PROTECTION OF REFUGEES' RIGHTS ARISING OUT OF THE INTERNATIONAL PROTECTION PROCEDURE FROM THE VIEW OF TURKISH CONSTITUTIONAL COURT'S INDIVIDUAL APPLICATION DECISIONS

Türk Anayasa Mahkemesi'nin Bireysel Başvuru Kararları Işığında Uluslararası Koruma Usulünden Kaynaklanan Mülteci Haklarının Korunması

Sibel YILMAZ*

ÖZ

Türkiye, özellikle doğusundaki komşu ülkelerin siyasi koşullarından ötürü, her zaman sığınma alan bir ülke olmuştur. Şu anda, kendi topraklarında 3,5 milyondan fazla Suriyeli ile mülteciler için başlıca sığınma ülkesi olan Türkiye'de, bu mültecilere uluslararası koruma sağlanması hayati önem taşımaktadır. İç hukukta ikincil nitelikte bir koruma mekanizması olan Anayasa Mahkemesi'ne bireysel başvuru, bu bağlamda kritik bir öneme sahip olabilir. Yasal düzenlemelerin yanı sıra, özellikle bu mekanizma ile mültecilere de uygulanabilecek anayasal haklar gerçekleştirilebilir. Bu çerçevede, bu makalenin iki amacı vardır: İlk amaç, Anayasa Mahkemesi'nin içtihadında yerini alan geri göndermeme ilkesi ile bağlantılı olarak mülteci korumasını ele almaktır. Bu kapsamda, makale Anayasanın 17'nci maddesine göre ("kişinin dokunulmazlığı, maddî ve manevî varlığı") verilen tedbir kararları ile 17'nci madde, 19'uncu madde ("kişi hürriyeti ve güvenliği) ve 40'ıncı maddesine (temel hak ve hürriyetlerin korunması") göre verilen nihai bireysel başvuru kararlarını incelemektedir. Bu incelemeye paralel olarak makalenin ikinci amacı, Türk sığınma sistemi uygulamasındaki, özellikle bu kararlarda belirtilen, eksikliklerini ortaya koymaktır.

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* Arş. Gör., Uludağ Üniversitesi Hukuk Fakültesi, Anayasa Hukuku Anabilim Dalı E-Posta: sibelyilmaz@uludag@edu.tr, ORCID: 0000-0002-3969-2185

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ABSTRACT

Turkey, particularly due to the political circumstances of its eastern neighbours, has always been an asylum state. Currently, as the primary asylum country for refugees with more than 3.5 million Syrians in its territories, the provision of international protection to these refugees in Turkey is vital. The individual application mechanism to the Constitutional Court, as a subsidiary protection mechanism in domestic law, can be crucial in this context. In addition to legislative regulations, especially with this mechanism, constitutional rights that are also applicable to refugees can be realized. Thus, this article has two main aims. The first aim is to address protection of refugees' rights with respect to the principle of *non-refoulement,* which finds its place in the Constitutional Court's precedent. In this context, the article examines the interim measures within the framework of article 17 of the Constitution ('personal inviolability, corporeal and spiritual existence of the individual') and the final decisions within the scope of article 17, article 19 ('right to personal liberty and security') and article 40 ('protection of fundamental rights and freedoms'). Concordantly, the second aim is to demonstrate the deficiencies particularly in the practice of the Turkish asylum system, which are indicated in these decisions.

Keywords: Turkish Constitutional Court, individual application decisions, international protection, Turkey, constitutional rights.

1. INTRODUCTION

With the Syrian refugee crisis, Turkey has become the primary host country for refugees in the world, with over 3.5 million Syrians in its territory.[1] Due to this refugee population, Turkey's asylum system has attracted attention. Especially after the European Union (EU)-Turkey Deal[2] dated 18 March 2016, the question whether Turkey is a safe third country and/or first country of asylum under EU law has occupied the agenda of the literature in this field.

This literature consists of many reports and articles that have been

[1] UNHCR Turkey.
[2] EU Council; European Commission.

published on the protection provided to Syrians by Turkey. The principle of *non-refoulement*, the conditions on administrative detention and the social rights of refugees, in short, the treatment of refugees, in Turkey have been examined from the perspectives of theory and practice, both with and without considering that Turkey is a safe country. Thus, dwelling on this literature will mean falling into repetition.

According to a recent study,[3] it appears that Turkey complies with its international legal obligations relating to Syrians on the basis of an analysis of Turkish law alone. The article emphasizes, however, that this does not automatically mean that Turkey is a safe third country or a first country of asylum. This requires a different analysis.[4] We agree with the assessment that different legal analyses are needed not just for Syrians but for all refugees in Turkey. When addressing a different legal analysis, an assessment not only of law but also of practice is significant. Apart from a general discussion, a case-by-case analysis of whether refugees can access protection or not is required.[5] This requirement may be met partly by searching and examining the Turkish Constitutional Court's ('the Court's') individual application decisions about protection of refugees' rights, especially the principle of *non-refoulement*. Before expanding this discussion, it is important to clarify the relationship between the principle of *non-refoulement*, protection of refugees' rights arising out of the international protection procedure and the Court's decisions in the context of this article.

In today's society, every citizen is under the protection of the state under which he/she has citizenship.[6] However, sometimes the need for international protection arises in the absence of national protection.[7] It is a prerequisite for a person in need of international protection to go to the territory of the country in which he or she seeks asylum and remain there to receive international protection. Once a person seeking asylum is there, the principle of *non-refoulement* then becomes a precondition of protection since it limits the state's sovereign power to admit a foreigner into its territories and deport that person.[8]

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3 Ineli-Ciger.
4 Ineli-Ciger, p. 579.
5 In the same view, Ineli-Ciger, p. 579.
6 Çiçekli, 2009, p. 19.
7 Goodwin-Gill Guy S. and Mcadam, p. 10.
8 Korkut, p. 23; Yılmazoğlu, p. 906; Uluslararası Göç Örgütü (IOM)Yayınları, p. 75; Ekşi, 2010a, p. 8; Sirmen, p. 30; Soysüren, pp. 153-181.

The principle of *non-refoulement* was envisaged for refugees[9] in the Geneva Convention Relating to the Status of Refugees ('Geneva Convention') (article 33).[10] The meaning of 'refugee' can vary according to different international legal instruments. Nevertheless, a refugee is generally defined as a person who has received refugee status.[11] By this definition, the Geneva Convention does not provide protection for everyone.[12]

The principle of *non-refoulement* is not regulated only under the Geneva Convention. The principle is considered a supplementary field in human rights conventions and international customary law.[13] As it is established in some international conventions concerning fundamental rights and freedoms, *non-refoulement* forbids states from sending individuals who are not or cannot be protected under the Geneva Convention to a country in which they would face risks to their lives or freedoms.[14] Thus, these provisions ensure supplementary protection by expanding the scope of the protection provided by international refugee law.[15] Because of this, we can discern that although the Turkish Constitutional Court is not an international instrument, the protection derived from applying constitutional rights through the Turkish Constitutional Court can also be considered supplementary protection for the people in Turkey's territories.

Turkey is a party to the Geneva Convention but with a declaration of geographical limitation, which means that only persons fleeing into Turkey as a result of events occurring in Europe can benefit from the refugee status under the Geneva Convention. Turkey preserves this limitation under the Protocol Relating to the Status of Refugees in 1967[16] article 7. Although it is possible for a person who seeks asylum to attain a conditional refugee status as a result

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9 It is also accepted that this principle can be appied for asylum seekers. Çiçekli, 2009, p. 84; Lauterpacht and Bethlehem, p.116.

10 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 Apr. 1954) 189 UNTS 137.

11 Acer, Kaya and Gümüş, p. 14.

12 Korkut, p. 23.

13 Duffy, p. 373. In the same view, Çiçekli, 2009, p. 79; Uzun, p. 25; Taneri, p. 141.

14 Peker and Sancar, p. 30; Farmer, p. 2. We should note that the scope of the *non-refoulement* is not limited to the deportation. For a detailed analysis see Yılmaz, 2016, p. 54-57; Ekşi, 2010a, p. 8; Sirmen, p. 30; Soysüren, pp. 153-181.

15 Çiçekli, 2009, p. 79, 94. In the same view, Farmer, p. 18-19; Taneri, p. 176. For the most effective conventions in this context, see Çiçekli, 2009, pp. 95-97.

16 Protocol relating to the Status of Refugees (entered into force Oct. 4, 1967) 606 UNTS 267.

of events occurring outside of European countries, this status can only be acquired under a limited number of circumstances, and it only provides a temporary residence permit in Turkey until the refugee resettles in a third country. Moreover, the number of people who receive conditional refugee status is quite low when we take into consideration that more than three million people seek asylum in Turkey. Because of these reasons, limiting the definition of 'refugee' to refer to someone who has received the status of a refugee under a refugee convention would only account for very few cases. Such attitude would mean that a narrow approach has been adopted with respect to problems that arise with refugee crises. To broadly address the problems relating to protection of refugees' rights, the concept of refugee should not be limited to exclusively referring to the statuses recognized in finalized contracts.[17] Therefore, instead of adhering to the limited scope of the refugee conventions, this article considers a 'refugee' to be a person who seeks refuge outside of his/her country in response to a well-founded fear of persecution.[18] We address protection of refugees' rights in the context of the *non-refoulement* principle precedent of the Turkish Constitutional Court. Therefore, all applicants in the cases studied are either in need of international protection or claim a well-founded fear of persecution.

Refugees can benefit from the constitutional rights that are provided for 'everyone', and they shall not be subjected to treatments that shall be imposed on 'nobody' in the Constitution of the Republic of Turkey.[19] The individual

[17] Yılmaz, 2016, p. 18.

[18] For this definition see also Shacknove, p. 274.

