TURKISH JUDICIAL PRACTICES ON INTERNATIONAL PROTECTION, REMOVAL AND ADMINISTRATIVE DETENTION IN CONNECTION WITH THE SAFE THIRD COUNTRY CONCEPT

A Ph.D. Dissertation

by

GAMZE OVACIK

Faculty of Law

İhsan Doğramacı Bilkent University

Ankara

June 2021

TURKISH JUDICIAL PRACTICES ON INTERNATIONAL PROTECTION, REMOVAL AND ADMINISTRATIVE DETENTION IN CONNECTION WITH THE SAFE THIRD COUNTRY CONCEPT

The Graduate School of Economics and Social Sciences

of

İhsan Doğramacı Bilkent University

By

GAMZE OVACIK

In Partial Fulfillment of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY IN LAW

THE FACULTY OF LAW

İHSAN DOĞRAMACI BİLKENT UNIVERSITY

ANKARA

June 2021

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy in Law.

Prof. Dr. Ece Göztepe - Supervisor

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy i

Prof. Dr. Erdal Onar - Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy in Law.

Dr. Neva Övünç Öztürk - Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy in Law.

Doç. Dr. Doğa Elçin - Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Doctor of Philosophy in Law.

Dr. Ayşe Dicle Ergin - Examining Committee Member

Approval of the Graduate School of Economics and Social Sciences

Prof. Dr. Refet S. Gürkaynak - Director

Y. Tarık Kona

ABSTRACT

TURKISH JUDICIAL PRACTICES ON INTERNATIONAL PROTECTION, REMOVAL AND ADMINISTRATIVE DETENTION IN CONNECTION WITH THE SAFE THIRD COUNTRY CONCEPT

Ovacık, Gamze

Ph.D., Faculty of Law

Supervisor: Prof. Dr. Ece Göztepe

June 2021

Whether Turkey should be deemed as a "safe third country" for asylum seekers in Europe is a legal conundrum that deserves heighthened attention with the adoption of the EU-Turkey Statement of March 2016 and EU-Turkey Readmission Agreement. I aspire to contribute to this discussion through an analysis of Turkish judicial practices on international protection, removal and administrative detention procedures, including their interaction with international and European framework and jurisprudence. One purpose of the dissertation is to display the protection challenges that the safe third country concept creates through the example of Turkey. The position defended in the thesis is that Turkish

judicial practices or any other component of safe third country assessment such as administrative practices or normative framework should be evaluated from this perspective, by keeping in mind the inherent problems of the safe third country concept. In the assessment of Turkey's position as a safe third country for EU states, state of judiciary is a crucial factor. Judiciary acts as the ultimate safeguard for protection of rights and guiding administrative practices through interpretation of normative framework. Thus the second aim of this thesis is to analyze the problematic legal issues in Turkish judicial practices relevant to international protection, removal and administrative detention, based on an empirical study of decisions of Turkish courts. The empirical method in the qualitative analysis of Turkish jurisprudence is supported with a comparative analysis of the case law of the European Court of Human Rights, Court of Justice of the EU as well as the domestic jurisprudence of EU states.

Keywords: Administrative detention, international protection, Law on Foreigners and International Protection, removal of foreigners, safe third country

ÖZET

GÜVENLİ ÜÇÜNCÜ ÜLKE KAVRAMIYLA BAĞLANTILI OLARAK ULUSLARARASI KORUMA, SINIR DIŞI VE İDARİ GÖZETİM HAKKINDA TÜRK YARGI PRATİKLERİ

Ovacık, Gamze

Doktora, Hukuk Fakültesi

Danışman: Prof. Dr. Ece Göztepe

Haziran 2021

Türkiye'nin Avrupa'daki sığınmacılar için "güvenli üçüncü ülke" olarak kabul edilip edilmemesi gerektiği sorusu, AB-Türkiye Mart 2016 Bildirisi ve AB-Türkiye Geri Kabul Anlaşmasının kabulüyle beraber daha da fazla önem kazanmıştır. Bu tartışmaya, uluslararası koruma, sınır dışı ve idari gözetim prosedürleriyle ilgili Türk yargı pratiklerinin, bunların uluslararası ve Avrupa çerçevesiyle ve içtihadıyla etkileşimini içerecek şekilde, bir analizini yaparak katkıda bulunmayı hedefliyorum. Bu tezin ilk amacı güvenli üçüncü ülke kavramının yarattığı koruma zorluklarını Türkiye örneği üzerinden göstermektir. Burada savunulan pozisyon, Türk yargı pratiklerinin veya idari uygulamalar

ya da normatif çerçeve gibi güvenli üçüncü ülke değerlendirmesinin herhangi bir unsurunun, bu perspektiften, güvenli üçüncü ülke kavramının içkin sorunlarını göz önünde bulundurarak, değerlendirilmesi gerektiğidir. Türkiye'nin AB ülkeleri için güvenli üçüncü ülke olma konumunun değerlendirilmesinde, yargının durumu önemli bir faktördür. Yargı, hakların korunması ve normatif çerçevenin yorumlanmasıyla idari uygulamaların yönlendirilmesi için nihai güvence rolündedir. Bu yüzden, bu tezin ikinci amacı, Türk mahkeme kararlarının ampirik bir çözümlemesine dayanarak, uluslararası koruma, sınır dışı ve idari gözetimle ilgili Türk yargı pratiklerindeki sorunlu hukuki konuları analiz etmektir. Türk içtihadının niteliksel değerlendirilmesindeki ampirik yöntem, Avrupa İnsan Hakları Mahkemesi, AB Adalet Divanı ve AB ülkelerinin yerel içtihadının karşılaştırmalı analiziyle desteklenmektedir.

Anahtar Kelimeler: Güvenli üçüncü ülke, idari gözetim, uluslararası koruma, Yabancılar ve Uluslararası Koruma Kanunu, yabancıların sınır dışı edilmesi

ACKNOWLEDGEMENTS

When I felt overwhelmed with the thesis work and when it seemed like the thesis writing would never end, imagining the day that I was going to write the acknowledgements and what I would write, was something that I used to do that would bring that sense of endlessness to a manageable level. Now, I am having a hard time believing that this day actually arrived. Doing a PhD and writing this thesis has been an incredible experience that transformed me, I am a better person now with more patience, perseverance, and compassion towards myself and the world. There are many people that I should thank who were of great help to me through this journey.

My biggest support was my thesis supervisor Prof. Dr. Ece Göztepe. I am deeply grateful for her timely interventions reminding me my priorities, her methodological guidance about the writing process, her contributions to the content of my thesis and her role as a mentor helping me go through the challenges of the PhD process and making me realize what I want out of the thesis and my academic career. I felt an amazing sense of clarity, calm and ambition at the same time whenever I spoke to her. Next, I feel very lucky for having Prof. Dr. Erdal Onar, Dr. Lami Bertan Tokuzlu and Dr. Neva Övünç Öztürk on my thesis supervisory committee. I am thankful for the extensive knowledge and experience they shared, their meticulous approach to my thesis and their eagerness to make time for communication outside of committee meetings. It was inspiring and also comforting to work with them as I was always able to rely on their contribution to improve my thesis.

I would like to also thank my dear friends and colleagues, in no specific order, Nurali Çitil, Abdülhalim Yılmaz, Cumali Şimşek, Veysel Eşsiz, Oktay Durukan, Onur Gelbal,

Ebru Beşe, İbrahim Ergin, Enes Kafadar, Hatice Sönmez, Duygu İnegöllü, Ayşegül Yalçın Eriş, Lemi Keleş, Ayşegül Tansen, Hayriye Kara, Ayşegül Karpuz, Nazlı Göbek, Ceylan Tanrıverdi, İrem Geçmez, Koray Aygün, Öykü Tümer, Pırıl Erçoban, Şafak Yılmaz, Salih Efe, Selen Vargün, Şenol Karaaslan, Sinan Yolalan, Sinem Uludağ Gök, Taner Kılıç, Emine Sarı, Yasemen Öztürkcan, Eda Bekçi, Tutku Kurt, Hilal Çelik, Hasan Kemal Elban, Tuğçe Duygu Köksal, Mahmut Kaçan, Volkan Görendağ and other members of Mülteci Hakları Çalışma whatsapp group. They are lawyers working in the field who were kind enough to share with me sample court decisions and/or their insights about judicial practices, without which it would not be possible for me to conduct an empirical study. I am grateful for their help and trust, as well as the hard work they carry out which makes the world a better place. On a similar basis, I would like to also thank the judges of Ankara and İstanbul administrative court, Constitutional Court and Council of State who agreed to cooperate, legal aid offices/refugee rights centres of Ankara, İstanbul, Antalya, İzmir and Gaziantep Bar Associations, my colleagues Güz Gültan and Neşe Kılınçoğlu at UNHCR Turkey and non-governmental organizations Refugee Rights Turkey ("*Mülteci Hakları Merkezi*"), Association for Solidarity with Asylum Seekers and Refugees ("*Sığınmacı ve Göçmenlerle Dayanışma Derneği*"), Association for Solidarity with Refugees ("*Mültecilerle Dayanışma Derneği/Mülteci-Der*"), Association for Human Rights and Solidarity for the Oppressed ("*Mazlumlar için Dayanışma Derneği/MAZLUMDER*") and International Refugee Rights Association ("*Uluslararası Mülteci Hakları Derneği*"). Another person whose help was invaluable for my thesis is Fırat Olcay, thanks to him it was possible to make a quantitative analysis of the data on

the collected court decisions, something that was central to my thesis and that I could never handle without his help.

Finally, I want to mention the people whose mere presence in my life gave the strength and joy that enabled me to go through the thesis process. My dearest friend Ayşe Sert was always by my side through thick and thin, just like she always is. Despite the isolating effect of the PhD process, she always managed to pull me out of my head and into the world, granting the fresh breath I so much needed. My love Buğra Sezgin was the closest witness of my struggles about my thesis in the last two years and I am thankful for his generous love and endless understanding. It is amazing how he comes through for me every time and makes it so much easier to endure tough times. Lastly, but most importantly, I would like to thank my dear mother Nuray Ovacık and my dear father Ahmet Ovacık, not just for the way they shouldered the mental, emotional and physical burdens of the PhD process together with me, but also for encouraging me through all my career shifts finally to land at the academic career that I always desired. I dedicate this thesis to them.

Table of Contents

ABBREVIATIONS

1951 Convention	Convention relating to the Status of Refugees adopted on 28 July 1951
1967 Protocol	Protocol relating to the Status of Refugees adopted on 31 January 1967
Administrative Procedure Act No. 2577	Administrative Procedure Act ("İdari Yargılama Usulü Kanunu") No. 2577 published in the Official Gazzette No. 17580 dated 20 January 1982
Asylum Procedures Directive	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
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984
CC	Turkish Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women adopted on 18 December 1979
CJEU	Court of Justice of the European Union
Civil Procedure Act No. 6100	Civil Procedure Act ("Hukuk Muhakemeleri Kanunu") No. 6100 published in the Official Gazzette No. 27836 dated 4 February 2011
Constitution	Constitution of the Republic of Turkey No. 2709 published in the Official Gazzette No. 17863 (repeating) dated 9 November 1982
CRC	Convention on the Rights of the Child adopted on 20 November 1989
Criminal Procedure Act No. 5271	Criminal Procedure Act ("Ceza Muhakemesi Kanunu") No. 5271 published in the Official Gazette No. 25673 dated 17 December 20014
Decree Law No. 676	Decree Law No. 676 regarding Undertaking of Certain Arrangements within the Scope of State of Emergency ("Olağanüstü Hal Kapsamında Bazı Düzenlemeler Yapılması

	Hakkında Kanun Hükmünde Kararname") published in the Official Gazette No. 29872 dated 29 October 2016
DGMM	Turkish Ministry of Interior Directorate General of Migration Management ("Göç İdaresi Genel Müdürlüğü")
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950
ECtHR	European Court of Human Rights
EMN	European Migration Network
EU	European Union
EU Commission Proposal for a recast Return Directive	EU Commission proposal COM/2018/634 dated 12 September 2018 for a recast of the directive on common standards and procedures in Member States for returning illegally staying third-country nationals
EU-Turkey Readmission Agreement	Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorisation signed on 16 December 2013
EU-Turkey Statement of March 2016	EU-Turkey Statement, 18 March 2016 as declared here: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/
ICCPR	International Covenant on Civil and Political Rights adopted on 16 December 1966
Implementing Regulation	Regulation on Implementation of the Law on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanununun Uygulanmasına İlişkin Yönetmelik") published in the Official Gazzette No. 29656 dated 17 March 2016
Internal Regulation of the CC	Internal Regulation of Constitutional Court ("Anayasa Mahkemesi İçtüzüğü") published in the Official Gazzette No. 28351 dated 12 July 2012
IP	International protection as defined in Article 3(1)(r) of the Law No. 6458 on Foreigners and International Protection

ISIS	Islamic State of Iraq and Syria
Law No. 6216	Law No. 6216 on Establishment and Judicial Procedures of Constitutional Court ("Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun") published in the Official Gazzette No. 27894 dated 3 April 2011
LFIP	Law No. 6458 on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanunu") published in the Official Gazette No. 28615 dated 11 April 2013
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NGO	Non-governmental organization
PDMM	Provincial Directorate of Migration Management ("İl Göç İdaresi Müdürlüğü")
Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
RAC	Regional Administrative Court ("Bölge İdare Mahkemesi")
Reception Conditions Directive	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
Return Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

LIST OF FIGURES

INTRODUCTION

Having observed the implementation of the EU-Turkey Statement, 18 March 2016 as declared here: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ ("EU-Turkey Statement of March 2016") and with the recent full entry into force of the Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorisation ("EU-Turkey Readmission Agreement"), whether Turkey should be deemed as a "safe third country" for asylum seekers in Europe is a conundrum that deserves continuing attention. I aspire to contribute to this discussion through an analysis of judicial practices of Turkish Courts implementing the laws on international protection ("IP") procedures, removal and administrative detention, as well as their interaction with international and European framework and jurisprudence in this regard.

Adoption of the EU-Turkey Statement of March 2016 as well as EU-Turkey Readmission Agreement effectively put Turkey in the position of a safe third country with respect to European Union ("EU") states. This paved the way for the EU states to return to Turkey, those asylum seekers who arrived their territory by transiting through Turkey. As determined by the European Court of Human Rights ("ECtHR")[1] and by domestic courts of the EU states, most recent being the Dutch Council of State,[2] deficiencies in IP procedures, detrimental living conditions and difficulties in access to rights in the country of return may trigger non-refoulement obligations of the sending state and prevent such

[1] M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraph 263.
[2] *Council of State (The Hague) October 23 2019, ECLI: NL: RVS: 2019: 3537*

safe third country transfers. Therefore, the quality of the conditions available for returnees in Turkey and the associated problems have crucial implications with respect to such returns to Turkey. In that sense, the problems identified here could contribute to the arguments of asylum seekers before national courts of EU states, against safe third country transfers to Turkey. Moreover, after the mass influx of refugees from Syria, Turkey became the country hosting the highest number of refugees in the world. Thus, the procedures and conditions for refugees as provided by Turkish authorities became all the more important for the protection of almost 3.7 million[3] refugees in Turkey. Therefore, in this context, the significance of judicial practices in Turkey relevant to the IP procedures, removal and administrative detention, rests in their role as a component in assessing the quality of the protection standards in the country in general and in assessing whether Turkey qualifies as a safe third country in particular.

Safe third country practices serve as a "burden shifting" rather than a "responsibility sharing" tool within the deterrence paradigm[4] dominating the field of international migration and asylum. They also create a climate in transit countries such as Turkey conducive to human rights breaches and this in return renders the legality of such practices questionable. Robust criticism raised so far by academia and non-governmental organizations ("NGOs") as to whether Turkey should be deemed as a "safe third country"

[3] According to the statistics published by Directorate General of Migration Management as of 7 April 2021, here: http//en.goc.gov.tr.

[4] As discussed in T. Gammeltoft-Hansen, "International Refugee Law and Refugee Policy: The Case of Deterrence Policies," *Journal of Refugee Studies* 27, no. 4 (December 1, 2014): 574–95; Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence," *Colum. J. Transnat'l L.* 53 (2014): 235; Thomas Gammeltoft-Hansen and Nikolas F. Tan, "The End of the Deterrence Paradigm-Future Directions for Global Refugee Policy," *J. on Migration & Hum. Sec.* 5 (2017): 28.

for asylum seekers in Europe, mainly focused on Turkish administrative practices and normative framework.[5] They mainly base their position on the challenges related to refugee protection in Turkey. They especially claim that general human rights situation in Turkey is problematic, that access to and content of IP are insufficient, and that respect to non-refoulement principle is lacking. By choosing to focus only on these criticisms, the human rights organizations miss out on the real problem with the safe third country concept. Use of safe third country concept is inherently problematic because it is a tool for deflection of responsibility for asylum seekers who should have actually found protection in the sending countries. Thus, even if the criticisms raised about Turkey are not true, such third country transfers to Turkey are still bound to be criticized. It is the position defended here that Turkish judicial practices or any other component of safe third country assessment such as administrative practices or normative framework should be evaluated from this perspective, by keeping in mind the inherent problems of the safe third country concept.

[5] Such as; "A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal" (Amnesty International, 2017); Emanuela Roman, Theodore Baird, and Talia Radcliffe, "Analysis: Why Turkey Is Not a 'Safe Country'" (Statewatch, 2016); Danish Council for Refugees and European Council on Refugees and Exiles, "Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey," 2016; Orçun Ulusoy and Hemme Battjes, "Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement," VU Migration Law Series, 2017; Steve Peers and Emanuela Roman, "EU Law Analysis: The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?," February 5, 2016, http://eulawanalysis.blogspot.com.tr/2016/02/the-eu-turkey-and-refugee-crisis-what.html; Roman Lehner, "The EU-Turkey-'Deal': Legal Challenges and Pitfalls," *International Migration* 57, no. 2 (2018): 176–85; Reinhard Marx, "Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a 'Safe Third State'" (Pro Asyl, 2016); Medecins Sans Frontiers, "One Year on from the EU-Turkey Deal: Challenging EU's Alternative Facts," 2017; European United Left / Nordic Green Left European (GUE/NGL) Parliamentary Group, "What Merkel, Tusk and Timmermans Should Have Seen during Their Visit to Turkey. Report from GUE/NGL Delegation to Turkey, May 2-4 2016," 2016.

Within the broader context of EU-Turkey relations, it should also be noted that the EU-Turkey Readmission Agreement was coupled with a Roadmap on Visa Liberalization which brings the prospect of visa free travel through EU borders for Turkish citizens. This can be perceived as an example of how EU accepted the fact that it may need to grant certain concessions in return of obtaining Turkey's acceptance of safe third country position and cooperation for struggling with irregular migration in the aftermath of the Syrian crisis.

To set the scene before proceeding with the analysis, it is worth mentioning that, after facing many violation decisions by the ECtHR[6] and with the impact of the EU accession process, Turkey adopted its very first law on asylum and migration in 2013. With this comprehensive reform, the legal framework in Turkey became very much aligned with the EU acquis. Before the adoption of this law, the Law No. 6458 on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanunu") published in the Official Gazette No. 28615 dated 11 April 2013 ("LFIP"), legal remedies and thus case law on asylum were virtually non-existent. On administrative dimension, asylum procedures that were previously handled by the law enforcement, was transferred to the newly established Directorate General of Migration Management ("DGMM"). Whereas United Nations High Commissioner for Refugees ("UNHCR") was effectively carrying out refugee status determination as part of its technical assistance to Turkish government, as of September 2018, these procedures are entirely taken over by the DGMM. Thus,

[6] Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000); Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005); Ghorbanov and Others v. Turkey, No. 28127/09 (ECtHR December 3, 2013); Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009).

Turkish regime on asylum and migration, as implemented today, is relatively young and the case law is newly emerging.

In terms of account of the current state of affairs, the relevant decisions by Greek courts and asylum committees as well as the Court of Justice of the European Union ("CJEU") should be mentioned. In the course of enforcement of the EU-Turkey Statement of March 2016 by Greece, upon appeals against decisions ordering return to Turkey, Greek asylum committees initially resisted such returns on the basis that Turkey is not a safe third country. However, upon second appeal, the courts overturned these decisions, effectively declaring Turkey as a safe third country. Moreover, the Government then enacted a legislation changing the composition of the asylum committees making them more government-oriented. After this change, the committees started to reject the appeals in line with Turkey's safe third country position for Greece.[7] On the other hand, in the relevant cases before the CJEU,[8] again the legality of returns under EU-Turkey Statement of March 2016 was challenged. The Court, arguably due to political reasons, remained silent on the merits of the question, on the basis that the Statement is not an act of the EU but rather that of the individual member states.[9] Considering the decisions by Greek courts and asylum committees declaring Turkey as a safe third country as well as by the CJEU refraining from commenting on the issues raised by the implementation of the EU-Turkey

[7] For a detailed account of the discussion, please see: Mariana Gkliati, "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees," *Movements* 3, no. 2 (2017): 213–24.

[8] NF v. European Council, NG v. European Council and NM v. European Council, No. T-192/16, T-193/16, T-257/16 (CJEU 2017).

[9] For a detailed account of the discussion, please see: Thomas Spijkerboer, "Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy before the EU Court of Justice," *Journal of Refugee Studies*, no. 31 (2018): 216–39.

Statement of March 2016, EU seems determined to make full use of the safe third country concept with respect to Turkey. Whereas, the Turkish government suspended the implementation of the bilateral Readmission Agreement with Greece in June 2018 and readmission arrangements with the EU in July 2019 based on political reasons.[10] This creates uncertainties as to the application of the safe third country to Turkey. Since the agreements are not terminated but merely suspended, according to the political climate, it is possible that the parties decide to implement them again at any time, which would reanimate Turkey's position as a safe third country.

In the assessment of Turkey's position as a safe third country for EU states, state of judiciary is among the most important factors. Institutionally and traditionally, judiciary has the key role of acting as the ultimate safeguard for protection of rights and guiding administrative practices through interpretation of normative framework. Nevertheless, there is a lack of literature exploring Turkish case law relevant to asylum procedures and the analysis of such body of case law within an international context. Thus, whereas the first aim of this dissertation is to provide a critical perspective to the safe third country concept, implementation of which is very advanced in the context of EU-Turkey relations, the second aim is to analyze the prominent legal discrepancies in Turkish judicial practices relevant to asylum procedures, based on an empirical study of decisions of Turkish first instance and high courts. Testing the conformity of the newly emerging Turkish case law with international law with an emphasis on the impact of regional policies on national

[10] Neva Övünç Öztürk and Cavidan Soykan, "Üçüncü Yılında AB – Türkiye Mutabakatı: Hukuki Bir Analiz," *Heinrich Böll Stiftung Derneği Türkiye Temsilciliği* (blog), n.d., https://tr.boell.org/tr/2019/10/03/ucuncu-yilinda-ab-turkiye-mutabakati-hukuki-bir-analiz.

practice will be an original contribution that I seek to make to the literature on asylum and migration.

Just as EU member states did among themselves, within the frame of the accession process, Turkey also committed to harmonization with EU acquis on asylum and migration at normative level. However construing and implementing the normative framework relies extensively on national judicial practices. The intended harmonization can only succeed through development of common understandings, principles and rules on asylum and migration by the courts.[11] Domestic courts are thus faced with the need to adapt to the positions of other national courts as well as the CJEU also partly because there are no international, regional or supra-national courts that have the authority to develop legal standards concerning asylum and migration issues.[12]

This is also the case in terms of the implementation of the Convention relating to the Status of Refugees adopted on 28 July 1951 ("1951 Convention"), beyond harmonization through EU instruments. 1951 Convention is widely codified in national legislation which leads to domestic authorities including courts to be authorized with decision-making on a daily basis concerning issues such as different types of refugee protection and principle of non-refoulement. Its widespread infiltration to and implementation within domestic judiciary like this on one hand displays the effectiveness of the 1951 Convention, on the other hand though, it also brings out certain challenges such as the matter of consistent interpretation. Considering the vast amount of individual applications across jurisdictions,

[11] Guy S. Goodwin-Gill and Hélène Lambert, eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (New York: Cambridge University Press, 2012), 2.
[12] Goodwin-Gill and Lambert, 4, 7.

judicial consistency maintaining the minimum level of protection enshrined in the 1951 Convention appears difficult.[13] Lack of an international court or a monitoring body of any sort designated for the 1951 Convention further exacerbates the role of domestic courts.[14]

One result of lack of a complaint mechanism linked with the 1951 Convention is utilization of other international complaints procedures such as the United Nations ("UN") Human Rights Committee or the UN Committee Against Torture for refugee claims largely in the form of allegations of infringement of non-refoulement principle. However, the jurisprudence of these bodies remains limited because they restrict themselves to measuring compliance with their constituent instruments and they do not assess compliance with the 1951 Convention.[15] Despite the absence of a designated international court with the specific mandate of overseeing the implementation of international law connected with refugee protection, it should also be noted that jurisprudence of regional courts become increasingly relevant for refugees. In this vein, primarily, the case law of the ECtHR and CJEU address refugee related issues which make their jurisprudence important as a unifying factor for domestic case law.[16] Both venues saw many applications concerning refugee matters. However, here too it should be noted that they do not have direct jurisdiction to evaluate compliance with the 1951 Convention although they sometimes do take the Convention into consideration in indirect fashion.[17] Still, adoption of legislation at EU level on issues related to migration and asylum created the

[13] K. O'Byrne, "Is There a Need for Better Supervision of the Refugee Convention?," *Journal of Refugee Studies* 26, no. 3 (September 1, 2013): 331.
[14] O'Byrne, 332.
[15] O'Byrne, 347.
[16] O'Byrne, 334.
[17] O'Byrne, 347.

requirement that domestic courts adapt themselves to the approaches of other national courts and the CJEU.[18]

All in all, in terms of practice, the role of overseeing national implementation mainly belongs to domestic courts. They also undertake the job of interpretation of the 1951 Convention as well as other instruments with international character that are effective on national framework.[19] The increasingly important role that national courts play in the implementation of international refugee law also triggers transnational dialogue among domestic courts through adoption of each other's reasonings on similar cases. This gives way to emergence of a common understanding in international refugee case law as well as to increasing expertise of domestic courts in refugee issues. On the other hand it raises issues of consistency among different jurisdictions due to factors such as differing national legal frameworks.[20] Still, as a highly judicialized area in domestic systems, refugee law creates the opportunity for intense transjudicial activity.[21]

Against this background, the chapters of the thesis touch upon the following issues:

Safe third country concept in international and European law and its implementation with respect to Turkey

The first chapter of the thesis seeks to address the safe third country concept which is one of the most controversial notions of international refugee law. In late 1980s, this

[18] Hélène Lambert, "Transnational Judicial Dialogue, Harmonization and the Common European Asylum System," *International and Comparative Law Quarterly* 58, no. 3 (2009): 523.
[19] O'Byrne, "Is There a Need for Better Supervision of the Refugee Convention?," 333.
[20] O'Byrne, 343–44.
[21] Lambert, "Transnational Judicial Dialogue, Harmonization and the Common European Asylum System," 521.

notion emerged as a solution to the "asylum shopping" or "refugees in orbit" phenomena. The alleged purpose was to ensure that refugees stop their journeys as soon as they reached IP after they escaped persecution. However, in fact, the transfers through the safe third country concept based on inadmissibility of asylum applications of refugees who do not come directly from persecution, tend to render their access to asylum more difficult. This thesis aims to display the protection challenges that the safe third country concept creates through the example of Turkey considering the assumption that it is a safe third country for EU states which prevailed with the adoption of the EU-Turkey Statement of March 2016 and the EU-Turkey Readmission Agreement.

To establish the background for this analysis, Turkey's engagement with international refugee law in general, and specifically, the safe third country concept are explored. In this regard, at the beginning of the chapter, situating Turkey with respect to trans-border migratory dynamics and outlining its areas of engagement with international law on migration and asylum brings a holistic approach to the subject. Overview of contemporary dynamics reveal great diversity in trans-border human mobility affecting Turkey. As a result, in addition to its traditional roles of being a country of origin and transit for migratory flows, Turkey also is a country of destination, especially with respect to asylum as well as regular and irregular labor migration, substantially owing to its economic growth. This position makes Turkey a key regional and global actor in terms of formation of international and regional law and policies on asylum and migration, due to its longstanding and substantial experience with respect to international migration and asylum flows. Turkey was also extensively involved in the shaping of the 1951 Convention, the cornerstone of international refugee law, through discussions at UN level.

Thus, Turkey comes across as a key player in relation to progress of international law on asylum and migration. Next, evolution of the safe third country concept is analyzed by covering its emergence and purpose, definition and legal basis and conditions of application, finally, with special reference to the political position taken and contributions made by Turkey in respect of the evolution of this concept. The findings of the chapter concentrate on the current state of affairs and future prospects in view of Turkey's position as a safe third country with respect to EU countries.

The analysis of the safe third country concept in the first chapter serves as a background for the second chapter of the thesis which constitutes the empirical part. It identifies and critically analyzes problematic legal issues in Turkish case law related to IP, removal and administrative detention procedures. The identified problematic legal issues are described below.

Problematic issues in Turkish judicial practices regarding IP procedures

The first problematic issue in Turkish case law on IP procedures, is their limited focus on risk of persecution only based on five 1951 Convention grounds, disregarding cases that qualify for subsidiary protection due to persecution based on reasons other than 1951 Convention grounds, and persecution inflicted only by state actors, disregarding persecution by non-state actors.

The principle of non-refoulement within international refugee law, is applicable to undesired conduct inflicted based on the grounds of race, religion, nationality, membership of a particular social group or political opinion, as opposed to the general formulation under international human rights law which provides protection against

removal regardless of the grounds of the acts against prohibition of torture. This means there is a certain category of non-removable people who are not qualified to be refugees in technical sense as per international refugee law but who are under the protection of international human rights law. This protection responsibility outside the scope of refugee protection but still mandated by international legal obligations is responded by the legal status of subsidiary protection that is recognized both within EU and Turkish law. In this sense, there are instances where Turkish judicial practices tend to overlook this distinction between IP statuses.

Another aspect of IP assessment that the Turkish judges neglect concerns the scope of actors of persecution whereby cases of persecution by non-state actors are at times not found eligible for IP. Both the Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950 ("ECHR") and EU framework recognize that risk of treatment which triggers of IP and non-return obligations, may come from non-state actors or state actors alike. Accordingly, when the actors of persecution or serious harm in the state of removal do not consist of public officials, human rights obligations of the host state may come into play, if it is demonstrated that the risk is real and the authorities in the state of removal are not able or willing to offer appropriate protection against such risk. European domestic judicial discussions on the risk arising from non-state actors and the standards of state protection that should be available against their conduct are extensive. The subjects of European cases frequently focus on forced marriage, domestic and sexual violence, women with Western lifestyle in conservative Muslim societies, sexual and gender based violence, contexts relating to religion or race

where risk is more often than not posed by family members and spouses of applicants, where also Articles 60 and 61 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (İstanbul Convention) come into play. Moreover, many European cases rest on the reasoning that persecution by non-state actors on the ground of gender should be considered within the concept of membership of a particular social group.

The second problematic issue in Turkish judicial practices concerning IP procedures relate to implicit withdrawal of IP applications. Implicit withdrawal indicates a procedure where the IP applicant is accepted to have withdrawn his/her application when certain indicators identified in the law are present and there are no justified excuses. As per Article 54(1)(i) of LFIP, implicit withdrawal decision constitutes a basis for issuance of a removal order, so considering the dire legal consequences of withdrawal decision, how judiciary construes the scope of justified excuse for failure to comply with obligations within IP procedures, becomes critical.

UNHCR strongly expresses that indicators for implicit withdrawal should not be construed to result in termination of IP procedures of applicants who do not have the intention to withdraw their application or abandon the procedure, solely due to their failure to comply with procedural rules. In the Turkish context, it should be taken into account that more often than not the non-compliance with obligations within IP procedures are triggered by the exigencies in the ground, rather than unwillingness of the IP applicants and status holders to continue the IP procedures. Turkey implements a system of dispersed residence for IP applicants and status holders who are responsible from covering their own

needs including accommodation, with limited or no access to formal labor market. Considering that the assignments to satellite cities do not always match the preferences, personal circumstances and employment chances of IP applicants and status holders, many of them fail to comply with their obligations within the IP procedures as they find themselves compelled to change cities for pursuing job opportunities. Administrative difficulty of changing satellite city of assignment or obtaining administrative permission to leave the city of residence are also additional challenges in this regard.

The third problematic legal issue observed in Turkish court decisions concerning IP procedures relate to the instances where the judges reviewing the administrative decisions on implicit withdrawal of IP applications, also evaluate the substantial aspects of the IP application as well as possible removal of the applicant. Typically, this happens in cases where the court rejects the appeal of the implicit withdrawal decision and further asserts lack of IP need and risk upon return. These judicial practices should be assessed with respect to sequence of administrative actions concerning IP assessment and removal as well as the possibility of full legal review concerning removal at the stage of appeal of implicit withdrawal. It should also be considered from the perspective of the criteria of impartial tribunal.

Problematic issues in Turkish judicial practices regarding removal procedures

The first problematic legal issue in Turkish judicial practices concerning removal procedures relate to how the grounds for removal on threat to public security and public order are implemented. One of the two dimensions of the issue is the fact that it is not clear in the legislation what constitutes a threat to public security or public order and thus

the administration holds wide discretion as to what these grounds for removal mean in practice. For the requirements of legal certainty, the interpretation of courts in this respect gain significance. As a benchmark, the ECtHR case law states that in cases where removal order is based on national security, as per the requirements of lawfulness and rule of law, it must be possible for the individual to challenge the administration's claim that national security is at stake. This position was taken in cases where removal orders were issued based on documents or information from the intelligence agency or Security Service and where authorities did not submit evidence or information to the court.

The other dimension of the matter concerning implementation of threat to public order and public security as a removal ground relates to the legal evolution experienced as to judicial appeal procedures and interim measures of the CC. It should be mentioned that, with the impact of the special circumstances caused by the intensification of the terrorist activities in Europe and in Turkey during the years 2015-2016, Decree Law No. 676 regarding Undertaking of Certain Arrangements within the Scope of State of Emergency ("Olağanüstü Hal Kapsamında Bazı Düzenlemeler Yapılması Hakkında Kanun Hükmünde Kararname") published in the Official Gazette No. 29872 dated 29 October 2016 ("Decree Law No. 676") amending LFIP was adopted. This legislation removed the rule prohibiting removal of IP applicants and status holders and it became possible to issue a removal order, at any stage of IP procedures, concerning individuals who are connected to terrorist or criminal organizations, or who pose threat to public order, public security and public health. It is still possible for IP application or status holders to be expelled based on reasons in connection with terrorism and public order, security and health. This means that in such cases, the removal order may be issued

even if it is recognized that the person is in need of IP or even if the procedure to determine the existence of such need is not finalized yet. Furthermore, presence of an official action or a court decision is not required to prove the mentioned removal reasons and the practice is based on the discretion of administration. This situation poses a destructive disruption to IP process and runs the risk that the principle of non-refoulement, which has an absolute nature, is compromised. The other change brought by the Decree Law No. 676 was to remove the automatic suspensive effect of judicial appeals against removal orders that are based on connection with terrorist or criminal organizations or threat to public order, public security and public health. Upon a pilot decision by CC on the matter, the automatic suspensive effect was finally brought back with a legislative amendment. Judicial reactions to these important changes are significant in terms of impact of judiciary in protection of human rights in removal procedures as well as interaction with legislative dynamics.

The second problematic issue arising from judiciary concerning removal procedures relate to their approach to the instances where administration fails to specify country of removal in removal orders. Removal orders are made subject to judicial appeal often based on the claim that the applicant should be exempt from removal as per the grounds of exemption identified in LFIP. One of these grounds is the risk of death penalty, torture, inhuman or degrading treatment or punishment in the country of removal. It follows that the assessment as to the presence of this ground preventing removal, inherently requires the evaluation of the conditions in country of removal however the problem is that, removal orders issued by Turkish authorities typically omit specification of a country of

removal. The position of ECtHR on this issue is that the legal regime and practice whereby the country to which a foreigner is removed is not specified in the removal order is problematic in terms of legal certainty. The case law developed by Turkish courts in this regard demonstrate varying positions.

The third problematic issue observed in Turkish judicial practices in relation to removal procedures manifest itself as the instances of inconsistency in CC's case law concerning its interim measure and merit decisions. This issue relates to the cases where the conclusions of the CC at merits stage to the detriment of the applicant whereas previously it granted interim measures. Such cases in fact call for clear justification. This happens when the CC, after accepting interim measure requests, rules at the merit stage that the claim is inadmissible or that there is no violation of the rights of the applicant. Criticism relies on the general obligation arising from Constitution of the Republic of Turkey No. 2709 published in the Official Gazzette No. 17863 (repeating) dated 9 November 1982 ("Constitution") for providing the reasons that constitute the basis of court decisions.

Problematic issues in Turkish judicial practices regarding administrative detention procedures

The first problematic judicial issue concerning administrative detention procedures relate to the legislative preference as to jurisdiction for appeals on administrative detention. Such appeals are heard by criminal judges of peace as per LFIP, a choice that

is contrary to determination of administrative courts for all other actions in connection with LFIP. Assignment of criminal judges is scrutinized essentially from the angle that administrative detention and criminal arrest and detention on which criminal judges of peace also have jurisdiction, are part of different legal regimes.

The second legal issue that proves to be problematic concerning administrative detention relates to how risk of absconding is interpreted as a ground for administrative detention. As observed in Turkish judicial complaints, risk of absconding is used very often as a basis for administrative detention decisions. Although certain grounds for administrative detention provided in Turkish normative framework, are quite straight forward, the ground of risk of absconding, requires further clarification as to what it entails in concrete situations and this requires resort to the decisions of criminal judges of peace construing this concept.

The third problematic legal issue in Turkish court decisions on administrative detention concerns judicial review of de facto administrative detention. The term "de facto administrative detention" refers to instances where asylum seekers or irregular migrants are held or deprived of their liberty without the implementation of a legally prescribed administrative detention regime that satisfies the rule of law criteria and usually with a view to their removal or to prevent their entry into the country. De facto administrative detention may take place when even though the detention regime is sufficiently regulated in domestic law, in concrete situation, the procedural steps outlined in the law are not undertaken such as cases of absence of duly issued decision ordering detention. Judicial take on de facto administrative detention is critical for overcoming the administrative deficiencies taking place on the ground.

The fourth problematic legal issue in judicial practices on adminsitrative detention concerns granting of compensation for unlawful detention and determination of effective remedy regarding detention conditions. This issue is handled extensively by the case law of the CC upon individual applications and by adminsitrative courts to a lesser extent. While not expressly provided in LFIP in the context of administrative detention within removal and IP procedures, right to compensation for unlawful deprivation of liberty is provided in the Constitution, in line with ECHR. Other than its lawfulness, conditions of administrative detention may also give way to compensation. As a rule, in order to trigger right to compensation, severity of administrative detention conditions should reach at least the level of incompatibility with human dignity as expressed in the Constitution in line with the ECHR. The judicial practices in this regard are analyzed by following the path of CC through its changing case law over time.

Methodology

Whereas the first chapter of the thesis concentrating on the safe third country concept is based on a doctrinal research method essentially consisting of scholarly resources as well as policy documents of international organizations, the second chapter of the thesis rather follows an empirical methodology. Accordingly, the second chapter focusing on a critical analysis of judicial practices of Turkish courts mainly rely on around thousand Turkish court decisions as resource.

Due to lack of a central database of decisions of Turkish first instance and regional courts, it was a challenge to collect court decisions and information on case law for

analysis within the scope of this study. Impacts of this challenge of accessibility on consistency of case law are analyzed in more detail in Section IV. I. of this Chapter.

Upon contact established with them, DGMM Department of Legal Affairs mentioned ongoing institutional efforts to establish a database of court decisions rendered by Turkish courts concerning implementation of LFIP. The database is planned to be for DGMM's internal use, however it would be highly beneficial for the field of Turkish law on refugees and foreigners in general, if such database is made accessible for external users other than DGMM staff. Whereas such access would enable judges to navigate the legal interpretations made by other courts, in cases similar to those before them, and thus enhance uniformity in case law; it would also enable academics to contribute to the improvement of case law in Turkey through comparative and critical analyses of court decisions in line with regional and international legal standards. Possibility to monitor the trends in national case law would also provide inputs for policy development and legislation works. Apparently, protection of rights of individual applicants would also be enhanced if lawyers could access sample case law. Moreover, DGMM is the best-situated actor in the field to lead such data collection and sharing effort, since it is the respondent authority in all judicial complaints and appeals, against administrative decisions and actions undertaken in implementation of LFIP.

Since the courts rendering decisions on IP, removal and administrative detention procedures are geographically widespread across the country, I was able to visit only Ankara and İstanbul administrative courts, Council of State and CC for the purposes of this study. It was occasionally possible to contact judges from other courts through

workshops, seminars and trainings organized by international organizations and non-governmental organizations including Bar Associations. I obtained the majority of court decisions analyzed in this thesis and information on judicial practices through individual lawyers and legal aid offices especially in Ankara, İstanbul, Antalya, İzmir and Gaziantep Bar Associations and non-governmental organizations who provide legal counselling in the field of refugee law such as Refugee Rights Turkey ("*Mülteci Hakları Merkezi*"), Association for Solidarity with Asylum Seekers and Refugees ("*Sığınmacı ve Göçmenlerle Dayanışma Derneği*"), Association for Solidarity with Refugees ("*Mültecilerle Dayanışma Derneği/Mülteci-Der*"), Association for Human Rights and Solidarity for the Oppressed ("*Mazlumlar için Dayanışma Derneği/MAZLUMDER*") and International Refugee Rights Association ("*Uluslararası Mülteci Hakları Derneği*").

Due to the explained challenges, it was not possible to adopt a systematic method for choosing the court decisions for analysis. Therefore, although I spent utmost effort to ensure diversity, the sample of collected case law could not be established on a selective basis with respect to indicators of location, date, nationality of applicants, legal issue or outcome and thus may not constitute an evenly representative sample of Turkish court decisions on IP, removal and administrative detention practices. In order to assess to what extent the analyzed sample represents the existent body of Turkish case law, I tried to reach the statistics on court decisions based on certain indicators listed above. However, it was determined through contacts with Ministry of Justice Judicial Registry and Statistics General Directorate ("*Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü*") that there is no practice of central data collection and analysis for court decisions that could be

enlightening for the purposes of this study. I was advised to contact Provincial Justice Commission Presidencies ("*İl Adalet Komisyonu Başkanlıkları*") present in each courthouse and each of administrative courts, criminal judges of peace and Regional Administrative Courts ("Bölge İdare Mahkemesi") ("RAC") separately in order to request them to compile statistics with respect to court decisions rendered within their jurisdiction. I was left with no choice but to give up on pursuing statistical information, considering, on one hand, the slim likelihood of bringing together reliable data as a result of such attempt that would be dependent on individual discretion of each officer or judge; and on the other hand, the time and energy (which would not be all mine, too) required to send out and follow up over fifty official letters through my university after going through intensive internal bureaucracy. This whole process highlighted once more the need for central data collection and sharing on Turkish case law concerning LFIP.

Limitations explained above set aside, I am still confident that the court decisions reviewed form a sufficiently wide and a qualitatively representative sample. Distribution of subjects of the court decisions and problematic legal issues derived from them overlap with the significant legal issues expressed by lawyers and NGOs. In this respect, although I did not conduct structured interviews, as a professional active in the field, I had various sources of information. Especially between 2017 and 2019, I attended several workshops and trainings organized by Ankara, Aksaray, Gaziantep, Nevşehir, Bursa Bar Associations, NGOs such as Refugee Rights Turkey and Amnesty International as well as meetings with individual lawyers from Ankara, İstanbul, Antalya, Gaziantep and Edirne active in the field of refugee law. Moreover, I am part of a communication network

composed of refugee lawyers and NGOs in Turkey, where legal and judicial matters are subject to discussion and sharing of case law and other data among colleagues. They contributed to the thesis through reflections from the ground as well as legal discussions on judicial discrepancies. Thus, based on information exchange in these platfoms, qualitative analysis verifies the quantitative data with respect to the legal issues identified to be problematic in Turkish case law.

Before explaining the methodology of analysis, I would like to clarify my preferences related to use of terminology. Since court decisions that form the basis of analysis in this Chapter naturally refer to legal provisions and concepts as they are adopted within Turkish normative framework, I tried to stay loyal to the terminology in the official English translations of Turkish legislation, especially of LFIP and Constitution. This is solely for the purpose of maintaining terminological unity with Turkish legal framework and case law for practical reasons and ease of reference. On the other hand, terminology in comparative law especially in EU and ECHR context was also taken into account. To mention few examples, instead of "deportation" or "expulsion" which are commonly used synonyms in English, I preferred to use the term "removal" ("*sınır dışı*") in line with English version of LFIP provided in the website of DGMM as well as Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive). Similarly, despite its more common use as "detention" in comparative law, Turkish framework adopts the term "administrative detention" ("*idari gözetim*") to differentiate the measure from criminal detention.

Similarly, since the CC refers to its "internal regulation" ("*içtüzük*"), this was chosen over the generally used term "standing orders". Finally, terminology in line with LFIP is preferred over terminology in international framework and literature concerning asylum statuses. Accordingly, in general terms, "international protection" is used instead of "asylum", "international protection applicant" denotes "asylum seeker" and "international protection status holder" signifies "refugee". It should be noted that when there are exceptions to this terminology, the term "refugee" is used in its most general sense including those who do not have any formal application for international protection.

On the other hand, considering that translations within the Constitution and the Internal Regulation of Constitutional Court ("Anayasa Mahkemesi İçtüzüğü") published in the Official Gazzette No. 28351 dated 12 July 2012 ("Internal Regulation of the CC") vary and that the interpretation of the concept by the CC is very much inspired by ECtHR case law, instead of terms "material/corporeal and moral/spiritual existence/integrity", the established terminology used by the ECtHR is preferred for "physical and moral existence/integrity". On a similar vein, although it is translated as "cautionary judgment" in the Internal Regulation of the CC, taking into account the widespread use in the comparative case law and literature, the expression I preferred is "interim measure".

In terms of legal analysis, this dissertation aims to show case and examine prominent legal issues in Turkish judicial practices related to the provisions of LFIP that are most significant with respect to human rights protection. I did not bring any limitation to the diversity of subjects of court decisions at the stage of data collection so that I could proceed on a selective basis at the stage of legal analysis according to the distribution of

weight among different subjects. Considering their dominant ratio within the existing national and regional case law and key importance in implementation of the main principles of international refugee and human rights law, I restrict the focus of this study to the court decisions and legal issues they trigger, on;

- IP procedures as per the provisions in Part Three of LFIP;
- removal procedures as per Articles 52-56 of LFIP;
- on administrative detention procedures as per Articles 57-58 of LFIP.

Therefore, court decisions rendered as a result of complaints against;

- refusal of entry to Turkey as per Article 7 of LFIP;
- security codes and entry bans imposed as per Articles 9 and 10 of LFIP;
- refusal, non-renewal or cancellation of residence permit or visa applications as per Articles 15, 16, 21, 25, 26, 33, 35, 36, 37, 40, 47 and 49 of LFIP;
- reporting obligations imposed as per Article 57(4) of LFIP; and
- administrative fines imposed as per Article 102 of LFIP are not included within the scope of this thesis.

Also, since no court decisions have been reviewed on these subjects, which indicates their rarity, if not absence,

- exclusion from IP as per Article 64 of LFIP, and
- cancellation of IP status as per Article 86

are outside the scope of the thesis as well.

Built on these methodological preferences, the following sections of this Chapter consist of analysis of problematic legal issues in Turkish case law on IP procedures, removal procedures and administrative detention procedures respectively. To clarify, in line with the legal remedies provided in the LFIP, the case law on IP procedures consist of decisions of first instance administrative courts, RACs and Council of State issued upon requests for annulment of decisions of the administration on rejection, inadmissibility or withdrawal of IP applications. Case law on removal procedures encompass decisions of first instance administrative courts rendered upon request for annulment of removal orders and decisions of the CC in individual applications against removal procedures. Finally, case law on administrative detention substantially covers decisions of criminal judges of peace on requests for annulment of administrative detention decisions and case law of the CC on individual applications concerning administrative detention procedures.[22] Every section is structured to include several sub-sections, each of which are devoted to a legal issue of concern.

As a general approach, the analysis here focuses on the methodology and depth of legal analysis carried out by Turkish courts and not on comparison of cases based on facts involved. The facts surrounding court decisions are considered to the extent and in the form that they were reflected in the court decisions, therefore although such test of adequacy and consistency with respect to legal categorization of facts could reveal

[22] As a result of the amendment to Constitution and the amendment to the Law No. 6216, it became possible as of 23 September 2012 for anyone to lodge an individual application to the CC with the claim that the public power has violated his/her fundamental rights and freedoms that fall within the common scope of the Constitution and the ECHR. Similar to ECtHR, in addition to merits decisions, the CC also has the power to issue interim measure decisions in case of a serious danger to physical and moral existence/integrity of the applicant, as per Article 49 of the Law No. 6216 and Article 73 of the Internal Regulation of the CC.

important outcomes; it would not be a reliable exercise without at least reviewing the whole court file. Therefore, the analysis here does not focus on whether the court decisions bring just results in concrete cases but rather tries to highlight areas where the legal analysis of the courts demonstrate deficiencies. Legal issues selected are not necessarily the most frequently observed themes in the court decisions. Selection of legal issues was rather made among problematic themes that regularly demonstrate contradiction with or fall short of, national or international normative framework or comparative case law, or that comprises inconsistency within domestic case law due to non-uniform judicial practices among courts of different location or jurisdiction. Thus, many themes where Turkish courts consistently exhibit judicial practices in compliance with international standards are excluded deliberately from the scope of this thesis. Of course, relevant court decisions that establish good practices are quoted within the analysis of each theme with the aspiration that they would influence transformation of future judicial practices. However, this is still within the analysis of a problematic theme.

The reason for focusing on negative judicial practices and excluding themes with dominantly positive judicial practices is twofold. First, as set forth in Chapter I, one of the main arguments of this thesis rests on challenging safe third country practices with respect to Turkey, by arguing, among others, that the condition of the judicial processes in Turkey concerning IP, removal and administrative detention procedures contain problematic practices creating protection shortcomings. Secondly, there are already certain

publications[23] featuring good examples from Turkish jurisprudence on IP, removal and administrative detention procedures that include comprehensive legal reasoning in line with national and international normative framework. These works have great value in terms of setting a standard and for promoting similar legal approaches among judges. On the other hand, I believe, its reverse symmetry, adopting a critical approach to case law as I am doing here, is equally necessary. As it will be demonstrated by multiple references to court decisions, the problematic issues identified here appear to be more than isolated instances. They rather represent judicial approaches triggered by formulation of the national legal framework or its interpretation by judiciary. So the purpose here is to attempt a modest contribution to Turkish judiciary, by participating in the legal discussions initiated in court decisions, by pointing out the undesired outcomes of criticized judicial practices and by suggesting alternatives from national and comparative case law that resonate better with the text and the spirit of the national and international legal framework. As a methodological note, it should be noted that in analyzing jurisprudence, it is justified to employ various methods of criticism such as offering a political critique moving from the idea that the case law does not reflect the democratic majority's will, or a law and economics critique claiming that court decisions are

[23] International Commission of Jurists (ICJ) et al., "Geri Göndermeme, Sınır Dışı Etme ve Uluslararası Koruma," "Sığınmacılar, Mülteciler ve Göçmenlerin Adalete Erişimine Destek" Projesi - Modül 1, n.d.; International Commission of Jurists (ICJ) et al., "İdari Gözetim Altındaki Göçmen, Mülteci ve Sığınmacılar Için Adalete Erişim," "Sığınmacılar, Mülteciler ve Göçmenlerin Adalete Erişimine Destek" Projesi - Modül 2, n.d. as well as a booklet that I worked on during my employment at UNHCR Turkey that was planned to be published and disseminated to Turkish judges; and not being limited to IP and foreigners context, Doğru Prof. Dr. Osman, *Yaşama Hakkı*, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 5 (Council of Europe, 2018); Şirin Dr. Tolga, *Özgürlük ve Güvenlik Hakkı*, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 1 (Council of Europe, 2018); Öncü Dr. Gülay Arslan, *Özel Yaşama ve Aile Yaşamına Saygı Hakkı*, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 8 (Council of Europe, 2019) contain relevant precedents from CC case law on human rights.

inefficient, or a moral critique criticizing the immorality of the case law. However in this dissertation, in order to ensure the legitimacy of the critique based on its technical nature, the criticism of court decisions will be confined to legal discourse.[24]

Within this frame, in addition to examples from Turkish case law, jurisprudence from ECtHR, CJEU as well as national case law of EU member states are used for comparative purposes, without forgetting that they too have problematic practices in terms of judicial reasoning. As is well known, ECHR does not contain a right to asylum as such. However, mainly through its case law on right to life as per Article 2 and prohibition of torture as per Article 3, on right to liberty and security of the person as per Article 5, right to effective remedy in connection with these rights as per Article 13, as well as on some other provisions to a lesser extent where relevant, it developed comprehensive case law on removal, administrative detention and IP procedures. Moreover, the applicants frequently utilize ECtHR's power to issue interim measures under Rule 39 of the Rules of the Court, to prevent removal procedures.[25] Considering the great influence of violation decisions of ECtHR on the development of a new legal and institutional framework in Turkey, ECtHR jurisprudence has a generally accepted role of setting judicial standards for alignment by Turkish judges. This may be most visible in decisions of the CC rendered concerning

[24] Thomas Spijkerboer, "Analysing European Case-Law on Migration: Options for Critical Lawyers," in *EU Migration Law*, ed. Loic Azoulai and Karin de Vries (Oxford University Press, 2014), 188.
[25] Samantha Velluti, "The Role of the European Courts in Ensuring Adequate Standards of Asylum-Seekers' Human Rights' Protection in Europe After Lisbon," in *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014), 79–80; Laurens Lavrysen, "European Asylum Law and the ECHR : An Uneasy Coexistence," *Goettingen Journal of International Law*, 2012, 219–20.

individual applications consisting of claims of violation of rights that are protected by both the ECHR and Constitution, and where many references are made to ECtHR decisions.

Similarly, Turkey's efforts for harmonization with EU acquis in the process of EU accession, leaves remarkable traces in establishment of legal framework and national case law. Asylum Procedures Directive, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ("Qualification Directive"), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection ("Reception Conditions Directive") and Return Directive being the leading sources, have extensively inspired Turkish lawmaking. In the context of IP and removal, it should be noted that apart from all EU member states being party to them, the Charter of Fundamental Rights of the EU (2012/C 326/02) makes reference both to the ECHR and 1951 Convention and 1967 Protocol and it also explicitly provides for a right to asylum. In parallel with this normative framework, case law of the CJEU being the judicial organ competent in matters of interpretation of EU law to ensure legal harmonization among EU member states, also has significance for Turkey. Through preliminary rulings upon reference by national courts, CJEU renders decisions directly

binding for the referring court and constituting precedent for other member state courts for the purposes of judicial interpretation of EU law.[26]

Against this background, the two regional courts ECtHR and CJEU have a demonstrated role in guiding Turkish normative framework, administrative and judicial practices. However, naturally, the provisions of the regional and supra-national framework does not contain as much detail as domestic legislation. Both in the implementation of ECHR and the EU framework, many matters, including but not limited to procedural details, are left to national discretion. Thus, in addition to ECtHR and CJEU case law, I also refer to national court decisions of EU member states, implementing the European normative framework as they serve as reference points for assessing Turkish judicial practices. Since the purpose here is to assess Turkish judicial practices, problematic practices by European regional and national courts are delibaretely left outside the scope of this thesis.

In fact, decisions of quasi-judicial bodies empowered to hear individual complaints concerning international human rights treaties could also be relevant for assessing the practices of Turkish judiciary in the context of IP, removal and administrative detention of foreigners. In this respect Turkey is a party to many relevant international treaties such

[26] J. Whiteman and C. Nielsen, "Lessons from Supervisory Mechanisms in International and Regional Law," *Journal of Refugee Studies* 26, no. 3 (September 1, 2013): 365–66; Roland Bank, "The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law," *International Journal of Refugee Law* 27, no. 2 (2015): 214; M. Garlick, "International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR," *Refugee Survey Quarterly* 34, no. 1 (March 1, 2015): 109–12; Lavrysen, "European Asylum Law and the ECHR : An Uneasy Coexistence," 222–23; Velluti, "The Role of the European Courts in Ensuring Adequate Standards of Asylum-Seekers' Human Rights' Protection in Europe After Lisbon," 77–78; Lambert, "Transnational Judicial Dialogue, Harmonization and the Common European Asylum System," 525.

as ICCPR, CRC, CEDAW and CAT. However, examination of the case law of the international convention mechanisms concerning foreigners and IP yielded to the result that, compared to the case law of the European courts, this body of case law is significantly limited in number and in depth. Considering that the principles enshrined in these conventions are reflected in the European and Turkish normative framework, it is a conscious choice to focus on European case law.

Finally, quantitative overview of the court decisions reviewed for the purposes of this dissertation is provided below according to different indicators:

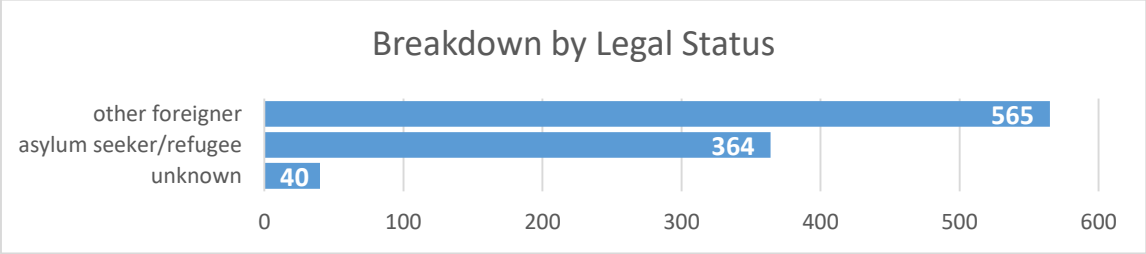

Figure 1: Breakdown of Analyzed Court Decisions by Legal Status of Applicants

This graph shows the breakdown of the court decisions reviewed according to the legal status in Turkey of the applicants of relevant legal proceedings. Those with previous or current IP applications or statuses are accepted to fall under the category of "asylum seeker/refugee". The reason for maintaining a wide scope covering previous IP applications/statuses is because, even though they are not active/valid at the time of the court decision, the fact that the foreigner was within IP procedure generally affects the character of the legal bases and argumentation in the course of the judicial proceedings. The category of "other foreigner" denotes individuals that have no connection with IP procedures and who are present in Turkey either on a regular (eg. residence permit, visa)

or irregular status that is without any legal basis to enter into/stay in Turkey. However since the court decisions relate to IP procedures, removal and administrative detention, by the nature of the subjects of judicial complaints, the applicants who have no connection with IP procedures consist dominantly of irregular migrants. It is seen that, although not extremely, the number of court decisions concerning asylum seekers/refugees are less than those concerning other foreigner. This is a reflection of the fact that removal and administrative detention procedures dominantly relate to irregular migrants. Thus, understandably majority of the judicial appeals on these subjects are brought by those under the category of "other foreigner". Therefore the breakdown as per legal status, having a negligible amount of foreigners with unidentifiable legal status, demonstrates a representative sample of approximately one thousand court decisions subject to analysis within this dissertation.

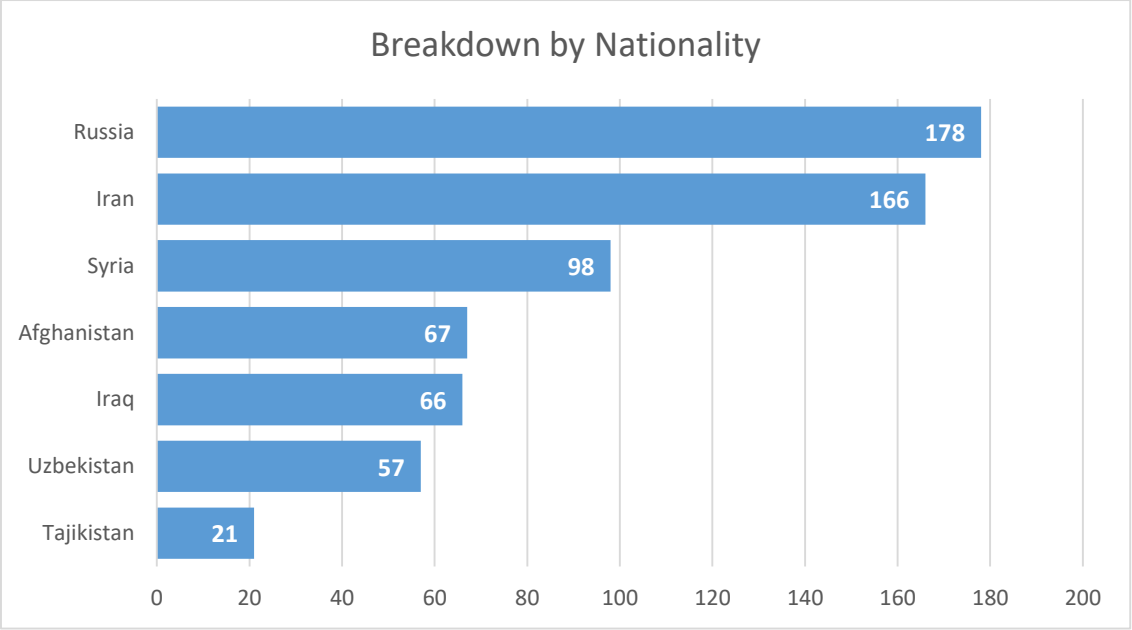

Figure 2: Breakdown of Analyzed Court Decisions by Nationality of Applicants – I

Another display of data, as contained in the next page, that is meaningful for the purposes herein concerns the distribution of the nationalities of the applicants in the court decisions reviewed. Due to the wide spectrum of nationalities that appeared before Turkish courts concerning administrative measures concerning IP procedures, administrative detention and removal, the most common nationalities observed are shown here, whereas the nationalities with less frequency as well as cases where nationality of the applicant was unknown are included in the graph next page. The most important outcome to be derived from this distribution is that the court decisions collected for this study are in line with the realities of the ground. The nationalities of highest number as observed in the judgments coincide with the major groups of asylum seekers/refugees and irregular migrants in Turkey according to the official statistics.[27] This was in fact the expected outcome and it confirms the reliability of the data in terms of diversity which is crucial due to lack of possibility of selective data collection.

[27] According to the statistics published by Directorate General of Migration Management as of 7 April 2021, here: http//en.goc.gov.tr.

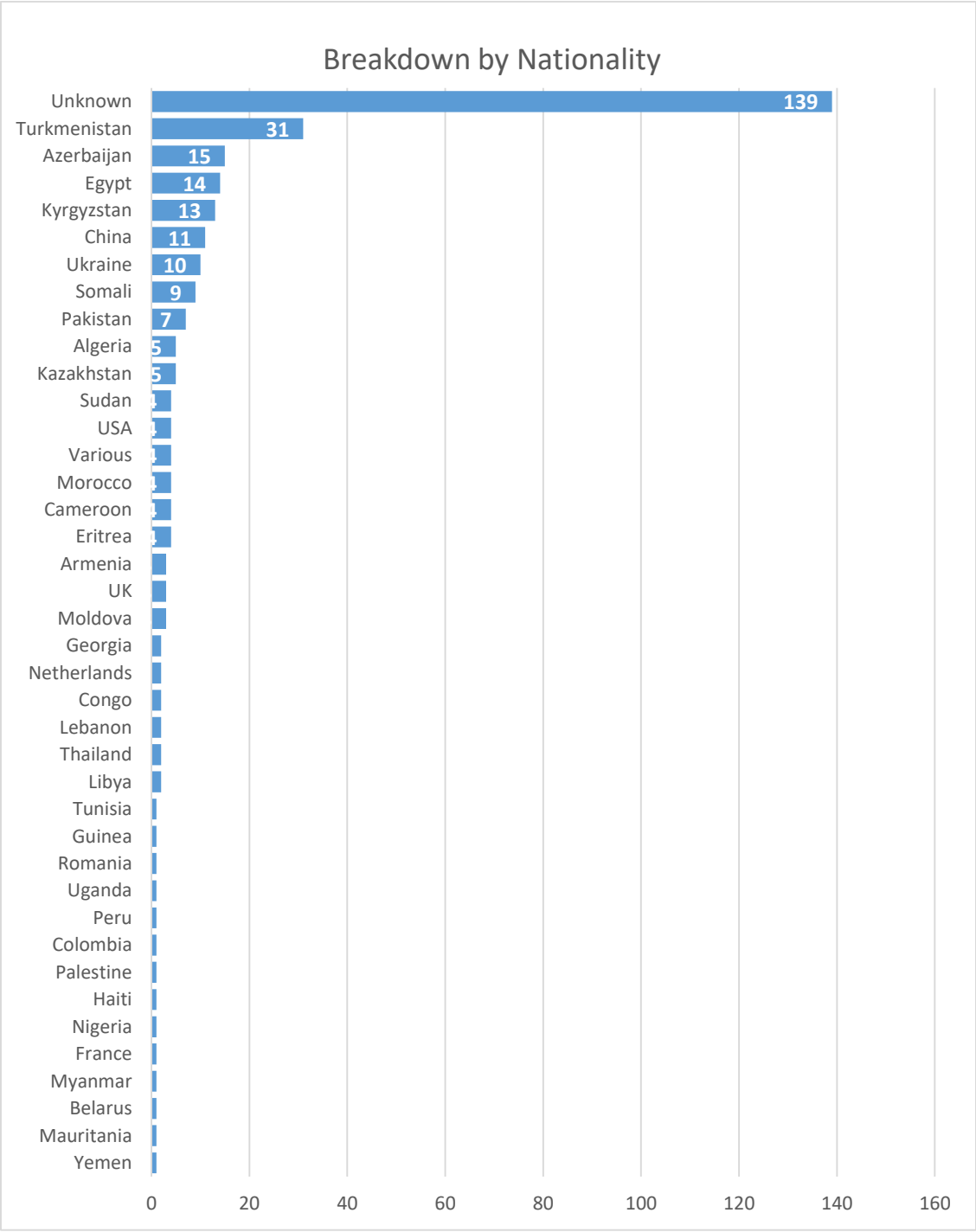

Figure 3: Breakdown of Analyzed Court Decisions by Nationality of Applicants – II

Final display of data in the next page, concerning the reviewed case law within this thesis relates to the legal outcome obtained as a result of judicial appeals against the decisions within IP procedures as well as decisions concerning administrative detention and removal. Upon closer examination it becomes clear that outcomes to the benefit of the applicants which may be referred to as positive outcomes and outcomes to the detriment of the applicants that can be referred to as negative outcomes, demonstrate a somewhat balanced distribution. Considering that we are looking at a large sum of court decisions with fairly representative properties in terms of different indicators as explained above, the meaning of this distribution signifies lack of a grave structural or systemic problem such as a constant bias in the studied judicial procedures. This strengthens the reliability of appeal procedures concerning IP procedures, administrative detention and removal.

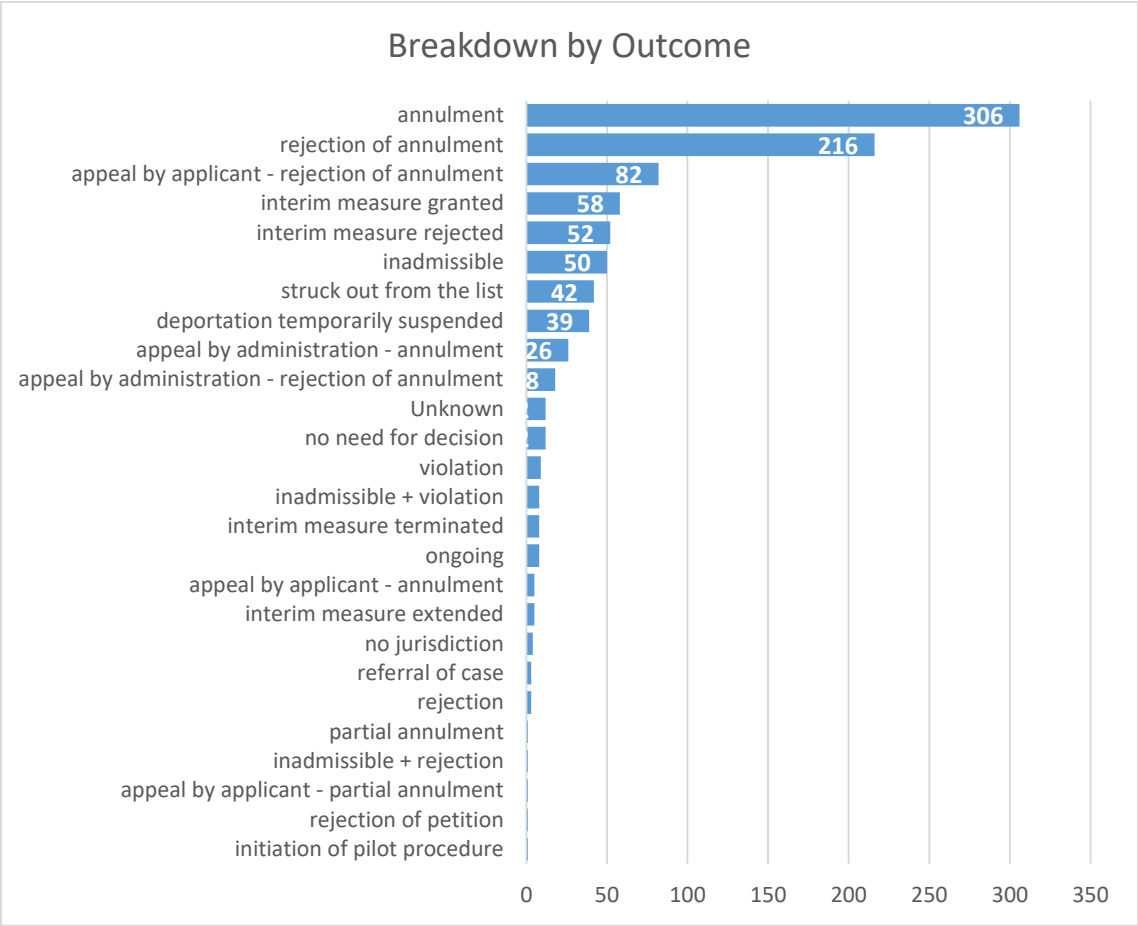

Figure 4: Breakdown of Analyzed Court Decisions by Outcome of Applications

CHAPTER I: SAFE THIRD COUNTRY CONCEPT IN INTERNATIONAL AND EUROPEAN LAW AND ITS IMPLEMENTATION WITH RESPECT TO TURKEY[28]

I. Introduction

This chapter seeks to address one of the most currently debated notions in international refugee law, that is the safe third country concept. This notion was presented as a solution to the "asylum shopping" or "refugees in orbit" phenomena when it emerged in late 1980s. Thus, the purpose was arguably to ensure that the refugees do not change countries after they escaped persecution and found IP at the closest instance possible. However, the practices involving safe third country transfers relying on inadmissibility of asylum applications in cases where the refugees do not come directly from persecution, tend to render their access to asylum more difficult. The purpose here is to display the protection challenges that the safe third country concept creates through the example of Turkey in consideration of its position as a safe third country for EU states through adoption of the EU-Turkey Statement of March 2016 and the EU-Turkey Readmission Agreement. To establish the background, Turkey's engagement with international refugee law in general, and specifically, the safe third country concept will be explored. For this aim, the analysis commences by situating Turkey with respect to trans-border migratory dynamics and outlining its areas of engagement with international law on migration and asylum. Then,

[28] This chapter is based on Gamze Ovacık, "Compatibility of the Safe Third Country Concept with International Refugee Law and Its Application to Turkey," *Perceptions Journal of International Affairs* XXV, no. 1 (2020): 61–80.

evolution of the safe third country concept will be analyzed with special reference to the political position taken and contributions made by Turkey. Finally, current state of affairs and future prospects will be discussed in view of Turkey's position as a safe third country with respect to EU countries.

