A GENERAL LEGAL REVIEW OF ADMINISTRATIVE DETENTION REGULATIONS AND PRACTICES IN TURKEY

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The Association for Solidarity with Refugees is a rights-based civil society organisation working for access of asylum seekers, refugees and migrants to rights and services arising from human dignity, universal human rights and international and national law.

Foreigners who are issued a deportation decision has been taken under administrative detention pending their deportation. Despite the existence of procedural safeguards in national and international law for foreigners who are placed under administrative detention, which is actually a practice of "deprivation of liberty" of the person, arbitrary practices and violations are widely observed in the field. This work, which we hope will be useful for rights holders, decision-makers, executors, advocates and researchers, is an evaluation of adminitrative detention practices in Turkey behing the framework of national and international law.

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Table of contents

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I. General Information on the Scope and Methodology

This study intends to perform a legal review of the administrative detention mechanism in terms of legislation and enforcement as part of the "Rights in Administrative Detention" project (Project) led by Mülteci-Der and funded by the European Union. Administrative detention, which was introduced into the legislation on foreigners in Turkey with the Law on Foreigners and International Protection ("LFIP"), which entered into force with all its provisions in 2014, is directly related to the right to liberty and security of individuals, as it is a measure that results in the deprivation of foreigner's liberty. Therefore, although this review focuses mainly on administrative detention, the lawfulness of some other practices that may result in the deprivation of liberty of the foreigner, but are not referred to by the same name, are also addressed where appropriate. Accordingly, the treatment of inadmissible passengers, the detention and transfer of foreigners suspected of being irregular migrants pending a decision by the competent authority, and the treatment of persons held in specific sections in temporary accommodation centers under Article 8 of the Temporary Protection Regulation (TPR) are also included in the scope of the review. The review also addresses several issues directly and effectively linked to removal orders, given that administrative detention is mainly enforced based on the decision to remove in compliance with the legal framework. Another issue covered by the review is the relationship between administrative detention and international protection.

This review analyzes to what extent the relevant practices comply with the law. This analysis is mainly based on the European Convention on Human Rights (ECHR), the related case law of the European Court of Human Rights (ECtHR), and the national legislation. In addition, information collected during activities carried out as part of the Project (meetings, workshops, and field

observations), particularly information on practices, were also used. Although mainly a desk-based study methodology was adopted, Mülteci-Der organized a focus group meeting with a

group of lawyers experienced in the field, and the inputs on practice obtained during this meeting were also used. In terms of analysis methodology, it should be emphasized that the review incorporates inferences regarding judicial review in addition to the conclusions made in terms of procedure and substance of the administrative procedures.

II. An Overview of the Measures and Practices that May Result in Deprivation of Liberty in Turkish Foreigners' Law

Depending on the aim and conditions of detention, practices that may result in the deprivation of liberty of a foreigner may be related to various fundamental rights, including the right to liberty and security. However, an assessment of whether detention constitutes a deprivation of liberty must be made within the framework of the right to liberty and security. Article 5 of the ECHR and Article 19 of the Constitution protect the right to liberty and security of the person, without any distinction between citizens and foreigners. Article 45 of Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court focuses on the 'right to individual application'. According to this article, in individual applications to the Constitutional Court, it is important to discuss the framework of deprivation of liberty by emphasizing the common sphere of protection and the legal conformity of the practices leading to deprivation of liberty in the context of Article 5 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights. Therefore, this content is also of primary importance in analyzing migration control practices on individual liberty. In line with Article 19 of the Constitution, Article 5 of the ECHR specifically includes a provision on immigration control among the circumstances that may result in deprivation of liberty within the legitimate limits of the right to liberty and security. The relevant provision [ECHR, Article 5(1)(f)] provides as follows:*" the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to removal or extradition.*" The ECtHR interprets 'prevent his effecting an unauthorized entry into the country' broadly, giving weight to the national legal provisions of the States Parties, and accordingly, the

ECtHR may interpret the provision not only in the context of attempted unauthorized entry but also cover persons who have already entered the country without authorization. [1].

The ECtHR generally focuses on several circumstances specific to the case in hand as a starting point in establishing whether there has been a deprivation of liberty under Article 5 of the ECHR. These circumstances may include the type, duration, effects, and method of application of the measure[2]. What is decisive here is that the measure of detention is not merely a restriction of freedom of movement, but goes beyond that and reaches the level of deprivation of liberty. Based on the case law of the ECtHR, it is possible to argue that the relevant provision of the ECHR (Art. 5/1) has an objective and a subjective element. [3] The objective element refers to the detention of a person in a specific and restricted area for a specified period, [4] and here, the likelihood of the individual leaving the confined space in which he or she is held, the degree of supervision and control by the authorities over the individual's movements, the degree of isolation, and the availability of social contact are all relevant. The subjective element is the lack of consent of the person to be detained[5]. The Court's assessment of detention as a deprivation of liberty is independent of the name or purpose by which it is regulated in national law. How a measure is characterized in national law is irrelevant in this respect; in other words, a characterization in national law that a measure does not result in deprivation of liberty is not decisive as to whether the measure is in fact of such a nature[6]. In fact, some measures taken to protect the person or for the benefit of the person may also result in deprivation of liberty[7].

[1] "U*ntil a State has "authorised" entry to the country, any entry is 'unauthorised'": Saadi v. The United Kingdom* [GC], 2008, para. 65.

[2] See, *De Tommaso v.* Italy [GC], 2017, para. 80; *Guzzardi v. Italy*, 1980, para. 92; *Medvedyev and Others v. France* [GC], 2010, para. 73; *Creangă v. Romania* [GC], 2012, para. 91.

[3] *Storck v. Germany*, 2005, para. 74; *Stanev v. Bulgaria* [GC], 2012, para. 117

[4] *Guzzardi v. Italy*, 1980, para. 95; *H.M. v. Switzerland*, 2002, para. 45; *H.L. v. the United Kingdom*, 2004, para. 91; *Storck v. Germany,* para. 73.

[5] *Storck v. Germany*, para. 74; *Stanev v. Bulgaria*, para. 117.

[6] See*., Khlaifia and Others v. Italy* [GC], 2016, para. 71; *H.L. v. the United Kingdom*, 2004, para. 90; *H.M. v. Switzerland*, 2002, paras. 30 and 48; *Creangă v. Romania* [GC], 2012, para. 92.

[7] *Khlaifia and Others v. Italy* [GC], 2016, para. 71.

As a result, in general, the practices in Turkish foreigners' law relating to immigration control, which include a state of detention and so necessitate an assessment of whether they result in deprivation of liberty, can be classified under three groups. Those include (1) administrative

detention regulated in the legislation (2) detentions occurring during comprehensive control at the border and (in the case of inadmissible passengers) during refoulement at the border, (3) detention in practice (detention during the transfer of the foreigner to the competent authority for a decision to be made on him/her and detention under Article 8 of the TPR).

Administrative detention is one of the main measures in Turkish foreigners' law that is designed to control immigration and may result in deprivation of liberty. This measure is based on Articles 57 and 68 of the LFIP. Article 57 of the Law governs the administrative detention of a person against whom a removal decision has been taken as specified in this article, whereas, Article 68 governs the administrative detention of persons who have applied for international protection and who need to be taken under administrative detention due to the grounds set out in the relevant provision. As such, it can be stated that these provisions are compatible with Article 5(1)(f) of the ECHR in terms of their purpose. There is no doubt that the content of these provisions and their implementation result in deprivation of liberty. Therefore, there is no need for a detailed assessment of the practices based on these two provisions in terms of deprivation of liberty. However, it should be underlined that, since these measures constitute administrative procedures, they cannot seek a punitive purpose under Article 38 of the Constitution, which stipulates that the administration cannot impose a sanction that results in the restriction of personal liberty but can only be applied as a precautionary measure.

[8]Compared to these measures, which are referred to in the legislation as 'administrative detention', the first measure, which should be examined in more detail as it is not (relatively) so clear that it results in deprivation of liberty, is detention at the border during comprehensive control and - in the case of inadmissible passengers - during refoulement at the border. There are regulations in the legislation for both measures. In relation to comprehensive controls, Article 6 of the LFIP on document checks (Art. 6/5) stipulates that during document checks at the time of border crossing, persons regarding whom a comprehensive control is required may only be held

[8]See below under III/A "Evaluation of Administrative Detention Practices" for the lack of a clear definition or statement in the legislation on administrative detention that this measure results in deprivation of liberty.

for a maximum of four hours; the foreigner may return to his/her country at any time during this period or wait for the completion of the procedures for admission to the country without being limited to the four-hour period. According to the Implementing Regulation on the Law on

Foreigners and International Protection (Implementing Regulation on LFIP), the comprehensive control is not an administrative detention procedure and if the four-hour period is exceeded during this control, the person may be kept waiting by obtaining his/her consent. It is also reiterated that it is possible for the person concerned to return to his/her country without waiting for the conclusion of the procedures if he/she wishes (Art. 6/2 of the LFIPR), and it is also stated that the security and personal privacy of the foreigner will be observed during the procedure and that he/she will be provided with access to basic needs for the duration of the procedure and will be informed about the purpose and procedure of the controls. The Regulation also includes the content of the comprehensive controls[9]. This reveals that this procedure serves the purpose of preventing unauthorized entry into the country. [10] Another action taken at the border, which seems to serve the same purpose, is related to inadmissible passengers. [11] These foreigners are defined in the LFIP (LFIP, Art. 3/1/z) as *persons* who *arrive at border gates to enter or transit the country but are not allowed to enter or transit because they do not meet the conditions required by the legislation."* It is clear that these persons are removed at the border and kept waiting in designated areas at the border gates until their procedures are completed (LFIP, Art. 7/1 and 7/3). It is also stipulated that the relevant actions shall be notified to the aforementioned persons, and the notification shall include how these foreigners can effectively exercise their right to appeal against the decision and their other legal rights and obligations in this process (LFIP, Art. 7/2).

The ECtHR briefly considers the following factors when drawing the distinction between a restriction on liberty of movement and deprivation of liberty to prevent unauthorized entry for

[9] Pursuant to the relevant provision of the Regulation (Implementing Regulation on LFIPR, Art. 6/4), the comprehensive controls generally include checking and examining the travel documents of the person concerned, reviewing the restrictions on their entry into the country, determining whether they are subject to proceedings by judicial and administrative authorities, determining whether they are internationally wanted, determining the purpose of their arrival, clarifying how they will earn a living in Turkey, investigating whether they are among the foreigners whose entry into Turkey will not be permitted and foreigners who will not be granted visas, and other issues deemed necessary for public security.

[10] See LFIP, Article 7

[11] For these requirements see. Ibid.

migration control in airport transit zones or areas characterized as international zones[12]: i) the individual situation and choices of the individuals ii) the applicable legal regime of the respective country and its purpose, iii) the duration, and iv) the nature and degree of actual (de facto) restrictions imposed on or experienced by the individuals. Accordingly, when the comprehensive controls governed by the LFIP and the Implementing Regulation on LFIP are evaluated, it can be concluded that, as a rule, and at first glance, this practice does not constitute a deprivation of liberty. This is because, although the individual is kept in a limited area and under the control of the authorities during a comprehensive control, in terms of the subjective element, it can be considered that it is difficult to talk about the lack of consent, as the individual has the opportunity to leave without waiting for the completion of the procedures with his/her own consent. However, according to the case law of the ECtHR, this possibility must be feasible and reasonable in practice, not in theory[13]. If the individual is an asylum-seeker or if it is not possible to identify a (safe) country to which he or she can be expected to return voluntarily within a short period, the individual may be considered to be held against his or her will, since the possibility of voluntary departure is only in theory and not in practice[14]. Although it is stated in the Implementing Regulation on LFIP that comprehensive control is not a form of administrative detention, it is not possible to conclude from this, that comprehensive control procedures do not result in deprivation of liberty in any way; as emphasized above, depending on the circumstances of the case in hand, these procedures may also result in deprivation of liberty[15]. It should be noted that a similar conclusion can be drawn concerning inadmissible passengers. In *Amuur v. France*, the ECtHR held that keeping or holding foreigners in what are sometimes referred to as 'international areas' (or transit areas) (especially airports) involves a restriction upon liberty, but

[12] Council of Europe, Guide on Article 5 of the European Convention on Human Rights (Right to liberty and security) (Guide on Art. 5), https://www.echr.coe.int/documents/guide_art_5_eng.pdf, p.9, para. 7; see also, *Z.A. and Others v. Russia* [GC], 2019, para. 138; *Ilias and Ahmed v. Hungary* [GC], 2019, para. 217; *R.R. and Others v. Hungary*, 2021, para. 74).