[19] Republic of Turkey, OJ 09.11.1982, 17863. In examining the link between protection of refugees' rights and the Court's decisions, it is necessary to look at Turkish foreign law in the context of Turkish Constitutional law. In international law, rules relating to granting special status are *lex specialis*, and they are applied instead of foreign laws. Aybay and Kibar, p. 8. However, applicants under this article do not have a special status, except for the 'temporary protection' status that can be granted to Syrians. These applicants are considered 'foreigners' under the Constitution. According to this law, a foreigner is a person who does not have Turkish citizenship (See the Turkish Constitution, article 66; LFIP article 3/1-ü). Ekşi, 2014a, p. 41. This concept concerns not only foreign citizens but also refugees. Ekşi, 2010a, p. 7. With the exception of rights specified only for Turkish citizens, (Çelikel and Gelgel, pp. 58-59; Sargın, p. 333; Çiçekli, 2014, p. 50; Öden, p. 356) the Turkish Constitution guarantees fundamental rights and freedoms to everyone under article 10, without discriminating between citizens and foreigners. Aybay and Kibar, p. 74. An important discrepancy between citizens and foreigners does exist in the definition of the limitation of constitutional rights. While article 13 of the Constitution is provided for the purpose of limiting Turkish citizens' constitutional rights and freedoms, article 16 regulates

application mechanism provides the concretisation of foreigners' - in this article refugees' - rights, which are guaranteed under the Constitution. Thereby, it is possible to claim a violation of a right and request compensation. The classic rights such as the right to life, the right not to be exposed to torture or ill treatment, the right to individual liberty and security, and the right to effective remedy are easily actionable for refugees. In fact, the individual applications are mostly based on the rights that correspond to the Turkish Constitution articles 17, 19 and 40.

Considering the aforementioned explanations, this article evaluates the Court's individual application decisions about protection of refugees' rights arising out of the international protection procedure, especially the principle of *non-refoulement* in the context of articles 17, 19 and 40.[20] It examines these decisions in detail and reflects the related scene on the Turkish asylum system by trying to reach general conclusions.

The article focuses just on these three articles of the Constitution for the following reasons. First, the obligation arising from the principle of *non-refoulement* is addressed in article 17 of the Constitution. Second, under Turkish Constitutional law, interim measures are made just in the context of article 17. Third, these constitutional articles are the most prominent and applicable provisions for refugees. Fourth, in essence, these articles mostly correspond to the articles in the European Convention on Human Rights (ECHR)[21] concerning which the European Court of Human Rights (ECtHR) has founded many violations against Turkey.

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the limitation of the rights and freedoms ascribed to foreigners. According to article 16, 'fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law.' See also Gören, p. 317. Although there are doctrinal disagreements concerning the relationship between article 13 and article 16, we offer that article 13 is specific to the limitation of citizens' rights and article 16 is specific to foreigners' rights. Yılmaz, 2016, p. 146-149; Gözler, 2015a, p. 121; Gözler, 2015b, p. 424. For counter-views see Sargın, p. 333-335; Aybay and Kibar, p. 76; Çiçekli, 2010, p. 340; Erdoğan, p. 215. This means that the rights of foreigners can be limited by law for any reason, as per international law. Gözler, 2015a, p. 121; Gözler, 2015b, p. 424.

[20] This article involves the given interim measure up to February 2018. Turkish Constitutional Court <http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html>. Unless indicated otherwise, the TCC's decisions are taken from this link and they are accessed 12 Feb 2018. Thus we do not write this link and access date again.

[21] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 Nov 1950, ETS 5.

2. THE EVALUATION OF THE TURKISH CONSTITUTIONAL COURT'S INDIVIDUAL APPLICATION DECISIONS

Individual application to the Turkish Constitutional Court has been established as an exception and a subsidiary remedy where a breach of fundamental constitutional rights and freedoms is concerned and after all other domestic remedies are exhausted, with the constitutional amendment in 2010 (article 148/3).[22] This mechanism functions as a new means of protection for both citizens and foreigners[23] to overcome any deficiencies in the protections granted through fundamental rights and freedoms established by the Constitutional Court.[24] It has significant value because it allows individuals to refer directly to the Court in the event that these rights are violated, therefore providing effective protection.[25]

Individual application is set forth by article 148, 149 and provisional clause 18 of the Constitution, the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey ('Law No 6216') (articles 45-51),[26] and the Internal Regulation of the Constitutional Court.[27] It is possible for rights and freedoms within the scope of the ECHR that are guaranteed by the Turkish Constitution (article 148/3). Turkey has to comply with the ECHR on fundamental rights under article 90/5 of the Constitution.[28] In fact, the importance and influence of the ECHR has increased with the individual application mechanism.[29] The Court considers related decisions of the ECtHR in its decision making.[30] Indeed, before the individual application mechanism existed in Turkey, a serious ECtHR precedent was applied in Turkey. Thus, it will be useful to first observe these precedents to evaluate the Court's decision properly.

Although there is no direct provision about the principle of *non-refoulement* and the right to asylum or expulsion is not guaranteed in ECHR,

22 Yokuş; Ural; Şirin.
23 Ural, p. 195.
24 Yokuş, p. 31.
25 Ural, p. 123.
26 Republic of Turkey, OJ 03.04.2011, 27894. The details of the individual application are set forth in this Law.
27 Republic of Turkey, OJ 12.07.2012, 28351. Kuş, p. 120; Ulusoy and Kılınç, p. 256.
28 For more information see Yokuş, pp. 26-30.
29 Yokuş, p. 32; Ulusoy and Kılınç, p. 258.
30 Doğru, p. 1.

the ECtHR supplies more effective protection than most refugee conventions.[31] ECHR article 3 absolutely forbids torture or inhuman or degrading treatment or punishment. Under ECtHR precedent, an individual shall not be sent to a country where a real risk of torture or inhuman or degrading treatment or punishment exists.[32]

ECtHR have made numerous decisions in which Turkey has been convicted of not complying with ECHR article 3 in the context of expulsions and article 5 and article 13. The ECtHR has applied the Rule 39 of the Rules of the ECHR[33] in cases of expulsion, since there has been no effective remedy in Turkish national law in this context.[34] At the same time, the ECtHR has made decisions on the violation of article 3 in the context of treatment under administrative detention.[35]

The *Abdolkhani and Karimnia v Turkey* decision[36] has been a turning point for Turkey. The ECtHR found no violation of article 3 because deportation had not been effected. However, if deportation had actually taken place and Abdolkhani and Karimnia had been deported to Iran or Iraq which was not safe for them, it would have been said that Turkey violated article 3 (para 92). After this decision, which was the leading decision on the deportation of refugees and expatriates, particularly with regard to restricting their self-protection for this purpose, the ECtHR has issued twenty decisions.[37] In the case of *Ghorbanov and others v Turkey*, the ECtHR found a violation of article 3, deeming it inhumane treatment that 19 Uzbek refugees were arbitrarily sent to Iran because the decision to deport was made without instituting procedural safeguards.[38]

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31 Korkut, p. 24. On the impact and importance of the ECHR also see Ulusoy and Kılınç, pp. 247-249; Duffy, p. 378; Ergül, pp. 110-123, 183.

32 See Taneri, p. 172; Doğru, p. 9; Tezcan *et al*., p. *135;* Ekşi, 2010a, pp. 16-17. For some of these decisions see *Soering v UK* App No 14038/88 (ECtHR, 7 July 1989) para 91; *Chahal v UK* App No 22414/93 (ECtHR, 15 Nov 1996) para 74; *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 Feb 2012) para 114. For more information including decisions concerning Turkey, see Yılmaz, 2016, pp. 184-187; Korkut, pp. 26-27; Yılmaz, 2014, p. 198.

33 Fact sheet – Interim measures, ECHR.

34 Korkut (12) 24.

35 Some of these decisions *Charahili v Turkey* App No 46605/07 (ECtHR 13 April 2010); *Z.N.S. v Turkey* App No 21896/08 (ECtHR, 10 Jan 2010). For details about these decisions see Yılmaz, 2016, pp. 187-189; Ekşi, 2010a, p. 30; Ekşi, 2014a, p. 139; Yılmaz, 2014, pp. 235-239. For the ECtHR's general attitude on this subject see Ergül, pp. 184-188.

36 *Abdolkhani and Karimnia v Turkey* App No 30471/08 (ECtHR, 22 Sep 2009).

37 Yılmaz, 2014, 235.

38 *Ghorbanov and others v Turkey* App No 28127/09 (ECtHR, 3 Dec 2013) para 32.

The ECtHR's decisions about Turkey were based on the following main deficiencies: The asylum application was not examined by the national authorities; though the case was instigated in order to cancel the deportation order, the execution of the deportation was not automatically stopped; there were no effective and accessible legal means for the court to examine claims regarding the risk of death and ill treatment in the event of deportation; and there were no legal grounds for the administrative detention.[39]

As a consequence of pressure arising from decisions of the ECtHR against Turkey and criticisms made by the EU in Turkey Progress Reports between 1999 and 2012,[40] the first Turkish law on asylum and international protection, Law No 6458 on Foreigners and International Protection (LFIP), came into force on 11 April 2014.[41] The problems in Turkish national law were theoretically solved by the passage of LFIP (especially articles 53-57). However, these solutions are determined to be effective not just in theory but also in practice.[42] With the implementation of the LFIP and the ability to make individual applications to the Constitutional Court, a serious expectation now exists that intensive applications would be made in the context of refugee law so that cases of illegal migration and deportation and would receive interim decisions in this regard.[43] Does the Court meet this expectation by providing protection to refugees like the ECtHR does with its decisions?