II. Turkey's position with respect to trans-border migratory dynamics

In order to comprehend the ways that Turkey engages with international law on asylum and migration, we should first build an understanding of its position within the realm of various trans-border movements throughout history. Such mobility through its borders has always been an important reality as well as a policy area for the Republic of Turkey starting with immigration from Balkans and population exchange with Greece during its nation state building efforts at the beginning of 1900s, until the recent mass influx of refugees from Syria. In fact, Turkey witnessed a great variety of human mobility through its borders, most significant ones being the emigration of Turkish workers to Germany in 1960s, transit and incoming flows in the end of 1980s and beginning of 1990s, triggered by the collapse of the Soviet Union and conflicts in Iran and Iraq. Also, relatively recent flows of labour migrants, students and retirees, as well as continual asylum flows are among important components of Turkish migratory dynamics.

To be more specific, the categorization based on chronology composed by *İçduygu and others*[29] paint a more detailed picture encompassing the main incoming and outgoing

[29] Ahmet İçduygu, Sema Erder, and Ömer Faruk Gençkaya, "Türkiye'nin Uluslararası Göç Politikaları, 1923-2023: Ulus-Devlet Oluşumundan Ulus-Ötesi Dönüşümlere," MiReKoc Research Reports 1/2014 (İstanbul, 2014), 53–59.

trans-border flows affecting Turkey. Accordingly, incoming asylum and migratory movements to Turkey mainly consist of flows of Turkish Muslims from former Ottoman territories in Balkans starting from the establishment of the republic in 1923 through 1950s; Jewish migration from Europe arising from World War II; flows from Iran, Iraq and Afghanistan starting from 1980s due to political and economic unrest; mass influx of ethnic Turks from Bulgaria in 1989 due to pressure they faced for reasons related to religion and ethnicity; mass influx from northern Iraq in 1991 due to Gulf War; circular and irregular labour migration from former Soviet Union states after its collapse; mixed transit movements including asylum seekers, mixed flows containing different groups such as economic migrants and victims of human trafficking from underdeveloped countries such as Afghanistan, Bangladesh and Pakistan; retirement migration to western and southern coasts of Turkey from Western European countries and finally the mass influx from Syria which started in 2011 as a result of the ongoing internal conflict. Opposite to such incoming flows, the main outgoing flows from Turkey consist of displacement of Armenians in 1915; 1960s' Turkish guest worker emigrations to Europe; returns to Europe in the aftermath of the World War II; and asylum flow of citizens from Turkey after 1980 military coup. On the other hand, Turkish-Greek population exchange within Lausanne Treaty in 1923, as well as increasing high skilled labour and student migration through increased global mobility of capital and people, appear as flows with both an immigration and an emigration component. As for today, being the country hosting the largest refugee population of almost 3.7 million[30], Turkey's regional and

[30] As per statistics available on the website of Directorate General for Migration Management at https://www.goc.gov.tr/ updated as of 7 April 2021.

global significance with respect to management of international human mobility is ever increasing.

This background of diverse dynamics of trans-border human mobility, in fact rests on Turkey's geopolitical position, which is probably one of the most recurrent themes in the context of international politics concerning Turkey. International migration is one of the areas that reminds us why this characteristic of Turkey is mentioned so frequently. Indeed, for the region to its south-east, Turkey serves as a safe haven for those fleeing conflicts, persecution and poverty, whereas for the countries in its west, it serves as a buffer zone relieving the pressures of influx of migrants and asylum seekers. Analysis of contemporary dynamics of trans-border human mobility shows us that, in addition to still being a country of origin and transit for migratory flows, Turkey also is a country of destination, especially with respect to asylum as well as regular and irregular labor migration, substantially owing to its economic growth.

Due to its longstanding and substantial experience with respect to international migration and asylum flows, Turkey has always been a key regional and global actor in terms of creation of international and regional law and policies related to asylum and migration. It has also extensively engaged with the shaping of the 1951 Convention[31], the cornerstone of international law on asylum, through discussions at UNHCR Executive Committee and UN General Assembly Meetings. Thus, Turkey comes across as a key player in relation to progress of international law on asylum and migration.

[31] Turkey has become a party to the 1951 Convention in 1962 and to the Protocol relating to the Status of Refugees adopted on 31 January 1967 ("1967 Protocol") in 1968 removing the temporal but maintaining the geographical limitation.

III. Areas of engagement with international law on asylum and migration by Turkey

Considering the diversity of human mobility surrounding Turkey, its engagement with international law concerning asylum and migration is also multi-dimensional.

For instance, several efforts exist at international level for establishing a framework for temporary protection in cases of mass influx situations, such as publication of the Guidelines on Temporary Protection or Stay by the UNHCR[32] or adoption of Temporary Protection Directive[33] by the EU, which remains to be unimplemented so far. Thus, temporary protection regime implemented by Turkey is one of the few examples where a mass influx situation is addressed by implementation of national normative framework regulating the conditions and scope of temporary protection in detail. This situation will surely contribute to the evolution of international understanding of the concept of temporary protection in international refugee law.

Moreover, Turkey is among the few immigration countries party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[34] which enhances the significance of the Convention. Turkey also assumes a leading role in inter-governmental cooperation platforms on migration such as the

[32] UNHCR, "Guidelines on Temporary Protection or Stay Arrangements," February 2014, https://www.refworld.org/docid/52fba2404.html.
[33] Council of the European Union, "Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof," 2001.
[34] UN General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by Resolution 45/158 of 18 December 1990," December 18, 1990, https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx.

Budapest Process[35] and Global Forum on Migration and Development,[36] which increases the soft power attached to such fora.

Finally, another subject of engagement for Turkey concerns the overlapping area between international law on asylum and migration and international human rights law. This area constitutes the vertical dimension of this field being the relationship between the state and the individual. In this respect, cases brought against Turkey by asylum seekers before the ECtHR have yielded to landmark judgments by ECtHR such as *Jabari v. Turkey*[37], *Mamatkulov and Askarov v. Turkey*[38], *Abdolkhani and Karimnia v. Turkey*[39] and *Ghorbanov and Others v. Turkey*[40]. This is not a proud contribution on behalf of Turkey, yet at the same time, it is a major one that cannot be disregarded when considering Turkey's engagement with international law on asylum and migration. These cases are especially important because the ECHR does not expressly provide for a right to asylum. Thus, human rights protection for asylum seekers is made available within ECHR, mainly through interpretation of other rights enshrined in the Convention. These mainly consist of the right to life and the right to be free from torture and inhuman and degrading treatment and punishment, in the context of return of foreigners; right to freedom and security, in the context of administrative detention of foreigners; as well as right to

[35] The Budapest Process is a consultative forum with over 50 governments and 10 international organisations aiming at developing comprehensive and sustainable systems for orderly migration. More information is available at: https://www.budapestprocess.org/

[36] The Global Forum on Migration and Development is a voluntary, informal, non-binding and government-led process open to all States Members and Observers of the UN, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes. More information is available at: https://gfmd.org/

[37] Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000).

[38] Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005).

[39] Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009); Abdolkhani and Karimnia v. Turkey (no. 2), No. 50213/08 (ECtHR July 27, 2010).

[40] Ghorbanov and Others v. Turkey, No. 28127/09 (ECtHR December 3, 2013).

effective remedies in connection with these rights. It should be emphasized that Turkey's engagement with ECHR framework concerning asylum seekers and migrants is reciprocal. Whereas cases brought against Turkey before ECtHR contributed to international jurisprudence for the implementation of human rights principles in the context of asylum and migration, they also contributed to the improvement of IP and return system in Turkey. The national legal framework addressed by these violation decisions, represented the era before the adoption of LFIP. These judgments eventually played an important role in initiating a comprehensive legal and administrative reform in Turkey. As a result, LFIP was adopted in 2013, which is Turkey's first law on asylum and migration, and Directorate General for Migration Management[41] was established as a specialized administrative authority to carry out all procedures related to migration and IP.

Having outlined Turkey's position with respect to trans-border human mobility and the international framework that governs it, the rest of this section will focus on what I believe is one of the most critical and controversial concepts within contemporary dynamics of international refugee law; namely the "safe third country" concept. Turkey's engagement with international refugee law at horizontal level of inter-state relationships is to some extent materialized in the evolution and implementation of the concept of "safe third country" in international law on asylum.

[41] More information on the Directorate General is available at: www.goc.gov.tr.

IV. Evolution and scope of the safe third country concept

1. Emergence and purpose

The 1951 Convention rests on the idea of according protection to people who flee from persecution. However, the Convention is silent as to the question of which state is responsible for providing such protection. Safe third country concept concerns with the question of determination of this state.[42] It relies on the premise that refugees should seek protection in the first safe country that they are able to reach.[43] It is assumed that if the person is in genuine need, he/she seeks protection in a place that is geographically closest.[44] Thus safe third country concept challenges the idea of protection of refugees in the country of their own choosing. It is based on the assumption that an asylum seeker who passes from a safe country should submit an asylum claim there and not in the destination country he/she reaches after.[45]

The context in which the safe third country practices emerged is important. In the beginning of 1980's, the period when safe third country concept emerged, was also when "asylum fatigue" began to appear coupled with the rising numbers of asylum seekers in Europe. It was observed that Western states were looking to deflect the asylum flows away

[42] Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," *International Journal of Refugee Law* 15, no. 4 (2003): iii.; Aydın Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," *Public and Private International Law Bulletin* 38, no. 1 (2018): 13.
[43] Gkliati, "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees," 214.
[44] Violeta Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," in *Migration and Refugee Protection in the 21st Century: Legal Aspects*, ed. Guy Goodwin-Gill and Philippe Weckel (Brill Nijhoff, 2015), 672.
[45] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 14–16.

from their territories.[46] Other policies restricting access to asylum procedures were also introduced such as carrier sanctions, detention and accelerated asylum procedures.[47] Among these procedural barriers, safe third country transfers appear as serving similar purposes, resulting in asylum seekers to be sent to third countries without their claims being decided on the substance.[48] Safe third country concept emerged with the practices of Scandinavian states and were quickly adopted by other European states,[49] USA, Canada and Australia as well as some states in Africa. Its mode of implementation has typically been through unilateral acts of states by adoption of legislation and administrative regulations.[50]

Safe third country practices were initiated as a response to what has been termed as "asylum shopping" by refugees. This term indicates situations where asylum seekers lodge multiple or consecutive asylum claims in different states in an effort to find the most favorable conditions for themselves. It was deemed that transiting through third countries results from a search of improved living conditions and not of protection.[51] Those who do not come directly from persecution are not considered to be in genuine need of

[46] Yıldırım Turan and Osman Şaşkın, "AB'ye İltica Başvurularının Değerlendirilmesinde Geri Kabul ve Güvenli Üçüncü Ülke Tartışmaları," *PESA International Journal of Social Studies* 3, no. 1 (2017): 52.
[47] Susan Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," *Studies in International Law: Forced Migration, Human Rights and Security*, 2008, 12.
[48] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," iii.
[49] Hüseyin Özcan, "Yabancılar ve Uluslararası Koruma Kanunu'nun 74. Maddesinin 'Güvenli Üçüncü Ülke' Kavramı Bağlamında Değerlendirilmesi," *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 28, no. 2 (2020): 828.
[50] Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009), 45–50.
[51] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672.

protection.[52] Whereas in fact, in many cases asylum seekers choose the country of destination based on legitimate factors such as family connections, language and cultural ties that are relevant in determining durable solutions for them.[53] Such asylum shopping is viewed as an abuse of the asylum system and is considered to lead to an uneven distribution of asylum seekers among destination countries and the safe third country mechanism was seen as a remedy.[54]

With the implementation of the safe third country concept, it is assumed that it is possible to return asylum seekers to third countries if they can be considered to be safe, without examination of the merits of their asylum claim. Thus, with the denial of the refugee's right to choose the country of asylum, safe third country concept serves to allow the removal to transit countries in case of indirect arrivals. Safe third country mechanism is considered to pre-empt asylum shopping, to result in an even distribution of asylum seekers between states and to contribute to burden sharing.[55] However, it is claimed that safe third country practices are incapable of addressing these aims.[56] They result in the safe third countries to receive maximum number of refugees[57] and causes asylum seekers to be left without protection especially in cases where it is not clear whether their claim

[52] Hélène Lambert, "Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK," *Journal of Immigration, Asylum and Nationality Law* 26, no. 4 (2012): 318.
[53] Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," 23.
[54] Joanne Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," in *Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees*, 2001, 3; Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 667.
[55] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672.
[56] Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," *European Journal of Migration and Law* 7, no. 1 (2005): 38.
[57] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 8.

was substantively reviewed in the sending country.[58] Despite the proclaimed purpose of not leaving the refugees "in orbit", it is argued that safe third country practices result in leaving more asylum seekers without access to asylum procedures for longer periods of time.[59]

2. Definition and legal basis

UNHCR defines the safe third country concept as a mechanism which has the effect "to deny an asylum seeker admission to substantive asylum procedures in a particular State on the ground that he/she could request or should have requested and, if qualified, would actually be granted, asylum and protection in another country."[60] Its result is to act as a basis of inadmissibility of the protection claim.[61] It is part of the broader concept of protection elsewhere policies whereby a state is acting upon the premise that an asylum seeker's need for protection is supposed to be handled in another state other than the one in which the asylum seeker seeks or intends to seek protection.[62] In this sense, protection elsewhere concept rests on the assumption that the asylum seekers are not entitled to choose their country of refuge, whereas it is argued that it should be rather assessed with a weight on the refugees. The right of an asylum seeker to choose the country of refuge is

[58] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 49.
[59] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 25.
[60] UNHCR, "Note on International Protection," August 31, 1993, para. 20.
[61] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 667.
[62] Michelle Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," *Refuge: Canada's Journal on Refugees* 25, no. 2 (2008): 64.

defended as a crucial and modest compensation for lack of a uniform and inclusive refugee definition and protection standards across states.[63]

"Safe third country" concept does not originate directly from 1951 Convention, the main legal instrument establishing the international legal regime for refugee protection. The concept emerged in late 1980s, four decades after the adoption of the Convention, through unilateral practice of Western states seeking to restrict the access of asylum seekers to their territories and asylum systems. Safe third country concept in fact evolved from the concept of first country of asylum. As opposed to the concept of first country of asylum which denotes existence of previous protection accorded in another country, safe third country concept encompasses situations where the asylum seeker could have made an application to seek protection.[64]

The claimed purpose of the safe third country concept is to address the "refugees in orbit" phenomenon whereby refugees are "shuttled from one country to another in a constant quest for protection"[65] without directly returned to persecution but without access to IP either.[66] It was argued that this situation is a result of irregular secondary movements of asylum seekers from countries where they could have sought protection after they flee persecution. Thus, coming from a safe third country serves as a ground for inadmissibility of an asylum claim and developed states increasingly implement schemes to send the

[63] James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," *Harv. Hum. Rts. J.* 10 (1997): 142.
[64] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 665–67.
[65] G. Melander, "Refugees in Orbit," in *African Refugees and the Law*, ed. G. Melander and P. Nobel (Stockholm: Almqvist, 1978), 28.
[66] Ogün Erşan Aydınlı, "Güvenli Üçüncü Ülke Uygulamaları: Uygulamanın Dayanakları, Eleştirileri ve Hukukiliği," *Çankaya Üniversitesi Hukuk Fakültesi Dergisi* 5, no. 1 (2020): 227.

asylum seekers back to safe third countries that they passed through after leaving their countries of origin.[67]

The possibility of finding protection in the third country serves as a basis for return to that country, whereas such protection has not been actually provided before. So the return to the safe third country is based on the idea that the refugee could have sought protection elsewhere that is the safe third country.[68] The premise behind safe third country practices is that if the asylum seeker comes from a safe country other than the country of origin, then the destination state is not responsible from examining his/her asylum application.[69] Thus safe third country mechanism is of procedural nature whereby without making a decision on the merits of the asylum application, the applicants are shuttled to the state which is considered to have primary responsibility for them.[70]

In implementing this concept, states mainly rely on Articles 31 and 33 of 1951 Convention. Actually, there is no explicit legal basis in international law providing for the safe third country concept. It is rather the silence of the 1951 Convention that serves as a basis as it does not bring a right to be granted asylum for asylum seekers or an obligation to recognize refugees for states. Given the lack of such obligation, states are considered to be free to send refugees to any country as long as it does not breach the *non-refoulement*

[67] Nazaré Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," *International Journal of Refugee Law* 11, no. 1 (1999): 61–62.
[68] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 16; Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672; Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 8.
[69] Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 45.
[70] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2010), 392.

obligation as provided in Article 33 of the 1951 Convention.[71] As per Article 33 of 1951 Convention, it is forbidden for the state parties to send a refugee to "*the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". In seeking to implement safe third country returns, states argue that the prohibition on transfer of asylum seekers is legally limited with situations of the mentioned threats to life or freedom by the virtue of the principle of non-refoulement enshrined in Article 33 of 1951 Convention.[72] Thus, in their view, if the prohibition of transfer is limited with the listed ones, other transfers that do not trigger the outlined threats are permissible. Since this provision prohibits transfers to countries where asylum seekers would face persecution, it is argued that, *a contrario*, transfers to countries where they would not face persecution are allowed.[73] So, based on such interpretation, transfer of asylum seekers to safe third countries where no such threats exist, should be possible.[74]

[71] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 667; Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," 13; Kerem Batir, "Avrupa Birliği'nin Geri Kabul Anlaşmaları: Türkiye İle AB Arasında İmzalanan Geri Kabul Anlaşması Çerçevesinde Hukuki Bir Değerlendirme," *Journal of Administrative Sciences* 15, no. 30 (2017): 588.

[72] Özcan, "Yabancılar ve Uluslararası Koruma Kanunu'nun 74. Maddesinin 'Güvenli Üçüncü Ülke' Kavramı Bağlamında Değerlendirilmesi," 823.

[73] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 65–66; "Background Note on the Safe Country Concept and Refugee Status" (UNHCR Executive Committee, July 26, 1991); Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 15; Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 40.

[74] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 698; María-Teresa Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice," *Netherlands Quarterly of Human Rights* 33, no. 1 (2015): 43–44; Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," 70.

Another provision, which the defenders of the safe third country concept rely on, is Article 31 of 1951 Convention. The article prohibits states from imposing penalties on refugees "coming directly" from a territory where their life or freedom was threatened, on account of their illegal entry to or presence in territory. This formulation is construed as a basis for returning to safe countries those asylum seekers who do not come directly from a territory where their life or freedom was threatened.[75] The proponents of the "safe third country" concept argue that, since the provision provides the non-penalization of refugees who came directly from countries where they face risk of persecution, such obligation does not apply to refugees who came indirectly, by passing through other countries where they do not face any risk of persecution, before lodging an asylum claim in the host state. This interpretation begs for criticism for incompatibility with the purpose of Article 31. This provision in fact has a different context as it aims to protect asylum seekers who are compelled to have recourse to irregular means during their flight.[76] Thus, by isolating this reference of "coming directly" from its specific context of non-penalization of refugees for irregular modes of travel, it is interpreted as a general obligation on the part of the asylum seekers to seek refuge at the earliest instance possible.[77] On the contrary, it is further argued by some authors that the term "directly" in the provision should not be

[75] Aydınlı, "Güvenli Üçüncü Ülke Uygulamaları: Uygulamanın Dayanakları, Eleştirileri ve Hukukiliği," 229.
[76] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 16; Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 40; Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," 20–21; Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672; Gkliati, "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees," 214.
[77] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 689.

interpreted literally and should cover indirect flight as long as the reasons for leaving fall within the scope of Article 31.[78] Nevertheless, Article 31 as a basis of the safe third country concept gain ground due to the fact that the "coming directly" condition denotes the condition that secondary movements by asylum seekers are not acceptable and that they are not forced movements.

The interpretation of Article 31 offered by the supporters of the safe third country concept deserves criticism also because it does not reflect the true spirit of international cooperation, affirmed in the preamble of 1951 Convention. This is best explained by the vision of the international refugee protection system in a world where we absolutely accept that refugees are to seek protection in the countries that they can access directly upon escaping from risk against their lives or freedom in their country of origin or residence. In such a world, given the deterrence measures such as carrier sanctions and visa policies, it is almost impossible for a refugee fleeing persecution to reach the countries in the global north directly as it is almost impossible for them to pursue air travel. This means that in the ultimate global order where the refugees behave in accordance with the conditions of "coming directly" from persecution and staying in the first country that they reach upon fleeing, in practice, refugees are to be hosted exclusively by the countries neighboring their country of origin or residence. It would be equal to say that all of the world's refugees should stay in the countries immediately neighboring the refugee producing countries. What constitutes burden sharing in international refugee law has

[78] Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," 20–21; Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection," *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2001, 33.

been a heated debate without a conclusive answer. As much as it is difficult to reach a definite answer as to what exactly international cooperation in international refugee law should look like, it is safe to say that it does not look like a world where refugees are only hosted by the countries, which happen to share a border with the refugee producing countries.

The last provision of the 1951 Convention relevant to the safe third country concept is Article 32 on expulsion. Indeed, once the applicability of the concept is established, the transfer to the third country is implemented in the form of expulsion of the asylum seeker. At this point the question of compatibility with Article 32 arises because this provision allows expulsion of a refugee lawfully in the territoty only based on the grounds of national security or public order, which clearly is not the case for all safe third country transfer. Therefore, this provision creates a clash with the safe third country arrangements.

Looking at the UN documents relevant to the safe third country concept, it is considered that UNHCR Executive Committee Conclusion No. 15 on Refugees without and Asylum Country[79] serves as a legal basis for this notion. Conclusion No. 15 adopts the concept of "responsible state" and states that clear criteria must be set to determine the state responsible to evaluate an asylum application.[80] Moreover, it provides that an asylum application should not be rejected solely because the applicant could have sought asylum in another state. However it also states that where "it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it

[79] UNHCR Executive Committee, "Conclusion No. 15 (XXX)," October 16, 1979.
[80] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 17.

appears fair and reasonable be called upon first to request asylum from that State."[81] Thus Conclusion No. 15 sets a basis for the principle that asylum should be sought in the first safe country that the asylum seeker reaches.[82]

An even more relevant UNHCR Executive Committee decision on this topic is Conclusion No. 58 on the Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection.[83] It expresses growing concern on the matter of irregular movements of asylum seekers from countries where they found protection, in order for seeking asylum elsewhere, and calls governments to action in cooperation with the UNHCR. This document more explicitly provides for the opportunity for safe third country returns. Accordingly, it sets forth that asylum seekers who move irregularly from a country where they found protection may be returned as long as there is protection against *refoulement* and the possibility to stay there by being treated in accordance with basic human standards.[84]

Final legal instrument to be mentioned as providing a legal basis for safe third country concept is the 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 ("Asylum Procedures Directive"). Binding upon the EU member states, the Directive sets forth the conditions of implementation of the safe third country concept including protection standards.

[81] UNHCR Executive Committee, "Conclusion No. 15 (XXX)," para. (h)(iv).
[82] Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country'Concept"," 18.
[83] UNHCR Executive Committee, "Conclusion No. 58 (XL)," October 13, 1989.
[84] UNHCR Executive Committee, "Conclusion No. 58 (XL)," para. (f).

3. Conditions of application

Based on the background explained above, the conditions for the applicability of the safe third country concept are widely discussed. It is generally accepted that in order for the safe third country transfers to be acceptable under international law, there should be no risk of refoulement, persecution or other serious harm for the returnee at the receiving state and there should be a possibility to claim and receive IP in accordance with the 1951 Convention. Also, it is accepted that the applicability of safe third country transfers must be assessed on a case by case basis whereby the possibility exists for the returnee to challenge the application of the concept in his/her case. Lastly, safe third country transfers should not be implemented based on mere transit from a country and the asylum seeker should have a connection or close links with the third state.[85] Conditions for application of the safe third country concept have been spelled out along similar lines by the UNHCR in its Executive Committee decisions No. 15 and 58. First of all it is stressed that the sole basis that it could be sought somewhere else should not result in denial of asylum. Other conditions are in line with the general stance explained above. The connections and links that the returnee has with the destination country must be meaningful. Guarantees must be present so that the destination country will grant the individual admission to territory, respect the principle of non-refoulement and offer treatment in line with accepted international standards, assess the individual's claim of asylum and grant status if

[85] Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," 64; Hélène Lambert, "Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK," *Journal of Immigration, Asylum and Nationality Law* 26, no. 4 (2012): 4–5.

appropriate.[86] As to the protection from refoulement, it should be stressed that NGOs and UNHCR sometimes report about instances where refoulement takes place following safe third country transfer, however it is difficult to detect and hold an account of such cases by their nature as contact with the individual is often lost unless they manage to avoid refoulement or flee again.[87]

There are certain accepted limitations as to the criteria of connections or links of the individual with the safe third country. Accordingly, even if the individual arrives by passing through the safe third country, he/she cannot be sent back in case of presence of strong relations with the country of arrival such as close family relations or other connections. Likewise, the safe third country transfer should not take place if the individual only transited through the safe third country and has no other connections with it.[88]

A crucial element regarding the substantial aspect of the safe third country concept relates to the standard of protection available in the destination country. Essentially, a state that wants to apply the safe third country concept is required to factor in the human rights situation in the receiving state, within the assessment for the transfer.[89] It is accepted that in order for a safe third country transfer to be carried out, such third country should provide effective protection to transferred individuals. What constitutes effective protection is subject to extensive debate and several indicators are suggested in this regard. According

[86] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 48.
[87] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 22–23.
[88] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 18.
[89] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 69.

to UNHCR, in addition to lack of risk of treatment against prohibition of torture and risk of refoulement, there should be a prospect of a genuinely accessible and durable solution, no risk of arbitrary deportation or deprivation of liberty, adequate and dignified means of subsistence, respect for family unity and integrity, and recognition of specific protection needs such as those related to gender or age.[90] It should be stressed that the elements of effective protection have not been defined in a comprehensive and consistent manner yet. However, another set of frequently spelled out elements include at the minimum, beyond lack of persecution and onward refoulement, access to a fair refugee status determination procedure and protection of fundamental human rights.[91] Another expression of criteria for effective protection consists of possibility of legal admission and stay of the individual at the destination state and access to IP procedures whereby the individual's asylum claim will be assessed on merits. Thus in order for a safe third country transfer to be possible, respecting the principle of non-refoulement and being party to 1951 Convention are not sufficient by themselves.[92] Similarly, another suggestion of criteria comprises of acceptance of admission of individual by the third country, as well as its compliance with international human rights and refugee law, enabling access to fair and efficient asylum procedures, consideration of individual's vulnerabilities, privacy and family.[93]

[90] Lambert, "Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK," 2012, 321.
[91] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 50.
[92] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 18.
[93] Lambert, "Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK," 2012, 322.

It should also be emphasized that in addition to these criteria of guarantee of admission and provision of basic standards of safety and access to procedures in the third country, presence of basic socio-economic rights started to gain importance next to provision of fundamental political and civil rights.[94] The ECtHR as well confirmed this understanding in M.S.S. v. Belgium and Greece. It is significant that this is the judgment after which the term "degrading treatment" within the meaning of Article 3 of the ECHR were accepted to include denial of socio-economic rights in the context of expulsion related cases. ECtHR considered the applicant's living conditions in Greece upon transfer from Belgium and underlined the asylum seekers' need for special protection.[95] The Court also considered that Greece was not in a position to fulfill the requirement of providing a fair treatment to the asylum application of the returnee. Overall, it was expected from Belgium before effecting a safe third country transfer through Dublin system, that the situation in practice in Greece is in conformity with ECHR standards instead of assuming that they are, based on the legislation.[96] This case resulted in the suspension of Dublin transfers to Greece.[97] To cite another case with similar reasoning, in Amuur v. France,[98] within its assessment of deprivation of liberty, the Court takes into consideration the fact that the third country of transfer, not being a party to the 1951 Convention, does not have an

[94] Lambert, 324.
[95] Lambert, 332; M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraphs 250–251.
[96] Lambert, "Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK," 2012, 327; M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraphs 358–359.
[97] Paolo Biondi, "Compliance with Fundamental Rights Demands Shared Responsibility," in *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, ed. Vladislava Stoyanova and Eleni Karageorgiou (Brill | Nijhoff, 2018), 268.
[98] Amuur v. France, No. 19776/92 (ECtHR June 25, 1996)-13129-131 48.

asylum system as good as France. Although somewhat indirectly, the ECtHR underlines the matter of effective protection concerning safe third country concept. In a similar vein, Ilias and Ahmed v. Hungary,[99] sets out the criteria for implementation of safe third country transfers as lack of risk of treatment contrary to Article 3 of ECHR and availability of access to an adequate asylum procedure in the third country.

An alternative approach in defining the level of protection that should be available upon safe third country transfer relies on what is referred to as the principle of complicity. It means that the state of arrival may not transfer the individual to a third state where he/she will be subject to a treatment that the state of arrival is not allowed to implement itself. Thus the standards that bind the state of arrival, continue to be binding in the case of an attempt of safe third country transfer. Otherwise, the state of arrival would be an accomplice to the treatment that the individual receives in the third state.[100] In defending this position, the main argument is the principle that states are prohibited from sending a person to a state where he/she will be subject to a treatment that the sending state is not allowed to impose. In essence, it is suggested that as much as a state that is a party to the 1951 Convention cannot directly violate the rights provided in the Convention, it cannot avoid such limitation by undertaking a safe third country transfer to a country where any of such rights would be violated.[101] As a result, according to this view, if the transferring state is a party to the 1951 Convention, it may not conduct a safe third country transfer to

[99] Ilias and Ahmed v. Hungary, No. 47287/15 (ECtHR March 14, 2017) paragraph 129-131.
[100] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 32.
[101] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 62.

a state where the individual will be deprived of the rights provided within the 1951 Convention, otherwise the responsibility of the sending state will be triggered as if it committed a violation directly.[102] This position is equally valid for principle of non-refoulement as well as other rights included in the 1951 Convention such as non-discrimination, free movement, legal status and documentation, family life, subsistence, education, health care and work. Thus the complicity principle that prevents safe third country transfers in the risk of refoulement, similarly phohibits them in case of risk of violation of other Convention rights in the countries of transfer or as a result of further returns that may be conducted by those countries of transfer.[103] At this point concerning practical implementation of these principles, it is suggested that for the violations except for that of the principle of non-refoulement, it might be expected that the initial burden or proof rests with the individual as to a possible violation of a Convention right that might occur upon a safe third country transfer. [104]

Another approach in the application of the complicity principle, is offered as a criterion of recognition of basic human rights standards upon a safe third country transfer, without being limited with the catalogue of rights provided under the 1951 Convention. At the extreme, it is suggested that it is not possible for a state to conduct a safe third country transfer to a country where there is a risk of violation of any of the human rights of the individual that the sending state is obliged to protect.[105] A nuanced stance seeks to

[102] Legomsky, 56; Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 66.
[103] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 36.
[104] Legomsky, 62–63.
[105] Legomsky, 66–67.

create a distinction among such rights risk of violation of which prohibit a safe third country transfer. Accordingly, non-derogable provisions of the International Bill of Rights (that is the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights adopted on 16 December 1966 ("ICCPR") and International Convention on Economic, Social and Cultural Rights) are suggested as a reference.[106] Nevertheless, it should be kept in mind that it is difficult to legally justify the distinction among sources of human rights in terms of the complicity principle. Some authors also suggest that the transferees should be given the chance to refute the presumption of safety in a safe third country transfer by arguing and proving that the criteria for IP implemented by the third country is heavier than that of the state of arrival.[107]

Another crucial legal factor concerning safe third country transfers relate to the scope of responsibility of the transferring state towards the individual. This was a point of discussion by the ECtHR in the prominent case of T.I. v. the United Kingdom,[108] where, an asylum seeker from Sri Lanka claimed that Germany would remove him to his country of origin, if he was sent to Germany from the UK. The judgment established that the responsibility of the sending state does not cease with the transfer and in the case that the individual is subject to a deportation by the receiving state, which violates the prohibition of torture, the sending state will also be responsible. Thus, a safe third country transfer does not necessarily mean the end of the responsibility of the state effecting such

[106] Legomsky, 68.
[107] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 35.
[108] T.I. v. the United Kingdom, No. 43844/98 (ECtHR March 7, 2000) pages 14-15.

transfer.[109] The Court set forth that the responsibility of the sending state continues as to ensuring that the individual is not exposed to treatment contrary to prohibition of torture as a result of removal following the transfer to the intermediary safe third country.[110] The Court also noted that in the case of lack of careful review of safe third country transfers considering divergences in national norms and practices related to asylum, absence of appropriate safeguards would result in violation of the ECHR.[111]

This case was followed with a more elaborative judgment years later. In M.S.S. v. Belgium and Greece[112], the ECtHR defied Belgium's assumption of safety about Greece based on the acceptance that it provides the protection foreseen in the 1951 Convention. The Court ruled that it has to be taken into account whether Greece implements the anticipated asylum regime in practice. Based on the problems experienced on the ground it further concluded that Greece violates the prohibition of torture and that Belgium was responsible from such violations against the individual due to transferring him to Greece.[113]

In line with the case law of the ECtHR, the CJEU followed suit.[114] Accordingly, the matter in the joined cases before the CJEU was whether, in order for realizing a transfer within Dublin system, which is basically the EU verison of the implementation of the safe

[109] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 20.
[110] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 47.
[111] Costello, 48.
[112] M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraph 359.
[113] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 20.
[114] Joined Cases of N.S. v. the UK and M.E. v. Ireland, No. C-411-10 and C-493-10 (CJEU December 21, 2011) paragraph 94.

third country concept, it was required for the receiving state to be abiding by the fundamental rights and minimum standards arising from the EU law.[115] The CJEU acknowledged that certain EU states might experience problems in practice, which could cause treatment of transferred individuals against their fundamental rights. The Court further concluded that, in order to ensure fundamental rights standards, such transfers cannot be carried out to states where there are systemic insufficiencies in reception conditions and the transferees have the risk of being subject to inhuman or degrading treatment.[116]

Consequently, the possibility of refoulement or wider human rights violations that are integral in the implementation of the safe third country concept, was scrutinized both in the context of EU and ECHR. The legal remedy to it, comes across as holding the transferring state responsible within international law if the required human rights standards are not provided in the destination state against violations including further transfer of the individual to a territory where a violation would occur.[117]

As a result, only the states that provide effective protection as per above stipulations supported by the relevant provisions of 1951 Convention can be accepted as safe third countries.[118] It should be underlined here that being a party to the 1951 Convention is not

[115] Cathryn Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored," *Human Rights Law Review* 12 (2012): 314.
[116] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 26.
[117] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 47.
[118] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 30–31.

deemed to be an absolute condition, however the standards of the 1951 Convention should be fulfilled by the third country in actual practice.[119]

In connection with the effective proctection criteria, what should be understood by availability of access to a fair refugee status determination procedure was also elaborated by the UNHCR. Relevant elements were identified as a specialized single first instance authority which has qualified decision makers with adequate training and ability to access country of origin information, availability of sufficient resources for efficiency and for determining protection needs, right to appeal the decisions of the first instance authority to a separate and independent organ.[120] According to a UNHCR report,[121] properties of such an asylum system should include the possibility to receive automatically a reasoned decision in written form. Also, the asylum applicant should be allowed to stay in the territory during the decision making period. In the context of safe third country transfers, another point to consider comes across as the basic matter of access to the asylum system. The transferee must not be prevented by rules related to procedure or other obstacles.[122] Other elements of fairness of the asylum procedure comprise protection of privacy within the asylum process and consideration of vulnerabilities especially to the extent that they affect the individual's situation with respect to risk and severity of persecution. [123]

[119] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 76–79.
[120] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 70.
[121] UNHCR, "Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures)," 2001.
[122] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 70.
[123] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 75–76.

Finally, the UNHCR emphasizes the comparative status of the asylum systems in the sending and destination states as a point of reference in determining the possibility of a safe third country transfer. Accordingly, whereas minor divergences in the interpretation of 1951 Convention among states is conceivable, significant differences may constitute an obstacle before the implementation of the safe third country concept. It should not be possible for a safe third country transfer to be carried out in the case that a person who is likely to receive recognition as a refugee in the sending state, would be unlikely to receive such recognition in the destination state.[124] A different formulation of this condition focuses on comparative situation in the destination state with respect to international standards and not with respect to the standards in the transferring state. Accordingly, it is offered that a safe third country transfer should be prohibited in the case that the transferring state implements a refugee definition that is in line with international law and more favourable than that of the destination state, whereas the implementation of the destination state does not match international law requirements. This is a reflection of non-refoulement principle. If however, the definition in effect in the destination state do match international law but falls short of the practice in the transferring state, safe third country transfer should be allowed regardless.[125]

Consequently, it is accepted that the returnees should be allowed to stay in the safe third countries they are transferred until they reach a durable solution. Such durable solution could be provided by the safe third country, however it is also possible for the

[124] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 71.
[125] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 58.

safe third country to conduct a further transfer eventually to a state which will provide a durable solution.[126] Lastly, a formal qualification suggested for safe third country transfers is the requirement that the individual is given a letter by the transferring state, which states that his/her asylum application was not reviewed in substance before the transfer, to ensure access to asylum procedures at the destination state.[127]

4. Legal issues connected with the safe third country concept

Building on the above explained legal bases and conditions for implementation of the safe third country concept, its functioning in reality is important. In order for the safe third country concept to be operational in practice; the sending states are dependent on the consent of the receiving "safe third countries" to accept such asylum seekers back. As opposed to the duty to admit own citizens, there is not a general principle in international law obliging states to readmit third country nationals to their territory and as a general rule, it is deemed to be the states' sovereign prerogative to decide on entry and exit of aliens. Moreover, as the transferring states continue to be bound by the principle of non-refoulement, which is accepted to be a part of customary international law,[128] such transfers must be in conformity with this principle. Thus, the formalization of the safe third country concept occurred through international legal instruments ranging from

[126] Legomsky, 80.
[127] Legomsky, 73.
[128] Ministerial Meeting of States Parties, 12-13 December 2001, Geneva-Switzerland, "Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees" (Geneva, Switzerland, December 12, 2001), para. 4.

UNHCR Executive Committee Conclusion No. 15[129] and Conclusion No. 58[130] justifying the implementation of the concept and relevant provisions of Asylum Procedures Directive,[131] to readmission agreements creating international legal obligations on their parties to readmit alien returnees.

In the face of lack of an obligation to readmit non-citizens, in order to make safe third country practices work, states usually enter into readmission agreements which create a contractual obligation in this regard.[132] Readmission agreements emerged as a tool for expelling rejected asylum seekers and irregular migrants to their countries of origin and evolved to facilitate safe third country transfers by including in their scope the citizens of countries other than the receiving state who could have sought protection there.[133] Whereas traditional readmission agreements were related to readmission of nationals, they increasingly became tools for readmission of third country nationals in the 1990s.[134]

Readmission agreements regulate the modalities of safe third country transfers and their execution is generally coupled with financial or diplomatic incentives such as visa facilitation or development aid to ensure cooperation by the receiving countries. Readmission agreements include the promises of their parties to readmit certain

[129] UNHCR Executive Committee, "Conclusion on Refugees Without an Asylum Country No. 15 (XXX)," 1979. Available at: https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html
[130] UNHCR Executive Committee, "Conclusion on Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection No. 58 (XL)," 1989. Available at: https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html
[131] Council of the European Union, "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on on Common Procedures for Granting and Withdrawing International Protection (Recast),".
[132] Batir, "Avrupa Birliği'nin Geri Kabul Anlaşmaları: Türkiye İle AB Arasında İmzalanan Geri Kabul Anlaşması Çerçevesinde Hukuki Bir Değerlendirme," 599.
[133] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 43.
[134] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 32.

individuals namely their own nationals or nationals of other countries who typically passed through the third state on their way to the destination state.[135] Readmission agreements can be seen as border control measures as their aim is to return people who enter or stay irregularly. Asylum seekers often fall within the scope of readmission agreements as they naturally become part of irregular movements. Readmission agreements are preferred by UNHCR instead of unilateral implementation of safe third country concept as this does not ensure readmission or access to asylum procedures.[136] Readmission agreements on the other hand are considered to make the return process more orderly decreasing the situations of orbit.[137] UNHCR further expressed willingness for facilitating negotiation of readmission agreements between states.[138] Readmission agreements prove to be useful in determining the country that will admit the person and decide on his/her asylum claim and thus in avoiding disputes in this regard.[139] In fact even without the existence of a readmission agreement, for return of an asylum seeker to a third country, the UNHCR insists on prior consent of the third country for readmitting and for providing access to asylum. The reason behind this position is the purpose of avoiding the situations of orbit or chain refoulement.[140]

[135] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 7.
[136] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 40; UNHCR, "Position on Readmission Agreements," August 1, 1994, para. 4.
[137] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 8.
[138] UNHCR, "Position on Readmission Agreements," para. 6.
[139] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 53.
[140] Legomsky, 53–55.

One problem with readmission agreements is that, although typically they include a provision that the agreement will be applied without prejudice to the 1951 Convention, no mechanism is in fact envisaged to guarantee that protection issues are taken care of.[141] They include no more than mere references to the standards of treatment in 1951 Convention without providing for any mechanism for supervision of returns or any remedy in case of failure of satisfaction of such conditions. They do not reinstate the obligation of non-refoulement or guarantee access to asylum procedures.[142] Readmission agreements traditionally lack safeguards for protection of asylum seekers in the safe third country and for ensuring implementation of the safe third country returns in a manner compatible with international refugee and human rights law.[143] It is granted that echnically the individuals subject to readmission through Readmission Agreements are not asylum seekers as per their legal status, however they contain individuals whose IP application has been rejected on grounds of inadmissibility and not on the basis of substance. Considerin such individuals have asylum claims, the merits of which need to be evaluated in the country of readmission, inclusion of asylum related protection issues in readmission agreements appear to be a reasonable expectation.

Another matter to be discussed with respect to third country transfers is the selection as to which country the asylum seeker could be sent. Since there is no clear rule in 1951

---

[141] Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 45.
[142] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 32–33; Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 2005, 45.
[143] Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," 66; Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," *European Journal of Migration and Law* 7 (2005): 44–45.

Convention as to the allocation of responsibility for examination of claims for protection, such determination is generally made through a rule concerning the connection between the asylum seeker and the third country.[144] Along this line, UNHCR Executive Committee's Conclusion No. 15 implies the possibility of return to a third country in case of presence of a connection or close links between the asylum seeker and the third country.[145] It is argued that the selection of the state to which the asylum seeker is sent within a safe third country return, should be based on the connections of the asylum seeker with the third state. This has been the settled approach of the UNHCR that the asylum seekers should be returned to third states only if they have sufficient connection with them. Such connection may be determined through indicators such as family ties, cultural links, knowing the language, holding a residence permit or previous residence, and they should not consist of mere transit or other brief presence.[146] Nevertheless, in state practice it is often previous transit that serves as an indicator for connection with the third state. In this sense both regular and irregular transit is accepted by the sending states as triggering the responsibility of the transited state in the implementation of the safe third country concept.[147] On the other hand, considering asylum seeker's links with the third country is preferable for humanitarian reasons as well as because they support integration,

[144] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672.
[145] UNHCR Executive Committee, "Conclusion No. 15 (XXX)," para. (iv).
[146] UNHCR, "Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application," 2002, para. 7; UNHCR, "Global Consultations in Budapest, Conclusions," 6-7 2001, para. 18; UNHCR, "Observations on EC Proposal on Asylum Procedures," 2001, para. 31 (ii), 37; UNHCR, "Considerations on Safe Third Country," 8-11 1996, 4; UNHCR, "Position on Readmission Agreements," para. 5; Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 81.
[147] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 672.

international solidarity and equitable responsibility sharing.[148] It should be noted that the requirement of presence of a link between the asylum seeker and the third state is also included in the safe third country provision of the Asylum Procedures Directive. Accordingly, Article 38(2) requires presence of a connection between the asylum seeker and the third country, on the basis of which it would be reasonable to send that person to that country.

The safe third country transfers may be based on unilateral practices of sending states as well as through implementation of readmission agreements. In the case of unilateral invocation of safe third country measures for return, a potential situation of orbit arises if the destination country does not specifically agree to readmit the concerned individual. As is the concern of the UNHCR, it may even be exacerbated to a risk of chain refoulement to the country of origin from which the individual fled.[149] Although the safe third country returns are accepted to be safe in the case of unlikelihood of persecution or of refoulement, it should be considered that refoulement may take place as a result of deficiencies in the refugee status determination procedure in the destination state which may prevent a genuine refugee from having his situation recognized.[150] As the main purpose of the readmission agreements is to fight irregular human mobility, they focus on returning people who are not lawfully in the territory. Therefore, it is not common that these agreements mention those with need of IP apart from general indirect expressions of reminding the states of their obligations within the 1951 Convention. In this sense the risk

[148] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 82–84.
[149] Legomsky, 14.
[150] Legomsky, 15.

of chain refoulement of refugees in the absence of specific asylum procedures is quite high.[151] Thus, safe third country practices result in imposition of an obligation on individual asylum seekers to pursue their asylum requests in the country that is of closest proximity by paying no attention to their choice as to the country of refuge.[152]

Moreover, whether conducted through a unilateral practice or a readmission agreement, safe third country returns prove problematic in the case that the fundamental human rights or other basic human needs such as housing are not fulfilled in the destination country.[153] Safe third country implementations also disregard the ties of the individuals to the sending country as compared to the country of destination.[154]

Taking into consideration the conditions of applicability of the safe third country concept as explained in the previous section, at its outset, dependence of applicability of safe third country returns on these conditions may seem to render such returns unproblematic. As a result, when such conditions are fulfilled, it is ensured that asylum seekers find protection in line with international refugee law. However, while we are busy with the discussions related to the standards that should be present in the receiving country for the return to be considered safe, we tend to overlook the real problem. As the practice stands, it is always the country seeking to enforce return, which undertakes an assessment of the safety of the third country. The question of whether a country satisfies the conditions for the safe third country concept, is always asked and answered unilaterally by the state

[151] Legomsky, 13–14.
[152] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 673.
[153] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 16.
[154] Legomsky, 17.

which is trying to conduct returns. Therefore, no matter how high the threshold is with respect to safety in theory, in practice the assessment can never be an objective one and the tendency to favour returns always prevails. Therefore, setting aside the discussions as to whether it is even possible or feasible to establish supervisory mechanisms that actually warrant that the foreseen standards in safe third countries of return are satisfied, the real problem arises from the fact that the outcome of evaluation of conditions for applicability of such returns are almost predetermined.

Safe third country concept is also criticized for not having regard to the choices of the asylum seeker. It disregards the asylum seeker's freedom of choice as to where to seek protection. It is implied that the individual does not have a right to choose the asylum state. The perception is that the asylum seeker is abusing the asylum system by seeking more favorable conditions. It is argued that it should be considered that denying the asylum seeker of the opportunity to choose the place where he/she will seek asylum, causes problems with integration and well-being which may trigger irregular movement and may also prevent potential return.[155] However, it should be kept in mind that asylum is by its nature a forced movement, so it is doubtful whether the choice of the asylum seeker to arrive at or leave a country of refuge would be parallel to integration opportunities.

Another point of criticism regarding safe third country practices relates to the rights that should be accepted to be acquired by the returnee based on his/her presence in the sending state. It could be argued that beyond the principle of non-refoulement in Article

[155] Van Selm, "Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits," 23–25.

33 of the 1951 Convention, other provisions of the Convention should also be considered with respect to the validity of a safe third country transfer. In this vein for instance, mere presence of such an individual within the territory of the sending country, even without official recognition as a refugee, entails triggering of the following rights enshrined in the 1951 Convention:

- non-discrimination as per Article 3,
- freedom of religion as per Article 4;
- right to property as per Article 13,
- access to the courts as per Article 16(1),
- equality of access to rationing as per Article 20,
- right to education as per Article 22,
- administrative assistance as per Article 25,
- identity papers as per Article 27,
- freedom from fiscal charges as per Article 29,
- non-penalization for illegal entry or presence as per Article 31(1),
- freedom from constraints on freedom of movement unless necessary as per Article 31(2),
- consideration for naturalization as per Article 34.

Moreover, on account of the gradual structure of the 1951 Convention, it is possible for the individual to gain more rights as the connection with the host state grows stronger on the basis of legal status. Considering that the host state owes the individual such rights,

it should not be possible to evade these obligations simply by a safe third country transfer, otherwise it would render the purpose of the 1951 Convention futile.[156]

Another view in this regard relies on a differentiation between provisions based on their legal nature. Accordingly, it is suggested that the articles to which the state parties cannot put a reservation, that is, Article 1, 3, 4, 16(1), 33 and 36-46 constitutes the scope of fundamental protection aimed with the 1951 Convention and thus should be fulfilled in the country of destination in order for a safe third country transfer to be effected.[157] It is generally admitted that there is no full agreement as to which particular rights should be considered regarding the legality of a safe third country removal. However, the conviction that violation of other obligations beyond non-refoulement may trigger responsibility in safe third country transfers is expanding. In this vein another suggested criterion comes across as the preservation of the rights already acquired by the individual in the sending state through his/her presence there.[158] Thus, scholars challenge the assumption that the obligations of the host states where refugees are present without legal status are limited to non-refoulement. They criticize the focus of discussions on what the requirements are for a third country to be accepted as safe rather than the lawfulness of this basic assumption underlying the safe third country concept.[159] Instead, the focus of discussion should be concerning the issues of state responsibility that arise with the transfer of a refugee from

[156] Foster, "Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law," 67.
[157] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 31.
[158] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 674.
[159] Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice," 44.

the host state to a third state even when it is certain that such state qualified to be a safe third county.[160]

Safe third country policies impact the destination countries as well in addition to the individuals subject to them. It could be said that unilateral implementation of safe third country practices are against the spirit of responsibility sharing and international cooperation. Also, they impose an uneven burden on states that are closer to countries of origin.[161] As a result, what can be referred to as a domino effect is created whereby safe third country practices spread further from the traditional sending countries towards the so called safe third countries. This increases the situations of refugees in orbit as well as refoulement.[162]

For these reasons, in practice, safe third country concept exacerbates the refugees in orbit situation that it allegedly seeks to tackle and reinforces the "deterrence paradigm"[163] dominating the field of asylum. Similar measures include procedural obstacles before access to asylum such as time limits, application of the concepts of first country of asylum and safe country of origin, carrier sanctions, visa policies, cooperation schemes with countries of origin and transit to suppress asylum and other migratory flows.[164] Such deterrent policy tools in conflict with the spirit of 1951 Convention, creates a climate in

---

[160] Gil-Bazo, 45.
[161] Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," 17.
[162] Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 673–74.
[163] As discussed in T. Gammeltoft-Hansen, "International Refugee Law and Refugee Policy: The Case of Deterrence Policies," *Journal of Refugee Studies* 27, no. 4 (December 1, 2014): 574–95; Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence," *Colum. J. Transnat'l L.* 53 (2014): 235; Thomas Gammeltoft-Hansen and Nikolas F. Tan, "The End of the Deterrence Paradigm-Future Directions for Global Refugee Policy," *J. on Migration & Hum. Sec.* 5 (2017): 28.
[164] Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," 76.

transit countries within which rights breaches may occur.[165] Moreover, in order to alleviate the burden posed by these deflection tools, transit countries also tend to adopt similar policies whereby they try to shift the burden further away.[166]

5. Turkey's contributions to the evolution of the safe third country concept

Turkey's position regarding the issues related to safe third country concept are substantially reflected in its statements at the 36th, 38th, 39th, 40th and 41th sessions of the Executive Committee of the UNHCR held at the time of the emergence of the concept in state practice and international law in late 1980s.[167] Conclusions of the Executive Committee of the UNHCR are not legally binding per se, however they are important soft law instruments for the purpose of ensuring consistency among states in implementation of the 1951 Convention and providing guidelines for questions of interpretation. Accordingly, statements of Turkey as an important transit country for asylum flows, reflected on protection challenges and uneven burden among states that is caused by implementation of safe third country concept.

[165] Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence," *Colum. J. Transnat'l L.* 53 (2014): 279.
[166] Thomas Gammeltoft-Hansen, "The Externalisation of European Migration Control and the Reach of International Refugee Law," in *The First Decade of EU Migration and Asylum Law* (Brill, 2011), 294.
[167] Please see; 36th Session of the Executive Committee of the UNHCR (1985) UN Doc. A/AC.96/671 para. 68., 38th Session of the Executive Committee of the UNHCR (1987) UN Doc. A/AC.96/SR.418 para. 73-76., 39th Session of the Executive Committee of the UNHCR (1988) UN Doc. A/AC.96/SR.430 para. 63-66., 40th Session of the Executive Committee of the UNHCR: Interpretative declarations or reservations made with respect to Executive Committee of the UNHCR's Conclusion No. 58 (XL) on "The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They Had Already Found Protection" (1989) UN Doc. A/AC.96/737 para. 47., 41st Session of the Executive Committee of the UNHCR (1990) UN Doc. A/AC.96/SR.456 para. 1-7.

Key points raised by Turkish government's representatives related to safe third country concept are as follows:

a. Respect for the refugees' right to choose country of asylum[168]

Being allowed to seek asylum in the country of his choice is a privilege of the asylum seekers and accordingly respect for their expressed wish in this regard constitutes a basic guiding principle.[169] The choice between local integration and resettlement should be made in the light of the desire expressed by the asylum seekers themselves in addition to the conditions in the host country.[170] Therefore, more weight should be given to resettlement as a form of burden-sharing to alleviate the burden placed on the shoulders of transit countries and to serve the best interests of refugees.[171]

b. Mere transit should not constitute a basis for safe third country transfer

Movements of refugees and asylum seekers who were only in transit in another country should not be considered as a basis for safe third country transfers.[172] This indicates the necessity of existence of more substantive links berween the refugees and asylum seekers on the move and the countries that they pass through in order for a safe third country transfer to be conducted. This requirement essentially seek to protect the countries which are in the position of transit countries with respect to asylum flows

[168] Proponents of the safe third country concept argue that the asylum seekers do not have the rights to choose the country in which they will seek refuge from persecution. For further discussion, please see: Albuquerque Abell, "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees," 77; Moreno-Lax, "The Legality of the Safe Third Country Notion Contested," 694; James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," *Harv. Hum. Rts. J.* 10 (1997): 142.
[169] UNHCR Executive Committee, "Summary Record of 41st Session," October 5, 1990, para. 7.
[170] UNHCR Executive Committee, "Summary Record of 41st Session," para. 5.
[171] UNHCR Executive Committee, "Summary Record of 39th Session," October 12, 1988, para. 66; UNHCR Executive Committee, "Summary Record of 41st Session," para. 7.
[172] UNHCR Executive Committee, "Summary Record of 36th Session," October 9, 1985, para. 68; UNHCR Executive Committee, "Summary Record of 40th Session," October 30, 1989, para. 47.

between the refugee producing countries and the destination countries they desire to reach. Within this reality transit passages occur that do not necessarily entail any connection between the refugee or asylum seeker and the transit country but that are merely the resul of the geographical positioning of the travel route. In such cases it is argued that transit passage alone should not be a basis to be considered to be a safe third country.

c. Causes for irregular movements and abuse of the right to seek asylum

The problems of irregular movements and abuse of the right of asylum must be treated as a whole, by attacking the root causes.[173] However, let alone the elimination of the root causes of refugee movements, new refugee generating situations are emerging.[174]

Lengthy and restrictive resettlement processes drive refugees to desperation and cause irregular movements to developed third countries.[175] Undue visa restrictions to control migratory flows and the demand for illegal and, therefore, low-cost labor force in some sectors of the economies of highly-industrialized countries provoke abuses of the asylum system.[176]

d. Impacts on transit countries and refugee protection

The influx of asylum seekers into countries of first asylum or transit creates a risk of erosion of the principle of non-refoulement due to difficulties of repatriation and the progressively more restrictive practices of other destination countries. Restrictive measures by developed countries cause developing countries to adopt similar restrictive measures in order to be able to cope with refugee influx. Instances of refoulement due to

[173] UNHCR Executive Committee, "Summary Record of 38th Session," October 14, 1987, para. 75.
[174] UNHCR Executive Committee, "Summary Record of 41st Session," para. 2.
[175] UNHCR Executive Committee, "Summary Record of 38th Session," para. 75.
[176] UNHCR Executive Committee, "Summary Record of 41st Session," para. 4.

inability to continue bearing the burden would not be the fault of only these countries, since the responsibility for ensuring the conditions necessary for observance of the non-refoulement principle rests with the international community as a whole.[177]

e. Need for international burden sharing

The international community has a collective duty to find solutions based on the principles of equitable burden sharing for the problems that increasing refugee influx cause in destination as well as transit countries. Considering that majority of the world's refugee population is hosted in developing and least developed countries of first asylum and transit, these countries have already done more than their fair share to meet the humanitarian challenges and should not be expected to bear any additional burdens.[178] It would be wrong to perceive these countries as permanent havens where the movement farther west or north could be contained.[179] Resettlement quotas remaining limited in the face of the increasing number of asylum seekers arriving in transit countries lead to accumulation of asylum seekers in transit countries, contrary to the principles of international burden sharing and solidarity. Financial and material aid alone does not address the social and political problems associated with refugee influx in these countries. The heavy burden on the developing countries could only be alleviated if developed countries adopted more flexible resettlement policies especially for regions where local integration is not feasible. Modest resettlement quotas by further destination countries are

[177] UNHCR Executive Committee, "Summary Record of 38th Session," para. 74; UNHCR Executive Committee, "Summary Record of 39th Session," para. 66.
[178] UNHCR Executive Committee, "Summary Record of 41st Session," para. 3.
[179] UNHCR Executive Committee, "Summary Record of 41st Session," para. 6.

not well balanced and situation of asylum seekers awaiting resettlement require more effective action.[180]

V. Turkey's position as a safe third country with respect to EU member states

In light of the above analyses regarding conditions and legality of the safe third country, the current state of affairs concerning implementation of safe third country practices with respect to Turkey will be evaluated here.

Before the analysis of the dynamics of EU-Turkey relations with respect to Turkey's position as a safe third country, introduction will be made by the internal legal and foreign policy dynamics of Turkey. Because, the question whether Turkey is a safe third country or not is in fact affected by these dynamics. It should be noted that, as understood from the review of the case law that there are virtually no court decisions rendered concerning threat to public order and security as basis of removal orders in connection with Islamic State of Iraq and Syria ("ISIS"), up until 2016 although the outburst of asylum crisis and emergence of ISIS date back to 2011. It is possible to read this situation in relation to Turkey's foreign policy that remained in effect until 2016. In August 2014, in a statement he made on a national TV channel, the then Prime Minister of Turkey referred to ISIS as group acting with anger and not as terrorist organization.[181] Almost with an overlapping timing, in October 2014, Temporary Protection Regulation[182] entered into effect which

[180] UNHCR Executive Committee, "Summary Record of 39th Session," para. 66; UNHCR Executive Committee, "Summary Record of 38th Session," para. 76.
[181] 'Davutoğlu'ndan IŞİD'e Anlayış: Öfkeyle Büyüyen Bir Tehdit Ama Sünniler Dışlanmasa Öfke Birikmezdi' <https://t24.com.tr/haber/davutoglundan-iside-anlayis-ofkeyle-buyuyen-bir-tehdit-ama-sunniler-dislanmasa-ofke-birikmezdi,266945> accessed 7 June 2021.
[182] Published in the Official Gazette No. 29153 dated 22 October 2014.

provides as a general rule that persons under temporary protection may not have access to individual IP procedures. One exception of this general rule is provided in Article 14(3)(ç) on the actions to be taken following the termination of temporary protection regime. Accordingly, persons who were part of an armed conflict in their countries and who has permanently terminated their armed activities, shall be given access to IP status determination procedures. This provision provides an outstanding possibility for persons involved in armed conflict who fled to Turkey, even further than what is provided for civilians and also further than the scope of European Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, shortly known as EU Temporary Protection Directive. This judicial and legislative framework is in fact in line with the Turkish foreign policy that was in effect at that period. Turkey's response to the mass influx from Syria starting in 2011 was to implement an open door policy which affected Turkey's position as a safe third country. In essence, the open door policy encompassed allowing all entries from Syria without any border controls and without imposing any distinctions. Considering all of these factors leads to the conclusion that, in the case that persons involved in armed conflicts including agents of ISIS were also a part of the influx towards Turkey, in addition to refugees, then such persons were also not seen as a threat to public order or security by courts. Thus the open door policy and its reflections to legislation and judiciary came across as an element for questioning the safe third country position of Turkey as not only a normative preference but also a signal of political evolution.

The other important aspect with respect to Turkey's position as a safe third country is the dynamics of EU-Turkey relations. With the adoption of the EU-Turkey Statement[183] on 18 March 2016, Turkey accepted to take back all irregular migrants passing from Turkey to Greece after this date. Also, the provisions of the EU-Turkey Readmission Agreement[184] relating to third country nationals and stateless persons entered into force in October 2017. With the adoption of these two instruments, which effectively put Turkey in the position of a safe third country for EU states, Turkey seems to have compromised its position regarding the conditions for applicability of the safe third country concept that are outlined above. It is especially remarkable that the scope of the readmission obligation arising from the EU-Turkey Readmission Agreement is much wider than that of the EU-Turkey Statement of March 2016. It extends to irregular migrants who have entered the EU countries through Turkey retroactively within preceding five years and regardless of whether their initial entry into EU territory was through irregular channels or whether their status became irregular later on. Also, transit through in addition to stay in Turkey is outlined as a basis triggering readmission obligations of Turkey and a wide range of documents are accepted as proof including hotel bills, doctor appointment cards or credit card receipts.

Thus, both the EU-Turkey Statement of March 2016 and the EU-Turkey Readmission Agreement appear as bold instruments of EU policies for externalization of migration

[183] Full text of the Statement is available at: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf .

[184] English text published in the Official Gazette of the EU is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN and Turkish text published in the Turkish Official Gazette is available at: http://www.resmigazete.gov.tr/eskiler/2014/08/20140802-1-1.pdf .

control. In fact it is prevalently expressed that EU started developing its offshoring of migration and asylum policy already before the so called refugee crisis of 2015 and the Statement as well as the Readmission Agreement are just a step further in the same direction.[185] On the other hand, these policies were faced with robust criticism by academia and non-governmental organizations questioning whether Turkey should be deemed as a "safe third country" for asylum seekers in Europe.[186]

Implementation of these externalization instruments vis-à-vis Turkey showcases a typical example of how implementation of safe third country concept endangers refugee protection. Impact of these policies on Turkey is twofold:

First, there is an increasing pressure on Turkey to manage migration flows better, and second, we observe practices of norm diffusion from EU to Turkey to ensure the legality of policies for externalization such as safe third country returns to Turkey. This dynamic is visible in the overlap in the processes of adoption of the EU-Turkey Readmission Agreement and the Law on Foreigners and International Protection of Turkey. The Readmission Agreement, being an instrument of externalization was signed on 16

[185] Radu Carp, "How Safe Shall Be a Third Country for Asylum-Seekers from a European Perspective? The Human Rights Implications of the EU-Turkey Deal and the Assessment of the ECHR/General Court," *Journal of Identity and Migration Studies* 12, no. 2 (2018): 50.

[186] Such as; "A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal"; Roman, Baird, and Radcliffe, "Analysis: Why Turkey Is Not a 'Safe Country'"; Danish Council for Refugees and European Council on Refugees and Exiles, "Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey"; Ulusoy and Battjes, "Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement"; Peers and Roman, "EU Law Analysis: The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?"; Lehner, "The EU-Turkey-'Deal': Legal Challenges and Pitfalls"; Sahle Worke, "The EU-Turkey Deal: A Legal Analysis - Is the Deal in Compliance with Refugee Law and Human Rights Law?," IRL Research Paper, 2018, 9–12; Jenny Poon, "EU-Turkey Deal: Violation of, or Consistency with, International Law?," European Papers, 2016, 1199–1200.

December 2013[187] right after the enactment of Turkey's first law on migration and asylum, the LFIP on 11 April 2013.[188] One year gap for entry into force of the LFIP was intended as a period for preparation and the EU-Turkey Readmission Agreement would enter into force around two and a half years after that. Before the adoption of this law, legal framework on migration and asylum was almost non-existent in Turkey, there were no comprehensive regulations on procedures and legal remedies, which led to many violation decisions from the ECtHR. The field was managed through secondary legislation at lower level that were largely closed to public. Thus it is possible to read the whole process of adoption of instruments for externalization and domestic legislation, as an effort to make Turkey into a safe third country.

To set the scene concerning Turkey, it should be explained that before the enactment of LFIP, the legal framework on migration and asylum was scattered within Turkish legislation that are composed of secondary legislation and administrative decisions that were not transparent. Administrative practice concerning asylum applications were incoherent falling short of recognition and treatment according to international standards. Also, difficulties in access to justice and shortness of time limits for complaints procedures were problematic.[189] These issues were made subject to criticism by the ECtHR as well.[190]

---

[187] As stated in the Law on Endorsement of Approval of the Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorisation: https://www.resmigazete.gov.tr/eskiler/2014/06/20140628-11.htm

[188] Published in Official Gazette No. 28615 on 11 April 2013: https://www.resmigazete.gov.tr/eskiler/2013/04/20130411-2.htm

[189] Margarite Helena Zoeteweij and Ozan Turhan, "Above the Law-Beneath Contempt: The End of the EU-Turkey Deal," *Swiss Review of International and European Law* 27, no. 2 (2017): 160.

[190] To cite few; Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000); Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005); Ghorbanov and Others v. Turkey, No. 28127/09 (ECtHR December 3, 2013); Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009).

Eventually, a legal and administrative reform was carried out with the adoption of LFIP which is the first comprehensive law in Turkey on migration and asylum. Despite its several shortcomings such as ambiguities in removal regime, it also clarified the legal definitions concerning different protection regimes, established a basis for provision of fundamental rights for foreigners within its scope, and formulated appeal periods and procedures in a clear manner.[191]

It is known that during the drafting process of the LFIP, there was extensive technical and financial support from the EU and member states. As a result, the new normative framework is largely aligned with the EU framework. In addition, a specialized administrative agency, Directorate General for Migration Management ("Göç İdaresi Genel Müdürlüğü") was founded. However, despite the demonstrated pressure from EU for Turkey to become a safe third country, Turkish migration and asylum system, being very young, is naturally still in need for enhancement of capacity, also considering diversity of national actors involved such as administrative personnel, law enforcement, judges and lawyers. Thus, in determining whether Turkey is a safe third country for asylum seekers in EU countries, the assessment of practices of Turkey should be made against this background.

Within the current political dynamics, the question is not asked with a genuine interest in protection of refugees, but rather unilaterally by EU states seeking to externalize migration control. EU has presumed Turkey as a "safe third country" regardless of whether Turkey fulfills the relevant criteria mentioned above. For instance, although,

[191] Zoeteweij and Turhan, "Above the Law-Beneath Contempt: The End of the EU-Turkey Deal," 161.

Turkey does not provide "refugee status" to people coming from a non-European country due to the geographical limitation that it maintains with respect to the 1951 Convention, and does not recognize for them the rights of refugees mentioned in the 1951 Convention in full, the presumption of Turkey as a "safe-third country" is solely based on ensuring non-refoulement protection and access to fundamental rights.[192] One opposing view in this regard defends that it is not possible for a state that is a party to the 1951 Convention with a geographical limitation to be accepted as a safe third country because it cannot be deemed as providing protection in accordance with the 1951 Convention.[193] Whereas it should be noted that, as repeteadly declared by various EU institutions, the EU does not seek the condition of being a party to the 1951 Convention without any reservations in order for accepting a certain state as a safe third country.[194] It deems the substitute criterion of provision of protection in accordance with the 1951 Convention sufficient, offering a rather flexible interpretation of the safe third country, enabling application of the concept to a larger group of states. However, in any case it should be noted that the situation of refugees coming to Turkey from Syria, who form the dominant majority of the refugee population in Turkey, is problematic as they are part of temporary protection regime in Turkey, which is essentially different than refugee protection and is argued to be not in compliance with 1951 Convention.

[192] Doğuş Şimşek, "Turkey as a 'Safe Third Country'? The Impacts of the EU-Turkey Statement on Syrian Refugees in Turkey," *Perceptions Journal of International Affairs* 22, no. 4 (2017): 164; Turan and Şaşkın, "AB'ye İltica Başvurularının Değerlendirilmesinde Geri Kabul ve Güvenli Üçüncü Ülke Tartışmaları," 54.
[193] Esen, "Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları," 30.
[194] Esen, 30–31.

At this outset, it seems that the EU is determined to make full use of the safe third country concept with respect to Turkey. On the other hand, relatively recent political developments interrupted the implementation of EU policies for externalization of migration control that come into being through application of the safe third country concept to Turkey.

The provisions of the EU-Turkey Readmission Agreement concerning the readmission of third country nationals were supposed to enter into effect on 1 October 2017. However, Turkey refused to implement these provisions in practice relying on the EU's failure to take necessary steps for liberalization of visa requirements for Turkish citizens.[195] Later on, in July 2019, Turkey has declared that it suspended the EU-Turkey Readmission Agreement based on the reason that the visa-free regime for Turkey was not introduced by the EU.[196] EU has criticized Turkey's position as to suspension of the EU-Turkey Readmission Agreement and underlines its obligation for implementing the Agreement effectively in full.[197] The progress reports on Turkey by the EU Commission for the years 2018, 2019 and 2020 also take note of this matter. In all three reports it was expressed that the implementation of the EU-Turkey Readmission Agreement has been unsatisfactory.

---

[195] "Third Anniversary of EU-Turkey Statement: A Legal Analysis | Heinrich Böll Stiftung | Niwêneriya Tirkiyeyê," accessed February 18, 2021, https://tr.boell.org/index.php/en/2019/10/03/third-anniversary-eu-turkey-statement-legal-analysis.

[196] "Why the EU-Turkey Statement Should Never Serve as a Blueprint | Asile," accessed February 18, 2021, https://www.asileproject.eu/why-the-eu-turkey-statement-should-never-serve-as-a-blueprint/; "What Happened at the Greece-Turkey Border in Early 2020? – Verfassungsblog," accessed February 18, 2021, https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/; "Turkey Suspends Deal with the EU on Migrant Readmission – EURACTIV.Com," accessed February 18, 2021, https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/.

[197] Çiğdem Akın Yavuz, "Analysis of the EU-Turkey Readmission Agreement: A Unique Case," *European Journal of Migration and Law* 21 (2019): 489.

Especially with respect to its provisions concerning readmission of third country nationals, Turkey persisted not to implement the relevant provisions of the Agreement until the EU revokes the visa requirement for Turkish citizens travelling for short stay. Also it was observed that the Bilateral Readmission Protocol between Turkey and Greece which is another tool for application of the safe third country concept to Turkey, was suspended.[198]

Nevertheless, considering that the EU-Turkey Readmission Agreement remains legally in effect,[199] its implementation in the future is expected which widens the scope of application of the safe third country concept to Turkey further than the EU-Turkey Statement of March 2016. Consequently, the protection challenges exacerbated by safe third country practices are best visible in the migration management dynamics between EU where resort to this concept is most advanced and Turkey with the largest refugee population in the world and a young legal and institutional framework on migration and asylum. Considering the scale of transit asylum and migration flows through Turkey, Turkey's interpretation and attitude will continue to be crucial for the evolution of this international law concept and its practices.

[198] European Commission, "Turkey 2020 Report" (Brussels, 2020), 49; European Commission, "Turkey 2019 Report" (Brussels, 2019), 46–47; European Commission, "Turkey 2018 Report" (Brussels, 2018), 46.
[199] It is not possible to interpret the situaiton as termination, since Turkey did not serve a notification to EU for denouncement of the EU-Turkey Readmission Agreement as per the termination procedure outlined in its Article 24 paragraph 5.

CHAPTER II: PROBLEMATIC ISSUES IN TURKISH JUDICIAL PRACTICES REGARDING INTERNATIONAL PROTECTION, REMOVAL AND ADMINISTRATIVE DETENTION PROCEDURES IN THE LIGHT OF EUROPEAN CASE LAW

I. Problematic issues in Turkish practice revealed through case law analysis for prospective research

Court decisions actually tell much more than the manner of implementation of the normative framework by judiciary. The focus of this research is limited to judicial practices thus other problematic issues about IP, removal or administrative detention procedures that become visible through court decisions are not addressed in detail. However, it is worth mentioning few of them here to inspire further research in the field and to reiterate the boundaries of the scope of this thesis.

Court decisions demonstrate administrative discrepancies, as they reflect, to a certain extent, the administrative process that was exhausted before judicial stage. These discrepancies are not always, but mostly, addressed by the courts. They typically consist of lack of sufficient investigation about personal circumstances of applicants or situation in the country of origin,[200] failure to comply with procedural rules such as discrepancies in notification of administrative decisions,[201] failure to evaluate existence of barriers to

[200] Esas/Subject No. ("E.") 2015/581 Karar/Decision No. ("K.") 2015/1519 (Ankara 1. Administrative Court September 10, 2015).
[201] E. 2017/419 K., 2017/451 (Ankara RAC May 18, 2017); E. 2016/125, K. 2016/312 (Manisa 1. Administrative Court March 18, 2016); 2015/690 D. İş (Tekirdağ 2. Criminal Judge of Peace June 5, 2015); 2014/1509 D. İş (İstanbul 6. Criminal Judge of Peace October 2, 2014); 2014/1246 D. İş (İstanbul 2.

removal before issuing removal order,[202] issuance of administrative decisions by administrative bodies without legal authority.[203]

A matter that is not visible through court decisions themselves, but that is crucial in terms of ensuring effectiveness of legal remedies, concerns enforcement of court decisions. Further research is required in this area in order to track the implementation of court decisions as there are reported instances of continuation of administrative detention or implementation of removal, despite court decisions to the contrary. The reasons and scale of such instances should be examined in order to ensure legal security.

