant applicable provisions include European Convention on Human Rights (Articles 6 and 13), Universal Declaration of Human Rights (Article 8), International Covenant on Civil and Political Rights (Article 2/3), Convention on the Elimination of All Forms of Discrimination Against Women (Articles 2 and 15), Convention on the Rights of Persons with Disabilities (Article 13), and Convention Relating to the Status of Refugees (Article 16/2).

2 Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), Access to Justice in Europe, CEPEJ Studies No.9, https://rm.coe.int/168074827e, p.13.

Accordingly, Turkey's new Law on Foreigners and International Protection (Law No. 6458)[3] as well as other applicable legislation[4] acknowledge the importance of the access to legal representation and to legal counselling in safeguarding the right to access to justice, and introduced multiple provisions highlighting the possibility to benefit from the state-funded legal aid scheme for foreigners who are unable to cover attorney fees.

Despite this positive recognition, however, refugees' and other vulnerable migrants' access to the justice system and legal aid lags far behind the desired level in Turkey[5] and across the globe.[6] One of the major procedural impediments in this regard is a set of challenges faced in granting power of attorney.

Refugee Rights Turkey previously published a legal opinion paper[7] in February 2016 with a view to underline problems faced by refugees in granting power of attorney and continued to monitor developments in this matter. In the present paper, Refugee Rights Turkey takes stock of these developments and primarily focuses on improvements and positive judgments.

All decisions outlined in this paper are welcoming as they provide critical guidance and interpretation aiming to facilitate the right to a legal remedy and the right to access to justice. Yet, despite these important decisions, problems faced in granting a power of attorney remain worryingly potent. A lingering challenge is courts' declaration of cases initiated against deportation orders as null and void due to the lack of a notarized power of attorney. Moreover, in some cases

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3 Law on Foreigners and International Protection (No. 6458), 11/04/2013 dated Official Gazette (No. 28615).

4 The term "applicable legislation" includes, among others, Temporary Protection Regulation (22/10/2014 dated Official Gazette, No. 29153) and Regulation on Combating Human Trafficking and Protection of Victims (17/03/ 2016 dated Official Gazette, No. 29656).

5 Refugee Rights Turkey, Access to State-Funded legal Aid Services by Asylum-Seekers and Migrants in Turkey: Challenges and Opportunities, January 2019, http://mhd.org.tr/images/yayinlar/MHM-74-EN.pdf.

6 UNDOC & UNDP, Global Study on Legal Aid: Global Report, 2016, https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf, p. 3. [accessed on 26 December 2018].

7 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, http://mhd.org.tr/images/yayinlar/MHM-47.pdf[accessed on 26 December 2018].

courts fail to provide a reasoned rejection or continue to reject cases despite the presence of a letter of consent submitted by the claimant.

With this legal opinion paper, Refugee Rights Turkey wishes to promote the adoption of more positive judgments, and possibly an established caselaw, and would like to encourage the introduction of legal and policy measures aiming to secure compliance to principles highlighted in these decisions.

Accompanying individuals during proceedings and the provision of attorney services

With the exception of registering international protection applications,[8] neither Law No. 6458 nor any other legislation poses a barrier against benefiting from attorney services. An important judgment[9] on the role of power of attorney in the provision of attorney services was delivered due to an action filed by the Izmir Bar Association. The case was initiated by the Izmir Bar Association after a lawyer was denied the ability to accompany his client to his residence permit application, as he was not able to present a notarized power of attorney at the time of application.

