
An Overview and Discussion of the New Turkish Law on Foreigners and International Protection

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Abstract

The object of this article is to offer a critical analysis of the impact of the 2013 Law on Foreigners and International Protection regarding the general status of aliens. The examination will focus on the provisions regulating the entry, residence and deportation of foreigners. Primarily, it undertakes a systematic comparison of the provisions of the new law and the relevant old legislation, aiming to evaluate the extent to which public policy priorities challenge the goal of bringing the new legislation into line with modern standards.¹ The second objective is to discuss whether the new legislation constitutes an amelioration of the status of foreign persons in Turkey in comparison with the old legal provisions. The regulation of international protection shall not be the part of our study, except where explanations in certain issues may necessitate reference to the provisions regarding international protection.

Key Words

Law on Foreigners and International Protection, status of aliens, entry of foreigners, residence of foreigners, deportation of foreigners.

Introduction

A new Law on Foreigners and International Protection (LFIP) was adopted in April 2013 by Turkish Grand National Assembly.² This reflected a desire to bring Turkish legislation into accordance with EU standards. The preparation of the new law has required codification of most of the national laws on foreigners and the legal regulations on asylum and migration. The LFIP regulates basic subjects concerning aliens' status in Turkey, excepting the work permits and the acquisition of immovable property. Additionally, it constitutes the first domestic law governing practices of asylum in Turkey. Until the adoption of the LFIP, asylum had been regulated by secondary legislation, namely 1994 Regulation on Asylum and administrative circulars.³ The status of stateless persons is regulated firstly by law in the domestic system. The provisions of the new law generally reflect the impact of EU law. It may be said that the principles of international law and human rights have also been taken into

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consideration, as the Articles affecting the entry, residence and deportation of foreigners, constitutes a manifestation of the principle of non-refoulement.⁴

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A semi-casuistic approach seems to dominate the new law which gives priority to the concept of security. Nevertheless, rather than giving a detailed analysis of the new law in its entirety, this Article intends to emphasize the impact of public policy and security concerns in the regulation of entry, residence and deportation issues by the LFIP and to examine whether the new law contributes to the amelioration of the aliens' status in comparison to the old rules. The LFIP regulates issues regarding the status of foreigners almost totally, tending to do so in accordance with "Community acquis" and superseding the old legislation's archaic and dispersed provisions. The new regulation on aliens' status is much more detailed in comparison to the old relevant legislation, and this contributes

to the reinforcement of personal security and immunity. Nevertheless, while the casuistic approach dominating the structure and content of the new legal provision seems to show a remarkable development with regards to human rights, the preponderance of the concept of security make the development in this area questionable.

Entry of Foreign Persons into Turkey

The entry of foreign persons to Turkey is regulated by the Articles in section 1 of the LFIP. The requirements and other regulations regarding this issue may be briefly classified in five groups: (i) Formal requirements concerning the entry of foreigners; (ii) The category of foreigners who shall not be permitted entry into Turkey; (iii) The ban on entry (iv) Competence of the Council of Ministers; (v) Procedural guarantees.

Formal requirements concerning the entry of foreigners

The formal requirements contain the obligation of entry and exit through border gates with valid passport or passport substitute documents (Art. 5) and the obligation to obtain a visa (Art. 11). A last requirement about the absence of prohibition of entry may be

considered in the framework of formal requirements. The importance and the composite content of the relevant regulation makes it necessary, however, to review this issue separately. In the main, the Law on Passports⁵ implies the same obligations, but the new regulation about visas involves some important changes. Nevertheless, the provision of the old law (Art. 8) enumerating the category of foreign persons “whose entry into Turkey is forbidden” has been replaced by the provision which indicates the category of foreign persons “who shall not be permitted entry into Turkey” (Art. 7). The substance of the new provision also differs from the regulation in the Law on Passports.

The obligation to obtain a visa may be roughly characterized as a part of the formal requirements, and some grounds as to the refusal of visas (Art. 15) are rather substantial in nature.