Finally, the way that this thesis is structured depicts a vision as if, when the problems outlined here are overcome, access to justice would be fully satisfied for persons within IP, removal and administrative detention procedures. However, we should keep in mind that being able to obtain a just outcome from a judicial process does not necessarily entail justice. Systemic challenges that become visible from a larger perspective should also be recognized. Even if a person that is subject to IP, removal and administrative detention procedures can trust that each judicial complaint will yield a just decision, it is very challenging to survive through the legal adventure that awaits. Wide range of administrative decisions rendered about a single person causes multiplicity of judicial complaints to be lodged and followed up. I will reflect this from the perspective of the individual to make my point clear.

Criminal Judge of Peace August 29, 2014); E. 2017/1878, K. 2017/1973 (Samsun 1. Administrative Court December 7, 2017); E. 2017/1483, K. 2017/1655 (Konya 1. Administrative Court October 19, 2017).

[202] Interim Measure Appeal 2018/358 (Izmir RAC June 5, 2018).

[203] E. 2017/1314, K. 2017/968 (Van 1. Administrative Court May 24, 2017).

In case of a foreigner whose IP application is rejected, it is possible to issue a removal order and administrative detention decision based on grounds related to terrorism or public order, public security and public health as per Article 54(2) of LFIP.[204] In this case, one application should be made to administrative court against IP rejection decision as per Article 80(1)(ç) and another against removal order as per Article 53(3) of LFIP. If such appeals of the IP rejection decision and removal order are not successful before the administrative court, they will also need to made subject to individual application before the CC, because their further appeal is not allowed, which also can be argued to be problematic in terms of right to fair trial and right to be heard. Since a security code and entry ban are imposed related to the ground of removal order, a separate application should be made to administrative court for their cancellation. In the meantime, a complaint should be made to criminal judge of peace ("sulh ceza hakimi") against administrative detention and if accepted it would lead to a full remedy action before administrative court. If not accepted, the arguments concerning lawfulness of administrative detention will need to be brought before the CC in an individual application. Similarly, complaints concerning conditions of detention would be subject to a full remedy action and if rejected, an individual application before the CC. The figure below helps to visualize this complicated process of judicial appeals.

[204] For the analysis of the historical development of this norm, please see Section III.1.b of this Chapter.

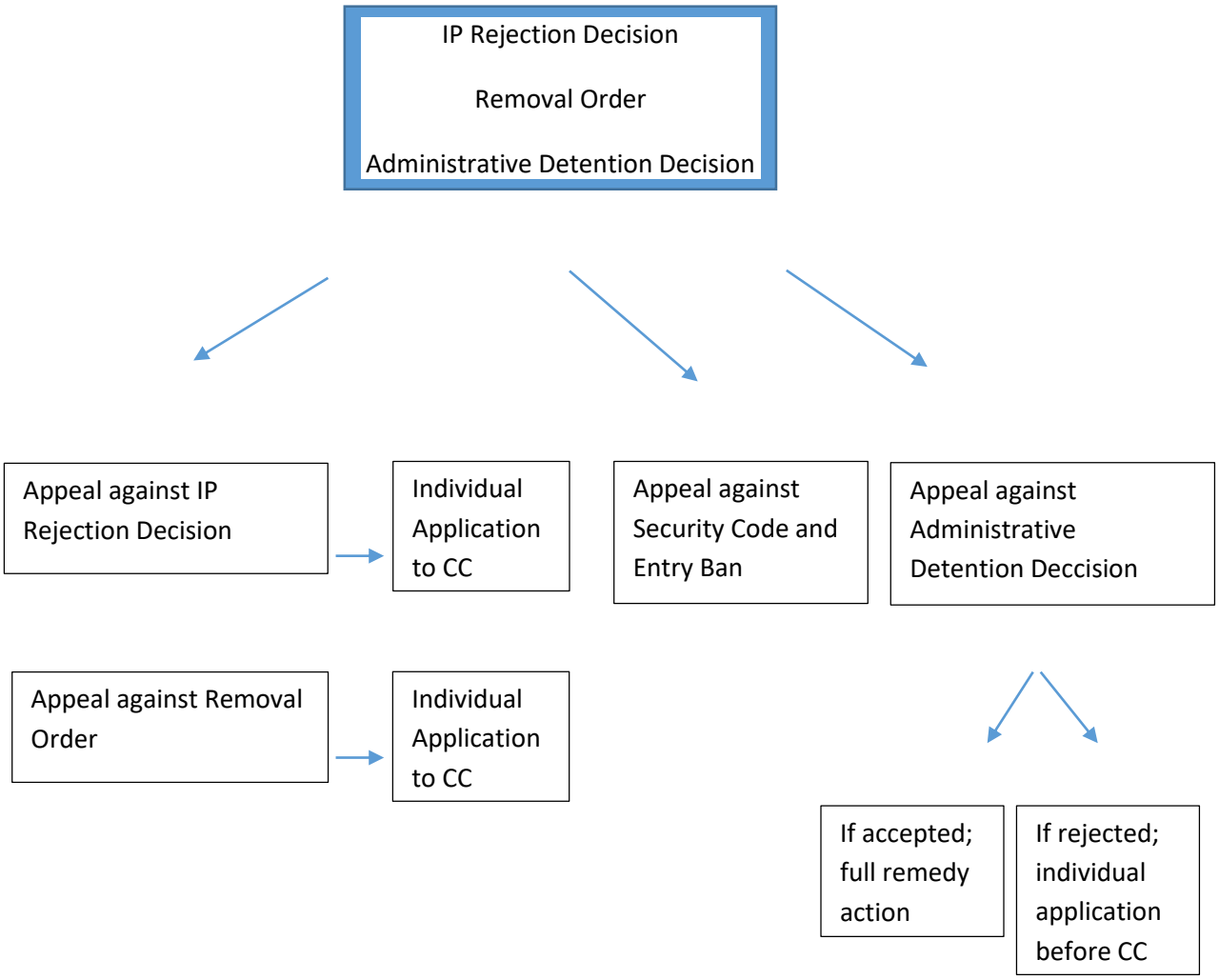

Figure 5: Visualization of judicial appeal processes involved with respect to the hypothetical case

As a result, we may easily be looking at almost ten judicial applications, which will all inevitably repeat more or less similar legal arguments as they all relate to the same circumstances concerning a single person. Based on this picture, beyond prominent issues within judicial processes, the cumulative functionality of legal remedies related to IP, removal and administrative detention procedures could also be an area of further study.

II. Problematic issues in Turkish judicial practices regarding international protection procedures

1. Assessment of risk arising from non-state actors

The first controversial legal issue in jurisprudence regarding IP procedures is detectable in administrative court decisions rendered upon appeals by applicants against rejection of their IP applications. It is observed in at least nine court decisions cited below that, while assessing whether a certain applicant fulfills the conditions for being a beneficiary of IP, some Turkish courts maintain a limited understanding of scope of IP with a focus on risk of persecution inflicted only by state actors and based on five 1951 Convention grounds. Thus they disregard cases of persecution by non-state actors and cases requiring subsidiary protection due to persecution that do not fall within 1951 Convention grounds.

In order to demonstrate the limitation in the perspective of Turkish judges, first, the interplay between international refugee law and international human rights law and its reflection into Turkish legal framework will be explored. Then, the scope of actors of persecution or serious harm will be defined with reference to European framework and case law. Building on this background, I will reflect on sample cases from national courts of EU states concerning cases of persecution or serious harm by non-state actors. This analysis will serve as a basis for pointing out the lacking dimensions in the legal analysis conducted by Turkish courts in appeals against administrative decisions rejecting IP applications.

Non-refoulement principle, which is at the heart of international refugee law and enshrined in Article 33 of the 1951 Convention, prohibits states from removing a person to a place where he/she risks suffering persecution based on one of the grounds of race, religion, nationality, membership of a particular social group or political opinion, which are also known as the 1951 Convention grounds. In line with the complementary nature of international refugee law and human rights law,[205] a somewhat similar legal obligation also emanates from the prohibition of torture, which has an absolute nature within international human rights law and is expressed in many human rights instruments including the ICCPR and the ECHR. Accordingly, in addition to the obligation of preventing torture, inhuman or degrading treatment to a person in its own territory, a state is also prohibited from sending a person to a place where he/she will be subject to such conduct. Thus, as opposed to general formulation under international human rights law, independent from reasons that the acts against prohibition of torture are based on; the principle of non-refoulement within international refugee law, is applicable when the undesired conduct is inflicted based on certain grounds. This means there is a certain category of non-returnable people who are not qualified to be refugees in technical sense as per international refugee law but who are under the protection of international human rights law. To respond to this protection need exceeding the scope of refugee protection but still mandated by international legal obligations, the legal status of subsidiary

[205] Salvatore Fabio Nicolosi, "Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law," *International Human Rights Law Review* 4, no. 2 (2015): 311.

protection is recognized within EU and Turkish law[206] alike. This concept addresses the situation of persons who risk facing unacceptable conduct upon return, although not based on their race, religion, national, membership of a particular social group or political opinion.[207]

Just as all member states of the EU, Turkey is also a party to the 1951 Convention as well as to the ICCPR and the ECHR. Similarly, Turkey also accommodates these overlapping yet different international legal obligations in its domestic legal framework on foreigners and IP. Article 4 of the LFIP provides for prohibition on refoulement with an extensive scope encompassing the requirements of international human rights and refugee law. This provision combines both, and bans returning a person to a place *"where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a social group or political opinion"* or *"where he or she may be subjected to torture, inhuman or degrading punishment or treatment."* Accordingly, apart from the "temporary protection" status allocated to situations of mass influx,[208] types of IP available under Turkish law include "refugee" and "conditional refugee" statuses corresponding to the first category of non-returnable foreigners as well as "subsidiary protection" that corresponds to the second category.[209] In line with this categorization,

[206] Aslı Canyaş Bayata, "Yabancılar ve Uluslararası Koruma Kanunu Kapsamındaki Geri Gönderme Yasağının Uygulanma Koşullarının AİHM Kararları Çerçevesinde İrdelenmesi," *Hacettepe Hukuk Fakültesi Dergisi* 5, no. 1 (2015): 76.
[207] Eleanor Drywood, "Who's in and Who's out? The Court's Emerging Case Law on the Definition of a Refugee," *Common Market Law Review* 51 (2014): 1112–13.
[208] For a discussion as to the ambiguity of whether temporary protection is a type of international protection status, please see Lami Bertan Tokuzlu, "The Principle of Legal Certainty - Impact Assessment of the Syrian Refugee Crisis on the Turkish Law on Foreigners and International Protection," in *Transitional Justice and Forced Migration - Critical Perspectives from the Global South*, ed. Nergis Canefe (Cambridge University Press, 2019), 260.
[209] Cathryn Costello, "The European Asylum Procedures Directive in Legal Context" (UNHCR, 2006), 13.

many court decisions successfully assess the situation of applicants with respect to different types of IP,[210] or criticize administrative authorities for not having considered eligibility for subsidiary protection as referred in more detail below despite agreeing with their conclusion of denial of conditional refugee status. This approach affirms that it is incumbent on the state to evaluate the situation of the IP applicant to provide the appropriate IP status corresponding to his/her individual circumstances so as to avoid breach of international legal obligations by conducting a prohibited removal from territory. As it will be demonstrated through the court decisions mentioned below, the explained distinctions among IP statuses are sometimes overlooked by Turkish judges and this results in implementation of a limited scope of IP in judicial practice.

Another dimension of IP assessment neglected by Turkish judges relates to the scope of actors of persecution. It is recognized both within ECHR and EU framework that treatment, the risk of which triggers obligations of IP and non-return of the host state as outlined above, may be inflicted by non-state actors or state actors alike.[211] ECtHR accepts that when the actors in the receiving state are persons or groups who are not public officials, human rights obligations of the host state may come into play, as long as it is demonstrated that there is a real risk and the authorities in the receiving state are not able or willing to offer appropriate protection against such risk.[212] Examples include non-state

[210] E. 2014/2158, K. 2015/823 (Ankara 1. Administrative Court April 21, 2015); E. 2014/2068, K. 2015/849 (Ankara 1. Administrative Court April 22, 2015); E. 2014/2195, K. 2015/2067 (Ankara 1. Administrative Court October 27, 2015); E. 2014/2070, K. 2015/2630 (Ankara 1. Administrative Court November 30, 2015); E. 2015/1672, K. 2015/3250 (Ankara 1. Administrative Court December 31, 2015).
[211] Ralf Allerweldt, "Protection against Expulsion under Article 3 of the European Convention on Human Rights," *European Journal of International Law* 4 (1993): 365.
[212] Hugh Massey, "UNHCR Manual on the Case Law of the European Regional Courts," n.d., 195.

actors such as drug traffickers in Colombia[213] or a rival clan in the civil war in Somalia.[214] Thus, the obligation of the host state not to undertake return arises regardless of whether the risk is caused by factors in which the authorities of the receiving country have direct or indirect responsibility.[215] Similarly, within the EU framework, Article 6(c) of the Qualification Directive expressly provides that actors of serious harm in the context of subsidiary protection and actors of persecution in the context of refugee protection may consist of non-state actors. Here again there is the condition of unwillingness or inability of protection by actors of protection consisting of the state or "parties or organizations controlling the state or a substantial part of its territory" including international organizations, as elaborated in national case law.[216] CJEU recognizes availability of protection as a crucial element for assessing IP status determination.[217] Thus, engagement of non-state actors requires an assessment by courts as to whether protection is available against their acts in line with the terms of Article 7 of the Qualification Directive.[218] The term "non-state actor" is not further defined in the Qualification Directive however

[213] H.L.R. v. France, No. 24573/94 (ECtHR April 29, 1997) paragraph 30.
[214] Ahmed v. Austria, No. 25964/94 (ECtHR December 17, 1996) paragraph 35.
[215] Salah Sheekh v. the Netherlands, No. 1948/04 (ECtHR January 11, 2007) paragraph 147.
[216] "Czech Republic - Supreme Administrative Court, 18 December 2008, S.I.Ch v Ministry of Interior, 1 Azs 86/2008-101 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-18-december-2008-sich-v-ministry-interior-1-azs#content; "Belgium – Council for Alien Law Litigation, 20 October 2010, Nr. 49.821 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-alien-law-litigation-20-october-2010-nr-49821#content; "Ireland - High Court, 25 June 2012, W.A. [DRC] v Minister for Justice and Equality, Ireland and the Attorney General, [2012] IEHC 251 | European Database of Asylum Law," accessed June 29, 2019, https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-25-june-2012-wa-drc-v-minister-justice-and-equality-ireland-and-attorney.
[217] Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland, No. C-175/08, C-176/08, C-178/08 C-179/08 (CJEU March 2, 2010) paragraph 68.
[218] "Czech Republic - Supreme Administrative Court, 15 May 2013, A.S. v. Ministry of the Interior, Azs 56/2012-81 | European Database of Asylum Law," 20, accessed June 29, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-15-may-2013-v-ministry-interior-azs-562012-81#content.

considering the aim of ensuring protection against persecution or serious harm it should be interpreted widely. Accordingly, based on regional and national case law, International Association of Refugee Law Judges list possible non-state actors committing acts of persecution or serious harm as single persons, clans, tribes, guerrillas, paramilitaries, warlords, extremist religious groups, terrorists, criminals, gangs, mafia, political parties, family and extended family members.[219]

Building on this background, relevant facts and judicial analyses in cases from domestic jurisdictions of EU member states will be examined as a comparative tool before turning to Turkish case law with similar facts but a different judicial approach.

Risk of being subject to forced marriage by family members was frequently considered as a valid basis for IP by judges of European domestic courts. It should be noted that Article 37 of İstanbul Convention requires criminalization of forced marriage. A court decision from Denmark concerned a 17-year-old girl who fled to Denmark from Jordan with her mother, who claims that her father's family would force her to quit school and marry her cousin. The judge criticized the administrative authorities for disregarding the risk of forced marriage and found the rejection of asylum application unlawful.[220] In another Danish case, the applicant fled her country of origin Afghanistan because she was being forced to marry the brother of her husband's father. The applicant suspected that he killed her husband and her life was also in danger due to her rejection of marriage. The

[219] International Association of Refugee Law Judges, "Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis," December 2016, 59–60.
[220] "Denmark - The Refugee Appeals Board's Decision of 27 June 2017 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-27-june-2017#content.

court considered the supporting evidence, the fact that the man was a locally powerful figure and his previous sexually violent behavior towards the applicant. As a result, the court accepted that the applicant belonged to the particular social group of "widows in risk of forced marriage" and that internal protection was not available to her.[221] Two German court decisions likewise recognized the refugee status of an Afghan applicant and an applicant from Iran who were under the risk of forced marriage. They were considered to be a part of the particular social group of "unmarried women from families whose traditional self-image demands a forced marriage." The court reiterated that forced marriage constitutes severe violation of basic human rights due to involving physical and psychological violence as well as breaching a woman's right to self-determination. In both cases state protection was found to be unavailable for the applicants as state authorities are not willing or able to protect women against persecution related to forced marriage. With respect to the first applicant it was also considered that the applicant did not live in Afghanistan for a long period and it was not possible for her to make a living on her own as she was an uneducated and unqualified single woman and her relatives would not accommodate her as she escaped her marriage.[222] In the second case, the applicant from Iran faced forced marriage to a man much older than her, who was chosen by her father and who did not let her to undertake professional activity. The court accepted that threat of persecution may arise from non-state actors who are single persons such as the

[221] "Denmark - the Refugee Appeals Board's Decision of 16 January 2017 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content.
[222] "Germany - Administrative Court Augsburg, 16 June 2011, Au 6 K 30092 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-augsburg-16-june-2011-au-6-k-30092#content.

applicant's father.[223] Along the same lines, an Irish judge found the examination conducted by administrative authorities with respect to an applicant's need for IP insufficient in a case initiated by a Nigerian woman. She made an arranged marriage when she was 16-years-old and was subject to ill-treatment, rape and torture by her husband and his friends which was the basis for her protection need. The court ruled that the administration should have reviewed if she was unable or unwilling to avail herself of internal protection and whether relocation to another place in the country would be a viable option for her.[224]

Finally, another German court decision indicated similar conclusions concerning an applicant from Algeria. She was under the threat of forced marriage arranged by her uncles and she was also faced with the risk of being killed by them due to escaping from marriage. So here too, the risk of persecution emanates from non-state actors. Refugee status was again granted on the basis of membership of a particular social group. Breach of right to sexual self-determination and lack of protection from sexual violence was accepted to constitute threat to freedom and physical integrity on account of applicant's sex, in consideration of Article 9(2) of the Qualification Directive which explicitly refers to sexual violence and acts of a gender-specific nature. The court also rejected the alternative of internal relocation taking into account past persecution, likelihood of applicant's family

[223] "Germany - Administrative Court Stuttgart, 14 March 2011, A 11 K 553/10 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-14-march-2011-11-k-55310#content.
[224] "Ireland - High Court, 1 March 2012, J.T.M. v Minister for Justice and Equality, Ireland and the Attorney General,[2012] IEHC 99 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-1-march-2012-jtm-v-minister-justice-and-equality-ireland-and-attorney#content.

finding her and impossibility of the uneducated and unqualified applicant to sustain a living without her family's support.[225] In a final example, again risk associated with forced marriage gave rise to subsidiary protection. The applicants were a young couple from Iraq and they fled their country because the girl's parents did not allow them to marry and instead forced her to marry her cousin. In the appeal against rejection of their IP application in Sweden, the judge found that it is not reasonable to expect the applicants to have sought protection in the country of origin considering that the girl's father is a locally influential figure.[226]

IP applications related to sexual and gender based violence became subject to lawsuits in European countries in other contexts as well, especially domestic violence. An Uzbek woman from Kyrgyzstan who fled to Czech Republic claimed being in a forced polygamous marriage and under the threat of domestic violence for changing her religion. Whereas the risk emanating from the non-state actor was recognized in both levels of jurisdiction, the Supreme Court overruled the first instance court's decision that authorities in the country of origin would be able and willing to provide protection.[227] It was not the first time that the same court encountered an IP claim by a woman from Kyrgyzstan based on domestic violence. Another applicant was subject to physical and

[225] "Germany - Administrative Court of Oldenburg, 13 April 2011, 3 A 2966/09 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609#content.
[226] "Sweden - Migration Court of Appeal, 9 March 2011, UM 3363-10 & 3367-10 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-9-march-2011-um-3363-10-3367-10#content.
[227] "Czech Republic - Supreme Administrative Court, 25 January 2011, R.S. v Ministry of Interior, 6 Azs 36/2010-274 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-25-january-2011-rs-v-ministry-interior-6-azs#content.

mental violence by her husband for at least five years and the Court recognized that private individuals can be actors of persecution or serious harm and it should be evaluated whether sufficient protection is available in the country of return and this constituted the basis of rejection of applicant's complaint in this case. Nevertheless, the Court elaborated that sufficient protection indicates that the state takes reasonable steps for prevention, through established effective legal system for detecting, prosecuting and punishing the acts of persecution or serious harm.[228] Another domestic violence related application was before the Belgian Council for Alien Law Litigation where the applicant was from Russia with Tatar origin and claimed being subject to violence from her husband throughout their marriage. Reference was made to case law from Canada and the UK and it was concluded that membership of a particular social group can be defined on the basis of characteristics that are innate or unchangeable such as gender.[229] Similar reasoning was also adopted with respect to a Macedonian woman who was a victim of forced prostitution.[230] Based on the fact that persecutors were non-state actors, possibility of effective protection in countries of origin was also evaluated and dismissed. One such case concerned an applicant from Algeria who claimed asylum based on gender based persecution due to domestic violence from her husband including sexual violence. Spanish judge reviewing the appeal against rejection of IP application, recognized that persecution by non-state actors on the ground

[228] "Czech Republic - Supreme Administrative Court, 16 September 2008, N.U. v Ministry of Interior, 3 Azs 48/2008-57 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-16-september-2008-nu-v-ministry-interior-3-azs#content.
[229] "Belgium - Council for Alien Law Litigation, 9 July 2008, Nr. 13.874 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-9-july-2008-nr-13874#content.
[230] "Belgium – Council for Alien Law Litigation, 20 October 2010, Nr. 49.821 | European Database of Asylum Law."

of gender should be considered within the concept of membership of a particular social group. If the state authorities refuse or are unable to provide protection against or they tolerate serious abuse by non-state actors, such situation could give rise to granting of refugee status.[231]

Domestic violence constituted a reason for qualification for IP according to Polish courts as well. One case was related to an applicant from Russia who claimed risk of persecution based on being a victim of domestic violence including physical violence by her husband and his colleagues as well as restriction of her freedom of movement. The court accepted that these constitute persecution by non-state actors. This court decision is significant for its extensive analysis on the concept of "particular social group". Based on comparative case law from other countries, the court stated that gender could be a characteristic defining a social group. The court elaborates that social groups may be defined based on a common feature subject to protection that is of permanent or such fundamental nature so that no one should be compelled to renounce it. Another criterion stated by the court for defining a social group is the common feature that makes the group different from the rest of the society. Thus, social perception and treatment by different actors are evaluated based on the conditions in the country of return. The court also cited the factors for assessing whether the applicant could be expected to seek protection in the country of origin, as appropriateness and accessibility of protection.[232] Another applicant

[231] "Spain - High National Court, 13 January 2009, 1528/2007 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/spain-high-national-court-13-january-2009-15282007#content.
[232] "Poland - Supreme Administrative Court of Poland, 8 May 2008, OSK 237/07 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/poland-supreme-administrative-court-poland-8-may-2008-osk-23707#content.

from Russia claiming refugee status in Poland was a victim of domestic violence from her husband. The Supreme Court overruled the judgment of the lower court which dismissed the applicant's appeal without considering the situation in the country of origin and, without assessing lack of consideration of the applicant's membership of a particular social group during IP evaluation.[233] Finally, in another Polish case, the applicant from an African country who was sold by her father and was taken to Egypt claimed being subjected to sexual and other types of violence. She claimed she would not have any protection against violence from her family if returned, considering that the authorities did not take any action when she complained to them before being taken to Egypt. The court recognized gender based persecution as a ground for refugee protection based on membership of a particular social group with reference to UNHCR Guidelines. The court emphasized that non-state actors could be actors of persecution if state authorities are unable or unwilling to provide protection.[234]

Situation of women with Western lifestyle in conservative Muslim societies constituted the subject of several court decisions on IP in Germany. In one case initiated by an unmarried applicant from Iraq, the court elaborated on the situation of women in Iraq and underlined enforcement of Islamic rules, increasing pressure on women, restriction of their freedom of movement and participating in public life, practice of "honor killings" and violent behavior towards women who are labeled as having

[233] "Poland - Supreme Administrative Court of Poland, 18 February 2009, II OSK 247/08 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/poland-supreme-administrative-court-poland-18-february-2009-ii-osk-24708#content.
[234] "Poland - Polish Refugee Board, 8 September 2010, RdU-439-1/S/10 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/poland-polish-refugee-board-8-september-2010-rdu-439-1s10#content.

"dishonorable" conduct. The court recognized applicant's need for IP considering that the state does not provide protection as such attitude towards women with "Western" life style is deep rooted in the society.[235] To point out judicial inconsistency, it should be noted that in a previous case concerning an Iraqi woman as well, the applicant's risk of persecution by family members due to having a Western life style was rejected due to not being based on one of the five grounds of persecution mentioned in 1951 Convention.[236] In a similar case the Lebanese applicant's IP claim was granted based on threat of "honor killing" by her brother. Upon finding out that she got divorced and was told that his sister was visiting bars and made friends with men, her brother threatened to kill her because of her lifestyle incompatible with Islam. The court described the concept of "gender" as including the stereotyped social roles that were expected from members of a sex, in addition to its reference to biological assignment. Thus presence of risk of persecution by a non-state actor, which could include single persons, was recognized based on membership of a particular social group of women who do not bow to discrimination and deprivation of rights arising from tradition and social circumstances.[237]

Sexual and gender based violence by non-state actors other than family members may also constitute a ground for refugee protection as pointed out in a court decision from Ireland. The applicant from Albania who was raped by her employer, reported the incident

[235] "Germany - Administrative Court Stuttgart, 18 January 2011, A 6 K 615/10 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-18-january-2011-6-k-61510#content.
[236] "Germany - Administrative Court München, 10 December 2008, M 8 K 07.51028 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnchen-10-december-2008-m-8-k-0751028#content.
[237] "Germany - Administrative Court Stuttgart, 8 September 2008, A 10 K 13/07 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-8-september-2008-10-k-1307#content.

to the police. As the authorities did not pursue the investigation and take any action, she arrived in Ireland to escape harassment and threats to life from her employer for reporting him. Her IP application was rejected as it was not found related to a 1951 Convention ground on account of the highly personal nature of the incident. Upon final review, in assessing the reason of Albanian authorities' unwillingness or inability for providing protection, the national court did not find review of country of origin information by the authorities in lower instances to be sufficiently elaborate. The court referred to discrimination and gender based violence against women in Albania and accepted that the applicant faces threat of persecution due to membership of a particular social group.[238]

It should be mentioned here that, for the cases referred above, with respect to the cases of forced marriage, domestic and sexual violence, situation of women with Western lifestyle in conservative Muslim societies and sexual and gender based violence, İstanbul Convention is relevant, especially considering that Turkey was its party until March 2021.[239] Especially, Article 60 on gender-based asylum claims and Article 61 on non-refoulement of İstanbul Convention require states to ensure that gender based violence against women is recognized as a form of persecution leading to refugee status or serious

[238] "Ireland - SM -v- The Refugee Appeals Tribunal [2016] IEHC 638, 11 September 2016 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/ireland-sm-v-refugee-appeals-tribunal-2016-iehc-638-11-september-2016#content.

[239] Turkey announced its withdrawal from İstanbul Convention with the Presidential Decree published in the Official Gazzette No. 31429 dated 20 March 2021. Turkey ratified İstanbul Convention in 2012 when it was first opened for signature. It withdrawal was taken with regret by public, civil society and academia in Turkey as well as Council of Europe, as expressed in its statement here: 'Turkey's Announced Withdrawal from the Istanbul Convention Endangers Women's Rights - View' <https://www.coe.int/en/web/commissioner/-/turkey-s-announced-withdrawal-from-the-istanbul-convention-endangers-women-s-rights> accessed 7 June 2021.

harm leading to subsidiary protection, and to ensure that principle of non-refoulement is respected for victims of violence against women.

Whereas more weight is given here to sexual and gender based violence related claims due to overlap with Turkish case law that will be referred below, there are also examples where judiciary in EU states found risk of persecution by non-state actors in other contexts. An appeal initiated in Czech Republic concerned an applicant from Pakistan who is a member of Ahmadiyah religion. He claimed risk of persecution based on his faith and relied on having been attacked by religious persons resulting in serious physical injury. The court pointed out that according to the country of origin information, public authorities obviously discriminate against the religious group that the applicant belongs to, by targeting them and tolerating attacks by non-state actors against them. In such situations, applicants cannot be subjected to the requirement of seeking protection from the state authorities.[240]

Another applicant from Pakistan sought protection in Czech Republic based on the ground of religion, due to being a Muslim married to a Ukrainian Christian. The couple faced physical assault, pressure and threats to life from the Muslim community in Pakistan and from a racist group in Ukraine. Supreme Administrative Court rejected the reasoning of the lower court that in order to give rise to a successful refugee claim, persecution should be directly caused or supported by state authorities. It is sufficient if the state

[240] "Czech Republic - Supreme Administrative Court, 30 September 2013, I.J. v Ministry of the Interior, 4 Azs 24/2013-34 | European Database of Asylum Law," accessed June 21, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-30-september-2013-ij-v-ministry-interior-4-azs#content.

authorities are unable to provide protection against persecution by non-state actors. The court also commented on the standard of state protection and stated that the legal system must be effective and accessible in accordance with the Qualification Directive.[241] The court decision rendered as a result of an appeal of rejection of an IP application due to fear of persecution based on racial grounds, is the key judgment in the UK setting forth principles concerning persecution by non-state actors. The judges held, in assessing the level of protection that should be available against such persecution, that, complete protection that would eliminate all risk concerning persecutory acts cannot be expected from the country of origin. The measure should be a practical standard of generality. Presence of a system for detection, prosecution and punishment of persecutory acts of non-state actors has to be sought and the state must be ready, willing and able to operate this system.[242]

Finally, a case from the High Court of Ireland should be mentioned about an asylum applicant from Sierra Leone. She faced violence and threats to life from her gangster brother because of having a child out of wedlock. The court focused on the methodology for risk assessment and availability of state protection in case of risk arising from non-state actors. When assessing whether it was possible for her to find state protection by relocating to another city, the court emphasized that suitability of this option for threats of general nature can be determined by reviewing country of origin information. In case of a

[241] "Czech Republic - Supreme Administrative Court, 18 December 2008, S.I.Ch v Ministry of Interior, 1 Azs 86/2008-101 | European Database of Asylum Law."
[242] "UK - House of Lords, 6 July 2000, Horvath v. Secretary of State for the Home Department [2000] UKHL 37 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/uk-house-lords-6-july-2000-horvath-v-secretary-state-home-department-2000-ukhl-37#content.

specific risk directed at an applicant from a family member, country of origin information would be of little help and the risk assessment should be conducted based on objective evaluation of specific circumstances surrounding the case.[243]

All of these cases from European domestic courts demonstrate that risk arising from the conduct of non-state actors were discussed extensively in judicial context. This resulted in the body of case law on various non-state actors as well as standards of state protection that should be available against their conduct. Acts of non-state actors triggered refugee protection in case of being related to one of 1951 Convention grounds and if they give way to serious harm subsidiary protection is offered in case of lack of connection with a 1951 Convention ground. This approach is a natural extension of complementary overlap between international refugee law and international human rights law that was explained in the beginning of this Sub-Section. When we look at the cases handled by Turkish administrative courts surrounded with similar facts regarding IP applicants, more often than not, we encounter a rather limited approach that over-emphasizes state persecution and disregards subsidiary protection. Another general discrepancy in this regard comes across as non-evaluation of the nexus concerning the connection of undesired conduct to the underlying specific reasons.

The first Turkish court decision relates to an appeal of rejection of an IP application by an applicant from Afghanistan and his family. Based on the IP interview report and

[243] "Ireland - High Court, 3 November 2009, D.T. v Minister for Justice, Equality and Law Reform [2009] IEHC 482 | European Database of Asylum Law," accessed June 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-3-november-2009-dt-v-minister-justice-equality-and-law-reform-2009-iehc#content.

submissions to the court, the applicant claims that he faced ill treatment from his wife's ex-husband and, his and his pregnant wife's lives are at risk due to his threats. In rejecting the applicant's claims, the court underlined that his statements do not relate to being a member of any organizations in his country of origin including political organizations or unions. The court emphasizes that the applicant did not have any claim as to facing any pressure from state officials or illegal organizations or that he does not have safety of life.[244]

Another similar judgment was rendered concerning IP application of another Afghan national who claims that she has a risk to be killed by his ex-husband and his family. She was living as an IP applicant in Turkey in 2013 together with her husband and two children. She was facing domestic violence from her husband and she complained to Turkish authorities about this. As her husband went to Iran after this by taking their daughter, she went to Iran after them together with the other daughter. They got divorced there and the court gave the custody of the children to the father. The applicant claims that the children were suffering from physical and psychological violence from their father. As she could not access state protection in Iran or Afghanistan regarding this situation, she took her daughters and came to Turkey. In rejecting the appeal, the court stated that applicant did not submit any documents regarding domestic violence claims and asserted that the applicant is not a member of any political, religious and social group, she was never detained in her country of origin, she did not face any ill treatment and her siblings

[244] E. 2015/1019, K. 2016/3129 (Ankara 1. Administrative Court October 31, 2016).

live in Afghanistan.[245] Article 35 of İstanbul Convention provides a requirement of criminalization of conducts of physical violence should be taken into consideration here.

Similarly, in a case initiated by an Iraqi national who was an IP applicant in Turkey together with his family, the alleged risk emanated from threats to life by his wife's ex-husband's family. The Court based its judgment on a similar reasoning emphasizing that the applicant is not a member of any political, religious and social group, did not face any ill treatment or did not have any problems with official authorities. The court described the applicant's fear as having a private nature. [246]

Finally, another court decision concerned a Moroccan woman who appealed rejection of her IP application. She claimed that she feared risk of violence and even death caused by her father and brother if returned, as she lives with her boyfriend in Turkey and she was apprehended working illegally in a night club. The court stated that the applicant is not a member of any political, religious and social group and she did not face any ill treatment before.[247]

In all of these cases, the applicants claim fearing persecution from non-state actors. Along a similar line, there are various examples from European national jurisdictions where the judges assessed the risk associated with threats from ex-husbands or family members. Turkish courts however conducted legal analysis in a generic manner in the axis of risk of persecution from state actors. They focused on lack of risk of persecution by state actors, did not include relevant country of origin information and disregarded

[245] E. 2018/327, K. 2018/555 (Sivas Administrative Court July 11, 2018).
[246] E. 2016/1405, K. 2016/2677 (İstanbul 1. Administrative Court December 26, 2016).
[247] E. 2014/896, K. 2014/1413 (Ankara 1. Administrative Court September 11, 2014).

evaluation of risk associated with non-state actors mentioned in IP applications, required conditions for state protection against such risk and whether effective state protection is available to the applicants in the country of origin. At this point the decision of Trabzon Administrative Court provides guidance for the assessment of availability of state protection against risks from non-state actors.[248] The IP applicant's reason for leaving the country of origin was her ex-husband who kidnapped their child from the applicant. The court did not focus on lack of risk from state actors but rather considered that state authorities in Iran successfully retrieved the child upon complaint from the applicant, which indicated that she can access effective state protection. The courts' emphasis on absence of past persecution also reflect their narrow approach.[249]

Apart from limited consideration with respect to actors of persecution, the courts also refused need for IP on the basis that the feared conduct in countries of origin are not based on one of the 1951 Convention grounds. In concluding so, the courts did not conduct or require the administration to conduct an assessment as to whether the claimed threats are connected to sexual and gender-based violence. As demonstrated in comparative case law above, this could be considered as persecution on the ground of membership of a particular social group. In the first Turkish case addressed above which was initiated by an Afghan applicant, the applicant mentioned previous imprisonment related to Islamic marital rules[250] and both in this case and the third case above initiated by an Iraqi applicant,[251] the

[248] E. 2017/1014, K. 2017/1347 (Trabzon Administrative Court November 21, 2017).
[249] Allan Mackey, Martin Treadwell, and Bridget Dingle, "A Structured Approach to the Decision Making Process in Refugee and Other International Protection Claims" (International Association of Refugee Law Judges, n.d.), 19.
[250] E. 2015/1019, K. 2016/3129 (Ankara 1. Administrative Court October 31, 2016).
[251] E. 2016/1405, K. 2016/2677 (İstanbul 1. Administrative Court December 26, 2016).

applicants feared threats related to their wives' ex-husbands which hint gender or honor related social rules. The same is valid for the final court decision mentioned above which relate to a Moroccan woman fearing violence from her family members.[252] In the second case, where the applicant accounts for previous violence from her ex-husband towards herself as well as her daughters, the court dismissed the claim because of lack of documentation in this regard.[253] Reviewed European case law surrounded by similar facts does not reveal such strict standard of proof related to domestic violence, which admittedly is not a phenomenon that could be easily documented, especially given that in this case, the applicant was in foreign countries when the alleged incidents took place.

Finally, in cases where the reason for IP application is found not to be related with any of the 1951 Convention grounds thus not eligible for refugee protection, the judicial assessment should not be limited to refugee protection and it should be considered whether any protection obligation arises from international human rights law. All mentioned judgments invariably quote the definition of IP in Article 3 of LFIP, which mentions subsidiary protection as one of the IP types, and Article 63 of LFIP on subsidiary protection as well as ECHR and often Soering v. United Kingdom[254] as representative of the relevant ECtHR case law. Despite this, in the ensuing reasoning sections of the decisions, the courts defined IP as limited to refugee protection covering justified fear of persecution based on the five 1951 Convention grounds. Building on this, it is stated that both objective and subjective elements should be considered to determine presence of

[252] E. 2014/896, K. 2014/1413 (Ankara 1. Administrative Court September 11, 2014).
[253] E. 2018/327, K. 2018/555 (Sivas Administrative Court July 11, 2018).
[254] Soering v. United Kingdom, No. 14038/88 (European Court of Human Rights July 7, 1989).

justified fear of persecution. Objective conditions are to be based on country of origin information and, since it is not possible to expect everyone to behave in the same way, subjective elements related to the IP applicant's situation are to be based on interviews, credibility and risk assessment. Whereas these general principles are set forth concerning refugee protection, the courts do not make any evaluation as to conditions of subsidiary protection and whether the claims of the applicants satisfy them.

On the other hand, better judicial practice examples from Turkish courts do not disregard this distinction among subsidiary and refugee protection. I have encountered two court decisions from Ankara 1. Administrative court where the judges cancelled the administrative decisions for rejection of IP applications by Afghan nationals based on the reasoning that the administration did not consider possibility of subsidiary protection.[255] In both cases the applicants claimed threat to life due to indiscriminate violence in the country of origin. The court was not satisfied with administration's assessment only regarding eligibility of applicants for conditional refugee status and stressed that country of origin information was not sufficiently assessed with respect to the claims and availability of internal protection in different parts of the country.

[255] E. 2014/2031, K. 2015/601 (Ankara 1. Administrative Court March 24, 2015); E. 2015/1304, K. 2015/1553 (Ankara 1. Administrative Court September 10, 2015).

2. Assessment of excuses with respect to indicators of implicit withdrawal of IP applications

a. Comparative analysis and significance of judicial assessment in Turkey in the context of implicit withdrawal of IP applications

Implicit withdrawal or abandonment of IP application, or as expressed in LFIP, considering the IP application withdrawn, signifies situations where the administrative authority examining the IP application may assume that the IP applicant does not want to proceed with the IP application and thus discontinue the procedure.[256] Article 28 of the Asylum Procedures Directive lists, in a non-exhaustive fashion, the situations to assume that the applicant abandoned the IP application.

They consist of;

- failure to respond to requests of information essential to the IP application,
- not appearing for personal interview,
- absconding or leaving without authorization the place where he/she lives or was held, without contacting the competent authority within reasonable time and,
- non-compliance with reporting duties or other communication obligations.[257]

[256] UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," March 2010, 187.

[257] It should be noted that the EU Commission Proposal for an Asylum Procedures Regulation dated 2016 and currently pending before the European Parliament and the European Council, provides for an additional ground of implicit withdrawal, which concerns failure to meet the requirements for submitting an IP application despite having an effective opportunity.

However, if the IP applicant demonstrates that the situation was caused by circumstances beyond his/her control, then it cannot be assumed that the applicant has implicitly withdrawn or abandoned the IP application.

Article 77 (1) of LFIP regulates the indicators of implicit withdrawal of IP applications in a similar vein. To allow for a comparison between the corresponding EU regulation, it should be noted that the exhaustive list in LFIP includes;

- absconding from the place of administrative detention,
- objection to collection of personal data and non-compliance with obligations at the registration and interview,
- not appearing at the interview, or not complying with reporting obligation three consecutive times, unless he/she has an excuse, or
- not showing up in the designated place of residence or leaving the place of residence without permission, unless he/she has an excuse.

In the case that the IP applicant is considered to have withdrawn his/her application, a decision in this regard is issued by the competent Provincial Directorate of Migration Management ("PDMM"). If this decision becomes final through rejection of judicial appeal or expiry of judicial appeal period, then according to Article 54(1)(i) of LFIP, removal order is issued concerning the individual, unless the decision on implicit withdrawal of IP application could not be notified to him/her as per Article 79(4) of the Regulation on Implementation of the Law on Foreigners and International Protection ("Yabancılar ve Uluslararası Koruma Kanununun Uygulanmasına İlişkin Yönetmelik")

published in the Official Gazzette No. 29656 dated 17 March 2016 ("Implementing Regulation").

As set forth in the relevant provisions explained above, as opposed to explicit withdrawal, there is no explicit statement by the IP applicant to abandon the application, but rather the administration derives this intention of the applicant based on presence of certain grounds or indicators such as non-compliance with obligations within the IP procedure. As persistently expressed by UNHCR, such indicators should not be implemented in a way that would result in termination of examination of applications, by applicants who do not have the intention to withdraw their application or abandon the procedure, solely due to their failure to comply with procedural rules. Presence of grounds for implicit withdrawal does not necessarily show lack of need for protection and may be caused by a variety of reasons including deficiencies and complications in administrative procedures related to communication or notification. Also, these grounds should be implemented in a flexible manner especially for certain IP applicants with special difficulties in complying with their obligations within IP procedures for reasons such as health problems or limitations on physical movement.[258] These concerns are strongly

[258] UNHCR, "Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)," February 10, 2005, 25; UNHCR, "Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (COM(2009)554, 21 October 2009)," August 2010, 29; UNHCR, "Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast) COM (2011) 319 Final," January 2012, 21; UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," 187, 193, 196; UNHCR, "Comments on the European Commission Proposal for An Asylum Procedures Regulation," April 2019, 33.

shared by human rights advocacy groups[259] and explicit reference is made in the Asylum Procedures Directive as well as in the EU Commission Proposal for Asylum Procedures Regulation, to circumstances beyond IP applicant's control as a factor negating the reasons for implicit withdrawal. Moreover, considering the dire legal consequences of withdrawal decision triggering removal from territory, judicial interpretation of what constitutes justified excuse for failure to comply with obligations within IP procedures, within the meaning of Article 77 of LFIP, is crucial.

Due to scarcity of accessible comparative case law as to what constitutes "justified excuse", as expressed in the Turkish framework, or "circumstances beyond IP applicant's control", as expressed in the European framework; the analysis below is based mainly on administrative and legislative practices. This is followed by an analysis setting forth the significance of judicial assessment concerning implementation of implicit withdrawal, for the IP system in Turkey. Then, the next sub-section consists of analysis Turkish judicial practices that highlight both flexible and dismissive perspectives taken in different court decisions with respect to excuses set forth by IP applicants.

Based on the implicit withdrawal grounds provided in the Asylum Procedures Directive, comparative research shows that the reasons stated below are found in European national practices, which take the form of legislation in the case of Belgium,

[259] ECRE, "Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467," November 2016, 46; ECRE, "Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status," October 2006, 19; ECRE, "Comments on the Amended Commission Proposal to Recast the Asylum Procedures Directive (COM(2011) 319 Final)," September 2011, 25–26; Amnesty International, "Position Paper on the Proposed Asylum Procedures Regulation," March 31, 2017, 9–10.

Bulgaria, Czech Republic, Finland, Germany, Greece, the Netherlands, Slovenia, Spain and the UK:[260]

- Not reporting at a designated place for providing fingerprints,
- Not returning the application form or other IP questionnaires,
- Not attending a screening interview, without reasonable explanation,
- Not providing personal information such as name, date of birth, place of residence or mailing address,
- Leaving an interview before it is completed, without reasonable explanation,
- Not reporting to the administrative authority for examination,
- Not responding to inquiry sent in writing asking if the applicant wishes to pursue the IP application,
- Refusing cooperation in clarifying circumstances about the IP application, including age assessment,
- Not notifying the administrative authority as to a change of address.

Whereas the grounds for implicit withdrawal in Turkish and European framework overlap to a great extent, in the European practice based on Asylum Procedures Directive, a reasonable period of time should elapse before the adimnistrative authority can decide that the IP application is implicitly withdrawn. Within this period, it is expected that the authority tries to reach the IP applicant and find out the reasons for his/her non-compliance. Accordingly, for instance, upon non-compliance with obligations, the period

[260] UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," 189–92.

for decision making on implicit withdrawal increases up to 2.5 months in Belgium whereas German legislation provides that action can be taken on withdrawal only one month after a notification is made to the IP applicant containing information on consequences of withdrawal and requesting the applicant to pursue the application.

Similarly, the legislation in Spain and Greece foresee a 30-day period upon failure to respond to a request of information, to attend an interview or to renew documentation. On the other hand, in Greece, if the implicit withdrawal decision follows absconding from detention place or leaving place of residence without authorization, then it can be issued immediately according to legislation. However, it was reported that in practice this does not happen without trying to reach the IP applicant and in any case before 30 days.

Czech Republic's practice demonstrates that decisions on implicit withdrawal are issued at least one month after non-compliance with the relevant obligation within the IP procedure. In Finland, implicit withdrawal provisions cannot be implemented, unless the whereabouts of the IP applicant are unknown to the authorities for at least two months.

In the Netherlands, rather than a waiting period for issuing the implicit withdrawal decision, a new interview is scheduled after the interview that the IP applicant failed to attend and the IP application is considered to be withdrawn if the applicant does not show up on the new date either. In the case that the IP applicant leaves the place of residence in an unauthorized manner, implicit withdrawal decision may be issued immediately without the requirement of an attempt to reach the applicant. This practice was criticized by UNHCR for not being in line with the Asylum Procedures Directive, according to which a reasonable period is granted in such a case for the IP applicant to contact the authorities. Finally, the period of five days implemented in the UK for issuance of implicit withdrawal

decision upon failure to appear for an interview, has been criticized by the UNHCR for not being reliable to determine the intention of the applicant to abandon the IP application. It was also pointed out that, the IP applicants are dispersed across the country, which is also the case in Turkey, and this increases the possibility of the address of the applicant known to the authorities to be out of date.[261]

These examples from European practice demonstrate that there is a waiting period, usually no less then one month, between the occurrence of the ground for implicit withdrawal and the issuance of an administrative decision concerning implicit withdrawal resulting in the termination of the assessment of IP application. This is in fact reasonable given the grave consequence of implicit withdrawal of IP application and the likelihood of presence of reasons, other than lack of need of protection, which cause the application to be considered withdrawn.

In Turkey, there is no such waiting period to allow the IP applicant to contact authorities and explain his/her excuse. As also apparent from the sample cases mentioned below, for instance, reporting obligations are usually brought to IP applicants on a weekly or even more frequent basis. Considering that failing to comply with this obligation three times immediately leads to the consideration that the IP application is withdrawn, this may happen where last contact with the applicant was less then two weeks ago. This makes IP applicants, who have the intention to stay in the IP procedure, prone to discontinuation of their IP applications, even if they have justified excuse for failing their obligations within the IP procedure.

[261] UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," 189–95.

Turkey implements a system of dispersed residence for IP applicants and status holders where DGMM assigns them to register and reside in one of the 62 provinces determined as satellite cities, which exclude coastal and border cities and metropolises. Although not implemented very strictly, dispersal scheme operates based on the effort to maintain a balance as to the ratios of refugee and local populations by province and to host certain nationality, ethnicity, religious, vulnerable groups together. Moreover, apart from ad-hoc support provided to certain vulnerable groups, in principle, monetary subsistence is not provided to IP applicants and status holders. During their time in Turkey, which usually takes at least a couple of years depending on the basis of their IP application, they are responsible from covering their own needs including accommodation, with limited or no access to formal labor market. It is the reality of the ground that the assignments to satellite cities do not always match the preferences, personal circumstances and employment chances of IP applicants and status holders.[262] As a result, many IP applicants or status holders find themselves compelled to go to bigger cities with job opportunities usually in informal sector.[263] These problems concerning residence and access to labour market are in fact issues that need to be addressed separately on their own however for the purposes here they are merely mentioned in terms of leading to justified excuses for neglecting administrative obligations within IP procedures.

[262] Mültecilerle Dayanışma Derneği, "Türkiye'de Mültecilerin Kabul Koşulları Hak ve Hizmetlere Erişimleri," Uydu Kentler İzleme ve Raporlama Projesi, 2015; Asylum Information Database, "Country Report: Turkey," Update 2018, 62–63.
[263] Refugee Rights Turkey, "Legal Opinion Paper on 'Implicit Withdrawal' of International Protection Applications in Turkey: Issues in Implementation and Recommendations," December 2017, 3.

Taking into account these factors as well as the administrative difficulty of changing satellite city of assignment or obtaining an administrative permission to leave the city of residence, in deciding whether they have a justified excuse for leaving their residence without permission, courts should be flexible with the IP applicants and status holders. Judges should keep in mind that the purpose of the implicit withdrawal rule is to differentiate IP applicants who do not have the genuine intention to follow up their IP application and not to serve as a punitive measure for non-compliance with procedural obligations. Procedural obligations for residence in a certain province or imposition of reporting duty are essentially tools for ensuring smooth operation of IP procedures with a view to answer protection needs of IP applicants and status holders and they should not be implemented in a way exceeding their purpose.

The matter of IP applicants' and status holders' compliance with administrative limitations applicable within the IP procedures should also be framed in connection with the state's obligation to ensure freedom of movement and reception standards that do not fall below the standard required by human rights obligations. Right to freedom of movement of asylum seekers and refugees have been stressed by the UNHCR Executive Committee Conclusions on several occasions. Accordingly, the Executive Committee encouraged States "*to intensify their efforts to protect the rights of refugees to avoid unnecessary and severe curtailment of their freedom of movement*";[264] reiterated "t*he enduring importance of freedom of movement and residence within the borders of each State*";[265] encouraged State parties "*to explore the most practical and feasible means to*

[264] UNHCR Executive Committee, "General Conclusion No. 65 (XLII) on International Protection," 1991.
[265] UNHCR Executive Committee, "General Conclusion No. 108 (LIX) on International Protection," 2008.

accord freedom of movement";[266] called upon States and UNHCR "*to ensure the equal access of women and men to all forms of personal documentation relevant to refugees' freedom of movement*";[267] stated that asylum seekers "*should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order*";[268] and recognized that "*the protection, in all States, of basic civil, economic and social rights, including freedom of movement of refugees is essential to the achievement of self-reliance of refugees*".[269] Finally the Executive Committee stated that "*the empowerment of displaced women and girls is to be enhanced including by partnerships and actions to strengthen women's and girls' capacities, including by enhancing freedom of movement*."[270] It should also be kept in mind that the ECtHR recognizes that the states may bring administrative duties to IP applicants and status holders that limit freedom of movement, however reception conditions worse than minimum standards amounting to destitution may lead to violation of Article 3 of the ECHR by constituting inhuman or degrading treatment. If foreigners within the IP procedure are exposed to extreme poverty or destitute living conditions, it may constitute a breach of Article 3 of the ECHR by the host state.[271] In this vein, in M.S.S. v. Belgium and Greece, the ECtHR took into account that, the applicant was living in the street for a couple of months in Greece, with no resource and any means for attaining his basic

[266] UNHCR Executive Committee, "General Conclusion No. 102 (LVI) on International Protection," 2005.
[267] UNHCR Executive Committee, "Conclusion No. 73 (XLIV) on Refugee Protection and Sexual Violence," 1993.
[268] UNHCR Executive Committee, "Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx," 1981.
[269] UNHCR Executive Committee, "Conclusion No. 104 (LVI) on Local Integration," 2005.
[270] UNHCR Executive Committee, "Conclusion No. 105 (LVII) on Women and Girls at Risk," 2006.
[271] Nicolosi, "Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law," 321.

needs.[272] The Court also referred to Article 13 of the Reception Conditions Directive which requires states to provide material reception conditions[273] to persons within IP procedures to ensure an adequate living standart in terms of health and subsistence.[274]

Within this context, judiciary should be functioning as one of the state actors striving for a better functioning IP system respectful of human rights, accordingly the administrative tools should be implemented in a way and may be modified if necessary, to ensure this. If an IP applicant neglects procedural obligations essentially because in the city of assignment he/she lacks means of subsistence or is subject to severe social pressure, for instance in case of a "lesbian, gay, bisexual, transgender and intersex" ("LGBTI") applicant assigned to a small conservative city, then such mismatch that went unnoticed by the administration during the initial assignment, can be addressed during appeal of implicit withdrawal decision. The fact that the IP applicant undertook the effort of judicial appeal can be perceived as an indicator of the intention to follow up the IP application, casting doubt on the underlying reason of the implicit withdrawal decision. It is plausible that sometimes the reasons causing implicit withdrawal emanates from imposition of over-burdening duties to the IP applicant rather than his/her intention to misuse the IP procedure. Understandably, the circumstances of the IP applicant cannot be the sole factor

[272] Gina Clayton, "Asylum Seekers in Europe: M.S.S. v. Belgium and Greece," *Human Rights Law Review* 11, no. 4 (2011): 776; Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored," 321.
[273] Fabian Lutz, "Non-Removable Returnees under Union Law: Status Quo and Possible Developments," *European Journal of Migration and Law* 20, no. 1 (2018): 36.
[274] Lavrysen, "European Asylum Law and the ECHR : An Uneasy Coexistence," 247–49; Garlick, "International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR," 125–26; Hélène Lambert, "The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities," *Refugee Survey Quarterly* 24, no. 2 (2005): 42; M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraphs 251–264.

in deciding on procedural obligations considering other concerns such as public order and security or workload of local authorities, however they should be accommodated to the extent possible.

Finally, implicit withdrawal decisions issued due to non-compliance with administrative duties where intention to follow the application and need for IP continues may cause other indirect detrimental consequences in practice. Firstly, as per Article 79(1)(f) of LFIP, a new IP application made after implicit withdrawal of the previous IP application is considered within accelerated IP procedure with shorter assessment periods, which would possibly be detrimental to the IP applicant. Also, even accelerated procedure could not be accessible at times, because it is reported that, although there is no such condition arising from the legislation, IP applications by applicants whose previous IP applications were considered withdrawn are not processed by PDMMs if the implicit withdrawal is not appealed to the court. This situation on its own constitutes administrative discrepancy. [275] Also, if validity of the excuse, related to ground of implicit withdrawal, is not properly considered, the IP assessment is ceased upon withdrawal decision and this might result in wrongfully depriving a person of the protection he/she needs, in the case that he/she fails to appeal the withdrawal decision but makes a new IP application instead. Another administrative practice reported from some provinces is confiscation of IP applicant or status holder identity document immediately after the notification of the implicit withdrawal decision before it becomes final.[276] So, again wrongful

[275] Refugee Rights Turkey, "Legal Opinion Paper on 'Implicit Withdrawal' of International Protection Applications in Turkey: Issues in Implementation and Recommendations," 7.
[276] Refugee Rights Turkey, 8.

implementation by PDMMs, as to what constitutes justified excuse, might cause the relevant persons to be unable attain certain rights and services accessible with the relevant identity documents. These situations can be prevented through court decisions as judicial interpretation of what should be accepted as valid excuse also guides administrative practice.

Consequently, judicial review of IP applicants' excuses for triggering of grounds concerning implicit withdrawal, become all the more important. More often than not, the court room is the first place where IP applicants can argue existence of justified excuses and flexibility in judicial interpretation becomes crucial for maintaining compliance with non-refoulement principle. Building on these factors, rather than limiting itself to either upholding or annulling the appealed implicit withdrawal decision, the courts can and should address the issue of reasonableness of the neglected procedural obligations in respect of the circumstances of the IP applicant and ask the administration to review and modify them if necessary.

Unfortunately, many court decisions as analyzed in the next sub-section below refrain from such endeavor and usually, contribute to a judicial perspective indifferent to the systemic challenges associated with the IP procedures, some of which are outlined above. Against this background, a critical analysis is provided below as to the approach of Turkish judiciary to implicit withdrawal with a special focus on assessment of excuses in situations leading to consideration of IP applications as withdrawn.

b. Judicial assessment of excuses for non-compliance with procedural obligations leading to implicit withdrawal of IP application

Below, the first category of judicial discrepancy consists of the cases where the courts failed to evaluate the excuses claimed by IP applicants for non-compliance with duties within IP procedures. The second category of judicial discrepancy relates to the examples where the courts followed a rather restrictive approach in assessing the claims of justified excuse and rejected such claims. Finally, as the third category of court cases, the positive judicial practices in this regard will be reflected.

The first category of judicial discrepancy in assessment of lawfulness of decisions to consider IP application withdrawn is, disregarding and not assessing the claims of IP applicants as to why they have failed to comply with procedural obligations. These court decisions also lack any evaluation as to whether these claims were submitted to and duly considered by the relevant PDMMs and whether such consideration is reflected in the reasoning of the administrative decision on implicit withdrawal.

In one case from Denizli, the IP applicant claimed that the reason why she neglected her reporting obligation is because PDMM is far from her house, and her daughter suffers from a sickness that requires home care. In rejecting her appeal, the court made no reference to her claims.[277] Another applicant registered again in Denizli together with her husband, left the city to live in Ankara with her friend, because her husband left her as a result of conflict and she did not want to live alone in Turkey. While in Ankara, she gave birth to a child from her boyfriend and allegedly could not go back to Denizli due to health

[277] E. 2016/1031, K. 2016/1949 (Denizli Administrative Court February 16, 2017).

problems she had during childbirth. She also claims not knowing the legal consequences of leaving Denizli. The court dismissed her appeal by relying on the fact that the residence obligation was notified to the applicant in the presence of a translator. However, her claim of medical excuse preventing her to change cities was not evaluated.[278] At this point, Article 60 of İstanbul Convention should be reminded which requires development of gender-sensitive IP procedures and support services for IP applicants.Similarly, a Christian convert applicant from Iran who was registered in Nevşehir opposed withdrawal of his IP application based on the reason that the closest church is located in another province and he had to go there to obtain financial support as he experiences financial difficulties in Nevşehir. The court stated that the applicant was apprehended during controls conducted upon the suspicion that a group of IP applicants registered in Nevşehir, actually reside in Kayseri and that they travel to Nevşehir weekly only to fulfill their signature duty. The court rejected the appeal and did not discuss the validity of the applicant's excuse, accuracy of his account against the suspicion of residence in Kayseri or whether these matters were investigated by the administration.[279] In another judgment, it is mentioned that the IP applicant whose application was considered withdrawn, claims that he could not fulfill his reporting obligations due to reasons beyond his control. In rejecting the appeal, the court did not touch upon these excuses, there are no indications that those claims are assessed or as to court's reasoning for rejecting them.[280] Another example concerns an applicant who relied on presence of a reason beyond her control

[278] E. 2016/935, K. 2017/348 (Denizli Administrative Court February 10, 2017).
[279] E. 2017/618, K. 2017/1117 (Kayseri 1. Administrative Court September 27, 2017).
[280] E. 2016/138, K. 2016/567 (Afyonkarahisar Administrative Court August 25, 2016).

claiming that she left the city of residence so that her children could take an exam in Iraq. The court rejected the appeal again, without assessing whether the applicant's reason for leaving constitutes valid excuse. [281] Finally, although not directly related to an excuse for neglecting administrative duties, one case shows a similar failure of the court to assess applicant's arguments. The court referred to the applicant's claim that the withdrawal decision was not duly notified in accordance with Notifications Law, however does not provide any evaluation concerning this claim.[282]

In other cases, the court chose not to take into account the IP applicants' claims of valid excuse when they failed to fulfill administrative obligations without the knowledge or permission of the authorities. According to one judgment, the IP applicant claims before the court that he could not approach the authorities due to fear of imprisonment after the interim measure decision issued upon an argument with his wife but the court does not assess whether his excuse is justified. It was sufficient for the court that the applicant neglected his reporting obligation for almost one year without making any explanation or submitting any excuse.[283]

In another case as well, the IP applicant asserted family and medical reasons as excuse by stating that he had to leave the province because his wife gave birth and his son had medical problems. The court did not accept the applicant's appeal because he did not notify or obtain permission from PDMM, although notification was made to him through a translator concerning his obligations including weekly signature duty.[284] Whereas the

[281] E. 2017/1005, K. 2017/1397 (Sivas Administrative Court December 27, 2017).
[282] E. 2018/66, K. 2018/300 (Sivas Administrative Court April 11, 2018).
[283] E. 2017/242, K. 2017/1360 (Kastamonu Administrative Court September 22, 2017).
[284] E. 2017/2022, K. 2018/809 (Kastamonu Administrative Court July 4, 2018).

legislation clearly prohibits an IP applicant from leaving the city of registration without permission, it is reported by the lawyers that in practice such requests for permission are, more often than not, dismissed without assessment. So, especially in case of a medical emergency, it may not be reasonable to expect the applicant to go through this process. Thus, rejection of appeal only due to lack of permission, without assessing the claimed excuse itself, may restrict the IP applicants' freedom of movement excessively.

Second category of discrepancy in the court decisions concerns the rigid and restrictive approach adopted in assessing the applicants' excuses for not fulfilling their reporting or residence obligations. So, the court did not neglect and did assess the claims of justified excuse, but rejected them. For instance, an applicant whose IP application was considered withdrawn by Uşak PDMM, relied on having been compelled to accompany her brother's wife for medical treatment in Ankara. In the course of appeal, he submitted supplementary documents showing that his brother has been hospitalized in Baghdad, which left the applicant responsible for accompanying his wife. The court rejected the applicant's appeal by noting that he left the city of residence without permission and did not submit to the court supporting documents showing that the treatment in Ankara continued for the whole period of ten months during which he neglected his signature duty. It is significant that the court decision did not reject that such excuse on medical and family grounds could justify breach of administrative obligations but rather found the applicant's submissions insufficient. This was also criticized by a dissenting judge arguing

that the court should have asked the submission of supporting documents as to the course of treatment in Ankara rather than rejecting the appeal.[285]

One IP applicant claims that she left her city of residence Erzincan because she was receiving threats from her ex-husband. The Court required a rather high standard of proof and did not accept this as a justified excuse due to lack of criminal proceedings concerning the alleged threat.[286] Another case concerned an IP applicant who left her house and the province due to having disputes with her husband and neglected her signature duty due to her psychological state. The court rejected the validity of her excuse.[287] Similarly the judges took a rigid stance as to an LGBTI individual who claims that his relocation to Ankara and failure to fulfill his reporting duty in Iğdır is due to impossibility of living there as an LGBTI individual. Again, the Court rejected the applicant's arguments because he did not submit any concrete information or documents as to such impossibility, he did not apply to the authorities concerning this situation and he did not request relocation to another province.[288] These decisions reflect a non-flexible approach adopted by these courts for not prioritizing possible vulnerabilities and protection needs of disadvantaged refugee groups such as single women and LGBTI individuals over procedural obligations within IP procedures, despite Article 60 of İstanbul Convention envisaging establishment of gender-sensitive IP procedures.

[285] E. 2016/78, K. 2017/1510 (Manisa Administrative Court October 11, 2017).
[286] E. 2014/1658, K. 2015/1321 (Sivas Administrative Court September 3, 2015).
[287] E. 2017/1249, K. 2017/1504 (Adana 1. Administrative Court December 19, 2017); E. 2018/305, K.2018/427 (Konya RAC 5. Chamber of Administrative Lawsuits February 27, 2018).
[288] E.2017/1836, K.2018/1055 (Erzurum Administrative Court May 24, 2018).

Despite systemic and practical challenges that IP applicants and status holders face in accessing the labor market in Turkey, many court decisions do not accept excuses concerning employment situation as justified for neglecting administrative duties concerning IP procedures. The Council of State expressed this in even wider terms in one decision where it stated that economic reasons are not considered as valid excuse.[289] In four other cases, possibly somehow connected with each other considering the resemblance in facts, the IP applicants were assigned to Elazığ province but neglected their administrative duties because they spent the whole money they have to rent an apartment in Ankara province and to pay one year's rent in advance. In two of the cases each of the applicants went to province of assignment and fulfilled the signature duty four times[290] and one of them was granted refugee status by the UNHCR.[291] Although the Council of State issued an interim measure to suspend the application of the local court decision in one of the cases,[292] eventually in all of them the requests of the IP applicants for annulment of the implicit withdrawal decisions were rejected. The Council of State ruled that it is possible for the applicants to apply for social aid from governorate, the Red Cross or other relevant NGOs, so not showing up in the province of assignment due to economic reasons cannot be accepted as a justified excuse. The judges found that the implicit withdrawal decision and rejection of appeal against this decision are lawful due

[289] E. 2016/1274, K. 2016/4466 (Council of State 10th Chamber December 12, 2016).
[290] E. 2016/1252 K. 2016/3847 (Council of State 10th Chamber October 25, 2016); E. 2016/1841 K. 2016/3846 (Council of State 10th Chamber October 25, 2016).
[291] E. 2016/1841 K. 2016/3846 (Council of State 10th Chamber October 25, 2016).
[292] E. 2016/1799 Interim Measure (Council of State 10th Chamber May 25, 2016).

to failure with administrative obligations imposed based on the law.[293] On the other hand, a local court has found the same facts as constituting a valid excuse due to lack of financial means[294] however, as mentioned the Council of State overruled the cases with similar facts.

There are many court decisions where local courts also followed the suit of Council of State and rejected validity of economic reasons for neglecting administrative duties within IP procedures. One of such IP applicants was assigned to Giresun but was later on apprehended in a close-by province, Trabzon, where he went to work.[295] In other three decisions, two of them related to a family application for IP, the applicants confirmed that they do not live in the assigned provinces but went to İstanbul from Kastamonu[296] and Karabük respectively,[297] as job opportunities were limited and they had financial difficulties in the provinces of assignment. In another judgment, the Court did not take into account the claim that the applicant was compelled to leave the satellite city of assignment, Sivas, in order to work in Konya in agriculture sector, as he has not been paid in Sivas despite working for five months.[298] Manisa Administrative Court rejected that the IP applicant had a valid excuse for leaving the province without the permission of the authorities, against the argument of the applicant that he was not able to obtain permission so he went anyway because his employer requested him to travel and he did not want to

[293] E. 2016/2011, K. 2016/3848 (Council of State 10th Chamber October 25, 2016); E. 2016/1252, K. 2016/3847 (Council of State 10th Chamber October 25, 2016); E. 2016/1799, K. 2016/3845 (Council of State 10th Chamber October 25, 2016).
[294] E. 2015/1740, K. 2015/2867 (Ankara 1. Administrative Court December 21, 2015).
[295] E. 2017/1023, K. 2018/230 (Ordu Administrative Court February 16, 2018).
[296] E. 2017/1696, K. 2018/157 (Kastamonu Administrative Court February 20, 2018); E. 2017/1695, K. 2018/158 (Kastamonu Administrative Court February 20, 2018).
[297] E. 2015/1248, K. 2017/984 (Kastamonu Administrative Court May 25, 2017).
[298] E. 2018/66, K. 2018/300 (Sivas Administrative Court April 11, 2018).

lose his job.[299] An appeal against implicit withdrawal decision for failure to comply with signature duty concerned economic reasons as the applicant explained that he stayed on the streets for three days after he was evacuated from his apartment by the landlord because he was unable to pay the rent. This was due to his sprained ankle, which prevented him from working in constructions as he used to. So, he started to share an apartment with a friend in İstanbul. The court rejected the appeal and found the implicit withdrawal decision lawful as the applicant neglected his signature duty and was not found in his place of residence.[300] Lastly, an Iranian applicant argued that his application to register in the province he was assigned to was not accepted by the authorities because he could not rent a house there. The court did not accept existence of a justified excuse for failure to register within the legal period.[301]

These court decisions demonstrate an approach where judges fail to consider administrative duties brought to IP applicants as tools for better operation of IP procedures but in a way uphold them for their own sake. For instance, in two cases where the applicants were apprehended during attempt of irregular exit towards Greece[302] and in Atatürk airport,[303] it is possible to conclude with certainty that the applicants had no intent of pursuing their IP application in Turkey anymore. Apart from such clear cases, judicial scrutiny should be exercised carefully so as not to magnify the significance of procedural rules and disregard the applicants' continuing need and intention to pursue IP applications.

[299] E. 2018/435, K. 2018/766 (Manisa 1. Administrative Court June 29, 2018).
[300] E. 2015/23, K. 2015/574 (Bursa 1. Administrative Court Date Unknown).
[301] E. 2015/1144, K. 2016/592 (Kastamonu Administrative Court May 18, 2016).
[302] E. 2016/1456, K. 2017/3631 (Erzurum 1. Administrative Court December 1, 2017); E. 2018/735, K. 2018/1880 (Erzurum RAC October 24, 2018).
[303] E. 2017/665, K. 2017/1726 (Bursa 1. Administrative Court November 9, 2017).

Examples of such judgments where the validity of excuses set forth by applicants are evaluated comprehensively and with flexibility, are presented below as the final category of court cases on implicit withdrawal.

In an appeal that was addressed by Council of State, it was notified to the applicant that he should register within 15 days at the province of assignment, Bayburt. The judges considered that, although he arrived one week late, it is apparent that the applicant had the intention to pursue the IP application and took action for this. He made an administrative application against the notification, as he was worried he would not be able to sustain himself in Bayburt. Upon receiving a negative answer three days after the expiry of the period of registration, he visited UNHCR Ankara office, obtained an asylum seeker document and took a bus to Bayburt. So, the Council of State overruled local court's decision upholding the implicit withdrawal based on the applicant's failure to register at the province of assignment without excuse. It is crucial that, in interpreting the concept of excuse, the Council of state investigated the real intention of the applicant concerning the IP procedure, considering that the grounds for implicit withdrawal are nothing but indicators of abandonement of IP application. Despite presence of such indicators, implicit withdrawal should not be implemented strictly, if it is otherwise obvious that the applicant has the intention to follow up the IP application. At that point the reasons for occurrence of the indicators can be accepted as excuses for non-compliance with administrative duties.[304]

[304] E. 2016/478, K. 2018/1250 (Council of State 10th Chamber March 26, 2018).