In the case brought before the Ankara First Administrative Court, the Izmir Bar Association emphasized that the provision of attorney services is directly related to the right to a legal remedy, guaranteed under Article 36 of the Constitution of the Republic of Turkey, and noted that as per Attorneys' Act (No. 1136), an attorney is vested with the right to intervene in the "settlement of any kinds of legal issues or disputes" before all administrative and judicial bodies. In essence, this argument is a summary of Article 2 of Attorneys' Act

8 Law on Foreigners and International Protection (No. 6458), Article 65. As per this Article, as a general rule, all international protection applications must be made in person. However, an applicant may also apply on behalf of his/her family members whose applications are on the same grounds and upon the explicit consent of the adult family member. For minor family members, Article 68 of the Regulation on the Implementation of Law on Foreigners and International Protection (17/06/2016 dated Official Gazette, No. 29656) does not require a consent. Finally, under Article 65/2 of the said Regulation, in cases where unaccompanied minors and other applicants cannot make an application in person, competent authorities may also register their international protection applications.

9 Ankara First Administrative Court, E: 2016/2121, K: 2017/186, 25.01.2017. For the full-text of the judgment: http://www.izmirbarosu.org.tr/Upload/files/doc20170517184654.pdf [accessed on 26 December 2018].

(No. 1136). The same provision also reiterates that judicial bodies as well as other state institutions and agencies are under the obligation to assist attorneys in carrying out their duties.

In its decision, the Ankara First Administrative Court initially highlighted that "compared to nationals, persons falling within the ambit of Law No. 6458 are in a more disadvantageous position in accessing legal remedies." This emphasis is incisive and important. Indeed, persons seeking safety in another country often experience many significant challenges including language barriers, traumatization, and loss of social networks hindering their effective access to available protection mechanisms, legal remedies, and justice.[10] Moreover, the Ankara Court's emphasis is also echoed in Turkey's Judicial Reform Strategy, a critical blueprint brought into force by the Council of Ministers on 8 April 2015[11]. In this vein, strengthening access to justice is identified among the key objectives in the said strategy document[12]. Similarly, in the Strategic Plan: 2015-2019[13] adopted for the implementation of Judicial Reform Strategy and shared with the public on 15 July 2015, the Ministry of Justice included refugees among disadvantaged groups[14] and incorporated refugees under the second strategic objective[15] entitled "improving access to justice and practices for victims and disadvantageous groups."

Following this critical note, the Ankara Court further noted that "a power of attorney is not a condition for validity, but merely a condition for proof." This statement is yet another reiteration of a longstanding legal understanding. That is, the fact that a power of attorney is merely a condition of proof has been jointly accorded by

10 European Council on Refugees and Exiles (ECRE), Survey on Legal Aid for Asylum Seekers in Europe, October 2010, p. 6.

11 Republic of Turkey Ministry of Justice, Yargı Reformu Stratejisi [Judicial Reform Strategy], April 2015, http://www.sgb.adalet.gov.tr/yargi_reformu_stratejisi.pdf, [accessed on 26 December 2018].

12 Ibid.

13 Republic of Turkey Ministry of Justice, Adalet Bakanlığı Stratejik Planı: 2015-2019 [Ministry of Justice Strategic Plan: 2015-2019], July 2015, http://www.adalet.gov.tr/Bakanlik/StratejikPlan/Stratejik-Plan-2015-2019.pdf, [accessed on 26 December 2018]

14 Ibid, p. 4.

15 Ibid., p. 84 and following pages.

legal scholars[16] and the Court of Cassation.[17] This was unequivocally repeated[18] in many other judgments[19] delivered by the higher courts[20].

Thus, Ankara First Administrative Court found that "[denying the lawyer to accompany his client] for his failure to present a notarized power of attorney has resulted in the limitation of the right to legal remedy and thus cannot be deemed lawful." This decision was later upheld by Ankara Regional Administrative and became final.[21]

■ Attorneys' access to persons in immigration detention

Under Law No. 6458, foreigners issued deportation orders[22] and international protection applicants[23] may be placed in immigration detention on various grounds. These individuals are held in removal

16 Baki Kuru, Hukuk Muhakemeleri Usulü [Civil Procedures], Demir Demir Müşavirlik ve Yayıncılık Ltd. Şti, 6. Edition, İstanbul, February 2001, Vol: II, p. 1255; Ejder Yılmaz, Hukuk Muhakemeleri Kanunu Şerhi [Code of Civil Procedures: Commentary], Yetkin Yayınları, 3.Edition, Ankara, July 2017, Vol: II, s.1414; Süha Tanrıver, Noterlik Açısından Vekâlet (Temsil) [Power of Attorney from the Perspective of Notary Law (Agency)], Noterlik Hukuku Araştırma Enstitüsü, Ankara, April 2000, p.68.