Under the new law, foreigners intending to stay in Turkey for a period of 90 days or less shall arrive in Turkey after obtaining a visa indicating the purpose of the visit. The visa is issued by Turkish consulates in the country of nationality or residence of the interested person. The duration of stay provided by the visa or visa exemption shall not exceed 90 days within 180 successive days. Visas shall be issued exceptionally

by governorates that are responsible for border gates. Foreigners for whom a visa is deemed necessary in view of Turkey’s national interest may obtain visas from Turkish embassies. In that case, the Ministry of Interior and the Ministry of Foreign Affairs are to be notified of all visas issued in accordance with the general procedures for issuing visas (Art. 11). The visa exemptions are included in Article 12.

The regulation about the refusal of visas is a novelty; the Law on Passports contains no similar provision. Some of the grounds regarding refusal of visa concern formal requirements. Firstly, foreigners who do not possess a passport or substitute document with a sufficient validity period and foreigners who are prohibited entry into Turkey cannot obtain visa in terms of Article 15, (1) (a),(b). Other cases which justify refusal of a visa are mostly of a substantial nature. The cases enumerated in Article 15, from paragraph (1)(c) to (1)(ğ) are: undesirability on grounds of public order or public security, carrying a disease identified as a threat to public health, being suspected or convicted of a crime or crimes that are subject to extradition under agreements or treaties to which Turkey is party, not being covered by valid medical insurance covering the intended duration of stay, being unable to provide justification for the purpose

of the entry into, transit through, or stay in Turkey, not possessing sufficient and regular means of subsistence during the intended stay in Turkey, and, finally, refusing paying of fines deriving from legal regulations mentioned by Article 15(1)(ğ).

While most of these situations can be clearly and straightforwardly established, some are also open to question. For instance, Article 15(1)(c) indicating that visas shall be refused to foreigners who are “found undesirable on grounds of public order or public security” attributes remarkable powers of discretion to the competent authorities and is consequently susceptible to arbitrary treatments. The impreciseness and ambiguity of Article 15(1)(c) renders the importance of judicial review more ‘appreciable’. The identification of disease as a threat to public health is similarly debateable and susceptible to controversy, and the notion of public health needs further precision. Finally, whether an individual is suspected or convicted of a crime is to be evaluated in accordance with the rules of Turkish Criminal Law.

On the other hand, Article 16 of the new law provides the cancellation of a visa in the following cases: If it is identified as having been subject to erasure, scraping or other alteration, if the foreigner is prohibited from entering

Turkey, if there is strong suspicion that the foreigner might commit a crime, if the passport or substitute document is fraudulent or expired, if the visa and visa exemption is used for purposes other than those for which it was granted, or if it becomes evident that the conditions and documents on which the decision to issue the visa was based are no longer valid. Additionally, in case where deportation of the foreigner is ordered within the validity of visa, the visa shall be cancelled.

Most of the grounds for the cancellation of visas are interesting formal requirements and consequently they may be considered reasonable. Nevertheless, it is unclear whether the reference to the prohibition of entry stated in Article 16 and also in Article 15 should be interpreted as a reference to Article 7 that indicates the category of foreigners who shall not be permitted entry into Turkey or as a reference to Article 9 that regulates the ban on entry. It is probable that the reference is made to the ban on entry, as the relevant provision mentions “the foreigner [who] is prohibited from entering into Turkey”, not “the foreigner who shall not be permitted entry into Turkey”. Finally, the expression “strong suspicion that the foreigner might commit a crime” is debateable as it may form a basis for arbitrary practices in future.

The category of foreigners who shall not be permitted entry into Turkey

Article 7 of the LFIP includes the cases in which foreigners shall not be permitted entry into Turkey. These cases are: absence/fraudulence of the passport or substitute document, visa, residence or work permit, fraudulent acquisition of these permits; absence of a passport or substitute document which is valid for at least sixty days as of expiry of the associated visa, visa exemption, or residence permit; falling under the scope of the foreigners listed under Article 15(1) regulating the refusal of visa, regardless of the existence/nonexistence of visa exemption. Besides the formal requirements for a passport, visa or residence permit, the relevant provision makes reference to cases that justify refusal of a visa. The evaluations regarding Article 15 shall also apply in the matter of prohibition of entry into Turkey.