[13] *Amuur v. France*, 1996, para. 48; *Ilias and Ahmed v. Hungary*, paras. 240, 248.

[14] See *Amuur v. France*, para. 48.

[15] See *Z.A. and Others v. Russia*, 2017, para. 89.

one which is not in every respect comparable to which obtains in centers for the detention of foreigners pending removal. [16]. The Court points out that such measures taken by States to

prevent unlawful migration may be legitimate, provided that appropriate safeguards are in place and international obligations are respected, but such measures may cease to be a mere restriction of liberty and may amount to a deprivation of liberty if they are prolonged and undermine the protection afforded to asylum seekers under international law.[17] The ECtHR has held that where a passenger has been stopped at a border checkpoint, the right to liberty and security of the person is not impaired where this detention has not exceeded the time strictly necessary to comply with relevant formalities[18]. The Court's approach is based on the fact that the need to carry out certain checks, particularly in air travel, is inherent to the nature of the journey and passengers must be aware of this. It follows that national law sets four hours as the precise duration of the comprehensive control exercise that satisfies these formalities. Therefore, based on the ECtHR's interpretation, keeping the persons under investigation during the comprehensive control, and waiting for a limited period may not in itself lead to a discussion on the right to liberty and security. However, the most salient issues regarding comprehensive control or detention in transit/international zones as an inadmissible passenger relate to the duration and conditions of detention. Hence, it may be argued that the reverse reading of the ECtHR's interpretation of the duration of the detention may turn the practice into a deprivation of liberty if the duration exceeds the reasonable time required for the formalities to be carried out. Here, it is not important how long the exceeded time is in terms of violation. [19]. In addition, it can be argued that the duration of detention, as well as the conditions of detention, the weight of the authorities' control, and the restrictiveness of the conditions of detention, may transform the detention into a deprivation of liberty. Therefore, it can be concluded that both cases may result in deprivation of liberty according to the specific conditions of the implementation.

Another instance, which is not defined as administrative detention in the legislation, but which in practice should be evaluated whether it may result in deprivation of liberty, is the transfer stage

[16] *Amuur v. France*, para. 43.

[17] Ibid.

[18] See *Gahramanov v. Azerbaijan*, 2013, para. 41.

[19] For instance, see *Gillan and Quinton v. the United Kingdom*, 2010, para. 57; *Shimovolos v. Russia*, 2011, paras. 48-50.

where persons are transferred to removal centers or Provincial Directorates of Migration for removal and administrative detention (Art. 57/1 of the LFIP; Art. 53 and 54 of the Implementing Regulation on LFIP). Detailed provisions on the conditions and implementation of this stage are

not included in the legislation. However, it is understood from the practice that the foreigner is under the effective control of the police in this process, and objective and subjective factors related to the deprivation of liberty may exist.[20] Therefore, it can be stated that this procedure may result in deprivation of liberty. Syrian Arab Republic nationals, Syrian refugees, and stateless persons who are found to be in the country illegally and are transferred/removed for appropriate checks by law enforcement authorities may also be in a similar situation. The legislation does not contain detailed provisions on the treatment and duration of the transfer of these persons to make a decision on whether or not to grant them temporary protection. However, it can be argued that this process may result in deprivation of liberty, given the fact that the aforementioned persons are under the effective control of the law enforcement officers, that they can't leave the control area, and that they do not consent to their detention. In fact, the ECtHR held in Akkad v. Turkey that this procedure constitutes a deprivation of liberty[21]. Another procedure that may result in deprivation of liberty concerns foreigners who will not be granted temporary protection under Article 8 of the Temporary Protection Regulation (TPR). The first paragraph of the relevant article of the TPR lists the foreigners who will not covered under the scope of temporary protection. The fourth paragraph of the same Article provides as follows: "*persons under paragraph one may also be accommodated in a special section of current temporary accommodation centers or a separate temporary accommodation center or in places to be determined by the governorates for humanitarian reasons until their return to their country without requiring an administrative detention decision as provided under the Law." The family members of these foreigners may also be accommodated in the same place upon their request regardless of the family members' temporary protection situation*." At first glance, this provision may seem to suggest that the practice is only intended to 'provide shelter' and not to lead to deprivation of liberty. However, it is possible to conclude from the fifth paragraph of the

[20] See. Focus Group Meeting of 15.06.2023 (Focus Group Meeting) and Summary Report of the Workshop on Access to Rights in Administrative Detention of 17-18.12.2022 (Workshop Summary Report).
[21] *Akkad v. Turkey*, 2022, paras. 101-103.

same Article that this measure constitutes a deprivation of liberty. Pursuant to the relevant regulation (TPR, Art. 8/5)*"Temporary accommodation center management may grant permission to those covered by paragraph one for leaving the temporary accommodation centers for a short*

period in case of emergencies or upon the request of a public institution and organization." The management of the temporary accommodation center may request law enforcement officers to

accompany these persons who would be leaving the temporary protection center for a short period when deemed necessary. The issues related to these foreigners who would leave a temporary protection center for a short period shall be determined within the scope of the regulations on the establishment and management of the temporary accommodation centers."
As a matter of fact, it is reported that in practice, the persons in question are not free to enter and exit, they are kept in places under the effective control of the authorities, thus they are subject to '*de facto* detention'[22]. For the reasons stated above, it can be concluded that there is also a deprivation of liberty for persons held in special sections of temporary accommodation centers under Article 8 of the TPR.

Although measures based on deprivation of liberty for the purpose of migration control, prevention of unauthorized entry into the country, and enforcement of removal orders are accepted as legitimate grounds in the case law of the ECtHR, such measures must meet certain conditions in terms of legality. Therefore, in the above-mentioned cases that may result in deprivation of liberty, the legislation and practices should be assessed according to the criteria sought by the ECtHR in terms of conformity with the law.

III. Evaluating the Lawfulness of the Measures in terms of Liberty and Security of the Person

Article 5(1)(f) of the ECHR on deprivation of liberty for immigration control purposes stipulates that such detention must be lawful. Although the term '*lawful*' in the original text is translated as '*yasaya uygun* (in accordance with the law)' in Turkish, it points to the necessity for the action to be based on a legal basis, as well as the necessity for it not to be arbitrary (which can also be

[22] See Focus Group Meeting and Workshop Summary Report.

considered within the same framework). Indeed, the ECtHR also primarily considers the lawfulness and non-arbitrariness criteria (in conjunction with each other) for a deprivation of liberty to be lawful. In addition, the second paragraph of Article 5 of the Convention stipulates

that "*Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him"* In the case law of the ECtHR, this provision also applies to the lawfulness of deprivations of liberty falling within the scope of Article 5(1)(f) (for immigration control purposes). Paragraph 4 of the same Article provides that "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."* Just like the second paragraph of Article 5, the fourth paragraph has an impact on the lawfulness of deprivations of liberty for the purposes of immigration control in the case law of the ECtHR. In this respect, in addition to the criteria of lawfulness and non-arbitrariness, the provision of the aforementioned procedural safeguards also has a decisive feature in terms of whether the implementation complies with the law. Therefore, in this section, compliance with the law in will be viewed in terms of (1) lawfulness and non-arbitrariness and (2) procedural safeguards.

A. Lawfulness and Non-Arbitrariness

When reviewing the lawfulness of the measure, the ECtHR requires that it has a legal basis, that it is procedurally and substantively in conformity with national law, and that the legal basis has certain qualities that make the measure free from arbitrariness in the sense of 'quality of law'. Here, it should first be noted that the Court points out that the legal basis must be accessible, detailed, clear, and foreseeable to fulfill these criteria[23][24]. This is particularly important in the case of foreigners, such as migrants or asylum seekers, who may not know or be expected to know the national legal system very well[25]. Therefore, it is a key factor in the lawfulness of the deprivation of liberty measures, specifically for these persons, that they meet the aforementioned

[23] See, *Abdoulkhani v. Turkey*, para. 135.

[24] *Medvedyev and Others v. France*, para. 80; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, para. 97; *Amuur v. France*, para. 50.

[25] *Amuur v. France*, para. 50.

qualifications under national law. The ECtHR has not set a criterion for the form of the legal basis. However, the Court also takes into account conformity with national law in terms of lawfulness/non-arbitrariness and quality of law. In other words, if national law provides for the

deprivation of liberty to be regulated by law not only in the substantive sense but also in the formal (and narrow sense), this is also an issue that needs to be addressed in terms of compliance with the law. Indeed, as fundamental rights and freedoms can only be restricted by law according to Articles 13 and 16 of the Constitution, the requirement that the legal basis for deprivation of liberty in Turkish foreigners' legislation must be law in the narrow sense, is essential for compliance with domestic law as well as for compliance with ECtHR case law.

On the other hand, in the context of ECtHR case law, in terms of lawfulness and non-arbitrariness, the regulation must clearly characterize (administrative) detention, the duration of the detention and the legal remedies to be applied against the detention decision[26]. In fact, in *Amuur v. France*, the Court stated that the legal regulation must include provisions guaranteeing the review of the conditions of detention, imposing time limits for detention, and providing legal, humanitarian, and social assistance to detainees.[27]

The ECtHR states that no deprivation of liberty can be lawful unless it falls within one of the grounds set out in paragraphs (a) to (f) of Article 5(1) ECHR[28]. Accordingly, even if there is a legal basis, a deprivation of liberty that does not serve the aforementioned grounds may also be characterized as arbitrary and may call into question the lawfulness of the legal basis. As far as the subject matter of this review is concerned, a measure leading to deprivation of liberty and has a legal basis must be aimed either at removal or at preventing unauthorized entry. The ECtHR seeks collective fulfillment of three requirements for removal[29]. These requirements are: (1)

[26] See, *Abdoulkhani and Karimnia v. Turkey*, paras. 125-135; *Z.N.S. v. Turkey*, 2010, para. 56; *Charahili v. Turkey*, 2010, para. 66.

[27] *Amuur v. France*, paras. 53, 54.

[28] *Khlaifia and Others v Italy* [GC], 2016, para. 88; *Aftanache v. Romania*, 2020, paras. 92-100; *I.S. v. Switzerland*, 2020, paras. 46-60.

[29] For detailed explanations and various ECtHR rulings on this issue, see also ÇAVUŞOĞLU, M.: , Avrupa İnsan Hakları Mahkemesi'nin İdari Gözetim İçtihadı: Gereklilik İncelemesinin Yokluğuna Dair Eleştirel ve Karşılaştırmalı Bir İnceleme, Basılmamış Yüksek Lisans Tezi, Ankara Üniversitesi Sosyal Bilimler Enstitüsü, 2022, pp. 71-81.

there is a pending removal order[30] (2) the removal of the individual from the country is likely to take place (there is a realistic prospect of the person being removed)[31] and (3) due diligence is

exercised (the proceedings should be conducted with due diligence)[32]. Here, the ECtHR considers that where the enforcement of a removal order is uncertain and cannot be carried out, the deprivation of liberty of individuals constitutes a failure to exercise due care. The Court has ruled that states have an obligation to apply alternative measures when removal is no longer a realistic possibility[33].

Another issue to be considered in terms of non-arbitrariness relates to proportionality. Except in the case of vulnerable groups, as a rule, the ECtHR does not examine whether, in circumstances falling within Article 5(1)(f) of the ECHR (removal or prevention of unauthorized entry), there is a possibility of a measure, which is less severe than a measure resulting in deprivation of liberty, i.e. whether the measure is proportionate[34]. However, since the Court also considers the criterion of 'conformity with national law' in the context of lawfulness and non-arbitrariness, if national law stipulates a proportionality requirement or if alternative obligations with lighter consequences are included alongside a measure, such as administrative detention, which results in deprivation of liberty, then the Court conducts a proportionality assessment[35].