Medical and family reasons are often considered as valid excuse for non-compliance with reporting duties and obligation of not leaving the province of residence without permission. An IP applicant asserting medical problems concerning his knee as an excuse for neglecting his signature duty, submitted a report from the orthopedics department of a state hospital to support his claim. Although the date of the report suggesting surgery due to non-responsiveness to medical treatment, is later than the date of the implicit withdrawal decision, the court found it sufficient to accept the applicant's excuse, as it indicates there has been a process of medical treatment.[305] In another incident, the IP applicant, whose application was considered withdrawn, explained that she obtained permission from the authorities to visit her sick father in Ağrı. She returned to her satellite city before the permission expired. Ten days later her father passed away and her request for permission to go to Ağrı was declined this time. She went regardless and stayed for three months as her mother was sick and in need of support. The court explained that the applicant's claims are in line with the documents submitted to the court and found that the implicit withdrawal decision should be annulled in view of applicant's excuse.[306] In another case, the IP applicant was seven months pregnant and she could not travel to Karaman as requested, due to health risks. She did not receive an answer to her request to be assigned to Eskişehir where her cousin resides and in the mean time she gave birth in İstanbul where her baby was hospitalized for medical treatment for one year. The court

[305] E. 2018/1049, K. 2018/1405 (Manisa 1. Administrative Court December 20, 2018).
[306] E. 2017/342, K. 2017/764 (Sivas Administrative Court June 14, 2017).

found that withdrawal decision is unlawful due to lack of consideration and investigation of these excuses.[307]

In some situations, rather than reaching a conclusion itself, courts evaluate whether the administration has adequately took into account the applicant's excuse claim. This was the case in two cases about an Iraqi national and his daughter-in-law. The applicant was hospitalized and had heart surgery in Eskişehir. He was not able to take care of himself afterwards, so his daughter and daughter-in-law stayed with him whereas his wife was with her minor children in Afyon. Withdrawal decisions were issued both for the applicant and his daughter-in-law. The court concluded that the withdrawal decisions were unlawful because PDMM did not investigate whether the circumstances are true and whether they constitute valid excuse.[308] The court took a similar position in another appeal by an IP applicant from Afghanistan. According to the account of the applicant, Iranian police apprehended his children during their journey to Turkey, and he, later on, found out that the smugglers took them to Van province. Upon request, he was given five days of travel permission; however, the smugglers forcefully kept the applicant and his children for 29 days. They were finally released at Iranian border where Iranian police apprehended them again, before finding their way back to Turkey. The court concluded that, the implicit withdrawal decision is unlawful because accuracy of the applicant's account and whether it could constitute valid excuse, were not evaluated.[309]

[307] E. 2014/1238, K. 2015/34 (Konya 1. Administrative Court January 14, 2015).
[308] E. 2017/309, K. 2017/696 (Afyonkarahisar Administrative Court June 8, 2017); E. 2017/311, K. 2017/698 (Afyonkarahisar Administrative Court June 8, 2017).
[309] E.2018/992, K.2019/120 (Sivas 1. Administrative Court February 12, 2019).

3. Assessment of lawfulness of removal during review of withdrawal or rejection of IP applications

In Turkish administrative judiciary, it is observed that sometimes the judges reviewing the lawfulness of administrative decisions considering IP applications withdrawn, also make assessments concerning possible removal of the applicant. Typically, this happens in cases where the court rejects the appeal of the implicit withdrawal decision and further asserts lack of risk upon return. Below, first, facts and reasoning of courts in such cases are conveyed, so that the ensuing analysis on the problems that such assessments might trigger, rests on solid grounds.

In one case, the Council of State reviewed an appeal against a local court decision, which annulled the decision on implicit withdrawal of an IP application on the basis that the applicant had justified excuse for failing to comply with the reporting duty. Although not as a direct basis of annulment, the local court decision also mentioned the applicant's statements concerning the risk he will allegedly face, if he is returned to Iraq, as well as the fact that UNHCR granted refugee status to the applicant. The judgment of the Council of State, on the other hand, provided an assessment of applicant's such claims of risk by referring to the report of his IP interview. Accordingly, the judgment states that, considering that the applicant has not been detained, arrested or subjected to ill treatment in the country of origin, none of his family members encountered any problems with state authorities, the applicant does not have any political, religious, syndicate or any other organizational membership, his sister lives in country of origin and there is no concrete information or document that support his account, there is no real risk of persecution in

case of return. The court also evaluated the legal effect of the refugee status granted by the UNHCR and highlighted the advisory status of the organization as opposed to DGMM which has decision making power.[310] Sivas Administrative Court also encountered an appeal by an Iraqi applicant whose IP application was considered withdrawn. The court dismissed applicant's claims of risk in case of return, by stating that there are no indications of serious risk, the applicant accepted having come from a safe region and his reason for coming to Turkey is marital problems and difficulty of living conditions. There are no expressions in the judgment as to which sources the court resorted to in evaluating lack of risk in the country of origin.[311]

Kayseri Administrative Court established a similar reasoning in rejecting the applicant's request for annulment of the decision on withdrawal of his IP application. The court stated that there is no serious risk of persecution in the country of origin, Iran, and the applicant did not submit any document or information supporting his claims that he was attending a house church raided by the police and that he was detained with his friends. The court also considered DGMM's thematic report on Iran, which proclaims the presence of freedom of religion for minorities in Iran and accordingly concluded that there is no risk of encountering inhuman treatment or capital punishment for the applicant solely for his religious beliefs.[312]

In another appeal initiated by an applicant from Afghanistan, the court took into account the statements in the IP application form in concluding that the applicant will not

[310] E. 2016/1841, K. 2016/3846 (Council of State 10th Chamber October 25, 2016).
[311] E. 2017/1005, K. 2017/1397 (Sivas Administrative Court December 27, 2017).
[312] E. 2017/618, K. 2017/1117 (Kayseri 1. Administrative Court September 27, 2017).

be subject to risk upon return. The IP applicant mentioned that she never faced ill treatment in her life, her family members did not have any problems with the authorities, she did not have any connection with a political or religious group. Reportedly, she lived in Iran between 1996-2001 and 2005-2012 and she came to Turkey when her mother rejected her after her marriage with a person that her mother did not approve of, ended with dispute.[313] The appeal of implicit withdrawal of IP application of another Afghan applicant was rejected by the court and the judgment again included assessment of claims of risk upon return. The court stated that there is no serious risk of persecution in country of origin as the applicant did not mention any concrete situation or incident that could be an element of threat against himself personally. The court also relied on the thematic report on Afghanistan prepared by DGMM in declaring that internal flight alternative is available and that Taliban is not effective in the whole country.[314] RAC concurred with the local court's decision.[315] The final case concerns, an IP applicant from Afghanistan whose IP application was considered withdrawn due to not registering in the city of assignment, Erzincan. The court underlined that there is no concrete evidence that the applicant will be subjected to death penalty in case he is returned to his country of origin and in reaching this conclusion the court made reference to the IP interview of the applicant.[316]

In all of the cases cited above, the courts rejected the appeals of administrative decisions on implicit withdrawal of IP application. However, in addition to the assessment of reasons for implicit withdrawal, the judges took their analyses further and stated their

[313] E. 2014/1658, K. 2015/1321 (Sivas Administrative Court September 3, 2015).
[314] E. 2017/1377, K. 2018/83 (Kayseri 1. Administrative Court January 24, 2018).
[315] E. 2018/360, K. 2018/332 (Ankara RAC 10. Chamber of Administrative Lawsuits April 17, 2018).
[316] E. 2015/1022, K. 2016/74 (Sivas Administrative Court January 20, 2016).

opinion on the merits of the IP applications and removal of the applicants. As a matter of fact, in terms of evaluation of claims concerning risks that the applicants might face in their countries of origin, these decisions are not different from court decisions assessing rejection of IP applications or removal orders. It should be stressed that, at the time of analysis by these courts, there are no administrative decisions rejecting IP applications or ordering removal yet. As explained below, based on these dynamics, the analyses in the cited court decisions are problematic, first, because the administrative process after rejection of these judicial appeals does not necessarily have to lead to removal. Secondly, by ruling on these matters before issuance of administrative decisions, the courts are essentially using the authority that belongs to administration and not themselves at that point. Finally, it might be argued that such court decisions create problem in terms of right to impartial tribunal and, even if not so, at the least, they become instructions to the administration to act in a certain way, possibly without full knowledge of relevant facts.

As per Article 77(1) of the LFIP, the legal effect of the implicit withdrawal decision is discontinuation of the evaluation of IP application and the reasons for implicit withdrawal mainly consist of failure to comply with administrative duties within the IP procedure, as explained in detail in above sub-sections. Therefore, the implicit withdrawal of an IP application does not necessarily mean that the applicant is not in need of IP. It does not involve any determination as to whether the applicant qualifies for an IP status or not. It is possible and observed that the applicants, who actually qualify for IP status, abandon their IP applications for other reasons such as lack of trust to the IP system, misinformation or misguidance by others, or desire to submit IP application in another state due to belief that they may have better living conditions or chance of recognition

there.[317] Similarly, failure to comply with procedural requirements may arise from reasons other than absence of protection need[318] as also exemplified in the above sub-section where the excuses submitted by IP applicants are discussed. As the reason for implicit withdrawal may arise at any stage of assessment of IP application, it is possible that implicit withdrawal decision is issued before full examination of the merits of an IP application, before IP interview and before the IP applicant has submitted all relevant information and documents related to the IP application. These are also the reasons why the IP system in Turkey allows persons whose IP applications were previously considered withdrawn to re-apply for IP as per Article 79(1)(f). Possibility of submission of a new IP application after implicit withdrawal, confirms that the administrative process starting with the implicit withdrawal of an IP application does not necessarily have to result in the removal of the applicant. Upon court's rejection of an appeal against decision on implicit withdrawal, whereby it becomes final, it is true that one of the possible scenarios is issuance of removal order as per Article 54(1)(i). However, another possibility is that the applicant submits another IP application, during the assessment of which he/she may not be removed, unless he/she falls within the exceptions provided in Article 54(2). It is also possible that removal order cannot be issued about the applicant for reasons stated in Article 55 of LFIP and a humanitarian residence permit is issued instead as per Article 46 of LFIP.

[317] UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," 188.
[318] UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice," 196.

It should be underlined that evaluation of presence of reasons for exemption from removal as per Article 55, is to be carried out only after the rejection of the appeal against implicit withdrawal decision. So, at the time of decision making by the judge reviewing the implicit withdrawal decision, it is possible that, not all information and documents related to the country of origin or personal circumstances of the applicant, substantiating the existence of reasons for qualification for IP status or for exemption from removal, are available before the court. It would be unfair to expect from the applicant to submit all of such information and documents to the court during appeal of implicit withdrawal decision, considering that the appeal deadline is shorter than administrative appeal of other administrative decisions and difficulties associated with involvement in court proceedings in a foreign country. In any case, the subject matter appeal is related to grounds for implicit withdrawal and not merits of an IP application or barriers for removal. Consequently, it is likely that at the stage of implicit withdrawal, the assessments of the courts concerning IP application or removal of the applicants, are not based on complete knowledge of relevant factors that might affect the outcome of such assessments.

Moreover, it is also problematic from a technical point of view to carry out legal assessment of conditions for IP and removal, which are essentially the subject of an administrative process other than implicit withdrawal. It is the authority of the governorates to issue administrative decisions concerning IP applications as per Article 65 of LFIP and concerning removal as per Article 53(1) of LFIP. The responsibility of the courts is to review such decisions upon judicial appeal as per Articles 53(3) and 80 of LFIP. This entails that according to the lawmaker, within the context of IP, administrative authorities are better situated to assess the facts and circumstances concerning an

individual as demonstrated by preference as to initial decision making. In fact, the scrutiny carried out by courts relates to the *lawfulness* of the assessment and outcome of such process and not the *fairness* of the result. To reach a conclusion on IP or removal, without prior decision making by the administration in this regard, is not a power vested in judges by the law and from this aspect, the court decisions analyzed here interfere with the powers of the administrative authority.

For all these reasons, the appropriate stage for the courts to assess the qualification of an applicant for IP status would be during the judicial appeal of administrative decision on rejection of IP application. Likewise, the court should evaluate the lawfulness of removal of the applicant, during the judicial appeal of a removal order. Both of such appeal processes could take place only after the appeal of implicit withdrawal and in any case, after administrative decisions are made on IP status and removal.

Another concern that may arise when judges reviewing the appeal of implicit withdrawal decision, state their opinion on possible removal, is related to the right to have access to an impartial tribunal. According to the established case law of the ECtHR, right to fair trial does not extend to measures in asylum and migration context as they do not fall under the civil or criminal limb of Article 6 of the ECHR.[319] Following the suit of ECtHR, the CC also excludes administrative actions under LFIP from the scope of

[319] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2010), 124; David James Cantor, "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence," *Refugee Survey Quarterly* 34 (2015): 90; Nuray Ekşi, "İnsan Hakları Avrupa Sözleşmesi'nin 6. Maddesinin Yabancıların Sınırdışı Edilmesine Uygulanıp Uygulanamayacağı Sorunu," *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 29, no. 1–2 (2009): 126–27.

individual application based on Article 36 of the Constitution on right to fair trial,[320] even though the corresponding provision in the Constitution itself does not bring the limitation provided in ECHR.[321] The fact that right to fair trial is not enforceable before ECtHR with respect to judicial scrutiny of administrative decisions related to IP procedures and removal, is a matter of scope of juridicial authority rather than a substantial issue regarding human rights. Thus, this exclusion does not mean that such judicial processes do not need to provide or they cannot be criticized for not providing the guarantees of right to fair trial. Within domestic legal order, the scope determined by Turkish legal framework should prevail over the restrictions brought by ECHR. Accordingly, within the scope of Article 36 of the Constitution, the freedom to claim rights is defined as including "*right to fair trial before the courts through legitimate means and procedures*" which does not contain any limitation as to the characteristics of claim being of criminal and civil nature or of administrative nature. Moreover, regardless of this issue related to human rights jurisdiction, the requirement of impartiality of all courts is a principle recognized by Article 138 of the Constitution in general terms without any distinction as to the subject matter judicial authority. Thus, here, after defining the problem, standards adopted in

[320] 2018-2141, Kaveh Parvizi (Constitutional Court February 12, 2018) paragraphs 23-26; 2015-4459, Yulia Matur (Anikeeva) (Constitutional Court February 7, 2018) paragraphs 36-39; 2016-6293, Aigul Mavlianova (Constitutional Court November 9, 2017) paragraphs 28-30; 2015-5371, Gulalek Begnyazova (Constitutional Court February 22, 2017) paragraphs 20-24; 2014-13794, R. K. (Constitutional Court February 22, 2017) paragraphs 20-25; 2015-2037, Z.M. and I.M. (Constitutional Court January 6, 2016) paragraphs 55-64.

[321] Here, Article 53 of the ECHR should be reminded which explicitly prevents any action by governments to use ECHR as an excuse to limit or derogate from human rights and fundamental freedoms that are ensured under their domestic laws. Therefore, one argument could be that in fact CC should not delimit the scope of its jurisdiction based on the relatively limited scope of ECHR on the matter.

human rights adjudication will be used as guidance as to when the courts are not considered impartial.

As explained above, unsuccessful appeal of implicit withdrawal decision comes before removal order that would be issued about the applicant due to implicit withdrawal. Usually, it is the same local authority that processes the case of a certain applicant, which means that appeals of the implicit withdrawal decision and the removal order that follows it, would be subject to the jurisdiction of the same administrative court. Thus, it is very likely that some or all of the judges who declare their opinion on lawfulness of removal of a certain applicant, during the appeal of implicit withdrawal decision, will also be the judges reviewing the appeal of such removal order at a later point in time. Therefore, it is worth questioning, whether the fact that the judges who will decide on the lawfulness of a removal order, have already expressed their view in this regard in a prior court decision, casts a doubt on the impartiality of the court.

Article 31 of Administrative Procedure Act ("İdari Yargılama Usulü Kanunu") No. 2577 published in the Official Gazzette No. 17580 dated 20 January 1982 ("Administrative Procedure Act No. 2577") provides that relevant provisions of the Civil Procedure Act ("Hukuk Muhakemeleri Kanunu") No. 6100 published in the Official Gazzette No. 27836 dated 4 February 2011 ("Civil Procedure Act No. 6100") are applicable to administrative judiciary as well, on certain issues including rejection of the judge due to lack of impartiality. Accordingly, as per Article 36(1)(b), declaration of opinion on the case, to either of the parties or to a third person, despite it is not required by law, is accepted as an important reason which casts doubt on the impartiality of the judge. Consequently, it is possible for the parties to reject the judge or the judge to

withdraw from the case, based on this reason. It has not been possible to detect any court decisions, which assess whether declaration of opinion on removal during the appeal of implicit withdrawal, could constitute a justified reason for rejecting the judge at the stage of appeal of removal order, based on loss of impartiality. One possible reason for this could be the fact that local court decisions, if any, assessing requests for rejection of judge in appeals against removal orders are final without possibility of further appeal as per Article 43(1) of the Civil Procedure Act No. 6100, which creates a challenge in terms of accessibility.

Turning to the human rights case law to seek guidance, it is recognized by the CC in its individual application decisions that rejection of judge serves the purpose of ensuring impartiality of the judge with respect to the case he/she reviews and it is connected to the right to fair trial.[322] The CC almost identically follows the case law of ECtHR in explaining the principles related to issues of right to fair trial in connection with the impartiality of the court.[323] Over the years, ECtHR ruled on various manifestations of matters concerning impartiality of the tribunal both in connection with the civil and criminal limb of Article 6 of the ECHR.[324] Although Article 6 is not directly applicable in the context of asylum cases, the assistance of the case law on this article is still relevant to understand how the concept of impartiality of the tribunal is construed. According to the ECtHR, determination of whether there is a lack of impartiality on the part of the

[322] 2014/17141, Kemal Demir (Constitutional Court July 6, 2017) paragraph 64; 2014/13811, İsmet Ünal (Constitutional Court July 6, 2017) paragraph 42.
[323] Tokuzlu, "The Principle of Legal Certainty - Impact Assessment of the Syrian Refugee Crisis on the Turkish Law on Foreigners and International Protection," 266–67.
[324] Council of Europe/European Court of Human Rights, "Guide on Article 6 : Right to a Fair Trial (Civil Limb)," 2013, 31.

judges must be decided in each individual case.[325] In case of presence of a legitimate reason for doubting the impartiality of a judge, he/she must withdraw from the case, considering that, it is a matter of confidence that the courts must stimulate in a democratic society.[326] Domestic procedures such as rejection or withdrawal of a judge are significant as their presence demonstrate the effort of the legislature to eliminate reasonable doubts and ensure impartiality of courts.[327] ECtHR states that whether impartiality is affected by participation of the same judge in different stages of a case, must be determined on a case-by-case basis based on the circumstances surrounding the particular case. The scope and nature of the procedures carried out previously are important factors in this regard.[328] The important point is that the judgment should be based on the analysis conducted, evidence and arguments submitted within the subject matter lawsuit.[329] If the substantive issues are very closely connected, the impartiality of the judge participating in the different stages, may become questionable.[330] In the context of criminal law, it was found problematic in terms of impartiality of the judge when the same judge takes part in two consecutive judicial proceedings against the same person and the first judgment contains elements on assessment of guilt that is actually the subject of the second proceedings.[331]

---

[325] Micallef v. Malta, No. 17056/06 (ECtHR October 15, 2009) paragraph 97; Pullar v. the United Kingdom, No. 22399/93 (ECtHR June 10, 1996) paragraph 38.
[326] Micallef v. Malta, No. 17056/06 (ECtHR October 15, 2009) paragraph 98; Castillo Algar v. Spain, No. 28194/95 (ECtHR October 28, 1998) paragraph 45.
[327] Meznaric v. Croatia, No. 71615/01 (ECtHR July 15, 2005) paragraph 27; Micallef v. Malta, No. 17056/06 (ECtHR October 15, 2009) paragraph 99.
[328] Fey v. Austria, No. 14396/88 (ECtHR February 24, 1993) paragraphs 28-30; Sainte-Marie v. France, No. 12981/87 (ECtHR December 16, 1992) paragraph 32; Nortier v. the Netherlands, No. 13924/88 (ECtHR August 24, 1993) paragraph 33.
[329] Morel v. France, No. 34130/96 (ECtHR June 6, 2000) paragraph 45.
[330] Toziczka v. Poland, No. 29995/08 (ECtHR July 24, 2012) paragraph 36.
[331] Poppe v. the Netherlands, No. 32271/04 (ECtHR March 24, 2009) paragraph 26; Schwarzenberger v. Germany, No. 75737/01 (ECtHR August 10, 2006) paragraphs 42-44; Ferrantelli and Santangelo v. Italy, No. 19874/92 (ECtHR August 7, 1996) paragraphs 54-60.

Similarly, the ECtHR recognized that a situation where a judge participates in two proceedings related to the same set of facts, might raise an issue as to impartiality of the tribunal.[332] This case was in fact surrounded with facts that parallels with the relation between appeal of administrative decisions on implicit withdrawal of IP applications and removal orders. The judge who was a member of the tribunal deciding on the appeal concerning applicant's dismissal, was later also part of the tribunal which reviewed the appeal against rehabilitation proceedings about the dismissal. It was recognized that technically the subjects of the two judicial proceedings were different. However, the Court found it significant that both judicial proceedings concerned the same set of facts and accepted that the applicant's fears about the impartiality of the judge were legitimate.

Considering that statements about the risk upon return to country of origin, contained in previous appeals concerning implicit withdrawal, can be regarded as public expressions on the outcome of a possible future lawsuit, two decisions of ECtHR assessing such expressions are relevant. The Court found that public expressions of a judge, which indicated his negative opinions about the applicant's lawsuit, objectively justify applicant's fears about impartiality.[333] On the other hand, it should be emphasized that as a general rule, the ECtHR accepts that a situation where a judge takes part in different stages of proceedings concerning the same judicial claim does not by itself constitute a reason to categorically dismiss the impartiality of the tribunal within the meaning of right

[332] Indra v. Slovakia, No. 46845/99 (ECtHR February 1, 2005) paragraphs 53-54.
[333] Buscemi v. Italy, No. 29569/95 (ECtHR September 16, 1999) paragraph 68; Lavents v. Latvia, No. 58442/00 (ECtHR November 28, 2002) paragraphs 117-121.

to fair trial.[334] Even if the discrepancy that emerges with assessment of risk upon removal to country of origin, within the appeal of implicit withdrawal of IP application, does not amount to breach of impartiality of the judge in subsequent appeal against removal order, it cannot be denied that it is a factor weakening his/her impartiality.

Questioning the impartiality of the judge is a matter, which arises at the moment that an appeal is brought against the removal order issued after rejection of appeal of an implicit withdrawal. In fact, the problem created with such premature assessment of removal at the stage of implicit withdrawal of IP application manifests itself earlier. As mentioned before, an overlap in members of the tribunals reviewing the appeals against implicit withdrawal decision and removal order is highly likely, because the same court is authorized to decide on both appeals, when issued against the same local branch of DGMM, which is mostly the case. Thus, the whole administrative and judicial process is a continuum of dialogue between the court and the relevant PDMM concerning the situation of the applicant. From this perspective, the assessment of the court asserting lack of risk upon return, when rejecting the appeal against the preceding administrative action before removal order, can easily be read as a green light to the administration to issue a removal order. This is because the first court decision reveals the outcome of a possible appeal against such removal order and thus removes the risk of its annulment in the eyes of administration. This creates the risk that the administration issues a removal order about the applicant without extensively assessing the barriers to removal that could otherwise be discovered at a later stage.

[334] Council of Europe/European Court of Human Rights, "Guide on Article 6 : Right to a Fair Trial (Civil Limb)," 31.

III. Problematic issues in Turkish judicial practices regarding removal procedures

1. Implementation of removal grounds related to threat to public security and public order

a. Indicators for assessment of threat

Article 54 of LFIP lists posing a threat to public security or public order among reasons for removal. Due to this general formulation and lack of further clarification in the Implementing Regulation, interpretation of what constitutes a threat to public security or public order, leaves extensive discretion to administration. It is also recognized in the doctrine that these concepts can demonstrate a changeable character.[335] This makes judicial review all the more important in terms of legal certainty. Nevertheless, more often than not Turkish courts interpret these grounds widely without challenging the administrative decisions based on a low standard of proof. It should also be underlined that, the formulation in Turkish law provides that reason for removal is to be the threat posed by the individual, rather than the acts or actions committed. This denotes that the assessment for removal should contain a risk assessment as to future and the present acts and actions should be taken into account to the extent that they create an assumption as to

[335] Jacek Chlebny, "Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases," *European Journal of Migration and Law* 20, no. 2 (2018): 119; Arda Atakan, "Kamu Düzeni Kavramı," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 13, no. 1–2 (2007): 81; Ashley Terlouw, "Voluntary Departure of Irregular Migrants and the Exception of Public Order: The Case of Z. Zh. & I.O. v Staatssecretaris Voor Veiligheid En Justitie, Case C-554/13, 11 June 2015," *European Journal of Migration and Law* 18, no. 1 (2016): 131–34; Ali Özdemir, "Kamu Düzeni ve Kamu Güvenliği Kavramlarına Analitik Bir Yaklaşım (Toplantı ve Gösteri Yürüyüşü Hakkının Sınırlandırılması Örneği)," *International Journal of Legal Progress* 2, no. 2 (2016): 80.

the future threat. This distinction is overlooked by Turkish courts as will be seen in the case law cited below.

In this section, before touching upon the Turkish court decisions, relevant ECtHR case law will be introduced for a comparative perspective. These cases are significant because the facts have high resemblance to those in Turkish court decisions whereas the interpretation of the courts vary significantly and the ECtHR's case law is exemplary. It should be hovewer noted that in the context of ECtHR construing what constitutes a threat to national security is to a large extent left to national authorities, the margin of appreciation granted to domestic administrative and judicial authoties are extensive.

Article 1 Protocol 7 to the ECHR concerns the procedural safeguards related to expulsion of aliens.[336] Paragraph 2 of this Article provides that an alien may be expelled without the implementation of the procedural safeguards, if the expulsion is necessary in the interests of public order or is grounded on reasons of national security. The scope of this exception should be clarified first. As reflected in the Explanatory Report to the Protocol 7, paragraph 2 refers to cases where "*expulsion before the exercise of these rights is considered necessary in the interest of public order or when reasons of national security are invoked*".[337] As referred by the provision, for the exception in paragraph 2 to arise, the enforcement of expulsion should be required due to necessity in the interest of public order

[336] The possible overlap between the protection area of Article 13 in relation to Article 3 and that of Article 1 Protocol 7 should be mentioned here. It is possible to argue that when the question at stake becomes about possible consequences of return rather than the manner of issuance of removal order and that the procedural rules entailed by the right to an effective remedy come into play, Article 1 Protocol 7 becomes a passive provision. On a similar note with respect to national legal orders, since the assessment as to return is carried out ex officio, it is possible to accept that Article 1 Protocol 7 becomes passive in this regard.
[337] Council of Europe, "Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms," November 22, 1984, para. 15.

or invocation of reasons of national security. Here a distinction should be made between enforcement of expulsion and the issuance of an expulsion order which may not always lead to an immediate enforcement. Thus in many decisions, the Court disusses what constitutes interest of public order or a reason of national security. As Turkey is a party to Protocol 7 to the ECHR, the ECtHR's case law plays a guiding role in terms of standard of proof for the concepts of public order and national security.

To start with one of the most recent cases of the ECtHR on this matter, Muhammad and Muhammad v. Romania concerned two applicants who were subject to removal order from Romania based on national security reasons and who were denied access to such reasons despite their requests.[338] After careful examination the Court reached the conclusion that the national court decisions did not include an examination as to why it is necessary to refrain from disclosure of confidential information to the applicants. The judgments also failed to clarify the national security reasons relevant to the applicants.[339] Finally, the Court found that the applicants' right to be informed about the factual elements behing the removal order suffered significant limitations and moreover, the need for these limitations was not examined at national level.[340] This analysis led the ECtHR to the conclusion that the limitations imposed by the government were not duly counterbalanced through domestic proceedings to preserve the essence of the rights provided in Article 1 of Protocol 7.[341]

[338] Muhammad and Muhammad v. Romania, No. 80982/12 (ECtHR October 15, 2020) paragraphs 11-46.
[339] Muhammad and Muhammad v. Romania, No. 80982/12 (ECtHR October 15, 2020) paragraph 163.
[340] Muhammad and Muhammad v. Romania, No. 80982/12 (ECtHR October 15, 2020) paragraph 203.
[341] Muhammad and Muhammad v. Romania, No. 80982/12 (ECtHR October 15, 2020) paragraph 206.

ECtHR accepts in one case that the requirement of foreseeability does not amount to oblige states to adopt legislation listing in detail all cases that may trigger an expulsion decision based on grounds of national security. However, as per the requirements of lawfulness and rule of law, it must be possible for the individual to challenge the administration's claim that national security is at stake and this must be before an independent authority or a court competent to effectively review the reasons and relevant evidence. This authority must be able to intervene when invocation of the concept of national security does not have a reasonable basis or it is interpreted in a way that is unlawful or arbitrary. In the case at hand, the Court elaborated on the administrative document of the intelligence agency that was relied on as proof of a reason of national security.[342]

The Court emphasized that this document or any other information on grounds for removal were not made available to the applicant or the domestic courts. Therefore, the applicant was not able to present her case during judicial review proceedings. On the other hand, the review by the local courts was confined to a purely formal review of the administrative order and thus they failed to subject the administration's claim that the applicant constituted a risk to national security to meaningful scrutiny.[343] On a similar note, in one case the ECtHR considered the information available to the decision-making administrative authority concerning removal of a terrorist suspect. In the case, the Migration Agency decided on removal without full knowledge of the facts known to the

[342] Ljatifi v. the Former Yugoslav Republic of Macedonia, No. 16870/11, 16874/11 and 16879/11 (ECtHR May 17, 2018) paragraphs 35–36.
[343] Ljatifi v. the Former Yugoslav Republic of Macedonia, No. 16870/11, 16874/11 and 16879/11 (ECtHR May 17, 2018) paragraphs 39–40.

Security Service, which requested the removal and the assessment of which the Migration Agency relied on. Despite acknowledging that terrorism is a threat to human rights, the Court concluded that the government failed to dispel doubts raised by the applicant as reliability of domestic proceedings was diminished because the administrative decision was made without all relevant and important information.[344]

In three cases against Bulgaria with very similar facts, the Court criticized the national proceedings concerning applicants who were to be deported based on national security reasons. In one of the cases this was due to the lack of reference to evidentiary basis in the judgment of the domestic court handling the case which indicated that authorities did not submit evidence to the court and taking into account the previous similar cases, the Court was not convinced that the national security claims of the government were made subject to genuine inquiry.[345] In the second case, in refusing to cancel the removal order about the applicant, the national court relied on an internal undisclosed document of the National Security Service which suggests that the applicant is involved in migrant trafficking. ECtHR pointed out that the applicant must be given the opportunity to challenge the claims of the administration as to national security and an independent assessment must be made concerning such claims. Consequently the ECtHR found a violation in the subject matter case since that the domestic court did not provide meaningful independent scrutiny and relied on administrative discretion blankly.[346] The

[344] X v. Sweden, No. 36417/16 (ECtHR January 9, 2018) paragraphs 59-60; "Guide on the Case Law of the European Convention on Human Rights - Immigration" (European Court of Human Rights, August 2019), 18.
[345] Amie and Others v. Bulgaria, No. 58149/08 (ECtHR February 12, 2015) paragraph 98.
[346] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraphs 98-102.

final case along these lines bear very similar facts where the applicant was issued a removal order based on a declaratory statement in an internal undisclosed document of the National Security Service expressing that the applicant poses a national security threat due to being involved in drug trafficking for financing of a terrorist organization. The domestic court considered itself bound by the administrative action without examining the factual basis. Like in the other applications, the ECtHR decided that the applicants were deprived of protection against arbitrariness thus found a violation of the lawfulness requirement of interference with the applicant's rights.[347]

In another case, the ECtHR assessed the limits of the concept of national security. The applicant was subject to expulsion because he was allegedly involved in unlawful trafficking of narcotic drugs. The Court recognized that the concept of national security cannot be defined comprehensively and that wide margin of appreciation is left to the administration. ECtHR still underlined that its limits may not be stretched beyond its natural meaning. The Court asserted that considering a reasonable definition of the term, the acts only alleged against the applicant could not be capable of interfering with the national security.[348] The Court also criticized the fact that the national courts did not gather any evidence about the allegations concerning the applicant and subjected the administration's order to a purely formal examination. As a result, the applicant was not able to have his case genuinely heard and reviewed. [349]

[347] Madah and Others v. Bulgaria, No. 45237/08 (ECtHR May 10, 2012) paragraphs 29-30.
[348] C.G. and Others v. Bulgaria, No. 1365/07 (ECtHR April 24, 2008) paragraph 43.
[349] C.G. and Others v. Bulgaria, No. 1365/07 (ECtHR April 24, 2008) paragraph 74.

In another case against Russia, where the government relies on national security reasons for excluding the applicant from the country, the ECtHR highlighted that the government merely asserts that the applicant's activities constitute a threat to national security. The government did not submit any further explanation and documentation supporting the allegations against the applicant or showing it is not possible to provide such explanation or documentation. Moreover, such reiteration did not take place in domestic proceedings either. It should be noted that, in excluding the individual, the administration relied on a report by the intelligence agency, the content of which was not shared by the government at any stage of the subsequent proceedings. The Court emphasized that even if national security is at stake, it is the requirement of lawfulness and the rule of law in a democratic society that such measures which affect fundamental human rights are made subject to adversarial proceedings before an independent body which is competent to review the reasons for the measure and the relevant evidence. ECtHR also mentioned that in such adversarial proceedings, necessary procedural limitations may be brought on the use of classified information. The claim of threat to national security must be challengable by the concerned individual. According to the Court, these safeguards are needed to prevent arbitrary violation of ECHR rights. Building on this analysis the Court found a violation of Article 1 of Protocol 7.[350]

A case against Romania concerned a similar situation where the individual was issued a deportation order based on reasons of national security. The ECtHR found the national practice problematic because the individual was not provided with any

[350] Nolan and K. v. Russia, No. 2512/04 (ECtHR February 12, 2009) paragrpahs 71-75.

information as to the offence of which he was suspected at all until the day of his hearing. The Court found a violation stating that the applicant did not have the chance to have his case examined by setting forth the reasons against his deportation.[351]

Final case from the ECtHR is Chahal v. the United Kingdom[352] where the government was accused for inadequate judicial review. Due to the restrictions that apply in national security related cases, none of the domestic courts could access the information based on which the administration issued a decision of expulsion. This limited power of review was criticized by the ECtHR.[353] In the end, even when national security considerations were at stake, the Court adopted a quite strict approach regarding the requirements of Article 13 under a risk concerning Article 3.[354] For the sake of providing a complete overview of different dimensions of the legal discussion, it should be noted that this is the position of the ECtHR when Article 13 comes into play in connection with Article 3. Otherwise, there have been instances where the Court essentially underlined that the nature of the protection by Article 13 is not absolute. Although the wording of Article 13 does not provide any exceptions, here the ECtHR mentions inherent limitations that may be entailed by the context of the alleged violations.[355] It further sets out that such implied restrictions should be kept to a minimum.[356]

---

[351] Lupsa v. Romania, No. 10337/04 (ECtHR June 8, 2006) paragraphs 58-61.
[352] Chahal v. the United Kingdom, No. 22414/93 (ECtHR November 15, 1996) paragraphs 142-143.
[353] Beate Rudolf, "Chahal v. United Kingdom. No. 70/1995/576/662," *American Journal of International Law* 92 (1998): 71; J. Vedsted-Hansen, "The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection," *Refugee Survey Quarterly* 29, no. 4 (2010): 47.
[354] Chahal v. the United Kingdom, No. 22414/93 (ECtHR November 15, 1996) paragraph 152; Susan Nash and Mark Furse, "Deportation, National Security and Judicial Review," *New Law Journal* 146 (1996): 1825; Colin Harvey, "Expulsion National Security and the European Convention," *European Law Review* 22, no. 6 (1997): 631.
[355] Kudla v. Poland, No. 30210/96 (ECtHR October 26, 2000) paragraph 151.
[356] Kudla v. Poland, No. 30210/96 (ECtHR October 26, 2000) paragraph 152.

It will be demonstrated below that Turkish judicial practice is full of cases similar to those cited above. Thus, the purpose here is to take the ECtHR case law as a guiding tool in assessing the Turkish court decisions. In fact the general tendency of Turkish judges is reflected in a case from Erzurum where the court's point of departure is the extensive discretion of administrative authorities. According to the court, such discretion is a natural result of the sovereign rights of the state and it aims protecting public order. The court then specifies that in cases where the deportation measure is based on public order reasons, the situations triggering deportation do not have to be of criminal nature or do not have to be made subject to a court decision.[357] Further specific examples of Turkish case law on the subject are presented below.

The first category of court cases where public order or security reasons trigger removal orders, is those that are based on the administrative practice of imposition of security codes to individuals. Security forces frequently impose certain security codes concerning foreigners that they deem as a threat to public order or national security. These are information records visible in different administrative databases and they denote the issue concerning the individual, such as being a threat to public order. Security codes are then likely to constitute basis for further administrative action about the concerned individual, such as removal orders. They can be based on judicial action, intelligence information or similar sources of information. When they notice security codes concerning foreigners, based on these, governorates issue removal orders for these foreigners with the suggestion of DGMM or ex officio. One problematic practice of administrative courts in

[357] E. 2016/28, K. 2016/145 (Erzurum 1. Administrative Court February 18, 2016).

appeals of such removal orders is that they often rely on the imposition of security codes without reviewing any information or documents as to the basis of such codes, which is clearly in conflict with ECtHR's case law on the subject.[358] Accordingly, in many appeal decisions, the courts considered the presence of G-87 general security code and concluded that the subject matter person poses a threat to public order or security.[359] In other examples the courts reached similar conclusions in view of presence of other security codes such as A-26 on illegal organization activities, C-114 on judicial action and G-89 on entry subject to preliminary review, in addition to G-87 code.[360] In other decisions, as justification for reliance on security codes, the administrative courts asserted that the applicants did no submit any administrative court decision as to annulment of the security codes.[361] In all of these court decisions the courts relied on presence of security codes and

[358] Tokuzlu, "The Principle of Legal Certainty - Impact Assessment of the Syrian Refugee Crisis on the Turkish Law on Foreigners and International Protection," 265.

[359] E. 2017/825, K. 2018/322 (Isparta Administrative Court March 14, 2018); E. 2015/1345, K. 2016/16 (Antalya 1. Administrative Court January 14, 2016); E. 2017/944, K. 2018/862 (Isparta Administrative Court June 21, 2018); E. 2017/943, K. 2018/593 (Isparta Administrative Court May 3, 2018); E. 2017/894, K. 2018/264 (Isparta Administrative Court February 27, 2018); E. 2017/1047, K. 2018/205 (Antalya 1. Administrative Court February 20, 2018); E. 2017/893, K. 2018/863 (Isparta Administrative Court February 27, 2018); E. 2018/614, K. 2019/65 (Eskişehir 1. Administrative Court February 15, 2018); E. 2016/737, K. 2016/720 (Hatay Administrative Court September 9, 2016); E. 2015/1537, K. 2016/12 (Bursa 1. Administrative Court January 12, 2016); E. 2015/1536, K. 2016/11 (Bursa 1. Administrative Court January 12, 2016); E. 2016/35, K. 2016/25 (Antalya 1. Administrative Court January 14, 2016); E. 2016/454, K. 2016/513 (Antalya 1. Administrative Court May 18, 2016).

[360] Administrative Court decision dated 21 June 2016 as quoted in 2016-13290, Aleksei Alekseev (Constitutional Court December 5, 2017) paragraph 20; E. 2017/1317, K. 2017/1525 (Bursa 1. Administrative Court October 10, 2017); E. 2017/907, K. 2017/1197 (Bursa 1. Administrative Court August 9, 2017); E. 2017/631, K. 2017/1066 (Bursa 1. Administrative Court July 11, 2017); Decision of Kocaeli 1. Administrative Court dated 25 August 2015 as referred in 2015-16437, No. Uthman Deya Ud Deen Eberle (Constitutional Court October 11, 2018) paragraph 23.

[361] E. 2015/1436, K. 2016/15 (Antalya 1. Administrative Court January 14, 2016); E. 2015/1437, K. 2016/20 (Antalya 1. Administrative Court January 14, 2016); E. 2016/28 K., 2016/145 (Erzurum 1. Administrative Court February 18, 2016); E. 2017/683, K. 2017/967 (Antalya 1. Administrative Court September 26, 2017); E. 2015/1500, K. 2016/67 (Antalya 1. Administrative Court January 26, 2016); E. 2016/29, K. 2016/670 (Erzurum 1. Administrative Court June 15, 2016); E. 2015/1395, K. 2016/19 (Antalya 1. Administrative Court January 14, 2016); E. 2016/36, K. 2016/26 (Antalya 1. Administrative Court January 14, 2016); E. 2017/862, K. 2017/1768 (İstanbul 1. Administrative Court November 10, 2017).

there is no indication that they sought any information or documents concerning the basis for insertion of security codes regarding relevant persons.

It should be noted that similar approach is often taken by Criminal Judges of Peace in assessing the lawfulness of administrative detention based on threat to public order or security. They too often rely on presence of security codes for finding that the applicant poses a threat to public order or security, without making any further assessment.[362] It is especially problematic that the courts accepted the imposed security codes at their face value without questioning their basis and whether there is any further evidence as to the nature of the threat posed by the applicants.

Here it should be explained that, in line with Article 125 of the Constitution judicial assessement by the courts should be limited to the matters of lawfulness and not legitimacy so as to replace the power of executive. This rule protects the authorities of the executive and prohibits the judiciary from acting instead of administration. However, the principle of effective judicial assessment should also be factored in, concerning the element of cause of an administrative act such as in the above cases where the causes of the removal orders are ambiguous. If the administration does not set forth based on which concrete facts it used its discretion, how it characterized these facts and how it interpreted

[362] 2017/880 D. İş (Edirne 2. Criminal Judge of Peace February 27, 2017); 2017/4131 D. İş (Edirne 2. Criminal Judge of Peace September 21, 2017); 2018/1403 D. İş (Antalya 2. Criminal Judge of Peace March 18, 2018); 2016/601 D. İş (Ağrı Criminal Judge of Peace March 14, 2016); 2016/847 D. İş (Ağrı Criminal Judge of Peace April 4, 2016); 2017/2795 D. İş (Izmir 3. Criminal Judge of Peace May 25, 2017); 2016/509 D. İş (Ağrı Criminal Judge of Peace March 3, 2016); 2016/736 D. İş (Ağrı Criminal Judge of Peace March 24, 2016); 2016/903 D. İş (Ağrı Criminal Judge of Peace April 12, 2016); 2017/1774 D. İş (Aydın 2. Criminal Judge of Peace March 21, 2017).

the legal norm, then it should be inevitable for the judiciary to replace the administration in conducting such assessment in order to ensure effectiveness of judicial assessment.[363]

Similar situation arises for removal orders issued based on intelligence information. Both in the case of decisions based on security codes and intelligence information, it is not possible for the applicants to defend themselves vis-à-vis the allegations made against them. The basis of the security codes or the content of the intelligence information is not made available to them, simply depriving individuals of the possibility to explain or defend themselves.

One case in this regard concerned an individual who was issued a decision declaring him an inadmissible passenger and thus was refused entry to Turkey. In rejecting the individual's request of cancellation of this decision, the court relied on the intelligence report that was not submitted, but briefly shown to the court by the administration. The reports were said to include the name of the applicant in the list regarding fight against terrorism.[364] This approach was also approved by the RAC later on during appeal.[365]

There are also many cases where the courts rely on merely the presence of intelligence information as basis for issuance of removal order.[366] Similar bases were expressed as follows: Threat to public order based on suspicion of membership to the

[363] Kaya Burak Öztürk, "İdari İşlemin Sebep Unsuru: Yeni Bir Tanım Denemesi," in *Prof. Dr. Metin Günday Armağanı* (Ankara: Atılım Üniversitesi, 2020), 1042.
[364] E. 2016/3395, K. 2018/115 (Ankara 1. Administrative Court January 23, 2018).
[365] E. 2018/762, K. 2018/798 (Ankara RAC 10. Administrative Lawsuit Chamber September 11, 2018).
[366] E. 2017/825, K. 2018/322 (Isparta Administrative Court March 14, 2018); E. 2015/1345, K. 2016/16 (Antalya 1. Administrative Court January 14, 2016); E. 2017/944, K. 2018/862 (Isparta Administrative Court June 21, 2018); E. 2017/943, K. 2018/593 (Isparta Administrative Court May 3, 2018); E. 2017/894, K. 2018/264 (Isparta Administrative Court February 27, 2018); E. 2017/1047, K. 2018/205 (Antalya 1. Administrative Court February 20, 2018); E. 2017/893, K. 2018/863 (Isparta Administrative Court February 27, 2018); E. 2018/614, K. 2019/65 (Eskişehir 1. Administrative Court February 15, 2018).

terrorist group ISIS considering the intelligence information as to increase of passage to Syria,[367] presence of intelligence information concerning a Syrian university student,[368] threat to public order and security based on correspondence from intelligence agency[369] and individual's link with a terrorist organization based on information from intelligence agency.[370]

In some cases it is observed that the courts depend on various factors, whereas the main indicator remain to be intelligence information. One decision as to approval of administrative detention was based on the court's reliance on the intelligence information in the criminal investigation file regarding applicant's connection with a terrorist organization. Additionally the court considered the fact that the applicant admitted previously living in a region controlled by the terrorist organization and making illegal entry to Turkey.[371] In another case the concerned individuals were apprehended during police search during which no criminal elements were found. They were issued removal orders for posing a threat to public order. The court based its decision on a letter of intelligence agency, which states that it was determined through reliable sources that the foreigners from Tajikistan opened religious education and prayer halls and foreigners who gather there go to Syria in groups to join ISIS.[372] In the final case, in rejecting the appeal

[367] E. 2016/804, K. 2016/722 (Hatay Administrative Court September 9, 2016); E. 2016/807, K. 2016/674 (Hatay Administrative Court September 7, 2016); 2016/806, K. 2016/1164 (Hatay Administrative Court November 1, 2016); E. 2016/389, K. 2016/502 (Antalya 1. Administrative Court May 10, 2016).
[368] E. 2017/359, K. 2018/98 (İstanbul 1. Administrative Court January 19, 2018).
[369] E. 2017/1856, K. 2017/2053 (Gaziantep 1. Administrative Court December 15, 2017).
[370] E. 2018/287, K. 2018/1050 (İstanbul 1. Administrative Court June 13, 2018).
[371] 2018/1023 D. İş (Şanlıurfa 1. Criminal Judge of Peace March 12, 2018); 2018/1024 D. İş (Şanlıurfa 1. Criminal Judge of Peace March 12, 2018).
[372] E. 2015/2299, K. 2016/1333 (İstanbul 1. Administrative Court May 31, 2016); E. 2015/2718, K. 2016/1334 (İstanbul 1. Administrative Court May 31, 2016).

against a removal order, the court considered both the security code imposed about the applicant and a letter of the intelligency agency. The letter explained that there is information suggesting that legal action was taken about the individual for financing ISIS in Qatar, his previous destination before Turkey. The court determined that the administration's assessment stands as to the individual because he poses a threat to public security and order and he is associated with terrorist organizations defined by international organizations.[373]

Another category of indicators of posing a threat to public security or public order that the Turkish courts frequently rely on consist of presence of ongoing adjudication about the concerned individual. Many instances in this regard relate to adjudication for crimes related to terrorism. The courts considered adjudication at different stages, for instance some decisions determined threat to public security or order by relying on ongoing criminal investigation regarding membership to terrorist organizations,[374] specifically to ISIS in one of them.[375] Similarly, in one of the cases, the criminal indictment by the public prosecutor regarding membership to ISIS was pending before the court when the administrative court approved the removal order.[376] Other courts based their position on ongoing adjudication related to terrorism,[377] whereas in one of them the

[373] E. 2017/862, K. 2017/1768 (İstanbul 1. Administrative Court October 11, 2017).
[374] E. 2015/1537, K. 2016/12 (Bursa 1. Administrative Court January 12, 2016); E. 2015/1536, K. 2016/11 (Bursa 1. Administrative Court January 12, 2016); E. 2016/35, K. 2016/25 (Antalya 1. Administrative Court January 14, 2016).
[375] As quoted in 2016-13290, No. Aleksei Alekseev (Constitutional Court December 5, 2017) paragraph 20.
[376] E. 2016/613, K. 2016/670 (Antalya 1. Administrative Court June 21, 2016).
[377] E. 2016/688, K. 2016/1288 (Antalya 1. Administrative Court December 20, 2018).

court upheld the removal order by disregarding the prohibition to leave the country imposed on the individual by the criminal court.[378]

An interesting set of decisions conclude on presence of threat to public security or order even if the concerned individuals are not subject to criminal adjudication anymore. In one such case the acquittal of the criminal court based on lack of evidence could not save the applicant from being subject to removal order. The court relied on suspicion of membership to ISIS when declaring that the applicant is a threat to public order.[379] In other cases the criminal case for being a member to ISIS did not move forward as the prosecutor decided not to prosecute due to lack of evidence. However, the administrative court and criminal judges of peace still approved presence of threat to public order based on the finalized prosecution.[380] The result may remain unchanged if the charges proceed to the criminal court, such as in a case where the court considered the nature of criminal charges brought against the applicant in view of the terrorism threat in the country, although the applicant was acquitted in the criminal proceedings concerning membership to ISIS.[381] We understand that the administrative judges considered the threshold for determining threat to public order to be lower than that sought for criminal evidence. Even wrongful apprehension, instead of someone else, for link with terrorist organization was once the

[378] E. 2016/454, K. 2016/513 (Antalya 1. Administrative Court May 18, 2016).
[379] E. 2016/804, K. 2016/722 (Hatay Administrative Court September 9, 2016); E. 2016/807, K. 2016/674 (Hatay Administrative Court September 7, 2016); E. 2016/806, K. 2016/1164 (Hatay Administrative Court November 1, 2016); E. 2016/389, K. 2016/502 (Antalya 1. Administrative Court May 10, 2016).
[380] 2018/1023 D. İş; 2018/1024 D. İş; E. 2014/1371, K. 2014/1486 (İstanbul 1. Administrative Court September 8, 2014); 2014/329 (İstanbul 11. Criminal Judge of Peace June 24, 2014); 2014/1058 (İstanbul 1. Criminal Judge of Peace September 17, 2014); 2014/1503 (İstanbul 4. Criminal Judge of Peace October 2, 2014); 2014/2450 (İstanbul 2. Criminal Judge of Peace November 7, 2014).
[381] 2017/2962 D. İş (Kilis Criminal Judge of Peace December 21, 2017).

basis of a removal order and administrative detention decision[382] until the individual's counsel explained the confusion to the judge that his client is in fact not accused due to link with terrorist organization.[383]

Apart from connection with a terrorist organization, other crimes that triggered criminal prosecution or adjudication were also considered by the courts in ruling on the lawfulness of issuance of removal order based on public order or security. For instance in one case, there was an ongoing criminal investigation against the applicant for wilful murder of his brother, he was taken under criminal detention due to this but was then released. The court found this sufficient for ordering removal based on threat to public order or security and stated that presence of criminal conviction is not mandatory for finding such a threat.[384] This reasoning was followed by other courts as well such as the one which approved the removal order by stating that the basis of removal does not have to be commission of a crime that is determined with a court decision,[385] or the one which found that presence of a crime and a court judgment in this regard is not necessarily required for ordering removal.[386] Another court decision expressed the same reasoning even despite the existence of a decision by the public prosecutor stating that there is no need for criminal adjudication.[387] Similarly, as indication of threat to public order another judgment set forth the sufficiency of the existence of an ongoing criminal investigation

[382] 2017/1257 D. İş (İstanbul 2. Criminal Judge of Peace March 20, 2017).
[383] 2017/1406 D. İş (İstanbul 2. Criminal Judge of Peace March 22, 2017).
[384] E. 2017/881, K. 2017/1594 (Şanlıurfa 1. Administrative Court December 29, 2017).
[385] E. 2017/1950, K. 2018/107 (Gaziantep 1. Administrative Court February 5, 2018).
[386] E. 2017/1856, K. 2017/2053 (Gaziantep 1. Administrative Court December 15, 2017).
[387] E. 2018/287, K. 2018/1050 (İstanbul 1. Administrative Court June 13, 2018).

based on use of false identity information, which was allegedly a typing mistake.[388] In two other judgments, it was found that the issuance of a removal order based on threat to public order and security was reasonable concerning persons against whom criminal investigations were initiated for the crime of insult upon complaint, in view of the content of the investigation and assessment of allegations. The judges did not require a judgment on criminal conviction to be present.[389] In one case simply the existence of judicial action was found sufficient as a ground for constituting threat to public order.[390] Similarly, an interim decision by the CC quotes a local court decision where the judge found that the applicant poses a threat to public security because of criminal prosecution during which he was arrested, although he was acquitted in the end.[391]

A striking example concerns a foreigner who was criminally convicted for the crimes of wilful injury and carrying an illegal knife. The judge reviewing the appeal against the removal order that he was subject to, went as far as to state that these crimes constitute a serious indication that the applicant is guilty of the crimes listed in Article 1(F) of the 1951 Convention which in fact sets a very high threshold related to exclusion from refugee status.[392] As such, Article 1(F) includes crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the UN. Even without profound technical knowledge as to the meaning

[388] 2017/880 D. İş (Edirne 2. Criminal Judge of Peace February 27, 2017).
[389] E. 2017/816, K. 2017/1764 (İstanbul 1. Administrative Court October 11, 2017); E. 2015/1996, K. 2015/1614 (Ankara 1. Administrative Court November 6, 2015).
[390] E. 2017/1317, K. 2017/1525 (Bursa 1. Administrative Court October 10, 2017); E. 2017/907, K. 2017/1197 (Bursa 1. Administrative Court August 9, 2017).
[391] 2016-27304, H. B. (Constitutional Court December 13, 2016) paragraph 10.
[392] E. 2015/453, K. 2015/811 (Sakarya 1. Administrative Court September 14, 2015).

of these crimes, one can detect that intentional injury and carrying an illegal knife should not fall within their scope. Nevertheless, the judge relied on this in concluding that the applicant is a threat to public order. However, it should also be noted that the reason why a removal order was issued concerning the applicant was not because he was found to be a threat to public order, but becase his IP application was rejected and that there was no other legal basis for him to stay in Turkey.

As a similar example, I should cite one interim measure decision of the CC, which refers to a local court decision rejecting the appeal of a removal order. In the subject matter case, the local court judge found that criminal conviction for wilfull injury constitutes a basis for being threat to public order and approved the removal order concerning the applicant despite the refugee status issued to him by the UNHCR.[393] In another local court decision referred by an interim measure decision of the CC, it was established that the applicant poses a threat to public order and public security for being subject to criminal investigation for importing watches illegally.[394] Finally, in another local court case referred to by the CC in an interim measure decision, the judge accepted that the applicant is a threat to public security because the applicant was subject to criminal investigation for fraud on an official document.[395]

At times, courts considered factors other than security codes, intelligence information and criminal adjudication for determining the presence of threat to public order and public security. A common approach taken by judges is to rely on the discretion

[393] 2016-5126, Haider Subhi Amenn Amenn (Constitutional Court March 17, 2016) paragraphs 12-15.
[394] 2015-18203, Mahira Karaja (Constitutional Court December 1, 2015) paragraphs 5-7.
[395] 2017-1442, Seyed Amin Seyed Mortazei (Constitutional Court January 26, 2017) paragraphs 10-12.

of administration and simply state that it is within the discretion of the administration to determine what constitutes threat to public order and public security, thus leaving such discretion without scrutiny.[396] Another somewhat common reasoning that the administrative courts resort to, is that committing of or involvement with a crime or presence of a court judgment in that regard is not necessarily sought in order for determining the existence of threat to public order and public security. The judges set forth that the administration has the discretion to decide on threat to public order and public security even in the face of lack of a committed crime or a court decision.[397]

Other miscellaneous factors taken into account by Turkish judges in determining threat to public order or public security include, proximity of the individual's city of apprehension to the conflict zones in Syria,[398] suspicion of connection to conflict zones for apprehension close to conflict zones and inability of declaring any reason or place for stay,[399] the fact that the applicant was driving a motorcycle that did not have a license plate which indicates that it is stolen,[400] the fact that the applicant lived and had an affair

[396] E. 2017/1317, K. 2017/1525 (Bursa 1. Administrative Court October 10, 2017); E. 2017/907, K. 2017/1197 (Bursa 1. Administrative Court August 9, 2017); E. 2017/1856, K. 2017/2053 (Gaziantep 1. Administrative Court December 15, 2017); E. 2017/105, K. 2017/1136 (İstanbul 1. Administrative Court July 7, 2017); E. 2017/631, K. 2017/1066 (Bursa 1. Administrative Court July 11, 2017).
[397] E. 2015/1436, K. 2016/15 (Antalya 1. Administrative Court January 14, 2016); E. 2015/1437, K. 2016/20 (Antalya 1. Administrative Court January 14, 2016); E. 2016/28, K. 2016/145 (Erzurum 1. Administrative Court February 18, 2016); E. 2017/683, K. 2017/967 (Antalya 1. Administrative Court September 26, 2017); E. 2015/1500, K. 2016/67 (Antalya 1. Administrative Court January 26, 2016); E. 2016/29, K. 2016/670 (Erzurum 1. Administrative Court June 15, 2016); E. 2015/1395, K. 2016/19 (Antalya 1. Administrative Court January 14, 2016); E. 2016/36, K. 2016/26 (Antalya 1. Administrative Court January 14, 2016); E. 2018/287, K. 2018/1050 (İstanbul 1. Administrative Court June 13, 2018); As quoted in 2016-13290, No. Aleksei Alekseev (Constitutional Court December 5, 2017) paragraph 20.
[398] E. 2016/804, K. 2016/722 (Hatay Administrative Court September 9, 2016); E. 2016/807, K. 2016/674 (Hatay Administrative Court September 7, 2016).
[399] E. 2016/737, K. 2016/720 (Hatay Administrative Court September 9, 2016).
[400] E. 2017/1950, K. 2018/107 (Gaziantep 1. Administrative Court February 5, 2018).

with a married Turkish citizen which disrupts the marital unity,[401] resistance to a police officer,[402] suspicion of connection with conflict zones based on contradicting answers during interrogation,[403] apprehension while driving an illegal taxi cab,[404] and apprehension trying to steal perfumes in a department store.[405]

b. Suspension of removal during judicial appeal procedures and interim measures of the CC[406]

It is observed that the individual application to the CC is utilized intensely by foreigners who are subject to removal orders.[407] It is also possible for the applicants to request the CC to render interim measure decisions within the scope of individual application which is a domestic legal remedy for overcoming violations of the rights that form the common protection area of the Constitution and ECHR.[408] Due to the possibility that the rights violations that will take place once the individuals are removed from the country, may cause irreparable damages, in individual applications concerning removal

[401] E. 2017/816, K. 2017/1764 (İstanbul 1. Administrative Court October 11, 2017).
[402] E. 2016/82, K. 2016/924 (İstanbul 1. Administrative Court April 18, 2016).
[403] E. 2017/105 K. 2017/1136 (İstanbul 1. Administrative Court July 7, 2017).
[404] 2016-8317, Akmal Yunuskhodjaev (Constitutional Court May 3, 2016) paragraphs 18-23.
[405] 2017-21661, Abdelouahed Essehl (Constitutional Court May 25, 2017) paragraph 7.
[406] This sub-section is based on Gamze Ovacık, "Türk Anayasa Mahkemesinin İçtihadı Işığında Sınır Dışı Kararlarına Karşı Yargısal İtirazın Hukuki Etkisi," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 26, no. 2 (2020): 1047–62.
[407] Korkut Kanadoğlu, *Anayasa Mahkemesi'ne Bireysel Başvuru* (İstanbul: On İki Levha Yayıncılık, 2015), 234.
[408] Hüseyin Turan, "Bireysel Başvuru Yolunda Geçici Tedbir Kurumu," *Ceza Hukuku Dergisi* 24 (2014): 244; Gonca Erol, "Anayasa Mahkemesine Bireysel Başvuruda Tedbir," *Türkiye Barolar Birliği Dergisi* 130 (2017): 77; Benan Molu, "Anayasa Mahkemesi ve Geçici Tedbir Talepli Başvurularda Karşılaşılan Sorunlar," 2017, https://anayasatakip.ku.edu.tr/wp-content/uploads/sites/34/2017/08/Benan-Molu-Anayasa-Mahkemesi-ve-Gec%CC%A7ici-Tedbir-Talepli-Bas%CC%A7vurularda-Kars%CC%A7%C4%B1las%CC%A7%C4%B1lan-Sorunlar.pdf; Ece Göztepe, *İnsan Haklarının Korunmasında Geçici Tedbir - Avrupa İnsan Hakları Mahkemesi, Almanya ve Türkiye Örnekleri* (On İki Levha Yayıncılık, 2017), 234.

operations, the CC's interim measure decisions have crucial importance in order to eradicate the risk of the claimed human rights violations.

The authority of the CC to issue interim measure decisions in individual applications, ex officio or upon request, is foreseen in Article 49(5) of the Law No. 6216 on Establishment and Judicial Procedures of Constitutional Court ("Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun") published in the Official Gazzette No. 27894 dated 3 April 2011 ("Law No. 6216") and Article 73 of the Internal Regulation of the CC. Interim measure, which has the purpose of preserving the existing situation until the application procedure is finalized[409] and protecting the applicant against the negative effects of the public power action[410], is also characterized as a mandatory result arising from the fact that constitutional complaint does not have automatic suspensive effect due to presumption of lawfulness.[411] Also, although individual application provides a subjective protection for the applicant, since in general there is public benefit in protection of human rights and ensuring the functionality of the court's decisions, it should be accepted that the interim decisions which basically take the future decision of the court under guarantee, have an objective purpose as well.[412] In this vein, it should be kept in mind that the European Commission for Democracy through

[409] Hannah R. Garry, "When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights," *European Public Law* 7, no. 3 (2001): 404.
[410] Berkan Hamdemir, *Anayasa Mahkemesi'ne Bireysel Başvuru* (Ankara: Seçkin Yayıncılık, 2015), 339; Özcan Özbey, *Türk Hukukunda Anayasa Mahkemesine Bireysel Başvuru Hakkı* (Ankara: Adalet Yayınevi, 2013), 300; Sami Sezai Ural, *Hak ve Özgürlüklerin Korunması Bağlamında Bireysel Başvuru* (Ankara: Seçkin Yayıncılık, 2013), 390.
[411] Ece Göztepe, *Anayasa Şikayeti* (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1998), 88; Tolga Şirin, *Türkiye'de Anayasa Şikayeti (Bireysel Başvuru)* (İstanbul: On İki Levha Yayıncılık, 2013), 600.
[412] Göztepe, *Anayasa Şikayeti*, 88, 90; Şirin, *Türkiye'de Anayasa Şikayeti (Bireysel Başvuru)*, 620; Musa Sağlam, "Anayasa Mahkemesine Bireysel Başvuruda Tedbir Kararı," *HUKAB Dergi*, no. 5 (2013), http://www.hukabdergi.com/p2122/.

Law (Venice Commission) supports the suspension of actions the implementation of which will cause irreparable damages or violations within the constitutional framework[413] and in parallel with the practice of the CC, ECtHR also grants interim measures based on a similar scope.[414] Since the individual application procedure to the CC is a legal remedy for protection of fundamental rights and freedoms guaranteed under the Constitution which are also within the scope of the ECHR, it is observed that the practices of the CC develop to a great extent in parallel to the case law of the ECtHR.

To set the legal scene in Turkey, it should be mentioned that as a result of the intensification of the activities of the terrorist organization ISIS in Europe and in Turkey during the years 2015-2016 and the various terrorist attacks that took place in İstanbul, Ankara and other places in Turkey, with the impact of these special circumstances,[415] Decree Law No. 676 was adopted. It should be noted that due to its enactment in the form

[413] "Study on Individual Access to Constitutional Justice" (Venice Commission, 2011), 42.

[414] Olivier De Schutter, "The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights," *International Law FORUM Du Droit International* 7, no. 1 (2005): 18; Ergin Ergül, *Anayasa Mahkemesi ve Avrupa İnsan Hakları Mahkemesine Bireysel Başvuru ve Uygulaması* (Ankara: Yargı Yayınevi, 2012), 115; Committee of Ministers of Parliamentary Assembly of the Council of Europe, "Reply to a Written Question on Extradition of Refugees and the Obligation of "non-Refoulement of Member States of the Council of Europe," February 23, 2007, http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11641&Lang=EN#P52_3678; European Court of Human Rights, "Rules of Court Practice Directions on Interim Measures," 2016; European Court of Human Rights, "Fact Sheet on Interim Measures," 2016; Peter Langford, "Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights," *The International Journal of Human Rights* 13, no. 4 (September 2009): 519; Nuala Mole and Council of Europe, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Pubishing, 2010), 222; Laurence Burgorgue-Larsen, "Interim Measures in the European Convention System of Protection of Human Rights," *Inter-American and European Human Rights Journal* 2 (2009): 104; Yves Haeck and Clara Burbano Herrera, "Staying the Return of Aliens from Europe through Interim Measures: The Case-Law of the European Commission and the European Court of Human Rights," *European Journal of Migration and Law* 13, no. 1 (2011): 32.

[415] A similar global reaction occurred following the 9/11 attacks, as explained in James C Simeon, "Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11," *Refugee Survey Quarterly* 29, no. 4 (2011): 106–7.

of a state of emergency decree, Decree Law No. 676 is exempt from constitutionality review by the CC as per Article 148 of Turkish Constitution. Accordingly, certain changes were made in LFIP regarding its provisions on removal and especially in the judicial complaint mechanism. Firstly, an additional ground of removal was inserted as being connected to terrorist organizations that are defined by international organizations and institutions. Also, it was possible to issue removal order concerning individuals who are applicants or holders of IP status, only when there are serious indications that they pose an important danger for national security or in the case that they are convicted in a final manner due to a crime which is a threat to public order. However, with the Decree Law No. 676, it was made possible to issue a removal order, at any stage of IP procedures, concerning individuals who are managers, members or supporters of terrorist or benefit oriented criminal organizations, or who pose threat to public order, public security and public health and who are assessed to be connected to terrorist organizations that are defined by international organizations and institutions. Thus, in line with security concerns, the scope of foreigners that may be subject to removal was extended with the Decree Law No. 676 which was later on adopted as the Law No. 7070 published in the Official Gazzette No. 30354 dated 8 March 2018.

In addition to this, before the amendments by the Decree Law No. 676, it was regulated that a foreigner who is subject to a removal order would not be removed during the period of judicial appeal or until the judicial appeal is finalized in case of application

for judicial appeal.[416] In other words, complaint against removal used to have suspensive effect. Decree Law No. 676 brought an exception to this provision and removed the suspensive effect of judicial appeal for individuals who are managers, members or supporters of terrorist or benefit oriented criminal organizations, or who pose threat to public order, public security and public health and who are assessed to be connected to terrorist organizations that are defined by international organizations and institutions. Therefore, it was made possible for such persons to be removed before the expiry of judicial appeal period or before the finalization of appeal in case of application for judicial appeal.[417]

Considering the parallelity in the timing of the adoption of the Decree Law No. 676 in October 2016 and the entry into force of Protocol 7 to the ECHR for Turkey in August 2016, it comes to mind whether there is a causal link between these changes in Turkish legal framework. In fact, Article 1 of Protocol 7 to the ECHR which regulates the procedural safeguards related to expulsion procedures, do provide a basis for the possibility of waiver of procedural guarantees in case of expulsions necessary in the interests of public order or grounded on reasons of national security. Moreover, requirement of automatic suspensive removal of appeal of an expulsion order is not among the specific procedural safeguards listed in this provision. Thus, the amendment brought by the Decree Law No. 676 may seem as a somewhat reverse effort to ensure overlap

[416] Sibel Yilmaz, 'Protection of Refugees' Rights Arising out of the International Protection Procedure from the View of Turkish Constitutional Court's Individual Application Decisions' (2019) 68 Ankara Üniversitesi Hukuk Fakültesi Dergisi 707, 722.
[417] Meltem İneli Ciğer, "Remedies Available against Asylum Decisions and Deportation Orders in Turkey: An Assessment in View of European Law and the European Convention on Human Rights," *Nordic Journal of International Law* 88 (2019): 246.

between the domestic legal framework and international human rights obligations of Turkey. However, in fact such interpretation is not legally possible when other relevant provisions of ECHR are taken into account. First of all, Article 17 on prohibition of abuse of rights and Article18 on limitation on use of restrictions on rights, prevents a state party from using ECHR as a basis for limiting the rights enshrined in the Convention and also from applying restrictions to rights for any purpose other than that prescribed therein. Secondly, Article 53 safeguard for existing human rights clearly prohibits any action by governments to use ECHR as an excuse to limit or derogate from human rights and fundamental freedoms that are ensured under their domestic laws. This means it is not possible for Turkey to narrow down the scope of the procedural rights provided in Turkish legal framework concerning removal procedures, based on the excuse that the scope provided in ECHR framework is more restricted. In the end it is possible to express that Turkish legal framework as it stood before the amendment by the Decree Law No. 676, is more progressive and more extensive in terms of human rights compared to Protocol 7, in consideration of recognition of automatic suspensive effect for judicial appeal of expulsion without providing any exceptions in terms of grounds for expulsion.[418]

One of the reasons for adoption of LFIP, was to ensure that no new decisions are issued against Turkey by the ECtHR that are similar to Jabari v. Turkey[419], Mamatkulov and Askarov v. Turkey[420], Abdolkhani and Karimnia v. Turkey[421]. In all of these cases, violation decisions were rendered due to the way of application of removal and relevant

[418] Aydoğan Asar, *Yabancılar Hukuku* (Seçkin Yayıncılık, 2020), 155.
[419] Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000).
[420] Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005).
[421] Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009).

procedures and lack of their legal basis in legislation before LFIP. So, with LFIP it was desired that processes regarding removal and IP are carried out in compliance with Turkey's international human rights obligations.[422] For this reason, the case law of the ECtHR concerning removal should be taken into account for the purposes of implementation of LFIP. In the judgment of Saadi v. Italy case[423] which is one of the key cases concerning removal, the ECtHR stated that the prohibition set forth by Article 3 of ECHR titled prohibition of torture is absolute and that even if a foreigner poses a threat to national security, he/she cannot be removed if there is a risk of treatment contrary to Article 3.[424] In Conka v. Belgium[425] and Gebremedhin v. France[426] which are among the judgments that shaped the established case law of ECtHR on this subject, removal was addressed in terms of Article 13 which provides a right to effective remedy against the violation of rights within the scope of ECHR. Accordingly, it was explained that in removal procedures, judicial appeal must have suspensive effect which means that the removal procedure must be suspended until the judicial appeal process is finalized. Practices to the contrary, result in decisions by ECtHR stating that Article 13 is violated.[427]

---

[422] Esra Dardağan Kibar, "Yabancılar ve Uluslararası Koruma Kanunu Tasarısında ve Başlıca Avrupa Birliği Düzenlemelerinde Yabancıların Sınır Dışı Edilmelerine İlişkin Kurallar: Bir Karşılaştırma Denemesi," *Ankara Avrupa Çalışmaları Dergisi* 11, no. 2 (2012): 68; Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Kanunu Tasarısı* (İstanbul: Beta Basım Yayım Dağıtım, 2012), 163.

[423] Saadi v. Italy, No. 37201/06 (ECtHR February 28, 2008) paragraph 138.

[424] Anna Magdalena Kosińska, "The Problem of Exclusion from Refugee Status on the Grounds of Being Guilty of Terrorist Acts in the CJEU Case Law," *European Journal of Migration and Law* 19 (2017): 444; Jernej Letnar Cernic, "Naitonal Security and Expulsion to a Risk of Torture," *Edinburgh Law Review* 12, no. 3 (2008): 489; Vedsted-Hansen, "The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection," 53–55; Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed," *Leiden Journal of International Law* 22, no. 3 (2009): 585.

[425] Conka v. Belgium, No. 51564/99 (ECtHR May 2, 2002) paragraph 293.

[426] Gebremedhin [Gaberamadhien] v. France, No. 25389/05 (ECtHR July 26, 2007) paragraph 58.

[427] Presence of practices to the contrary should be mentioned such as Norway and the Netherlands lacking automatic suspensive effect in case of judicial appeal of removal orders based on national security reasons,

Accordingly, in this context automatic suspensive effect is considered to be one of the elements of effectiveness of a legal remedy.[428]

As mentioned above, according to Article 73 of the Internal Regulation of the CC, necessary interim measures may be granted in the case that it is understood that a serious danger against the life or physical or moral integrity exists. With respect to removal procedures, implementation of interim measures by the CC appears to be different before and after the Decree Law No. 676.