Under the old relevant provision (Law on Passports, Art. 8), the category of foreigners denied entry into Turkey includes tramps and beggars, insane persons or those suffering from contagious diseases, persons accused or condemned of one of the crimes subject to extradition under international

treaties to which Turkey is party, persons who had been deported from Turkey and still had no right of entry, persons who were “perceived” to have come to Turkey for the purpose of destroying security and public order or assisting persons who intended do so, prostitutes and persons who incited women to prostitution, or were involved in “white women trading”, and all types of smuggler, persons who could not prove they had enough money to live in or depart from Turkey or could not prove that they would not engage in employment prohibited to foreigners. Some archaic notions are included in this provision, including “tramp”, “beggar”, and “white women trading”. The expression “persons perceived to have come to Turkey with the purpose of [...]” was open to arbitrary and abusive interpretations.

In comparison to Article 8 of the Law on Passports, the list of foreign persons who shall not be permitted entry into Turkey in the new regulation reflects a ‘more contemporary vision’, in which non-fulfilment of formal requirements is considered legitimate ground for prohibition of entry. Nevertheless, Article 7 of the LFIP should be examined together with Article 15 regulating the refusal of visa and containing many grounds of substantial nature. The imprecise notions of “public order and public security” have been used here in

order to legitimate the prohibition of entry of foreigners. Similar hesitations about interpretation in respect of the refusal of visas on the same grounds should also be considered concerning Article 7.

Ban on entry

The new law states that the Directorate General of Migration Management (under the Ministry of Interior) “may” issue a ban on entry against foreigners whose entry into Turkey is found objectionable on grounds of public order or security or public health (Art. 9, par. 1). Foreigners who are deported from Turkey “shall” be issued a ban on entry into Turkey by the Directorate General or governorates (Art. 9, par.2). This may be considered a novelty as there seems to be no similar provision in the old legislation. Such references to public order, public security and public health could excite the same doubts and criticisms mentioned above. Nevertheless, as will be seen below, some procedural guarantees have been recognized by Article 10.

Competence of the Council of Ministers

Certain parallels can be observed between the old and new legislation

in respect of the competence of the Council of Ministers relating to entry of foreigners into Turkey. Without going into detail, it should be mentioned that the competences according to the new law are composed of exemptions and facilities concerning the visa obligation, restrictive measures to be applied in cases of war or other extraordinary circumstances with regard to foreigners’ passports, and powers to apply restrictions or exemptions to a region or whole territory of the country, and generally any restrictive measures with regard to the entry of foreigners into Turkey (Art. 18). The old Law on Passports provides for retaliatory measures against nationals of states forbidding or restricting the entry of Turkish citizens (Art. 9), introduced facilities in the matter of visas and passports (Art. 10), and permitted exceptional measures in war and other exceptional circumstances (Art. 11).

Procedural guarantees

The notions of public order, public security, and public health are frequently used in the LFIP in order to create bases for ‘barriers’ to entry into Turkey. The granting of procedural guarantees by Article 10 of the new law may be appreciated and considered as having a somewhat balancing effect with regard to the provisions that prioritise public order/

security concerns. By virtue of Article 10, notification regarding the ban on entry against foreigners who come under the scope of Article 9(1) is to be given by the competent authority at the border gates when they arrive to enter into Turkey, and by governorates to foreigners who come under the scope of Article 9(2). The notification shall include the way in which foreigners can ‘effectively’ use their right of appeal against the decision as well as information on their other rights and obligations.

The introduction of the humanitarian residence permit and the permit for victims of human trafficking (Art. 46 and 48) reflect the impact of developments in the field of International Law and Human Rights.

On the other side, the non-refoulement principle constitutes an important guarantee in the issue of entry as well as in the matter of deportation. Finally, Article 8 emphasizes that non-fulfilment of requirements stipulated in Articles 5, 6 and 7 (as to entry into and exit from Turkey through border gates with valid passports, to document checks and to not falling under the scope

of the category of foreigners who not permitted entry into Turkey) shall not be interpreted or implemented in a way to prevent the application of international protection. It can be said, therefore, that the regime of international protection is according an ‘extra’ favour to foreigners in the field of entry into Turkey.