Assessment of Administrative Detention Practices

When administrative detention, which is the first among the practices resulting in deprivation of liberty, is considered in the light of the above explanations, it is evident that the legal basis of

[30] *Chahal v. The United Kingdom* [GC], 1996, para. 113; Akkad v. Turkey, para. 103.

[31] *L.M. and Others v. Russia*, 2015, para. 148; Al *Husin v. Bosnia and Herzegovina*, 2012, paras. 107, 108.

[32] *Gallardo Sanchez v. Italy*, 2015, para. 41; *Saadi v. The United Kingdom*, para. 74; *J.N. v. The United Kingdom*, 2016, para. 146.

[33] Bkz., *S.K. v. Russia*, para. 115; *Azimov v. Russia*, para. 173.

[34] This issue can also be considered as a 'requirement' in the doctrine. For a detailed and critical study on the said practice of the ECtHR See ÇAVUŞOĞLU, ibid. For examples of relevant ECtHR rulings, see *Saadi v. The United Kingdom*, para. 72; *Feilazoo v. Malta*, 2021, para. 102; *K.F. v. Cyprus*, 2015, para. 130; *Mikolenko v. Estonia*, 2010, para. 59; *Conka v. Belgium*, 2002, para. 38; *Aden Ahmed v. Malta*, 2013, para. 139; *Shiksaitov v. Slovakia*, 2020, para. 53; *Chahal v. The United Kingdom*, para. 112.

[35] See, for example. *Rusu v. Austria*, 2008, paras. 54-58.

this practice is included in the LFIP (Articles 57 and 68) and that the aforementioned practices are compatible with the purposes of removal (Art. 57 of the LFIP) and prevention of unauthorized entry into the country (Art. 68 of the LFIP). Both regulations are made by law and specify the reasons for detention and the duration of detention. However, administrative detention is not defined in the Law, thus the link between this measure and deprivation of liberty is not clearly established in the Law. Although the fact that the legislation states that persons

taken under administrative detention as per Article 57 will be held in removal centers and the nature of other regulations on administrative detention indicate that this practice is aimed at the deprivation of liberty, it can be asserted that establishing the connection clearly is important in terms of the 'foreseeability' criterion, which is also taken into account by the ECtHR.

The circumstances under which administrative detention can be applied are specified in the LFIP (Art. 57 and 68 of the LFIP). Therefore, administrative detention does not apply to every foreigner who has been subject to a removal order or who has applied for international protection. Furthermore, Article 57/A added to the LFIP by Law No. 7196 dated 06.12.2019 regulates alternative obligations to administrative detention. According to its last paragraph, the procedures and principles for implementing this Article are outlined in the Regulation on Alternative Obligations to Administrative Detention (RAOAD) issued by the Ministry of Interior and published in the Official Gazette on 14 September 2022.

These regulations indicate that a foreigner against whom a removal order has been issued may be held to alternative obligations instead of administrative detention in the presence of conditions requiring administrative detention. It is also possible to impose alternative obligations in the event of termination of administrative detention of the foreigner.

In this respect, it should be emphasized that the foreigner who is not placed under administrative detention despite the existence of conditions requiring administrative detention should be put under alternative obligations. Article 57(2) of the LFIP provides as follows "*those who are at risk of flight or disappearance, have violated the rules of entry or exit into or from Turkey, have used false or fabricated documents, have not left Turkey within the time allowed for their departure without an acceptable excuse, or pose a threat to public order, public security or public health, shall be placed under administrative detention by the governorate, or shall be subject to alternative obligations to administrative detention in accordance with Article*

57/A". This provision sets out the conditions/reasons that require taking an administrative detention decision or imposing alternative obligations and the wording of the provision implies that alternative obligations must be imposed on foreigners in the absence of an administrative detention decision. The third paragraph of Article 57/A confirms this: "*Foreigners covered by the second paragraph of Article 57 who are not placed under administrative detention must be imposed one or more of the obligations listed in the first paragraph of this Article*".

Paragraph 4 of Article 57 stipulates that the governorate shall regularly review the need to continue administrative detention on a monthly basis and shall immediately terminate administrative detention for foreigners for whom administrative detention is no longer deemed necessary. Pursuant to the clause "*imposing alternative obligations to administrative detention on these foreigners in accordance with Article 57/A"* in the same paragraph, alternative obligations must be imposed in cases where administrative detention is terminated. However, the grounds on which administrative detention is terminated are important here: If the decision to terminate administrative detention is justified by the cessation of the reasons/conditions listed in the second paragraph of Article 57, it should not be possible to impose alternative obligations, since alternative obligations can only be imposed in the presence of these conditions.[36] However, if the conditions under Art. 57/2 of the LFIP still persist, but administrative detention is no longer considered necessary, or if administrative detention has been terminated because its duration has expired, then alternative obligations may be imposed. The first paragraph of Article 6 of the RAOAD also confirms this. This provision lists the reasons/conditions stipulated in the second paragraph of Article 57 and explicitly states that alternative obligations may be imposed on those whose administrative detention has expired or whose administrative detention has been

[36]Some of these conditions cannot be eliminated at a later date, because they refer to acts or facts that have taken place in the past. Foreigners who have violated the rules of entry or exit into or from Turkey, who have used false or fabricated documents, or who have not left Turkey within the time allowed for their departure without an acceptable excuse could be given as examples. However, in particular, the risk of the foreigner fleeing and disappearing is a grounds for administrative detention/alternative obligation that can be eliminated later. Furthermore, the fact that the foreigner poses a threat to public order, public security, or public health, which may also be the basis for a removal order pursuant to Article 54 of the LFIP, is a reason that may subsequently disappear. However, if a removal order was taken against the foreigner for this reason and this reason subsequently ceases to exist, the administrative detention should be terminated, as the removal order will also become unfounded, and it will not be possible to impose alternative obligations. However, if there is another reason that justifies the decision to deport the foreigner and the foreigner also poses a threat to public order, public security, or public health, but this threat no longer exists, the foreigner may not be put under administrative detention or alternative obligations, even if the removal order remains valid.

terminated. Therefore, if the administrative detention is terminated on the grounds of, for example, the elimination of the risk of flight or disappearance of the foreigner, it will no longer be possible to impose an alternative obligation on the foreigner who is not covered by this Article, since the conditions under Article 57/2 of the LFIP will no longer apply.

The structure of the Law and the accompanying regulations indicate that the relationship established between administrative detention and alternative obligations is a reflection of the principle of proportionality. Thus, to impose an administrative detention decision on a foreigner covered by Article 57/2 of the LFIP, this decision must be required to achieve the objective of the administrative detention and must be proportionate - taking into account the extent to which it limits the foreigner's fundamental rights and freedoms. If alternative obligations are sufficient to achieve the objective, it could be argued that there is no need for administrative detention and that alternative obligations, which are less restrictive than administrative detention in terms of the foreigner's fundamental rights and freedoms, should be preferred. This relationship between administrative detention and alternative obligations is reflected in the last sentence of Article 7/1 of the RAOAD: *" Administrative detention may, however, be resorted to if alternative obligation(s) is not feasible or if such obligation(s) is not adequate"*.

There are certain provisions in the legislation that ensure the correct establishment of this relationship and allow the proportionality test to be applied. The RAOAD provides that the applicability of alternative obligations must be assessed before the foreigner is placed under administrative detention and that this assessment should be undertaken on an individual basis and take into account whether the foreigner is a person with special needs or is vulnerable, as well as his/her age, health status, gender, family situation, etc. (Art. 7/1). Furthermore, when assessing whether to put the foreigner under alternative obligations to administrative detention, the foreigner's right to liberty and security, family integrity, the best interests of the child and public order, public health, and public security must be weighed (Art. 5/4 of RAOAD). Indeed, the considerations set out in these provisions suggest that the choice between administrative detention and alternative obligations involves an assessment of whether the impact of the measure on the person is proportionate - taking into account the individual characteristics of the foreigner - and ultimately requires a balancing exercise deriving from the principle of proportionality. Here, it should also be noted that the definition of vulnerable persons under the RAOAD includes persons other than those with special needs specified in the LFIP. These

include persons with alcohol or substance dependence, physical or mental illness, propensity to harm themselves or others, infectious diseases, those who are strongly suspected of being or may be victims of trafficking, children at risk, or persons identified by the United Nations High Commissioner for Refugees (UNHCR) as a vulnerable group. It is particularly important to be mindful of UNHCR's categories of vulnerability and not to overlook in practice the vulnerability of such persons, as they are not explicitly listed in the RAOAD.[37]

The Regulation also sets out the importance of applying a proportionality test in terms of alternative obligations for the review of an administrative detention decision. Accordingly, "(i)n cases where it is not possible to assess alternative obligations to administrative detention without placing the foreigner under administrative detention, the foreigner shall first be placed under administrative detention and interviewed after he/she is handed over to the removal center to assess whether he/she will be put under alternative obligation(s) to administrative detention" (Art. 7/2 of the RAOAD)[38]. Moreover, it is provided that any assessment of the continuation or extension of the administrative detention decision should consider whether alternative obligations may be imposed (Art. 7/3 of the RAOAD) and that the assessment of alternative obligations can be made at any stage of the proceedings against the foreigner and without waiting for a time limit (Art. 7/5 of the RAOAD).

According to Art. 57/4 of the LFIP and Art. 61/1 of the Implementing Regulation on LFIP, the Governorate must regularly assess whether there is a need for the continuation of administrative detention on a monthly basis, and pursuant to Art. 7/3 of RAOAD, this assessment must also consider whether alternative obligations should be imposed. However, Art. 61/2 of the Implementing Regulation on LFIP provides as follows:

The continuation of the administrative detention may not be deemed necessary under the following conditions:

a) Where it is foreseen that the removal order shall not be implemented within six months following the administrative detention of the foreigner.

[37] See UNHCR: Vulnerability Screening Tool, 2016, https://www.unhcr.org/media/unhcr-idc-vulnerability-screening-tool-identifying-and-addressing-vulnerability-tool-asylum.

[38] Article 7(4) of the RAOAD even explicitly stipulates that the administrative detention decision should be revoked if it is determined that the foreigner against whom a removal and administrative detention decision has been taken should be put under alternative obligations before he/she is taken to the removal center.

b) Where there are strong reasons to believe that the foreigner under the administrative detention falls within the scope of those who are not to be issued with a removal order.

c) Where the risk of absconding or disappearing which constituted the basis for issuing an administrative detention decision with regard to the foreigner is no longer available.

ç) Where the foreigner applies for voluntary return support

It is not possible to say that this provision exhaustively foresees the conditions that require the termination of the administrative detention when it is no longer necessary; it should be concluded that this Article lists these conditions by way of example. Particularly despite Article 7/3 of the RAOAD, the Governorate may decide to discontinue administrative detention on the grounds that it would be sufficient to impose an alternative obligation, although it is not among the cases stipulated in Article 61/2 of the Implementing Regulation on LFIP[39].

Examining the relationship between alternative obligations and the removal order, which is the main basis for these obligations, sheds light on a different aspect of the relationship between administrative detention and alternative obligations. Since administrative detention under Article 57 of the LFIP is entirely dependent on the removal order, the outcome of the removal order is crucial for administrative detention. Although resorting to administrative judicial proceedings against a removal order does not suspend administrative detention (Art. 59/4 of the Implementing Regulation on LFIP), the administrative detention decision must also be revoked if the removal order is annulled by a court (Art. 57/3 of the Implementing Regulation on LFIP). It is also not possible to impose alternative obligations in the event of revocation of the removal, which is the basis for administrative detention; Article 6/3 of the RAOAD stipulates that the obligations to which the foreigner is subject, if any, must also be annulled. It is also stipulated that the administrative detention of foreigners who cannot be removed in the six-month period prescribed for administrative detention (which can be extended for another six months if needed) should be terminated immediately by imposing certain administrative obligations (Art. 59/7 of the Implementing Regulation on LFIP). Furthermore, subparagraphs (a) and (b) of the above-

[39] Implementing Regulation, Art.61/3 provides as follows: *"provisions of subparagraphs (b) and (d) of the first paragraph of Article 54 of the Law are reserved in relation to the fulfillment of the procedures in the second paragraph*". If it is meant by this provision that it is not possible to conclude that there is no need for the continuation of administrative detention in respect of foreigners falling within the scope of the aforementioned subparagraphs, such an interpretation is not possible, considering the regulations of the LFIP and the extent to which administrative detention limits personal liberty and security.

mentioned second paragraph of Article 61 of the Implementing Regulation on LFIP indicate that administrative detention may also be terminated if the enforcement of the removal order becomes impossible, even if the removal order has not been revoked and the period of administrative detention has not yet expired.