The Court applies and concretizes the constitutional rights that are also guaranteed for foreigners in its individual application decisions. These provisions particularly concern personal inviolability, corporeal and spiritual existence of the individual (article 17), protection of fundamental rights and freedoms (article 40) and personal liberty and security (article 19). In addition to applying the constitutional provisions in the final decisions, the Court has been empowered to take interim measures with the individual application

[39] *Abdolkhani and Karimnia v Turkey*; *S.A. v Turkey* App No 74535/10 (ECtHR, 15 Dec 2015); *Tehrani and others v Turkey* App No 32940/08 (ECtHR, 13 April 2010); *D. and others v Turkey* App No 24245/3 (ECtHR, 22 June 2006); *Keshmiri v Turkey* App No 36370/08 (ECtHR, 13 April 2010). For more information see Yılmaz, 2016, pp. 212-215. We have not addressed these decisions since we focus on the Turkish Constitutional Court's individual application decisions.

[40] See Dalkıran.

[41] Republic of Turkey, OJ 11.04.2013, 28615.

[42] Yılmazoğu, p. 911.

[43] Ulusoy and Kılınç, p. 247, 262.

mechanism. The Court often uses this competency in view of article 17 of the Constitution, and an important precedence has come into existence on protection of refugees' rights. Thus, first, these interim measure decisions are examined, and then, the final decisions both on admissibility, which are significant for this article, and on merits,[44] are examined.

2.1 The evaluation of the Court's interim measure decisions

No definition or concept about the interim measure is defined in the Constitution. However, the Law No 6216 article 49/5 states that 'the Chambers may, *ex officio* or upon request of the applicant, decide for measures they deem necessary for the protection of the applicant's fundamental rights.'

As it is understood from this provision, while an urgent interim measure can be requested, the individual complaint does not supply an automatic suspensive effect. The Court must make a decision on its own or upon request. When the Court determines that a situation requires an interim measure, it can also decide this by the way of *ex officio* in ordinary examinations.[45] Although article 49/5 of the Law No 6216 describes the competency to decide on measures for the protection of the applicant's fundamental rights, the Internal Regulation of the Constitutional Court limits this competency to a serious danger towards the life, material or moral integrity of the applicant (article 73/1). The Court acts also with this limitation. Thus, its interim measure decisions are just according to article 17 of the Constitution. [46]

While the individual application is a protection mechanism at the subsidiarity level, every domestic remedy is exhausted before an application is submitted. However, if these remedies are ineffective, or in the event of a serious and unrepairable threat arising during the waiting period for domestic remedies to be effective, this application can be submitted under the principle

[44] It is worth noting that by the nature of procedural examination, the Constitutional Court addresses interim measure demands with a sense of urgency. Yılmazoğlu,p. 922; Erol, pp. 76-77.

[45] Sağlam, p. 54; Erol, p. 78.

[46] For a similar view see Erol, p. 69. The Constitutional Court interestingly stated that the case of deportation constitutes a risk with respect to the rights under article 19 and article 17. TCC, *Farah Abdulhameed Mohammed Ali Al-Mudhafar[ID]* App No 2015/13854 (4 Aug 2015). This is due to the fact that, as we explain above, the Court considers only article 17 in interim measure decisions. For another explanation see Erol, p. 71.

of respect for constitutional rights (*'anayasal haklara saygı ilkesi'*). In such cases, not-first exhausting domestic remedy options will not be an obstacle against making the decision to take interim measure.[47] In this context, the Constitutional Court's authority to take interim measure is an exceptional authority.[48]

This article addresses the interim measure decisions in two parts: 'Violation of article 17 of the Constitution due to deportation' and 'violation of article 17 of the Constitution due to administrative detention for deportation purposes'. As shown below, the Court's interim measures when addressing the issue of deportation always include the order to stop deportation.[49]

2.1.1 Violation of article 17 of the Constitution due to deportation

According to Constitution article 17/1, 'everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.'[50] The third paragraph of this provision says that 'no one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.' By this article, like the ECHR article 3, the Constitution supplies absolute protection against *non-refoulement*.

No provision exists on the deportation of foreigners in the Turkish Constitution. However, we can consider article 16 of the Constitution in this context.[51] The process of deportation concerns article 23 of the Constitution which provides for the right of freedom. According to this provision, citizens cannot be deported. Thus, deportation is possible only for foreigners and it concerns the rights and freedoms of foreigners.[52]

Turkey is party to many international human rights conventions that guarantee the principle of *non-refoulement* directly or indirectly.[53] These

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47 For the Court's precedent on exceptions of exhaustion of domestic remedies, see Gülener, pp.19-22; Ekinci, pp. 181-182; Koç and Kaplan, pp. 193-200.

48 TCC, *Enedjan Narmetova[ID]* App No 2013/6782 (6 Sep 2013) paras 18, 19. See also Erol, p. 60; Sağlam, p. 54.

49 See also Erol, p. 83.

50 Tanör and Yüzbaşıoğlu, p. 165. For the responsibility of the state under article 17 of the Constitution see Doğru, pp. 5-10; Sirmen, p. 39.

51 Yılmaz, 2014, 207.

52 Ekşi, 2014a, p. 114; Aybay, 144.

53 The ECHR, the International Covenant on Civil and Political Rights, and the Convention against Torture are the most importants. For the other conventions see Taneri, pp. 235-237.

conventions form a part of Turkish domestic law under article 90 of the Constitution. The principle of *non-refoulement* is also accepted broadly as a rule of international customary law. Thus, in the case of non-compliance with this principle, Turkey would violate this rule and these conventions.[54] Correspondingly, the principle of *non-refoulement* is set forth in LFIP article 4 as a fundamental principle[55] without any exceptions.

Due to both the principle of *non-refoulement* and article 17 of the Constitution, Turkey shall not remove a person to a country if a real risk regarding the right to life or the right not to be subject to torture or to inhuman or degrading treatment or punishment exists there. Taking the domestic law provisions and article 33 of the Geneva Convention into consideration, the Court has recognized in its decisions *non-refoulement* as a principle in national and international law.[56]

In *Rıda Boudraa [ID]* case, the Turkish Constitutional Court gave its first interim decision about the principle of *non-refoulement* in 2013 and stated that it would be against this principle to expel the applicant without concluding his application for refugee status.[57] After this case, the Court made a number of interim measure decisions that found a serious danger towards the life or material or moral integrity of the applicant regarding the principle of *non-refoulement*.

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[54] Ekşi, 2010a, pp. 26-28. Also Taneri, pp. 233-234; Ekşi, 2014a, p. 123. LFIP is envisaged to apply without prejudice to provisions of international agreements to which Turkey is party to and specific laws (article 2).

[55] Ekşi, 2012, p. 131.

[56] Turkish Constitutional Court ('TCC') *Mohammad Abdul Khaliq[Interim Decision('ID')]* App No 2015/6721 (14 April 2015) para 26; TCC, *K.A.[ID]* App No 2014/19101 (10 Dec 2014) para 14; TCC, *A.D.[ID]* App No 2014/19506 (25 Dec 2014) para 21; TCC, *M.S.S.[ID]* App No 2014/19690 (31 Dec 2014) para 22. The decisions that do not include any special expression are the final decisions.

[57] TCC, *Rıda Boudraa [ID]* App No 2013/9673 (30 Dec 2013). In the first application against deportation act with the interim measure request (TCC, *Caceres [ID]* App No 2013/1243 (30 Dec 2013)) the Constitutional Court rejected this request, since there was not any claim about the risk to life or being exposed to torture, inhuman or humiliating treatment or punishment. The Court rejected the case of *Cheishvili[ID]* (TCC, *Cheishvili[ID]* App No 2014/19023 (5 Dec 2014)) due to the same reason. However, in this article, we evaluate only the applications which include the claim about the mentioned risk. Thus, we do not examine these decisions in detail. In case of *Enedjan Narmetova[ID]* although there was such a claim, the Court did not reject the application since it considered that the applicant did not present a founded argument. For more details about these three decisions before Rıda Boudraa, see Yılmazoğlu, pp. 912-917.

The Court requires serious risk in order to take interim measures.[58] For serious risk, the applicant who will be returned should prove that 'he/she will be subjected to ill treatment on the grounds of a special situation related to just him/herself or the group of which he/she is a part with a high degree of probability'. In this context, the general situation of the country to which the applicant will be returned, the applicant's past experience, and the general or personal nature of the risk are taken into account.[59] However, if country of origin information that supports the applicant's claims is included in the reports of the human rights organizations that study in this field (for example, Amnesty International, Human Rights Watch), the Court can take interim measures without concrete knowledge or documentation from the applicant about his/her personal situation.[60]

In any individual application based on an expulsion case, the Court also considers whether the applicant has applied to the United Nations High Commissioner for Refugees (UNHCR) for refugee status or not and regards the UNHCR's decision about this. Prior to examining such cases, we should first determine the UNHCR's role in the Turkish asylum system.

Before the enactment of the LFIP, the UNHCR had a big *de facto* role in refugee protection, especially in determining refugee status in Turkey, due to the geographical limitation. The asylum applications and other related procedures were carried out by Turkish police authorities in cooperation with the UNHCR. The UNHCR resettled people who had received refugee status. According to LFIP article 92, the Ministry of the Interior may cooperate with the UNHCR on issues related to the international protection procedures set out in that part of the LFIP. The necessary cooperation shall be undertaken with the UNHCR with regard to its duty to supervise the implementation of the provisions of the Geneva Convention. In practice, this cooperation also takes place concerning resettlement.[61] Thereby, the Court pays attention to the UNHCR's role in the asylum procedure.[62]

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[58] *Rıda Boudraa[ID]* para 24; TCC, *A.M.A.A. and J.A.A.A.[ID]* App No 2015/3941(27 March 2015) para 17; TCC, *D.M.[ID]* App No 2015/4176 (17 March 2015) para 17. See also Erol, pp. 64-68.

[59] *Mohammad Abdul Khaliq[ID]* para 25; *A.D.[ID]* para 21; TCC, *Gulistan Ernazarova[ID]* App No 2015/508 (16 Jan 2015) para 30.

[60] TCC, *M.A.[ID]* App No 2016/220 (20 Jan 2016) para 19; TCC, *Azizjon Hikmatov[ID]* App No 2015/18582 (15 Dec 2015) para. 19; TCC, *R.M.[ID]* App No 2015/19133 (16 Dec 2015) para 17.