Residence of Foreign Persons in Turkey

The residence of foreign persons in Turkey is regulated in Section 2 of the LFIP. The new regulation introduces important novelties concerning formalities and it provides new and different types of residence permit. The Law no. 5683 on Residence and Travel of Foreigners in Turkey,⁶ which regulates this issue in general will be abrogated by the entry into force of the LFIP.

Regulation on formalities

Article 19 of the new law indicates that foreign persons who intend to stay in Turkey longer than the visa or visa exemption period or in excess of 90 days are obliged to obtain a residence permit. The old Law on Residence and Travel of Foreigners makes this obligatory for foreigners staying in Turkey more than a month to obtain residence permit, but this duration has been exceeded to

90 days by a Decision of the Council of Ministers.⁷

Article 21 regulates applications to obtain residence permits. The competent authority to decide on the applications for residence permits is the Directorate General of Management of Migration. The current legislation (Law no. 5683) designated local police authorities as competent. Differently from the procedure adopted by Law no. 5683, the new law establishes a system of application outside Turkey.

Residence permit applications shall be made to Turkish consulates in the foreigner's country of nationality or legal residence. It is stipulated, however, in Article 22 that in exceptional cases the application may be made to governorates. These cases include, among others, application for long-term/student/humanitarian residence permits and residence permits for victims of human trafficking.

A new and positive regulation with regard to the residence of foreigners is that a valid work permit (or exemption from work permit pursuant to the Law on Work Permits for Foreigners)⁸ shall also substitute for a residence permit (Art. 27).

Different types of residence permit

The LFIP also introduces six types of residence permit (Art. 30): short-term, family, students, long-term, and humanitarian residence permits, as well as those issued to victims of human trafficking. Without going into details, short-time residence permits for a maximum period of one year are to be granted to foreigners who, for example, intend to conduct scientific

research, establish businesses, possess immovable property, will receive medical treatment, enter for touristic purposes, or participate in student exchange programs in Turkey. Family

residence permits shall be given to (1) the spouse, the minor children, and the dependent children of Turkish citizens, foreigners falling under scope 28 of the Turkish Citizenship Law (a group of ex-Turkish citizens with advantageous status), foreigners holding residence permits and refugees/ subsidiary status holders, and (2) to the minor child, and dependent children of the spouses of the above mentioned persons. The maximum period of validity of the family residence permit is 2 years. Long-

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term residence permits are granted to foreigners who have resided in Turkey with a residence permit for at least 8 years uninterruptedly and to foreigners meeting criteria to be determined by the Migration Policies Board. This type of permit grants the holder a very advantageous status (granting the same rights as those accorded to Turkish citizens except for political rights and some other public rights). The old legislation stipulated a few different types of residence permit (for spouses of Turkish citizens and students for example) but only by secondary legislation (notices of General Directorate of Security).⁹ The introduction of the humanitarian residence permit and the permit for victims of human trafficking (Art. 46 and 48) reflect the impact of developments in the field of International Law and Human Rights. The categories of foreigners who may obtain humanitarian residence permits are determined largely by considering the process of international protection, the impossibility or great difficulty of expelling a foreigner from the country, and other probable necessities in respect to extraordinary circumstances.

The conditions for the acquisition and the refusal, cancellation, or non-extension of residence permits are regulated for each type separately. Nevertheless, concerning refusal, cancellation, and non-extension,

some common grounds may be observed for the majority of permits, such as not meeting the conditions stipulated or the existence of a deportation decision or ban on entry, etc. Staying outside Turkey for a certain period forms the basis for the refusal, non-extension, or cancellation of short-term, long-term or family residence permits. Constituting a serious threat to public order or public security justify cancellation of long-term permits. The regulation on long-term residence permits in particular reflects the impact of European law. The grounds for granting resident permits for humanitarian reasons or to victims of human trafficking are related to the termination of the need to grant these permits (Art. 47 and 49).