How does the fact that a foreigner who is subject to a removal order subsequently falls within the scope of Article 55 of the LFIP (foreigners against whom a removal order cannot be issued) affect administrative detention and alternative obligations? Even if the removal order against a foreigner, in this case, is not annulled (or revoked by the administration), it is not possible to keep him/her under administrative detention or to impose alternative obligations within the meaning of Article 57/A of the LFIP. Even though there is no explicit provision in the LFIP or the Implementing Regulation on LFIP that the administrative detention of a foreigner in such a position should be terminated, Article 55 of the LFIP stipulates that "t*hese persons may be asked to reside at a given address and report to authorities in form and periods as requested*", which indicates that such foreigners cannot be kept under administrative detention and that administrative detention, if any, should be terminated. The fact that Article 61/2-b of the Implementing Regulation on LFIP Law lists "*Where there are strong reasons to believe that the foreigner under the administrative detention falls within the scope of those who are not to be issued with a removal order*. " as one of the circumstances in which the continuation of administrative detention may not be deemed necessary, demonstrates prima facie that the continuation of administrative detention will not be deemed necessary if it is determined that the foreigner falls within the scope of those who will not be subject to a removal order. Article 6/2 of the RAOAD clearly stipulates that foreigners covered by Article 55 of the LFIP cannot be put under alternative obligations.

Although there is no clear answer in the legislation as to whether it is possible to impose alternative obligations on a foreigner if it is foreseen that the removal order cannot be enforced within six months following the administrative detention of the foreigner or there are strong reasons to believe that the foreigner under the administrative detention falls within the scope of those against whom a removal order will not be issued as per Article 61/2(a) and (b) of the Implementing Regulation on LFIP, considering that the relationship between alternative obligations and the removal order is no different with the relationship with administrative

decision, in practice, if the removal order becomes unenforceable, the alternative obligations will also become ineffective.

A final point to be emphasized in the context of the relationship between administrative detention and alternative obligations is Article 6(4) of the RAOAD, which lists circumstances when the foreigner*" must be primarily placed under administrative detention*". Accordingly,

Foreigners who are subject to a removal order and at risk of flight or disappearance, have violated the rules of entry or exit into or from Turkey, have used false or fabricated documents, have not left Turkey within the time allowed for their departure without an acceptable excuse, or pose a threat to public order, public security or public health must be primarily placed under administrative detention in case of existence of any or more of the following circumstances
a) It will not be possible to access accurate information and documents about his/her country if he/she is not placed under administrative detention.
b) Administrative detention is required for the purpose of determining the identity and nationality of the foreigner.
c) The foreigner does not cooperate with the administration.
ç) The foreigner cannot be returned to his/her country if he/she is not placed under administrative detention.

It can be argued that this provision introduces a kind of "presumption of necessity"; in other words, it is accepted as a presumption that administrative detention of the foreigner is necessary in these circumstances and that alternative obligations would not be sufficient. However, it is not possible to infer that this mandates administrative detention. If the individual assessment concludes that alternative obligations would be sufficient, they must be implemented; the existence of this provision does not relieve the administration of the need to conduct a proportionality assessment.
Another aspect of alternative obligations that need to be assessed is the legal framework of these practices. As mentioned above, alternative obligations to administrative detention are governed

by Article 57/A, which was added to the LFIP by Law No. 7196, and the procedures and principles regarding the implementation of this article are stipulated in the RAOAD issued by the Ministry of Interior pursuant to the last paragraph of the aforementioned article. Although alternative obligations were introduced to the legal system in 2019, the RAOAD was issued

almost three years later, during which time it was not possible to implement alternative obligations.

Article 57/A of the LFIP defines alternative obligations by listing what they consist of and stipulating a few basic and common rules regarding their legal framework. RAOAD on the other hand, contains more detailed rules on how these obligations will be implemented. Nonetheless, it can be said that the implementation problem arising from the late enactment of the RAOAD still persists in some respects. This is because, although the RAOAD provides detailed rules, many issues require sub-regulations for implementation, and since these regulations have not yet been issued, alternative obligations cannot be fully implemented.

Therefore, although it is difficult to make a detailed and comprehensive review of each alternative obligation, it is useful to emphasize some general and common points regarding the legal framework. First of all, since it is mandatory to impose an alternative obligation in cases where administrative detention is not/can not be applied to foreigners falling within the scope of Art. 57/2 of the LFIP, a proportionality assessment should also be made for the alternative obligation(s) (among themselves) to be selected in this case. Therefore, the obligation(s) that are appropriate and sufficient to achieve the objective and that least restrict the rights and freedoms of the person concerned should be applied.

Neither the Law nor the Regulation clearly states how the relationship of necessity between alternative obligations is constructed. However, the following provision in Article 21/4 of the ECHR indicates the existence of such a relationship: *"In the event that the obligation(s) alternative to administrative detention are terminated as a result of a court decision or a stay of execution is ordered by the court, a new alternative obligation may be imposed on the foreigner, if possible, taking into account the reasoning of the court decision. In any event, the new alternative obligation imposed on the foreigner may not be* **more restrictive** *than the obligation which the court has decided to terminate".* Considering that the most restrictive obligation is "electronic handcuffs" and the least restrictive is "residence at a specific address", it can be

argued that the obligations are ranked from the least restrictive to the most in the Law and Regulation. In assessing the choice of alternative obligations, the restrictive impact of the relevant obligation on freedoms such as the right to respect for privacy and confidentiality of communications should also be taken into account. Furthermore, it may be argued that the

proportionality relationship should not only be established abstractly and generally but also the restriction or burden placed on the foreigner in the case at hand should be considered, taking into account the particular circumstances of the person in question.

Nevertheless, there are provisions in the RAOAD which, in some cases, do not permit the imposition of certain alternative obligations on their own or require them to be imposed together, or which make the imposition of certain obligations specific to certain situations or at the request of the person concerned. For instance, it is not possible to impose only the obligation to reside at a specific address or to report to authorities foreigners falling under subparagraphs (b), (d), and (k) of Article 54/I of the LFIP in terms of grounds for removal; additional obligations/obligations should also be imposed on them to prevent them from disappearing (Art. 8/8, 9/6 of the RAOAD). On the other hand, the electronic handcuff obligation can only be imposed on foreigners within this category (Art. 54/I-b, d, k of the LFIP); other foreigners cannot be placed under such an obligation (Art. 17/1 of the RAOAD). In addition, to impose the obligations for family-based return and taking part in services in the public interest, the request of the person concerned is required (Articles 11 and 13 of the RAOAD). There is no doubt that this and similar provisions of the Regulation must also be considered when assessing which of the alternative obligations to apply.

The sixth paragraph of Article 57/A of the LFIP stipulates that the foreigner may be placed under administrative detention if he/she fails to fulfill alternative obligations. A foreigner who is considered to be placed under administrative detention on the grounds that he/she falls within the scope of Article 57/2 of the LFIP, but who is put under alternative obligations in accordance with the principle of proportionality, may be placed under administrative detention if he/she does fail to fulfill the requirements of these obligations. Because the breach of obligations can be considered as a fact indicating that these obligations are not sufficient to achieve the objective and that administrative detention has become necessary. However, can a foreigner who was initially placed under administrative detention but whose detention period has expired and who

was imposed alternative obligations, be placed under administrative detention again if he/she violates these obligations? If this question is responded to negatively, the violation of alternative obligations has no consequences for foreigners in this situation and the expected benefit from their implementation cannot be achieved; on the other hand, if administrative detention is

considered possible in such a case, the legal regulation limiting administrative detention to six months loses its meaning and a precarious area emerges in terms of personal liberty and security. This question cannot be answered explicitly in the legislation; however, due to its importance, it should be noted that it is beneficial to clearly regulate the issue.

Reviewing Comprehensive Control and Treatment of Inadmissible Passengers

As explained above, comprehensive controls and practices regarding inadmissible passengers can be considered lawful and legally justified if they are carried out in the time and under the conditions that serve the purpose of the measure, as specified in the legislation. However, it is also possible that such practices may, depending on the specific circumstances, result in deprivation of liberty. Yet, there is no explicit provision in the legislation on the circumstances in which these practices may result in deprivation of liberty, nor is there a provision that provides a legal basis for these practices by linking them to existing administrative detention practices. [40]In particular, because a comprehensive control lasting more than four hours becomes a detention practice that deprives the person of liberty if there are no conditions that would make it reasonable for the person to return to his/her country of his/her own volition (e.g. if he/she is in need of international protection or alleges a matter falling under the prohibition of refoulement), it is necessary to formulate a specific rule outlining the circumstances, timeline, and procedural safeguards for how this practice should be carried out. Regarding international protection applicants; as a rule, holding the applicant for more than four hours under an administrative detention decision, because of the existence of any of the circumstances listed in Article 68 of the LFIP may be considered a relatively positive practice, since this complies with the

[40]Here, it should be reiterated that the fact that the person has applied for international protection or claims that being refused entry at the border and sent back to his/her country of origin would constitute a violation of non-refoulement is of particular relevance, because it may eliminate the option to return voluntarily when the four-hour period for control is exceeded, thus rendering the state of waiting involuntary.

legislation, and meets the lawfulness and non-arbitrariness criteria. However, if a person has filed international protection at the border but is held for more than four hours without the absence of an administrative detention decision, this may constitute an arbitrary action, because such a practice does not have a legal basis.

As a rule, it can be noted that if the four-hour control period was exceeded for a person who has not claimed international protection and who does not bear any risk of returning to his/her country of origin, there would be no problem in terms of lawfulness and non-arbitrariness since this person would be free to choose to return without waiting for the procedures to be finalized. However, in such cases, when considering the ECtHR's case law that detention at border controls must serve the purpose of control and be carried out within the precise period necessary for such purpose, together with the requirement that the authorities should act in good faith and diligently, it can be stated that any detention that fails to meet this requirement will constitute unlawful detention. In other words, in cases where the person is detained for more than four hours due to improper procedures (lack of due diligence) and/or with the intention of keeping him/her waiting for a longer period, the detention of the person may turn into an arbitrary and *de facto* deprivation of liberty.

The same may be the case for inadmissible passengers. According to the legislation, carriers are responsible for the transportation of persons who are refused entry at the border to the country where they came from or where they will be definitively admitted, and for the provision of food, accommodation, and emergency medical expenses (during their detention) until they are removed (LFIP, Art. 98). Furthermore, pursuant to the Regulation on the Procedures and Principles Regarding the Obligations of Air Carriers (RAC), the carrier bringing the passenger must immediately initiate and, within three days at the latest, finalize the procedures for the transfer of the passenger to the country where he/she came from or where he/she will be definitively admitted, with the passenger's consent (RAC, Art. 5/1/a). Pursuant to the relevant Regulation, if the carrier certifies that it or another carrier has no flights to the place where the passenger is to be taken or that the airspace of that country is closed to flights due to weather conditions, delays, cancellations, or any other reason, the airport administrative authority must facilitate the transfer of the passenger (RAC, Art. 5/1/c). Accordingly, it is recognized that the responsibility of the carrier consists of the transfer of the person to the place of destination and

the reimbursement of the expenses incurred during this period. Since the detention of the person falls within the scope of the administration's law enforcement powers, if this detention results in deprivation of liberty, depending on the necessity of the relationship between the duration, conditions, and purpose of the detention, the responsibility will belong to the administration.

Here, depending on the specifics of the case, it is possible to argue that an arbitrary deprivation of liberty may arise if the person is held for longer than a reasonable period required for the transfer.