[61] See UNHCR Turkey <http://www.unhcr.org/tr/en/refugee-status-determination> accessed 20 July 2018.

[62] The ECtHR also takes the UNHCR's decisions *into account in case of non-refoulement*.

The Court accepts the interim measure request regardless of the decisions of the Turkish authorities if UNHCR gives the applicant refugee status and operates the resettlement procedure for him/her. In such cases, the Court notes that if it rejects the applicant's request, he/she would be in danger of being subjected to ill treatment and would face the risk to lose his/her right to being resettled in a third country.[63] The Court's consideration of the UNHCR's decisions and respect of the principle of *non-refoulement* are in favour of refugees. However, not applying for refugee status or receiving a negative response to the application to Turkish authorities and/or the UNHCR is seen by the Court as an absence of a current and serious risk relating to the applicant's special situation and negatively affects the Court's decision.[64]

In many decisions, the Court states that it considers *ex officio* international organizations' reports about the country of return, without being limited to the applicant's information and documentaries. Nevertheless, the Court requires applicants to submit tangible information relating to the risk they will face personally.[65] Thus, it usually rejects an interim measure request if the applicant's application for protection is rejected by other authorities. For example, in the case of *A.M.A.A. and J.A.A.A.[ID]* the Court accepted the applicant's request for interim measures in respect of the principle of *non-refoulement,* indicating that there was a serious risk to the applicant in the country of return, Iraq, due to armed conflict. The Court says that effective investigation and enlightenment are needed; however, this can be met while examining the merits. However, in the cases of *Z.K.[ID]*[66] (the return country was Iraq), *I.Z. and others[ID]*[67] and *Rasul Semenov[ID]*[68] (the return country

Yılmaz, 2016, pp. 186-187. Thus, it can be said that the Constitutional Court follows the ECtHR in this context. The Constitutional Court takes the ECtHR's precedence into account and has a similar attitude with regards to the justification of interim decisions relating to deportation. Yılmazoğlu, p. 922; Erol, p. 67.

63 *Azizjon Hikmatov[ID]* para. 20; TCC, *Majid Mahmood Ahmed Aljamal[ID]* App No 2015/15277 (11 Sep 2015) para. 15-16; TCC, *A.A.K.[ID]* App No 2015/17761 (2 Dec 2015) para 16.

64 TCC, *R.N.[ID]* App No 2015/9291 (4 June 2015) para 14; *M.S.S.[ID]* para 21; TCC, *Mir Ahmed[ID]* App No 2015/8021 (20 April 2015) para 10.

65 The main cases to which the Court always refers are these:TCC, *Leyla Dogot [ID]* App No 2015/11252 (10 July 2015) para 14; TCC, *Eiza Kashkoeva[ID]* App No 2016/9483 (25 April 2016) para 17.

66 TCC, *Z.K.[ID]* App No 2017/7042 (5 April 2017).

67 TCC, *I.Z.[ID]* App No 2017/9422(11 April 2017).

68 TCC, *Rasul Semenov[ID]* App No 2017/10466 (11 May 2017).

was Russia in both cases), the Court rejected the requests on the grounds that they did not submit documents relating to their personal situation and claims and with no other explanations. We cannot understand from the *obiter dictum* what the difference is between the accepted applications and the rejected ones. This attitude also does not conform with the Court's precedent, that asking an applicant to submit serious evidence would equate to asking for proof of the existence of a future event and would place a clearly disproportionate burden on him/her.[69]

Family unity also matters in the case of expulsion. When evaluating the expulsion process, the Court takes interim measures if it finds a serious threat to an applicant's family unity. The Court regards family unity in the context of spiritual existence under the Constitution article 17. Therefore, we face different perspectives in the decisions. In the *Abdolghafoor Rezaei[ID]* case, the Court stated that if the applicant were expelled to the country, which was considered unsafe by international reports, he would remain separated from his family for an ambiguous period, and his family unity would be broken. Thus, the Court stated that there would be a serious threat to the applicant's spiritual existence.[70] This judgement makes us think that the Court accepts an applicant's request about family unity in the case that there is existing risk associated with the expulsion to the related country. However, in a subsequent application, the *Uthman Deya Ud Deen Eberle[ID]* case, although the Court did not accept the risk to the applicant's life in the expulsion case, it stated that there would be serious threats to the applicant's family unity, making 'spiritual existence' relevant in the situation of *refoulement,* and granted the interim measures.[71]

I explained in detail that the Court expects a serious and current risk to suspend the expulsion decision using the interim measure decisions. For this reason, if an expulsion decision does not exist, the Court does not affirm the existence of a concrete risk.[72] Under article 80/1-e of the LFIP, the person shall be allowed to stay in Turkey until the completion of the review process or judicial proceedings. Thus, if the applicant appeals against the

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69 *Mohammad Abdul Khaliq[ID]* para 26. The Court, here, referred to the case of *Fozil v Russia* App No 74759/13 (ECtHR, 11 Dec 2014) para 38.

70 TCC, *Abdolghafoor Rezaei[ID]* App No 2015/17762 (1 Dec 2015) paras 15-16.

71 TCC, *Uthman Deya Ud Deen Eberle[ID]* App No 2015/16437 (10 Nov 2015) paras 19-20.

72 TCC, *K.S.[ID]* App No 2015/14566 (4 Sept 2015) para 14.

administrative or judicial decision, since he/she shall not be deported, the Court finds no serious risk that requires interim measures.[73]

Like article 80/1-e, LFIP article 53 guarantees in some way an 'automatic-suspension mechanism' with the Court's own words. These two provisions are the most important and effective provisions in the LFIP provided that the persons who are subject to a removal decision can remain in Turkey until the final decisions are issued by the courts. According to article 53/3, the last sentence before revision, a foreigner could not be deported during the judicial appeal period or until after the finalisation of the appeal proceedings (against the deportation decision), without prejudice to the foreigner's consent. Therefore, the Court rejected the interim measure request since deportation was not possible while the judicial appeal remained in the administrative courts due to article 53/3 of the LFIP, even though the expulsion decision was final and the international protection application had been rejected.[74]

From the above explanations, it could be argued that there was an effective remedy against *refoulement* at least in the Court's decisions. However, this situation has changed. Subsequent to a failed coup attempt, the Turkish government declared a state of emergency on 20 July 2016, which was terminated on 18 July 2018 after being extended for the seventh time.[75] Therefore, it can be argued that Turkey was governed by the emergency decrees that almost had the force of law (Kanun Hükmünde Kararname – KHK) for a long period. This situation impacted the Turkish asylum system and caused revisions in the LFIP.

'KHK/676 concerning some revisions in the context of the state of emergency,'[76] which came into force on 29 October 2016, revised articles 53 and 54 of the LFIP. The KHK/676 repealed the 'automatic suspension mechanism' envisaged in article 53. According to the KHK/676, judicial appeal of the persons who are supposed to be removed on the grounds of

[73] TCC, *Z.S. and others [ID]* App No 2015/16770 (5 Nov 2015) paras 16-17.

[74] TCC, *M.A.[ID]* App No 2015/16282 (15 Oct 2015) paras 20-21; TCC, *Ali Javid[ID]* App No 2017/20451 (18 April 2017) para 16.

[75] For the most recent declaration of the state of emergency; Republic of Turkey, repetitive OJ,18.04.2019, 30395. See also, BBC, 'Turkey ends state of emergency after two years' *BBC* (18 July 2018).

[76] Republic of Turkey, OJ, 29.1.2016, 29872, articles 35, 36.

article 54/1 (b) (d) and (k) does not prevent the execution of the expulsion decision, contrary to the previous situation. A deportation order may be issued at any time for an applicant or holder of international protection status who (b) is a leader, member, or supporter of a terrorist organization or a criminal organization; (d) poses a threat to public order, public security, or public health; and (k) is reported by international institutions and organizations to have links with a terrorist organization.[77] Therefore, for these groups, the appeal procedure will no longer have an automatic suspension effect, and this statement may increase the risk of *refoulement.*[78] Due to the revision in the LFIP, the Court decides to use interim measures if there will be dead loss in the case of the realization of the deportation process while the applicant's appeal procedure continues.[79] However, if the applicant's administrative appeal is rejected, the Court does not assess the removal of this automatic suspensive effect as the sole reason for taking interim measures.[80]

2.1.2 Violation of article 17 of the Constitution due to administrative detention for deportation purposes

According to article 57/2 of the LFIP (last sentence), 'foreigners subject to administrative detention shall be taken to removal centres…' We address diffusively the 'administrative detention for removal purposes' envisaged in article 57 of the LFIP, while examining the final decisions below. Thus, the explanations in this heading are limited to the context of the interim measure decisions.

Under the Court's precedent, in a case based on administrative detention, the poor material and physical conditions in administrative detention centres should be more than a minimum margin to determine a violation of article 17 of the Constitution. This margin is determined based on the time, the physical and mental influence of the administrative detention, and the victim's gender, age and health conditions.[81] For a determination of the administrative

[77] TCC, *H.S.[ID]* App No 2016/22512 (2 Nov 2016) paras 19-20; TCC, *Y.T.[ID]* App No 2016/22418 (1 Nov 2016) paras 22-24.

[78] In the same view, Ineli-Ciger (n 3) 573-574. It is worth noting that the revisions in the articles 53 and 54 of the LFIP have been permanent with articles 30 and 31 of the Law No 7070. Republic of Turkey, repetitive OJ, 08.03.2018, 30354.

[79] *H.S.[ID]* para 23-24; *Y.T.[ID]* para 26.

[80] *T.A.A.[ID]* para 12.