17 It is important to note that Code of Administrative Procedures (No. 2577) does not have a provision regulating the power of attorney, but rather makes a direct reference to Code of Civil Procedures (No. 6100); and thus, judgments of the Court of Cassation, as the highest appeals court in civil and criminal cases, shall serve a guiding role.

18 The Court of Cassation, Assembly of Civil Chambers, 14.10.1972, E. 1968/2-712, K. 1972/836.

19 Inter alia, see The Court of Cassation, Second Civil Chamber, 27.6.1963, 3697/4061; 2HD, 13.10.1972, 5981/5777; The Court of Cassation, Fourth Civil Chamber, 27.6.1966, 5402/7212, The Court of Cassation, Eight Civil Chamber, 30.6.1986, 6359/6696. For all cited decisions, please refer to Baki Kuru, Hukuk Muhakemeleri Usulü [Civil Procedures], Vol: II, p. 1260, p. 1269 and p. 1270. Please also refer to, inter alia, The Court of Cassation, General Assembly of Civil Chambers, E:2003/19-265, K: 2003/67, 02.04.2003 and The Court of Cassation, Third Civil Chamber, 15.3.2004, E: 2004/2385, K: 2004/2082 (Kazancı İçtihat Bankası), The Constitutional Court of the Republic of Turkey, E: 2002/48, K: 2006/22, 15.2.2006, 10/11/2006 dated Official Gazette, No. 26342, and The Court of Cassation, Third Civil Chamber, E: 2012/12635, K: 2012/18907, 17.09.2012. for the full text of the last-cited decision, please also refer to: http://www.izmirbarosu.org.tr/Upload/files/Sayfalar/merkezler/baro-pulu-eksikligi.pdf

20 Kuru also states that there are even older judgments reiterating this principle: Please refer to, inter alia, The Court of Cassation, General Assembly of Civil Chambers, 30.4.1958, 4/2-26 and The Court of Cassation, General Assembly of Civil Chambers, 12.9.1962, 7/69-88). See: Kuru, loc. cit.

21 Ankara Regional Administrative Court, Tenth Administrative Chamber, E:2017/742, K: 2017/167, 20.12.2017.

22 Law on Foreigners and International Protection (No. 6458), Article 57/2.

23 Law on Foreigners and International Protection (No. 6458), Article 68/2.

centers. The same law also provides that foreigners held in removal centers have the right to access and meet their relatives, legal representatives, and attorneys.[24]

An important ruling on attorneys' access to removal centers was delivered by the Kayseri First Administrative Court.[25] The case originated in an application filed by a Pakistani individual who was under administrative detention in the Kayseri Removal Center. The applicant was denied access to his lawyers on the grounds that he failed to give the full name of attorneys in writing. This requirement was set in an internal circular and the circular was not public. Although in the responsive pleading, authorities acknowledged that a power of attorney was "a condition of proof," they still maintained the requirement set forth in the internal circular as well as the requirement to produce a power of attorney for access to a removal center aimed to "prevent unlawful profits" and "nurture an atmosphere of trust for foreigners".