In the period before the adoption of the Decree Law No. 676, the CC would to render an interim measure decision only after the exhaustion of judicial appeal against removal order before the administrative court. Concerning the applications with request of interim measures made in that period, the CC used to reject such requests if no application was made to the administrative court, or if no decision was made yet within the judicial appeal, since it would not be possible for the removal order to be implemented until this process is finalized according to Article 53(3) of LFIP and thus there would not be any serious danger for the individual. For example in one application[429], in the decision concerning interim measure, the CC stated that the lawsuit that the applicant initiated before administrative court for the cancellation of the removal order is ongoing, in order for the applicant to be removed all of the relevant lawsuits must be finalized as per Article 53(3) of LFIP and therefore at this stage there is no serious danger against the applicant

as reported in Chlebny, "Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases," 128.

[428] Cantor, "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence," 91.

[429] 2015-16282, M.A. (Constitutional Court October 15, 2015) paragraphs 20-21.

that requires immediate issuance of interim measures and in similar applications as well, it typically decided that appeal before administrative court suspends removal.[430]

On the other hand, after the adoption of the Decree Law No. 676, the automatic suspensive effect of appeal against removal order was removed for foreigners who are subject to removal based on the grounds in Article 54 (1) (b), (d) and (k) of LFIP. Accordingly, upon Y.T. application[431] lodged few days after the adoption of the Decree Law No. 676, the CC explained the new situation as *"after the amendment made with the Decree Law No. 676 […] automatic suspensive mechanism was removed. In the new situation within the mentioned scope, the cancellation lawsuit before administrative court issued by foreigners who are subject to removal orders shall not affect the enforcement of these orders."* and with the reasoning that; *"[the applicant] set forth his claims concerning his personal situation in detail, the cancellation lawsuit he lodged before the administrative court is still ongoing, therefore at this stage irreparable results may emerge in the case that the removal procedure is carried out",* the CC accepted the interim measure request and ordered the suspension of the removal procedures. In decisions with subsequent dates, the CC continued to issue interim measures against removal orders without seeking the condition of exhaustion or even initiation of appeal procedure before administrative courts by referring to its above mentioned decision.[432]

---

[430] 2015-509, Gulbahar Rahmanova (Constitutional Court January 19, 2015) paragraphs 24-30; 2015-508, Gulistan Ernazarova (Constitutional Court January 16, 2015) paragraphs 24-29; 2015-16770, Z.S. and Others (Constitutional Court November 5, 2015) paragraphs 11-17.
[431] 2016-22418, Y.T. (Constitutional Court November 1, 2016) paragraph 23.
[432] *2016-23685,* Applicant Name Unknown (Constitutional Court November 8, 2016); *2016-24976,* Applicant Name Unknown (Constitutional Court November 16, 2016); *2016-34546,* Applicant Name Unknown (Constitutional Court December 15, 2016); *2017-5993,* Applicant Name Unknown

Based on the same reason, after the amendments brought by the Decree Law No. 676 to the articles of LFIP on removal procedures, it is observed that, in its decisions on interim measures, the CC took a path different from before and decided "removal procedures to be stopped temporarily" immediately, on the same day or within few days upon request for interim measure concerning removal procedures. In these decisions[433], on a standard basis the CC decided that *"information and documents are needed in order to assess whether there is a serious danger against the life or physical or moral integrity of the applicant"* and that *"enforcement of removal procedures during investigation period may cause irreparable results, for this reason, removal procedures are to be stopped temporarily in order to carry out reassessment after information and documents are collected"*. What is striking here is that, whereas as per the Internal Regulation of the CC, interim measure decisions may be rendered in the case that it is understood that a serious danger exists against the life or physical or moral integrity of the applicant, the CC granted interim measure in the mentioned decisions and stopped removal procedures even before it was assessed whether such danger exists. It is understood that this is a strategy for preventing the human rights violations that might be caused by the

(Constitutional Court February 16, 2017); *2017-6906*, Azam Valizadeh (Constitutional Court March 29, 2017); *2017-21577*, Khadijeh Mohammadipiraghaj (Constitutional Court April 28, 2017); *2017-21577*, Khadijeh Mohammadipiraghaj (Constitutional Court May 18, 2017); *2017-21577*, Khadijeh Mohammadipiraghaj (Constitutional Court June 1, 2017); *2017-36637*, Marziyeh Dashypeima (Constitutional Court November 3, 2017); *2017-36637*, Marziyeh Dashypeima (Constitutional Court November 14, 2017); *2018-11107*, Tiam Asadpour (Constitutional Court April 26, 2018).

[433] For example; 2016-24976, Applicant Name Unknown (Constitutional Court November 16, 2016); 2016-34546, Applicant Name Unknown (Constitutional Court December 15, 2016); 2017-5993, Applicant Name Unknown (Constitutional Court February 16, 2017).

amendments carried out in LFIP with the Decree Law No. 676 and that the case law of the CC was shaped accordingly.

Another development on this subject is that for the first time since the individual application procedure was started to be implemented on 23 September 2012, the CC applied the pilot procedure. Pilot decision is a procedure that is also implemented by the ECtHR and the details of which are regulated in Article 75 of the Internal Regulation of the CC. Accordingly, if an individual application arises from a structural problem and this problem caused or will cause other applications, the CC may initiate pilot decision procedure and the pilot decision issued as a result is legally binding.[434] In the pilot decision the structural problem that is determined and the measures that need to be taken for its solution are mentioned and the subject matter pilot decision is published in the Official Gazette. The CC may decide to postpone the evaluation of similar applications and such applications are resolved by administrative authorities within the frame of the principles set forth in the pilot decision. In the case that the problems subject to individual application are not resolved in line with the pilot decision, the CC may collectively assess and decide on the postponed applications. As is seen, in the situations where structural human rights violations emerge within the common scope of the Constitution and the ECtHR as a result of administrative practices or reasons arising from legislation, pilot decision procedure give the CC the possibility to carry out an evaluation for overcoming such structural

[434] Nimet Özbek and Döndü Kuşçu, "Anayasa Mahkemesinin 30.5.2019 Tarihli Pilot Kararı (Y.T. Kararı) İncelemesi ve Sınır Dışı Kararına Karşı Etkili Başvuru Üzerine Bir Değerlendirme," *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 24, no. 3 (2020): 33.

reason, instead of assessing the applications that all have the same reasons, individually one by one.[435]

Along these lines, within the scope of Y.T. application,[436] the CC referred to the amendments of LFIP made by the Decree Law No. 676 and the individual applications lodged because of removal of suspensive effect of judicial appeal for removal orders based on certain grounds and decided that *"After the mentioned amendment 866 individual applications were made to the CC based on the stated reasons and interim measure requests were accepted in 784 of them. With the purposes of determining whether these applications arise from a structural problem and determining solution recommendations if necessary, pilot decision procedure is initiated ex officio as per Article 75(2) of the Internal Regulation."* It should be mentioned that the very first interim measure decision that the CC granted, due to removal of automatic suspensive effect of judicial appeal against removal orders issued based on certain reasons even when such appeal is not finalized, was regarding the same individual application file.[437]

Pilot decision of the CC was rendered in 30 May 2019, almost one year after the initiation of pilot decision procedure.[438] In the decision, concerning the assessment of claims that the removal procedure would lead to violation of a prohibition of ill-treatment

[435] Luzius Wildhaber, "Pilot Judgments In Cases of Structural Systemic Problems on the National Level," in *The Europan Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, ed. Rüdiger Wolfrum and Ulrike Deutsch (Berlin: Springer, 2009), 71; Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Leiden, Boston: Martinus Nijhoff Publishers, 2013), 38.
[436] 2016-22418, Y.T. (Constitutional Court June 12, 2018).
[437] 2016-22418, Y.T. (Constitutional Court November 1, 2016) paragraphs 20-27.
[438] 2016-22418, Y.T. (Constitutional Court May 30, 2019).

and violation of a right to effective remedy, the CC took as reference various ECtHR decisions[439], some of which are referred above. As CC summarizes, in these decisions ECtHR in a nutshell, emphasized that in order for a remedy to be effective, before the implementation of the removal order, a chance to apply to an independent authority should be granted to the individual and the removal order is automatically not implemented until this assessment is finalized.[440]

After its reference to ECtHR case law, the CC shed a light on the matter by reminding the principles in its own case law[441] that is inspired from that of ECtHR. Accordingly, within the frame of the positive obligation imposed on states by the prohibition of ill-treatment, an effective remedy must be provided to persons who are subject to removal orders. If this is not provided, it is not possible to accept that real protection is provided to the person who claims that he/she will be subject to ill-treatment and who has more limited possibilities than the state to prove this. Put differently, it should be accepted that the positive protection obligation brought by the prohibition of ill-treatment, also bears the procedural safeguards that enable investigation of the applicant's claims and review of the removal order fairly. Therefore if the foreigner claims that in the country he/she will be sent, he/she will face a practice that is against the prohibition of ill-

[439] Soering v. United Kingdom, No. 14038/88 (ECtHR July 7, 1989); Saadi v. Italy; M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011); J.K. and others vs. Sweden, No. 59166/12 (ECtHR August 23, 2016); Ghorbanov and Others v. Turkey, No. 28127/09 (ECtHR December 3, 2013); Silver and others v. United Kingdom, No. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR March 25, 1983); Aksoy v. Turkey, No. 21987/93 (ECtHR December 18, 1996); Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005); Babajanov v. Turkey, No. 49867/08 (ECtHR May 10, 2016); Rotaru v. Romania, No. 28341/95 (ECtHR May 4, 2000).
[440] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraph 35.
[441] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraphs 59-62.

treatment, then administrative and judicial authorities should investigate in detail whether there is really a risk of violation. Within the scope of the mentioned procedural safeguards, removal order should be reviewed by an independent judicial organ, removal order should not be implemented during such review, and it should be ensured that parties are involved in adjudication effectively.[442] In other words, according to legal safeguards offered within this frame, a reasonable period of time should be provided to the individuals so that they can use their appeal right and after that, until the appeal is finalized, these individuals should be allowed to stay in the country without being subject to discretion of administrative or judicial authorities. This means that if there is a claim of ill-treatment, the legislation should automatically prevent implementation of removal procedures from the beginning of the appeal period until the finalization of adjudication. At this point the Court did not think that administrative courts' authority to cancel removal orders, their possibility of issuing interim measures and their ability of fast decision-making are sufficient in order to ensure the right to effective remedy, and emphasized that protection of this right can be possible through existence of legal infrastructure of a system which ensures that individuals can stay in the country within the appeal period, even before they access the court yet and that they can follow up their court applications.[443]

When the CC implemented these principles to the concrete case, it determined that according to the existing situation of the legislation, even if they make a judicial application, a part of the foreigners who have a claim of ill-treatment in case of removal,

[442] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraph 45.
[443] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraphs 49–51.

do not have the possibility of following up their cases or at best, this is left to the discretion of administrative and judicial authorities. In the concrete case, the Court reminded the claims of the applicant and underlined that the applicant was facing the possibility of being removed at all times without having the possibility of waiting for the outcome of the judicial appeal before administrative court. In this respect the Court ruled that the applicant's claims that the judicial process before administrative court is not an effective legal remedy as it does not provide chance of success in practice, have merit and that it is not possible for the applicant to continue its case without being subject to risk of removal.

Then the CC made a critical determination and stated that the described situation does not arise from the practice of the administrative court or its interpretation of the legislation, but it arises rather from the amendment of Article 53 of LFIP by the Decree Law No. 676 and that this amendment is against the right to effective remedy. In short the Court decided that the applicant did not have any legal safeguard that excludes the risk of being removed while the lawsuit before administrative court is ongoing, and for this reason the right to effective remedy is violated and this violation emerged from the situation that formed after the legislative amendment.[444]

After the explanation of general principles and determination of violation in the concrete case, the CC addressed the matter of reparation of the violation. The Court firstly set forth that in situations where violation occurs due to administrative and judicial authorities' implementation of a provision which is not possible to be construed in a way

[444] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraphs 57–61.

that is in compliance with Constitution, the violation arises directly from the law itself and not implementation of the law. Thus, according to the Court, in order for overcoming such a violation with all of its consequences, the legal provision which is the source of the violation should be reformulated so as not to cause violation or should be repealed. Also, it was emphasized that in some situations it may not be possible to remove all of the consequences of the violation even if the provision is repealed, in such situations, some measures may need to be taken to compensate through individual application, the damages of the injured parties.[445] After this general determination, the CC stressed in the concrete case that the legislative amendment gave the administrative authorities the possibility to remove the person who is subject to a removal order, before such person have the chance to apply to the court. It was pointed out that since the violation arises from the legal provision, in order to eradicate the violation and its consequences and to prevent new violations, this provisions should be reviewed. In order to eliminate the subject matter structural problem and to prevent new applications, the CC's suggestion in this regard is that a regulation is made which provides that the persons subject to removal order may not be removed during the appeal period and adjudication. For this purpose the Court decided that the decision is notified to the legislative organ. The CC also made an assessment as to the elimination of violation with respect to existing applications. As stated in the decision, as of 8 April 2019, 1545 applications similar to Y.T. application were made concerning the possibility of enforcement of removal order during the period of appeal and adjudication. Since making a new legislative regulation as suggested by the

[445] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraph 68.

CC will not be sufficient for the resolution of pending applications, the need for creation of a solution by the administrative regarding the removal orders issued before, was touched upon. For this purpose it was decided that the decision is notified to Turkish Grand National Assembly as well as the DGMM and also that evaluation of these 1545 applications and any new applications with similar properties are to be postponed for one year starting from the publication of the Pilot Decision in Official Gazette.[446]

In sum, this decision sets forth that lack of automatic suspensive effect of judicial appeal against removal orders issued for certain reasons, violates the right to effective remedy. Court stated that this structural problem arises from legislation which should be reverted to its original version where automatic suspensive effect was provided indistinctively. This judgment cherished the hopes of all foreigners who face removal procedures and whose judicial appeals are not finalized yet, including IP application and status holders who are waiting for protection within the scope of non-refoulement principle which prohibits sending a person to a place where he/she would be subject to torture, inhuman or degrading treatment or punishment.

In line with the CC's pilot decision, with an amendment to Article 53(3) of LFIP made on 6 December 2019[447], it was decided to remove the expression that people who are subject to removal orders for reasons connected to terrorism and public order, public security and public health, shall be exempted from the provision that persons who are subject to removal orders cannot be removed during appeal period or until the finalization

[446] 2016-22418, Y.T. (Constitutional Court May 30, 2019) paragraphs 74–78.
[447] Article 75 of the Law No. 7196 dated 6 December 2019 published in the Official Gazette No. 30988 dated 24 December 2019.

of the appeal. This way, with this provision, it was made possible again that judicial appeal and appeal period creates an automatic suspensive effect regarding all removal orders. Considering that the previous practice exposed the persons with IP need to the danger of removal without their claims of need for protection are listened or even if such claims were accepted, it should be mentioned that this amendment is a positive one in terms of human rights law.

The significant impacts that the legal developments concerning removal regime have on the IP regime should also be analyzed. Some of the legal matters that will be addressed here are not specific to the persons within the scope of IP regime however taking into account their protection needs, IP applicants or status holders appear to be the group that is most open to violations of human rights. Thus, explaining these matters in connection with IP regime serves the purpose of drawing attention to human rights violations. Also, one purpose is to analyze the relation between IP and removal regimes. The amendment carried out with the Decree Law No. 676, made it possible for the first time, to issue removal orders for those within the scope of IP regime based on a wide scope of grounds. Before the Decree Law No. 676 issuance of removal orders for IP applicants or status holders was possible exceptionally only for the reason of being convicted for a crime that may be a threat to national security and public order. Taking into account that the risk of removal of persons within IP regime is directly connected with assessment and implementation processes in the context of IP, as will be explained below, it is observed that the legal developments addressed above concerning removal regime have important effects on IP regime in Turkey.

As a result of these legal developments, it was made possible that IP application or status holders who have or may have need for IP,[448] could be issued removal orders for reasons related to terrorism and public order, public security and public health.[449] Also, with the amendment in the law made by the Decree Law No. 676, until the legislative amendment that followed the pilot decision of the CC, there was a period during which the IP application or status holders ran the risk of removal without the possibility of exhausting judicial appeal process. To paint an even more concrete picture, in this period it was possible that a person who was recognized as a refugee or a conditional refugee according to the Turkish law, in other words who was accepted to have fled persecution, could be issued an order for removal from the country based on a reason such as posing threat to public order that is open to interpretation and without his/her complaints are heard by a court.

It should be noted here that there is a distinction between the issuance of the removal order and the enforcement of removal. It is correct that the possibility of issuance of removal order for IP applicants and status holders has arisen with the amendment to

[448] Considering that temporary protection is left outside the scope of IP as per the definition in Article 3(r) of the LFIP, the grounds of removal in Article 54 of LFIP should be accepted to be applicable to the persons within temporary protection procedures instead of more restricted grounds in Article 54(2). This may prove problematic in terms of the guarantee provided in Article 32 of the 1951 Convention which is reflected in Article 54(2) to a certain extent. For a view to the contrary arguing that persons within the scope of temporary protection procedures should bee deemed to fall under Article 54(2) please see Doğa Elçin, "Türkiye'de Bulunan Suriyelilere Uygulanan Geçici Koruma Statüsü 2001/55 Sayılı Avrupa Konseyi Yönergesi Ile Geçici Koruma Yönetmeliği Arasındaki Farklar," *Türkiye Barolar Birliği Dergisi* 124 (2016): 41.

[449] For views arguing that it is possible for IP application or status holders to be subject to removal for reasons in Article 54(1) and not just 54(2), please see Barış Teksoy, "Türk Yabancılar Hukukunun Sınır Dışı Etme Kurallarının Güncel Durumu Üzerine Değerlendirmeler," in *Göç, İltica ve Hukuk Sempozyumu*, ed. Süheyla Balkar Bozkurt (Galatasaray Üniversitesi Hukuk Fakültesi, 2018), 43; Döndü Kuşçu, *Yabancılar ve Uluslararası Koruma Kanunu Hükümleri Uyarınca Yabancıların Sınır Dışı Edilmeleri* (İstanbul: On İki Levha Yayıncılık, 2017), 106.

Article 53 of LFIP enacted with the Decree Law No. 676. Despite this, Article 80(1)(e) of LFIP remained also in effect which states that in case of judicial appeal against decisions within the IP procedures, the foreigner is allowed to stay in the country. Thus, even if a removal order is issued, it cannot be enforced, which provides a partial protection against removal of IP applicants and status holders. However, it should be kept in mind that Article 80(1)(e) refers to appeals against decisions within IP procedures, thus it could not be of help in case of issuance of a removal order directly without any decision on the IP application. It prevents removal only until judicial appeal against a decision within IP procedure is finalized.

The first legal issue that will be analyzed here emerges from the interpretation of the scope of removal reasons. What exactly constitutes connection with terrorist organization and threat to public order, public security and public health is not defined in the legislation and administrative and judicial practices in this regard varies to a great extent. As a result of this it is seen that the administration has an extensive discretion in determining the scope of these concepts. So much so that this is sometimes as wide as alleged association with criminal activities despite acquittal or association with intelligence information, details of which are not disclosed to the administration or judiciary. This is visible also in the decisions by courts which more often than not, merely recognize the discretion used by the administration.[450] The associated risk is that such grounds are misused for removal of IP application or status holders.

[450] For various examples of such decisions please see: E. 2017/435, K. 2017/650 (Konya 1. Administrative Court March 27, 2017); E. 2019/212, K. 2019/620 (Hatay 1. Administrative Court April 18, 2019); E. 2015/1345, K. 2016/16 (Antalya 1. Administrative Court January 14, 2016); E. 2016/1229 K. 2017/163

The second crucial point is that it is still possible for IP application or status holders to be expelled based on reasons in connection with terrorism and public order, security and health. This risk is valid except in case of application of Article 80(1)(e) of LFIP which prevents removal during the judicial appeal of decisions within IP procedure. This means that in such cases, the removal order may be issued even if it is recognized that the person is in need of IP or even if the procedure to determine the existence of such need is not finalized yet. Furthermore, presence of an official action or a court decision is not required to prove the mentioned removal reasons and the practice is based on the discretion of administration. This situation poses a destructive disruption to IP process and runs the risk that the principle of non-refoulement, which has an absolute nature[451] and which is the cornerstone of international refugee law,[452] is compromised.

Finally, note should be taken of the practice that occurred between October 2016 – December 2019. Although, the automatic suspensive effect of judicial appeal in expulsion cases is brought back in December 2019, it was lacking for approximately three years starting from the initial legislative amendment in October 2016. This means that a number of IP application and status holders who were part of the IP regime in Turkey, were removed without having a chance of judicial review of their removal grounds. Being

(Antalya 1. Administrative Court February 24, 2017); E. 2016/688 K. 2016/1288 (Antalya 1. Administrative Court December 20, 2018); E. 2017/1047 K. 2018/205 (Antalya 1. Administrative Court February 20, 2018); E. 2015/1395 K. 2016/19 (Antalya 1. Administrative Court January 14, 2016); E. 2018/614 K. 2019/65 (Eskişehir 1. Administrative Court February 15, 2018); E. 2016/389 K. 2016/502 (Antalya 1. Administrative Court May 10, 2016); E. 2017/359 K. 2018/98 (İstanbul 1. Administrative Court January 19, 2018); E. 2016/134 K. 2016/243 (Trabzon Administrative Court February 25, 2016); E. 2017/436 K. 2017/649 (Konya 1. Administrative Court March 27, 2017); E. 2017/826 K. 2017/1741 (Isparta Administrative Court September 13, 2017).

[451] Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed," 592.

[452] Nicolosi, "Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law," 312.

within IP process, they all had a claim of risk of persecution, meaning wrongful implementation of removal possibly led to refoulement.

Consequently, the entire process of adjudication and legislation analyzed here, could be interpreted as the impact of judiciary on IP regime. Although it is not directly related to IP regime, this impact took place because the groups who may be subject to removal could be from those who are within the scope of IP regime. This actually shows the intertwined nature of IP and removal regimes. In addition to all this, it should be highlighted as a legal risk component regarding IP regime that, the legislative amendment which made the removal of IP application and status holders possible based on reasons connected with terrorism and public order, public security and public health, is still valid as it was not within the scope of the pilot decision procedure of the CC.

To provide a brief summary, it is observed that after the amendments on the provisions of LFIP concerning removal brought by the Decree Law No. 676, the number of individual applications with interim measure requests approached a thousand in a period as short as 1.5 years, it exceeded 1500 in almost 2.5 years and in nearly all of them interim measure requests were accepted. Since it was a situation directly caused by legislation, it is understood that the pilot decision procedure for structural problems is an appropriate tool to resolve this situation. In fact, the removal of automatic suspensive effect of judicial appeal against removal orders, was criticized in the pilot decision of the CC and it was decided that this situation violated the right to effective remedy. In the following process, a new legislative amendment was made and automatic suspensive effect was brought back. It is a positive development that as of the time of writing, the

legislation is again capable of protection of human rights in removal procedures and of ensuring the effectiveness of judicial complaint mechanism. On the other hand the removal practices carried out between October 2016 – December 2019 are worrisome considering the possibility of results contrary to non-refoulement principle.

It should be considered that the legal effect of these situations could be heavier for persons within IP regime who are accepted to be under risk of human rights violations. The legal provision which was accepted in 2016 with the Decree Law No. 676 and which makes it possible to remove persons within the scope of IP regime based on reasons connected with terrorism and public order, public security and public health, is still valid. This provision puts the mentioned persons under the risk of removal even if they have need for IP and thus endangers the effective implementation of non-refoulement principle. Overcoming these problems calls for a legislative amendment which removes the reasons foreseeing removal of persons within the scope of IP regime. Another step to be taken could be the detailing in the legislation, the concepts of connection with terrorist organizations and threat to public order, public security and public health, so that uniform application in this regard could be attained.

It should be remembered that the explained developments have reflections in international context as well. Turkey retains its position as the top refugee hosting country in the world.[453] Also bilateral and multilateral arrangements such as EU-Turkey

[453] As per official data as of 7 April 2021 the number of persons within IP regime in Turkey is almost 3.7 million. Please see: https://www.goc.gov.tr/gecici-koruma5638 ve https://www.goc.gov.tr/uluslararasi-koruma-istatistikler. According to UNHCR report titled "Global Forced Displacement Trends in 2019" Turkey is the country hosting the highest number of refugees in the world. Please see: https://www.unhcr.org/globaltrends2019/

Readmission Agreement or EU-Turkey Statement of March 2016 which foresee returns to Turkey, make many of those with IP needs prone to be returned to Turkey. Thus, how the regimes of IP and removal are operated in Turkey, is critically important for protection of many persons in need of IP and for contributing to international and regional protection in this field.

2. Judicial review in connection with non-specification of country of removal by administration

Judicial appeal of removal orders are, among other reasons, dominantly based on the claim that the applicant falls within the scope of exemption from removal as indicated in Article 55 of LFIP. According to this provision, removal is not possible if the person will be subjected to death penalty, torture, inhuman or degrading treatment or punishment in the country of removal as well as if he/she is undergoing treatment for a life threatening health condition and would not be able to receive treatment in the country of removal. Article 55 is a natural reflection of international human rights obligations and as indicated in its second paragraph, assessment within this scope has to be made on a case by case basis. Evaluation as to whether Article 55 is compromised, inherently includes assessment of the conditions in country of removal.

Removal orders issued by Turkish authorities typically omit specification of a country of removal. This is different from the prevailing practice in EU states. Looking at comparative national practices, a 2017 study conducted by the European Migration

Network ("EMN")[454] explores the practices of the participating EU states on specification of country of removal in the removal order. Except for Belgium, Czech Republic, Ireland, Latvia, the Netherlands and Slovenia, the majority of the countries[455] determine the country of removal in the removal order. This makes it possible for the courts to assess the legality of removal vis-à-vis possible human rights violations that the individuals might face.

The issue of non-specification of country of removal was dealt with by the ECtHR in one case against Bulgaria. The case concerned an Afghan national and his family who received refugee status in Bulgaria. Later on the primary applicants'residence permit was withdrawn and a removal order was issued on account of being threat to national security. The removal order did not mention the country of removal in line with the national practice and as this is not against the legal framework.[456] The Court's analysis is important in terms of underlining the necessity of identifying the country to which an applicant will be removed. It should be noted however that, since the Court found that the removal of the applicants would cause a violation of their right to family and private life and ordered that they are not removed, it deemed it unnecessary to evaluate the claims that removal would be against the prohibition of torture and inhuman or degrading treatment.[457] Therefore, the matter of non-specification of country of removal was addressed within the context of right to liberty and security. It was a part of the assessment as to the necessity of detention

[454] European Migration Network, "Ad-Hoc Query on Specification of Destination Country in the Return Decision," 2017.
[455] Consists of; Austria, Croatia, Cyprus, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Louxembourg, Malta, Slovak Republic, Switzerland and the UK.
[456] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraphs 10–12.
[457] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraphs 113–118.

pending removal where the Court typically looks at whether reasonable effort was shown by the government to execute removal, throughout the period of detention. The Court explicitly stated that the legal regime and practice whereby the country to which a foreigner is removed is not specified in the removal order is problematic in terms of legal certainty. It is especially significant that the Court reinstated that requirement of legal certainty is inherent in all provisions of the ECHR. The judgment than goes on to underline that legal certainty must be strictly complied with in respect of deprivation of liberty, for all elements relevant to justification of detention. ECtHR finds that lack of clarity as to country of removal is capable of hampering effective control as to whether the authorities acted diligently in deportation procedures.[458] In the end, non-specification of country of removal, coupled with other circumstances, led to the conclusion that the applicant's detention was not valid for the whole period that he was detained.[459] The same legal reasoning constituted the basis of another ECtHR case again with similar facts and against Bulgaria and issued several months later.[460] In both cases, ECtHR ruled on execution of the judgment and underlined that general measures for execution of the respective judgments should include changes to the legal framework as well as administrative and judicial measures so that the country of removal is always indicated in removal orders and should be subject to judicial review.[461]

[458] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraph 69.
[459] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraph 75.
[460] Auad v. Bulgaria, No. 46390/10 (ECtHR October 11, 2011) paragraph 133.
[461] M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011) paragraph 138; Auad v. Bulgaria, No. 46390/10 (ECtHR October 11, 2011) paragraph 139.

ECtHR addressed the issue of non-specification of country of removal also with respect to Turkey. Before concluding that there is a violation of right to effective remedy provided in Article 13 of ECHR, the Court noted the government's argument which is also often stated in local cases, as it is mentioned below. The case was initiated by applicants from China who claim, in case of removal to country of origin, that there is a possibility of being subject to conduct against prohibition of torture and inhuman or degrading treatment. The government argued that issuance of removal orders does not necessarily mean that the applicants would be removed to China whereas the Court stated that this was still a possibility.[462] ECtHR drew attention to the fact that none of the multiple removal orders specified the country of removal and this ambiguity has worsened the already precarious position of the applicants. The Court more importantly noted that this situation was unacceptable because when the country of removal is not specified, it is not possible to conduct a meaningful judicial review and thus it frustrates the purpose of judicial review. Thus the Court concluded that the applicants were not provided an effective remedy for their claims under prohibition of torture and inhuman or degrading treatment.[463]

Against this background of Turkish administrative practices and comparative context, it is significant how Turkish courts deal with non-specification of the destination country in the removal orders. Non-specification of country of removal in Turkey, makes it impossible for the judges to definitively assess the impacts of a possible removal. In the

[462] A.D. and Others v. Turkey, No. 22681/09 (ECtHR July 22, 2014) paragraph 91.
[463] A.D. and Others v. Turkey, No. 22681/09 (ECtHR July 22, 2014) paragraphs 103–104.

face of general administrative practice, general tendency of Turkish judges in reviewing legality of removal orders, is to conduct Article 55 assessment by assuming that the applicants are to be removed to their country of origin. In a discussion with an administrative court judge in December 2017, it was confirmed that because of non-specification of countries of removal in general, the court evaluates the conditions in country of origin to determine whether removal is against Article 55. Still, the matter is subject to judicial inconsistency as will be explained below. First body of case law is a reflection of good practice in terms of challenging the administrative practice of non-specification of country of removal and upholding legal certainty. Second group of judgments however constitutes examples of when the judges use lack of clarity as a basis for upholding the removal order.

First category of cases encompass legal reasoning of judges based on lack of legal certainty and failure of administration to fulfill its duty to collect information and conduct assessment with respect to exemption from removal. In two cases both initiated by Russian nationals, the Courts interpreted the provisions on removal of foreigners so that in issuing removal orders the administration is required to assess whether the foreigner to be removed falls within the scope of Article 55, and determine the country of removal, which, be it the country of origin or a third country, should be mentioned in removal order. The Courts also referred to Article 52 of the LFIP which states that "foreigners may be removed to their country of origin or a transit country or a third country by virtue of a removal decision". The Court relied on this provision to reinstate an obligation to specify the country of removal in removal orders. The Courts then concluded that the respective

removal orders are unlawful because the administration did not investigate whether the applicants should be exempt from removal as per Article 55 and because the removal orders do not contain any explanation as to where the applicants are to be removed.[464]

In another appeal this time initiated by an Iranian national, the Court agreed with the administration's determination of existence of a ground for removal since the applicant poses a threat to public order due to drug abuse. Despite this, the removal order was found to be unlawful based on lack of proper assessment of bases for exemption from removal. In reaching this finding the Court again relied on lack of Article 55 assessment. The fact that is not explicitly specified whether the applicant would be removed to country of origin, a transit country or a third country, indicated that no assessment was made as to risks that the applicant would face in the country of removal. Therefore, administration did not sufficiently carry out its duty to collect information.[465]

In addition to these cases where the courts annulled the removal order because Article 55 assessment is not carried out, the issue of non-specification of country of removal also came up in cases where the Courts themselves assessed presence of Article 55 reasons. Accordingly, in such judgments the Courts pointed out that the removal order does not state where the applicant from East Turkistan is to be sent so, there is a risk of removal to be sent to country of origin China. The Courts criticized that there is no determination or assessment as to whether the applicant will be sent to China or another safe country.[466]

[464] E. 2018/460, K. 2018/1773 (İstanbul 1. Administrative Court October 25, 2018); E. 2019/219, K. 2019/441 (Eskişehir 1. Administrative Court September 13, 2019).
[465] E. 2018/1135, K. 2018/1456 (Manisa 1. Administrative Court December 31, 2018).
[466] E. 2016/1682, K. 2017/261 (İstanbul 1. Administrative Court February 16, 2017).

Final local court case relates to an IP applicant from Iran who was accepted for resettlement to the USA. A removal order was issued about him based on implicit withdrawal of IP application. In annulling the removal order, the Court's reasoning was that the country of removal is not specified and it should have been assessed whether the country of removal will be the country of resettlement. Court wanted to preserve the applicant's chance for resettlement, upheld his claims concerning IP and found that the removal order issued without making this assessment is unlawful.[467]

Last significant decision is by the CC in an individual application against removal. In its interim measure decision, the CC assessed administration's argument that the applicant might be removed to a third country which is safe and not his/her country of origin. The CC rightly pointed out that, from this statement, it is not possible to conclude definitively that there is no probability of the applicant to be returned to his/her country of origin. In the face of this situation the CC found that there is a risk of serious danger against his/her physical or moral integrity in case of removal to country of origin and issued an interim measure for suspending removal.[468]

Second category of cases concerning non-specification of country of removal in removal orders show an opposite tendency by Courts. In these cases the Courts mostly relied on the uncertainty of country of removal to disregard applicants' claims of risk if returned to country of origin and to uphold the removal order. In the first case, the judgment mentions that the applicant from Pakistan argues, among other things, that

[467] E. 2015/1534, K. 2015/2027 (Adana 1. Administrative Court October 22, 2015).
[468] 2016-220, M.A. (Constitutional Court January 20, 2016) paragraphs 19-21.

removal order is unlawful because the country of removal is not specified but, in its reasoning the Court ignores this argument. The Court does not assesses this matter or the fact that the applicant has a pending IP application and upholds the removal order based on approving the presence of removal grounds and without making an assessment of Article 55 as to claimed risks upon return.[469]

Another version of case law typically relies on non-specification of country of removal to reject arguments concerning unlawfulness of removal orders. In one case initiated by applicants from Syria, the court states that the removal order is not unlawful as it is clear that the applicants cannot be sent back to Syria due to principle of non-refoulement, as if administrative action can never deviate from the law.[470] In another case again the Court accepted presence of reasons associated with Article 55 with respect to country of origin, Uzbekistan. But, the Court ruled that the fact that the applicant cannot be sent Uzbekistan does not render the removal order unlawful because the applicant can be sent to another country.[471] Thus they uphold the legal uncertainty in favour of the administration and deviate from the settled practice of judiciary of assuming the country of removal is the country of origin.

Other cases does not include an assessment as to whether the applicants can be removed to their country of origin. They direcly rely on non-specification of country of removal to set aside any claims as to presence of Article 55 reasons. Samsun

[469] E. 2016/1555, K. 2016/1596 (Edirne Administrative Court December 12, 2016).
[470] E. 2016/1644, K. 2016/1776 (İzmir 1. Administrative Court December 23, 2016).
[471] E. 2017/2832, K. 2018/285 (Hatay Administrative Court March 7, 2018).

Administrative Court opined in two cases, one concerning an Iranian[472] and the other concerning an Iraqi[473] national, that the removal order does not contain any expression as to removal would be made to country of origin and only mentions removal from Turkey. Thus, the Court finds that it is possible for the applicants to be sent to a country other than countries of origin. Similar decisions were rendered by Bursa Administrative Court where it was found that the removal order is not unlawful because it is not limited to removal to country of origin and the applicants may be removed to another country in the case that a country suitable for removal is found.[474] According to another similar reasoning, it is not possible for the removal orders without country of removal to breach Article 55 because removal to a transit or third country is also possible.[475] The same reasoning was also used concerning a Syrian applicant whose removal to country of origin would definitely be problematic.[476]

In other cases the courts took into account the administration's statements or actions. For instance in one case, administration stated to the court that the applicant will not be removed to country of origin but to a third country and if such safe third country cannot be determined the applicant will be allowed to stay with a humanitarian residence permit.

[472] E. 2016/21, K. 2016/37 (Samsun 1. Administrative Court January 27, 2016).
[473] E. 2017/12, K. 2017/283 (Samsun 1. Administrative Court February 15, 2017).
[474] E. 2017/630, K. 2017/1065 (Bursa 1. Administrative Court July 11, 2017); E. 2017/566, K. 2017/1004 (Bursa 1. Administrative Court June 22, 2017); E. 2017/631, K. 2017/1066 (Bursa 1. Administrative Court July 11, 2017); E. 2017/1317, K. 2017/1525 (Bursa 1. Administrative Court October 10, 2017).
[475] E. 2017/944, K. 2018/862 (Isparta Administrative Court June 21, 2018); E. 2017/943, K. 2018/593 (Isparta Administrative Court May 3, 2018); E. 2015/1050, K. 2016/615 (Antalya 1. Administrative Court May 31, 2016); E. 2015/2393, K. 2016/780 (İstanbul 1. Administrative Court March 31, 2016); E. 2016/613, K. 2016/670 (Antalya 1. Administrative Court June 21, 2016); E. 2017/894, K. 2018/264 (Isparta Administrative Court February 27, 2018); E. 2017/893, K. 2018/863 (Isparta Administrative Court February 27, 2018); E. 2016/389, K. 2016/502 (Antalya 1. Administrative Court May 10, 2016).
[476] E. 2016/688, K. 2016/1288 (Antalya 1. Administrative Court December 20, 2018).

The judges were convinced with the statement and upheld the removal order.[477] In another case the Court considered that a Syrian applicant was not being removed directly to the country of origin and a third country for removal was being investigated. The court stated its preference for administrative action by stating that in the case that a suitable country cannot be found, it is obvious that the applicant's stay in Turkey will be allowed.[478]

In another judgment the Court trusts that the administration will act in line with LFIP and upholds the removal order based on this. The applicant from Iraq claims the presence of Article 55 reasons in case of removal to country of origin. The Court accepts that it is possible to carry out removal to country of origin, transit or a third country as per Article 52 and that the administration will decide the matter of country of removal according to principle of non-refoulement enshrined in Article 4 LFIP and 1951 Convention. The court concludes that since the administration did not make a decision in this regard, the subject of appeal is the removal order and not removal to Iraq and thus it is not legally possible for the court to make an assessment as to which country the applicant will be removed.[479] On an equal footing, another judgment provides guidance to the administration concerning applicant's claim of Article 55 for removal to country of origin Pakistan and without assessing this claim, states that it is undisputable that principle of non-refoulement is to be taken into account in the choice of country of removal.[480] Ankara 1. Administrative Court also relied on the fact that the administration has the right to choose the country of removal among country of origin, transit or a third country in accepting that the removal

[477] E. 2017/1950, K. 2018/107 (Gaziantep 1. Administrative Court February 5, 2018).
[478] E. 2017/1856, K. 2017/2053 (Gaziantep 1. Administrative Court December 15, 2017).
[479] E. 2015/453, K. 2015/811 (Sakarya 1. Administrative Court September 14, 2015).
[480] E. 2018/970, K. 2018/1592 (Izmir 1. Administrative Court November 2, 2018).

order does not violate Article 55 in the case of removal to Russia, the applicant's country of origin.[481] Finally, in a case where the Court assessed presence of an internal flight alternative in country of origin, it also relied as a supporting argument on non-specification of country of removal in the removal order.[482]

The main problem with these judgments is that they overlook the fact by upholding removal orders due to possibility of removal to a third country they completely leave them out of judicial scrutiny. As per the relevant provisions of LFIP, only one removal order is issued concerning a foreigner subject to removal and it is then enforced without issuance of another decision on country of removal. Therefore, when the applicants have claims concerning risk of being subjected to the death penalty, torture, inhuman or degrading treatment or punishment in their country of origin or another country they might be sent to, it is only during appeal of the removal order that they can raise these claims. Thus individuals are left without any effective remedy vis-á-vis the risk that the administrative action does not match the desirable scenario of compliance with human rights obligations. Thus in the face of Turkish administrative practice whereby the removal orders do not specify a country of removal, Turkish judges must ask themselves if compliance of a removal order with Article 55 is not judged by a court during its judicial appeal, when would it be judged? Leaving the issue of country of removal completely out of judicial scrutiny efectively means that conditions of exemption from removal are left outside of judiciary.

[481] Decision of Ankara 1. Administrative Court dated 21.6.2016 as quoted in 2016-13290, Aleksei Alekseev (Constitutional Court December 5, 2017) paragraph 20.
[482] E. 2017/2197, K. 2018/132 (Van 1. Administrative Court January 19, 2018).

3. Instances of inconsistency between interim measure and merit decisions of the CC

Individual application to the CC is a legal remedy frequently used by foreigners who are subject to removal orders and who have exhausted other domestic remedies before first instance courts. It is possible for applicants to request interim measures to be issued within individual application process, in line with the practice of the ECtHR. Interim measures have crucial importance in human rights adjudication for cases where protection of key human rights is at stake such as in removal procedures.

ECtHR describes the purpose of interim measures as maintaining the status quo pending the determination of the case by the court and preserving the right without any irreparable damage in cases where the applicant is potentially a victim of a violation of one of the core rights in ECHR. The purpose is to ensure the effecive exercise of the individual application process by preventing damages that violation decision alone cannot prevent.[483] In essence, interim measures preserve the subject matter of the individual's application. [484] Interim measure decision rendered by a judicial organ is of an urgent and temporary nature so that it effectively prevents the decision on the merits of the case from becoming futile and it serves as a guarantee of the rights protected by the legal remedy. [485] Along these lines, European Commission for Democracy through Law of Council of

[483] Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005) paragraph 108; Grori v. Albania, No. 25336/04 (ECtHR July 7, 2009) paragraph 194; Paladi v. Moldova, No. 39806/05 (ECtHR March 10, 2009) paragraph 89.
[484] Langford, "Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights," 520.
[485] Garry, "When Procedure Involves Matters of Life and Death," 404; Şirin, *Türkiye'de Anayasa Şikayeti (Bireysel Başvuru)*, 598.

Europe, which is also known as the Venice Commission, also supports the suspension of procedures, the application of which will cause irreparable damages or rights violations, in the case they are found to be unlawful.[486] Interim measures find wide application beyond the CC and the ECtHR. Inter-American Court of Human Rights, African Commission on Human and People's Rights, Human Rights Committee and Committee Against Torture ("CAT") also implement interim measures within their adjudication process. [487]

Considering the fact that individual application to the CC is the last domestic resort for preventing unlawful removal and the key significance of interim measures, any judicial discrepancy in this legal process should be addressed with utmost caution. In this vein, one legal issue in court decisions concerning removal stands out with respect to consistency between interim measure and merit decisions of the CC in individual applications regarding removal orders.

In fact, no *prima facie* issue of inconsistency arises when the CC rejects an interim measure request and then rejects or finds inadmissible the claim of violation of Article 17 of the Constitution at the merits stage, as these conclusions are logically compatible with

[486] "Study on Individual Access to Constitutional Justice," 42.
[487] De Schutter, "The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights," 20; Ergül, *Anayasa Mahkemesi ve Avrupa İnsan Hakları Mahkemesine Bireysel Başvuru ve Uygulaması*, 115; Piandiong and Others v. Phillipines, No. 869/1999 (Human Rights Committee 2000); Weiss v. Austria, No. 1086/02 (Human Rights Committee 2003); Cecilia Rosana Núñez Chipana v. Venezuela, No. 110/1998 (Committee Against Torture 1998); Ominayak v. Canada, No. 167/1984 (Human Rights Committee 1984); Shin v. South Korea, No. 926/2000 (Human Rights Committee 2000); Lansman III v. Finland, No. 1023/2001 (Human Rights Committee 2001) as referred in Ece Göztepe, İnsan Haklarının Korunmasında Geçici Tedbir - Avrupa İnsan Hakları Mahkemesi, Almanya ve Türkiye Örnekleri (On İki Levha Yayıncılık, 2017) 20; Velasquez Rodriguez v. Honduras, No. 7920 (Inter-American Court of Human Rights 1987); Butios-Rojaz v. Peru, No. 10.458 (Inter-American Court of Human Rights 1997) as referred in Ece Göztepe, İnsan Haklarının Korunmasında Geçici Tedbir - Avrupa İnsan Hakları Mahkemesi, Almanya ve Türkiye Örnekleri (On İki Levha Yayıncılık, 2017) 31.

each other. The same parallelity exists also in the case of decisions granting interim measures against removal orders, followed by decisions of violation of Article 17. As for the decisions of the CC establishing violation of Article 17 that follow an earlier rejection of interim measure request; they do not necessarily demonstrate an inconsistency, since it is plausible for the CC to arrive at a different conclusion at merits stage upon closer scrutiny of increased submissions of the parties, when information and documents available at an earlier stage may not be sufficient to grant interim measure. General practice of the CC supports this line of reasoning. However, the below mentioned seven individual applications concerning removal procedures, where interim measure was granted prior to inadmissibility or rejection decision on merits, deviate from this pattern.

In some cases, the conclusions of the CC at merits stage contradict with its prior assessments in granting interim measures, in a way that begs for clear justification. After accepting interim measure requests, the CC ruled in two cases[488] that there is no violation of Article 17 and, in five other cases[489] that the claims of violation of Article 17 are inadmissible due to being manifestly ill-founded. In all of these cases, except individual application No. 2016-4405, the CC relied on the basis that the complaint of the applicants is not arguable. Facts surrounding these cases are worth reviewing in order to understand

[488] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraph 82; 2016-4405, F.R. (Constitutional Court February 15, 2017) paragraph 87.
[489] 2015-17762, Abdolghafoor Rezaei (Constitutional Court December 6, 2017) paragraph 52; 2016-5687, W. S. (Constitutional Court October 25, 2017) paragraph 47; 2016-5688, A. S. (Constitutional Court October 26, 2017) paragraph 55; 2016-8317, Akmal Yunuskhodjaev (Constitutional Court November 8, 2017) paragraph 66; 2016-9485, Arkan Tareq Ali Ali (Constitutional Court October 26, 2017) paragraph 55.

the inconsistencies triggered by the interim and merit decisions and this will be followed by a legal analysis as to the reasons why these decisions constitute inconsistency.

In the first case,[490] the applicant from Iran was convicted and imprisoned due to membership to the terrorist organization PKK. A removal order was issued for him due to membership to an armed terrorist organization and for being threat to public security. The appeal against this removal order was rejected with the reasoning that the matter falls within the administration's discreation regarding deportation based on criminal conviction. The applicant also made an IP application to UNHCR and no decision was made about it yet at the time of adjudication before the CC. He claims risk of capital punishment or ill-treatment due to membership to a terrorist organization, if returned the country of origin. The CC rejected the applicant's claims at merits stage, despite its initial issuance of interim measure and without any specific explanation as to its change of opinion.

Another case[491] concerned an IP applicant from Afghanistan whose application was considered withdrawn due to neglecting his reporting obligation and this was followed by a deportation order unsuccessfully appealed by the applicant. The applicant claimed before the CC that his country of origin is unsafe due to presence of Taliban and that he would be separated from his wife and five children who are in need of care and who would remain in Turkey. While granting an interim measure for stopping the implementation of the deportation order, the CC referred to the reports of Human Rights

[490] 2016-4405, F.R. (Constitutional Court February 15, 2017) paragraphs 8-28.
[491] 2015-17762, Abdolghafoor Rezaei (Constitutional Court December 6, 2017) paragraphs 8-19.

Watch and UNHCR on Afghanistan and determined that during appeal of the deportation order, the first instance court did not conduct any inquiry or assessment regarding applicant's claims. The CC concluded on the existence of a serious danger against the applicant's life due to Taliban and against his moral existence due to separation from his family for an unforeseeable period. However, in its merits decision, the CC made completely opposite determinations as to danger to applicant's life. The CC underlined that although the applicant generally expressed that Taliban continues its activities in his country, he did not explain how this situation affects him, neither did he present any information as to which region of Afghanistan he is from or he would have to live if returned. The CC also questioned the credibility of the applicant's claims about risk of ill-treatment because of his earlier statements as to economic reasons for leaving his country. Thus, the CC concluded that the claims of the applicant are not defendable so his application is manifestly ill-founded without referring to its convictions in the interim measure decision.

It is worth noting another case where the CC issued an interim measure decision first and then changed its decision at the merits stage without providing any justification about it. After the applicant from Thailand entered Turkey through legal channels, he was issued a removal order due to the intelligence information stating that he committed a non-political crime in his country of origin. The court rejected the appeal of the removal order and a request to extradtite the applicant was received from the country of origin authorities. The applicant stated that he came to Turkey because he was prosecuted, detained and tortured in the country of origin and his relatives were arrested due to being

Muslim. He claimed presence of threat to life and risk of ill-treatment based on religious belief, ethnic origin and political opinions if returned. Despite acceptance of interim measure request, the claims of the applicant were found manifestly ill-founded at merits stage since the CC opined that concrete information and documents were not submitted by the applicant and risk of ill-treatment could not be identified in ECtHR judgments or reports of human rights organizations.[492]

Yet another case concerned a Chinese national who has previously entered Turkey through illegal channels and then entered Turkey with someoneelse's passport. A removal order was issued to him based on being a threat to public security, against which his appeal was rejected by the local court. During his individual application to the CC, the applicant claimed presence of threat to life and risk of torture based on previous torture that he and his relatives suffered due to being a Muslim from East Turkistan. He expressed desire to seek refuge in Turkey due to unstable environment and civil war in the country of origin as well as ethnic, religious and political reasons. The CC found the application inadmissible due to being manifestly ill-founded because the applicant did not submit concrete information and documents regarding his claims and he did not assert risk of ill-treatment and torture earlier before administrative authorities. Also, his return to the country of origin in between his two entries into Turkey created doubt as to the credibility of his claims. Here again the CC actually granted an interim measure first however did not account for its change of opinion at the merits stage.[493]

[492] 2016-5687, W. S. (Constitutional Court October 25, 2017) paragraphs 8-19.
[493] 2016-5688, A. S. (Constitutional Court October 26, 2017) paragraphs 8-26.

Another case relates to an IP applicant who previously entered Turkey through legal channels however was apprehended during attempt of irregular exit. The IP applications he later submitted were considered withdrawn twice because he neglected his reporting obligation. The third IP application was about to be accepted when it was again considered withdrawn for the same reason. Later on, he was apprehended driving an illegal taxi so a removal order was issued about him, which he unsuccessfully challenged before the court. At that stage upon individual application, the CC issued an interim measure decision to stop his deportation. Then however, concerning merits, the CC concluded that the claims of the applicant as to threat to life and risk of ill-treatment based on religious belief in case of return to the country of origin, are manifestly ill-founded. The CC relied on its doubt as to the currency of the risk, lack of information on risk of ill-treatment, inconsistencies in applicant's statements and his lack of due diligence in following up his IP application which creates the impression of a purpose of avoiding deportation. Still the CC did not specify its reasons for departing from its earlier position while issuing an interim measure decision.[494]

One case relates to an Iraqi national who entered Turkey through legal channels, and runs a charity association and a company in Turkey. He had a dispute with his landlord and a criminal investigation was initiated about him based on the crime of threat. The removal order was based on threat to public order, public security, public health for involvement in a criminal incident, operating health clinic without license and using electricity illegally, became final upon rejection of appeal by the court of first instance.

[494] 2016-8317, Akmal Yunuskhodjaev (Constitutional Court May 3, 2016) paragraphs 8-27.

The applicant argued before the CC during his individual application that there is a danger to his life in case of return, due to an ongoing war in the country of origin and everyday killings by DAESH. Although the CC issued an interim measure against the removal order in the beginning, the court then found the applicant's claims inadmissible due to being manifestly-ill founded for not demonstrating personal risk. The crucial point for the purposes of the discussion here is that again the CC did not set forth any reasons for deviating from its initial position.[495]

In the final case,[496] removal order was issued to the applicants when their residence application was rejected following entry to Turkey through legal channels. During the applicants' appeal of the removal order it was revealed that entry ban was imposed which was found lawful by the court due to the suspicion that the applicants might enter conflict zones in Syria. Thus, the appeal of the removal order by the applicants was rejected. The applicants then made an individual application to the CC where they argued that the entry ban lacks concrete basis, that they are under risk due to ongoing conflicts and terrorist activities in Iraq, and where they claimed presence of threat to right to life due to religious differences, and expressed their desire to seek asylum in Turkey. Whereas the CC accepted the interim measure request within the individual application, it rejected the applicant's claims at the merits stage without any justification as to why it deviated from its opinion at the interim measure stage.

[495] 2016-9485, Arkan Tareq Ali Ali (Constitutional Court October 26, 2017) paragraphs 8-24.
[496] 2015-3941, No. A.A. and A.A. (Constitutional Court March 27, 2015) paragraphs 11-27.

The inconsistency between the interim measure and merit decision in expulsion cases was criticized by six of the judges in the dissenting opinion in the merits decision of this individual application No. 2015-3941 in a manner which sheds a light to the matter for all other similar cases cited here.[497] The judges makes a connection between a complaint being arguable or not, and issuance of interim measures. They build on the discussion, at the end of which, the majority of the judges reject the arguability of the complaint of the applicants. Whereas, it should be noted that in the ECHR context, the concept of "arguable complaint" is mainly used in the context of right to effective remedy.[498] Accordingly, the dissenting opinion first states that, as per the CC's established reasoning in individual applications for claims of violation of Article 17 of the Constitution regarding removal orders against foreigners, finding the complaint of the applicant to be arguable indicates that the claims are worth further investigation and raise reasonable doubt, whereas this investigation does not necessarily have to result in a violation decision. In fact, if the applicant's complaint is not arguable, the obligation to carry out further investigation is not triggered at all.[499] The dissenting judges explain that interim measure decision depends on the assessment as to whether there is a real and serious danger towards the life or physical or moral integrity of the applicant in case of implementation of the removal order, based on the information and documents presented by the applicant. Thus, interim measure may be granted only if the claim that the applicant

[497] Dissenting opinion by the judges Zühtü Arslan, Engin Yıldırım, Kadir Özkaya, Rıdvan Güleç, Recai Akyel and Yusuf Şevki Hakyemez at 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraphs 10–15.
[498] "Guide on the Case Law of the European Convention on Human Rights - Immigration," 18.
[499] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraphs 63–64; 2016-4405, F.R. (Constitutional Court February 15, 2017) paragraphs 61–62; 2016-13290, Aleksei Alekseev (Constitutional Court December 5, 2017) paragraph 48.

will risk facing death or ill-treatment, is found real and serious. This requires, before anything else, determining whether the complaint of the applicant is arguable or not and it is not possible to grant interim measure in case of an application that is based on a non-arguable complaint.

It should be accepted that the assessments conducted at the stage of interim measure and at the stage of merits are different in the sense that the CC carries out a more detailed analysis and evaluation in the latter, thus these assessments may yield to different conclusions.[500] As per the established case law of the ECtHR, decisions granting interim measures are of exceptional character limited to cases of imminent risk of irreparable damage[501] and do not affect the outcome of the assessments of admissibility and merits that follow.[502] Along the same lines, the CC emphasized in some decisions that the interim measure request which fulfills the conditions for interim measures, is accepted at that stage without any legal evaluation as to the merits of the application.[503]

Accordingly, in the dissenting opinion of the individual application mentioned above,[504] it is stated that it is possible for the CC to conclude that the claims, which were previously found serious, are in fact not arguable and that the danger is not real and serious, contrary to the earlier conviction of the Court.[505] However, general situation of

[500] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraph 13.
[501] Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005), paragraph 104.
[502] European Court of Human Rights, "Fact Sheet on Interim Measures," 2018, 1.
[503] 2013-9673, Rıda Boudraa (Constitutional Court December 30, 2013) paragraph 28; 2015-4176, D.M. (Constitutional Court March 17, 2015) paragraph 17; 2015-3941, A.A. and A.A. (Constitutional Court March 27, 2015) paragraph 17.
[504] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraphs 14–15.
[505] This happened in one case, where it was accepted that the claims are arguable and not manifestly unfounded, however they were found unreasonable based on inconsistencies in applicant's statements with respect to personal circumstances: 2016-4405, F.R. (Constitutional Court February 15, 2017) paragraph 86.

the country of origin, past experiences of the applicants, the risk being current and personal are taken into account also when deciding on interim measure requests as pointed out by the Court in granting interim measure with respect to that individual application. Thus, in order to arrive at such a different conclusion at merits stage after granting interim measure, it is required for the CC to find out information or documents in the meantime that justify the change of opinion which should be explained in the subsequent decision.[506] Whereas, in all of the seven cases mentioned above,[507] the CC did not provide further justification for having reached different conclusions in interim measure and merits stages.

This necessity of providing the reasons for arriving at a different conclusion at merits stage than the interim measure stage, is supported by the general obligation of providing the reasons that lay at the basis of court decisions, as provided in Article 141 of the Constitution. This provision states that decisions of all courts shall include justification and it is reflected into the rules regarding decision procedures of the CC in Articles 57, 58, 77 and 78 of the Internal Regulation of the CC and Article 50 of the Law No. 6216. Accordingly, contrary to its current practice, the CC should provide the specific reasons for departing from its earlier conviction, in view of the reasons for the interim measure decision, if the conclusion in the end of the individual application process is that, claims of violation of Article 17 are not arguable. Otherwise, the contradicting decisions on

[506] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017) paragraphs 14–15.
[507] 2015-3941, A.A. and A.A. (Constitutional Court March 1, 2017); 2015-17762, Abdolghafoor Rezaei (Constitutional Court December 6, 2017); 2016-5687, W. S. (Constitutional Court October 25, 2017); 2016-5688, A. S. (Constitutional Court October 26, 2017); 2016-8317, Akmal Yunuskhodjaev (Constitutional Court May 3, 2016); 2016-9485, Arkan Tareq Ali Ali (Constitutional Court October 26, 2017).

interim measure and merits in individual applications regarding removal of foreigners, constitute legal inconsistency.

Similar issue of consistency exists also with respect to termination of previously granted interim measures by the CC, without any explanation as to why the serious danger towards the life or physical or moral integrity of the applicant is no longer valid,[508] except for a general reference to new information and documents submitted by DGMM in one of them.[509]

Admittedly, the practices of the ECtHR in cases concerning expulsion procedures do not reflect the suggestion here. Where the ECtHR initially granted interim measures and later on at merits stage ruled that the applicant's removal yields to no violation of the prohibition of torture and inhuman treatment, the Court does not make an explicit explanation as to why it departs from its conviction of danger during interim measure assessment.[510] Exceptionally, in Mamatkulov and Askarov v. Turkey, which is the leading case of the ECtHR ruling on the bindingness of interim measures declared by the Court, in dissenting opinion three of the judges criticized the finding of no violation of prohibition of torture and inhuman treatment. They emphasized that in the face of incompliance of Turkey with the interim measure for suspending the extradition of the

[508] 2016-7458, Yryskul Beishenaliev (Constitutional Court April 20, 2016); 2016-7458, Yryskul Beishenaliev (Constitutional Court March 3, 2017); 2016-13290, Aleksei Alekseev (Constitutional Court July 22, 2016); 2016-13290, Aleksei Alekseev (Constitutional Court March 3, 2017).
[509] 2016-7458, Yryskul Beishenaliev (Constitutional Court March 3, 2017).
[510] Othman (Abu Qatada) v. the United Kingdom, No. 8139/09 (ECtHR January 17, 2012); N. v. the United Kingdom, No. 26565/05 (ECtHR May 27, 2018); Nnyanzi v. the United Kingdom, No. 21878/06 (ECtHR April 8, 2018); F.G. v. Sweden, No. 43611/11 (ECtHR March 23, 2016); R.K. v. Russia, No. 30261/17 (ECtHR October 8, 2019); X v. the Netherlands, No. 14319/17 (ECtHR July 10, 2018); A. v. Switzerland, No. 60342/16 (ECtHR December 19, 2017); Thampibillai v. the Netherlands, No. 61350/00 (ECtHR February 17, 2004); Bensaid v. the United Kingdom, No. 44599/98 (ECtHR February 6, 2001).

applicants, "*the Court should be slow to reject a complaint under Article 3 in the absence of compelling evidence to dispel the fears which formed the basis of the application of Rule 39.*"[511] In any case, lack of stronger support from ECtHR case law does not invalidate the progressive suggestion here, to improve the human rights case law and reinforce legal security in Turkey.

IV. Problematic Issues in Turkish Judicial Practices regarding Administrative Detention Procedures

1. Jurisdiction of criminal judges with respect to lawfulness of administrative detention

First problematic issue concerning judicial review of administrative detention procedures that will be handled in this section is designation of criminal judges of peace as the branch of judiciary with jurisdiction to examine the lawfulness of administrative detention practices as per Article 57(6) of LFIP. Accordingly, the decisions of the criminal judge of peace is final without the possibility for further appeal.[512] Multiple applications by the same applicant are allowed considering the possibility of changes in administrative detention grounds and conditions.

---

[511] Paragraph 8 in Joint Partly Dissenting Opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan in Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005).

[512] For problematization of this, please see Nimet Özbek, "AİHM Kararları Işığında YUKK'nda İdari Gözetimin Uygulandığı Mekanlar Hakkında Ortak Sorunlar," *Türkiye Barolar Birliği Dergisi* 118 (2015): 47; Esra S. Kaytaz, "At the Border of 'Fortress Europe': Immigraion Detention in Turkey," in *Immigration Detention: The Migration of a Policy and Its Human Impact*, ed. Amy Nethery and Stephanie Jessica Silverman (London ; New York: Routledge, Taylor & Francis Group, 2015), 66.

It is remarkable that, all actions, other than administrative detention decisions, taken within the scope of LFIP, be it concerning IP procedures, removal or other issues such as residence permits, work permits or entry bans concerning entry and stay of foreigners, are subject to the judicial scrutiny of administrative courts. This is only reasonable considering that all of these actions are performed in the form of administrative decisions or actions taken by public authorities.

It is possible to interpret this as a logical extension in judiciary, of a greater institutional reform triggered by LFIP. The aim of such reform is attributing a civil character to management of asylum and migration in Turkey in an effort to prevent criminalization of migration. This is also expressed in Turkish Grand National Assembly's Internal Affairs Commission Report on the Draft Law on Foreigners and International Protection.[513] In the explanations made on behalf of the government, need for an institution with expertise in the field of migration and asylum is expressed with reference to institutional authorities in EU member states, which are organized as *civil units [emphasis added]* within ministries of interior. Also, it was expressed that in the Draft LFIP, a *civil organization [emphasis added]* was undertaken within the Ministry of Interior to clarify the limits of scope of responsibility and duty instead of the current practice of shared responsibility and duty among various ministries.

Another projection of this reform is for instance, dissolution of Foreigners Police Department within the Provincial Directorates of Security and transferring the duties of

[513] Turkish Grand National Assembly, "Internal Affairs Commission Report of the Draft Law on Foreigners and International Protection (Yabancılar ve Uluslararası Koruma Kanunu Tasarısı TBMM İçişleri Komisyonu Alt Komisyon Raporu)," 1/619, June 18, 2012, 83, 85.

the police in this field to the newly established Directorate for Migration Management that is linked to the Ministry of Interior and is not a law enforcement unit as such. This institutional reform is celebrated,[514] among other reasons, because traditionally, the purpose of existence of the police force is to fight and prevent crime and it is equipped with an institutional perspective serving this purpose. It is only expected that the line between breach of criminal laws and laws on entry and stay in the country to get blurred from the perspective of the law enforcement and that their perception of the law breaching foreigners to bear traces of criminality as it is the focus of their main duty. Instead of such overlap with law enforcement duty and criminal law, functions related to management of migration and asylum are in entirety shifted to a purely administrative realm governed by administrative law.

In view of this outset, subjecting administrative detention to judicial scrutiny of criminal judges of peace bear similar disadvantages. On one hand, choice of courts authorized to hear complaints on administrative detention does make sense because criminal judges of peace also assess the lawfulness of deprivation of liberty in criminal instances in the form of arrest and detention. However, just like the police, the judges of criminal courts are exposed to issues related to criminals and suspects which may naturally

[514] Seçil Paçacı Elitok, "Turkey's Prospective EU Membership from a Migration Perspective: Two Steps Forward, One Step Back?," *Perceptions Journal of International Affairs* XVIII, no. 3 (Autumn 2013): 8; Lami Bertan Tokuzlu, "Yabancılar ve Uluslararası Koruma Kanun'nun Yasal Belirlilik İlkesi Konusunda Türk Uygulamasına Katkısı Üzerine Bir Değerlendirme," *Uyuşmazlık Mahkemesi Dergisi*, no. 7 (2016): 1096; Ahmet İçduygu and Damla B. Aksel, "Turkish Migration Policies: A Critical Historical Retrospective," *Perceptions Journal of International Affairs* XVIII, no. 3 (Autumn 2013): 182; Cavidan Soykan, "The New Draft Law On Foreigners And International Protection in Turkey," *Oxford Monitor of Forced Migration* 2, no. 2 (2012): 40–41; Meral Açıkgöz and Hakkı Onur Arıner, "Turkey's New Law On Foreigners And International Protection: An Introduction" (Turkish Migration Studies Group at Oxford, 2014), 7; Elif Sarı and Cemile Gizem Dinçer, "Toward a New Asylum Regime in Turkey?," *Movements Journal for Critical Migration and Border Studies* 3, no. 2 (2017): 71–72.

influence their approach to the assessments of necessity, arbitrariness and proportionality in case of administrative detention within IP and removal procedures. Administrative detention is an administrative measure implemented in a different context, serving completely different purposes and surrounded by different safeguards than criminal arrest and detention. Interpretation of similar concepts referred in both detention regimes such as risk of absconding and threat to public order and security in the same way as in criminal law context is not compatible with migration and asylum context. Also, existence of a justified ground for criminal arrest and detention is presumed in case of existence of a certain degree of suspicion with respect to the underlying crime and no separate ground is sought for imposition of the measure of deprivation of liberty. Whereas, such connection is not applicable in case of administrative detention and underlying purpose of removal. Initiation of removal or IP procedures, as the case may be, is a prerequisite of administrative detention, however, grounds for administrative detention must be present additionally which do not necessarily overlap. Moreover, criminal arrest and detention is at times implemented taking into account the social impact of the crime and safety of the suspect or other persons, whereas there cannot be such concerns in an instance related to IP or removal of a foreigner. There are also other differences between criminal arrest and detention and administrative detention such as deductibility of the period of criminal arrest from the final imprisonment sentence and issuance of detention decisions by judiciary in case of criminal arrest or detention and by administration in case of administrative detention, which affect the significance of judicial complaint mechanism.

These particular differences rather arise from the fact that criminal and administrative detention are part of different legal regimes. Administrative detention is a measure that is part of the wider legal regime on mobility of aliens across and within the borders of the country. The only measure that criminal judges deal with, within this legal regime is administrative detention, which means they may not be so much familiar with the principles and administrative procedures related to foreigners. The two types of administrative detention appear as ancillary measures complementing removal and IP procedures as evidenced by their legislative formulation within sections concerning these procedures separately. Thus, although both being measures of deprivation of liberty, as illustrated, criminal and administrative detention bear great differences in terms of basis, purpose and implementation but most importantly in terms of legal characterization of persons subject to the measure of deprivation of liberty.

Due to their position of engagement with legal concepts of criminal law, criminal judges naturally have a criminal law mindset. Thus, the disconnection between criminal and administrative detention measures puts criminal judges in a disadvantaged position when deciding on the lawfulness of administrative detention in compliance with the general principles applicable in the framework of LFIP. The inclination of criminal judges to think within the frame of criminal law in their approach to administrative detention is revealed in instances of references to criminal law concepts. Some decisions on administrative detention refer to the "crimes" of threatening public order and security[515]or

[515] 2014/3131 D. İş (İstanbul 1. Criminal Judge of Peace December 30, 2014).

of being subjected to restriction code[516] which is essentially an administrative measure imposed by law enforcement or migration authorities with respect to foreigners in relation to the judicial and administrative actions taken in their respect or their legal statuses. Similarly, in one judgment, unlawfulness of administrative detention was based on the reasoning that there is no concrete evidence that the applicant poses a threat to public order, public security or public health in consideration of assumption of innocence due to lack of criminal proceedings regarding the applicant.[517]

Other disadvantages of having an exceptional rule concerning jurisdiction with respect to examination of complaints against acts and actions within LFIP, include impracticality and delay in compensation of damages for unlawful administrative detention. As set forth in Section IV. 4. of this Chapter, whereas criminal judges of peace have jurisdiction for examination of lawfulness of administrative detention, in line with the current case law of the CC, the administrative courts are to decide on compensation for unlawful administrative detention. This results in the requirement of issuance of two consecutive lawsuits, which would clearly last longer than one, and before separate judicial organs, which are subject to different procedural rules and deadlines. This clearly exacerbates the burden on foreigners who have been unlawfully detained and it is also against the principle of procedural economy in adjudication. As revealed in several court decisions, in

[516] 2015/5213 D. İş (İstanbul 2. Criminal Judge of Peace November 18, 2015).
[517] 2017/833 D. İş (İzmir 2. Criminal Judge of Peace February 13, 2017).

European countries such as the United Kingdom,[518] the Netherlands[519] and Poland,[520] the preference of the lawmaker has been to subject the lawfulness of administrative detention and the amount of compensation to be granted in case of unlawful detention, to the jurisdiction of the same court. Considering that the two legal issues are linked so closely, it does in fact make sense to decide on both jointly at the same time, rather than having to go through another judicial procedure.

Separation in jurisdiction also causes inconsistency in judicial practices concerning administrative detention and removal procedures. Some of the removal grounds outlined in Article 54(1) of LFIP and administrative detention grounds listed in Article 57(2) of LFIP overlap. These consist of posing a threat to public order, public security and public health, submitting untrue information and false documents, and breaching the terms and conditions for legal entry into or exit from Turkey. The administrative implementation, which is to be guided by judicial interpretation of these grounds, should be carried out uniformly as they belong to the same body of law. Of course, this does not mean whoever is subject to a removal order based on these grounds should be taken under administrative detention, but the difference between consideration of these concepts for removal or

[518] "UK - Court of Appeal, 19 December 2007, HK (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ 1357 | European Database of Asylum Law," accessed May 13, 2019, https://www.asylumlawdatabase.eu/en/case-law/uk-court-appeal-19-december-2007-hk-turkey-v-secretary-state-home-department-2007-ewca-civ#content.
[519] "Netherlands – Court of The Hague, 24 November 2015, AWB 15/19968 | European Database of Asylum Law," accessed May 13, 2019, https://www.asylumlawdatabase.eu/en/case-law/netherlands-%E2%80%93-court-hague-24-november-2015-awb-1519968#content.
[520] "Poland - Judgement of the Court of Appeal in Warsaw from 22 June 2016 II Aka 59/16 Amending the Judgement of the Court of I Instance by Increasing the Amount of Compensation for Unlawful Detention | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/poland-judgement-court-appeal-warsaw-22-june-2016-ii-aka-5916-amending-judgement-court-i#content.

administrative detention is of degree and not of nature. This issue is covered in more detail with respect to the ground of posing a threat to public order, public security and public health in Section III. 1. a. of this Chapter. For the purpose of the argumentation here, it suffices to say that implementation of removal and administrative detention grounds must be consistent, especially with respect to the same person. This is more difficult to achieve by subjecting these two type of administrative decisions to the jurisdiction of separate judicial branches.

Final legal issue in relation to the procedure of examination of complaints against administrative detention decisions is lack of possibility of appeal of the rulings of criminal judges of peace as per Article 57(6) of LFIP. In fact, this issue is not special to judicial review of administrative detention. It is also valid for other judicial decisions issued by administrative courts concerning complaints against removal orders, decisions of inadmissibility of IP applications and decisions on IP applications within accelerated procedures as per Article 53(3) and Article 80(1)(d) of LFIP. In interpretation of right to effective remedy as provided in Article 13 of ECHR, ECtHR does not bring any conditions specifically as to number of level of legal remedies that should be provided in domestic law and evaluates whether aggregate of remedies available in national law satisfies the conditions of effectiveness.[521] CJEU evaluated this matter with respect to Return Directive and spelled out that the Directive does not oblige domestic laws to provide two levels of

[521] Gebremedhin [Gaberamadhien] v. France, No. 25389/05 (ECtHR July 26, 2007) paragraph 53; De Souza Ribeiro v. France, No. 22689/07 (ECtHR December 13, 2012) paragraph 79; Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000) paragraph 48; M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011) paragraph 289.

jurisdiction and that "*principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.*"[522]

Nevertheless, in the context of the Turkish legal system it is not a matter of whether effective judicial protection is maintained on individual basis for applicants but it is a matter of systemic effectiveness. Decisions of local courts in Turkey are not easily accessible. As a matter of fact, this was one of the significant challenges in data collection for this research, as it was not possible to reach sample case law through a central database or institution but only through individual lawyers and courts who thankfully agreed to cooperate. This challenge of accessibility of case law is experienced by lawyers and courts alike, as they expressed during my contacts with them. Although, it is generally overlooked as an ordinary reality of the ground, this has huge implications for legal issues attached to acts and actions of administration that are not subject to judicial review further than local courts.