[81] *Gulistan Ernazarova[ID]* para. 21; TCC, *G.B. and others [ID]* App No 2014/19481 (9 Jan 2015) para 17.

detention conditions as 'inhuman' or 'humiliating', it is essential to understand whether this treatment is done by design and whether it results in physical or mental suffering. For 'insulting' treatment, these detention conditions should make the applicant feel fear, anxiety, contemptibility and hurt feelings. Treatment and punishment should go beyond legitimate treatment or hurt feelings accompanying punishment to be asserted as 'inhuman' or 'humiliating'.[82]

When assessing the detention conditions in the removal centres, the Court expects to find a serious, imminent and current risk to the applicant's life. If ill treatment that is threatening to the applicant's life and physical integrity does not exist, the interim measure request is not accepted.[83] If no documentation or information that supports such claims exists, the Court does not find a serious threat. In such circumstances, the Court respects the documentation submitted by the Directorate General of Migration Management (DGMM).[84] In the cases of *Ahmad Mouaz Kajjouk[ID]* [85] and *Gulistan Ernazarova[ID]* the Court found that there was no serious risk relating to the administrative conditions at Kumkapı removal centre. These decisions are censurable since the conditions at this centre were found incompatible with human dignity and contrary to article 17 in the Court's final decisions, at that time.

In the light of the aforementioned explanations, we can say that the Court emphasizes the minimum required conditions and the positive obligation of the state with respect to article 17 of the Constitution but does not apply interim measures based upon the administrative detention conditions. It seems that the Court does not find the risk arising from these conditions to be a reason for interim measures until it finds a serious risk in the case of deportation. In my opinion, the Court tracks the ECtHR's precedent on administrative detention in theory but does not comply with it in practice.[86]

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[82] *G.B. and others [ID]* paras 18-19; *Gulistan Ernazarova[ID]* paras 22-23. In the context of these standards, the Court follows the ECtHR's precedent. For the notions of 'torture', 'inhuman', 'humiliating' treatments under Turkish law and the ECtHR, see Doğru, pp. 8-9; Tezcan et al., pp. 140-144.

[83] *G.B. and others [ID]* para 20; *Gulistan Ernazarova[ID]* para 24.

[84] TCC, *I.M.[ID]* App No2015/16013 (14 Oct 2015) para 23; TCC, *Ilia Karimov[ID]* App No 2015/16280 (15 Oct 2015); TCC, *K.L.[ID]* App No 2016/4754 (16 March 2016) para 22.

[85] TCC, *Ahmad Mouaz Kajjouk[ID]* App No 2015/17332 (19 Nov 2015) para 16.

[86] Erol has also realized the fact that the Court rejected all interim measure requests relating to the condition of administrative detention. Erol, p. 75.

2.2 The Evaluation of the Court's Final Decisions

In any application, the Court is not limited to the applicants' legal definition about the case. The Court makes legal qualifications of the events and facts by itself. It assesses claims about a threat to right to life and corporeal and spiritual existence relating to deportation and claims about inhumanity and ill treatment in the removal centres relating to deportation under article 17 of the Constitution. It considers the claims that effective remedy is lacking within the meaning of article 17, in conjunction with article 40 of the Constitution.[87] The Court addresses complaints about the legality of removal centres, monitors the reasons for detention and offers compensation for detention, under article 19 of the Constitution, which guarantees personal liberty and security.[88] Therefore, we address the decisions on articles 17, 40 and 19 of the Constitution in this turn.

2.2.1 Violation of article 17 of the Constitution due to deportation

This article focuses on the merits examination. However, some refugees' rights cannot be protected by the Court since these applications are found inadmissible. Thus, we also give place to the considerable cases on admissibility.

In any application, the Court first makes an admissibility assessment. For an admissibility application, an applicant is supposed to satisfy three criteria cumulatively. There should be violation of the applicant's *actual right*, the applicant should be *affected personally and directly*, and the applicant should claim that he/she is a *victim*.[89] If the deportation decision is no longer enforced for the applicant for whom a deportation decision has been issued, the *victim* adjective is lifted. The applicant can be considered a victim only on the condition that he/she is deported or under the deportation threat. Therefore, if a deportation order is withdrawn, is temporary or is not under continuing implementation, the Court does not accept the applicant's claim of being a victim. If the implementation of deportation is uncertain or loses legality, the result is the same.[90]

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87 TCC, *F.A. and M.A.*, App No.2013/655 (20 Jan 2016); TCC, *A.V. and others*, App No 2013/1649 (20 Jan 2016).

88 *F.A. and M.A; A.V. and others*.

89 TCC, *K.A.[General Assembly(GA)]* App No 2014/13044 (11 Nov 2015) para 52. For the admissibility criteria of individual application see Ekinci and Sağlam; Ekinci, 2017.

90 *K.A.[GA]* paras 54, 59-61; *D.A.*, para 24; *Farah Abdulhameed M. Ali Al-Mudhafar*, para 25. The Court referenced to the case of *A.D. and others v Turkey*.

In the *K.A.[General Assembly][GA]* case, the deportation decision under article 54/1(d) with an administrative detention decision were issued for the applicant, and the appeals against these decisions were rejected. Then, the applicant filed an individual application with the Court with the request of interim measures concerning the deportation decision. The Court accepted the applicant's request in its interim decision.[91] In its final judgement, the Court defined a temporary protection (TP) regime and stated that Turkey had provided TP to Syrians in the perspective of international law and international customary law. The Court also referred to the UNHCR's statement that the Turkish Government accept the stateless persons and refugees coming from Syria to Turkish territory in compliance with the TP regime and that these persons not be returned involuntarily.[92] Thus, according to the Court, the decision of the administrative court was taken based on an appeal against the removal decision, and the decision of the Judge of the Criminal Court against the administrative decisions had no effect on the legal status/situation of the Syrian applicant. Thus, there was no deportation decision that had been applied or that was current for the TP beneficiary applicant, so the applicant did not have victim status for individual application (para. 56-59).

The Court says that a TP beneficiary cannot be deported; however, the LFIP and TPR have no explicit provision that says a TP beneficiary can never be removed.[93] 'Persons subject to a removal decision' are mentioned in article 54 of the LFIP. This article provides for two main categories. The first paragraph includes a list of the persons for whom a deportation decision shall be issued. The second paragraph envisages a special provision for applicants and international protection beneficiaries. Being deported is possible for international protection applicants or beneficiaries but only on the grounds stated in the paragraph. Thus, it should be determined which provision (article 54/1 or 54/2) is applicable for TP beneficiaries since there is no provision about their deportation in the TPR.[94] TP beneficiaries are not covered under article 54/2 because TP status is not set forth as an international protection

[91] TCC, *K.A.[ID]* para 14.
[92] *K.A.[GA]* para 58.
[93] Aydoğmuş, p. 159.
[94] According to Ekşi, a provision on this matter should be included in TPR. Ekşi, 2014b, p. 82, 83.

status in the LFIP (articles 61-63, 3/1-r), and TP beneficiaries cannot be applicants for international protection. They are not provided with right to request asylum. The TPR does not accept the transition from TP status to other international protection statuses.[95] Since TP beneficiaries are not under the exception of article 54/2, their deportation shall be issued according to article 54/1. However, when deporting a TP beneficiary under article 54/1, the Temporary Protection Regulation[96] (TPR) should be taken into consideration.[97]

To state ill treatment, the Court needs 'a real risk' in the country of deportation. The state's obligation to prevent ill treatment comes into existence when the applicant makes a claim that is searchable, arguable and valuable/raises reasonable doubt. As a rule, the public authorities should examine the conditions of the related country *ex officio*. However, the Court finds 'general' and 'abstract' claims untenable and considers an application manifestly unfounded if it does not include an explanation about personal risk.[98]

As the Court declares, if the claim is justifiable, the basic role of the Court is to supervise whether the procedural guarantees are satisfied by the administrative and judicial authorities in regard to the prohibition of ill treatment. In principle, if these procedural guarantees are not satisfied, the Court determines that the violation requires a rehearing in regard to the subsidiarity principle. Contrary to this, if these guarantees are satisfied, the Court also examines the existence of a risk in the third country.[99]

In the case of *Azizjon Hikmatov,* the Court found there to be a violation since the administrative and judiciary authorities did not fulfil the obligation

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[95] Yılmaz, 2016, p. 198. See TPR article 7/3 and article 16. The definition of mass influx in article 3/1-j and article 11/2-b support this fact.

[96] Republic of Turkey, OJ 22.10.2014, 29153.

[97] See TPR article 4.

[98] TCC, *Yryskul Beishenaliev,* App No 2016/7458 (20 April 2017) paras 49, 51, 54-55; TCC, *Arkan Tareq Ali Ali,* App No 2016/9485 (26 Nov 2017) paras 52-54; TCC, *W.S.*, App No 2016/5687 (25 Oct 2017). As it is seen, the Court mentions the 'manifestly unfounded' application in the final decisions. While 'not being manifestly unfounded' is an admissibility criterion, actually it pertains to the merits of the application rather than procedure. Algan, pp. 251-252.

[99] TCC, *A.A. and A.A.[GA]* App No 2015/3941 (1 March 2017) para 71; *Azizjon Hikmatov,* App No 2015/18582 (10 May 2017) para 65.

to search and make assessment regarding the claim about a risk.[100] In special cases according to the concrete conditions, the Court can address whether there is ill treatment or not even if the administrative court does not make an assessment about the risk.[101]

According to article 54/1-i of the LFIP, a removal decision shall be issued with respect to those foreigners listed below who/whose

international protection claim has been refused; are excluded from international protection; application is considered inadmissible; has withdrawn the application or the application is considered withdrawn; international protection status has ended or has been cancelled, provided that pursuant to the other provisions set out in this Law they no longer have the right of stay in Turkey after the final decision.