The Kayseri First Administrative Court recalled principles articulated by the Ankara First Administrative Court and added that, because the practice of law is a public service in Turkey, attorneys have the power to intervene in legal matters and disputes without presenting a power of attorney. The Court further added that a not-for-public internal circular may "only be a text governing internal operations of the administration" and therefore "cannot introduce a limitation that has not been foreseen in the law." Based on this reasoning, the Kayseri First Administrative Court ruled that requiring detainees to submit petitions to gain access to their lawyers and requiring lawyers to present a power of attorney constitutes an undue restriction on the right to a legal remedy. This decision was also upheld by Ankara Regional Administrative Court[26] and became final.

■ Access to an attorney during asylum interview

Persons seeking protection in Turkey have the right to express their asylum claim in an in-person interview. Thus, as the wording of Law No. 6458 suggests, this interview's primary objective is to 'reach an

24 Law on Foreigners and International Protection (No. 6458), Article 59/1(b).

25 Kayseri First Administrative Court, E: 2017/626, K: 2017/1535, 29/12/2017.

26 Ankara Regional Administrative Court, Tenth Administrative Chamber, E:2018/316, K: 2018/334, 17.04.2018.

effective and a fair decision'. The asylum interview is indeed one of the most critical steps in the international protection procedure. In an asylum interview, a claimant typically provides a detailed account of the matters and personal history that has led them to seek asylum. In some instances, and particularly in complex cases, a set of interviews may be conducted. Thus, the claimant's statements in the interview, as a general principle, are of a critical importance for the adjudicator in assessing and establishing the credibility of the asylum claim. Law No. 6458 has therefore introduced an additional safeguard which allows the claimant's lawyer to participate in the asylum interview as an "observer" and upon the request of the claimant.[27]

However, it must be emphasized that as per the entitlements afforded to lawyers under Turkey's Attorneys' Act, even in the absence of the above-mentioned safeguard, there is no procedural barrier preventing a lawyer from attending an asylum interview. In other words, a lawyer has the authority to intervene for the resolution of all legal matters and disputes related to the client and to ensure the full implementation of legal provisions. It is equally important to add that even in cases where a lawyer merely wishes to attend an asylum interview in an "observer" status, there is also no procedural or legal barrier preventing the lawyer from keeping minutes and registering irregularities if any are observed during the interview. Finally, neither Law No. 6458 nor its implementation regulation prescribes a limit on the number of lawyers wishing to be present in an asylum interview.

27 This procedural safeguard appears to be taken from the European Council's Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Article 15 and Article 16) dated 1 December 2005. This Directive has been recast by the Directive on common procedures for granting and withdrawing international protection which has also broadened its scope. According to the relevant provisions of the recast Directive, Member States must provide the applicants the opportunity to consult, in an effective manner, a legal adviser or other counsellor, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision (Article 22) and allow an applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law (Article 23). For 2005 dated Directive, please refer to: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; for 2013 dated Directive (recast), please refer to Directive 2013/32/EU of The European Parliament and of The Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

An important ruling on lawyers' right to be present in an asylum interview and the power of attorney was delivered by the Aydın First Administrative Court. The case originated from the application of an Afghan national detained in the Aydın Removal Centre. The applicant submitted his asylum claim whilst under administrative detention, and specifically requested his lawyers to be informed and thus to participate to his asylum interview. However, despite this clear request, authorities carried out his interview without the presence of lawyers and subsequently rejected his international protection application.

In the responsive pleading, the administration asked the court to rescind the intervention power of the claimant's lawyers by arguing that they failed to present a duly executed power of attorney. The court, however, dismissed this claim and stated the following: "...It is well-established that foreigners, who are subject to Law No. 6458 and are facing an administrative decision related to the right to personal integrity, would be hard-pressed to benefit from legal tools such as the right to access legal representation offered by lawyers, particularly due to some measures taken to ensure the execution of these decisions. The court must therefore hold that written documents showing lawyers are authorized to initiate a legal action against administrative decisions about these foreigners should be deemed to sufficient from the perspective of the right to access to justice and the right to a legal remedy, and since lawyers in the present case have submitted a written document in proof of such authorization, the administration's argument is dismissed."