First of all, diverse interpretations by different courts of legal concepts and factual conditions yield to contradictory outcomes, in the absence of a higher court contributing to oversight and harmonization of the case law. The importance of development of consistent case law is magnified even more, considering the gravity of fundamental rights at stake in the context of IP, removal and administrative detention procedures as well as, the fact that the legal and institutional framework surrounding these issues is still very young in Turkey.

[522] Brahim Samba Diouf, No. C-69/10 (CJEU July 28, 2011) paragraph 69.

Secondly, difficulties in accessing sample judgments make it harder for the jurists and institutions working in the field to get a grasp of the judicial tendencies at macro level or to support or adjust their position with respect to legal issues within judicial procedures or elsewhere. Although it is possible to lodge consecutive complaints in the case of administrative detention, subsequent complaints are also reviewed by the same judge depriving the applicant from the benefit of a fresh assessment of circumstances. More often than not, this may render it difficult to make the changes in the conditions visible to the judge who already formed an opinion about administrative detention of that certain applicant.

In parallel with the opinions of ECtHR and CJEU, lack of availability of further judicial review does not necessarily render judicial protection ineffective. However, as a whole, it cannot be denied that availability of further judicial review would nevertheless contribute to increased quality of judicial practices. Transparency and accessibility of case law as well as consistency and harmonization of implementation of the legal framework across the country would improve and risk of judicial discrepancy on individual basis of applicants would decrease.

2. Implementation of risk of absconding as a ground for administrative detention for removal purposes[523]

Drawing on the general framework outlined by the Return Directive, risk of absconding is among the most common grounds for administrative detention within removal procedures that are included in domestic laws of EU member states. Other grounds include avoiding or hampering the removal process, purpose of executing the return decision of effecting removal, non-compliance with the timeline of the return decision including not using voluntary return option, grounds related to obtaining the necessary travel documents to return, having fraudulent application for stay or a residence permit, intention to leave the state and enter another state without a lawful authority.[524] This resonates with Turkish legislation and practice. LFIP is brought a new legal framework for administrative detention which also encompasses safeguards in line with the ECHR.[525] Accordingly, Article 57(2) of LFIP mentions risk of absconding as one of the grounds for administrative detention for removal purposes or alternative measures to administrative detention, in addition to breaching rules of entry into and exit from Turkey, using false or fabricated documents, not leaving Turkey after the expiry of the granted period without an acceptable excuse, and posing a threat to public order, public security or public health.

[523] This sub-section is based on Gamze Ovacık, "Turkish Judiciary's Interpretation of 'Risk of Absconding' as a Ground for Detention for the Purpose of Removal," *Nijmegen Migration Law Working Papers* 2020/02 (2020).
[524] European Migration Network, "The Use of Detention and Alternatives to Detention in the Context of Immigration Policies," EMN Synthesis Report, 2014, 18.
[525] Kaytaz, "At the Border of 'Fortress Europe': Immigraion Detention in Turkey," 60.

Return Directive, further provides that it is not sufficient for EU member states to merely include risk of absconding among reasons for detention in their legislation and it should further be based on objective criteria defined by law. Turkish law however, does not specify any further criteria for identification of risk of absconding and it is left, first to administrative, and ultimately to judicial practice to shape the indicators of risk of absconding. Thus, resort should be made to the decisions of criminal judges of peace who frequently interpret what type of situations constitute risk of absconding, upon appeal of administrative detention decisions by detainees.

As observed in Turkish judicial complaints, risk of absconding is used very often, on its own or together with other grounds, in administrative detention decisions. Although the other grounds for administrative detention provided in Turkish normative framework, are quite straight forward, the ground of risk to public order, public security or public health, as addressed in Section III. 1. A. of this Chapter, and risk of absconding, require further clarification as to what they entail in concrete situations. In this respect, national and supra-national practices in the European context prove useful as a tool of guidance for assessing Turkish judicial practices.

At supra-national level, CJEU's *Al-Chodor* judgment[526] shed a light on how the condition of "being based on objective criteria" in the EU law should be implemented at national level. CJEU was essentially confronted with the question of whether detention for risk of absconding as per Czech law, being based on settled administrative practice and case law, is in compliance with EU law. The Court concluded that the objective

[526] Al Chodor, No. C-528/15 (CJEU March 15, 2017) paragraphs 44-47.

criteria defined by law entailed a requirement of setting forth such criteria in binding provisions of general application.[527] The underlying logic is that the safeguards inherent in Charter of Fundamental Rights of the EU and ECHR concerning deprivation of liberty, applies by analogy in determining risk of absconding as basis of detention. Thus, only a binding provision of general application would meet the requirements of being precise, foreseeable and sufficiently accessible.[528] In a French case where failure to present proof of residence or resources resulted in administrative detention of the applicant based on risk of absconding, the Court followed *Al-Chodor* judgment and concluded that such criteria are not applicable due to absence of a binding provision with general application in this regard.[529] Absence of objective criteria in the reasoning of detention decision as to risk of absconding also led to a court decision establishing unlawfulness of detention as seen in a case from Greece concerning administrative detention of a national of Syria pending readmission by Turkey.[530]

Further to the reference to "objective criteria" in its detention provision, Recital 6 of the Return Directive also states that the decisions taken within its scope, one type of which is administrative detention decisions, should be taken on a case-by-case basis and based on objective criteria and consideration beyond the mere fact of illegal stay is required for this purpose. Thus, it should follow that illegal stay or entry on their own does not qualify

[527] Platform for International Cooperation on Undocumented Migrants, "Defending Migrants' Rights in the Context of Detention and Deportation Synthesis Report," 2017, 13–14.
[528] Al Chodor, No. C-528/15 (CJEU March 15, 2017) paragraph 43.
[529] "France - Court of Cassation, Decision No. 1130 FS-P+B+R+I, 27 September 2017 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/france-court-cassation-decision-no-1130-fs-pbri-27-september-2017#content.
[530] "Hellenic Republic - Administrative Court of First Instance of Mytilene, 30 October 2017, AP219/2017 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/hellenic-republic-administrative-court-first-instance-mytilene-30-october-2017-ap2192017#content.

as objective criteria to establish risk of absconding.[531] Accordingly, as observed in court decisions, some of these indicators, provided above, are implemented cumulatively. This means, presence of only one of these reasons may not be sufficient for imposing administrative detention and the courts conduct individual assessment to take into account other additional individual factors to justify existence of risk of absconding.[532]

It should be mentioned here that, EU Commission proposal COM/2018/634 dated 12 September 2018 for a recast of the directive on common standards and procedures in Member States for returning illegally staying third-country nationals ("EU Commission Proposal for a recast Return Directive") making substantial changes to the rules on administrative detention, is pending before the European Parliament at the time of writing. One of the most widely discussed provisions of the proposal reflects the effort to clarify the objective criteria for risk of absconding, along similar lines with indicators mentioned above. It is suggested in Article 6 of the EU Commission Proposal for a recast Return Directive that such criteria to be provided in national laws of EU member states should include at least the following:

> *"(a) lack of documentation proving the identity; (b) lack of residence, fixed abode or reliable address; (c) lack of financial resources; (d) illegal entry into the territory of the Member States; (e) unauthorised movement to the territory of another Member State; (f) explicit expression of intent of non-compliance with return-related measures*

[531] Philippe De Bruycker, Géraldine Renaudiere, and Madalina Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)" (Florence: European University Institute, 2016), 19–20.
[532] European Migration Network, "The Use of Detention and Alternatives to Detention in the Context of Immigration Policies," 18–19.

applied by virtue of this Directive; (g) being subject of a return decision issued by another Member State; (h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure; (i) non-compliance with the requirement to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay; (j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures; (k) existence of conviction for a criminal offence, including for a serious criminal offence in another Member State; (l) ongoing criminal investigations and proceedings; (m) using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by EU or national law; (n) opposing violently or fraudulently the return procedures; (o) not complying with a measure aimed at preventing the risk of absconding; (p) not complying with an existing entry ban."

Whether the proposal for defining objective criteria as to risk of absconding shall be adopted at EU level remains to be seen. However, as the situation stands at the time of writing, it is left to domestic practice to determine the objective criteria indicating risk of absconding.[533] For the purposes of the analysis here, the proposed provision, still have significance for Turkish context, since most of these criteria are frequently seen in Turkish court decisions concerning lawfulness of administrative detention.

[533] Izabella Majcher, "The European Union Returns Directive Does It Prevent Arbitrary Detention," *Oxford Monitor of Forced Migration* 3, no. 2 (n.d.): 25.

At national level, risk of absconding is accepted as a legal ground for detention in most EU member states.[534] This is also confirmed in a comparative study published in 2014, which found risk of absconding to be a ground for administrative detention in the context of removal in 25 EU member states.[535] These are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Greece, Spain, Finland, France, Croatia, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Slovenia, Slovak Republic, Sweden, the United Kingdom and Norway.

Indicators used in national laws of EU member states as to when to accept presence of risk of absconding of the individual, reveal how this concept is implemented at domestic level in Europe. Several comparative research studies brought together these indicators from national practices of Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Spain, France, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Poland, Slovak Republic, Slovenia, and Sweden.[536] They are as follows:

- not applying for a residence permit after illegal entry;
- over-staying period a visa or visa exemption period without applying for a residence permit;

[534] Alice Bloomfield, Evangelia (Lilian) Tsourdi, and Joanna Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 2015, 69.
[535] European Migration Network, "The Use of Detention and Alternatives to Detention in the Context of Immigration Policies," 23.
[536] De Bruycker, Renaudiere, and Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)," 18–19; European Migration Network, "The Use of Detention and Alternatives to Detention in the Context of Immigration Policies," 23; Bloomfield, Tsourdi, and Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 71–72; Madalina Moraru and Géraldine Renaudiere, "European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention," REDIAL Research Report, 2016, 63.

- staying for more than one month after the expiration of a residence permit or of a temporary permission to reside such as the one granted upon submission of a residence permit application, without asking for their renewal;
- previous illegal residence; lack of residence or work permit;
- having no documents at all; not having valid identity or travel documents;
- impossibility to immediately identify the concerned foreigner;
- providing false information on identity;
- providing false information in general;
- denying communication and not signing the minutes of hearing;
- having forged, falsified or used another name for, a residence permit or an identity or travel document;
- using false or misleading information or false or falsified documents when applying for a residence permit (except when this is done within the IP procedure);
- recourse to fraud or other illegal means to obtain the right to stay;
- failing repeatedly to respond to an invitation from the local administration to appear in person and receive notice of the decision on the application for residence or stay;
- having no documents proving accommodation where the person can be easily found;

- having no effective or permanent place of residence; impossibility to find the person at his/her place of residence; showing a lack of cooperation in the return procedures;
- non-compliance with voluntary departure (corresponds to invitation to leave under LFIP Article 56);
- violating the obligations such as reporting imposed with the aim of avoiding the risk of absconding during the voluntary departure period;
- previous absconding; non-compliance with an alternative measure to detention; clear unwillingness to comply with the imposed alternative measure;
- the statements indicating likelihood of absconding;
- previous criminal conviction; previous infringement of the public order;
- violation of an entry ban;
- reasonable possibility of being subject to an entry ban exceeding three years; being returned under a readmission process after leaving the country;
- non-compliance with an entry ban; having been sentenced for a crime;
- expressing unwillingness to return to country of origin;
- lack of family, social or professional bonds;
- high financial expenditure to smugglers to illegally enter the country.

Domestic court decisions inform the implementation of risk of absconding in concrete cases. Before addressing substantial issues, it should be underlined that, level of proof

required by European courts with respect to risk of absconding is important in judicial review of administrative detention as it determines the scope of accepted administrative discretion. Belgian and Bulgarian courts for instance, often require that finding of risk of absconding to be supported with appropriate argumentation and objective serious components or evidence in the administrative file in order to enable confirmation during judicial review that the administration did conduct risk assessment. German courts state that risk of absconding cannot be determined solely based on general assumptions as to the intention to abscond and specific circumstances indicating this intention such as conduct and expressions of the individual should be established.[537] This approach is reflected in certain Turkish court decisions where criminal judges of peace accept the complaint of detainees based on lack of concrete information or documents justifying administrative detention whether specifically based on risk of absconding[538] or not.[539]

As for the merits, Turkish judges resort to certain indicators in substantiating the presence of risk of absconding. Inability to submit a fixed address in Turkey appears as the most common indicator of risk of absconding accepted in Turkish court decisions.[540]

---

[537] De Bruycker, Renaudiere, and Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)," 22–23.
[538] 2018/2898 D. İş (İstanbul 2. Criminal Judge of Peace May 3, 2018).
[539] 2017/3012 D. İş (Kırklareli Criminal Judge of Peace October 3, 2017); 2017/2853 D. İş (Kırklareli Criminal Judge of Peace September 26, 2017); 2017/1943 D. İş (Antalya 2. Criminal Judge of Peace March 30, 2017); 2016/504 D. İş (Kırklareli Criminal Judge of Peace March 14, 2016); 2016/272 D. İş (Edirne 2. Criminal Judge of Peace November 21, 2016); 2014/2338 D. İş (İstanbul 5. Criminal Judge of Peace November 14, 2014); 2014/368 D. İş (İstanbul 29. Criminal Court of Peace July 4, 2014); 2014/215 D. İş (İstanbul 32. Criminal Court of Peace June 11, 2014); 2015/2065 D. İş (İstanbul 7. Criminal Judge of Peace August 7, 2015); 2017/3196 D. İş (Antalya 2. Criminal Judge of Peace May 31, 2017); 2017/3197 D. İş (Antalya 2. Criminal Judge of Peace May 31, 2017); 2017/2013 D. İş (Antalya 2. Criminal Judge of Peace April 4, 2017); 2016/2621 D. İş (Antalya 2. Criminal Judge of Peace August 19, 2016); 2017/975 D. İş (Antalya 2. Criminal Judge of Peace February 23, 2017); 2017/3146 D. İş (Antalya 2. Criminal Judge of Peace May 26, 2017); 2016/2622 D. İş (Antalya 2. Criminal Judge of Peace August 19, 2016).
[540] 2016/3003 D. İş (Kırklareli Criminal Judge of Peace November 10, 2016); 2017/2585 D. İş (Edirne 2. Criminal Judge of Peace June 6, 2017); 2017/2956 D. İş (Edirne 2. Criminal Judge of Peace June 28, 2017);

Other instances accepted as indication of risk of absconding by the judge include being sentenced to ten years of imprisonment for membership to terrorist organization;[541] administrative restriction code imposed by security units and indication of having mobile phones affiliated with conflict zones;[542] cancellation of student status in Turkey;[543] being returned to Turkey through readmission from Greece where attempting illegal exit again was seen as a risk;[544] and committing visa violation for twelve years which was revealed during apprehension for a judicial action where undertaking, for which there is no sanction in case of violation, was not found sufficient on its own to avoid the risk of absconding.[545]

European courts encounter similar cases as well, where they need to rule on presence of risk of absconding and their assessments seem to offer a more nuanced perspective in many comparable situations. Also, the European courts tend to rely on more than one factor affecting the assessment of risk of absconding.

A Slovenian court decision proclaimed that risk of absconding, can often exist, especially in case of single and healthy men, but such observation, on its own, is not sufficient to impose a detention measure. A significant or substantial risk of absconding must always be assessed on the basis of each individual case and circumstances relating to each applicant. The Supreme Court then exemplified the criteria, which are in

2017/4131 D. İş (Edirne 2. Criminal Judge of Peace September 21, 2017); 2017/5321 D. İş (Aydın 2. Criminal Judge of Peace October 18, 2017); 2017/5473 D. İş (Aydın 2. Criminal Judge of Peace October 18, 2017); 2017/4178 D. İş (Edirne 2. Criminal Judge of Peace September 28, 2017).
[541] 2016/2268 D. İş (Aydın 2. Criminal Judge of Peace August 15, 2016).
[542] 2018/333 D. İş (Muğla 2. Criminal Judge of Peace February 21, 2018); 2018/713 D. İş (Muğla 2. Criminal Judge of Peace March 28, 2018); 2018/1081 D. İş (Muğla 2. Criminal Judge of Peace May 18, 2018).
[543] 2017/2962 D. İş (Kilis Criminal Judge of Peace December 21, 2017).
[544] 2017/82 D. İş (Kırklareli Criminal Judge of Peace January 12, 2017).
[545] 2018/3770 D. İş (İstanbul 2. Criminal Judge of Peace June 11, 2018).

compliance with the requirements of EU law as; the foreigner's res judicata conviction for criminal offence; possession of foreign, forged or otherwise modified travel and other documents; the provision of false information or non-cooperation in the procedure.[546] High Administrative Court of Austria listed some of the relevant elements in determining risk of absconding as, previous attempt of absconding, previous breaches of criminal law, conduct of the individual, entry in breach of legal rules (in particular, shortly after removal or despite entry ban), trying to hamper removal.[547]

As to concrete examples, in another Austrian case, risk of absconding was found to be justified as the applicant was not integrated in the country, she was not working, had her income coming from her boyfriend and did not have any family connection. [548] Similarly, in a case from France, the court took into account that the applicant has never appeared before the authorities further to the notifications addressed to her in view to transfer her and her children, so she was considered as absconding. The court emphasized that such behaviour can be regarded as an intentional and systematic abstention from the control of authorities in the aim of hindering the transfer procedure.[549]

[546] "Slovenia - Administrative Court of the Republic of Slovenia, 29 July 2016, Judgment I U 1102/2016 | European Database of Asylum Law," accessed May 23, 2019, https://www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-29-july-2016-judgment-i-u-11022016#content.
[547] With reference to 2007/21/0246 (High Administrative Court [Austria]) in Bloomfield, Tsourdi, and Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 73.
[548] With reference to 01/55/13313/2013-20 (UVS - Independent Administrative Board within Aliens Police of Austria) in Philippe De Bruycker, Sergo Mananashvili, and Géraldine Renaudiere, "Synthesis Report of the Project CONTENTION - The Extent of Judicial Control of Pre-Removal Detention in the EU," 2014, 22.
[549] "France – Council of State, 19 November 2010, Mrs. E. v Minister for the Interior, No 344372 | European Database of Asylum Law," accessed May 24, 2019, https://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-council-state-19-november-2010-mrs-e-v-minister-interior-no-344372#content.

In *Mahdi* case the CJEU ruled on the substance of risk of absconding and refused a conclusion of risk of absconding based on a single factor. The Court stated that not having any valid identity document is not sufficient to accept presence of risk of absconding and cannot be a basis for administrative detention on its own.[550] However, the Court did not rule out the possibility for this factor to be taken into account in deciding on administrative detention.[551]Along similar lines, in a Dutch case, the court rejected the view that lack of sufficient resources of subsistence or failure to leave the country will automatically lead to a more significant risk of absconding.[552] There are also instances where plain statement as to unwillingness for voluntary return is not considered a sufficient indication of risk of absconding, as showcased in a case from Swedish Supreme Migration Court. Also, crossing the border illegally was not found sufficient for imposing detention and Supreme Administrative Court of Slovenia underlined that concrete individual circumstances are needed.[553]

In one example of a case from Slovenia, previous absconding and asylum applications submitted in different states appeared to be in bad faith and thus an indication of risk of absconding by the administration. However, in examining the individual circumstances the court found the applicant's behavior justified as his movement between countries is in

[550] Bashir Mohamed Ali Mahdi, No. C-146/14 PPU (CJEU June 5, 2014) paragraphs 71-74.
[551] Marie-Laure Basilien-Gainche, "Immigration Detention under the Return Directive: The CJEU Shadowed Lights," *European Journal of Migration and Law* 17, no. 1 (2015): 112.
[552] "Netherlands – Court of The Hague, 24 November 2015, AWB 15/19968 | European Database of Asylum Law."
[553] With reference to Supreme Migration Court (Sweden), case no MIG 2008:23 UM1610-08 and Supreme Administrative Court (Slovenia), case no I U 128/2013 in Bloomfield, Tsourdi, and Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 70.

fact a result of compliance with an order to leave the country.[554] On a similar vein, it was stated in a case from Switzerland that it cannot be assumed that risk of absconding automatically results from the fact that the applicant has travelled from a safe third country and there must be concrete indicators on a case-by-case basis as to presence of significant risk of absconding.[555]

As another example, although previous absconding is widely accepted as indication of risk of absconding, it should be considered that such a situation may not necessarily arise from bad faith of the individual but in many cases it is rather a result of lack of adequate reception conditions, administration's failure to address special needs, individuals' insufficient knowledge on procedures and obligations.[556] Such situations are frequently observed with respect to IP applicants in Turkey as reflected in court decisions concerning implicit withdrawal of IP application based on leaving place of residence without permission, as analyzed in Section II. 2. of this Chapter. Such situations then result in such persons to fall out of the IP system and become irregular migrants prone to removal and thus administrative detention.

In accepting the appeals of detainees and establishing the unlawfulness of administrative detention decisions, Turkish criminal judges of peace also rely on many factors as indications of lack of risk of absconding. Constituting the reverse symmetry of

[554] "Slovenia - Administrative Court of the Republic of Slovenia, I U 835/2016, 14 June 2016 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-i-u-8352016-14-june-2016#content.
[555] "Switzerland - Federal Administrative Court, Decision Dated 27 April 2016, D-2484/2016 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/switzerland-federal-administrative-court-decision-dated-27-april-2016-d-24842016#content.
[556] Bloomfield, Tsourdi, and Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 73.

the most commonly used factor in determining the presence of risk of absconding, having a fixed residence address in Turkey[557] is the most consistent ground for ruling out risk of absconding. In similar vein, existence of risk of absconding is rejected in cases where the applicants have permission to stay in Turkey, established life or connections such as work, education, family ties or dependent children in Turkey. The judges also take into account how the applicants are taken under administrative detention, accepting voluntary contact with authorities as indication that there is no risk of absconding.

Court decisions from other states reflect a similar tendency to resort to certain factors as proof of lack of risk of absconding. In a Bulgarian court decision[558] such factors were listed to include duration of the residence of the foreigner in the country, vulnerabilities of persons, ongoing proceedings concerning IP, renewal of residence permit or another procedure granting right to stay, family situation of the individual, and family, cultural and social connections with the host country and country of origin whereas in another,[559] accommodation and subsistence being provided by a Bulgarian national was taken into account. Similar factors from Italian judicial practices include previous record of compliance with immigration rules and measures, keeping contact with the authorities, ability to offer financial guarantee with legitimate source, regular employment,

[557] 2017/446 D. İş (Kırklareli Criminal Judge of Peace February 23, 2017); 2018/1280 D. İş (İstanbul 2. Criminal Judge of Peace February 15, 2018); 2018/3128 D. İş (İstanbul 2. Criminal Judge of Peace May 22, 2018); 2018/3100 D. İş (İstanbul 2. Criminal Judge of Peace May 21, 2018); 2018/3412 D. İş (İstanbul 2. Criminal Judge of Peace May 29, 2018); 2018/3447 D. İş (İstanbul 2. Criminal Judge of Peace May 28, 2018).

[558] With reference to Case No. 13868/2010 in De Bruycker, Renaudiere, and Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)," 21.

[559] With reference to Case No. 1535 of Sofia City Administrative Court in De Bruycker, Renaudiere, and Moraru, 21.

demonstrated integration to society and voluntary departure request.[560] In another example, in the face of applicant's openness in explaining the details of his journey and expressions confirming that he will not resist removal, detention on the ground of risk of absconding because removal is imminent was found unlawful by the Swiss Federal Administrative Court.[561] Also, the person's attitude of obeying return is considered as indicating lack of risk of absconding. According to Swiss Federal Administrative Court, failure of administration to assess individual circumstances and rely merely on a legal provision on indicators of risk of absconding caused detention to be unlawful considering the applicant's statement that he will not resist removal.[562] In another Swiss case, the court accepted the appeal based on the factual circumstances that the applicant expressed that he would not resist return.[563]

In Turkish court decisions similar factors are expressed as follows: The applicant and his wife and children are IP applicants, they have a fixed residence address according to lease contract, applicant's children are students in Saudi School which is a private school in İstanbul;[564] the applicant states that he lives in Turkey with his family on the basis of residence permit and his two children attend school in Turkey;[565] the applicant is married

[560] De Bruycker, Mananashvili, and Renaudiere, "Synthesis Report of the Project CONTENTION - The Extent of Judicial Control of Pre-Removal Detention in the EU," 22.
[561] "Switzerland – Federal Administrative Court, 17th May 2017, D-2925/2016 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/switzerland-%E2%80%93-federal-administrative-court-17th-may-2017-d-29252016#content.
[562] "Switzerland - Federal Administrative Court, Decision Dated 27 April 2016, D-2484/2016 | European Database of Asylum Law."
[563] "Switzerland - Federal Administrative Court, Decision Dated 27 April 2016, D-2484/2016 | European Database of Asylum Law."
[564] 2015/343 D. İş (İstanbul 9. Criminal Judge of Peace March 16, 2015).
[565] 2015/1334 D. İş (Hatay 1. Criminal Judge of Peace May 28, 2015).

and has a fixed residence address;[566] the applicant's wife and five children have residence permit in Turkey;[567] the applicant is held in removal center with her children;[568] the applicant is under temporary protection, married to a Turkish citizen with whom they have a permanent residence and he is a university student in Turkey, administrative authorities have access to his personal identity information and an interim measure was granted by the administrative court against deportation order;[569] the person resides in Turkey with his wife and has a child who attends to school in Turkey, he owns immovable property in Turkey and he was taken under administrative detention not by apprehension but when he went to the Security Directorate himself to extend his residence permit;[570] for an applicant who has an address and a lease contract in İstanbul who was taken under administrative detention during his voluntary visit to authorities for residence permit application, administrative restriction code imposed for voluntary withdrawal of IP application cannot be a reason for administrative detention on its own.[571]

Two cases were related to individuals against whom there were criminal proceedings for membership to a terrorist organization. In both, the judges decided that there is no risk of absconding as; one of the applicants was released with judicial control measure and is married with a child whose residence and education information were also taken into account, [572] and with respect to the other applicant the judge considered that the criminal

[566] 2017/1230 D. İş (Kayseri 2. Criminal Judge of Peace March 13, 2017).
[567] 2017/1714 D. İş (İstanbul 2. Criminal Judge of Peace April 18, 2017).
[568] 2017/1987 D. İş (İstanbul 2. Criminal Judge of Peace April 25, 2017); 2017/3698 D. İş (İstanbul 2. Criminal Judge of Peace August 9, 2017).
[569] 2017/484 D. İş (Rize Criminal Judge of Peace February 23, 2017).
[570] 2015/1758 D. İş (Edirne Criminal Judge of Peace April 28, 2015).
[571] 2018/2898 D. İş 2018/2898 D. İş (İstanbul 2. Criminal Judge of Peace May 3, 2018).
[572] 2016/5499 D. İş (Edirne Criminal Judge of Peace October 18, 2016).

court lifted the judicial control measure previously imposed.[573] Finally, in one instance the judge expressed that the burden of proof with respect to existence of risk of absconding rests with the administrative authority, not with the individual to prove the lack of such risk and cancelled the administrative detention in the face of lack of documents showing risk of absconding.[574] A similar approach is adopted in a UK case where the High Court refused presence of risk of absconding in consideration of the detainee's history, and in particular the 'proper and sensible' arrangements she made for her child's attendance to school. The Court concluded that the reasons for believing that the applicant would not comply with the conditions of release are not strong.[575]

Despite this general trend, there are court decisions contrary to the general judicial practices. One such decision shows insufficient regard to individual circumstances, as the court accepts risk of absconding without stating any reason although applicant states that he is a residence permit holder, his wife is a doctor, he has a bachelor degree in economy and his child is attending school in Turkey, he owns a work place and employs people so contributes to Turkish economy, acquired a vehicle, previously resided in the United Kingdom for eleven years without any problems.[576] The ruling mentioned applicant's statements to court without explaining any reasons outweighing these indications against risk of absconding.

[573] 2016/3599 D. İş (İzmir 2. Criminal Judge of Peace November 15, 2016).
[574] 2017/3661 D. İş (Çanakkale Criminal Judge of Peace November 3, 2017).
[575] "UK - High Court, 18 July 2007, S & Ors v Secretary of State for the Home Department [2007] EWHC 1654 | European Database of Asylum Law," accessed May 24, 2019, https://www.asylumlawdatabase.eu/en/case-law/uk-high-court-18-july-2007-s-ors-v-secretary-state-home-department-2007-ewhc-1654#content.
[576] 2017/1487 D. İş (Aydın 2. Criminal Judge of Peace March 9, 2017); 2017/1489 D. İş (Aydın 2. Criminal Judge of Peace March 9, 2017).

In certain instances, Turkish judges accepted the presence of risk of absconding without sufficient reasoning or indications, such as in a decision where it is assumed that the person poses risk of absconding due to the mere fact that he/she is a foreigner.[577] Similarly, another decision states that persons who are subject to a removal order, always bear risk of absconding in order to ensure that this order is rendered ineffective.[578] These decisions would mean administrative detention for removal purposes may be implemented in all instances as by its definition it is an administrative measure brought for foreigners who are subject to a removal order. In other cases, illegal entry[579] and breach of rules on entry to and exit from the country[580] were found sufficient to establish risk of absconding. Besides being listed as separate administrative detention reasons in Article 57 of LFIP rather than being indicators of risk of absconding, especially their generic application without making any assessment as to individual circumstances of the applicant falls short of constituting judicial good practice. Finally, a decision not mentioning any reasoning for finding risk of absconding regarding an applicant who was convicted based on the crime of being member to terrorist organization[581] and another decision where the implicit withdrawal of IP application due to leaving residence without permission was accepted to indicate risk of absconding do not constitute good practices on judicial implementation of risk of absconding.[582]

[577] 2014/329 (İstanbul 11. Criminal Judge of Peace June 24, 2014).
[578] 2018/2409 D. İş (Hatay 2. Criminal Judge of Peace June 25, 2018).
[579] 2017/2843 D. İş (İstanbul 2. Criminal Judge of Peace June 8, 2017); 2017/3731 D. İş (İstanbul 2. Criminal Judge of Peace August 21, 2017); 2017/3957 D. İş (İstanbul 2. Criminal Judge of Peace September 21, 2017).
[580] 2017/4131 D. İş (Edirne 2. Criminal Judge of Peace September 21, 2017).
[581] 2017/156 D. İş (Aydın 2. Criminal Judge of Peace January 12, 2017).
[582] 2015/251 D. İş (Van 1. Criminal Judge of Peace February 11, 2015).

In the light of comparative judicial practices, these decisions of Turkish criminal judges of peace interpreting risk of absconding beg for criticism. It is highlighted by CJEU that, risk of absconding is to be evaluated through an individual examination of the concerned foreigner's case.[583] It is accepted that a general assumption of risk of absconding based on presence of indicators is at times inaccurate and specific circumstances of the individual must be considered in any case as they may reveal valid excuses with respect to indicators of risk of absconding, such as serious health problems.[584] Similar understanding is confirmed in a UK case. According to this decision, even if presence of risk of absconding is established, detention should not be imposed automatically and administration should do balancing considering other circumstances such as health conditions, prospect of removal within a reasonable timescale or availability of alternatives to detention.[585]

Consequently, there is a general tendency in Turkish judges to accept certain factors as indicators of presence or lack of risk of absconding. The need for further clarification as to what constitutes risk of absconding, is highlighted in the EU framework, with the reference to objective criteria in the Return Directive and a list of such criteria as included in recent EU Commission Proposal for a recast Return Directive. As Turkish legal framework lacks equivalent regulation, it is left to the judges to substantiate the concept,

[583] Sagor, No. C-430/11 (CJEU December 6, 2013) paragraph 41.
[584] De Bruycker, Renaudiere, and Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)," 21; Bashir Mohamed Ali Mahdi paragraph 70.
[585] "United Kingdom - Arf v Secretary of State for the Home Department, 12 January 2017 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/united-kingdom-arf-v-secretary-state-home-department-12-january-2017#content.

which has been an exercise that, more often than not, might yield to inconsistent judicial practices in terms of substance or intensity of judicial review or reasoning.

3. Judicial review of de facto administrative detention[586]

The term "de facto administrative detention" refers to instances where asylum seekers or irregular migrants are held or deprived of their liberty without implementing a legally prescribed administrative detention regime that satisfies the rule of law criteria and usually with a view to their removal or to prevent their entry into the country. Even when the situation of these foreigners is not identified as administrative detention as per the national law, in effect they are subject to detention as their liberty is restricted and thus they should have access to procedural safeguards and legal remedies related to administrative detention. De facto administrative detention is in its essence, a problem of legality rather than necessity, arbitrariness or proportionality. The requirement of legality implies, but is not limited with, compliance with legal framework. It also indicates satisfaction of rule of law criteria in the sense that the standards and procedures related to detention should be accessible, precise and foreseeable. Errors of courts in implementing domestic law or other serious breaches of national law such as prolonged detention despite court decision ordering release have also raised concerns of rule of law in the judgments of the ECtHR.[587]

[586] This sub-section is based on Gamze Ovacık, "A Judicial Review of the De Facto Detention of Foreigners in Turkey," *Border Crossing* 10, no. 2 (2020): 143–53.

[587] Costello, "Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law," *Indiana Journal of Global Legal Studies* 19, no. 1 (2012): 279; Mole and Meredith, *Asylum and the European Convention on Human Rights*, 153; Amuur v. France, No. 19776/92 (ECtHR June 25, 1996) paragraphs 50-53; Riad and Idiab v. Belgium, No. 29787/03 and 29810/03 (ECtHR April 24, 2008) paragraph 75; Dougoz v. Greece, No. 40907/98 (ECtHR March 6, 2001) paragraphs 55-58.

In the wider meaning of the term, first type of de facto administrative detention situations, emerge in cases where legal provisions regulating administrative detention are absent or they fall short of satisfying the conditions related to quality of law. Thus, the deficiencies in the legal framework render detention to be a de facto situation rather than being in accordance with the law. Second, in a stricter sense of the term, de facto administrative detention may also take place when detention regime is sufficiently regulated in domestic law however in concrete situation, the procedural steps outlined in the law are not undertaken such as cases of absence of duly issued decision ordering detention.

Accordingly, administrative detention practices in Turkey before the enactment of LFIP raised serious concerns of legality to the extent of constituting de facto administrative detention in its wider sense.[588] As was repeatedly underlined by the ECtHR, there was no clear legal framework in Turkey regulating procedures related to detention of foreigners. Also, in general practice there was lack of administrative detention decisions duly notified to the foreigners, indicating reasons and legal remedies with respect to detention.[589]

[588] Özbek, "AİHM Kararları Işığında YUKK'nda İdari Gözetimin Uygulandığı Mekanlar Hakkında Ortak Sorunlar," 18.

[589] Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009) paragraphs 128–135; Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014) paragraph 39; Musaev v. Turkey, No. 72754/11 (ECtHR October 21, 2014) paragraph 30; Babajanov v. Turkey, No. 49867/08 (ECtHR May 10, 2016) paragraph 89; Alimov v. Turkey, No. 14344/13 (ECtHR September 6, 2016) paragraph 39; Khaldarov v. Turkey, No. 23619/11 (ECtHR September 5, 2017) paragraph 17; Dbouba v. Turkey, No. 15916/09 (ECtHR July 13, 2010) paragraph 50.

ECtHR holds the view that existence of domestic legal framework is not sufficient and found a violation of the ECHR due to ambiguity and lack of legal certainty.[590] In another case before the ECtHR where there were no legal provisions in national law regulating the procedures for detention, which prompted the Court to conclude that beyond the question of whether the administration followed the domestic legal rules, the conformity of those rules with the purposes of the ECHR is also critical.[591] In another case, the fact that national law was unclear and that detention, which lasted for several days, was not ordered by a person exercising judicial power authorized by law caused unlawfulness of detention.[592] The requirement of quality of law is expressed by CJEU as well in its assessment of objective criteria for risk of absconding.[593] In that sense the two regional courts' legal position overlaps in the sense of highlighting the quality of law expected from national laws. [594] In its merits decisions on individual applications, the CC follows the suite of ECtHR and refers to its decisions concerning Turkey, with respect to the case law on legality of administrative detention practices in Turkey before LFIP entered into force.[595]

[590] Khlaifia and Others v. Italy, No. 16483/12 (ECtHR December 15, 2016) paragraph 106.
[591] Soldatenko v. Ukraine, No. 2440/07 (ECtHR October 23, 2008) paragraph 110-111.
[592] Shamsa v. Poland, No. 45355/99 (ECtHR November 27, 2003) paragraph 58.
[593] Al Chodor, No. C-528/15 (CJEU March 15, 2017) paragraph 38.
[594] Platform for International Cooperation on Undocumented Migrants, "Defending Migrants' Rights in the Context of Detention and Deportation Synthesis Report," 24.
[595] 2014-13044, K.A. (Constitutional Court November 11, 2015) paragraphs 123-125; 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016) paragraphs 127-129; 2013-1649, A.V. and Others (Constitutional Court January 20, 2016) paragraphs 119-121; 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015) paragraph 77; 2014-2841, A.S. (Constitutional Court June 9, 2016) paragraphs 101-107; 2013-8810, T.T. (Constitutional Court February 18, 2016) paragraphs 107-113; 2013-8735, F.K. and Others (Constitutional Court February 17, 2016) paragraphs 114-119.

As is known, with the adoption of LFIP, Turkish legal framework became equipped with adequate provisions that sufficiently address the legal regime of administrative detention so as to satisfy the rule of law criteria. Thus in this era, the deficiencies observed corresponded to de facto administrative detention in its stricter sense, where administration fails to follow the procedure for administrative detention outlined in the law. What constitutes an ongoing legal issue in Turkish administrative detention practices is that, at times, incidents are observed where foreigners are effectively held under administrative detention especially in police stations and parts of airport transit zones identified as inadmissible passenger rooms or migration rooms. This is voiced by practicing lawyers and NGOs active in the field and also became subject to several court decisions analyzed here. As reported from the ground, such de facto administrative detention instances are also problematic because frequently access to lawyer by the individual is hindered as well. This is critical because access to legal assistance is considered to be a requirement for the implemented procedures to be fair.[596] It should be noted that in LFIP Article 57(1) there is a specific time limit of 48 hours for issuance of removal order and administrative detention decision. As per Article 53(2) of the Implementing Regulation this period of 48 hours starts with transfer of the individual to the removal center if there is one in that province with available capacity. In case of lack of such removal center, the period starts with the referral of the documents collected about the individual to the relevant PDMM. The mentioned provision of LFIP requires such transfer or referral to be carried out promptly upon apprehension so that foreigners are not

[596] Katia Bianchini, "Legal Aid for Asylum Seekers: Progress and Challenges in Italy," *Journal of Refugee Studies* 24, no. 2 (2011): 391.

held by the police arbitrarily and without an administrative detention decision. The meaning of the concept of promptness has been elaborated in various legal contexts by domestic courts as well as ECtHR. For instance, in Turkish court decisions concerning sale contracts, it is mentioned that the prompt notification of defects in goods means without spending much time considering the circumstances[597] and in that sense twelve days could be considered in conflict with promptness.[598] Other court decisions underline that, what is to be understood from the term promptness should be assessed based on objective rules of good faith[599] and the use of this concept aims at preventing the negative consequences that would be caused by delay.[600] In the context of deprivation of liberty, the CC navigates the concept of promptness with respect to criminal interrogations and refers to ECtHR case law. The Court explains that although a specific time limit has not been brought for the period of interrogation by the judge, the matter concerns right to liberty and freedom, which requires minimizing the risk of arbitrariness. Accordingly, promptness should be assessed according to the conditions of each case however in any case the essence of the right should not be impaired and the state's obligations of conducting release and bringing before a judge promptly should never be abolished. In the light of this reasoning the CC found deprivation of liberty during and after the conclusion

[597] E. 2017/1633, K. 2017/1013 (Turkish Court of Cassation General Assembly of Civil Chambers May 24, 2017); E. 2014/883, K. 2019/61 (İstanbul 5. Commercial Court January 29, 2019); E. 2014/223, K. 2018/28 (Bakırköy 10. Commercial Court January 16, 2018); E. 2017/376, K. 2018/1022 (Bakırköy 4. Commercial Court November 5, 2018); E. 2017/820, K. 2018/381 (İstanbul 16. Commercial Court April 25, 2018); E. 2017/813, K. 2018/1291 (İstanbul Regional Court 22. Civil Chamber July 16, 2018).
[598] E. 2013/12545, K. 2013/14522 (Turkish Court of Cassation 19. Civil Chamber September 23, 2013).
[599] E. 2017/790, K. 2018/406 (İstanbul Regional Court 12. Civil Chamber April 5, 2018).
[600] E. 2003/4-40, K. 2003/38 (Turkish Court of Cassation General Assembly of Criminal Chambers March 11, 2003).

of interrogation for fourteen hours and for three days and fourteen hours to be unlawful.[601] In similar cases, ECtHR also emphasized that in order not to weaken procedural safeguards and to protect the essence of the right to personal freedom, the time constraint should not be implemented in a flexible manner and in certain cases found violation due to deprivation of liberty without legal basis even for as short as few days or several hours.[602]

Against this background as to problematic practices in Turkey, the principles adopted by ECtHR in de facto administrative situations guides the analysis of Turkish court decisions. ECtHR assesses classifies deprivation of liberty according to the concrete situation on a case-by-case basis and has regard to all circumstances cumulatively such as the type of the measure, its period, effects and how it is applied.[603] In this sense the Court repetitively found that situations where asylum seekers were held in transit zones of airports to constitute detention[604] and to be unlawful.[605] In both cases, ECtHR did not accept the argument of the governments for the lack of deprivation of liberty because the individuals were free to take a flight out of the country and leave. In Amuur v. France, the facts that the individuals were not subject to a clear legal regime without legal remedies

[601] 2014/14061, Hikmet Kopar ve Diğerleri (Constitutional Court April 8, 2015) paragraph 25; 2015/144, Hidayet Karaca (Constitutional Court July 14, 2015) paragraph 16.
[602] Medvedyev and Others v. France, No. 3394/03 (ECtHR March 29, 2010) paragraph 121; Brogan and Others v. the United Kingdom, No. 1209/84; 11234/84; 11266/84; 11386/85 (ECtHR November 29, 1988) paragraph 62; Aquilina v. Malta, No. 25642/94 (ECtHR April 26, 1999) paragraph 48; Dikme v. Turkey, No. 20869/92 (ECtHR July 11, 2000) paragraph 63.
[603] Bloomfield, Tsourdi, and Pétin, "Alternatives to Immigration and Asylum Detention in the EU," 32.
[604] Platform for International Cooperation on Undocumented Migrants, "Defending Migrants' Rights in the Context of Detention and Deportation Synthesis Report," 9; Özbek, "AİHM Kararları Işığında YUKK'nda İdari Gözetimin Uygulandığı Mekanlar Hakkında Ortak Sorunlar," 38.
[605] Amuur v. France, No. 19776/92 (ECtHR June 25, 1996) paragraphs 53-54; Riad and Idiab v. Belgium, No. 29787/03 and 29810/03 (ECtHR April 24, 2008) paragraphs 78-80.

about conditions or duration of detention[606] and that they were unable to access any kind of assistance led the Court to find that there was a violation of the requirement for deprivation of liberty to be in accordance with a procedure prescribed by law. In more recent similar cases as well,[607] ECtHR decided that constraining individuals in an international zone of an airport or a transit zone located on the land border, for lengthy periods without legal basis could constitute deprivation of liberty despite their possibility to leave voluntarily as such option does not rule out the risk of unlawful deprivation of liberty. The Court also did not have regard to the claim of the government that transit zone is not within country territory. The government failed to satisfy the requirement of lawfulness due to lack of preciseness and foreseeability of national law and absence of a duly notified detention decision to individuals.

In some cases Turkish judges emphasized that situations that constitute detention in effect are unlawful. In one case where the applicant was held in Kumkapı Removal Centre, the administration failed to submit to the court, a removal order and administrative detention decision issued with respect to the applicant. The judge emphasized that no one can be deprived of his or her liberty without a duly issued detention decision and ordered the release of the individual.[608] In case of an applicant being held in Sabiha Gökçen airport, the judge ordered release, as there was no administrative detention decision issued despite the expiry of forty-eight hours time limit foreseen in the legislation.[609] In another case, the

[606] Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored," 295.
[607] Z.A. and Others v. Russia, No. 61411/15, 61420/15, 61427/15, 3028/16 (ECtHR March 28, 2017) paragraphs 164-171; Ilias and Ahmed v. Hungary, No. 47287/15 (ECtHR March 14, 2017) paragraphs 219-251.
[608] 2014/3351 D. İş (İstanbul 3. Criminal Judge of Peace January 30, 2015).
[609] 2015/890 D. İş (İstanbul Anadolu 10. Criminal Judge of Peace April 21, 2015).

applicant was held under administrative detention for six months based on a duly issued administrative detention decision however no decision was taken for extension of detention beyond this period. The judge considered this as de facto detention and based its acceptance of the complaint on unlawfulness of the measure.[610]

Despite these good practices, there are also some Turkish court decisions where judges failed to recognize the unlawfulness of de facto administrative detention. For instance, in one case, although the court annulled the administrative detention decision due to lack of extension reasons, it did not address the fact that the extension decision was issued four days after the expiry of the initial administrative detention, as a result of which, the individual was subject to detention without legal basis in the period in between.[611]

In one decision the judge paradoxically rejected the complaint of the applicant claiming that being held under de facto administrative detention is to the favor of the applicant. The Pakistani national came to Turkey without a valid visa and was refused entry at the airport where he submitted an IP application. Upon rejection of his application, he lodged a judicial appeal and he was being held in inadmissible passenger hall of the airport without an administrative detention decision, awaiting the outcome of the appeal. When assessing the lawfulness of deprivation of liberty, the judge wrongfully stated that the applicant would face a removal order if released whereas the applicant was allowed to stay in the country until the IP rejection decision is final upon appeal as per the version of

[610] 2018/2756 D. İş (Edirne 2. Criminal Judge of Peace July 3, 2018).
[611] 2016/2622 D. İş (Antalya 2. Criminal Judge of Peace August 19, 2016).

Article 53(2) of LFIP as was then valid. So his complaint was rejected in order to enable him to avoid removal order as he clearly wanted to stay in Turkey.[612]

In another case with very similar circumstances with the previous one, the complainant was again being held in the inadmissible passenger hall of the airport, pending the outcome of his appeal against inadmissibility of his IP application. Despite ECtHR's consistent case law on detention of foreigners in airports cited above, the Court established a decision very similar to the line of reasoning of the governments in those cases. The complaint was rejected as there was no administrative detention decision and the individual was staying at the airport voluntarily and is free to go back to his country of origin or somewhere else.[613]

It is also observed that judges sometimes reject the complaints where applicants are held in the airport[614] or police station[615] without any administrative decision in that regard. It is worth to note that the incidents at the police station concerned a single Syrian woman in one case[616] and an Afghan family held with their three minor children in the other.[617] As the complaint concerning the Afghan family was on apprehension and detention, rather than administrative detention, it was possible to lodge a further complaint against the first decision of the judge, based on the rules of Criminal Procedure Act ("Ceza Muhakemesi Kanunu") No. 5271 published in the Official Gazette No. 25673 dated 17 December

[612] 2014/2738 D. İş (Bakırköy 3. Criminal Judge of Peace December 10, 2014).
[613] 2015/3510 D. İş (Bakırköy 2. Criminal Judge of Peace June 29, 2015).
[614] 2019/1655 D. İş (İstanbul 2. Criminal Judge of Peace March 11, 2019).
[615] 2017/982 D. İş (İstanbul 2. Criminal Judge of Peace March 13, 2017); 2017/2289 D. İş (İstanbul 1. Criminal Judge of Peace June 7, 2017).
[616] 2017/982 D. İş (İstanbul 2. Criminal Judge of Peace March 13, 2017).
[617] 2017/2289 D. İş (İstanbul 1. Criminal Judge of Peace June 7, 2017).

20014 ("Criminal Procedure Act No. 5271"), which was also rejected.[618] The court decisions state that the complaint is rejected based on procedural reasons for the applicant in the airport and that there is no need to make a decision for the applicants in the police station. In all three cases, the judges assert that the complaint against administrative detention cannot be accepted because there is no administrative detention decision. In the case of the Afghan family, administrative detention decision was later issued for the parents and the whole family was transferred to a removal center. In rejecting the complaint against administrative detention of the whole family, the judge, rather than finding their de facto administrative detention unlawful, asserted that the children were not under administrative detention but were staying with their parents.[619] When encountered with a similar approach of the first instance court stating that the children were free to leave with the permission of parents, the approach adopted by the Czech Supreme Administrative Court is inspiring. The Court took into account the ECHR and the UN Convention on the Rights of the Child and concluded that the minors cannot leave the facility because they have nowhere else to go so the measure constitutes administrative detention and is unlawful.[620]

Another case of de facto deprivation of liberty relates to an applicant who was held in the police station without any detention decision. Court found the measure lawful relying on presence of a criminal investigation file with respect to the applicant.[621]

[618] 2017/3174 D. İş (İstanbul 2. Criminal Judge of Peace June 21, 2017).
[619] 2017/2843 D. İş (İstanbul 2. Criminal Judge of Peace June 8, 2017).
[620] "Czech Republic - Supreme Administrative Court, 17 June 2015, 1 Azs 39/2015 - 56 | European Database of Asylum Law," accessed May 16, 2019, https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-17-june-2015-1-azs-392015-56#content.
[621] 2018/4828 D. İş (İstanbul 12. Criminal Judge of Peace October 4, 2018).

However, detention is not an automatic result of such investigation and a separate detention decision is required in that regard, be it for criminal detention under Criminal Procedure Act No. 5271 or administrative detention under LFIP.

Whereas the lack of an administrative order should be the very basis of unlawfulness of the implemented measure, the judges relied on this administrative discrepancy to refuse conducting a legal review in this regard, limiting their jurisdiction with review of administrative detention decisions. This position of rejecting legal review of de facto detention of foreigners is problematic in terms of fulfilling the right to personal freedom as provided in the Constitution and ECHR, because the applicants do not have any other legal remedy against de facto deprivation of liberty.

Finally, a court decision rejecting the complaint against de facto administrative detention at the airport based on failure of the applicant's lawyer to submit a power of attorney should be mentioned.[622] In fact, the detention situation that is the very subject of the complaint was the cause of this procedural irregularity since the administration did not allow the lawyer's visit. Reportedly, lawyers try to overcome such situations through obtaining interim measure decisions from the CC such as the one, which concerns a Syrian applicant held in İstanbul Atatürk Airport inadmissible passenger hall.[623]

Two individual applications examined by the CC included instances of non-voluntary stays at reception and accommodation centers. Although not referred to as "administrative detention" by the authorities or described as such in the law, their situation in effect

[622] 2017/1045 D. İş (İstanbul 2. Criminal Judge of Peace March 13, 2017).
[623] 2018/32122, Manar Murad (Constitutional Court November 14, 2018).

constituted deprivation of liberty as the individuals were confined to a certain place. In one of them, Hatay 1. Criminal Judge of Peace with its decision dated 11 June 2014, rejected the complaint against administrative detention based on the reason that there is no complaint mechanism foreseen in the law concerning stays in reception and accommodation centers. This reveals a perspective that the non-voluntary stay in a closed facility regardless of its characterization by the administration, was not considered as administrative detention.[624] In the other instance, after termination of the administrative detention decision in his/her regard, the applicant was transferred to the Reception and Accommodation Centre in Adana. Upon complaint, the criminal courts of peace rejected to conduct legal review of the situation based on absence of administrative detention[625] and judge's lack of authority.[626] The applicant was finally released upon third complaint before criminal judge of peace.[627] The CC criticized the first two court decisions as triggering a problem of lawfulness of deprivation of liberty because of lack of legal review based on non-characterization of the measure as administrative detention.[628]

[624] 2014-19436, M.A. (Constitutional Court December 26, 2018) paragraph 21.
[625] 2014/242 D. İş (Yalova 3. Criminal Court of Peace June 18, 2014).
[626] 2014/1675 D. İş (Adana (Closed) Criminal Court of Peace June 27, 2014).
[627] 2014/431 D. İş (Adana 1. Criminal Judge of Peace July 31, 2014).
[628] 2014-15824, I.S. and Others (Constitutional Court September 22, 2016) paragraph 148.

4. Compensation for unlawful detention and effective remedy regarding detention conditions[629]

While not expressly provided in LFIP in the context of administrative detention within removal and IP procedures, right to compensation for unlawful deprivation of liberty is provided in Article 19(9) of Constitution, in line with Article 5(5) of ECHR. Both express that, damages suffered due to treatment contrary to other provisions of the article, shall be compensated by the state. This provision shows how much weight is given to right to personal liberty and security as in the case of ECHR, there are no other provisions that require party states to secure right to compensation in their domestic system for violation of one of the rights protected by the Convention, apart from compensation for wrongful conviction provided in Article 3 of Protocol 7 to the ECHR.[630] According to a comparative study conducted across EU member states, the only country, which does not provide such right to compensation in its legal framework is Czech Republic.[631] However, its practical application remains somewhat limited to France, the United Kingdom, Austria and the Netherlands, among which the last two even provide a fixed daily rate in their legislation, while in the others, it is the judge who decides on the amount.[632]

[629] This sub-section is based on Gamze Ovacık, "Compensation for Unlawful Practices Related to Administrative Detention of Foreigners in Turkey," *Public and Private International Law Bulletin* 41, no. 1 (2021): 41–62.
[630] Mole and Meredith, *Asylum and the European Convention on Human Rights*, 167.
[631] De Bruycker, Renaudiere, and Moraru, "European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)," 46.
[632] De Bruycker, Renaudiere, and Moraru, 47.

The other type of compensation arises from administrative detention practices relates to conditions of detention. In order to trigger right to compensation, severity of administrative detention conditions should reach at least the level of incompatibility with human dignity as expressed in Article 17 of Constitution, which corresponds to degrading treatment in Article 3 of the ECHR. Although there is no separate provision providing for a compensation right for violations of this nature, right to effective remedy as reflected in Article 40 of Constitution and Article 13 of the ECHR requires a legal remedy, capable of awarding compensation for the rights violations arising from such treatment, to be present in domestic legal system.

In determining the amount of compensation, comparative case law points to the need to take into consideration all circumstances of the case and differentiation of compensation amounts should be justified with supportive material. Polish Supreme Court overturned the decision of the Appeal Court in one case where both lawfulness and conditions of detention were evaluated. The reason for Supreme Court's decision was, Appeal Court's lack of consideration of applicant's status as a single mother and possible psychological effects of detention on children rather than only their age.[633] In another Polish case it was expressed by the Appeal Court of Warsaw that the amount of compensation should not be too excessive to result in unjust enrichment but it should not be only symbolic either. All circumstances that may influence the amount of compensation should be taken into account such as living conditions in the country or for

[633] "Poland – Supreme Court, 2 March 2017 r., S.C., Z.C. and F.C., Syg. Akt II KK 358/16 | European Database of Asylum Law," accessed April 9, 2019, https://www.asylumlawdatabase.eu/en/case-law/poland-%E2%80%93-supreme-court-2-march-2017-r-sc-zc-and-fc-syg-akt-ii-kk-35816#content.

that specific case, the level of stress experienced by children for not knowing the language or having to stay with persons other than family members.[634] In an example from the Netherlands, the court took into account the health condition of the applicant in abolishing detention and granting compensation.[635]

In Turkish context, compensation demands concerning administrative practices have been dominantly put forward through individual application procedure before the CC. Accordingly, the CC evaluated demands for compensation concerning lawfulness and conditions of administrative detention practices, which were conducted before[636] and after[637] the enforcement of LFIP. The landmark decision of the CC on the issue of

[634] "Poland - Judgement of the Court of Appeal in Warsaw from 22 June 2016 II Aka 59/16 Amending the Judgement of the Court of I Instance by Increasing the Amount of Compensation for Unlawful Detention | European Database of Asylum Law."
[635] "Netherlands – Court of The Hague, 24 November 2015, AWB 15/19968 | European Database of Asylum Law."
[636] 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016); 2013-1649, A.V. and Others (Constitutional Court January 20, 2016); 2013-8735, F.K. and Others (Constitutional Court February 17, 2016); 2013-8810, T.T. (Constitutional Court February 18, 2016); 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015); 2014-2841, A.S. (Constitutional Court June 9, 2016); 2014-688, İ.U. (Constitutional Court December 19, 2017); 2014-1368, A.S. (Constitutional Court December 19, 2017); 2014-2114, U.U. (Constitutional Court December 19, 2017); 2014-1369, A.B. (Constitutional Court December 20, 2017); 2014-3955, R.A. (Constitutional Court January 10, 2018); 2014-2427, D.D. (Constitutional Court May 9, 2018); 2014-19690, M.S.S. (Constitutional Court December 31, 2014).
[637] 2014-13044, K.A. (Constitutional Court November 11, 2015); 2014-15876, I.I. (Constitutional Court September 21, 2016); 2014-15824, I.S. and Others (Constitutional Court September 22, 2016); 2014-15769, B.T. (Constitutional Court November 30, 2017); 2014-16413, I.M. and Z.M. (Constitutional Court December 20, 2017); 2014-18827, A.A. (Constitutional Court December 20, 2017); 2015-15764, F.A.A. (Constitutional Court April 4, 2018); 2014-19481, G.B. and Others (Constitutional Court January 9, 2015); 2014-16575, K.K. (Constitutional Court June 11, 2018); 2015-6543, G.G. (Constitutional Court June 11, 2018); 2015-7305, M.A. (Constitutional Court June 11, 2018); 2015-1474, Manzura Jumaeva (Constitutional Court June 27, 2018); 2015-9776, F.M. (Constitutional Court June 28, 2018); 2015-8465, K.M. (Constitutional Court September 13, 2018); 2014-6493, M.B. and M.Z. (Constitutional Court December 25, 2018); 2014-16577, K.A. and N.A. (Constitutional Court December 26, 2018); 2014-19436, M.A. (Constitutional Court December 26, 2018); 2017-31040, Z.K. (Constitutional Court January 9, 2019); 2014-17572, A.A. and others (Constitutional Court February 7, 2019); 2015-5371, Gulalek Begnyazova (Constitutional Court February 22, 2017); 2016-26503, Fatma Bakki (Constitutional Court November 23, 2016); 2017-5839, M. I. (Constitutional Court February 9, 2017); 2017-6077, F.R. (Constitutional Court March 6, 2017); 2017-19685, Zamow Muhammed (Constitutional Court Date Unknown); 2017-10453, Y. H. (Constitutional Court July 6, 2017); 2016-27304, H. B. (Constitutional Court December 13, 2016); 2016-5688, A. S. (Constitutional Court October 26, 2017); 2015-4459, Julia Anikeeva (Constitutional Court

receiving compensation for unlawful detention and accessing effective remedies regarding detention conditions is its decision dated 30 November 2017, rendered upon the individual application No. 2014/15769[638]. Before this decision, the CC rendered six decisions on merits[639] upon claims concerning both lawfulness and conditions of administrative detention where the measure was carried out and finalized before the entry into force of the LFIP so there were no legal remedies available in Turkish law for challenging the lawfulness of administrative detention. Whereas, again before the landmark decision, the CC issued ten decisions[640] on administrative detention practices where the applicants were either being held under administrative detention when LFIP entered into force or they were taken under administrative detention after its entry into force. One of these applications contained claims only with respect to conditions of administrative detention,[641] and six of them concerned only lawfulness of administrative detention,[642] whereas three applications[643] covered claims concerning both lawfulness and conditions

March 17, 2015); 2017-23177, P.A. (Constitutional Court April 5, 2018); 2017-38222, F.Y. (Constitutional Court December 26, 2018); 2015-9409, Abdullah Omar (Constitutional Court February 6, 2019).

[638] 2014-15769, B.T. (Constitutional Court November 30, 2017).

[639] 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015); 2013-1649, A.V. and Others (Constitutional Court January 20, 2016); 2013-8735, F.K. and Others (Constitutional Court February 17, 2016); 2013-8810, T.T. (Constitutional Court February 18, 2016); 2014-2841, A.S. (Constitutional Court June 9, 2016); 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016).

[640] 2014-15876, I.I. (Constitutional Court September 21, 2016); 2014-15824, I.S. and Others (Constitutional Court September 22, 2016); 2014-13044, K.A. (Constitutional Court November 11, 2015); 2015-5371, Gulalek Begnyazova (Constitutional Court February 22, 2017); 2016-26503, Fatma Bakki (Constitutional Court November 23, 2016); 2017-5839, M. I. (Constitutional Court February 9, 2017); 2017-19685, Zamow Muhammed (Constitutional Court Date Unknown); 2017-10453, Y. H. (Constitutional Court July 6, 2017); 2016-27304, H. B. (Constitutional Court December 13, 2016); 2016-5688, A. S. (Constitutional Court October 26, 2017).

[641] 2016-5688, A. S. (Constitutional Court October 26, 2017).

[642] 2015-5371, Gulalek Begnyazova (Constitutional Court February 22, 2017); 2016-26503, Fatma Bakki (Constitutional Court November 23, 2016); 2017-5839, M. I. (Constitutional Court February 9, 2017); 2017-19685, Zamow Muhammed (Constitutional Court Date Unknown); 2017-10453, Y. H. (Constitutional Court July 6, 2017); 2016-27304, H. B. (Constitutional Court December 13, 2016).

[643] 2014-13044, K.A. (Constitutional Court November 11, 2015); 2014-15876, I.I. (Constitutional Court September 21, 2016); 2014-15824, I.S. and Others (Constitutional Court September 22, 2016).

of administrative detention. So, it was possible for this second category of applicants, who were subject to LFIP at least after a certain point of their detention, to lodge a complaint against lawfulness of administrative detention before criminal judges of peace.

In the first category of decisions concerning the period before entry into force of LFIP, when assessing lawfulness of detention, the CC referred to Article 5 of the ECHR and Article 19(2) and (8) of Constitution concerning grounds for deprivation of liberty listed exhaustively, as well as, right to judicial complaint against detention that should be capable of resulting in release of the applicant if detention is found unlawful. Based on this, due to lack of clear regulation in the law as to conditions, period, extension, notification and legal remedies with respect to administrative detention as well as access to lawyer and interpreter by the detainee, the administrative detention was found unlawful.[644] It should be noted that in the context of unlawful detention, Article 19(8) comes into play *as lex specialis* with respect to right to effective remedy, which is otherwise guaranteed by Article 40 of Constitution as *lex generalis,* concerning any claims of violation of fundamental rights and liberties set forth in Constitution.[645] The same relation exists between Article 5(4) and Article 13 within the frame of ECHR as emphasized by ECtHR.[646]

[644] 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016) paragraphs 126–138, 150–161; 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015) paragraphs 62–79; 2013-1649, A.V. and Others (Constitutional Court January 20, 2016) paragraphs 118–129, 143–153; 2013-8735, F.K. and Others (Constitutional Court February 17, 2016) paragraphs 111–122, 135–145; 2013-8810, T.T. (Constitutional Court February 18, 2016) paragraphs 104–115, 128–138; 2014-2841, A.S. (Constitutional Court June 9, 2016) paragraphs 100–109, 122–129.
[645] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 69.
[646] Amie and Others v. Bulgaria, No. 58149/08 (ECtHR February 12, 2015) paragraph 63; Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014) paragraph 34; Chahal v. the United Kingdom, No. 22414/93 (ECtHR November 15, 1996) paragraph 126.

In line with the applicants' complaints, in all of these decisions except for one, it is also assessed whether the applicants have been duly and immediately notified as to administrative detention and it was concluded that Article 19 (4) of Constitution was violated.[647] In these five decisions, the Court then proceeded with the claim that right to compensation provided in Article 5(5) of the ECHR and Article 19(9) of Constitution was violated. The CC stated that it is compulsory to establish a mechanism that enables demanding compensation for violations of any other provisions of Article 19 and absence of such mechanism will result in violation of Article 19(9). Arriving at the conclusion that Turkish legal system lacks a special mechanism for compensation of damages arising from unlawful detention, compelled the CC to rule that Article 19(9) has been violated.[648] These decisions of the CC, which assess the legal situation in Turkey before the enactment of LFIP regarding administrative regime, are essentially in line with many violation decisions of the ECtHR against Turkey. The landmark decision of the ECtHR was Abdolkhani and Karimnia v. Turkey[649] and many others[650] then followed the principles and determinations made in this decision.

[647] 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016) paragraphs 138–150; 2013-1649, A.V. and Others (Constitutional Court January 20, 2016) paragraphs 130–142; 2013-8735, F.K. and Others (Constitutional Court February 17, 2016) paragraphs 123–134; 2013-8810, T.T. (Constitutional Court February 18, 2016) paragraphs 116–127; 2014-2841, A.S. (Constitutional Court June 9, 2016) paragraphs 110–121.

[648] 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016) paragraphs 162–170; 2013-1649, A.V. and Others (Constitutional Court January 20, 2016) paragraphs 154–162; 2013-8735, F.K. and Others (Constitutional Court February 17, 2016) paragraphs 146–154; 2013-8810, T.T. (Constitutional Court February 18, 2016) paragraphs 139–147; 2014-2841, A.S. (Constitutional Court June 9, 2016) paragraphs 131–137.

[649] Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009).

[650] To cite several of them; Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014); Musaev v. Turkey, No. 72754/11 (ECtHR October 21, 2014); Moghaddas v. Turkey, No. 46134/08 (ECtHR February 15, 2011); Athary v. Turkey, No. 50372/09 (ECtHR December 11, 2012); Tehrani and Others v. Turkey, No. 32940/08, 41626/08 and 43616/08 (ECtHR April 13, 2010); Dbouba v. Turkey, No. 15916/09 (ECtHR July 13, 2010); Alimov v. Turkey, No. 14344/13 (ECtHR September 6, 2016).

As to the individual applications where the CC conducted assessment of lawfulness of administrative detention cases subject to the legal regime established by LFIP, the first decision was rendered upon the individual application No. 2014/13044.[651] This decision represents the position of the CC that remained unchanged until the decision in the individual application No. 2014/15769. Accordingly, as opposed to the decisions rendered for administrative detention practices carried out before enactment of LFIP, the CC recognized that there are appropriate mechanisms in place within the framework of LFIP to ensure that administrative detention practices fulfill the conditions of lawfulness and non-arbitrariness. However, procedures need to be conducted with due diligence and because of the procedural flaws determined in implementation of administrative detention based on concrete circumstances of the case, it was concluded that Article 19(2), (4) and (8) were violated.[652] Because of this conclusion, the CC granted compensation in favour of the applicant.

In one subsequent case,[653] the CC followed the suite of the decision in the individual application No. 2014/15769 and ruled for compensation in favour of the applicant as it again found violations with respect to paragraphs (2), (4) and (8) of Article 19 of Constitution. As per the claims of applicants, the CC also assessed compliance with Article 19(9) of Constitution, which provides for the possibility to obtain compensation for unlawful deprivation of liberty. In this respect, the CC did not depart from its case law relating to administrative detention practices carried out before LFIP's entry into force

[651] 2014-13044, K.A. (Constitutional Court November 11, 2015).
[652] 2014-13044, K.A. (Constitutional Court November 11, 2015) paragraphs 127–156.
[653] 2014-15824, I.S. and Others (Constitutional Court September 22, 2016) paragraphs 130–185.

and stated that the constitutional provision is violated since, there is no special mechanism in domestic law for compensation of damages arising from unlawful deprivation of liberty.[654] Apart from this case, in other decisions that relate to lawfulness of administrative detention and that were rendered before the decision in the individual application No. 2014/15769, the CC found applications inadmissible due to application after the expiry of the deadline for individual application[655] or struck them out from the list due to withdrawal of individual application.[656]

As to the applicants' claims concerning administrative detention conditions, the CC does not make any distinction in its legal assessment based on whether administrative detention was carried out before the entry into force of LFIP or not. In one case[657] where the applicant was held in Yalova police headquarters, it was found that such claims are inadmissible due to being manifestly ill-founded for having not attained the minimum level of severity to fall within the scope of Article 17.[658] Whereas, in other seven individual applications, the applicants of which were all held in Kumkapı Removal Centre in İstanbul,[659] upon detailed assessment of detention conditions, the Court determined that the conditions were incompatible with human dignity and thus violated Article 17 of

[654] 2014-15824, I.S. and Others (Constitutional Court September 22, 2016) paragraphs 173–178.
[655] 2014-15876, I.I. (Constitutional Court September 21, 2016) paragraph 28; 2015-5371, Gulalek Begnyazova (Constitutional Court February 22, 2017) paragraph 28.
[656] 2016-26503, Fatma Bakki (Constitutional Court November 23, 2016) paragraph19; 2017-5839, M. I. (Constitutional Court February 9, 2017) paragraph 21; 2017-19685, Zamow Muhammed (Constitutional Court Date Unknown) paragraph 18; 2017-10453, Y. H. (Constitutional Court July 6, 2017) paragraph 17; 2016-27304, H. B. (Constitutional Court December 13, 2016) paragraph 20.
[657] 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015) paragraph 64.
[658] Please see Boudraa v. Turkey, No. 1009/16 (ECtHR November 28, 2017) paragraph 36 for conclusions of the ECtHR on the contrary.
[659] Some of the applicants in 2014-13044, K.A. (Constitutional Court November 11, 2015) also complained about the conditions in Adana Reception and Accommodation Centre, Adana and Yalova Removal Centres and several police headquarters that they were held in.