Therefore, according to the Court, on one hand, *a contrario* of article 54/1-i, a foreigner whose application for international protection has not been refused cannot yet be deported. Thus, if the administrative judiciary reversed the decision about not accepting applications for international protection, it would prevent the enforcement of the removal process. On the other hand, considering article 80/1-e of the LFIP, the Court stated that the applicant should be permitted to stay in the country during the administrative or judicial appeal period of the application of the international protection process. Hereby, as a prominent result, before the enactment of the KHK/676, the Court recognized that there was an effective remedy that could generate solutions and offer a reasonable chance of success in protecting legal values within the context of article 17 of the Constitution. For that reason, in such cases, the Court found the individual applicants inadmissible because this effective remedy had not been resorted to.[102]

Before the revision of the KHK/676, there was no removal operation due to this suspensive effect. Thus, the Court found that applications were manifestly unfounded.[103] However, the KHK/676 has lifted the automatic

[100] *Azizjon Hikmatov*, para. 74.
[101] TCC, *F.R.*, App No 2016/4405 (15 Feb 2017) paras 75-77.
[102] *Z.M. and I.M.*, App No 2015/2037 (6 Nov 2016) paras 49- 52. For the relationship between accessible and effective remedy and admissibility criteria, see Doğru, p. 103; Ural, p. 258; Ekinci, pp. 187-188.
[103] TCC, *Rıda Boudraa,* App No 2013/9673 (21 Jan 2015) para 58.

suspensive effect in article 53/3 of the LFIP. After the exceptions were amended by the KHK/676, as we explained above, if any of the exceptions of article 54/1 (b) (d) and (k) apply to an applicant, there will be a risk of being deported and so a serious risk to corporeal and spiritual existence. Thus, the Court declares a violation and rejects the deportation of the applicant until the retrial is completed in such cases.[104]

In sum, before the enactment of the KHK/676, the Court rejected most individual applications as inadmissible due to the provisions of article 53/3, article 54/2 and article 80/1-e of the LFIP. Because of these provisions, the enforcement of deportation was not possible until the final decision of appeal. However, since the revision of article 53 and 54 by the KHK/676, the Court has started to examine the applicant based on merits since these revisions paved the way for deportation.

At this point, we should mention another article of the LFIP that is associated with this article directly. According to LFIP article 55/1, removal decision shall not be issued with respect to the foreigners listed below regardless of whether they are within the scope of article 54. One of these categories is the situation 'when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned' (article 55/1-a).[105] As shown, this provision corresponds to the principle of *non-refoulement* in parallel with article 4 of the LFIP[106] and the Court considers this provision and article 4 in the context of this principle. We suppose that the possibility of abiding by this provision is low. Otherwise, it is certain, if the authorities comply with article 55 of the LFIP (also considering article 4), there will be no deportation decision that will violate article 17 of the Constitution.

2.2.2 Violation of article 17 of the Constitution due to administrative detention for deportation purposes

According to article 19 of the Constitution, 'everyone has the right to personal liberty and security'. This article guarantees that individuals are not

[104] *Azizjon Hikmatov*, paras 80-85.
[105] The situation of these people are evaluated separately. Ekşi, 2014a, p. 123.
[106] Kibar, p. 193.

deprived of their liberty arbitrarily.[107] It is also set forth that no one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law. One of these exceptions is the case of arrest or detention of a person who enters or attempts to enter the country illegally or for whom a deportation or extradition order has been issued. We detail the article 19 of the Constitution below. The needed knowledge here is that detention in the removal centres is also a restriction of personal liberty and security within the meaning of article 19.[108]

In article 57 of the LFIP, 'administrative detention and duration of detention for removal purposes' is foreseen. For those whom a removal/deportation decision has been issued, the governorate shall issue an administrative detention decision for only those who have the criteria envisaged in the article (article 57/2). According to this article, 'foreigners subject to administrative detention shall be taken to removal centres.'[109] Therefore, the places in which the refugees' right to freedom is limited are removal centres.

In the process of examining the claims about the material conditions in the removal centres, the Court first reveals the general principles relating to article 17 of the Constitution. According to these, the negative obligation of the state derived from article 17 supposes that the public authorities will not interfere with this right; in other words, the public authorities will not cause the physical and spiritual suffering of individuals with acts that are prohibited in article 17/3.[110]

I have explained that the arrest or detention of a foreigner is possible under Turkish law for the execution of the deportation process,[111] and the minimum margin of the needed criteria to determine treatment as inhuman or humiliating and constituting a violation of article 17 due to the administrative detention conditions when evaluating the interim measure decisions.[112] When

[107] Tanör and Yüzbaşıoğlu, p. 168.
[108] *F.A. and M.A.,* para 129; *A.V. and others*, para 121.
[109] The provision regarding the 'Removal centres' is envisaged in article 58 of LFIP. See Yılmaz, 2016, pp. 216-17, 255; Kuşçu, pp. 264-65.
[110] *K.A.[GA]* para 88. About the negative obligation of the state regarding the right to life, see Tezcan et al., pp. 94-95.
[111] See *Rıda Boudraa,* para 73.
[112] See also these final decisions: *Rıda Boudraa; F.A. and M.A.; A.V. and others*.

the Court reviews the general principles about detention circumstances, it considers the ECtHR's precedent relating to article 3 of the ECHR and the standard that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recognizes for 'Immigration Detention'.[113] The Court also takes into account the Grand National Assembly of Turkey (TBMM) Report (2012),[114] United Nations Report by the Special Rapporteur on the Human Rights of Migrants[115] and the Security General Directorate's information in the perspective of each case.[116]

Looking at the documentation the Court regards in its decision, the precedent of the ECtHR considers 4 m^2 per person as a minimum standard. Decreasing of this space to less than 3 m^2 causes a violation of article 3 of the ECHR.[117] The opportunity to exercise outdoors at least an hour a day is a fundamental guarantee for an individual's welfare.[118] Considering this precedent, in the *K.A.[GA]* case, the Court stated that being detained in a space of at most 3 m^2, substandard to the CPT, and lacking any place for relief except a removal centre (Kumkapı removal centre) gives rise to 'inhuman treatment', and these conditions are contrary to article 17 of the Constitution.[119]

It can be argued that the *K.A.[GK]* case became a leading decision in the context of administrative conditions according to the Court's precedent. In the subsequent decisions relating to the Kumkapı removal centre, the Court reached the same conclusion.[120] However, the condition of each detention centre is determined *case-by-case*. For example, in the case of *I.S. and others,* the Court determined that the administrative conditions in Adana removal centre were incompatible with human dignity and violated Constitution article 17 (para 126). Hence, if the claim does not include the challenges and efficiencies in the removal centres but refers only to the physical qualifications of the removal centres, the application is found manifestly unfounded.[121]

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[113] CPT/Inf/E (2002).
[114] TBMM İnsan Hakları İnceleme Komisyonu.
[115] United Nations, General Assembly.
[116] *F.A. and M.A,* paras 82-84; *A.V. and others,* paras 75-77.
[117] *Hagyó v Macaristan* App No 52624/10 (ECtHR, 23 April 2013) para 45; *Yarashonen v Turkey* App No 72710/11 (ECtHR, 22 June 2014) para 72.
[118] *Yarashonen v Turkey,* para 73.
[119] *K.A.[GA]* para 111; *F.A. and M.A,* para 108; *A.V. and others,* para 100.
[120] *F.A. and M.A,* para 93; *A.V. and others,* para 86; TCC, *I.S. and others,* App No 2014/15824 (22 Sep 2016) paras 108-109; TCC, *T.T.,* App No 2013/8810 (18 Dec 2016) para 86.
[121] *I.S. and others,* para 99.

In the case of *B.T.[GA],*[122] the Court left its aforementioned precedent. The case was about an applicant detained for a while in the Kumkapı removal centre, and according to the Court, there was no legal interest for this applicant on account of administrative conditions since the detention was terminated. Thus, the Court saw the compensation remedy solely as an effective remedy. The Court referred to the cases of *KA[GA]* and subsequent cases with the statement that there was no effective administrative or judicial remedy against poor detention conditions, meaning that there was no compensation decision of the administrative or judicial court. However, the Court thought to review this statement. According to the Court, it could not decide on this statement on the sole grounds that there was no compensation decision. This actual state demonstrates that the remedy existed theoretically but does not mean that the administrative or judicial court rejected the compensation. The detention decision is an administrative decision, and it can be sued at administrative court for compensation. Moreover, the Court indicated that administrative courts would be more favourable towards examining the conditions of these centres since the Court makes its examination concerning only the application files, as a rule. In sum, with these arguments and considering the subsidiarity principle, the Court requires that all remedies, here applying to the administrative court for compensation, shall be exhausted. It found the application inadmissible (paras 40-60). The Court based its change of precedent on the case of *B.T.[GA]* and found more than ten cases after *BT[GA]* inadmissible since the remedies were not exhausted.

The *B.T.[GA]* case is censurable. The reason for this decision seems likely to hinder such cases and refer them to administrative courts. However, we do not find the Court's explanations reasonable, and we agree with the dissenting opinion in this case. In the general assembly, just one judge, Serruh Kaleli, opposed this decision. Kaleli found no reason to leave the previous precedent and declare the case inadmissible. He reached this conclusion based on the violations of article 17 and 40. However, the most important aspect is the Court's abandonment of its previous precedent. In Kaleli's opinion, the Court's reason for finding just compensation as an effective remedy nearly meant that there is no need for the state to meet its positive obligation to protect individuals from such treatment, so the applicant has no legal interest. This will legitimate such treatment and degrade the state's obligation of

[122] TCC, *B.T.[GA]* App No 2014/15769 (30 Nov 2017).

financial compensation, rather than protecting individuals' primary rights (dissenting opinion, para 55). Abdülhalim Yılmaz, the representative of many individual applications to the Court in this field including *B.T.* case defines this decision as chaos. According to him, the Court gave up to be the solution address for refugee rights. Moreover, he finds nearly impossible the administrative courts' giving decisions in favour of refugees, due to the lack of their experience in refugee law and their connivance of the need for international protection just because of public security.[123]

According to the official data provided by the DGMM, there are 19 removal centres (one of them is temporary) operated by DGMM.[124] Many of the removal centres were originally designed as reception and accommodation centres for persons seeking international protection.[125] However, these removal centres were also used to detain international protection applicants, while they are actually defined as facilities dedicated to administrative detention for the purpose of removal.[126] Eventually, all these centres were transformed into removal centres within the EU-Turkey Deal with EU approval.[127] Furthermore, there are 7 EU project (removal) centres and 8 centres under investment programmes that are planned for service. In contrast, there are just two Reception and Accommodation Centres.[128] Accordingly, it is very clear that persons seeking protection in Turkey will likely find themselves in these removal centres. We should note that Turkey shall comply with CPT and ECtHR standards. At this stage, reports of both the national and international institutions have a big role in the Court's evaluation of the conditions of the removal centres.