The court further noted that "...where a foreigner requests the participation of his/her lawyer to an asylum interview, the administration is under the obligation to honor this request. The administration does not have a discretionary power in this regard. An assumption otherwise would mean that a foreigner, who is already in a disadvantaged position due to being placed under administrative detention, might be denied the right to benefit legal counselling of a lawyer on the basis of the administration's discretion, and this would constitute a violation of the right to a legal remedy which is enshrined under Article 36 of the Constitution and set forth without a distinction between foreigners and Turkish citizens." Based on the aforementioned reasons, the Aydın First Administrative Court quashed the decision rejecting the international protection application of the claimant.

Ongoing challenges

Decisions outlined in this legal opinion are consistent with the Law on Foreigners and International Protection and Attorneys' Act as well as with other applicable legislation. Refugee Rights Turkey welcomes these developments as these rulings secure an interpretation seeking to remove barriers before the right to legal remedy and enhance access to justice. Refugee Rights Turkey also would like to reiterate its call to all relevant administrative bodies to step up efforts to improve their practice in accordance with principles articulated in these decisions.

However, despite this welcoming progress, it is still observed and reported that in many cases, persons subject to Law No. 6458 face barriers in obtaining power of attorney. A major concern persists in this regard is the denial of some safeguards set under Article 77 of the Code of Civil Procedure (Law No. 6100)[28] without any justification and subsequent declaration of initiated court cases and proceedings as null and void.

Law No. 6458 establishes that with the exception of administrative detention decisions, the competent courts for appeals against all other decisions taken under the Law are administrative courts[29]. Thus, cases initiated before these courts are subject to administrative procedures as per Article 1 of the Code of Administrative Procedures (Law No. 2577).[30] However, this Code 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. As a general principle, all persons possessing the requisite legal capacity may either initiate a proceeding in person or through a legal representative.[31] In cases where a claimant is represented by a lawyer, 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.[32]

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28 Code of Civil Procedures (No. 6100), 04/02/ 2011 dated Official Gazette (No. 27836).

29 Law on Foreigners and International Protection (No. 6458), among others, see: Article 53/3, Article 80 and Article 101.

30 Code of Administrative Procedures (No. 6100), 20/01/1982 dated Official Gazette (No. 17580).

31 Code of Civil Procedures (No. 6100), Article 71.

32 Code of Civil Procedures (No. 6100), Article 76.

However, as this requirement has the potential to unduly restrict the right to a legal remedy, the Code of Civil Procedure contains an additional safeguard. That is, Article 77 of said law states that where the lawyer fails to comply with this requirement, 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.

As the wording of the Article suggests, judges enjoy a discretion both in granting a permission and in setting the time limit. It must be also emphasized that the inclusion of such possibility constitutes an explicit declaration of intent of the legislator indicating its will to facilitate the right to a legal remedy and the right to access to justice. Indeed, the Court of Cassation also noted that "one must refrain from exercising this discretionary power without providing a reason or a justification, and contrary to the facts of the case. Otherwise, this would lead to a result contrary to the purpose of the provision and no legal order will lend its aid to such a result."[33] Thus, both the purposive construction and the interpretation of the Court of Cassation underline that in cases where a delay would cause harm to a party, Article 77 is to interpreted so as to uphold the right to access to justice.

Where a judge grants a permission, the lawyer must produce the power of attorney within the set time limit or the principal (i.e. the claimant) may file submit a petition with the court attesting his/her acknowledgment of proceedings carried out on his/her behalf thitherto. In addition, and where possible, the claimant may also declare his/her consent before the court[34]. Thus, both written and oral consent shall constitute a ratification and as per the Code of Civil Procedure, such ratification shall make up for the lack of a power of attorney[35]. However, should the lawyer fail to produce the

33 The Court of Cassation, Nineteenth Civil Chamber, E:2004/7149, K:2005/629, 3.2.1005 (Kazancı İçtihat Bankası); Also see: The Court of Cassation, Fourth Civil Chamber, 6.3.1967, 10654/1995, (Kuru, loc.cit).