In comparison to the old legislation, the new regulation of the refusal, non-extension, or cancellation of residence permits is much more detailed and precise. The introduction of grounds that justify refusal, non-extension, or cancellation of permits is a novelty, and these grounds are generally indicated through clear criteria. The old Law on Residence and Travel of Foreigners in Turkey includes only the grounds for refusal of residence permit. The legislation contains no detailed regulation about the grounds for non-extension and cancellation. Under the old law, application for residence permits shall be refused by

virtue of Article 7 only for foreigners who arrive in Turkey with intent to work in a job open only to Turkish citizens by law, who do not act in conformity with Turkish traditions or political requirements, who are determined to be unable to ensure their subsistence legally, who are prohibited entry into Turkey but have somehow entered, or who violate peace and security during their stay in Turkey. Some of these situations imply the discretionary power of the administration because of the ambiguous nature of notions such as Turkish traditions, political requirements, and violating peace and security. The relevant grounds in respect of the regulation of the LFIP are more concrete and more acceptable with regards to utility.

Procedural guarantees

The LFIP introduces important guarantees with regards to refusal, cancellation, and non-extension of residence permits which do not exist in Law no. 5683. These guarantees contain the requirement that, in issuing the decision of refusal, non-extension or cancellation, the competent authority shall take into consideration certain factors and the obligation to relevant notification, as well as the content of that notification.

Article 25 of LFIP indicates that rejection of residence permit applications

filed in Turkey, non-extension or cancellation of residence permits, and notifications about these procedures shall be made by the governorates. It is emphasized that, during these procedures, factors such as foreigners' family links in Turkey, the duration of their stay, foreigners' situations in the country of origin, and the best interests of any affected children shall be taken into consideration. Foreigners or their legal representatives or lawyers are to be notified of decisions concerning residence permits. The notification shall describe how foreigners can effectively use the right to appeal against the decision, as well as their legal rights and obligations in this process.

Deportation of Foreign Persons from Turkey

Articles 53 to 60 of Section 4 of the LFIP regulate deportation. Currently, deportation is regulated mainly by Law no. 5683 on the Residence and Travel of Foreigners in Turkey and Article 34 of the Law on Passports. The grounds justifying deportation of foreigners have been significantly increased, particularly those related to irregular entry, stay, and work. To compensate, a new category of foreign persons exempted from deportation has been introduced. The procedural guarantees related specifically

to deportation have been indicated in the relevant provision, while, in the old legislation, it was necessary to refer to general rules and principles of Turkish Administrative Law in this issue. On the other hand, administrative detention in the framework of deportation has been provided a legal basis by the LFIP.

Grounds for deportation

Cases which justify deportation from Turkey may be classified as follows: (i) the foreign person's presence in Turkey is considered dangerous; (ii) irregular entry and residence; (iii) application as a security measure in the context of the Criminal Law (for foreigners condemned in Turkey). This classification is valid for both the new and old legal regulations. Article 54 of LFIP lists foreigners against whom a deportation decision shall be issued.

The foreigner's presence in Turkey is considered dangerous

Under the LFIP, the persons to be deported in the framework of this ground are those who are leaders, members, or supporters of a terrorist or benefit-oriented criminal organization, who provide for their subsistence by illegitimate means during their stay in Turkey, or who constitute a threat to

public order, security or public health. The last subcategory includes abstract and ambiguous notions which could be concretized in practice and in the light of the judicial review process. The other subcategories are described by clearer notions.

The old Law on Residence and Travel of Foreigners in Turkey provides the deportation of foreigners whose residence in Turkey is considered contrary to general security or political and administrative requirements (Art. 19) and specifies that the Ministry of Interior is competent to deport foreign nomads (stateless/not related to Turkish culture) (Art. 21 (3)). The new regulation in the LFIP does not target a determined group of persons and it replaces the notions of "general security" and "political and administrative requirements" with those of "public order/security/health," which nevertheless also lack clarity and precision.