2.3 Violation of article 40 of the Constitution in conjunction with article 17 of the Constitution

The Constitution article 40 (protection of fundamental rights and freedoms) guarantees the right to request prompt access to the competent

[123] These explanations are from his personal e-mail dated 8 Aug 2018.
[124] DGGM <http://www.goc.gov.tr/icerik6/merkezlere-iliskin-bilgiler_308_323_326_icerik> accessed 10 Aug 2018. We prefer to consider this Turkish link since we think it involves more current data.
[125] Refugee Rights Turkey, p. 7.
[126] The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey (May 2016) p. 12, para 49; Amnesty International.
[127] Refugee Rights Turkey (n 89) 7.
[128] DGMM, Removal Centres.

authorities for everyone whose constitutional rights and freedoms have been violated as to ECHR article 13 (right to an effective remedy). In any application based on a complaint about the absence of effective remedies in the context of article 17 of the Constitution, the Court addresses whether article 40 is violated or not. If article 40 is already violated, the Court states the lack of effective remedy. In such a case, when evaluating the admissibility of the applications, the Court does not also review whether the means of appeal concerning the detention conditions are exhausted or not.[129]

The concept of the right to effective remedy varies based on the nature of the right. The ECtHR determines whether effective guarantees exist against arbitrary removal directly or indirectly back to the applicant's country of origin under the ECHR articles 3 and 13.[130] Like the ECtHR's review of this right (article 13) in relation to article 3, the Court reviews the effective remedy (article 40) in relation to article 17.

The right to effective remedy provides the guarantees relating to conveying claims of the violation of article 17 to the competent authorities.[131] According to the Court's precedent, which refers to the ECtHR case law,[132] the needed remedy should be accessible both in theory and in practice, in preventing violation, terminating the violation quickly or supplying the possibility of compensation due to the violation, pursuant to article 17.[133]

The Turkish Constitution article 125 envisages that 'recourse to judicial review shall be available against all actions and acts of administration.' However, according to the Court, this rule alone did not provide an effective remedy that could generate solutions and offer a reasonable chance of success in protecting legal values in article 17/3 before enforcement of the LFIP.[134] In fact, there was no explanation about judicial practice or case law that the administration could submit to the Court. In addition, before the enactment of the LFIP, there was no clear regulation that showed the standard concerning

[129] *F.A. and M.A.,* para 70; *A.V. and others,* para 64.
[130] *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR, 21 Jan 2011) para 288.
[131] TCC, *Yusuf Ahmed Abdelazim Elsayad* App No 2016/5604 (24 May 2018) para 63.
[132] *M.S.S. v Belgium and Greece.*
[133] *K.A.[GA]* para 71; *F.A. and M.A.,* para 58, 60; *A.V. and others,* paras 52, 54.
[134] Since deportation is an administrative act, it is possible to demand cautionary judgment under Turkish law. However, there is no automatic suspension to prevent the potential violation effectively. Yılmazoğlu, pp. 907-909.

detention conditions in the removal centres.[135] TBMM Human Right Commission reports reveal that it was not possible in practice to apply for claims based on these conditions in the removal centres.[136] In fact, the ECtHR confirmed that Turkey did not submit any forensic or administrative judiciary judgement or any explanation relating to the matter indicating that the detention conditions were improved and/or the applicant was paid compensation due to these poor conditions.[137] The TBMM report in 2012 also recognized that there was no standard regulation on the treatment of detainees in removal centres, although such regulation was needed.[138]

Considering the aforementioned explanations, it is an interesting and important question whether enforcement of the LFIP filled this gap or not. As we will see, unfortunately, the answer to this question is no. In this regard, two notable articles of the LFIP come into prominence: articles 53 and 57. In the LFIP article 57, 'administrative detention and duration of detention for removal purposes' is foreseen. According to the Court, there is no specific administrative or judicial appeal mechanism/remedy in LFIP article 57, including monitoring and review of the conditions, which sets the standards of detention conditions and will allow the conditions to be fixed or detention to be halted in the case of an audit finding any irregularity in terms of compliance with the Constitution article 17.[139] It also stated that while an appeal remedy against removal order is envisaged in LFIP article 53 the special conditions under which the appeal will occur are not regulated. The Court also attributed to the ECtHR decisions,[140] which did not find the possibility of any recovery in Turkey in terms of the administrative court's or authority's positive impact on detention conditions or compensation decisions.[141]

In the *K.A.[GA]* case the Court stated that there was a violation of article 40 on the grounds that there was no effective remedy with regard with to the administrative detention conditions incompatible with article 17 (paras 62-

[135] *F.A. and M.A.*, para 62; *A.V. and others*, para 56.
[136] *K.A.[GA]* para 79; *F.A. and M.A.*, para. 64; *A.V. and others*, para 58.
[137] *Yarashonen v Turkey*, para 63; *Abdolkhani and Karimnia v Turkey*, para 25. See also Kibar, p. 197.
[138] *F.A. and M.A.*, para 65; *A.V. and others*, para 59.
[139] *K.A.[GA]* para 76-77; *F.A. and M.A.*, para 66; *A.V. and others*, para 60.
[140] *Yarashonen v Turkey*, para 63; *Abdolkhani and Karimnia v Turkey*, para 25.
[141] *K.A.[GA]* paras 75-79.

65).[142] The Court followed this determination in other decisions when no unique or special finding in the case existed. In the cases of *F.A. and M.A., A.V. and others, T.T., I.S. and others,* and *A.S.,*[143] the Court stated that there had been a violation of article 40 by referencing the *K.A.[GA]* case since there were no effective remedies that could generate solutions and offer a reasonable chance of success in protecting legal values in the article 17/3 in both theory and practice. However, the Court found the case of *BT[GA]* and subsequent cases inadmissible on account of article 17 and so did not need to also evaluate these cases within the meaning of article 40.

In a different case of *Yusuf Ahmed Abdelazim Elsayad,* the applicants' suit against a deportation decision was rejected by the administrative court due to the prescription. The Constitutional Court reviewed the case only in the perspective of whether there was any intervention for the right to effective remedy. The Court concluded that the reason for this prescription was precluded by the public authorities. Considering the disadvantageous position of the detained applicant, the Court stated that an effective remedy was not provided relating to the complaints about the prohibition of ill treatment. After this decision, the possibility for review of this prohibition by the administrative court came to exist, so the Court made no examination in this sense.

At this stage, we should note that more than ten cases before the ECtHR with respect to detention conditions (Kumkapı removal centre), between 13 September 2016 and 16 May 2017, were concluded with the Turkish government's option for a friendly settlement indicating an admission of the problem we mentioned above. These decisions were based on the facts before individual application mechanism, although they were concluded after it. Thus, the case of *Z.K. and others v Turkey*[144] is important to demonstrate the ECtHR's attitude towards this mechanism. In this case, the ECtHR referred to the cases of *Rıda Boudraa, K.A.[GA]* and other cases of the Court, touched on the case of *Uzun v Turkey*,[145] and declared a number of other cases raising

[142] Kuşçu touches on the deficiencies of the criteria for reviewing/examining the conditions in removal centres both for the Judge of the Criminal Court of Peace and the governorates. Kuşçu, p. 276.
[143] TCC, *A.S.* App No 2014/2841 (9 June 2016).
[144] *Z.K. and others v Turkey,* App No 60831/15 (ECtHR, 7 Nov 2017).
[145] *Uzun v Turkey* App No 10755/13 (ECtHR 30 April 2013).

various issues under the Convention inadmissible for non-exhaustion of domestic remedies on account of the applicants' failure to apply to the Constitutional Court. The ECtHR stated that 'the Constitutional Court was entrusted with a specific jurisdiction to establish a breach of Convention provisions and the appropriate powers to secure redress for violations,' and its 'decisions are binding on defaulting authorities and enforceable against them.' In the light of these considerations, the ECtHR declared the application inadmissible since the applicant had not lodged an individual application to the Constitutional Court.

It seems that regarding the precedent of the Constitution Court, the ECtHR found the individual application mechanism an effective remedy that needs to be exhausted. However, we do not have enough decisions of the ECtHR in the period after this mechanism. Especially after the case of *B.T.[GA]*, the ECtHR will likely reassess its considerations. Moreover, the ECtHR did not find this mechanism absolutely effective. Indeed, in the case of *Boudraa v Turkey*, the ECtHR observed that the Constitutional Court did not establish the facts surrounding the material conditions of the detention. Therefore, the ECtHR carried out its own assessment of the facts, examined the case and determined that there had been a violation of article 3 on account of the administrative conditions at Yalova police headquarters (para 27).