34 Code of Civil Procedures (No. 6100), Article 78.

35 This procedural rule also mirrors substantive law. That is, Article 73 of the Code of Civil Procedures (No. 6100) states that provisions of Turkish Code of Obligations (No. 6098) shall also be applicable to matters relating to filing a lawsuit and consequent proceedings to be carried out by attorney. Article 46 of Turkish Code of Obligations (No. 6098), on the other hand, states that in cases where a person issues a legal

power of attorney or the principal refuse or fail to give consent, the judge shall declare the case and the proceedings as null and void.

In practice, due to ongoing challenges in obtaining a power of attorney and because of the shortness of the period permitted for appeals under the Law No. 6458,[36] lawyers are forced to file appeals without notarized power of attorneys. While doing so, lawyers submit a request for a permission by making a direct reference to Article 77 of the Code of Civil Procedure. In other cases where a contact with the claimant could be established, lawyers either enclose a letter of consent duly signed by the claimant or submit the appeals petition signed by both the lawyer and the claimant in an attempt to demonstrate the attestation.

As the above-summarized information indicates, in cases where a delay would cause harm to a party, there is no procedural barrier before filing an appeal without a notarized power of attorney. In this connection, it is important to recall that the execution of particularly deportation orders would cause an irreparable damage. Law No. 6458 also pays regard to this risk and in order to highlight the critical importance of deportation decision, the Law includes a provision on *non-refoulement* principle in its first section.[37] Thus, considering that execution of a deportation order might lead to a person face a risk of torture, ill-treatment or inhuman or degrading treatment or punishment and that such acts are absolutely prohibited both under

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proceeding without an authorization, then the principal shall be bond with this proceeding upon a declared consent.

36 Article 7 of Code of Administrative Procedures (No: 2577) states that unless otherwise stated in other acts, the standard time limit to initiate an action before an administrative court is 60 days. However, as per Article 53 of the Law on Foreigners and International Protection (No: 6458), a person has the right to appeal against a removal order within 15 days following the date of notification. On the other hand, Article 80 states that "notwithstanding the judicial appeal mechanism provided under Article 68 ["administrative detention of international protection applicants"], the concerned person, his/ her legal representative or lawyer may appeal against the decisions made pursuant to Articles 72 ["inadmissible application"] and 79 ["accelerated procedure"] within fifteen days following the notification of the decision, and within thirty days following the notification of other administrative decisions and actions before the competent administrative court." Italics added by Refugee Rights Turkey

37 Non-refoulement principles is one of key absolute norms under international human rights protection regime. This principle means that no one shall be returned to a place where he or 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.

the Constitution and applicable international human rights treaties of which Turkey is a State Party, it is hard to reckon a graver situation that could arise due to a delay in filing an appeal.

Another serious obstacle before the right to a legal remedy is administrative detention. In other words, in practice, many foreigners issued with a deportation order are placed under administrative detention on various grounds. According to the current provisions of the Code of Administrative Procedures governing the jurisdiction of administrative court related to venue, provided that is not specifically prescribed in another acts, the administrative court located in the locality of the administrative authority of which issued the decision shall have jurisdiction over the case. However, in some cases, persons under administrative detention are transferred to other removal centers in different provinces due to reasons including, but not limited to, capacity. Such referrals do not only pose yet another barrier before access to a lawyer, but also hamper the ability of a claimant to be present before a court in person.