Review of Other De Facto Detention Practices

Regarding Transfer/Transport and Detention until the Administrative Detention Decision

Article 53/1 of the Implementing Regulation on LFIP provides as follows: "*Removal, an invitation to leave Turkey, and administrative detention decisions shall be issued within forty-eight hours at the latest.* ". This rule defines how the first paragraph of Article 57 of the LFIP should be applied, and this Article provides as follows: "*Where foreigners within the scope of Article 54 are apprehended by law enforcement units, they shall immediately be reported to the governorate for a decision to be made concerning their status. For those who are deemed to require removal, the decision on removal shall be taken by the governorate. The duration of assessment and decision-making shall not exceed forty-eight hours.* ". Although it is understood from this regulation that a decision should be taken within forty-eight hours from the reporting of the situation of the foreigner apprehended by the law enforcement officers to the governorate, the commencement of this period is regulated separately in the second and third paragraphs of Article 53 of the Regulation. Accordingly, the commencement of the period for foreigners apprehended by law enforcement officers is the moment when the foreigner is delivered to the removal center in the provinces where there is a removal center; and if there is no removal center in the province where the foreigner is apprehended or if the removal center is full, the moment when the law enforcement officer submits the documents compiled about the foreigner to the provincial directorate with a report. As regards foreigners identified by the provincial directorate, the forty-eight-hour period starts as soon as the foreigner is present at the provincial directorate.

While LFIP does not stipulate the commencement of the decision-making period for foreigners identified by the provincial directorate, the commencement of the period for foreigners

apprehended by the law enforcement officers is determined as the moment when the foreigner's situation is reported to the governorate and it is stated that this reporting must be made immediately. It is clear that the Regulation's rule that the period starts from the moment the foreigner is handed over to the removal center is contrary to the Law. This is because no

provision in the LFIP allows the forty-eight-hour decision-making period to start from the delivery of the foreigner to the removal center. On the contrary, it is stated that the foreigner must be delivered to the removal center within a second forty-eight-hour period after the administrative detention decision is taken. Even if the foreigner is delivered to the removal center before an administrative detention decision is taken, it is evident that, pursuant to the LFIP, this situation must be immediately reported to the governorate without waiting for delivery, and the forty-eight-hour period must start from this moment.

In provinces where there is no removal center or the center is full, the commencement of the period is the moment when the police submit the documents collected about the foreigner to the provincial directorate with a report. According to the Regulation, in any case, the foreigner may be held by law enforcement officers until the start of the forty-eight-hour decision-making period. However, there is no legal basis for this detention and no guarantee of a maximum duration. From the wording of the LFIP, it can be inferred that the foreigner can be held by law enforcement officers during the forty-eight-hour assessment and decision period (until an administrative detention decision is taken), which starts with the immediate reporting of the foreigner's situation to the Governorate. However, since the Regulation postpones the start of the forty-eight-hour period to the moment when the foreigner is delivered to the removal center or the documents related to the foreigner are submitted, it may be argued that there is no legal basis for detaining the foreigner during the period between the apprehension and the moment of delivery/submission of documents.

It may be debatable whether the provision titled 'obligation to respond to summons' in Article 97 of the LFIP can be considered a legal basis in this regard. Article 97 provides as follows: "*Foreigners, applicants, and international protection beneficiaries may be summoned to the relevant governorate or Directorate General for reasons of a) examining their entry into or stay*

in Turkey; b) possible removal decision to be issued; c) notification of actions concerning the implementation of this Law.[41] "*In cases where foreigners do not respond to summons or, where*

there are strong reasons to believe that they will not respond, law enforcers may hold such foreigners without a prior summons. This action shall not be considered as administrative detention and the period for information gathering shall not exceed four hours."

The wording indicates that this provision cannot constitute a basis for a deprivation of liberty that may occur during the aforementioned practices. Namely, the relevant provision serves the purpose of obtaining information about the foreigner from himself/herself, rather than a transfer procedure related to removal and administrative detention. In other words, this provision can only be considered as a preliminary stage in determining whether an assessment should be made to decide on removal and administrative detention. Moreover, even if for a moment this provision can be considered as the legal basis for the transfer/transport stage to decide on the person, it does not meet the requirements of the ECtHR in terms of the quality of the law. There are two situations in the provision that require the person to be transferred/transported under the control of law enforcement officers. In the first case, the person must have been summoned and he/she must have failed to respond to the summons. For the latter, there must be a serious suspicion that the person would not respond to the summons even if it was issued. Thus, in the second case, the person will be brought to the relevant authority by law enforcement officers without the need for a summons. Here, the authority competent to determine non-compliance with the summons and to evaluate whether there are "strong reasons to believe that they will not respond to the summons" is not specified in the regulation. In addition, this provision does not specify the conditions of detention (including duration) during the transfer/transport stage. The four-hour period specified in the provision refers to the period for obtaining information that starts after the person concerned is brought to the competent authority for information. " *Even if*

[41] The relevant provision of the Law refers to the General Directorate (Directorate General of Migration Management). However, with Article 18 of Presidential Decree No. 85 Amending Certain Presidential Decrees, the title of the Chapter 13 of Presidential Decree No. 4 on the Organization of Authorities and Agencies Affiliated, Related and Associated with Ministries and Other Authorities and Agencies regarding the Directorate General of Migration Management was changed to 'Directorate General of Migration Management'. Furthermore, with the provisional article titled 'transitional provisions' added to Chapter 13 of Presidential Decree No. 4 by Article 31 of Presidential Decree No. 85, it is stipulated that the references made to the Directorate General of Migration Management in the legislation will be deemed to have been made to the Presidency of Migration Management.

"This action shall not be considered as administrative detention" part of the provision is considered to include not only the information gathering stage but also the transfer/transport stage dahi[42], according to the case law of the ECtHR, the description in national law is not decisive in determining whether the practice amounts to a deprivation of liberty[43]. Therefore, a de facto deprivation of liberty may occur. For this reason, it is necessary in terms of compliance with the law that the conditions of detention during transfer/transport and the information provided to the detainee are clearly regulated to prevent arbitrary practices.

Legislation other than the LFIP and the Implementing Regulation on LFIP may be checked to establish whether there is any legal basis to prevent an arbitrary detention of a person during the period that the person spends under the control of law enforcement officers (during the transfer/transport) between the moment of apprehension and the moment of his/her delivery/submission of the documents (this period includes detection and apprehension). Two provisions of the Law on the Police Duties and Powers ("LPDP") can be taken into account in such an assessment. The first of these is Article 4/A, entitled 'stopping and asking for identity', which constitutes the basis for the apprehension of the person. According to this provision, "if it is established that the person whose identity cannot be determined is a foreigner, an action shall be taken in accordance with the provisions of the Passport Law No. 5682 and the Law No. 5683 on the Residence and Travel of Foreigners in Turkey", the procedures after the apprehension of the person concerned (transfer/transport for a decision to be made on him/her) are carried out in accordance with LFIP. [44] However, as mentioned above, LFIP does not meet the standards of the quality of law required by the ECtHR in this respect. Although the LPDP explicitly refers to LFIP for the stages after the identification of the person, it can be considered that such reference can be effective if there are applicable provisions in the LFIP, and that if there are applicable provisions in the LPDP and other legislation for the subsequent stages (apprehension, transfer/transport), these can also be effective. Article 13(D) of LPDP, which is the second relevant provision, can be analyzed from this point of view. According to this provision, law

[42] An inference that the period covers the transfer/transport stage may not be applicable in practice. This is because the relevant provision stipulates that the person may be brought to the Presidency as well as the relevant governorship. It is therefore always possible to bring the person from another province, which is more than a four-hour drive from Ankara..

[43] See above, footnote 6.

[44] Pursuant to Article 122 of the LFIP, references to the abrogated Law on the Residence and Travel of Foreigners in Turkey (YİSHK) must be deemed to be references to the LFIP.

enforcement officers are authorized to apprehend those who have entered the country in an unauthorized manner or against whom a removal or refoulement decision has been made. However, actions that should be carried out related to these persons after their apprehension (in terms of transfer/transport) are not defined. Rules related thereto are included in the Regulation on Apprehension, Taking into Custody and Statement Taking (RACS). Although this Regulation contains detailed provisions on apprehension, these provisions, including those on transfer/transport, are related to judicial investigations. Indeed, this is also the purpose of the Regulation: "*the purpose of this Regulation is to set out the procedures and principles regarding apprehension, taking into custody, and taking statements by all judicial law enforcement officers and, where necessary or upon the request of the public prosecutor, other law enforcement officers performing judicial law enforcement duties, in the course of judicial investigations to be conducted under the information and with the orders of public prosecutors" (RACS, Art. 1)*[45]. Moreover, LFIP is not included in the legislation on which the Regulation is based[46].

Therefore, LPDP, LFIP, and RACS can be considered as the legal basis for the apprehension of irregular foreigners. Still, even in this case, the legal basis for the stages following the apprehension remains unclear. Because, it is understood from the reference of the LPDP to the LFIP that the stages after the apprehension of these persons are intended to be implemented along a regulation specific to the implementation of administrative procedures regarding the presence of foreigners in the country, such as the LFIP. Indeed, the LPDP and LFIP focus on the judicial investigation in terms of conditions of apprehension and transfer/transport. Therefore, it is considered that there is no clarity regarding the applicability of these provisions in the aforementioned legislation regarding the conditions of apprehension and transfer/transport, of these foreigners. Furthermore, the LFIP does not include provisions on conditions of apprehension, and transfer/transport. For these reasons, it can be concluded that there is no legal basis in our legislation that complies with the standard of legal quality by meeting the criteria of specificity, clarity, and foreseeability sought by the ECtHR regarding the conditions of apprehension and transfer of these foreigners. It is possible to conclude that deprivation of liberty practices carried out in the absence of such a legal basis are unlawful.

[45] Emphasis added by us.

[46] See Article 3 (Basis) of the Law on Police Duties and Powers. The abrogated provision does not make any reference to Law on the Residence and Travel of Foreigners in Turkey.

With regard to the practices under Article 8 of the Temporary Protection Regulation, it has already been stated that the detention of persons under Article 8(1) of the TPR in specific sections of temporary accommodation centers or elsewhere in accordance with paragraphs (3) and (5) of the same Article results in deprivation of liberty.

However, a review of the lawfulness of this detention reveals that the provision underlying the detention (Article 8 of the TPR) does not meet the requirements of lawfulness and non-arbitrariness. Firstly, the provision in question does not describe the detention of a person in accordance with the conditions required by the ECtHR case law in the context of the quality of the law; and it does not provide a detailed and foreseeable explanation of the duration and conditions of detention, as well as the judicial remedies and appeals against this practice. There is no basis for such detention in LFIP. According to Article 16 of the TPR, it is clear that international protection applications of persons falling within the scope of the TPR will not be processed, and therefore they will not be included in the international protection procedure. Therefore, it is concluded that these persons are deprived of their liberty even though they do not fall within the scope of Article 57 of the LFIP, which stipulates that there must be a removal order for administrative detention, and Article 68 of the LFIP, which stipulates that only international protection applicants may be placed under administrative detention in specific circumstances. The provision in the Regulation does not meet the requirements of foreseeability and specificity; moreover, although there is no such provision in the Law, the fact that it constitutes a source for practice does not meet the requirement of compliance with national law. This is because, according to Articles 13 and 16 of the Constitution, this practice under Article 8(3) and (5) of the TPR, which limits the right to liberty and security of the person, must be regulated by law both substantively and formally.

Moreover, even if it is assumed for a moment that a removal order has been issued against these persons and that they are held under Article 57 of the LFIP, it may be argued that the ECtHR's requirements of "due diligence" and "good faith" in terms of the lawfulness of the practice are not met. In other words, for a removal order to be issued under LFIP against a foreigner, the foreigner's situation must meet one of the criteria for removal listed in Article 54 of the LFIP and

not meet the criteria listed in Article 55 of the LFIP, titled "exemption from removal orders." According to Article 55(1)(a) of the LFIP, even if they fall within the scope of Article 54, a removal order cannot be issued against foreigners where there are substantial grounds to believe that they will be subject to death penalty, torture, and inhumane or degrading punishment or treatment in the country to which they will be deported. The conclusion to be drawn from this is that (without prejudice to individual circumstances) those covered by the TPR cannot be deported to their country of origin, taking into account the various reports on their country of origin. These persons can only be deported to a safe third country. Therefore, even if it is assumed that the removal order, which should not have been issued in the absence of a safe country in the first place, has been issued by the administration, it is clear that the enforcement of the order may take a long time, as it depends on the availability of a safe country to which the person will be sent. Here, the ECtHR considers that where the enforcement of a removal order is uncertain and cannot be carried out, the deprivation of liberty of individuals constitutes a failure to exercise due care. The Court has ruled in the past that States have an obligation to apply alternative measures when removal is no longer a realistic possibility[47]. Accordingly, both because a removal order cannot be issued or a removal order that has been issued cannot be enforced, it is unlawful to detain persons for an indefinite period and under indefinite conditions, without providing them with information or remedies for appeal. Such detention is contrary not only to the case law of the ECtHR but also to national law. Such a practice can only be considered lawful if its terms, duration, conditions, and remedies are regulated in detail by the Law and if procedural safeguards are introduced to prevent any arbitrary practice. Therefore, the problem here is not only practical but also structural and requires a revision and amendment of the regulations in national legislation.