Constitution. In these seven cases, it was also evaluated whether an effective remedy within the meaning of Article 40 of Constitution was provided in Turkish law to the applicants in connection with their claims of violation of Article 17. In finding violation, the Court followed ECtHR's case law, as to what constitutes effective remedy with respect to detention conditions. Accordingly, the CC stressed that preventive remedies which aim improvement in the material conditions of detention and compensatory remedies providing compensation for damages caused by these conditions must complement each other and compensation alone would not satisfy the necessities of an effective remedy.[660]

Upon assessing Turkish law as it was before and after LFIP, the Court concluded by ruling on violation of Article 17 of Constitution with respect to detention conditions and Article 40 of Constitution with respect to right to effective remedy in connection with detention conditions in the seven decisions mentioned in above paragraph, and Article 19 of Constitution with respect to lawfulness of administrative detention and consequently on payment of compensation to the applicants in all of the individual applications. After issuing these eight merits decisions on administrative detention practices and granting compensation in favor of applicants in all of them, with its decision in the individual application No. 2014/15769, the CC radically changed its position. The CC started to respond positively to the questions of whether Turkish legal system provides a legal remedy that allows individuals to receive compensation for unlawful administrative

[660] 2013-8735, F.K. and Others (Constitutional Court February 17, 2016) paragraphs 40–58; 2013-655, F.A. and M.A. (Constitutional Court January 20, 2016) paragraphs 50–68; 2013-1649, A.V. and Others (Constitutional Court January 20, 2016) paragraphs 44–62; 2014-2841, A.S. (Constitutional Court June 9, 2016) paragraphs 35–50; 2013-8810, T.T. (Constitutional Court February 18, 2016) paragraphs 35–53; 2014-15824, I.S. and Others (Constitutional Court September 22, 2016) paragraphs 90–96; 2014-13044, K.A. (Constitutional Court November 11, 2015) paragraphs 66–82.

detention practices that fall within LFIP and whether an effective remedy exists in Turkish law with respect to detrimental detention conditions. According to the line of reasoning that this decision follows, while the administrative courts do not have any authority in reviewing lawfulness of administrative detention, they do have authority to rule on compensation to be paid to the individual in the case that administrative detention is found unlawful by criminal judges of peace. The CC refers to Article 2 of the Administrative Procedure Act No. 2577, which provides that full remedy action may be issued by the persons whose personal rights are damaged directly because of administrative acts and actions.[661]

CC develops its argumentation about this legal remedy in an earlier section of the judgment where it found the claim of violation of the prohibition of treatment incompatible with human dignity provided in Article 17 of Constitution, inadmissible due to non-exhaustion of local remedies. In the relevant section, the CC emphasized firstly that the suspicion as to practical success of a legal remedy which has a reasonable capacity of success in theory, does not justify non-exhaustion of such remedy.[662] The CC stressed the need to review its established case law, against the backdrop of its earlier jurisprudence where lack of any judicial or administrative decisions in this regard, was taken into account for concluding that there is no effective judicial or administrative remedy providing compensation for the sufferings caused by detrimental detention conditions. The reason for departing from this line of reasoning was explained as the fact that the

[661] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraphs 70–71.
[662] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 46.

absence of such decisions providing compensation should not be decisive on its own. In the case that there are available remedies in theory, the fact that they have not been used in practice so far out of lack of information does not justify a conclusion as to ineffectiveness, but rather the existence of negative court decisions refusing such compensation demands for not being covered by the remedy would be required for arriving at such a conclusion.[663] In assessing whether there is a legal remedy available in theory, the CC asserts that administrative detention practices rely on administrative procedures and therefore falls within the scope of full remedy action provided in Article 2 of Administrative Procedure Act No. 2577 which provides for the possibility to demand compensation without making any distinction as to acts and actions of the administration and types of damages arising from them. Reference is also made to Article 125 of Constitution stating that recourse to judicial review shall be available against all actions and acts of administration. The CC also proclaims that administrative courts are in a more advantageous position for legal review concerning administrative detention considering the possibilities such as making onsite examination or obtaining expert reports as compared to the CC conducting legal assessment merely based on review of files.[664]

With respect to compensation concerning unlawfulness of administrative detention, the CC builds on the above conclusions regarding availability of administrative full remedy action for compensation of damages arising from conditions of administrative detention contrary to Article 17 of Constitution. Accordingly, administrative courts may

[663] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraphs 51–52.
[664] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraphs 53–57.

be in a position to provide compensation for unlawful administrative detention in certain cases. The CC clarifies that if the criminal judge of peace rejects the complaint and decides that administrative detention is in line with the law, then administrative full remedy action ceases to be effective for receiving compensation based on the complaint that administrative detention is unlawful, considering that administrative courts may not review lawfulness of detention. The CC confirms that for such compensation demands, it is possible to directly make an individual application to the CC within the designated period after the finalization of the decision of criminal judge of peace.[665] On the other hand, if the criminal judge of peace declared the administrative detention to be unlawful, then it is possible to initiate an administrative full remedy action before the competent administrative court. Contrary to its previous practice, the CC expresses that individual application may not be lodged before exhausting administrative full remedy action.[666] As Administrative Procedure Act No. 2577 refers both to acts and actions of administration, based on this legal criteria, the CC further asserts that it is possible to initiate full remedy action for compensation requests in cases where persons are held under administrative detention without any decision in respect of deprivation of liberty.[667] Thus, based on this reasoning, the CC expects individuals to make use of administrative courts for administrative full remedy action for compensation of damages arising from unlawful administrative detention practices, if relevant criminal judge of peace have already pronounced that administrative detention is unlawful or if the concerned instance of

[665] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 72.
[666] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 73.
[667] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 74.

administrative detention is implemented without an administrative decision in this regard. On the other hand, if complaint against administrative detention is rejected by criminal judge of peace, the CC accepts to review the merits of the individual application based on the claims of unlawfulness and compensation with respect to administrative detention. The CC then declared the individual application admissible since previous complaint to the criminal judge of peace did not result in determination of unlawfulness of administrative detention so the individual may not be expected to exhaust administrative full remedy action.[668]

It should be emphasized that the CC also provided procedural guidance with respect to full action remedies that are likely to be initiated after this decision. Relying the previous case law of the CC, there are many applicants who have lodged individual applications directly with the CC anticipating that their claims as to unlawfulness of administrative detention and detrimental administrative detention conditions would be heard by the Court and whose applications are pending with the CC, bound to be rejected for non-exhaustion of legal remedies if they fall within the above explained scope. In this respect, the CC recognizes that assessing whether the deadline for initiating a full remedy action has expired or not, is within the competence of the administrative court. However, it underlines that such procedural rules should be implemented in a way that would not hamper individual's right to access to legal remedies, signaling an expectation from

[668] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 75.

administrative courts to implement the judicial deadline in a flexible manner for these applications.[669]

It is significant that one of the judges of the CC put forward a deliberative dissenting opinion against this judgment. After thorough elaboration as to the facts of the case, the dissenting judge concludes that the CC should have decided that the applicant's rights were violated because of detrimental detention conditions and lack of effective remedy with respect to these conditions. What is important with respect to right to compensation for unlawful detention is that the judge bases all these conclusions on the opinion that the CC should not have deviated from its previous consistent case law. Considering that it is the state's legal duty to ensure compliance of administrative detention practices with constitutional standards and the case law of ECtHR, the case law should not be altered in a way that justifies the rights violations by directing individual applicants to a judicial remedy, which is not proven to be effective. The judge stresses that in order for a legal remedy to be effective, consistent practice is required, and protection and strengthening of fundamental rights and freedoms should be prioritized rather than relying on expectations focused on presumptive outcomes. The judge also follows suit of the ECtHR case law in criticizing that availability of compensation and not the possibility of improvement of detention conditions, as a result of a full remedy action, sends out the wrong message of justification of inhuman and degrading conditions contrary to Article 17 of Constitution.[670]

[669] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 59.
[670] Dissenting opinion in 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraphs 55–61.

After the decision in the individual application No. 2014/15769, the CC issued twenty-six[671] decisions on lawfulness of detention, six of them within one month and ten more of them within one year after this landmark decision, all[672] of which resulted with inadmissibility decisions concerning violation claims related to administrative detention. Considering that the total number of decisions issued before the decision on application No. 2014/15769 is also sixteen, it appears that the CC parked the individual applications concerning administrative detention until making up its mind about changing its established case law and determining its new position. Finally, the most recent decision of the CC that was examined,[673] combines forty-three individual applications regarding lawfulness of administrative detention and similarly concludes that applications are inadmissible since not all local remedies have been exhausted.

CC's change of position raises several issues with respect to provision of compensation for unlawful administrative detention in compliance with the standards of

[671] 2015-4459, Yulia Matur (Anikeeva) (Constitutional Court February 7, 2018); 2014-19690, M.S.S. (Constitutional Court December 31, 2014); 2017-38222, F.Y. (Constitutional Court December 26, 2018); 2015-9409, F.Y. (Constitutional Court December 26, 2018); 2014-688, İ.U. (Constitutional Court December 19, 2017); 2014-1368, A.S. (Constitutional Court December 19, 2017); 2014-2114, U.U. (Constitutional Court December 19, 2017); 2014-1369, A.B. (Constitutional Court December 20, 2017); 2014-16413, I.M. and Z.M. (Constitutional Court December 20, 2017); 2014-18827, A.A. (Constitutional Court December 20, 2017); 2014-3955, R.A. (Constitutional Court January 10, 2018); 2015-15764, F.A.A. (Constitutional Court April 4, 2018); 2014-2427, D.D. (Constitutional Court May 9, 2018); 2014-19481, G.B. and Others (Constitutional Court January 9, 2015); 2014-16575, K.K. (Constitutional Court June 11, 2018); 2015-6543, G.G. (Constitutional Court June 11, 2018); 2015-7305, M.A. (Constitutional Court June 11, 2018); 2015-1474, No. Manzura Jumaeva (Constitutional Court January 28, 2015); 2015-9776, F.M. (Constitutional Court June 28, 2018); 2015-8465, F.M. (Constitutional Court June 28, 2018); 2014-6493, M.B. and M.Z. (Constitutional Court December 25, 2018); 2014-16577, M.B. and M.Z. (Constitutional Court December 25, 2018); 2014-19436, M.A. (Constitutional Court December 26, 2018); 2017-31040, Z.K. (Constitutional Court January 9, 2019); 2014-17572, Z.K. (Constitutional Court January 9, 2019); 2015-516, No. Daygınat Magomedzhamilova and others (Constitutional Court March 20, 2019).

[672] Except for 2017-38222, F.Y. (Constitutional Court December 26, 2018) which was struck out from the list due to withdrawal of individual application.

[673] 2015-516, Z.K. (Constitutional Court January 9, 2019).

ECHR and Constitution. Firstly, it was also the shared view of the ECtHR that there is no effective mechanism in Turkish legal system for such compensation claims. Especially, it is significant that ECtHR maintained this position even after the CC started to accept administrative full remedy action as a local remedy that should be exhausted before individual application to the CC. In its latest two decisions dated June 2018, concerning lawfulness and conditions of detention, the ECtHR repeated its finding that Turkish legal system did not provide persons in the applicant's position with a remedy whereby they could receive compensation for their unlawful detention or an effective remedy concerning detention conditions and referred to its previous decisions on this subject. In fact, it does not matter that the administrative detention instances in these two cases were finalized before entry into force of the LFIP. According to the CC's reasoning, in the case that individuals are held without an administrative decision for detention, that constitutes an administrative act within the meaning of Article 2 of Administrative Procedure Act No. 2577 and issuance of full remedy action is possible. Accordingly, the CC rendered inadmissibility decisions based on non-exhaustion of local remedies in administrative detention cases regardless of whether administrative detention practices were implemented before or after the entry into force of LFIP.

In view of the fact that ECtHR did not change its case law, it remains to be seen how the ECtHR will assess the applications that might possibly be made upon inadmissibility decisions of the CC. In its decision on the case Yarashonen v. Turkey, the Court already refused the Turkish government's argument that full remedy action provided in Article 2 of Administrative Procedure Act was available to the applicant for

demanding compensation for detrimental conditions of administrative detention and thus rejected it as an effective remedy.[674] Moreover, the Court clearly stated that "*it is incumbent on the government to illustrate the practical effectiveness of the remedies they suggest in the particular circumstances in issue with examples from the case-law of the relevant domestic courts*". After stating that the government failed to submit a single judicial decision in this regard, the Court moved on to finding a violation of Article 13 of the ECHR.[675] Thus, whereas ECtHR requires presence of positive decisions to accept a legal remedy as effective, the CC, sets a lower standard by finding presence of positive decisions as not mandatory and absence of negative decisions as sufficient. Strikingly, the CC also referred to this decision when assessing violation of Article 40 of Constitution in its decisions before changing its case law.[676]

It is difficult to assess whether administrative full remedy action is in practice an effective remedy due to scarcity of court decisions. As also underlined by the CC, administrative full remedy action is not commonly used to raise complaints and demand compensation concerning unlawfulness of administrative detention and administrative detention conditions. Therefore, the court decisions that I was able to obtain from lawyers working in the field are very few in number. Nevertheless, the rare cases available for review were all concluded with the rejection of compensation demands of applicants which raises doubts as to effectiveness of this legal remedy.

[674] Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014) paragraphs 59–62.
[675] Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014) paragraphs 62–63.
[676] 2014-13044, K.A. (Constitutional Court November 11, 2015) paragraph 80.

One of the cases concern an Iraqi applicant about whom removal order and administrative detention decision was issued on 6 September 2017 based on breach of entry rules and threat to public order. Administrative detention was then extended for five months on 6 October 2017. Although previous complaint against administrative detention was rejected, his final complaint was accepted by Kırklareli Criminal Judge of Peace with its decision dated 18 April 2018 based on the fact that the period of administrative detention exceeded the legal limit of six months. The applicant was released from administrative detention on 20 April 2018, approximately 1,5 months after the expiry of the six months limit. In the mean time the removal order about the applicant was also cancelled on 28 February 2018 by the same court assessing the compensation claim. The applicant demands material and moral compensation for the whole duration of his administrative detention between 6 September 2017 and 20 April 2018. İstanbul 1st Administrative Court rejects the compensation claim by stating that, the fact that removal order was later cancelled by court decision does not prove that administrative detention was unjust and unlawful. The Court considered that administration is under the obligation to implement the law, which foresees administrative detention in the face of existing grounds of illegal entry and threat to public order.[677] However, this situation is different than administrative detention being lawful at the beginning and becoming unlawful due to a change in circumstances or in legal status of the individual as happened in one case in the Netherlands.

[677] E. 2018/1254, K. 2018/2324 (İstanbul 1. Administrative Court December 12, 2018).

A foreigner was taken under detention at the airport and a couple of days later, he submitted an IP application. His compensation claim for unlawful detention was rejected because he was taken under detention before making an IP application and he was released upon this application.[678] The reasoning of the Turkish court on the other hand, is problematic due to several reasons. Firstly, as per the construction of LFIP, there is an unbreakable link between removal order and administrative detention decision. Article 57(2) of LFIP explicitly states that administrative detention decision may be issued about persons for whom a removal order has been issued. Therefore, administrative detention decision is always based on the existence of a removal order, it cannot be imposed independent from a removal order. It is also recognized by the CC that removal order is prerequisite of administrative detention.[679] As a general rule of administrative law, if an administrative act is the basis of another administrative act, the validity of the latter affects the validity of the former. If the underlying administrative act is invalid, than other administrative acts issued on its basis are also invalid since it was issued.[680] Of course for issuance of an administrative detention decision, specific grounds outlined in Article 57(2) must exist however, even if one or more of those grounds are present in a specific case, it is not possible to impose administrative detention decision unless there is a valid removal order. In the specific case, removal order was cancelled by the court because it was determined that the applicant in fact did not enter Turkey illegally and he cannot be

[678] "Netherlands - ABRvS, 4 October 2011, 201102753/1/V3 | European Database of Asylum Law," accessed May 13, 2019, https://www.asylumlawdatabase.eu/en/case-law/netherlands-abrvs-4-october-2011-2011027531v3#content.
[679] 2016-35009, Abdulkadir Yapuquan (Constitutional Court February 5, 2019) paragraph 118.
[680] E.1975/542, K.1975/519 (Council of State 3. Chamber December 2, 1975); E.1991/112, K.1991/154 (Council of State 5. Chamber February 11, 1991); E.1980/32, K.1980/39 (Council of State 3. Chamber March 12, 1980); E.2003/14, K.2003/25 (Council of State 1. Chamber February 27, 2003).

deemed to pose a threat to public order in the circumstances of the case. Moreover, the court found that the removal order was not in line with the law, also because the applicant's claims as to presence of barriers to removal was not investigated and assessed by the administration.[681] In the face of these cancellation reasons, it is safe to say that the court though the removal order should not have been issued by the administration in the first place, which also means that the administrative detention decision should not have been issued either. Therefore, in arguing that cancellation of removal order does not necessarily render administrative detention unlawful from the beginning, the court is contradicting with its own reasoning. There is no doubt that, as a general rule, cancellation of an administrative act creates its legal effect retroactively, the result being as if the cancelled act has not been established at all.[682] Thus with the cancellation of removal order, administrative detention decision was also left without legal basis from the beginning. Moreover, the administration relied on the same grounds for issuance of both removal order and administrative detention decision. Therefore, although the administrative court is not competent to rule on the lawfulness of administrative detention decision, it does not make sense to accept that the same administrative authority was obliged to establish the administrative detention decision, whereas it was unjustified to issue the removal order, both based on the very same reasons. The court did not take into account these principles of administrative law in rejecting the full remedy action.

[681] E. 2017/1322, K. 2018/338 (İstanbul 1. Administrative Court February 28, 2018).
[682] Halil Kalabalık, *İdare Hukuku Dersleri Cilt-II*, 4. (Ankara: Seçkin Yayıncılık, 2019), 102; Ramazan Çağlayan, *İdare Hukuku Dersleri*, 6. (Ankara: Adalet Yayınevi, 2018), 393; E.1937/202, K.1938/14 (Council of State 2. General Council of Lawsuit Chambers January 25, 1938); E.1965/21, K.1966/7 (Council of State Board for Unification of Case Law July 9, 1966); E.1993/247, K.1994/559 (Council of State 3. General Chamber of Administrative Lawsuits September 30, 1994).

Furthermore, even if the removal order was not cancelled, it is not possible to concur with the court's rejection of compensation claim in the face of presence of a decision by criminal judge of peace finding administrative detention unlawful. This decision determines that, in any case, administrative detention became unlawful after the six months limit for administrative detention expired on 6 March 2018. The obligation to terminate the administrative detention upon expiry of the six month period was required to be followed by the administration no less than the requirement of imposing administrative detention when its grounds exist. Therefore, in any case, the applicant should be entitled to compensation for the period of administrative detention between 6 March and 20 April 2018 when he was finally released, two months after the cancellation of the removal order, which constitutes the basis for his detention. The court concluded that the administration has no fault and responsibility with respect to the material and moral damage that the applicant suffered because of administrative detention. This conclusion is against the purpose of existence of full remedy action, considering the general rule that the administration is liable to compensate the damages resulting from its acts and actions as provided in Article 125 of Constitution and the special rule with respect to measures of deprivation of liberty providing that damage suffered by persons for treatment contrary to personal liberty and security is to be compensated by the state as provided in Article 19 of Constitution.

Finally, in addition to being characterized as an administrative act, administrative detention is also by its nature, a measure of deprivation of liberty. While it is significant that there are no other measures of this nature in the realm of Turkish administrative law,

other measures of deprivation of liberty are found in criminal law in the form of criminal arrest and detention. There is a certain rightfulness in trying to stay away from criminal law when contemplating about migration and asylum law practices, in order to preserve the distinction between two fields in the face of the rising global trend of criminalization of human mobility. That being said, I believe here introducing a brief comparison with criminal law would actually strengthen the grounds for maintaining constitutional standards concerning deprivation of liberty through administrative detention.

Compensation for unlawful deprivation of liberty is also foreseen in Criminal Procedure Act No. 5271 in Articles 141 to 144. This partly overlaps with Article 3 of Protocol 7 to the ECHR which foresees compensation for wrongful conviction. To add a spin to the discussion as to whether compensation should be awarded in case of administrative detention which was rendered unlawful due to cancellation of the underlying removal order, looking at the conditions of compensation for unlawful criminal detention and arrest might be enlightening. In addition to the cases of unlawful criminal detention and arrest, the mentioned provisions also provide that compensation shall be granted in cases where it is decided not to proceed with criminal prosecution or the person is acquitted as a result of criminal prosecution. Here, it could be argued even more strongly that it might still be reasonable for a person to be deprived of his/her liberty, even if he/she is not found guilty in the end of criminal investigation or prosecution. However, even within the realm of criminal law where stark public order interests are at stake, the lawmaker prioritized personal liberty and security. Therefore, in a field where the persons are not deprived of their liberty because of suspicion of criminal activity, personal liberty

and security should be protected even more and accountability would also discourage arbitrary instances of deprivation of liberty.

In another case the administrative court rejected the full remedy action based on expiration of application deadline[683] and the RAC concurred.[684] The applicant in this case was released from detention on 22 November 2017. It is not mentioned whether the applicant applied to the CC for individual application with compensation request. However, in any case considering that the decision of the CC on the individual application No. 2014/15769 became public by being published in the Official Gazette dated 6 February 2018, the change of case law of the CC accepting administrative full remedy action was not known to the applicant within the period of administrative lawsuit deadline which is sixty days after her release from administrative detention. In consideration of the procedural guidance of the CC to administrative courts, these court decisions show that the administrative courts do not necessarily initiate the judicial deadline from the date of publication of the CC decision concerning the application No. 2014/15769 for the sake of providing access to the full remedy action. As the full remedy action was initiated on 23 March 2008, it would then be within the judicial deadline and the court could review the merits of the case.

One other case relates to different occurrences of deprivation of liberty through administrative detention and imposition of reporting obligation. The applicant requested the transfer of her daily reporting obligation duty in Kırıkkale to İstanbul, which was

[683] E. 2018/499, K. 2018/562 (Edirne Administrative Court May 8, 2018).
[684] E. 2018/2202, K. 2018/2042 (İstanbul RAC 10. Administrative Lawsuit Chamber September 20, 2018).

implicitly rejected by the administration but then granted during the course of the lawsuit where she requested cancellation of the rejection. The applicant also requested moral compensation claiming that the measure amounted to administrative detention in Kırıkkale due to having to be away from her spouse and children in İstanbul. Interestingly, the court does not reject ruling on the lawfulness of the measure in view of its characterization as administrative detention, to which it does not object. So the court rejects the compensation request by stating that there is no obstacle before imposing administrative detention and reporting obligations to foreigners, who pose threat to public order, and therefore there is no causality between the damage and administrative act.[685]

If the court concurs with the qualification of the measure as administrative detention, it would be expected to rule that jurisdiction to decide on lawfulness of administrative measure belongs to criminal courts of peace or otherwise, it would be expected to reject such qualification if it was to decide on claim of unlawfulness and compensation right arising from it. The decision was then approved by the RAC on appeal.[686] In a case with similar facts the applicant requested the cancellation of "unknown location" ("*semt-i meçhul*") code imposed by the administration based on non-compliance with reporting obligation in Kırklareli whereas he resides in İstanbul. He also demanded compensation for having been taken under administrative detention because of imposition of that code. As different from the previous case, the court here explicitly spelled out the unlawfulness of the act that caused implementation of administrative detention and

[685] E. 2017/1376, K. 2018/236 (Edirne Administrative Court March 5, 2018).
[686] E. 2018/1798, K. 2018/1544 (İstanbul RAC 10. Administrative Lawsuit Chamber June 8, 2018).

cancelled the administrative act of imposition of the code. However, it rejected the compensation request based on the same reasoning of lack of causality.[687]

Administrative full remedy action was tried to be used before the entry into force of LFIP as well. In two cases where the applicants were taken under administrative detention for removal due to rejection of their IP application and appealed the rejection of their IP application, they also requested compensation for unlawful detention. Meanwhile they escaped from administrative detention after being held for a couple of months shorter than two years. In one of the cases the court rejected the appeal of IP rejection and based on this, declined the compensation request without assessing the lawfulness of deprivation of liberty.[688] In the other case the court accepted the appeal and cancelled the IP rejection, however again declined the compensation claim. The court's reasoning was that, in order for responsibility of the administration to arise, in addition to presence of damage, such damage should also be caused by an act or action attributable to administration. So, there should be causality between the damage and the administrative activity. To the extent that the fault of a person other than the administration affects the arising of the damage, the responsibility of the administration for compensation based on service fault will be diminished. According to the court, the required degree of administration's fault is gross negligence in service. Thus, the court rejects compensation based on lack of causality between administration's act and damage as well as lack of gross negligence in service attributable to administration.[689]

[687] E. 2017/1451, K. 2018/201 (Edirne Administrative Court February 22, 2018).
[688] E. 2013/1311, K. 2015/659 (Ankara 7. Administrative Court April 24, 2015).
[689] E. 2013/1353, K. 2015/2689 (Ankara 8. Administrative Court December 30, 2015).

Lastly, although not very much possible to evaluate the general practice due to inconsistency in few available sample cases, it should be noted that time frame of court proceedings is also an important factor when evaluating whether a certain legal remedy concerning administrative detention practices is effective. In a case concerning Malta, when rejecting the government's claim of non-exhaustion of local remedies, ECtHR considered the presence of prolonged delays in adjudication during the suggested remedies of constitutional proceedings and action for damages.[690]

Though limited in number, all of these decisions rendered by administrative courts rejecting compensation in full remedy actions for administrative detention, do not paint such an optimistic picture about the effectiveness of this legal remedy and its capacity to replace individual application to the CC. Although operation of administrative full remedy action is theoretically capable of providing effective remedy for compensation concerning administrative detention practices, its effect in practice so far, rather indicates that the condition of exhaustion of full remedy action imposed by the CC might cast doubt as to the effectiveness of individual application in the eyes of the ECtHR. ECtHR in fact had to deal with a similar situation concerning Bulgaria. The Court recognized the presence of case law concerning conditions of detention in facilities for immigration detention and did not accept practical challenges caused by being foreigners as justified reasons for applicants not to exhaust domestic judicial remedies. However, since the evolution of case law of Bulgarian courts in this regard showed that individuals have no reasonable prospect

[690] Abdi Mahamud v. Malta, No. 56796/13 (ECtHR May 3, 2016) paragraph 51.

of success, ECtHR started not requiring the applicants to exhaust such domestic remedies that were not operating properly.[691]

Finally, based on the review of the CC's case law after its landmark decision on the individual application No. 2014/15769, the Court seems to almost automatically declare the individual applications concerning administrative detention practices inadmissible. In fact, according to the distinctions it made in its landmark decision, for the sake of consistency and protection of fundamental rights, the CC would rather be expected to examine the facts of the cases to see whether they contain claims that are eligible for review within individual application. As the CC rightly differentiated between administrative detention practices which were found lawful and unlawful upon complaint to criminal judges of peace, for claims of violation of Article 19 of Constitution by administrative detention practices that were not found unlawful by criminal judges of peace, the CC does not expect the applicants to exhaust administrative full remedy action, as explained above. This might be the case when applicants are released[692] or removed from the country[693] before a complaint was lodged to or a decision was made by criminal judges of peace, or when their complaints were rejected. Despite this differentiation by the CC, it is reported by the lawyers in the field that there has been many instances where the CC declared individual applications inadmissible although the complaints to criminal

[691] S.F. and Others v. Bulgaria, No. 8138/16 (ECtHR December 7, 2017) paragraph 48.
[692] It was concluded in 2016/1260 D. İş (İzmir 2. Criminal Judge of Peace April 18, 2016) that there is no need to make a decision on lawfulness of administrative detention as the applicant was released due to having submitted an IP application.
[693] As in the case of the applicant in 2017-34558, Shakhnoza Abullaeva (Constitutional Court February 7, 2019) who was removed one week after being taken under administrative detention as reported by her lawyer.

judges of peace were also rejected. This is alarming in terms of human rights protection because there are no other remedies left in domestic law concerning such practices.

This was the case where appeal to administrative detention was rejected by Kayseri 3. Criminal Judge of Peace with its decision No. 2015/773 dated 3 April 2015 and individual application to the CC with No. 2015/9074 was also rejected with the decision combining forty-three individual applications under the application No. 2015/516 dated 20 March 2016. Similarly, the complaint of the applicant from Uzbekistan, who submitted the individual application No. 2017/34994 to the CC, was rejected by İzmir 2. Criminal Judge of Peace on 17 August 2017 with its decision No. 2017/4245, due to presence of threat to public order, public security or public health and risk of absconding. Despite this, the CC decided on 10 April 2019 that his individual application is inadmissible due to non-exhaustion of local remedies. Again, applications against administrative detention was rejected four times by criminal judges of peace based on risk of absconding and threat to public order and security in the first three,[694] and, in the last complaint, based on need to extend administrative detention for non-cooperation of the applicant.[695] So, the part of the CC's decision finding the claims on lawfulness of detention inadmissible due to non-exhaustion of administrative full remedy action[696] constitutes inconsistency. Another example relates to a complaint rejected by Osmaniye 1. Criminal Judge of Peace on 27 December 2017. It was recognized by the CC that administrative detention was finalized not because it was unlawful but in order to implement removal. Still, both claims relating

[694] 2016/509 D. İş (Ağrı Criminal Judge of Peace March 3, 2016); 2016/736 D. İş (Ağrı Criminal Judge of Peace March 24, 2016); 2016/903 D. İş (Ağrı Criminal Judge of Peace April 12, 2016).
[695] 2016/1021 D. İş (Ağrı Criminal Judge of Peace April 27, 2016).
[696] 2016-54 Multiple Applicants (Constitutional Court April 24, 2019) paragraphs 15-16.

to unlawfulness of administrative detention and detention conditions were found inadmissible due to non-exhaustion of administrative full remedy action.[697] One final example of this type relates to and individual application which was found inadmissible due to non-exhaustion of local remedies both with respect to lawfulness and conditions of administrative detention,[698] despite the applicant's complaint was repeatedly rejected by Adana, Antalya and Kırklareli Criminal Judges of Peace.[699]

In certain cases, although administrative detention was finally declared unlawful, multiple applications were made to criminal judges during the course of administrative detention. In such cases, unless the final decision explicitly declares the whole period of administrative detention unlawful, for instance due to lack of grounds since the beginning of administrative detention, it is not possible to say that the final decision renders the entire administrative detention period unlawful. This is also compatible with facts of life as accepted by the lawmaker considering the formulation of Article 61 of the Implementing Regulation where it refers to estimation that it will not be possible to conduct removal within six months of administrative detention which may arise as removal procedures progress, to emergence of serious indications as to existence of barriers to removal, to disappearance of risk of absconding, and to applicant's application for voluntary return assistance. So it is possible for all of these situations to emerge at a later point in time during the course of administrative detention and administrative detention grounds that

[697] 2018-4529, Dana Ebrahimnezhad (Constitutional Court April 16, 2019) paragraphs 7-9 and 17-18.
[698] 2016-59015, Viktor Golovatskih (Constitutional Court April 12, 2019) paragraphs 6-8 and 19-20.
[699] 2016/3628 D. İş (Adana 2. Criminal Judge of Peace August 5, 2016); 2016/2821 D. İş (Adana 2. Criminal Judge of Peace June 1, 2016); 2016/1363 D. İş (Antalya 2. Criminal Judge of Peace April 29, 2016); 2016/972 D. İş (Antalya 2. Criminal Judge of Peace March 25, 2016); 2016/1964 D. İş (Kırklareli Criminal Judge of Peace August 22, 2016).

once existed to change or disappear over time. This is also confirmed with the wording of Article 57 of LFIP which makes multiple applications to criminal judges of peace possible with the claim that circumstances related to administrative detention have changed. Thus, it cannot be automatically assumed that acceptance of a complaint against administrative detention renders the whole period of administrative detention unlawful and more often than not, rejection of earlier complaints means that the judge confirms the lawfulness of administrative detention up until that point in time. This yields to a situation similar to what is explained in above paragraph, in terms of compensation requests and their evaluation by the CC. This situation was encountered by the CC on different occasions. Complaints against administrative detention were rejected twice[700] for one applicant and once for the other,[701] without any reasoning as to circumstances of the case. As a result of subsequent complaints, the relevant criminal judges of peace accepted the complaint and declared administrative detention unlawful.[702] However, since these decisions cancelling administrative detention were based on expiry of six months administrative detention period and lack of any reason for extension, they actually do not contain any assessment regarding lawfulness of the administrative detention for the first six months.

Thus in case of an administrative full remedy action it is not possible for the administrative court to accept the unlawfulness of the whole period of administrative detention and rule on compensation accordingly. Yet, the CC found the individual

[700] 2017/2197 D. İş (Adana 2. Criminal Judge of Peace May 25, 2017); 2017/2261 D. İş (Kırklareli Criminal Judge of Peace July 27, 2017).
[701] 2017/1009 D. İş (Antalya 2. Criminal Judge of Peace February 28, 2017).
[702] 2017/2853 D. İş (Kırklareli Criminal Judge of Peace September 26, 2017); 2017/2639 D. İş (Antalya 2. Criminal Judge of Peace May 13, 2017).

applications inadmissible due to non-exhaustion of local remedies without making any distinction in this regard.[703] Actually, it is revealed by the review of other inadmissibility decisions, following acceptance of administrative full remedy action as an effective way to demand compensation concerning administrative detention practices, that, at least eight individual applications had similar conditions.[704] In all of these cases, there were multiple applications to the criminal judge of peace demanding lifting of administrative detention and some of these applications resulted with rejection until they were finally accepted with subsequent decisions or applicants were released through administrative action. However the CC again fails to follow own case law by not evaluating compliance with Constitution and requests of compensation concerning the periods of administrative detention, unlawfulness of which were not declared by criminal judges of peace. In order not to cause preventing access to legal remedy against violations of Article 19 of Constitution, at the stage of admissibility review, the CC should assess the reasons of previous rejections and final acceptance by criminal judges of peace so as to differentiate the periods of administrative detention that falls within its jurisdiction concerning compensation requests. However, there are no indications of such assessment in the inadmissibility decisions. Considering that inadmissibility decisions were issued even in the lack of decisions by criminal judges of peace accepting the unlawfulness of at least a certain portion of the period of administrative detention, it is probably safe to assume that the CC

[703] 2017-36854, Murat Tkhagapsoev (Constitutional Court April 16, 2018); 2017/27477, Fadi Erber (Constitutional Court April 2, 2019).
[704] 2015-516, Z.K. (Constitutional Court January 9, 2019); 2014-17572, Z.K. (Constitutional Court January 9, 2019); 2014-19436, M.A. (Constitutional Court December 26, 2018); 2014-6493, M.B. and M.Z. (Constitutional Court December 25, 2018); 2015-1474, Manzura Jumaeva (Constitutional Court June 27, 2018); 2015-7305, M.A. (Constitutional Court June 11, 2018); 2014-19481, G.B. and Others (Constitutional Court January 9, 2015); 2014-16413, I.M. and Z.M. (Constitutional Court December 20, 2017).

does not conduct such examination in case of multiple decisions by criminal judges of peace with respect to a certain applicant.

One recent exception to this general trend of inadmissibility decisions relate to a political leader of Uyghur minority whose extradition was requested by People's Republic of China based on crimes related to terrorism.[705] Whereas the case related to extradition is still pending after Supreme Court overturned the first degree court's decision rejecting extradition based on political nature of alleged crimes, a removal order and an administrative detention decision was issued concerning the applicant. During the term of deprivation of liberty exceeding twelve months, his complaints were repeatedly rejected by criminal judges of peace. He claimed violation of Article 19 due to unlawfulness of detention and Article 17 of Constitution due to detention conditions for being held in isolation and having poor access to medical care.

Interestingly, the CC did not raise the possibility of administrative full remedy action with respect to the applicant's claims concerning detention conditions[706] despite its change of opinion in decision regarding individual application No. 2014/15769.[707] The Court decided that the part of the individual application related to the claims regarding conditions of detention is inadmissible, as it found the claims of the applicant to be manifestly ill-founded. However, it reached this conclusion after a detailed assessment of claims, no less than the assessment it would be expected to conduct under examination of merits. The blurry line between findings of inadmissibility due to being manifestly ill-

[705] 2016-35009, Abdulkadir Yapuquan (Constitutional Court February 5, 2019) paragraph 15.
[706] 2016-35009, Abdulkadir Yapuquan (Constitutional Court February 5, 2019) paragraphs 70–93.
[707] 2014-15769, B.T. (Constitutional Court November 30, 2017) paragraph 46.

founded and findings of no violation is also acknowledged by ECtHR, as the Court describes that an application is found manifestly ill-founded if there is "*no appearance of a violation or if there is settled or abundant case-law in similar or identical situations also finding no violation.*"[708] Due to unique circumstances surrounding this individual application before the CC considering the claims of the applicant being held in solitary confinement for an extensive period and lack of any other individual applications about the conditions in Kırklareli Pehlivanköy Removal Centre and Tekirdağ Removal Centre, it is not possible to assume that the Court considered the claims under admissibility review rather than examination of merits due to settled or abundant case-law in similar or identical situations.

Similarly, considering that it is established that the applicants has experienced serious medical problems and presence of many documents concerning this situation that begged review by the CC, it could be argued that the Court examined the facts of the case beyond a mere determination of no appearance of violation. Special circumstances surrounding the case, such as the high profile of the case being related to a known political figure, its wide publicity in the media and significance of Turkey's political relations with People's Republic of China as well as presence of a pending application before the ECtHR by the same application with similar claims based on Article 3 of the ECHR and communicated to the government,[709] might have strengthened the Court's preference to examine the applicant's claims as to conditions of detention under admissibility review.

[708] Council of Europe/European Court of Human Rights, "The Admissibility of an Application," 2015, 5.
[709] Communicated Case Yapuquan v. Turkey (ECtHR March 26, 2018).

Otherwise, it would not be possible for the CC to do this at merits stage, because the application would have to be rejected at admissibility stage in any case, based on non-exhaustion of remedies, if not based on being manifestly ill-founded, in line with the principles set out at its decision on individual application No. 2014/15769. So if the CC did not examine the claims of the applicant at the admissibility stage, their examination would not be possible at all, since the application would have to be found inadmissible due to failure to exhaust administrative full remedy action and it would not move forward to the stage of examination of merits. The CC took a similar position in its first decision on an individual application that includes claims concerning administrative detention conditions and decided that applicant's claims in this regard are manifestly ill-founded rather than finding no violation at merits stage.[710] This is the only other case where the CC examined detention conditions and did not find any violation, so, finding the claims manifestly ill-founded in this final case does not pose inconsistency in case law.

As to the claims of violation of Article 19, the Court took into account that, except the final one, all of the previous applications of the applicant to criminal judges of peace regarding the unlawfulness of detention were rejected. Also, even after administrative detention was found unlawful finally by a criminal judge of peace due to exceeding of twelve months maximum period inscribed in the legislation, the applicant claims that he was continued to be held in the Removal Centre. The CC states that administrative full remedy action cannot be accepted as an effective remedy under these circumstances because it does not have the possibility of enabling release of individuals from

[710] 2013-9673, Rıda Boudraa (Constitutional Court January 21, 2015) paragraph 64.

administrative detention.[711] Consequently, the Court found that this part of the application is admissible and went on with the examination of the merits of the case to find violations of Article 19 for the whole duration of deprivation of liberty. Although, the line of reasoning followed in this decision is in line with the principles outlined in the CC's decision on individual application No. 2014/15769, the sample cases noted above reveals that this decision does not represent the CC's general practice.

[711] 2016-35009, Abdulkadir Yapuquan (Constitutional Court February 5, 2019) paragraphs 99–101.

CONCLUSION

The purpose of this thesis is to bring a new perspective to the discussions on whether Turkey is a "safe third country" for returns from Europe, through an analysis of Turkish judicial practices on IP, removal and administrative detention practices. It is expected to be a timely contribution to the literature considering the implementation of the EU-Turkey Statement since March 2016 and with the full entry into force of the EU-Turkey Readmission Agreement in October 2017. To recap the main findings and arguments of the thesis, below first a compact summary will be presented and this will be followed by recommendations to judiciary and other relevant organs of the state for overcoming the discrepancies outlined in this thesis.

Safe third country concept in international and European law and its implementation with respect to Turkey

Building on the background of Turkey's position in the global asylum scene and the theoretical legal discussion on the safe third country concept, the conclusions of the first chapter of the thesis focus on the current state of affairs and future prospects in view of Turkey's position as a safe third country with respect to EU countries. Adoption of EU-Turkey Statement on 18 March 2016 and the EU-Turkey Readmission Agreement, which appear as bold instruments of EU policies for externalization of migration control and which effectively put Turkey in the position of a safe third country for EU states, Turkey appears to compromise its position regarding the conditions for applicability of the safe third country concept. Despite the efforts of EU to make Turkey into a safe third country, Turkish migration and asylum system, being very young, is naturally still in need for

enhancement of capacity, also considering diversity of national actors involved such as administrative personnel, law enforcement, judges and lawyers. Thus, implementation of these externalization instruments vis-à-vis Turkey showcases a typical example of how implementation of safe third country concept endangers refugee protection. In determining whether Turkey is a safe third country for asylum seekers in EU countries, the assessment of practices of Turkey should be made against this background. In fact, rather than focusing on the conditions of the third country, within the current political dynamics, the question of whether a country qualifies as a safe third country is not answered with a genuine interest in protection of refugees, but rather unilaterally by the sending states, in case of Turkey, EU states, seeking to externalize migration control. Consequently, the protection challenges exacerbated by safe third country practices are best visible in the migration management dynamics between EU where resort to this concept is most advanced and Turkey with the largest refugee population in the world and a young legal and institutional framework on migration and asylum. Considering the scale of transit asylum and migration flows through Turkey, Turkey's interpretation and attitude will continue to be crucial for the evolution of this international law concept and its practices.

Building on the international law analysis in the first chapter, the second chapter of the thesis constitutes the empirical part offering a critical analysis of selected problematic legal issues in Turkish case law concerning IP, removal and administrative detention procedures, the findings of which are summarized below. This chapter based on the analysis of around a thousand Turkish court decisions, adopts a comparative methodology

where the case law of the European domestic courts, ECtHR and CJEU serve as a benchmark in pointing out good practices.

Problematic issues in Turkish judicial practices regarding international protection procedures

The first problematic issue arising from Turkish case law assessing IP procedures, is adopting limited focus on risk of persecution only by state actors and based on five 1951 Convention grounds. Thus they disregard cases of persecution by non-state actors and cases requiring subsidiary protection due to persecution based on reasons that do not fall within 1951 Convention grounds.

Review of Turkish court decisions reveal that the distinction between refugee protection and subsidiary protection are at times overlooked and this results in implementation of a limited scope of IP in practice. In concrete cases the courts refuse need for IP on the basis that the feared conduct in countries of origin are not based on one of the 1951 Convention grounds. Where the reason for IP application is found not to be related with any of the 1951 Convention grounds thus not eligible for refugee protection, the judicial assessment often does not go beyond refugee protection and it is disregarded whether any protection obligation arises from international human rights law.

Another aspect of IP assessment that the Turkish judges neglect concerns the scope of actors of persecution. Whereas, Turkish courts rule in similar cases that the applicant is not a member of any political, religious and social group, and did not face any ill treatment or did not have any problems with official authorities in the country of origin.

In that sense, it was observed that the legal analysis by Turkish courts are generic and confined to the axis of risk of persecution from state actors. These judgments do not evaluate country of origin information, risk associated with non-state actors, conditions of state protection against such risk and whether effective state protection is available in the country of origin.

The second legal issue concerning judicial practices on IP procedures relate to implicit withdrawal of IP applications which is a procedure whereby the IP applicant is deemed to have withdrawn the IP application in the case of existence of certain indicators in this regard. Whereas an exhaustive list of such indicators are listed in Turkish legislation, for certain indicators that are non-appearance at the interview or non-compliance with reporting obligation three consecutive times, or not showing up in the designated place of residence or leaving the place of residence without permission, it is envisaged that they do not lead to implicit withdrawal of the IP application if the IP applicant has an excuse.

The first category of judicial discrepancy in this regard consists of failure to evaluate the excuses of IP applicants for non-compliance with duties within IP procedures. These court decisions also lack any evaluation as to whether these claims were duly evaluated by the administration. In general, the courts simply rely on the fact that the duties within the IP procedures were notified to the applicant. The second category of judicial discrepancy relates to the examples where the courts followed a rather rigid and restrictive approach in assessing the claims of justified excuse and rejected such claims. These decisions reflect a non-flexible approach where vulnerabilities and protection needs of

disadvantaged refugee groups such as single women and LGBTI individuals are not prioritized over procedural obligations within IP procedures. Despite systemic and practical challenges that IP applicants and status holders face in accessing the labor market in Turkey, many court decisions do not accept excuses concerning employment situation as justified for neglecting administrative duties concerning IP procedures. These court decisions demonstrate an approach where judges fail to consider administrative duties brought to IP applicants as tools for better operation of IP procedures but in a way uphold them for their own sake.

The third legal issue to be criticized in Turkish case law on IP procedures concern the fact that, sometimes the judges reviewing the administrative decisions which consider IP applications withdrawn, also make assessments concerning the merits of the IP application and possible removal of the applicant. However, the appropriate stage for the courts to assess the qualification of an applicant for IP status would be during the judicial appeal of an administrative decision on rejection of IP application. Likewise, the court should evaluate the lawfulness of removal of the applicant, during the judicial appeal of a removal order. Both of such appeal processes could take place only after the appeal of implicit withdrawal and in any case, after administrative decisions are made on IP status and removal.

The court decisions are problematic, first, because the administrative process after rejection of these judicial appeals does not necessarily have to lead to removal. Upon court's rejection of an appeal against decision on implicit withdrawal, it is also possible that removal order cannot be issued about the applicant due to presence of barriers to removal. Another possibility is that the applicant submits another IP application, during

the assessment of which he/she may not be removed. Secondly, by ruling on these matters before issuance of administrative decisions, the courts are essentially using the authority that belongs to administration and not themselves at that point. To reach a conclusion on IP or removal, without prior decision making by the administration in this regard, is not a power vested in judges by the law and from this aspect it is an interference with the powers of the administrative authority.

Moreover, substantially, at the time of decision making by the judge reviewing the implicit withdrawal decision, it is possible that, not all information and documents related to the country of origin or personal circumstances of the applicant, substantiating the existence of reasons for qualification for IP status or for exemption from removal, are available before the court. After all, the subject matter appeal is related to grounds for implicit withdrawal and not merits of an IP application or barriers for removal. Consequently, it is likely that at the stage of implicit withdrawal, the assessments of the courts concerning IP application or removal of the applicants, are not based on complete knowledge of relevant factors that might affect the outcome of such assessments.

Finally, such court decisions may be problematic in terms of right to impartial tribunal and, in the sense that they constitute instructions to the administration to act in a certain way. Unsuccessful appeal of implicit withdrawal decision comes before removal order that would be issued based on implicit withdrawal. Usually, it is the same local authority that issues the implicit withdrawal decision and the removal order that follows it and their appeal would be subject to the jurisdiction of the same administrative court. Thus, it is very likely that some or all of the judges who declare their opinion on lawfulness of removal of a certain applicant, during the appeal of implicit withdrawal decision, will also

be the judges reviewing the appeal of such removal order at a later point in time. Therefore, the fact that the judges who will decide on the lawfulness of a removal order, have already expressed their view in this regard in a prior court decision, casts a doubt on the impartiality of the court. Also, the assessment of the court asserting lack of risk upon return, during the appeal of implicit withdrawal, can easily be read as a green light to the administration to issue a removal order. The first court decision reveals the outcome of a possible appeal against such removal order and thus removes the risk of its annulment in the eyes of administration. This creates the risk that the administration issues a removal order about the applicant without extensively assessing the barriers to removal that could otherwise be discovered at a later stage.

Problematic issues in Turkish judicial practices regarding removal procedures

Having covered the judicial discrepancies in cases concerning IP procedures, the second main category is the cases on removal procedures. First of the three legal issues under this category arise from the implementation of removal grounds related to threat to public security and public order. One aspect arise from the lack of clarity in the legislative formulation of the removal grounds related to threat to public security or public order, which leaves extensive discretion to administration. This makes judicial review all the more important in terms of legal certainty. Nevertheless, more often than not Turkish courts interpret these grounds widely without challenging the administrative decisions based on a low standard of proof. Generally the Turkish courts' point of departure is the extensive discretion of administrative authorities. Such discretion is viewed as a natural result of the sovereign rights of the state and as aiming protection of public order. The courts adopt as a general principle that in cases where the deportation measure is based on

public order reasons, the grounds do not have to be of criminal nature or to be subject to a court decision.

Accordingly, a category of Turkish court cases rely on security codes imposed concerning foreigners who are deemed as a threat to public order or national security. Being information records based on judicial action, intelligence information or similar sources of information, that denote an issue concerning the individual, such as being a threat to public order, security codes then constitute basis for removal orders. One problematic practice of administrative courts in appeals of such removal orders is that they often rely on the imposition of security codes without reviewing any information or documents as to the basis of such codes. Similar situation arises for removal orders issued based on intelligence information. Both in the case of decisions based on security codes and intelligence information which are often related to link with terrorism, it is not possible for the applicants to defend themselves vis-à-vis the allegations made against them. The basis of the security codes or the content of the intelligence information is not made available to them, simply depriving individuals of the possibility to explain or defend themselves. Turkish courts also rely on presence of ongoing judicial action such as criminal adjudication or investigation, frequently regarding crimes related to terrorism, as indicators of posing a threat to public security or public order. An interesting set of decisions conclude on presence of threat to public security or order even if the concerned individuals are no longer subject to criminal adjudication for reasons such as acquittal or decisions of the prosecutor not to prosecute due to lack of evidence. We understand that the administrative judges considered the threshold for determining threat to public order to be lower than that sought for criminal evidence. Overall, the common approach taken

by judges is to rely on the discretion of administration and simply state that it is within the discretion of the administration to determine what constitutes threat to public order and public security, thus leaving such discretion without scrutiny.

The other aspect regarding implementation of threat to public security or public order as grounds for removal is the series of legislative amendments concerning legal effect of appeal of removal orders and judicial response to these legislative changes which started with the adoption of Decree Law No. 676. As a response to the removal of automatic suspensive effect of judicial appeal against removal orders from LFIP, the CC developed the strategy of issuing interim measures immediately to prevent removals without completed judicial review. After the amendments on the provisions of LFIP, the number of individual applications with interim measure requests approached a thousand in a period as short as 1.5 years, it exceeded 1500 in almost 2.5 years and in nearly all of them interim measure requests were accepted. Another judicial response to the amendments brought by the Decree Law No. 676 was adoption of pilot decision procedure by the CC. Since the discrepancy directly emanates from the legislation, the pilot decision procedure for structural problems is an appropriate tool to resolve this situation. In fact, the removal of automatic suspensive effect of judicial appeal against removal orders, was criticized in the pilot decision of the CC dated May 2019 and it was decided that this situation violated the right to effective remedy. In the following process, a new legislative amendment was made in December 2019 and automatic suspensive effect was brought back. Finally on this matter, note should be taken of the practice that occurred with the amendment of LFIP until it was reverted in December 2019. Although, the automatic suspensive effect of judicial appeal in expulsion cases is brought back, it was lacking for approximately three

years. This means that a number of individuals who were part of the IP regime in Turkey, were removed without a chance of judicial review of their removal grounds. Being within IP process, they all had a claim of risk of persecution, meaning wrongful implementation of removal possibly led to refoulement.

The second category of judicial discrepancies related to removal procedures concern the judicial review in connection with non-specification of country of removal by administration. Judicial appeal of removal orders are, among other reasons, dominantly based on the claim that the applicant falls within the scope of exemption from removal. Accordingly, removal is not possible if the person will be subjected to death penalty, torture, inhuman or degrading treatment or punishment in the country of removal as well as if he/she is undergoing treatment for a life threatening health condition and would not be able to receive treatment in the country of removal. Evaluation as to barriers of removal, inherently includes assessment of the conditions in country of removal. Removal orders issued by Turkish authorities typically omit specification of a country of removal.

Non-specification of country of removal in Turkey, makes it impossible for the judges to definitively assess the legality of a possible removal. In the face of general administrative practice, general tendency of Turkish judges in this regard, is to assess barriers to removal by assuming that the applicants are to be removed to their country of origin. Still, the matter is subject to judicial inconsistency. Good practice of judiciary challenges the administrative practice of non-specification of country of removal and upholds legal certainty. These Courts conclude that the removal orders are unlawful because the administration did not investigate whether the applicants should be exempt

from removal and because the removal orders do not specify the country of removal. Second group of judgments however constitutes examples of when the judges use lack of clarity as to country of removal as a basis for upholding the removal order. In the face of applicant's claims of human rights violations in case of removal to the country of origin, the Courts rely on the reasoning that the removal order does not contain any expression as to removal would be made to country of origin and only mentions removal from Turkey. Thus, the Courts argue that it is possible for the applicants to be sent to a country other than country of origin. The main problem with these judgments is that they overlook the fact by upholding removal orders due to possibility of removal to a third country they completely leave them out of judicial scrutiny. In Turkish practice, only one removal order is issued concerning a foreigner subject to removal and it is then enforced without issuance of another decision on country of removal. Therefore, when the applicants have claims concerning risk of being subjected to the death penalty, torture, inhuman or degrading treatment or punishment in their country of origin or another country they might be sent to, it is only during appeal of the removal order that they can raise these claims.

The third and final problematic issue in Turkish case law regarding removal procedures relate to the instances of inconsistency between interim measure and merit decisions of the CC. In some cases, the conclusions of the CC at merits stage contradict with its prior assessments in granting interim measures, in a way that begs for clear justification. This happens when the CC, after accepting interim measure requests, rules at the merit stage that the claim is inadmissible or that there is no violation of the rights of the applicant.

In fact, in order to arrive at such a different conclusion at merits stage after granting interim measure, it is required for the CC to find out information or documents in the meantime that justify the change of opinion which should be explained in the subsequent decision. Whereas, the CC does not provide further justification for having reached different conclusions in interim measure and merits stages, in any the reviewed cases. This necessity of providing the reasons for arriving at a different conclusion at merits stage than the interim measure stage, is supported by the general obligation of providing the reasons that lay at the basis of court decisions, as provided in the Constitution. Accordingly, the decisions of all courts are to include justification. Thus, the contradicting decisions on interim measure and merits in individual applications regarding removal of foreigners, constitute legal inconsistency.

Problematic issues in Turkish judicial practices regarding administrative detention procedures

Final set of Turkish court decisions analyzed for the purposes of this study relate to administrative detention. Out of four problematic issues detected through this review of judicial practices, the first one concerns the choice of jurisdiction of criminal judges with respect to lawfulness of administrative detention. It is remarkable that, all actions carried out within the scope of LFIP, other than administrative detention decisions, are subject to the judicial scrutiny of administrative courts. This makes sense considering that all of such actions are performed in the form of administrative decisions or actions taken by public authorities. It can be interpreted as a logical extension in judiciary, of a greater institutional

reform triggered by LFIP which aims attributing a civil character to management of asylum and migration in Turkey and preventing criminalization of migration.

The choice of criminal judges as the judicial body to review administrative detention measures may seem consistent considering they are in charge of reviewing the other measures of deprivation of liberty that are criminal arrest and detention. However, in fact how the characteristics of administrative detention differ from theirs makes this choice of jurisdiction questionable. Administrative detention is an administrative measure implemented in a different context of asylum and migration and not criminal law, it serves completely different purposes of administrative control and not punitive purposes and it is surrounded by different safeguards than criminal arrest and detention. These particular differences rather arise from the fact that criminal and administrative detention are part of different legal regimes. Moreover, considering that all other actions within LFIP are subject to the authority of administrative courts, separation in jurisdiction also causes inconsistency in judicial practices concerning administrative detention and removal procedures which are in sequence with each other. Also, the overlap in some of the grounds for removal and administrative detention requires that the implementation of removal and administrative detention grounds must be consistent, especially with respect to the same person. This is more difficult to achieve by subjecting these two type of administrative decisions to the jurisdiction of separate judicial branches.

The second problematic legal issue regarding the case law on administrative detention is implementation of risk of absconding as a ground for administrative detention for removal purposes. It should be noted that the indicators of lack of risk of absconding are

also taken into account in judicial practices, as a reverse symmetry of the indicators of risk of absconding. Despite the general trend followed for determining presence and lack of risk of absconding, there are court decisions contrary to the general judicial practices which contain discrepancies. In certain instances, Turkish judges accept the presence of risk of absconding without sufficient reasoning or indications. Overall implementations of the courts reveal lack of concrete criteria and consistent application. Consequently, as Turkish legal framework lacks detailed regulation as to what constitutes risk of absconding, it is left to the judges to substantiate the concept, which has been an exercise that, more often than not, yields to inconsistent judicial practices in terms of substance or intensity of judicial review or reasoning.

The third problematic area of judicial practice in this category concerns judicial review of de facto administrative detention. What constitutes an ongoing legal issue in Turkish administrative detention practices is that, at times, incidents are observed where foreigners are effectively held under administrative detention especially in police stations and parts of airport transit zones identified as inadmissible passenger rooms or migration rooms. In some cases Turkish judges emphasized that situations that constitute detention in effect are unlawful in case of de facto detention practices in a removal centre or an airport. Despite these good practices, there are also some Turkish court decisions where judges failed to recognize the unlawfulness of de facto administrative detention taking place in places such as airport or police station. Along these lines there are judicial examples, where although the lack of an administrative order should be the very basis of unlawfulness of the implemented measure, the judges relied on this administrative

discrepancy to refuse conducting a legal review in this regard, limiting their jurisdiction with review of formal administrative detention decisions.

The final problematic judicial practice relates to compensation for unlawful detention and effective remedy regarding detention conditions which is mainly handled by the case law of the CC upon individual applications. Judicial progress in Turkey concerning compensation for unlawful administrative detention practices is divided into several phases. The first one relates to the practices that took place before the enactment of LFIP, where the CC consistently granted compensation to applicants when it found rights violations regarding both lawfulness of administrative detention and detention conditions due to lack of legal framework on administrative detention.

The second phase concerned the administrative detention practices in the period after the enactment of the LFIP. As to the lawfulness of administrative detention, as opposed to the decisions rendered for administrative detention practices carried out before enactment of LFIP, the CC recognized that there are appropriate mechanisms in place within the framework of LFIP to ensure that administrative detention practices fulfill the conditions of lawfulness and non-arbitrariness. However, procedures need to be conducted with due diligence and in many cases, because of the procedural flaws determined in implementation of administrative detention based on concrete circumstances of the cases, the CC rendered violation decisions. Because of this conclusion, the CC granted compensation in favour of the applicants. Thus, the CC did not depart from its case law relating to administrative detention practices carried out before LFIP's entry into force and stated that the constitutional provision is violated since, there is no special mechanism

in domestic law for compensation of damages arising from unlawful deprivation of liberty. As to the applicants' claims concerning administrative detention conditions in the period after the enactment of LFIP, the CC again maintained its position and granted compensation in case of violating conditions, based on absence of relevant legal framework.

The third phase started with the landmark decision of the CC on this subject dated 30 November 2017 and rendered upon the individual application No. 2014/15769. The CC radically changed its position and started to respond positively to the questions of whether Turkish legal system provides a legal remedy that allows individuals to receive compensation for unlawful administrative detention practices and whether an effective remedy exists in Turkish law with respect to detrimental detention conditions. According to the line of reasoning that this decision follows, while the administrative courts do not have any authority in reviewing lawfulness of administrative detention, through full remedy action, they do have authority to rule on compensation to be paid to the individual in the case that administrative detention is found unlawful by criminal judges of peace. Full remedy action may be issued by the persons whose personal rights are damaged directly because of administrative acts and actions. Based on availability but non-exhaustion of full remedy action, in its landmark decision as well as similar decisions that followed, the CC found the claims of violation regarding lawfulness and conditions of detention inadmissible due to non-exhaustion of local remedies. the CC clarifies that if the criminal judge of peace rejects the complaint against administrative detention, then administrative full remedy action ceases to be effective for receiving compensation, since

administrative courts may not review lawfulness of detention. the CC confirms that for such compensation demands, it is still possible to directly make an individual application to the CC. On the other hand, if the criminal judge of peace declared the administrative detention to be unlawful, then it is required to initiate an administrative full remedy action before the competent administrative court. It should be noted that the ECtHR refused the Turkish government's argument regarding the availability of full remedy action for demanding compensation for unlawful administrative detention practices and thus rejected it as an effective remedy.

When full remedy action for compensation related to administrative detention practices was used by applicants, the decisions of the administrative courts, though limited in number, rejected compensation. This does not paint an optimistic picture about the effectiveness of this legal remedy and its capacity to replace individual application to the CC. Although operation of administrative full remedy action is theoretically capable of providing effective remedy for compensation concerning administrative detention practices, its effect in practice so far, rather indicates that the condition of exhaustion of full remedy action imposed by the CC might cast doubt as to the effectiveness of individual application in the eyes of the ECtHR. Finally, based on the review of the CC's case law after its landmark decision, the Court seems to almost automatically declare the individual applications concerning administrative detention practices inadmissible regardless of the distinction in its landmark decision based on whether criminal judges declared the relevant administrative detention practice unlawful. Despite this differentiation by the CC, it is observed that there has been many instances where the CC

declared individual applications inadmissible although the complaints to criminal judges of peace were also rejected.

Policy recommendations

Building on the summarized findings on problematic issues in Turkish judicial practices, I would like to finalize with several judicial and policy recommendations that could serve as solution to some of these identified discrepancies, some of which are also underlined in the assessments within the relevant sections above:

- Turkish court decisions from different locations and levels of courts, on IP, removal and administrative detention should be collected and analyzed by DGMM on a systematic basis for identification of needs for training and policy or legislative improvement. Such jurisprudence –on an anonymized basis– and the analysis reports should also be made public to enable access by lawyers, academics and other relevant actors on the ground.
- In order to enhance specialization, accumulation of expertise and uniform implementation for courts, enabling onward appeal for IP, removal and administrative detention decisions should be evaluated. On a similar basis, establishment of specialized courts on IP and migration should be considered.
- In cooperation with international organizations, action should be taken for;
    - enhanced training of administrative judges who deal with cases on IP and removal and criminal judges of peace who deal with administrative detention as well as judges of Council of State who deal with appeals of IP

cases and judges of the CC who deal with individual applications concerning IP, removal and administrative detention,

- strengthening judicial dialogue among Turkish judges who work on cases related to IP, removal and administrative detention to create a platform to share case law examples and to ensure consistency in judicial practices,
- enhancing judicial dialogue between Turkish judges and the judges of the ECtHR and CJEU working on cases regarding IP, removal and administrative detention to develop experience sharing and ensure that Turkish case law progresses in the direction in line with the ECHR and EU framework.

- Judges reviewing appeals on IP procedures should consider that the harmful treatment causing need for IP may be conducted by non-state actors as well as state actors and such treatment could be based on reasons other than 1951 Convention grounds.
- With respect to adjudication related to implicit withdrawal, the courts should be flexible with the IP applicants and status holders in deciding whether they have a justified excuse for neglecting their procedural obligations. Judges should keep in mind that the purpose of the implicit withdrawal rule is to differentiate IP applicants who do not have the genuine intention to follow up their IP application and not to serve as a punitive measure for non-compliance with procedural obligations. Procedural obligations of residence in a certain province or imposition of reporting duty are essentially tools for ensuring smooth operation of IP

procedures with a view to answer protection needs of IP applicants and status holders and they should not be implemented in a way exceeding their purpose.

- In the appeal of decisions on implicit withdrawal of IP, rather than limiting themselves to either upholding or annulling the appealed decision, the courts should address the issue of reasonableness of the neglected procedural obligations in respect of the circumstances of the IP applicant and ask the administration to review and modify them if necessary.
- Assessment should not be made regarding lawfulness of removal during the appeals of withdrawal or rejection of IP applications considering that the subject of these appeals is not the removal of the applicant.
- The provision in Article 54(2) of LFIP which envisages possibility of removal of IP applicants and status holders in case of connection with terrorism and posing a threat to public order, public security and public health, puts the mentioned persons under the risk of removal even if they are in need of IP and thus endangers the effective implementation of non-refoulement principle. A legislative amendment should be undertaken to remove the grounds of removal of persons within the scope of IP regime.
- Legislation should be revised to include a detailed definition and indicators for the concepts of connection with terrorist organizations and threat to public order, public security and public health, so that uniform administrative and judicial application in this regard could be attained.

- Removal orders issued by the administration should specify the country of removal to enable judicial supervision of non-refoulement principle. In the face of current Turkish administrative practice whereby the removal orders do not specify a country of removal, Turkish judges should recognize that appeal of the removal order in front of them is the only instance to judge whether the removal complies with the barriers before removal as provided in Article 55 of LFIP. Thus they should not refrain from carrying out an assessment of the applicant's situation with respect to possibility of removal to the country of origin or a third country.
- In the cases before the CC regarding removal, contrary to its current practice, the CC should provide the specific reasons for departing from its earlier conviction, in view of the reasons for granting an interim measure, if the conclusion in the end of the individual application process is that, claims of violation of Article 17 of the Constitution are not arguable.
- Administrative judges should be authorized concerning administrative detention related appeals, instead of criminal judges of peace, considering the close relation of administrative detention proceedings with other administrative procedures related to IP and removal and also considering that administrative detention is an administrative measure and not a penal one.
- Scope of risk of absconding should be determined more clearly either through a legislative amendment to include certain indicators or through efforts to attain judicial uniformity.

- Criminal judges of peace should not limit themselves with assessing the lawfulness of administrative detention decisions and consider cases where there is de facto administrative detention practice without issuance of a formal decision.
- CC should implement its case law on compensation for unlawful administrative detention practices consistently and review the merits of individual applications that involve previous rejection of part of multiple appeals by criminal judges of peace concerning a part of the period of administrative detention.
- Action should be taken including training of administrative court judges to ensure administrative full remedy action becomes an effective legal remedy for unlawful administrative detention practices.

REFERENCES

COURT DECISIONS

2013-655, No. F.A. and M.A. (Constitutional Court January 20, 2016).

2013-1649, No. A.V. and Others (Constitutional Court January 20, 2016).

2013-8735, No. F.K. and Others (Constitutional Court February 17, 2016).

2013-8810, No. T.T. (Constitutional Court February 18, 2016).

2013-9673, No. R.B. (Constitutional Court December 30, 2013).

2013-9673, No. Rıda Boudraa (Constitutional Court January 21, 2015).

2014/215 D. İş (İstanbul 32. Criminal Court of Peace June 11, 2014).

2014/242 D. İş (Yalova 3. Criminal Court of Peace June 18, 2014).

2014/329 (İstanbul 11. Criminal Judge of Peace June 24, 2014).

2014/368 D. İş (İstanbul 29. Criminal Court of Peace July 4, 2014).

2014/431 D. İş (Adana 1. Criminal Judge of Peace July 31, 2014).

2014-688, No. İ.U. (Constitutional Court December 19, 2017).

2014/1058 (İstanbul 1. Criminal Judge of Peace September 17, 2014).

2014/1246 D. İş (İstanbul 2. Criminal Judge of Peace August 29, 2014).

2014-1368, No. A.S. (Constitutional Court December 19, 2017).

2014-1369, No. A.B. (Constitutional Court December 20, 2017).

2014/1503 (İstanbul 4. Criminal Judge of Peace October 2, 2014).

2014/1509 D. İş (İstanbul 6. Criminal Judge of Peace October 2, 2014).

2014/1675 D. İş (Adana (Closed) Criminal Court of Peace June 27, 2014).

2014-2114, No. U.U. (Constitutional Court December 19, 2017).

2014/2338 D. İş (İstanbul 5. Criminal Judge of Peace November 14, 2014).

2014-2427, No. D.D. (Constitutional Court May 9, 2018).

2014/2450 (İstanbul 2. Criminal Judge of Peace November 7, 2014).

2014/2738 D. İş (Bakırköy 3. Criminal Judge of Peace December 10, 2014).

2014-2841, No. A.S. (Constitutional Court June 9, 2016).

2014/3131 D. İş (İstanbul 1. Criminal Judge of Peace December 30, 2014).

2014/3351 D. İş (İstanbul 3. Criminal Judge of Peace January 30, 2015).

2014-3955, No. R.A. (Constitutional Court January 10, 2018).

2014-6493, No. M.B. and M.Z. (Constitutional Court December 25, 2018).

2014-13044, No. K.A. (Constitutional Court November 11, 2015).

2014-13794, No. R. K. (Constitutional Court February 22, 2017).

2014/13811, No. İsmet Ünal (Constitutional Court July 6, 2017).

2014/14061, No. Hikmet Kopar ve Diğerleri (Constitutional Court April 8, 2015).

2014-15769, No. B.T. (Constitutional Court November 30, 2017).

2014-15824, No. I.S. and Others (Constitutional Court September 22, 2016).

2014-15876, No. I.I. (Constitutional Court September 21, 2016).

2014-16413, No. I.M. and Z.M. (Constitutional Court December 20, 2017).

2014-16575, No. K.K. (Constitutional Court June 11, 2018).

2014-16577, No. K.A. and N.A. (Constitutional Court December 26, 2018).

2014/17141, No. Kemal Demir (Constitutional Court July 6, 2017).

2014-17572, No. A.A. and others (Constitutional Court February 7, 2019).

2014-18827, No. A.A. (Constitutional Court December 20, 2017).

2014-19436, No. M.A. (Constitutional Court December 26, 2018).

2014-19481, No. G.B. and Others (Constitutional Court January 9, 2015).

2014-19690, No. M.S.S. (Constitutional Court December 31, 2014).

2015/144, No. Hidayet Karaca (Constitutional Court July 14, 2015).

2015/251 D. İş (Van 1. Criminal Judge of Peace February 11, 2015).

2015/343 D. İş (İstanbul 9. Criminal Judge of Peace March 16, 2015).

2015-508, No. Gulistan Ernazarova (Constitutional Court January 16, 2015).

2015-509, No. Gulbahar Rahmanova (Constitutional Court January 19, 2015).

2015-516, No. Daygınat Magomedzhamilova and others (Constitutional Court March 20, 2019).

2015/690 D. İş (Tekirdağ 2. Criminal Judge of Peace June 5, 2015).

2015/890 D. İş (İstanbul Anadolu 10. Criminal Judge of Peace April 21, 2015).

2015/1334 D. İş (Hatay 1. Criminal Judge of Peace May 28, 2015).

2015-1474, No. Manzura Jumaeva (Constitutional Court January 28, 2015).

2015-1474, No. Manzura Jumaeva (Constitutional Court June 27, 2018).

2015/1758 D. İş (Edirne Criminal Judge of Peace April 28, 2015).

2015-2037, No. Z.M. and I.M. (Constitutional Court January 6, 2016).

2015/2065 D. İş (İstanbul 7. Criminal Judge of Peace August 7, 2015).

2015/3510 D. İş (Bakırköy 2. Criminal Judge of Peace June 29, 2015).

2015-3941, No. A.A. and A.A. (Constitutional Court March 27, 2015).

2015-3941, No. A.A. and A.A. (Constitutional Court March 1, 2017).

2015-4176, No. D.M. (Constitutional Court March 17, 2015).

2015-4459, No. Julia Anikeeva (Constitutional Court March 17, 2015).

2015-4459, No. Yulia Matur (Anikeeva) (Constitutional Court February 7, 2018).

2015/5213 D. İş (İstanbul 2. Criminal Judge of Peace November 18, 2015).

2015-5371, No. Gulalek Begnyazova (Constitutional Court February 22, 2017).

2015-6543, No. G.G. (Constitutional Court June 11, 2018).

2015-7305, No. M.A. (Constitutional Court June 11, 2018).

2015-8465, No. K.M. (Constitutional Court September 13, 2018).

2015-9409, No. Abdullah Omar (Constitutional Court February 6, 2019).

2015-9776, No. F.M. (Constitutional Court June 28, 2018).

2015-15764, No. F.A.A. (Constitutional Court April 4, 2018).

2015-16282, No. M.A. (Constitutional Court October 15, 2015).

2015-16437, No. Uthman Deya Ud Deen Eberle (Constitutional Court October 11, 2018).

2015-16770, No. Z.S. and Others (Constitutional Court November 5, 2015).

2015-17762, No. Abdolghafoor Rezaei (Constitutional Court December 6, 2017).

2015-18203, No. Mahira Karaja (Constitutional Court December 1, 2015).

2016-54 (Constitutional Court April 24, 2019).

2016-220, No. M.A. (Constitutional Court January 20, 2016).

2016/272 D. İş (Edirne 2. Criminal Judge of Peace November 21, 2016).

2016/504 D. İş (Kırklareli Criminal Judge of Peace March 14, 2016).

2016/509 D. İş (Ağrı Criminal Judge of Peace March 3, 2016).

2016/601 D. İş (Ağrı Criminal Judge of Peace March 14, 2016).

2016/736 D. İş (Ağrı Criminal Judge of Peace March 24, 2016).

2016/806 K. 2016/1164 (Hatay Administrative Court November 1, 2016).

2016/847 D. İş (Ağrı Criminal Judge of Peace April 4, 2016).

2016/903 D. İş (Ağrı Criminal Judge of Peace April 12, 2016).

2016/972 D. İş (Antalya 2. Criminal Judge of Peace March 25, 2016).

2016/1021 D. İş (Ağrı Criminal Judge of Peace April 27, 2016).

2016/1260 D. İş (İzmir 2. Criminal Judge of Peace April 18, 2016).

2016/1363 D. İş (Antalya 2. Criminal Judge of Peace April 29, 2016).

2016/1964 D. İş (Kırklareli Criminal Judge of Peace August 22, 2016).

2016/2268 D. İş (Aydın 2. Criminal Judge of Peace August 15, 2016).

2016/2621 D. İş (Antalya 2. Criminal Judge of Peace August 19, 2016).

2016/2622 D. İş (Antalya 2. Criminal Judge of Peace August 19, 2016).

2016/2821 D. İş (Adana 2. Criminal Judge of Peace June 1, 2016).

2016/3003 D.İş (Kırklareli Criminal Judge of Peace November 10, 2016).

2016/3599 D.İş (İzmir 2. Criminal Judge of Peace November 15, 2016).

2016/3628 D. İş (Adana 2. Criminal Judge of Peace August 5, 2016).

2016-4405, No. F.R. (Constitutional Court February 15, 2017).

2016-5126, No. Haider Subhi Amenn Amenn (Constitutional Court March 17, 2016).

2016/5499 D. İş (Edirne Criminal Judge of Peace October 18, 2016).

2016-5687, No. W. S. (Constitutional Court October 25, 2017).

2016-5688, No. A. S. (Constitutional Court October 26, 2017).

2016-6293, No. Aigul Mavlianova (Constitutional Court November 9, 2017).

2016-7458, No. Yryskul Beishenaliev (Constitutional Court April 20, 2016).

2016-7458, No. Yryskul Beishenaliev (Constitutional Court March 3, 2017).

2016-8317, No. Akmal Yunuskhodjaev (Constitutional Court May 3, 2016).

2016-8317, No. Akmal Yunuskhodjaev (Constitutional Court November 8, 2017).

2016-9485, No. Arkan Tareq Ali Ali (Constitutional Court October 26, 2017).

2016-13290, No. Aleksei Alekseev (Constitutional Court July 22, 2016).

2016-13290, No. Aleksei Alekseev (Constitutional Court March 3, 2017).

2016-13290, No. Aleksei Alekseev (Constitutional Court December 5, 2017).

2016-22418, No. Y.T. (Constitutional Court November 1, 2016).