Possible negative ramifications of such transfers have also been challenged in a recent case[38] filed before the Constitutional Court of the Republic of Turkey. The applicant, originally an Egyptian citizen, was initially detained in Adana; yet in a two-month period, he was transferred to both Erzurum and Edirne, the former a province close to Turkey's eastern borders, and the latter the last step before reaching Greece and Bulgaria. In its decision, the Constitutional Court noted that despite specifically being requested in written by the applicant's lawyers, no information was provided on the whereabouts of the applicant, and that due to this lack of information and access, lawyers were forced to file a late appeal without a power of attorney.[39] The Court further stated that even though these complaints were raised at previous stages of the proceedings, the Administrative Court confined its review only as to ascertain procedural propriety, and ignored other grievances articulated by the applicant.[40]

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38 Constitutional Court of the Republic of Turkey, The Case of Yusuf Ahmed Abdelazım Elsayad, Application No: 24/5/2018, 3.7.2018 dated Official Gazette (No. 30467).

39 Constitutional Court of the Republic of Turkey, The Case of Yusuf Ahmed Abdelazım Elsayad, Paragraphs 82 and 83.

40 Constitutional Court of the Republic of Turkey, The Case of Yusuf Ahmed Abdelazım

In light of these facts, the Constitutional Court ruled that "given that the applicant was already in a disadvantageous position than the state in asserting alleged violations as he was under protective custody, and that his claims, based on material facts, were not taken into consideration by the administrative court, it is not possible to argue that the applicant in the present case had been provided an effective remedy in relation to his complaints of ill-treatment"[41] and found a violation of Article 40 of the Constitution in conjunction with Article 17, an equivalent of the violation of Article 13 in conjunction with Article 3 of the European Convention on Human Rights.

Conclusion and Recommendations

All court decisions cited in this opinion paper are consistent both with Law on Foreigners and International Protection and the Attorneys Act. These decisions are also critical as they provide interpretation aiming to remove barriers against the right to a legal remedy and secure access to justice for refugees and vulnerable migrants.

Refugee Rights Turkey would like to reiterate its call on all relevant stakeholders to take effective measures aiming to ensure an effective access to the right to a legal remedy and thus the right to justice.

Recommendations

- All appeals—particularly those made against deportation orders—should be guided by the overarching principle that refugees and other vulnerable migrants are in a disadvantageous position in accessing to the right to a legal remedy, and thus the possibility to bring a court case without a notarized power of attorney, a safeguard introduced by the Code of Civil Procedures, must be duly observed.

- As noted by the higher courts, the discretionary power in granting a permission to initiate a judicial appeal without a notarized power of attorney and setting of a time limit for the submission

Elsayad, Paragraph 86.

41 Constitutional Court of the Republic of Turkey, The Case of Yusuf Ahmed Abdelazım Elsayad, Paragraph 88.

of a notarized power of attorney must not be exercised in an arbitrary manner and should be reasonable with the facts of the case and aim to uphold the right to a legal remedy.

- Similarly, as noted by the Constitutional Court of the Republic of Turkey, all complaints relating to the right to a legal remedy should be examined on its merits and courts must not confine their reviews only as to ascertain procedural propriety.

- All authorities should comply with provisions of Attorneys Act, particularly with the provision emphasizing the obligation to assist attorneys in the performance of their roles.

- Internal regulations should be public and established in a manner to facilitate the access to the right to a legal remedy and to the right to justice.

- In light of the most recent amendment introduced to the Law on Foreigners and International Protection, which removed the issuance of international protection applicant IDs, a new regulation should be introduced particularly for individuals without identification documents and whose applications are either assessed under accelerated procedure or considered inadmissible.

- All documents issued by competent authorities and bearing the sign and stamp of these authorities are considered valid under the Regulation on the Notary Public Law and thus there should be no reluctance on the part of public notaries to rely on these official documents in issuing or notarizing a power of attorney.

- Similarly, as stipulated under the Regulation on the Notary Public Law, in cases where these documents could not be presented by individuals, public notaries should resort to accepting witness statements to establish identity.

- The Union of Public Notaries should publish a circular reiterating these possibilities with a view to prevent and/or overcome reported reluctance and inconsistencies.

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