Finally, when it is determined that the persons in question cannot be placed under temporary protection pursuant to Article 8(1) of the TPL, but at the same time cannot be deported, their deprivation of liberty for an indefinite period, leaving their status uncertain, without assessing whether they could be granted a humanitarian residence permit as required by national law, would be contrary to national law and in breach of due diligence and good faith requirements. The administration has discretionary power to grant humanitarian residence permits as set out in

[47] See, *S.K. v. Russia*, para. 115; *Azimov v. Russia*, para. 173.

Article 46 of the LFIP. The relevant provision stipulates that governorates may issue humanitarian residence permits upon approval of the Directorate of Migration Management, without seeking the conditions for the issuance of other residence permits, in the cases specified therein. Failure to execute a removal order and the inability to issue a removal order under Art. 55 of the LFIP are listed in Art. 46 of the LFIP among the situations in which a residence permit may be granted. In fact, under Article 57 of Implementing Regulation on LFIP, the discretionary power to grant a humanitarian residence permit becomes a subsidiary power in the event that a

removal order cannot be executed. The relevant provision is as follows: *"Following the issuance of the removal decision, the removal of the foreigner who falls under subparagraph (a) of the first paragraph of Article 55 of the Law to a third country shall primarily be assessed. In cases where it is impossible to remove the foreigner to a third country, the removal decision shall not be implemented and the foreigner shall be issued with a valid humanitarian residence permit. Within the period of the humanitarian residence permit, the opportunities for deporting the foreigner to his/her country of origin or a third country to which he/she could go. In cases where the obstacle to removal no longer applies, the humanitarian residence permit shall be canceled and the removal decision shall be finalized without issuing a new decision. "*

Accordingly, if a removal order cannot be executed or a removal order cannot be issued under Article 55(1)(a) of the LFIP in respect of persons staying in temporary accommodation centers under Article 8 of the TPR, the practice to be carried out in accordance with the legislation is to grant them a humanitarian residence permit.

B. Procedural Safeguards

Articles 5(2) and 5(4) of the ECHR govern the procedural aspects to be applied and safeguarded regarding deprivations of liberty. According to Article 5 (2) of the ECHR, everyone who is arrested must be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him. Whereas, Article 5(4) ECHR provides that everyone, who is detained must be guaranteed the right of access to a court to review the proceedings against him or her in terms of procedure and substance. The safeguards in Articles 5(2) and 5(4) of the ECHR must be provided in conjunction because according to Article 5(2) of the ECHR,

everyone, who is detained must be informed in a language that he/she understands, of the legal and factual reasons for the deprivation of his/her liberty, and this information allows challenging the lawfulness of his/her detention before a competent court as required by Article 5(4). Therefore, both provisions are considered together in the following assessments. In addition, judicial remedies for alternative obligations are also discussed here. Although the imposition of an alternative obligation does not directly concern the right to liberty and security of a person and does not result in deprivation of liberty, the explanations regarding this relatively new practice, especially regarding the judicial remedy, are important for the operation of a lawful immigration control system.

Review of Administrative Detention Practices

The safeguards for providing information on the administrative detention measure under Article 57 of the LFIP are set out in the Law. Under Article 57(5) of the LFIP; *"The administrative detention decision, the extension of the administrative detention period and the results of the monthly regular reviews together with its reasons shall be notified to the foreigner or, to his/her legal representative or lawyer. If the person subject to administrative detention is not represented by a lawyer, the person or his/her legal representative shall be informed about the consequence of the decision, procedure, and time limits for appeal."* Although this provision affords the safeguards for providing necessary information under Article 5(2) of the ECHR, it has been reported that in practice, the reasoning of administrative detention decisions does not explicitly include concrete reasons as to why the person concerned has been placed under administrative detention instead of being put under alternative obligations.[48] Apart from the fact that this omission in the reasoning is not sufficiently informative in the context of Article 5(2) ECHR, it would also have a negative impact on the effective exercise of the right of access to a court under Article 5(4) ECHR, if an objection were to be made that the proportionality criterion was not duly taken into account/applied. [49] It should also be noted that failures in the translation/interpretation services provided when giving information about the practice (not

[48] See Focus Group Meeting.

[49] For instance, see *Khalifa and Others v. Italy*, para. 115.

being able to be informed in a language that the person understands) will also lead to the same result.[50]

When the issue of access to the court against the administrative detention decision is reviewed, it is understood that although the administrative detention decision is an administrative procedure of the governorship within the central administration, the lawmaker has envisaged a special judicial remedy against this decision. Under Article 57/6 of the LFIP, it is possible to appeal against the administrative detention decision to a judge of the criminal court of peace; such an appeal does not suspend the administrative detention; the decision of the judge of the criminal court of peace is considered final; however, a further appeal can be made to the judge of the criminal court of peace on the grounds that the administrative detention conditions no longer apply or have changed. Since the judicial remedy against an administrative detention decision is not limited in time, it is possible to appeal to a judge of the criminal court of peace for the duration of the administrative detention, and it is also possible to appeal more than once claiming that the conditions of administrative detention have changed.

It is possible to appeal to a judge of the criminal court of peace on the grounds that the conditions for administrative detention do not apply, have changed, or have ceased to exist. Claiming that administrative detention is not necessary, that the proportionality test was not conducted at all or correctly, or that alternative obligations are possible and sufficient but were not applied, means that the conditions for administrative detention do not exist, and it is possible to apply to the judge of the criminal court of peace. If this claim is justified, the judge of the criminal court of peace must order the termination of the administrative detention. However, the judge of the criminal court of peace can't order the imposition of alternative obligations; it is at the discretion of the administration to decide which alternative obligations to impose.

In light of the information provided on the practice, it should be noted that in practice, the problems experienced by the person concerned in accessing counsel may result in procedural unlawfulness[5152].

[50] See, *Rahimi v. Greece*, 2011, para. 120; *Akkad v. Turkey*, para. 108

[51] See Focus Group Meeting and Workshop Summary Report.

[52] See, *Rahimi v. Greece*, para. 120; *Akkad v. Turkey*, para. 108.

Comprehensive Controls, Treatment of Inadmissible Passengers, and Other De Facto Detention Practices

Since there is no provision in the legislation on deprivation of liberty in the context of comprehensive controls and inadmissible passengers, there is no information safeguard regarding a measure specifically related to deprivation of liberty. The safeguards provided in the

legislation in relation to the provision of information are related to the nature of the comprehensive controls and refusal of entry at the border. Therefore, it is possible to conclude that there is a structural deficiency in terms of legal safeguards regarding the fulfillment of the obligation to inform in the context of deprivation of liberty. The same also applies to other forms of *de facto* detention, namely the transfer/transport stage and persons covered by Article 8 of the TPR. Failure to properly fulfill the obligation to inform in the case of such deprivation of liberty without any legal basis may also result in unlawfulness in relation to access to a court due to the link between Article 5(2) and Article 5(4) of the ECHR. This is particularly relevant for persons covered by Article 8 of the TPR. It is unlawful to regulate this measure, which is a mandatory " accommodation" and, in principle, restricts the freedom of the person, by a Regulation. Moreover, the fact that this *de facto* detention can be carried out without an administrative detention decision specified in the Law cannot be interpreted as there is no administrative procedure. This *de facto* detention, which not only produces an immediate result in the material world, but also creates a legal situation with its ongoing effects and requires the manifestation of will in this direction, can only be based on an administrative decision, and this decision must be subject to administrative judicial review. Moreover, if the mandatory accommodation is considered an administrative act that is not based on any decision, this will mean that the foreigner will not have an effective remedy against this practice which results in the deprivation of his/her liberty.

Legal Remedies for Alternative Obligations

Since the decision of the Governorate to impose obligations alternative to administrative detention is an administrative procedure, it is possible to file an action for annulment before an administrative court claiming that this procedure is unlawful. However, the legislation stipulates

that decisions regarding the obligation for electronic monitoring can be appealed to a judge of the criminal court of peace (LFIP, Art. 57/A-4; RAOAD Art. 18).

A full remedy action may also be brought before an administrative court to recover damages arising from the alternative obligation itself or how it is implemented.

IV. Review of Lawfulness concerning Other Fundamental Rights and Freedoms

During the implementation of measures that result in the deprivation of liberty of foreigners, there may be issues that need to be evaluated not only in terms of the right to liberty and security but also in terms of other rights. The most salient ones are the prohibition of torture and ill-treatment about conditions of detention, (in particular) the associated right to an effective remedy, and the protection of private and family life in terms of access to personal information and the maintenance of family life. The following explanations are based on these three rights.

A. Prohibition of Torture and Ill-Treatment

As per the prohibition of torture set out in Article 3 of the ECHR, "no one shall be subjected to torture or inhuman or degrading treatment or punishment".

The relevant provision imposes a primary negative obligation on States to refrain from causing serious harm to persons under their jurisdiction[53]. The relevant provision is widely applied in cases where the prohibited form of treatment is intentionally carried out by state officials or public authorities.

In line with the ECHR provision (Article 3) and ECtHR case law, the prohibition is absolute and cannot be subject to derogation. Therefore, there can be no exemption under Article 15(2) ECHR about the application of the prohibition, even under the most extreme circumstances, such as a public emergency threatening public life or the fight against terrorism, organized crime, or the influx of migrants and asylum seekers. Nor is there any exception to the prohibition, even in

[53] *Hristozov and Others v. Bulgaria*, 2012, para. 111.

ordinary cases for any reason[54]. The Court also emphasized that the prohibition of torture has achieved the status of "*jus cogens*" (peremptory norm) in international law[55].

The Court held that the threat of torture can also amount to torture because the nature of torture encompasses both physical and mental suffering. In particular, the fear of physical torture can in some cases constitute mental torture. The Court emphasized, however, that whether a threat should be classified as a threat of physical torture as psychological torture or inhuman or degrading treatment depends on the totality of the circumstances of the case in hand, including in particular the severity of the pressure exerted and the intensity of the mental suffering caused[56]. For the purposes of the distinction between torture, inhuman treatment or punishment, and degrading treatment or punishment, the Court's case law primarily considers the difference in the intensity of the suffering inflicted.

ECtHR considers acts that humiliate or degrade the individual, show a lack or diminution of respect for human dignity, or trigger feelings of fear, pain, or inferiority that may break the individual's moral and physical resilience to constitute degrading treatment. It is not necessary for the victim to be humiliated in the eyes of others in this context, and the mere fact that this situation has occurred in the eyes of the victim may be considered sufficient in terms of violation. The Court also takes into account whether the purpose of the treatment was to humiliate or degrade the victim, although the absence of such a purpose may not, in itself, be sufficient to conclusively exclude a violation of Article 3[57].

According to the case law, for a punishment to be " degrading" and in violation of Article 3, the contempt or degradation involved must reach a certain level. The assessment is, by its very nature, relative: it depends on all the relevant circumstances and in particular on the nature of the punishment, its context, and the way it is executed. The fact that a punishment functions as a

[54] See *A. and Others v. the United Kingdom* [GC], 2009, para. 126; *Mocanu and Others v. Romania* [GC], 2014, para. 315; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 2012, para. 195 and *Z.A. and Others v. Russia* [GC], 2009, paras. 187-188; *Ramirez Sanchez v. France* [GC], 2006, para. 116; *Gäfgen v. Germany* [GC], 2010, para.87.