2.4 Violation of article 19 of the Constitution due to administrative detention

In the ECHR article 5, there are exceptions in which it is possible to divest an individual of his/her freedom in compliance with the law. Article 19/2 of the Constitution corresponds to one of these exceptions, which is in ECHR article 5/1-f.[146] According to article 19/2, the right to personal liberty and security may be restricted only in the following cases where the procedure and conditions are prescribed by law. Hereunder, in the case of the arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued, the right to liberty and security may be restricted. This restriction corresponds to

[146] For the parallelism between ECHR article 5 and the Turkish Constitution, see Ekşi, 2014c, p. 8; Aybay and Kibar, p. 227, footnote 5. For more information on this matter, see Yılmaz, 2016, p. 206-212.

administrative detention[147] since it limits the liberty of the foreigner for whom a deportation decision has been issued.[148]

Administrative detention is an exceptional authority limiting the liberty of the individual.[149] Just because it is taken lawfully, an administrative detention decision cannot give unlimited power to the administration on this point. An explicit law is needed to provide procedural guarantees in order to supervise whether the detention decision applies in pursuance of *due diligence* criteria. Thus, the administrative detention measure could be executed in legality with no arbitrariness.[150]

To supply legality, the law shall explicitly reveal the conditions of the detention decision for deportation purposes, note the timeline, extend this timeline, inform the concerned person, the appeal remedies against this decision, allow access to a lawyer and allow interpreter services.[151] The detention measure should be review as needed and be made reasonable by the democratic state of law. The conditions should be with due regard to the well accepted standard and should not involve humiliating, degrading and inhuman treatment, and the detainees should be provided with fundamental rights and procedural guarantees.[152]

The Court reaffirms that there was no explicit legal regulation relating to administrative detention conditions and procedural guarantees until the LFIP.[153] The Court stated in the cases of *F.A. and MA., A. V. and others,* and *T.T.* that before the enactment of the LFIP, there was no legal arrangement that provided the procedural guarantees for the detainees under article 19/2, such as the condition of the detainment decision, protraction of this date, notification, access to lawyer and so forth. Moreover, since the administrative detention was not accepted as 'arrest' in the context of the criminal procedure, no effective appeal remedy against the detention decision was envisaged. For

[147] Ekşi, 2014c, p. 9. About the constitutionality (considering article 38 of the Constitution) of the administrative detention, see Huysal and Şermet, p. 2220; Ekşi, 2014c, p. 8; Özbek,p. 47; Kuşçu, pp. 247-248.
[148] Ekşi, 2014c, pp. 2-9;Yılmaz, 2014, p. 214; Kuşçu, p. 259.
[149] *Rıda Boudra,* para 73.
[150] *K.A.[GA]* para 130.
[151] *K.A.[GA]* para 125; *F.A. and M.A.,* para 135; *A.V. and others,* para 127.
[152] *K.A.[GA]* para 124.
[153] *F.A. and M.A.,* para 136; *A.V. and others,* para 128.

this reason, in *Rıda Boudra* and subsequent cases, the Court determined that the condition 'lawfully' in the meaning of article 19 of the Constitution was not met in the period before the entry into force of the LFIP.[154]

Regarding the period of the LFIP, article 57 involves some guarantees for the detainees in the removal centres based on administrative detention. In reference to article 57, the Court asserted that the LFIP explicitly reveals the procedure that will be considered in the execution of the removal process and hinder the possible arbitrariness. In this sense, the requirement in accordance with article 19 of the Constitution is met in theory. However, these arrangements should also be respected in practice.[155]

In the case of *BT[GA]*, the Court stated that an applicant detained under administrative detention without any administrative decision can take full remedy action for damages (para 74). According to the Court, just because of the lack of information about this possibility, the non-operation of this remedy did not mean that the remedy was ineffective (para 52-54). Thus, as in the perspective of administrative detention conditions in conjunction with effective remedy, the Court also left its precedent in this context. Following this change in its precedent, the Court found more than ten cases inadmissible, including *BT[GA]*, since this remedy was not exhausted.

The appeal to the Judge of the Criminal Court of Peace to review the administrative detention is consequential for implementing the foreseen guarantees. If the judge does not review the allegations about a breach of article 57, which will affect the removal decision and thereby the administrative detention, it will be a violation of article 19 of the Constitution.[156] In the case of *BT[GA]*, the applicant had applied to the Judge of the Criminal Court of Peace against the detention decision, but the case was rejected. Thus, this part of the application was found admissible. The Court declared a violation of article 19/2 since the applicant was detained without any removal and administrative detention decision (para 95).

In addition to article 19/2, articles 19/4, 19/8 and 19/9 have significant guarantees on detention. The Constitution article 19/4, which corresponds to

[154] *Rıda Boudra*, paras 76-79.
[155] *K.A.[GA]* paras 127-128, 134. See also Ekşi, 2014c, p. 4, 49.
[156] *K.A.[GA]* para 133.

ECHR article 5/2, envisages the right to be notified of the grounds for arrest or detention and the charges. This right, in the words of the Court, is sort of the holder of the other guarantees set forth in the Constitution article 19.[157] The Court evaluated whether the concept of notification is adequate and whether this notification is made promptly according to the conditions in the cases of *K.A.[GA], F.A. and M.A., A.V. and others,* and *BT[GA],* referring to the case of *Abolkhani and Karimina* (para 136), and found a violation since the applicant was not notified pursuant to article 19/4.[158]

Considering the Court's decisions, we see a direct relationship between LFIP article 57 and the Constitution article 19. According to the Court, if the guarantees provided in LFIP article 57 are not met, this will impair the possibility of applying to the competent judicial authority for the speedy conclusion we mentioned above. Thus, it will be a violation of article 19/4.[159]

Article 19/8 of the Constitution, which corresponds to ECHR article 5/4, involves the procedural guarantees for detainees, such as being entitled to apply to the competent judicial authority for the speedy conclusion of proceedings regarding the situation and for immediate release if the restriction imposed is not lawful.[160] According to the Court, the review in the context of this provision should be forensic and supply the necessary guarantee for the applicant's objections. This remedy should be effective not just in theory but also in practice.[161]

When we look at the period before the enactment of the LFIP, we determine that there was no lawful regulation that envisages application to the competent judicial authority for a speedy conclusion.[162] This deficiency was also asserted by the ECHR.[163] Since the enforcement of the LFIP, the fact of whether appeal remedies are executed effectively or not has become more noteworthy. The Court found violations of the Constitution article 19/8 in the

[157] *A.V. and others,* para 137.
[158] See also *A.V. and others,* paras 140-141; *I.S. and others*; *A.S.,* paras 118-119.
[159] *K.A.[GA]* para 145; *F.A. and M.A.,* paras 148-149.
[160] See also *F.A. and M.A.,* para 156; *A.V. and others,* para 148.
[161] *K.A.[GA]* para 152; *F.A. and M.A.,* para 158; *A.V. and others,* para 150.
[162] F.*A. and M.A.,* paras 159-160; *A.V. and others,* paras 151-152; *T.T.,* para 136.
[163] *Abdolkhani and Karimnia v Turkey,* para 142.

cases of *K.A.[GA] and I.S. and others*, and *BT[GA]* since the foreseen guarantees were not operated effectively.[164]

Article 19/9 of the Constitution, corresponding to ECHR article 5/5, foresees compensation. The compensation request is addressed in other paragraphs of article 19. Accordingly, article 19/9 is violated if at least one paragraph of article 19 is infringed and if no compensation mechanism exists in domestic law.[165]

3. CONCLUSION

The aims of this article were to present the perspective of the Constitutional Court's individual application decisions in relation to the international protection procedure and thereby also demonstrate the problems in practice with the purpose of contributing to the literature on whether or not Turkey is a safe third country. Thus, the article evaluated the Court's interim measures and final decisions on the provisions (articles 17, 40 and 19) most applicable to refugees and reached some conclusions.

The Court has granted many interim measure decisions related to refugee removals within the scope of article 17 for the operability of the principle of *non-refoulement*. The Court addresses article 17 not only in the perspective of the removal process but also in the perspective of administrative detention conditions. However, the Court has not taken any interim measure due to detention conditions.

The Court addresses the existence of the effective remedy required under article 17 within the meaning of the Constitution article 40. The Court has confirmed in its many decisions the lack of effective remedy both in theory and practice for the detainees in the context of article 17, with the exception of cases of poor detention conditions in the removal centres.

The Court also evaluated article 19 in the context of administrative detention conditions. These conditions can be separated into two parts: the 'period before the enactment of the LFIP' and the 'period after the enactment of the LFIP'. The legality criterion that is needed under article 19 was not met before the enactment of the LFIP. With the entry into force of the LFIP, this

[164] *K.A.[GA]* paras 155-156; *I.S. and others*, para 172; *B.T.[GA]* para 112.
[165] *F.A. and M.A.*, para 168; *A.V. and others*, para 160; *B.T.[GA]* para 120.

criterion has been met theoretically. However, we see that articles 19/2, 4, 8 and 9 face to be violated in practice, while evaluating the Constitutional Court's above-mentioned decisions.

The period of the LFIP can also be separated into two parts: before and after the enactment of the KHK/676. Before the enactment of the KHK/676, the Court rejected most individual applications as inadmissible due to the provisions of LFIP articles 53/3, 54/2 and 80/1-e. With the revisions by the KHK of the most important and effective provisions, LFIP articles 53 and 54, the automatic suspensive effect of the deportation process was lifted for some persons, and thus, the protection was weakened. Hence, we cannot claim that an effective remedy exists against *non-refoulement*, and this situation will cause the violation of this principle.

In fact, we cannot deny that the individual application mechanism frequently provided an effective remedy against *refoulement* of refugees for the period before the precedent change with the case of *B.T.[GA]*. However, although it may be accepted that individual applications to the Constitutional Court supplies an effective remedy in this context, it cannot be acceptable that it is possible for detainees or other applicants to apply this remedy easily. Many challenges to accessing judicial remedies exist. Indeed, the Court agrees that appeals based on the conditions in the removal centres are unlikely, as has been reported by the National Human Rights Institution of Turkey. Moreover, considering the effect of the state of emergency on the asylum system, especially with the KHK/676 and the new precedent with the case of *B.T.[GA]*, the fact that there is no effective remedy in the perspective of the principle of *non-refoulement* and detention conditions is another irrefutable situation. Considering that the individual application mechanism is an exception and a subsidiary remedy that is challenging for individual applications, Turkey fails to meet the most important condition (effective remedy) of the operability of the constitutional rights.

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