2016-22418, No. Y.T. (Constitutional Court June 12, 2018).

2016-22418, No. Y.T. (Constitutional Court May 30, 2019).

2016-23685 (Constitutional Court November 8, 2016).

2016-24976 (Constitutional Court November 16, 2016).

2016-24976 (Constitutional Court November 16, 2016).

2016-26503, No. Fatma Bakki (Constitutional Court November 23, 2016).

2016-27304, No. H. B. (Constitutional Court December 13, 2016).

2016-34546 (Constitutional Court December 15, 2016).

2016-34546 (Constitutional Court December 15, 2016).

2016-35009, No. Abdulkadir Yapuquan (Constitutional Court February 5, 2019).

2016-59015, No. Viktor Golovatskih (Constitutional Court April 12, 2019).

2017/82 D.İş (Kırklareli Criminal Judge of Peace January 12, 2017).

2017/156 D.İş (Aydın 2. Criminal Judge of Peace January 12, 2017).

2017/446 D. İş (Kırklareli Criminal Judge of Peace February 23, 2017).

2017/484 D. İş (Rize Criminal Judge of Peace February 23, 2017).

2017/833 D. İş (İzmir 2. Criminal Judge of Peace February 13, 2017).

2017/880 D. İş (Edirne 2. Criminal Judge of Peace February 27, 2017).

2017/975 D. İş (Antalya 2. Criminal Judge of Peace February 23, 2017).

2017/982 D. İş (İstanbul 2. Criminal Judge of Peace March 13, 2017).

2017/1009 D. İş (Antalya 2. Criminal Judge of Peace February 28, 2017).

2017/1045 D. İş (İstanbul 2. Criminal Judge of Peace March 13, 2017).

2017/1230 D. İş (Kayseri 2. Criminal Judge of Peace March 13, 2017).

2017/1257 D. İş (İstanbul 2. Criminal Judge of Peace March 20, 2017).

2017/1406 D. İş (İstanbul 2. Criminal Judge of Peace March 22, 2017).

2017-1442, No. Seyed Amin Seyed Mortazei (Constitutional Court January 26, 2017).

2017/1487 D. İş (Aydın 2. Criminal Judge of Peace March 9, 2017).

2017/1489 D. İş (Aydın 2. Criminal Judge of Peace March 9, 2017).

2017/1714 D. İş (İstanbul 2. Criminal Judge of Peace April 18, 2017).

2017/1774 D. İş (Aydın 2. Criminal Judge of Peace March 21, 2017).

2017/1943 D. İş (Antalya 2. Criminal Judge of Peace March 30, 2017).

2017/1987 D. İş (İstanbul 2. Criminal Judge of Peace April 25, 2017).

2017/2013 D. İş (Antalya 2. Criminal Judge of Peace April 4, 2017).

2017/2197 D. İş (Adana 2. Criminal Judge of Peace May 25, 2017).

2017/2261 D. İş (Kırklareli Criminal Judge of Peace July 27, 2017).

2017/2289 D. İş (İstanbul 1. Criminal Judge of Peace June 7, 2017).

2017/2585 D. İş (Edirne 2. Criminal Judge of Peace June 6, 2017).

2017/2639 D. İş (Antalya 2. Criminal Judge of Peace May 13, 2017).

2017/2795 D. İş (Izmir 3. Criminal Judge of Peace May 25, 2017).

2017/2843 D. İş (İstanbul 2. Criminal Judge of Peace June 8, 2017).

2017/2853 D. İş (Kırklareli Criminal Judge of Peace September 26, 2017).

2017/2956 D. İş (Edirne 2. Criminal Judge of Peace June 28, 2017).

2017/2962 D. İş (Kilis Criminal Judge of Peace December 21, 2017).

2017/3012 D. İş (Kırklareli Criminal Judge of Peace October 3, 2017).

2017/3146 D. İş (Antalya 2. Criminal Judge of Peace May 26, 2017).

2017/3174 D. İş (İstanbul 2. Criminal Judge of Peace June 21, 2017).

2017/3196 D. İş (Antalya 2. Criminal Judge of Peace May 31, 2017).

2017/3197 D. İş (Antalya 2. Criminal Judge of Peace May 31, 2017).

2017/3661 D. İş (Çanakkale Criminal Judge of Peace November 3, 2017).

2017/3698 D. İş (İstanbul 2. Criminal Judge of Peace August 9, 2017).

2017/3731 D. İş (İstanbul 2. Criminal Judge of Peace August 21, 2017).

2017/3957 D. İş (İstanbul 2. Criminal Judge of Peace September 21, 2017).

2017/4131 D. İş (Edirne 2. Criminal Judge of Peace September 21, 2017).

2017/4178 D. İş (Edirne 2. Criminal Judge of Peace September 28, 2017).

2017/5321 D.İş (Aydın 2. Criminal Judge of Peace October 18, 2017).

2017/5473 D.İş (Aydın 2. Criminal Judge of Peace October 18, 2017).

2017-5839, No. M. I. (Constitutional Court February 9, 2017).

2017-5993 (Constitutional Court February 16, 2017).

2017-5993 (Constitutional Court February 16, 2017).

2017-6077, No. F.R. (Constitutional Court March 6, 2017).

2017-6906, No. Azam Valizadeh (Constitutional Court March 29, 2017).

2017-10453, No. Y. H. (Constitutional Court July 6, 2017).

2017-19685, No. Zamow Muhammed (Constitutional Court Unknown).

2017-21577, No. Khadijeh Mohammadipiraghaj (Constitutional Court April 28, 2017).

2017-21577, No. Khadijeh Mohammadipiraghaj (Constitutional Court May 18, 2017).

2017-21577, No. Khadijeh Mohammadipiraghaj (Constitutional Court June 1, 2017).

2017-21661, No. Abdelouahed Essehl (Constitutional Court May 25, 2017).

2017-23177, No. P.A. (Constitutional Court April 5, 2018).

2017/27477, No. Fadi Erber (Constitutional Court April 2, 2019).

2017-31040, No. Z.K. (Constitutional Court January 9, 2019).

2017-34558, No. Shakhnoza Abullaeva (Constitutional Court February 7, 2019).

2017-36637, No. Marziyeh Dashtpeima (Constitutional Court November 3, 2017).

2017-36637, No. Marziyeh Dashtpeima (Constitutional Court November 14, 2017).

2017-36854, No. Murat Tkhagapsoev (Constitutional Court April 16, 2018).

2017-38222, No. F.Y. (Constitutional Court December 26, 2018).

2018/333 D. İş (Muğla 2. Criminal Judge of Peace February 21, 2018).

2018/713 D. İş (Muğla 2. Criminal Judge of Peace March 28, 2018).

2018/1023 D. İş (Şanlıurfa 1. Criminal Judge of Peace March 12, 2018).

2018/1024 D. İş (Şanlıurfa 1. Criminal Judge of Peace March 12, 2018).

2018/1081 D. İş (Muğla 2. Criminal Judge of Peace May 18, 2018).

2018/1280 D. İş (İstanbul 2. Criminal Judge of Peace February 15, 2018).

2018/1403 D. İş (Antalya 2. Criminal Judge of Peace March 18, 2018).

2018-2141, No. Kaveh Parvizi (Constitutional Court February 12, 2018).

2018/2409 D. İş (Hatay 2. Criminal Judge of Peace June 25, 2018).

2018/2756 D. İş (Edirne 2. Criminal Judge of Peace July 3, 2018).

2018/2898 D. İş (İstanbul 2. Criminal Judge of Peace May 3, 2018).

2018/3100 D. İş (İstanbul 2. Criminal Judge of Peace May 21, 2018).

2018/3128 D. İş (İstanbul 2. Criminal Judge of Peace May 22, 2018).

2018/3412 D. İş (İstanbul 2. Criminal Judge of Peace May 29, 2018).

2018/3447 D. İş (İstanbul 2. Criminal Judge of Peace May 28, 2018).

2018/3770 D. İş (İstanbul 2. Criminal Judge of Peace June 11, 2018).

2018-4529, No. Dana Ebrahimnezhad (Constitutional Court April 16, 2019).

2018/4828 D. İş (İstanbul 12. Criminal Judge of Peace October 4, 2018).

2018-11107, No. Tiam Asadpour (Constitutional Court April 26, 2018).

2018/32122, No. Manar Murad (Constitutional Court November 14, 2018).

2019/1655 D. İş (İstanbul 2. Criminal Judge of Peace March 11, 2019).

"A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal." Amnesty International, 2017.

A. v. Switzerland, No. 60342/16 (ECtHR December 19, 2017).

Abdi Mahamud v. Malta, No. 56796/13 (ECtHR May 3, 2016).

Abdolkhani and Karimnia v. Turkey, No. 30471/08 (ECtHR September 22, 2009).

Abdolkhani and Karimnia v. Turkey, No. 30471/08 (European Court of Human Rights September 22, 2009).

Abdolkhani and Karimnia v. Turkey (no. 2), No. 50213/08 (ECtHR July 27, 2010).

A.D. and Others v. Turkey, No. 22681/09 (ECtHR July 22, 2014).

Ahmed v. Austria, No. 25964/94 (ECtHR December 17, 1996).

Aksoy v. Turkey, No. 21987/93 (ECtHR December 18, 1996).

Al Chodor, No. C-528/15 (CJEU March 15, 2017).

Alimov v. Turkey, No. 14344/13 (ECtHR September 6, 2016).

Amie and Others v. Bulgaria, No. 58149/08 (ECtHR February 12, 2015).

Amuur v. France, No. 19776/92 (ECtHR June 25, 1996).

Aquilina v. Malta, No. 25642/94 (ECtHR April 26, 1999).

Athary v. Turkey, No. 50372/09 (ECtHR December 11, 2012).

Auad v. Bulgaria, No. 46390/10 (ECtHR October 11, 2011).

Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland, No. C-175/08, C-176/08, C-178/08 C-179/08 (CJEU March 2, 2010).

Bashir Mohamed Ali Mahdi, No. C-146/14 PPU (CJEU June 5, 2014).

"Belgium - Council for Alien Law Litigation, 9 July 2008, Nr. 13.874 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-9-july-2008-nr-13874#content.

"Belgium – Council for Alien Law Litigation, 20 October 2010, Nr. 49.821 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-alien-law-litigation-20-october-2010-nr-49821#content.

Bensaid v. the United Kingdom, No. 44599/98 (ECtHR February 6, 2001).

Bianchini, Katia. "Legal Aid for Asylum Seekers: Progress and Challenges in Italy." *Journal of Refugee Studies* 24, no. 2 (2011): 390–410.

Boudraa v. Turkey, No. 1009/16 (ECtHR November 28, 2017).

Brahim Samba Diouf, No. C-69/10 (CJEU July 28, 2011).

Brogan and Others v. the United Kingdom, No. 1209/84; 11234/84; 11266/84; 11386/85 (ECtHR November 29, 1988).

Buscemi v. Italy, No. 29569/95 (ECtHR September 16, 1999).

Butios-Rojaz v. Peru, No. 10.458 (Inter-American Court of Human Rights 1997).

Castillo Algar v. Spain, No. 28194/95 (ECtHR October 28, 1998).

Cecilia Rosana Núñez Chipana v. Venezuela, No. 110/1998 (Committee Against Torture 1998).

C.G. and Others v. Bulgaria, No. 1365/07 (ECtHR April 24, 2008).

Chahal v. the United Kingdom, No. 22414/93 (ECtHR November 15, 1996).

Communicated Case Yapuquan v. Turkey (ECtHR March 26, 2018).

Conka v. Belgium, No. 51564/99 (ECtHR May 2, 2002).

"Czech Republic - Supreme Administrative Court, 15 May 2013, A.S. v. Ministry of the Interior, Azs 56/2012-81 | European Database of Asylum Law." Accessed June 29, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-15-may-2013-v-ministry-interior-azs-562012-81#content.

"Czech Republic - Supreme Administrative Court, 16 September 2008, N.U. v Ministry of Interior, 3 Azs 48/2008-57 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-16-september-2008-nu-v-ministry-interior-3-azs#content.

"Czech Republic - Supreme Administrative Court, 17 June 2015, 1 Azs 39/2015 - 56 | European Database of Asylum Law." Accessed May 16, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-17-june-2015-1-azs-392015-56#content.

"Czech Republic - Supreme Administrative Court, 18 December 2008, S.I.Ch v Ministry of Interior, 1 Azs 86/2008-101 | European Database of Asylum Law." Accessed

June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-18-december-2008-sich-v-ministry-interior-1-azs#content.

"Czech Republic - Supreme Administrative Court, 25 January 2011, R.S. v Ministry of Interior, 6 Azs 36/2010-274 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-25-january-2011-rs-v-ministry-interior-6-azs#content.

"Czech Republic - Supreme Administrative Court, 30 September 2013, I.J. v Ministry of the Interior, 4 Azs 24/2013-34 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/czech-republic-supreme-administrative-court-30-september-2013-ij-v-ministry-interior-4-azs#content.

Dbouba v. Turkey, No. 15916/09 (ECtHR July 13, 2010).

De Souza Ribeiro v. France, No. 22689/07 (ECtHR December 13, 2012).

"Denmark - the Refugee Appeals Board's Decision of 16 January 2017 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content.

"Denmark - The Refugee Appeals Board's Decision of 27 June 2017 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-27-june-2017#content.

Dikme v. Turkey, No. 20869/92 (ECtHR July 11, 2000).

Dougoz v. Greece, No. 40907/98 (ECtHR March 6, 2001).

E.1937/202 K. 1938/14 (Council of State 2. General Council of Lawsuit Chambers January 25, 1938).

E. 1965/21 K. 1966/7 (Council of State Board for Unification of Case Law July 9, 1966).

E. 1975/542 K. 1975/519 (Council of State 3. Chamber December 2, 1975).

E. 1980/32 K. 1980/39 (Council of State 3. Chamber March 12, 1980).

E. 1991/112 K. 1991/154 (Council of State 5. Chamber February 11, 1991).

E. 1993/247 K. 1994/559 (Council of State 3. General Chamber of Administrative Lawsuits September 30, 1994).

E. 2003/14 K. 2003/25 (Council of State 1. Chamber February 27, 2003).

E. 2003/4-40 K. 2003/38 (Turkish Court of Cassation General Assembly of Criminal Chambers March 11, 2003).

E. 2013/1311 K. 2015/659 (Ankara 7. Administrative Court April 24, 2015).

E. 2013/1353 K. 2015/2689 (Ankara 8. Administrative Court December 30, 2015).

E. 2013/12545 K. 2013/14522 (Turkish Court of Cassation 19. Civil Chamber September 23, 2013).

E. 2014/223, K. 2018/28 (Bakırköy 10. Commercial Court January 16, 2018).

E. 2014/883 K. 2019/61 (İstanbul 5. Commercial Court January 29, 2019).

E. 2014/896 K. 2014/1413 (Ankara 1. Administrative Court September 11, 2014).

E. 2014/1238 K. 2015/34 (Konya 1. Administrative Court January 14, 2015).

E. 2014/1371 K. 2014/1486 (İstanbul 1. Administrative Court September 8, 2014).

E. 2014/1658 K. 2015/1321 (Sivas Administrative Court September 3, 2015).

E. 2014/2031, K. 2015/601 (Ankara 1. Administrative Court March 24, 2015).

E. 2014/2068 K. 2015/849 (Ankara 1. Administrative Court April 22, 2015).

E. 2014/2070 K. 2015/2630 (Ankara 1. Administrative Court November 30, 2015).

E. 2014/2158 K. 2015/823 (Ankara 1. Administrative Court April 21, 2015).

E. 2014/2195 K. 2015/2067 (Ankara 1. Administrative Court October 27, 2015).

E. 2015/23 K. 2015/574 (Bursa 1. Administrative Court Unknown).

E. 2015/453 K. 2015/811 (Sakarya 1. Administrative Court September 14, 2015).

E. 2015/581 K. 2015/1519 (Ankara 1. Administrative Court September 10, 2015).

E. 2015/1019 K. 2016/3129 (Ankara 1. Administrative Court October 31, 2016).

E. 2015/1022 K. 2016/74 (Sivas Administrative Court January 20, 2016).

E. 2015/1050 K. 2016/615 (Antalya 1. Administrative Court May 31, 2016).

E. 2015/1144 K. 2016/592 (Kastamonu Administrative Court May 18, 2016).

E. 2015/1248 K. 2017/984 (Kastamonu Administrative Court May 25, 2017).

E. 2015/1304, K. 2015/1553 (Ankara 1. Administrative Court September 10, 2015).

E. 2015/1345 K. 2016/16 (Antalya 1. Administrative Court January 14, 2016).

E. 2015/1395 K. 2016/19 (Antalya 1. Administrative Court January 14, 2016).

E. 2015/1436 K. 2016/15 (Antalya 1. Administrative Court January 14, 2016).

E. 2015/1437 K. 2016/20 (Antalya 1. Administrative Court January 14, 2016).

E. 2015/1500 K. 2016/67 (Antalya 1. Administrative Court January 26, 2016).

E. 2015/1534 K. 2015/2027 (Adana 1. Administrative Court October 22, 2015).

E. 2015/1536 K. 2016/11 (Bursa 1. Administrative Court January 12, 2016).

E. 2015/1537 K. 2016/12 (Bursa 1. Administrative Court January 12, 2016).

E. 2015/1672 K. 2015/3250 (Ankara 1. Administrative Court December 31, 2015).

E. 2015/1740 K. 2015/2867 (Ankara 1. Administrative Court December 21, 2015).

E. 2015/1996 K. 2015/1614 (Ankara 1. Administrative Court November 6, 2015).

E. 2015/2299 K. 2016/1333 (İstanbul 1. Administrative Court May 31, 2016).

E. 2015/2393 K. 2016/780 (İstanbul 1. Administrative Court March 31, 2016).

E. 2015/2718 K. 2016/1334 (İstanbul 1. Administrative Court May 31, 2016).

E. 2016/21 K. 2016/37 (Samsun 1. Administrative Court January 27, 2016).

E. 2016/28 K. 2016/145 (Erzurum 1. Administrative Court February 18, 2016).

E. 2016/29 K. 2016/670 (Erzurum 1. Administrative Court June 15, 2016).

E. 2016/35 K. 2016/25 (Antalya 1. Administrative Court January 14, 2016).

E. 2016/36 K. 2016/26 (Antalya 1. Administrative Court January 14, 2016).

E. 2016/78 K. 2017/1510 (Manisa Administrative Court October 11, 2017).

E. 2016/82 K. 2016/924 (İstanbul 1. Administrative Court April 18, 2016).

E. 2016/125 K. 2016/312 (Manisa 1. Administrative Court March 18, 2016).

E. 2016/134 K. 2016/243 (Trabzon Administrative Court February 25, 2016).

E. 2016/138 K. 2016/567 (Afyonkarahisar Administrative Court August 25, 2016).

E. 2016/389 K. 2016/502 (Antalya 1. Administrative Court May 10, 2016).

E. 2016/454 K. 2016/513 (Antalya 1. Administrative Court May 18, 2016).

E. 2016/478 K. 2018/1250 (Council of State 10th Chamber March 26, 2018).

E. 2016/613 K. 2016/670 (Antalya 1. Administrative Court June 21, 2016).

E. 2016/688 K. 2016/1288 (Antalya 1. Administrative Court December 20, 2018).

E. 2016/737 K. 2016/720 (Hatay Administrative Court September 9, 2016).

E. 2016/804 K. 2016/722 (Hatay Administrative Court September 9, 2016).

E. 2016/807 K. 2016/674 (Hatay Administrative Court September 7, 2016).

E. 2016/935 K. 2017/348 (Denizli Administrative Court February 10, 2017).

E. 2016/1031 K. 2016/1949 (Denizli Administrative Court February 16, 2017).

E. 2016/1229 K. 2017/163 (Antalya 1. Administrative Court February 24, 2017).

E. 2016/1252 K. 2016/3847 (Council of State 10th Chamber October 25, 2016).

E. 2016/1274 K. 2016/4466 (Council of State 10th Chamber December 12, 2016).

E. 2016/1405 K. 2016/2677 (İstanbul 1. Administrative Court December 26, 2016).

E. 2016/1456 K. 2017/3631 (Erzurum 1. Administrative Court December 1, 2017).

E. 2016/1555 K. 2016/1596 (Edirne Administrative Court December 12, 2016).

E. 2016/1644 K. 2016/1776 (İzmir 1. Administrative Court December 23, 2016).

E. 2016/1682 K. 2017/261 (İstanbul 1. Administrative Court February 16, 2017).

E. 2016/1799 Interim Measure (Council of State 10th Chamber May 25, 2016).

E. 2016/1799 K. 2016/3845 (Council of State 10th Chamber October 25, 2016).

E. 2016/1841 K. 2016/3846 (Council of State 10th Chamber October 25, 2016).

E. 2016/2011 K. 2016/3848 (Council of State 10th Chamber October 25, 2016).

E. 2016/3395 K. 2018/115 (Ankara 1. Administrative Court January 23, 2018).

E. 2017/12 K. 2017/283 (Samsun 1. Administrative Court February 15, 2017).

E. 2017/105 K. 2017/1136 (İstanbul 1. Administrative Court July 7, 2017).

E. 2017/242 K. 2017/1360 (Kastamonu Administrative Court September 22, 2017).

E. 2017/309 K. 2017/696 (Afyonkarahisar Administrative Court June 8, 2017).

E. 2017/311 K. 2017/698 (Afyonkarahisar Administrative Court June 8, 2017).

E. 2017/342 K. 2017/764 (Sivas Administrative Court June 14, 2017).

E. 2017/359 K. 2018/98 (İstanbul 1. Administrative Court January 19, 2018).

E. 2017/376, K. 2018/1022 (Bakırköy 4. Commercial Court November 5, 2018).

E. 2017/419 K. 2017/451 (Ankara RAC May 18, 2017).

E. 2017/435 K. 2017/650 (Konya 1. Administrative Court March 27, 2017).

E. 2017/436 K. 2017/649 (Konya 1. Administrative Court March 27, 2017).

E. 2017/566 K. 2017/1004 (Bursa 1. Administrative Court June 22, 2017).

E. 2017/618 K. 2017/1117 (Kayseri 1. Administrative Court September 27, 2017).

E. 2017/630 K. 2017/1065 (Bursa 1. Administrative Court July 11, 2017).

E. 2017/631 K. 2017/1066 (Bursa 1. Administrative Court July 11, 2017).

E. 2017/665 K. 2017/1726 (Bursa 1. Administrative Court November 9, 2017).

E. 2017/683 K. 2017/967 (Antalya 1. Administrative Court September 26, 2017).

E. 2017/790 K. 2018/406 (İstanbul Regional Court 12. Civil Chamber April 5, 2018).

E. 2017/813 K. 2018/1291 (İstanbul Regional Court 22. Civil Chamber July 16, 2018).

E. 2017/816 K. 2017/1764 (İstanbul 1. Administrative Court October 11, 2017).

E. 2017/820, K. 2018/381 (İstanbul 16. Commercial Court April 25, 2018).

E. 2017/825 K. 2018/322 (Isparta Administrative Court March 14, 2018).

E. 2017/826 K. 2017/1741 (Isparta Administrative Court September 13, 2017).

E. 2017/862 K. 2017/1768 (İstanbul 1. Administrative Court October 11, 2017).

E. 2017/862 K. 2017/1768 (İstanbul 1. Administrative Court November 10, 2017).

E. 2017/881 K. 2017/1594 (Şanlıurfa 1. Administrative Court December 29, 2017).

E. 2017/893 K. 2018/863 (Isparta Administrative Court February 27, 2018).

E. 2017/894 K. 2018/264 (Isparta Administrative Court February 27, 2018).

E. 2017/907 K. 2017/1197 (Bursa 1. Administrative Court August 9, 2017).

E. 2017/943 K. 2018/593 (Isparta Administrative Court May 3, 2018).

E. 2017/944 K. 2018/862 (Isparta Administrative Court June 21, 2018).

E. 2017/1005 K. 2017/1397 (Sivas Administrative Court December 27, 2017).

E. 2017/1014 K. 2017/1347 (Trabzon Administrative Court November 21, 2017).

E. 2017/1023 K. 2018/230 (Ordu Administrative Court February 16, 2018).

E. 2017/1047 K. 2018/205 (Antalya 1. Administrative Court February 20, 2018).

E. 2017/1249 K. 2017/1504 (Adana 1. Administrative Court December 19, 2017).

E. 2017/1314 K. 2017/968 (Van 1. Administrative Court May 24, 2017).

E. 2017/1317 K. 2017/1525 (Bursa 1. Administrative Court October 10, 2017).

E. 2017/1322 K. 2018/338 (İstanbul 1. Administrative Court February 28, 2018).

E. 2017/1376 K. 2018/236 (Edirne Administrative Court March 5, 2018).

E. 2017/1377 K. 2018/83 (Kayseri 1. Administrative Court January 24, 2018).

E. 2017/1451 K. 2018/201 (Edirne Administrative Court February 22, 2018).

E. 2017/1483 K. 2017/1655 (Konya 1. AC October 19, 2017).

E. 2017/1633 K. 2017/1013 (Turkish Court of Cassation General Assembly of Civil Chambers May 24, 2017).

E. 2017/1695 K. 2018/158 (Kastamonu Administrative Court February 20, 2018).

E. 2017/1696 K. 2018/157 (Kastamonu Administrative Court February 20, 2018).

E. 2017/1836 K. 2018/1055 (Erzurum Administrative Court May 24, 2018).

E. 2017/1856 K. 2017/2053 (Gaziantep 1. Administrative Court December 15, 2017).

E. 2017/1878 K. 2017/1973 (Samsun 1. AC December 7, 2017).

E. 2017/1950 K. 2018/107 (Gaziantep 1. Administrative Court February 5, 2018).

E. 2017/2022 K. 2018/809 (Kastamonu Administrative Court July 4, 2018).

E. 2017/2197 K. 2018/132 (Van 1. Administrative Court January 19, 2018).

E. 2017/2832 K. 2018/285 (Hatay Administrative Court March 7, 2018).

E. 2018/66 K. 2018/300 (Sivas Administrative Court April 11, 2018).

E. 2018/287 K. 2018/1050 (İstanbul 1. Administrative Court June 13, 2018).

E. 2018/305 K.2018/427 (Konya RAC 5. Chamber of Administrative Lawsuits February 27, 2018).

E. 2018/327 K. 2018/555 (Sivas Administrative Court July 11, 2018).

E. 2018/360 K. 2018/332 (Ankara RAC 10. Chamber of Administrative Lawsuits April 17, 2018).

E. 2018/435 K. 2018/766 (Manisa 1. Administrative Court June 29, 2018).

E. 2018/460 K. 2018/1773 (İstanbul 1. Administrative Court October 25, 2018).

E. 2018/499 K. 2018/562 (Edirne Administrative Court May 8, 2018).

E. 2018/614 K. 2019/65 (Eskişehir 1. Administrative Court February 15, 2018).

E. 2018/735 K. 2018/1880 (Erzurum RAC October 24, 2018).

E. 2018/762 K. 2018/798 (Ankara RAC 10. Administrative Lawsuit Chamber September 11, 2018).

E. 2018/970 K. 2018/1592 (Izmir 1. Administrative Court November 2, 2018).

E. 2018/992 K. 2019/120 (Sivas 1. Administrative Court February 12, 2019).

E. 2018/1049 K. 2018/1405 (Manisa 1. Administrative Court December 20, 2018).

E. 2018/1135 K. 2018/1456 (Manisa 1. Administrative Court December 31, 2018).

E. 2018/1254 K. 2018/2324 (İstanbul 1. Administrative Court December 12, 2018).

E. 2018/1798 K. 2018/1544 (İstanbul RAC 10. Administrative Lawsuit Chamber June 8, 2018).

E. 2018/2202 K. 2018/2042 (İstanbul RAC 10. Administrative Lawsuit Chamber September 20, 2018).

E. 2019/212 K. 2019/620 (Hatay 1. Administrative Court April 18, 2019).

E. 2019/219 K. 2019/441 (Eskişehir 1. Administrative Court September 13, 2019).

Ferrantelli and Santangelo v. Italy, No. 19874/92 (ECtHR August 7, 1996).

Fey v. Austria, No. Series A no. 255-A (ECtHR February 24, 1993).

F.G. v. Sweden, No. 43611/11 (ECtHR March 23, 2016).

"France – Council of State, 19 November 2010, Mrs. E. v Minister for the Interior, No 344372 | European Database of Asylum Law." Accessed May 24, 2019. https://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-council-state-19-november-2010-mrs-e-v-minister-interior-no-344372#content.

"France - Court of Cassation, Decision No. 1130 FS-P+B+R+I, 27 September 2017 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/france-court-cassation-decision-no-1130-fs-pbri-27-september-2017#content.

Gebremedhin [Gaberamadhien] v. France, No. 25389/05 (ECtHR July 26, 2007).

"Germany - Administrative Court Augsburg, 16 June 2011, Au 6 K 30092 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-augsburg-16-june-2011-au-6-k-30092#content.

"Germany - Administrative Court München, 10 December 2008, M 8 K 07.51028 | European Database of Asylum Law." Accessed June 23, 2019.

https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnchen-10-december-2008-m-8-k-0751028#content.

"Germany - Administrative Court of Oldenburg, 13 April 2011, 3 A 2966/09 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-oldenburg-13-april-2011-3-296609#content.

"Germany - Administrative Court Stuttgart, 8 September 2008, A 10 K 13/07 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-8-september-2008-10-k-1307#content.

"Germany - Administrative Court Stuttgart, 14 March 2011, A 11 K 553/10 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-14-march-2011-11-k-55310#content.

"Germany - Administrative Court Stuttgart, 18 January 2011, A 6 K 615/10 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-stuttgart-18-january-2011-6-k-61510#content.

Ghorbanov and Others v. Turkey, No. 28127/09 (ECtHR December 3, 2013).

Grori v. Albania, No. 25336/04 (ECtHR July 7, 2009).

"Hellenic Republic - Administrative Court of First Instance of Mytilene, 30 October 2017, AP219/2017 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/hellenic-republic-

administrative-court-first-instance-mytilene-30-october-2017-ap2192017#content.

H.L.R. v. France, No. 24573/94 (ECtHR April 29, 1997).

Ilias and Ahmed v. Hungary, No. 47287/15 (ECtHR March 14, 2017).

Indra v. Slovakia, No. 46845/99 (ECtHR February 1, 2005).

Interim Measure Appeal 2018/358 (Izmir RAC June 5, 2018).

"Ireland - High Court, 1 March 2012, J.T.M. v Minister for Justice and Equality, Ireland and the Attorney General,[2012] IEHC 99 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-1-march-2012-jtm-v-minister-justice-and-equality-ireland-and-attorney#content.

"Ireland - High Court, 3 November 2009, D.T. v Minister for Justice, Equality and Law Reform [2009] IEHC 482 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-3-november-2009-dt-v-minister-justice-equality-and-law-reform-2009-iehc#content.

"Ireland - High Court, 25 June 2012, W.A. [DRC] v Minister for Justice and Equality, Ireland and the Attorney General, [2012] IEHC 251 | European Database of Asylum Law." Accessed June 29, 2019. https://www.asylumlawdatabase.eu/en/case-law/ireland-high-court-25-june-2012-wa-drc-v-minister-justice-and-equality-ireland-and-attorney.

"Ireland - SM -v- The Refugee Appeals Tribunal [2016] IEHC 638, 11 September 2016 | European Database of Asylum Law." Accessed June 21, 2019.

https://www.asylumlawdatabase.eu/en/case-law/ireland-sm-v-refugee-appeals-tribunal-2016-iehc-638-11-september-2016#content.

Jabari v. Turkey, No. 40035/98 (ECtHR July 11, 2000).

J.K. and others vs. Sweden, No. 59166/12 (ECtHR August 23, 2016).

Joined Cases of N.S. v. the UK and M.E. v. Ireland, No. C-411-10 and C-493-10 (CJEU December 21, 2011).

Khaldarov v. Turkey, No. 23619/11 (ECtHR September 5, 2017).

Khlaifia and Others v. Italy, No. 16483/12 (ECtHR December 15, 2016).

Kudla v. Poland, No. 30210/96 (ECtHR October 26, 2000).

Lansman III v. Finland, No. 1023/2001 (Human Rights Committee 2001).

Lavents v. Latvia, No. 58442/00 (ECtHR November 28, 2002).

Ljatifi v. the Former Yugoslav Republic of Macedonia, No. 16870/11, 16874/11 and 16879/11 (ECtHR May 17, 2018).

Lupsa v. Romania, No. 10337/04 (ECtHR June 8, 2006).

M. and Others v. Bulgaria, No. 41416/08 (ECtHR July 26, 2011).

Madah and Others v. Bulgaria, No. 45237/08 (ECtHR May 10, 2012).

Mamatkulov and Askarov v. Turkey, No. 46827/99 and 46951/99 (ECtHR February 4, 2005).

Medvedyev and Others v. France, No. 3394/03 (ECtHR March 29, 2010).

Meznaric v. Croatia, No. 28194/95 (ECtHR July 15, 2005).

Micallef v. Malta, No. 17056/06 (ECtHR October 15, 2009).

Moghaddas v. Turkey, No. 46134/08 (ECtHR February 15, 2011).

Morel v. France, No. 34130/96 (ECtHR June 6, 2000).

M.S.S. v. Belgium and Greece, No. 30696/09 (ECtHR January 21, 2011).

Muhammad and Muhammad v. Romania, No. 80982/12 (ECtHR October 15, 2020).

Musaev v. Turkey, No. 72754/11 (ECtHR October 21, 2014).

N. v. the United Kingdom, No. 26565/05 (ECtHR May 27, 2018).

"Netherlands - ABRvS, 4 October 2011, 201102753/1/V3 | European Database of Asylum Law." Accessed May 13, 2019. https://www.asylumlawdatabase.eu/en/case-law/netherlands-abrvs-4-october-2011-2011027531v3#content.

"Netherlands – Court of The Hague, 24 November 2015, AWB 15/19968 | European Database of Asylum Law." Accessed May 13, 2019. https://www.asylumlawdatabase.eu/en/case-law/netherlands-%E2%80%93-court-hague-24-november-2015-awb-1519968#content.

NF v. European Council, NG v. European Council and NM v. European Council, No. T-192/16, T-193/16, T-257/16 (CJEU 2017).

Nnyanzi v. the United Kingdom, No. 21878/06 (ECtHR April 8, 2018).

Nolan and K. v. Russia, No. 2512/04 (ECtHR February 12, 2009).

Nortier v. the Netherlands, No. Series A no. 267 (ECtHR August 24, 1993).

Ominayak v. Canada, No. 167/1984 (Human Rights Committee 1984).

Othman (Abu Qatada) v. the United Kingdom, No. 8139/09 (ECtHR January 17, 2012).

Paladi v. Moldova, No. 39806/05 (ECtHR March 10, 2009).

Piandiong and Others v. Phillipines, No. 869/1999 (Human Rights Committee 2000).

"Poland - Judgement of the Court of Appeal in Warsaw from 22 June 2016 II Aka 59/16 Amending the Judgement of the Court of I Instance by Increasing the Amount of

Compensation for Unlawful Detention | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/poland-judgement-court-appeal-warsaw-22-june-2016-ii-aka-5916-amending-judgement-court-i#content.

"Poland - Polish Refugee Board, 8 September 2010, RdU-439-1/S/10 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/poland-polish-refugee-board-8-september-2010-rdu-439-1s10#content.

"Poland - Supreme Administrative Court of Poland, 8 May 2008, OSK 237/07 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/poland-supreme-administrative-court-poland-8-may-2008-osk-23707#content.

"Poland - Supreme Administrative Court of Poland, 18 February 2009, II OSK 247/08 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/poland-supreme-administrative-court-poland-18-february-2009-ii-osk-24708#content.

"Poland – Supreme Court, 2 March 2017 r., S.C., Z.C. and F.C., Syg. Akt II KK 358/16 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/poland-%E2%80%93-supreme-court-2-march-2017-r-sc-zc-and-fc-syg-akt-ii-kk-35816#content.

Poppe v. the Netherlands, No. 32271/04 (ECtHR March 24, 2009).

Pullar v. the United Kingdom, No. 22399/93 (ECtHR June 10, 1996).

Riad and Idiab v. Belgium, No. 29787/03 and 29810/03 (ECtHR April 24, 2008).

R.K. v. Russia, No. 30261/17 (ECtHR October 8, 2019).

Rotaru v. Romania, No. 28341/95 (European Court of Human Rights May 4, 2000).

Saadi v. Italy, No. 37201/06 (European Court of Human Rights February 28, 2008).

Sagor, No. C-430/11 (CJEU December 6, 2013).

Sainte-Marie v. France, No. Series A no. 253-A (ECtHR December 16, 1992).

Salah Sheekh v. the Netherlands, No. 1948/04 (ECtHR January 11, 2007).

Schwarzenberger v. Germany, No. 75737/01 (ECtHR August 10, 2006).

S.F. and Others v. Bulgaria, No. 8138/16 (ECtHR December 7, 2017).

Shamsa v. Poland, No. 45355/99 (ECtHR November 27, 2003).

Shin v. South Korea, No. 926/2000 (Human Rights Committee 2000).

Silver and others v. United Kingdom, No. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (European Court of Human Rights March 25, 1983).

"Slovenia - Administrative Court of the Republic of Slovenia, 29 July 2016, Judgment I U 1102/2016 | European Database of Asylum Law." Accessed May 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-29-july-2016-judgment-i-u-11022016#content.

"Slovenia - Administrative Court of the Republic of Slovenia, I U 835/2016, 14 June 2016 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-i-u-8352016-14-june-2016#content.

Soering v. United Kingdom, No. 14038/88 (European Court of Human Rights July 7, 1989).

Soldatenko v. Ukraine, No. 2440/07 (ECtHR October 23, 2008).

"Spain - High National Court, 13 January 2009, 1528/2007 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/spain-high-national-court-13-january-2009-15282007#content.

"Sweden - Migration Court of Appeal, 9 March 2011, UM 3363-10 & 3367-10 | European Database of Asylum Law." Accessed June 21, 2019. https://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-9-march-2011-um-3363-10-3367-10#content.

"Switzerland – Federal Administrative Court, 17th May 2017, D-2925/2016 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/switzerland-%E2%80%93-federal-administrative-court-17th-may-2017-d-29252016#content.

"Switzerland - Federal Administrative Court, Decision Dated 27 April 2016, D-2484/2016 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/switzerland-federal-administrative-court-decision-dated-27-april-2016-d-24842016#content.

Tehrani and Others v. Turkey, No. 32940/08, 41626/08 and 43616/08 (ECtHR April 13, 2010).

Thampibillai v. the Netherlands, No. 61350/00 (ECtHR February 17, 2004).

T.I. v. the United Kingdom, No. 43844/98 (ECtHR March 7, 2000).

Toziczka v. Poland, No. 29995/08 (ECtHR July 24, 2012).

"UK - Court of Appeal, 19 December 2007, HK (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ 1357 | European Database of Asylum

Law." Accessed May 13, 2019. https://www.asylumlawdatabase.eu/en/case-law/uk-court-appeal-19-december-2007-hk-turkey-v-secretary-state-home-department-2007-ewca-civ#content.

"UK - High Court, 18 July 2007, S & Ors v Secretary of State for the Home Department [2007] EWHC 1654 | European Database of Asylum Law." Accessed May 24, 2019. https://www.asylumlawdatabase.eu/en/case-law/uk-high-court-18-july-2007-s-ors-v-secretary-state-home-department-2007-ewhc-1654#content.

"UK - House of Lords, 6 July 2000, Horvath v. Secretary of State for the Home Department [2000] UKHL 37 | European Database of Asylum Law." Accessed June 23, 2019. https://www.asylumlawdatabase.eu/en/case-law/uk-house-lords-6-july-2000-horvath-v-secretary-state-home-department-2000-ukhl-37#content.

"United Kingdom - Arf v Secretary of State for the Home Department, 12 January 2017 | European Database of Asylum Law." Accessed April 9, 2019. https://www.asylumlawdatabase.eu/en/case-law/united-kingdom-arf-v-secretary-state-home-department-12-january-2017#content.

Weiss v. Austria, No. 1086/02 (Human Rights Committee 2003).

X v. Sweden, No. 36417/16 (ECtHR January 9, 2018).

X v. the Netherlands, No. 14319/17 (ECtHR July 10, 2018).

Yarashonen v. Turkey, No. 72710/11 (ECtHR June 24, 2014).

Z.A. and Others v. Russia, No. 61411/15, 61420/15, 61427/15, 3028/16 (ECtHR March 28, 2017).

ACADEMIC AND OTHER RESOURCES

36th Session of the Executive Committee of the UNHCR (1985) UN Doc. A/AC.96/671.

38th Session of the Executive Committee of the UNHCR (1987) UN Doc. A/AC.96/SR.418.

39th Session of the Executive Committee of the UNHCR (1988) UN Doc. A/AC.96/SR.430.

40th Session of the Executive Committee of the UNHCR: Interpretative declarations or reservations made with respect to Executive Committee of the UNHCR's Conclusion No. 58 (XL) on "The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They Had Already Found Protection" (1989) UN Doc. A/AC.96/737.

41st Session of the Executive Committee of the UNHCR (1990) UN Doc. A/AC.96/SR.456.

"A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal." Amnesty International, 2017.

Açıkgöz, Meral, and **Hakkı Onur Arıner**. "Turkey's New Law On Foreigners And International Protection: An Introduction." Turkish Migration Studies Group at Oxford, 2014.

Akın Yavuz, Çiğdem. "Analysis of the EU-Turkey Readmission Agreement: A Unique Case." *European Journal of Migration and Law* 21 (2019): 486–508.

Albuquerque Abell, Nazaré. "Compatibility of Readmisson Agreements with the 1951 Convention Relating to the Status of Refugees." *International Journal of Refugee Law* 11, no. 1 (1999): 60–83.

Allerweldt, Ralf. "Protection against Expulsion under Article 3 of the European Convention on Human Rights." *European Journal of International Law* 4 (1993): 360–76.

Amnesty International. "Position Paper on the Proposed Asylum Procedures Regulation," March 31, 2017.

Asar, Aydoğan. *Yabancılar Hukuku*. Seçkin Yayıncılık, 2020.

Asylum Information Database. “Country Report: Turkey,” Update 2018.

Atakan, Arda. “Kamu Düzeni Kavramı.” *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 13, no. 1–2 (2007): 59–136.

Aydınlı, Ogün Erşan. “Güvenli Üçüncü Ülke Uygulamaları: Uygulamanın Dayanakları, Eleştirileri ve Hukukiliği.” *Çankaya Üniversitesi Hukuk Fakültesi Dergisi* 5, no. 1 (2020): 223–52.

“Background Note on the Safe Country Concept and Refugee Status.” UNHCR Executive Committee, July 26, 1991.

Bank, Roland. “The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law.” *International Journal of Refugee Law* 27, no. 2 (2015): 213–44.

Basilien-Gainche, Marie-Laure. “Immigration Detention under the Return Directive: The CJEU Shadowed Lights.” *European Journal of Migration and Law* 17, no. 1 (2015): 104–26.

Batir, Kerem. “Avrupa Birliği’nin Geri Kabul Anlaşmaları: Türkiye İle AB Arasında İmzalanan Geri Kabul Anlaşması Çerçevesinde Hukuki Bir Değerlendirme.” *Journal of Administrative Sciences* 15, no. 30 (2017): 585–604.

Battjes, Hemme. “In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed.” *Leiden Journal of International Law* 22, no. 3 (2009): 583–621.

Bianchini, Katia. “Legal Aid for Asylum Seekers: Progress and Challenges in Italy.” *Journal of Refugee Studies* 24, no. 2 (2011): 390–410.

Biondi, Paolo. “Compliance with Fundamental Rights Demands Shared Responsibility.” In *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, edited by Vladislava Stoyanova and Eleni Karageorgiou, 263–300. Brill | Nijhoff, 2018.

Bloomfield, Alice, Evangelia (Lilian) Tsourdi, and **Joanna Pétin**. "Alternatives to Immigration and Asylum Detention in the EU," 2015.

Burgorgue-Larsen, Laurence. "Interim Measures in the European Convention System of Protection of Human Rights." *Inter-American and European Human Rights Journal* 2 (2009): 99–118.

Çağlayan, Ramazan. *İdare Hukuku Dersleri*. 6. Ankara: Adalet Yayınevi, 2018.

Cantor, David James. "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence." *Refugee Survey Quarterly* 34 (2015): 79–106.

Canyaş Bayata, Aslı. "Yabancılar ve Uluslararası Koruma Kanunu Kapsamındaki Geri Gönderme Yasağının Uygulanma Koşullarının AİHM Kararları Çerçevesinde İrdelenmesi." *Hacettepe Hukuk Fakültesi Dergisi* 5, no. 1 (2015): 73–90.

Carp, Radu. "How Safe Shall Be a Third Country for Asylum-Seekers from a European Perspective? The Human Rights Implications of the EU-Turkey Deal and the Assessment of the ECHR/General Court." *Journal of Identity and Migration Studies* 12, no. 2 (2018): 50–59.

Cernic, Jernej Letnar. "Naitonal Security and Expulsion to a Risk of Torture." *Edinburgh Law Review* 12, no. 3 (2008): 429–34.

Chlebny, Jacek. "Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases." *European Journal of Migration and Law* 20, no. 2 (2018): 115–34.

Clayton, Gina. "Asylum Seekers in Europe: M.S.S. v. Belgium and Greece." *Human Rights Law Review* 11, no. 4 (2011): 758–73.

Committee of Ministers of Parliamentary Assembly of the Council of Europe. "Reply to a Written Question on Extradition of Refugees and the Obligation of "non-Refoulement of Member States of the Council of Europe," February 23, 2007.

http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11641&Lang=EN#P52_3678.

Costello, Cathryn. "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored." *Human Rights Law Review* 12 (2012): 287–339.

———. "Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law." *Indiana Journal of Global Legal Studies* 19, no. 1 (2012): 257.

———. "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?" *European Journal of Migration and Law* 7, no. 1 (2005): 35–70.

———. "The European Asylum Procedures Directive in Legal Context." UNHCR, 2006.

Council of Europe. "Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms," November 22, 1984.

Council of Europe/European Court of Human Rights. "Guide on Article 6 : Right to a Fair Trial (Civil Limb)," 2013.

———. "The Admissibility of an Application," 2015.

Council of the European Union. "Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof," 2001.

———. "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on on Common Procedures for Granting and Withdrawing International Protection (Recast)," n.d.

Danish Council for Refugees and European Council on Refugees and Exiles. “Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey,” 2016.

Dardağan Kibar, Esra. “Yabancılar ve Uluslararası Koruma Kanunu Tasarısında ve Başlıca Avrupa Birliği Düzenlemelerinde Yabancıların Sınır Dışı Edilmelerine İlişkin Kurallar: Bir Karşılaştırma Denemesi.” *Ankara Avrupa Çalışmaları Dergisi* 11, no. 2 (2012): 53–74.

‘Davutoğlu’ndan IŞİD’e Anlayış: Öfkeyle Büyüyen Bir Tehdit Ama Sünniler Dışlanmasa Öfke Birikmezdi’ <https://t24.com.tr/haber/davutoglundan-iside-anlayis-ofkeyle-buyuyen-bir-tehdit-ama-sunniler-dislanmasa-ofke-birikmezdi,266945> accessed 7 June 2021

De Bruycker, Philippe, Sergo Mananashvili, and **Géraldine Renaudiere**. “Synthesis Report of the Project CONTENTION - The Extent of Judicial Control of Pre-Removal Detention in the EU,” 2014.

De Bruycker, Philippe, Géraldine Renaudiere, and **Madalina Moraru**. “European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC).” Florence: European University Institute, 2016.

De Schutter, Olivier. “The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights.” *International Law FORUM Du Droit International* 7, no. 1 (2005): 16–23.

Dr. Gülay Arslan, Öncü. *Özel Yaşama ve Aile Yaşamına Saygı Hakkı*. Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 8. Council of Europe, 2019.

Dr. Tolga, Şirin. *Özgürlük ve Güvenlik Hakkı*. Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 1. Council of Europe, 2018.

Drywood, Eleanor. “Who’s in and Who’s out? The Court’s Emerging Case Law on the Definition of a Refugee.” *Common Market Law Review* 51 (2014): 1093–1124.

ECRE. “Comments on the Amended Commission Proposal to Recast the Asylum Procedures Directive (COM(2011) 319 Final),” September 2011.

———. “Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467,” November 2016.

———. “Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,” October 2006.

Ekşi, Nuray. “İnsan Hakları Avrupa Sözleşmesi’nin 6. Maddesinin Yabancıların Sınırdışı Edilmesine Uygulanıp Uygulanamayacağı Sorunu.” *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* 29, no. 1–2 (2009): 119–39.

———. *Yabancılar ve Uluslararası Koruma Kanunu Tasarısı*. İstanbul: Beta Basım Yayım Dağıtım, 2012.

Elçin, Doğa. “Türkiye’de Bulunan Suriyelilere Uygulanan Geçici Koruma Statüsü 2001/55 Sayılı Avrupa Konseyi Yönergesi Ile Geçici Koruma Yönetmeliği Arasındaki Farklar.” *Türkiye Barolar Birliği Dergisi* 124 (2016).

Ergül, Ergin. *Anayasa Mahkemesi ve Avrupa İnsan Hakları Mahkemesine Bireysel Başvuru ve Uygulaması*. Ankara: Yargı Yayınevi, 2012.

Erol, Gonca. “Anayasa Mahkemesine Bireysel Başvuruda Tedbir.” *Türkiye Barolar Birliği Dergisi* 130 (2017): 55–88.

Esen, Aydın. “Avrupa Birliği Mevzuatında Güvenli Üçüncü Ülke Kavramı ve Türkiye-AB Geri Kabul Anlaşmasına Yansımaları.” *Public and Private International Law Bulletin* 38, no. 1 (2018): 11–40.

European Commission. “Turkey 2018 Report.” Brussels, 2018.

———. “Turkey 2019 Report.” Brussels, 2019.

———. “Turkey 2020 Report.” Brussels, 2020.

European Court of Human Rights. “Fact Sheet on Interim Measures,” 2016.

———. “Fact Sheet on Interim Measures,” 2018.

———. “Rules of Court Practice Directions on Interim Measures,” 2016.

European Migration Network. “Ad-Hoc Query on Specification of Destination Country in the Return Decision,” 2017.

———. “The Use of Detention and Alternatives to Detention in the Context of Immigration Policies.” EMN Synthesis Report, 2014.

European United Left / Nordic Green Left European (GUE/NGL) Parliamentary Group. “What Merkel, Tusk and Timmermans Should Have Seen during Their Visit to Turkey. Report from GUE/NGL Delegation to Turkey, May 2-4 2016,” 2016.

Foster, Michelle. “Responsibility Sharing or Shifting? ‘Safe’ Third Countries and International Law.” *Refuge: Canada’s Journal on Refugees* 25, no. 2 (2008).

Gammeltoft-Hansen, Thomas. “International Refugee Law and Refugee Policy: The Case of Deterrence Policies.” *Journal of Refugee Studies* 27, no. 4 (December 1, 2014): 574–95.

———. “The Externalisation of European Migration Control and the Reach of International Refugee Law.” In *The First Decade of EU Migration and Asylum Law*, 273–98. Brill, 2011.

Gammeltoft-Hansen, Thomas, and **James C. Hathaway**. “Non-Refoulement in a World of Cooperative Deterrence.” *Colum. J. Transnat’l L.* 53 (2014): 235.

Gammeltoft-Hansen, Thomas, and **Nikolas F. Tan**. “The End of the Deterrence Paradigm-Future Directions for Global Refugee Policy.” *J. on Migration & Hum. Sec.* 5 (2017): 28.

Garlick, M. “International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR.” *Refugee Survey Quarterly* 34, no. 1 (March 1, 2015): 107–30.

Garry, Hannah R. "When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights." *European Public Law* 7, no. 3 (2001): 399–432.

Gil-Bazo, María-Teresa. "The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice." *Netherlands Quarterly of Human Rights* 33, no. 1 (2015): 42–77.

Gkliati, Mariana. "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees." *Movements* 3, no. 2 (2017): 213–24.

Goodwin-Gill, Guy. "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection." *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2001, 185–252.

Goodwin-Gill, Guy S., and **Hélène Lambert**, eds. *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*. New York: Cambridge University Press, 2012.

Goodwin-Gill, Guy S., and **Jane McAdam**. *The Refugee in International Law*. Oxford University Press, 2010.

Göztepe, Ece. *Anayasa Şikayeti*. Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1998.

———. *İnsan Haklarının Korunmasında Geçici Tedbir - Avrupa İnsan Hakları Mahkemesi, Almanya ve Türkiye Örnekleri*. On İki Levha Yayıncılık, 2017.

"Guide on the Case Law of the European Convention on Human Rights - Immigration." European Court of Human Rights, August 2019.

Haeck, Yves, and **Clara Burbano Herrera**. "Staying the Return of Aliens from Europe through Interim Measures: The Case-Law of the European Commission and the European Court of Human Rights." *European Journal of Migration and Law* 13, no. 1 (2011): 31–51.

Haider, Dominik. *The Pilot-Judgment Procedure of the European Court of Human Rights*. Leiden, Boston: Martinus Nijhoff Publishers, 2013.

Hamdemir, Berkan. *Anayasa Mahkemesi'ne Bireysel Başvuru*. Ankara: Seçkin Yayıncılık, 2015.

Harvey, Colin. "Expulsion National Security and the European Convention." *European Law Review* 22, no. 6 (1997): 626–33.

Hathaway, James C., and **R. Alexander Neve**. "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection." *Harv. Hum. Rts. J.* 10 (1997): 115–211.

Hurwitz, Agnès. *The Collective Responsibility of States to Protect Refugees*. Oxford University Press, 2009.

İçduygu, Ahmet, and **Damla B. Aksel**. "Turkish Migration Policies: A Critical Historical Retrospective." *Perceptions Journal of International Affairs* XVIII, no. 3 (Autumn 2013): 167–90.

İçduygu, Ahmet, Sema Erder, and **Ömer Faruk Gençkaya**. "Türkiye'nin Uluslararası Göç Politikaları, 1923-2023: Ulus-Devlet Oluşumundan Ulus-Ötesi Dönüşümlere." MiReKoc Research Reports 1/2014. İstanbul, 2014.

İneli Ciğer, Meltem. "Remedies Available against Asylum Decisions and Deportation Orders in Turkey: An Assessment in View of European Law and the European Convention on Human Rights." *Nordic Journal of International Law* 88 (2019): 216–49.

International Association of Refugee Law Judges. "Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis," December 2016.

International Commission of Jurists (ICJ), ECRE, Mültecilerle Dayanışma Derneği, and Refugee Rights Turkey. "Geri Göndermeme, Sınır Dışı Etme ve Uluslararası Koruma." "Sığınmacılar, Mülteciler ve Göçmenlerin Adalete Erişimine Destek" Projesi - Modül 1, n.d.

———. “İdari Gözetim Altındaki Göçmen, Mülteci ve Sığınmacılar Için Adalete Erişim.” “Sığınmacılar, Mülteciler ve Göçmenlerin Adalete Erişimine Destek” Projesi - Modül 2, n.d.

Kalabalık, Halil. *İdare Hukuku Dersleri Cilt-II*. 4. Ankara: Seçkin Yayıncılık, 2019.

Kanadoğlu, Korkut. *Anayasa Mahkemesi'ne Bireysel Başvuru*. İstanbul: On İki Levha Yayıncılık, 2015.

Kaytaz, Esra S. “At the Border of ‘Fortress Europe’: Immigraion Detention in Turkey.” In *Immigration Detention: The Migration of a Policy and Its Human Impact*, edited by Amy Nethery and Stephanie Jessica Silverman. London ; New York: Routledge, Taylor & Francis Group, 2015.

Kneebone, Susan. “The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The ‘Safe Third Country’Concept”.” *Studies in International Law: Forced Migration, Human Rights and Security*, 2008.

Kosińska, Anna Magdalena. “The Problem of Exclusion from Refugee Status on the Grounds of Being Guilty of Terrorist Acts in the CJEU Case Law.” *European Journal of Migration and Law* 19 (2017): 425–46.

Kuşçu, Döndü. *Yabancılar ve Uluslararası Koruma Kanunu Hükümleri Uyarınca Yabancıların Sınır Dışı Edilmeleri*. İstanbul: On İki Levha Yayıncılık, 2017.

Lambert, Hélène. “Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK.” *Journal of Immigration, Asylum and Nationality Law* 26, no. 4 (2012): 318–36.

———. “The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities.” *Refugee Survey Quarterly* 24, no. 2 (2005): 39–55.

———. “Transnational Judicial Dialogue, Harmonization and the Common European Asylum System.” *International and Comparative Law Quarterly* 58, no. 3 (2009): 519–43.

Langford, Peter. "Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights." *The International Journal of Human Rights* 13, no. 4 (September 2009): 512–29.

Lavrysen, Laurens. "European Asylum Law and the ECHR : An Uneasy Coexistence." *Goettingen Journal of International Law*, 2012.

Legomsky, Stephen H. "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection." *International Journal of Refugee Law* 15, no. 4 (2003): 567–677.

Lehner, Roman. "The EU-Turkey-'Deal': Legal Challenges and Pitfalls." *International Migration* 57, no. 2 (2018): 176–85.

Lutz, Fabian. "Non-Removable Returnees under Union Law: Status Quo and Possible Developments." *European Journal of Migration and Law* 20, no. 1 (2018): 28–52.

Mackey, Allan, Martin Treadwell, and **Bridget Dingle**. "A Structured Approach to the Decision Making Process in Refugee and Other International Protection Claims." International Association of Refugee Law Judges, n.d.

Majcher, Izabella. "The European Union Returns Directive Does It Prevent Arbitrary Detention." *Oxford Monitor of Forced Migration* 3, no. 2 (n.d.): 23–31.

Marx, Reinhard. "Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a 'Safe Third State.'" Pro Asyl, 2016.

Massey, Hugh. "UNHCR Manual on the Case Law of the European Regional Courts," n.d., 289.

Medecins Sans Frontiers. "One Year on from the EU-Turkey Deal: Challenging EU's Alternative Facts," 2017.

Melander, G. "Refugees in Orbit." In *African Refugees and the Law*, edited by G. Melander and P. Nobel. Stockholm: Almqvist, 1978.

Ministerial Meeting of States Parties, 12-13 December 2001, Geneva-Switzerland. "Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees." Geneva, Switzerland, December 12, 2001.

Mole, Nuala, and **Catherine Meredith**. *Asylum and the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 2010.

Molu, Benan. "Anayasa Mahkemesi ve Geçici Tedbir Talepli Başvurularda Karşılaşılan Sorunlar," 2017. https://anayasatakip.ku.edu.tr/wp-content/uploads/sites/34/2017/08/Benan-Molu-Anayasa-Mahkemesi-ve-Gec%CC%A7ici-Tedbir-Talepli-Bas%CC%A7vurularda-Kars%CC%A7%C4%B1las%CC%A7%C4%B1lan-Sorunlar.pdf.

Moraru, Madalina, and **Géraldine Renaudiere**. "European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention." REDIAL Research Report, 2016.

Moreno-Lax, Violeta. "The Legality of the Safe Third Country Notion Contested." In *Migration and Refugee Protection in the 21st Century: Legal Aspects*, edited by Guy Goodwin-Gill and Philippe Weckel. Brill Nijhoff, 2015.

Mültecilerle Dayanışma Derneği. "Türkiye'de Mültecilerin Kabul Koşulları Hak ve Hizmetlere Erişimleri." Uydu Kentler İzleme ve Raporlama Projesi, 2015.

Nash, Susan, and **Mark Furse**. "Deportation, National Security and Judicial Review." *New Law Journal* 146 (1996): 1824–26.

Nicolosi, Salvatore Fabio. "Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law." *International Human Rights Law Review* 4, no. 2 (2015): 303–32.

O'Byrne, K. "Is There a Need for Better Supervision of the Refugee Convention?" *Journal of Refugee Studies* 26, no. 3 (September 1, 2013): 330–59.

Ovacık, Gamze. "A Judicial Review of the De Facto Detention of Foreigners in Turkey." *Border Crossing* 10, no. 2 (2020): 143–53.

———. "Compatibility of the Safe Third Country Concept with International Refugee Law and Its Application to Turkey." *Perceptions Journal of International Affairs* XXV, no. 1 (2020): 61–80.

———. "Compensation for Unlawful Practices Related to Administrative Detention of Foreigners in Turkey." *Public and Private International Law Bulletin* 41, no. 1 (2021): 41–62.

———. "Türk Anayasa Mahkemesinin İçtihadı Işığında Sınır Dışı Kararlarına Karşı Yargısal İtirazın Hukuki Etkisi." *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 26, no. 2 (2020): 1047–62.

———. "Turkish Judiciary's Interpretation of 'Risk of Absconding' as a Ground for Detention for the Purpose of Removal." *Nijmegen Migration Law Working Papers* 2020/02 (2020).

Özbek, Nimet. "AİHM Kararları Işığında YUKK'nda İdari Gözetimin Uygulandığı Mekanlar Hakkında Ortak Sorunlar." *Türkiye Barolar Birliği Dergisi* 118 (2015): 15–50.

Özbek, Nimet, and **Döndü Kuşçu**. "Anayasa Mahkemesinin 30.5.2019 Tarihli Pilot Kararı (Y.T. Kararı) İncelemesi ve Sınır Dışı Kararına Karşı Etkili Başvuru Üzerine Bir Değerlendirme." *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 24, no. 3 (2020): 3–39.

Özbey, Özcan. *Türk Hukukunda Anayasa Mahkemesine Bireysel Başvuru Hakkı*. Ankara: Adalet Yayınevi, 2013.

Özcan, Hüseyin. "Yabancılar ve Uluslararası Koruma Kanunu'nun 74. Maddesinin 'Güvenli Üçüncü Ülke' Kavramı Bağlamında Değerlendirilmesi." *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 28, no. 2 (2020): 819–55.

Özdemir, Ali. "Kamu Düzeni ve Kamu Güvenliği Kavramlarına Analitik Bir Yaklaşım (Toplantı ve Gösteri Yürüyüşü Hakkının Sınırlandırılması Örneği)." *International Journal of Legal Progress* 2, no. 2 (2016): 78–115.

Öztürk, Kaya Burak. "İdari İşlemin Sebep Unsuru: Yeni Bir Tanım Denemesi." In *Prof. Dr. Metin Günday Armağanı*. Ankara: Atılım Üniversitesi, 2020.

Öztürk, Neva Övünç, and **Cavidan Soykan**. "Üçüncü Yılında AB – Türkiye Mutabakatı: Hukuki Bir Analiz." *Heinrich Böll Stiftung Derneği Türkiye Temsilciliği* (blog), n.d. https://tr.boell.org/tr/2019/10/03/ucuncu-yilinda-ab-turkiye-mutabakati-hukuki-bir-analiz.

Paçacı Elitok, Seçil. "Turkey's Prospective EU Membership from a Migration Perspective: Two Steps Forward, One Step Back?" *Perceptions Journal of International Affairs* XVIII, no. 3 (Autumn 2013): 1–12.

Peers, Steve, and **Emanuela Roman**. "EU Law Analysis: The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?," February 5, 2016. http://eulawanalysis.blogspot.com.tr/2016/02/the-eu-turkey-and-refugee-crisis-what.html.

Platform for International Cooperation on Undocumented Migrants. "Defending Migrants' Rights in the Context of Detention and Deportation Synthesis Report," 2017.

Poon, Jenny. "EU-Turkey Deal: Violation of, or Consistency with, International Law?" European Papers, 2016.

Prof. Dr. Osman, Doğru. *Yaşama Hakkı*. Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 5. Council of Europe, 2018.

Refugee Rights Turkey. "Legal Opinion Paper on 'Implicit Withdrawal' of International Protection Applications in Turkey: Issues in Implementation and Recommendations," December 2017.

Roman, Emanuela, Theodore Baird, and **Talia Radcliffe**. "Analysis: Why Turkey Is Not a 'Safe Country.'" Statewatch, 2016.

Rudolf, Beate. "Chahal v. United Kingdom. No. 70/1995/576/662." *American Journal of International Law* 92 (1998): 70–74.

Sağlam, Musa. "Anayasa Mahkemesine Bireysel Başvuruda Tedbir Kararı." *HUKAB Dergi*, no. 5 (2013). http://www.hukabdergi.com/p2122/.

Sarı, Elif, and **Cemile Gizem Dinçer**. "Toward a New Asylum Regime in Turkey?" *Movements Journal for Critical Migration and Border Studies* 3, no. 2 (2017): 59–80.

Simeon, James C. "Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11." *Refugee Survey Quarterly* 29, no. 4 (2011): 104–37.

Şimşek, Doğuş. "Turkey as a 'Safe Third Country'? The Impacts of the EU-Turkey Statement on Syrian Refugees in Turkey." *Perceptions Journal of International Affairs* 22, no. 4 (2017): 161–82.

Şirin, Tolga. *Türkiye'de Anayasa Şikayeti (Bireysel Başvuru)*. İstanbul: On İki Levha Yayıncılık, 2013.

Soykan, Cavidan. "The New Draft Law On Foreigners And International Protection in Turkey." *Oxford Monitor of Forced Migration* 2, no. 2 (2012): 38–47.

Spijkerboer, Thomas. "Analysing European Case-Law on Migration: Options for Critical Lawyers." In *EU Migration Law*, edited by Loic Azoulai and Karin de Vries. Oxford University Press, 2014.

———. "Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy before the EU Court of Justice." *Journal of Refugee Studies*, no. 31 (2018): 216–39.

"Study on Individual Access to Constitutional Justice." Venice Commission, 2011.

Teksoy, Barış. "Türk Yabancılar Hukukunun Sınır Dışı Etme Kurallarının Güncel Durumu Üzerine Değerlendirmeler." In *Göç, İltica ve Hukuk Sempozyumu*, edited by Süheyla Balkar Bozkurt, 35–47. Galatasaray Üniversitesi Hukuk Fakültesi, 2018.

Terlouw, Ashley. "Voluntary Departure of Irregular Migrants and the Exception of Public Order: The Case of Z. Zh. & I.O. v Staatssecretaris Voor Veiligheid En Justitie, Case C-554/13, 11 June 2015." *European Journal of Migration and Law* 18, no. 1 (2016): 126–37.

"Third Anniversary of EU-Turkey Statement: A Legal Analysis | Heinrich Böll Stiftung | Niwêneriya Tirkiyeyê." Accessed February 18, 2021. https://tr.boell.org/index.php/en/2019/10/03/third-anniversary-eu-turkey-statement-legal-analysis.

Tokuzlu, Lami Bertan. "The Principle of Legal Certainty - Impact Assessment of the Syrian Refugee Crisis on the Turkish Law on Foreigners and International Protection." In *Transitional Justice and Forced Migration - Critical Perspectives from the Global South*, edited by Nergis Canefe, 247–71. Cambridge University Press, 2019.

———. "Yabancılar ve Uluslararası Koruma Kanun'nun Yasal Belirlilik İlkesi Konusunda Türk Uygulamasına Katkısı Üzerine Bir Değerlendirme." *Uyuşmazlık Mahkemesi Dergisi*, no. 7 (2016): 1061–1105.

Turan, Hüseyin. "Bireysel Başvuru Yolunda Geçici Tedbir Kurumu." *Ceza Hukuku Dergisi* 24 (2014): 237–51.

Turan, Yıldırım, and **Osman Şaşkın**. "AB'ye İltica Başvurularının Değerlendirilmesinde Geri Kabul ve Güvenli Üçüncü Ülke Tartışmaları." *PESA International Journal of Social Studies* 3, no. 1 (2017): 47–56.

'Turkey's Announced Withdrawal from the Istanbul Convention Endangers Women's Rights - View' <https://www.coe.int/en/web/commissioner/-/turkey-s-announced-withdrawal-from-the-istanbul-convention-endangers-women-s-rights> accessed 7 June 2021

"Turkey Suspends Deal with the EU on Migrant Readmission – EURACTIV.Com." Accessed February 18, 2021. https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/.

Turkish Grand National Assembly. "Internal Affairs Commission Report of the Draft Law on Foreigners and International Protection (Yabancılar ve Uluslararası Koruma Kanunu Tasarısı TBMM İçişleri Komisyonu Alt Komisyon Raporu)." 1/619, June 18, 2012.

Ulusoy, Orçun, and **Hemme Battjes**. "Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement." VU Migration Law Series, 2017.

UN General Assembly. "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by Resolution 45/158 of 18 December 1990," December 18, 1990. https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx.

UNHCR. "Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures)," 2001.

UNHCR. "Comments on the European Commission Proposal for An Asylum Procedures Regulation," April 2019.

———. "Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast) COM (2011) 319 Final," January 2012.

———. "Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (COM(2009)554, 21 October 2009)," August 2010.

———. “Considerations on Safe Third Country,” 8-11 1996.

———. “Global Consultations in Budapest, Conclusions,” 6-7 2001.

———. “Guidelines on Temporary Protection or Stay Arrangements,” February 2014. https://www.refworld.org/docid/52fba2404.html.

———. “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice,” March 2010.

———. “Note on International Protection,” August 31, 1993.

———. “Observations on EC Proposal on Asylum Procedures,” 2001.

———. “Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application,” 2002.

———. “Position on Readmission Agreements,” August 1, 1994.

———. “Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004),” February 10, 2005.

UNHCR Executive Committee. “Conclusion No. 15 (XXX),” October 16, 1979.

———. “Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx,” 1981.

———. “Conclusion No. 58 (XL),” October 13, 1989.

———. “Conclusion No. 73 (XLIV) on Refugee Protection and Sexual Violence,” 1993.

———. “Conclusion No. 104 (LVI) on Local Integration,” 2005.

———. “Conclusion No. 105 (LVII) on Women and Girls at Risk,” 2006.

———. “Conclusion on Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection No. 58 (XL),” 1989.

———. “Conclusion on Refugees Without an Asylum Country No. 15 (XXX),” 1979.

———. “General Conclusion No. 65 (XLII) on International Protection,” 1991.

———. “General Conclusion No. 102 (LVI) on International Protection,” 2005.

———. “General Conclusion No. 108 (LIX) on International Protection,” 2008.

———. “Summary Record of 36th Session,” October 9, 1985.

———. “Summary Record of 38th Session,” October 14, 1987.

———. “Summary Record of 39th Session,” October 12, 1988.

———. “Summary Record of 40th Session,” October 30, 1989.

———. “Summary Record of 41st Session,” October 5, 1990.

Ural, Sami Sezai. *Hak ve Özgürlüklerin Korunması Bağlamında Bireysel Başvuru*. Ankara: Seçkin Yayıncılık, 2013.

Van Selm, Joanne. “Access to Procedures Safe Third Countries, Safe Countries of Origin and Time Limits.” In *Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees*, 2001.

Vedsted-Hansen, J. “The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection.” *Refugee Survey Quarterly* 29, no. 4 (2010): 45–62.

Velluti, Samantha. “The Role of the European Courts in Ensuring Adequate Standards of Asylum-Seekers’ Human Rights’ Protection in Europe After Lisbon.” In *Reforming the Common European Asylum System — Legislative Developments and Judicial Activism of the European Courts*, 77–103. Berlin, Heidelberg: Springer Berlin Heidelberg, 2014.

“What Happened at the Greece-Turkey Border in Early 2020? – Verfassungsblog.” Accessed February 18, 2021. https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/.

Whiteman, J., and **C. Nielsen**. “Lessons from Supervisory Mechanisms in International and Regional Law.” *Journal of Refugee Studies* 26, no. 3 (September 1, 2013): 360–92.

"Why the EU-Turkey Statement Should Never Serve as a Blueprint | Asile." Accessed February 18, 2021. https://www.asileproject.eu/why-the-eu-turkey-statement-should-never-serve-as-a-blueprint/.

Wildhaber, Luzius. "Pilot Judgments In Cases of Structural Systemic Problems on the National Level." In *The Europan Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, edited by Rüdiger Wolfrum and Ulrike Deutsch. Berlin: Springer, 2009.

Worke, Sahle. "The EU-Turkey Deal: A Legal Analysis - Is the Deal in Compliance with Refugee Law and Human Rights Law?" IRL Research Paper, 2018.

Yilmaz, Sibel. "Protection of Refugees' Rights Arising out of the International Protection Procedute from the View of Turkish Constitutional Court's Individual Application Decisions." *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 68, no. 3 (2019): 707–52.

Zoeteweij, Margarite Helena, and **Ozan Turhan**. "Above the Law-Beneath Contempt: The End of the EU-Turkey Deal." *Swiss Review of International and European Law* 27, no. 2 (2017): 151–66.