[55] Council of Europe, Guide on Article 3 of the European Convention on Human Rights (Guide on Art. 3), https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf, p. 7, para. 12.

[56] *Gäfgen v. Germany* [GC], 2010, para. 108.

[57] See., Council of Europe, Guide on Article 3 of the European Convention on Human Rights, https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf, p. 9, para. 19.

deterrent or as an aid to control crime does not by itself preclude it from having a degrading character[58].

In line with the case law of the ECtHR, since the person is completely under the control of state authorities in cases of deprivation of liberty, when the flaws in the conditions of detention reach a certain level, it may lead to a violation of Article 3 of the ECHR. In light of the information provided on the practice, one of the most common circumstances that may lead to such a

violation may be the use of handcuffs during the transfer of the foreigner detained by law enforcement authorities. As a matter of fact, in *Akkad v. Turkey*, the ECtHR found this to be a violation of Article 3 and ruled that there had been a violation. In this judgment, the Court stated the following[59]: *".... when a person is deprived of his or her liberty or, more generally, confronted with law enforcement officers, any use of physical force that has not been made strictly necessary by the individual's conduct violates human dignity and constitutes a violation of the right set out in Article 3 of the Convention*". Also under national law, Article 7 of the RACS provides that "*persons who are arrested or detained and transferred from one place to another may be handcuffed if there are indications that they are likely to escape or that they pose a danger to their own or others' life or physical integrity*". The aforementioned Regulation stipulates that handcuffs must be used only for the reasons specified in the provision, regardless of whether it is applicable in the case of transfer/transport of the foreigner on the grounds that he/she is found to be irregularly present in the country or for the evaluation of the removal and administrative detention decision. Therefore, except for the aforementioned cases, law enforcement officers do not have the authority to do so, unless there is a provision explicitly stipulated in the legislation. However, the legality of the provision in Article 55(4) of the Implementing Regulation on LFIP stating that "*the assigned law enforcement officers shall take security measures as well as all measures for preventing foreigners from absconding or disappearing*" is also questionable.[60] This is because the phrase 'all measures' in this provision is susceptible to misinterpretation in such a way as to legitimize a general practice of handcuffing by law enforcement officers at the time of transfer. However, as emphasized above in the case

[58] *Tyrer v. the United Kingdom*, 1978, paras. 30, 31.

[59] Akkad v. Turkey, para. 115.

[60] Emphasis added by us.

law of the ECtHR, such a practice would be unlawful as it does not meet the criteria of foreseeability, specificity, and proportionality. Moreover, a provision on the conditions under which handcuffing, which imposes restrictions on fundamental rights and freedoms, must be based on a law in the narrow and formal sense.

Other issues that may come to the fore in terms of deprivation of liberty in the context of the prohibition of torture and ill-treatment are mainly related to accommodation conditions. The physical conditions of the places where individuals are held, the duration of their detention, their

access to water, food, hygiene materials, health services, showers, sleeping conditions, exposure to heat and cold, and the crowdedness of the place where they are held may result in violations depending on specific circumstances. Additionally, the same conclusion may arise with regard to how vulnerable groups are treated. In the case law of the ECtHR, among the general grounds for the Court's violation rulings (depending on the specific conditions), there are the following examples:

- Overcrowding (may be combined with other cumulative effects - such as hygiene/ventilation/duration)[61]
- Even if not overcrowded, being away from facilities such as hygiene, ventilation, communication, social communication, isolation[62]
- Being held for a long time in places not suitable for long-term detention (such as airports), open air, closed to social contact[63]
- Seriously poor living conditions, even if not long-term (hygiene, access to toilets, sleeping conditions, overcrowding)[64]
- Lack of access to medical services[65]

At the 'Workshop on Access to Rights in Administrative Detention' held as part of the project, it was claimed that there are situations in some removal centers that may fall under the above-mentioned categories.[66] These include allegations of difficulties in foreigners' access to health

[61] *Dougoz v. Greece,* 2001; *A.A. v. Greece*, 2010; *A.F. v. Greece*, 2013.
[62] *S.D. v. Greece*, 2009.
[63] *Riad and Idiab v. Belgium*, 2008.
[64] *MSS v. Belgium and Greece*.
[65] *A.A. v. Greece*; *Sakir v. Greece*, 2016.
[66] Summary Report of the Workshop on Access to Rights in Administrative Detention, Izmir December 17-18.

care, hygiene items, food and water, inadequate bed capacity, and ill-treatment through insults and threats. It should be noted that these allegations carry the risk of constituting a violation of the prohibition of torture and ill-treatment depending on the intensity of the material impact of the practice on the individual. In addition, three more allegations were mentioned at the Workshop that may be of importance in the context of the prohibition of torture and ill-treatment. Two of them are related to children who are considered vulnerable. It is alleged in one case that a girl who was with her father was accommodated in a place reserved for men, and in another case

that a person whose appearance and identity card issued by the country of origin would lead one to believe that he was a child was treated as an adult based on the opinion of the law enforcement officers and was not referred to a hospital for bone age determination. Here, it should be noted that the Convention on the Rights of the Child (CRC) should be followed in terms of the treatment of children in detention. In this Convention, it is stated that the deprivation of the child's liberty should only be considered as a last resort measure and should be limited to the shortest appropriate period. An amendment to the LFIP in 2019 prevented unaccompanied minors from being held in removal centers, which is considered a positive development. In light of the experiences in the field shared at the workshop, it was claimed that this rule is generally respected, but that there were unaccompanied minors in some removal centers. The detention of an unaccompanied minor in a removal center may be unlawful not only because it is contrary to the law, but also because of the risk that the effects of such detention on the child may reach the level of torture and ill-treatment. Following the amendment to LFIP, children should be able to stay in removal centers with the mother and father or only with the mother or father. However, even in this case, in accordance with both the case law of the ECtHR and the CRC, detention should only be imposed if there is no other measure that can provide control, taking into account the best interests of the child.[67] The above explanation for unaccompanied minors also applies to children in this situation. When considering whether to impose administrative detention on a parent accompanying a child, the presence of the child must be taken into account and the imposition of an alternative obligation must be considered as a priority. Otherwise (in the event that the presence of the child is not taken into account), the detention may not only be unlawful in terms of proportionality but may also carry the risk of reaching the level of torture and ill-

[67] See CRC, Art. 37(2).

treatment, especially for the child, depending on the specific circumstances (including the positive obligation of the State). Here, if it is concluded that the parent and child should be taken into custody together despite all kinds of assessments, the placement should be made taking into account the gender of the child. It is important that where possible, single-parent children are held with their parents in family detention facilities to prevent possible violations. In fact, Article 16 of the CRC states that no unlawful attacks shall be made on the privacy, honor, and reputation of the child, and the State Parties are under an obligation to provide guarantees for the protection

of the child against such interference and attacks. Furthermore, Article 19 of the same Convention stipulates that State Parties shall take all protective measures to protect the child from all forms of physical or mental violence, injury, or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s).

In terms of the other allegation concerning children reported at the Workshop, it should be emphasized that the procedure for determining that the person concerned is a child should be carried out rigorously. It is also an obligation under the CRC to take into account and evaluate the allegation that the person concerned is a child.

Another allegation reported from the field at the Workshop was that some individuals under administrative detention were made to sign voluntary return forms without their free will. The allegation may result in the person being sent against his or her will (including situations where the person has not also received detailed information on risks) to a place where the right to life or the prohibition of torture may be violated. In such cases, there may be consequences arising from positive obligations in relation to rights such as the right to life and the prohibition of torture. [68] There is also the risk that a person may be sent back because of having signed a form he/she does not understand, which may imply intense stress and psychological strain, and depending on the specific circumstances of the case, this may also entail violations of negative obligations related to the prohibition of torture.

B. Protection of Private and Family Life

[68] See *Akkad v. Turkey*.

The protection of private and family life is guaranteed under Article 8 of the ECHR. In the light of the information from the field of practice, the possible violations of this right in cases of deprivation of liberty are mainly related to the confiscation of personal belongings of the persons concerned, the search of these belongings, the impossibility of accessing information/documents about themselves, the uncertainty of their status and the effects that may arise on family life. In this regard, firstly, Article 57(8) of the LFIP, as amended in 2019, should be discussed. According to the relevant provision, '*electronic and communication devices of foreigners placed under administrative detention may be investigated in order to identify their nationality. The*

data obtained as a result of the investigation shall not be used for any other purpose' [69]It is possible to conclude that the relevant provision fails to comply with Articles 13 and 20 of the Constitution in the context of the right to protection of private life and therefore does not meet the required standard in the ECHR in terms of the safeguards provided for in national law. This is because this provision does not require a judge's order, which is required to search and seize a person's belongings under Article 20 of the Constitution.

Another issue in relation to the protection of private life is the right to access information about oneself. Persons under administrative detention or actually deprived of their liberty should be able to examine the relevant documents and receive detailed information about them, in particular, if they suspect that some of the documents they have signed are voluntary repatriation forms. Indeed, the ECtHR states that the authorities have a positive obligation in this respect[70].

In relation to the protection of private life, the fact that the status of persons deprived of their liberty remains unclear, especially for a prolonged period, also carries a risk of violation according to ECtHR case law. This particularly applies to individuals under Article 8 of the TPR who are detained in specific sections of temporary accommodation centers. This is because the duration of their detention is undetermined and there is no removal order or administrative

[69] See. TEKSOY, B.: İdarî Gözetim Altına Alınan Yabancıların Elektronik ve İletişim Cihazlarının İncelenmesine İlişkin Hükmün Değerlendirilmesi, Ankara Üniversitesi SBF Dergisi, (*Review of the Provision on the Investigation of Electronic and Communication Devices of Foreigners Under Administrative Detention, Ankara University SBF Journal*) 75(2), 2020, pp 517-556; see also. YUKK Değişiklikleri Hakkında Ortak Değerlendirme, (*Joint Assessment on the Amendments to the LFIP*) 2019, https://www.gocarastirmalaridernegi.org/attachments/article/144/yukk-degisiklikleri-hakkinda-ortak-degerlendirme.pdf.

[70]See *Roche v. The United Kingdom*, 2005, para. 162; *Haralambie v. Romania*, 2009, para. 86; *Joanna Szulc v. Poland*, 2012, paras. 86, 94.

detention decision taken against them. According to ECtHR case law, Article 8 ECHR protects, inter alia, the individual's right to associate with other people and the outside world. In some cases, some aspects of an individual's social identity may also fall within the scope of this protection. Therefore, all social ties between migrants settled in the country and society form part of the concept of private life[71]. Depending on the circumstances of the case, the Court may also include the uncertainty of an individual's status in a foreign country under the protection of private life.[72] In such cases, the Court may find that the individual is left in a precarious and

uncertain situation (the consequences and effects of this uncertainty may occur in terms of access to employment, education, obtaining a driver's license, opening a bank account, etc.). [73] The ECtHR recognizes that there may be a reasonable and short period of uncertainty when the authorities determine the status of an individual, but points out that it is among the positive obligations of States under Article 8 to keep this period as short as possible and to establish an effective and accessible procedure with appropriate arrangements to ensure that the procedures for determining the status of the person concerned are carried out within a reasonable period in order to bring the precarious situation of the person concerned to an end as soon as possible.[74].

In terms of the protection of family life, it can be stated that, depending on the specific circumstances, it may constitute a violation if persons deprived of their liberty interact with their family members disproportionately, if they are separated from their family members due to arbitrary detention, or for example, if they are not kept together with their spouse and/or children if they are also under detention. The ECtHR regards family living together as an integral aspect of family life in order for family relations to develop properly. [75] In *El-Masri v. 'The Former Yugoslav Republic of Macedonia'*, the Court held that where a person is arbitrarily detained, such detention constitutes an unlawful restriction on the right to protection of family life by preventing family members from being together[76]. The Court also held in *Nasr and Ghali v. Italy*

[71] *Abuhmaid v. Ukraine*, 2017, para. 102.
[72] *B.A.C. v. Greece*, 2016, para. 40.
[73] Ibid., para. 43.
[74] Ibid., para. 46.
[75] See., *Marcks v. Belgium*, 1979, para. 31; *Olsson v. Sweden*, 1988, para. 59.
[76] *El Masri v. The Former Yugoslav Republic of Macedonia*, 2012, paras. 49, 50.

that the applicant's isolation for more than one year without informing his family was a violation of the right to protection of family life[77].

C. Right to An Effective Remedy

Although it is necessary to appeal to a judge of a criminal court of peace against an administrative detention decision, this appeal is subject to an examination limited to the lawfulness of the administrative detention decision. The conditions of administrative detention do not fall within this scope and the legislation does not provide for a specific remedy for a

foreigner who complains about the conditions of detention. However, the ECtHR's case law on the right to an effective remedy under Article 13 of the Convention stipulates that an application alleging a violation of a right provided for in the Convention shall be deemed effective if, in addition to having a remedial (compensatory) dimension, it also has a preventive dimension that brings an ongoing violation to an end[78]. As regards the allegation that the conditions of administrative detention violate the prohibition of torture and ill-treatment under Article 3 of the Convention, the lack of a remedy to rectify these conditions constitutes a violation of the right to an effective remedy[79]. In the event that an application is made to the administration for the rectification of the conditions, but this application is rejected, either explicitly or by not responding, there is the possibility of filing a lawsuit before an administrative court for the annulment of such rejection, but it is highly doubtful whether such a remedy would be effective in practice in terms of redressing the violation.

In addition, pursuant to the right to an effective remedy, following the termination of administrative detention, any foreigner who claims that he/she has suffered damages as a result of the administrative detention decision itself or the detention conditions may bring a full remedy action before the administrative courts. [80] The Constitutional Court's decisions on individual applications also point in this direction. However, considering that an application should be

[77] *Nasr and Ghali v. Italy*, 2015, para. 305.
[78] *Ananyev and others v. Russia*, 2012, paras. 97,98.
[79] *J.M.B. and others v. France*, 2020, paras. 212-221.
[80] *B.T.* [GK], B. No: 2014/15769, 30/11/2017, para. 74.

made to a judge of a criminal court of peace against administrative detention decisions, the Court of Jurisdictional Disputes ruled that foreigners who have suffered damages in connection with administrative detention should file a lawsuit for compensation in the ordinary courts[81]. Despite this ruling, there are also decisions of various regional administrative courts that consider administrative courts to have jurisdiction over such cases[82]. Considering that an administrative detention decision is an administrative act, not a judicial act, and that the acts of law enforcement

officers and those carried out in removal centers (including the conditions of detention) are part of the administrative function, these cases should fall within the jurisdiction of the administrative courts. There are no judicial measures such as apprehension and custody as set out in the Code of Criminal Procedure, and removal centers are not penal institutions or detention houses. Therefore, there is no legal basis for the ordinary courts to be deemed as having jurisdiction over the lawsuits to be filed for the compensation of damages arising from the practices related to administrative detention.

In the above-mentioned full remedy actions, the commencement of the period for filing a lawsuit varies depending on whether the damage is caused by an administrative procedure or an administrative act. Since the administrative detention decision itself is an administrative procedure, Article 12 of the Code of Administrative Procedure shall apply to the lawsuits to be filed for the compensation of damages arising from this decision. Pursuant to this article, "*The concerned persons can directly file a full remedy action to the Council of State, administrative and tax courts due to an administrative procedure that violates their rights or file the actions of annulment and the full remedy actions together. They can also file the action of annulment first, and, upon the resolution of the action for annulment, bring the full remedy action as of the notification of the decision on this matter or from the notification of the decision to be taken if an action against this decision is filed. A full remedy action can also be filed due to damages arising from the performance of a procedure, within the time limit for the action starting from the date of performance*. " Since the damage in terms of the administrative detention decision arises with the

[81] E. 2020/651 K. 2020/684, 23/11/2020.

[82] See for example 3rd Regional Administrative Court in Adana İDD, E. 2020/1706 K. 2020/327, 21/12/2020.

performance of the decision, not with the decision itself, the date of performance should be taken as a basis for the commencement of the prescription period for filing a lawsuit. The performance date for the administrative detention decision is the date when the damaging consequence is fully produced, i.e. the date when the administrative detention is terminated, and as of this date, a full remedy action must be filed within the prescription period for filing a lawsuit.

It is possible to argue that during administrative detention of the foreigner, damages arising particularly from the conditions of detention are mostly caused by attitudes and behaviors that constitute administrative acts. In this case, Article 13 of the Code of Administrative Procedure is applied. Accordingly, the foreigner has to apply to the relevant administration within one year from the date on which he/she learns of the act causing damage, and in any case within five years

from the date of the act, and request the fulfillment of his/her rights; and if this request is dismissed, he/she must file a full remedy action within the prescription period for filing a lawsuit.

It should also be emphasized that there is no unity of the jurisprudence in this matter. Since the decisions of administrative courts in cases against removal orders and of judges of the criminal court of peace in appeals against administrative detention are final, it is not possible for the Council of State and the Supreme Court of Appeals to establish jurisprudence on these issues and to ensure unity of jurisprudence. Although filing an appeal in favor of the law, which is provided for in Article 51 of the Code of Administrative Procedure in terms of administrative jurisdiction, does not have any effect on the finalized decision, it may be useful for eliminating the contradictions between the decisions and establishing jurisprudence. In terms of the decisions of a judge of the criminal court of peace on appeal against administrative detention decisions, it is debatable whether the appeal for the benefit of the law stipulated in Articles 309-310 of the Code of Criminal Procedure is applicable or not. Since this is not a typical criminal proceeding and the relevant legal provision is regulated on the basis of conventional criminal proceedings, it is doubtful whether these decisions of a judge of the criminal court of peace can be subject to an appeal in favor of the law. In any case, it is not possible for the parties to resort to remedies, but the Chief Public Prosecutor of the Council of State may resort to these remedies related to administrative courts, and the Ministry of Justice or the Chief Public Prosecutor of the Supreme

Court of Appeals may resort to these remedies related to ordinary courts. However, the parties can try to prompt the aforementioned authorities to act by filing an application.

V. Access to International Protection and Review of the Lawfulness of Matters Relating to International Protection

Access to an international protection procedure for people in need of international protection is a requirement of both the right to asylum under Article 14 of the Universal Declaration of Human Rights, which is recognized as a rule of customary law[83], and the right to an effective remedy (in

particular the right to life and the prohibition of torture and ill-treatment), as it prevents the individual from being removed from the country in violation of the prohibition of refoulement. [84] Therefore, processing international protection applications, regardless of whether the individual's entry into the country is authorized and/or whether the person concerned has been deprived of liberty, is an obligation imposed on States by international (human rights) law[85]. In fact, in line with this obligation, the LFIP also includes special safeguards to ensure that the person concerned has access to international protection[86].

Taking into account the information and allegations regarding the practice bulundurulduğunda[87],, there are two aspects of the relationship between access to international protection and deprivation of liberty that may sometimes be interconnected. The first is that persons who are unable to access international protection due to problems at the application and registration

[83] See. CHOWDHURY, S.R.: "A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law", International Journal of Refugee Law, 1995, vol. 7, S. 1, s. 105; MERON, T.: Human Rights and Humanitarian Norms as Customary Law, Oxford 1989, s. 113; HUMPHREY, J.P.: "International Bill of Rights: Scope and Implementation", William and Mary Law Review, 1975-1976, vol. 17, s. 527, 529; HUMPHREY, J.P.: No Distant Millennium: The International Law of Human Rights, Paris 1989, s. 155; WALDOCK, H.: "Human Rights in Contemporary International Law and the Significance of the European Convention", 1965, vol. 11, s. 15; SOHN, L.B.: "Human Rights Law of the Charter", Texas International Law Journal, 1977, vol. 12, s. 129, 133; SCHACHTER, O.: International Law in Theory and Practice, Dordrecht 1991, s. 336.

[84] For instance, see *MSS v. Belgium and Greece*.

[85] See 1951 Convention relating to the Status of Refugees, Art. 31 ve 32; For relevant ECtHR case law, see , *D. v. Bulgaria*, 2001; *MSS v. Belgium and Greece*; *Hırsi Jamaa and Others v. Italy*, 2012; *M.A. v. Lithuania*, 2018; *F.G. v. Sweden*, 2016; *Ilias and Ahmed v. Hungary*, 2019.

[86] See. LFIP Art. 8; LFIP Art. 65.

[87] These inputs were provided during the Focus Group Meeting of 15.06.2023 and Workshop of 17-18 Decembr 2022 .

stages risk being faced with removal orders and administrative detention decisions. Pursuant to Article 8 of the LFIP, the provisions of Articles 5, 6, and 7 on the conditions for regular entry into the country cannot be construed and implemented to prevent an international protection claim. Therefore, even if the person does not meet the requirements for regular entry into the country, his/her application must be processed. Furthermore, Article 65 of the LFIP does not stipulate any other condition other than the application being lodged 'in person' and there is no exception that would prevent the application from being received. In the event that persons apply to the governorates for international protection within a reasonable period of time on their own accord, they are guaranteed that they will not be subject to criminal action for breaching the terms and conditions of legal entry into Turkey or illegally staying in Turkey, provided that they

provide acceptable reasons for their illegal entry or presence. Additionally, in parallel with Article 32 of the 1951 Convention, Article 54(2) of the Law limits the grounds for the removal of international protection applicants to the grounds of public order and national security[88]. The LFIP defines an (international protection) applicant as " a person who made an international protection claim and a final decision regarding whose application is pending". Therefore, it is sufficient for a person to have lodged an application for international protection with the authorities in order to benefit from the safeguards afforded to the applicant. Accordingly, if a person applies for international protection, these safeguards must be immediately operational and the application must be processed. Thus, it should be noted that, in practice, failure to receive or register international protection applications would both risk violating the fundamental rights and freedoms associated with access to international protection and constitute a violation of domestic law.

In addition, persons whose presence in the country is considered irregular because their application has not been processed and who cannot benefit from the safeguards afforded to the applicant are likely to be subject to removal and administrative detention decisions that should never have been taken in the first place. Furthermore, in cases where a person claims

[88]Pursuant to the relevant provision of the Law, removal decisions can only be issued against international protection status holders and applicants who are leaders, members, or supporters of a terrorist organization [Art. 54(1)(b) of the LFIP]; those who pose a threat to public order or public security or public health [Art. 54(1)(d) of the LFIP]; and those who are considered to be associated with terrorist organizations defined by international institutions and organizations [Art. 54(1)(k) of the LFIP].

international protection but this claim is not processed at the outset and is processed after a removal and administrative detention decision has been taken against him/her, the application, which should have been processed in the ordinary procedure, may be subject to expedited assessment in accordance with Article 79 of the LFIP. It should be noted that the mentioned examples may constitute a source of unlawfulness that may occur in the context of the administration's obligation to act with due diligence and good faith.

The second important aspect of the relationship between access to international protection and deprivation of liberty is that if a person under administrative detention in connection with a removal order lodges an application for international protection while in detention, the impact of this application on the removal order and thus on the administrative detention order is not clearly

regulated in the legislation. Article 65(5) of the LFIP provides as follows: *International protection applications lodged by persons whose freedom has been restricted shall immediately be reported to the governorates. The receipt and assessment of applications shall not prevent the enforcement of other judicial or administrative actions, measures, and sanctions. "* However, it is not sufficiently clear in this provision whether 'other administrative procedures or measures and sanctions' include removal and administrative detention decisions taken previously. This is because the term 'other' in this provision may refer to measures or procedures other than those related to the status of the person in the country (i.e. measures and procedures under the LFIP). The legal problems that may arise from this uncertainty may be particularly relevant for persons who have been placed in detention and for whom a removal order has been issued for reasons that do not fall within Article 54(2) of the LFIP. For instance, there is no provision in the legislation that prevents a person who has been subject to a removal order on the grounds of working without a work permit and an administrative detention decision on the grounds of risk of flight and disappearance from being qualified as an 'applicant' if he/she applies for international protection. However, removal decisions against applicants are limited for the reasons set out in Article 54(2) of the Law. According to Article 79 of the Law, the applications of persons subject to removal and administrative detention decisions will be subject to expedited assessment, implying that the process of determining such persons' status may be carried out while they are in administrative detention. As a result, for the sake of legal certainty and

predictability, it is necessary to expressly define whether removal and administrative detention decisions against such persons will be sustained or not.