Irregular entry into and irregular residence in Turkey

The foreigners against whom a deportation decision shall be issued pursuant to irregular entry and residence are those who use false information or fraudulent documents in procedures related to entry into Turkey or false visas

or residence permits, who exceed the duration of their visas or visa exemptions by more than 10 days, whose visas or residence permits have been cancelled, who exceed the duration of their resident permit for more than 10 days without an acceptable excuse, who are identified as having been working without a work permit, who violate the provisions of entry into and exit from Turkey, who are identified as having arrived in Turkey in spite of a ban on entry, who have applied for but are not entitled to benefit from international protection status due to circumstances described in the relevant provision and who stay in Turkey, and whose applications for extension of residence permits have been rejected but who don't leave Turkey within 10 days.

Currently, irregular entry and residence in Turkey are taken into consideration in practice and in Turkish doctrine in the framework of Article 19 of Law no.5683.¹⁰ The old legislation provides two specific situations necessitating deportation; foreigners who come to Turkey without passports (Art. 34 of the Law on Passports) and foreigners who do not renew their passport after they lose it (Art. 20 of the Law no.5683). The first situation automatically leads to deportation (without discretion), while in the second the deportation of the affected person depends on the discretion of the competent authority. In the LFIP,

by contrast, there are a large number of grounds for deportation depending on irregular entry and residence, and also irregular work and exit. Differently from the old legislation, all these grounds seem to automatically justify deportation and do not grant interested authorities discretion in evaluating if the conduct of the foreign person evaluated as irregular entry/residence/work in the framework of Article 54 would render reasonable or fair the deportation decision. By taking into consideration the very serious consequences of deportation, it can be said that a certain power of discretion should be attributed to the competent authorities in the context of irregular entry/exit/residence. This proliferation of grounds for deportation, including irregularity of entry, residence, or exit, reflects the priority given to public policy and security concerns. This preference may be explained by the problems related to transit migration as well as by the reinforcement of security concerns after 11 September 2001 in Europe, which has affected the evolution of European law on this issue.¹¹

Applications of deportation as a security measure

Foreign persons against whom a deportation decision is deemed necessary according to Article 59 of Penal Code

are those sentenced to prison. After the end of the custodial sentence or release on probation of the affected person, the Ministry of Interior is to be informed so as to be able to evaluate the necessity of an application for deportation.

Law no. 5683 contains similar provision concerning foreigners who have been convicted in Turkey for a crime that come under the jurisdiction of the criminal court (Art. 22). Although the strict construction of the provision implies that deportation will be applied automatically in this case, this provision is interpreted considering Article 59 of the Penal Code. It is consequently accepted in the doctrine that the issue of the deportation decision shall depend on the discretion of the Ministry of Interior.¹²

Foreigners exempted from deportation

The introduction of a category of persons who are “not deportable” is a new regulation in the LFIP, and no similar provision is included in the old legislation. Foreigners who shall not be deported regardless of whether they fall under the scope of Article 54¹³ are listed in Article 55 of the new law. The categories of persons against whom a decision for deportation shall not be issued includes those who will likely

be subjected to the death penalty, torture, cruel or degrading treatment or punishment in the country to which they will be deported, whose travel is considered risky due to a serious health problem, age, or pregnancy, who cannot continue treatment for a life-threatening health problem in the country to which they will be deported, who are victims of human trafficking benefitting from a victim support process, or who are at the time being treated as victims of psychological, physical, or sexual violence. The content of Article 55 makes it clear that developments in international and European law have been taken into consideration in the drafting of these provisions, and it may be said that a certain humane approach is prominent in this regulation. Foreigners falling under Article 55 can obtain a humanitarian resident permit (Art. 46(1)(c)).

A decision of deportation may be issued against applicants or beneficiaries of international protection only when there are serious indications that they constitute a threat to the security of the state or when they are convicted of a crime which constitutes a threat to public order.

The new regulation also grants an advantageous status to two groups; stateless persons and applicants or beneficiaries of international protection. Stateless persons holding a Stateless Person Identification Document (Art. 50) shall not be deported unless they constitute a serious threat to public order or public security (Art. 51(1) (b)). A decision of deportation may be issued against applicants or beneficiaries of international protection only when there are serious indications that they constitute a threat to the security of the state or when they are convicted of a crime which constitutes a threat to public order. The grounds for deportation have been restricted for these groups pursuant to international principles related to the protection of stateless persons and refugees/asylum seekers.

Process of deportation Competent authorities

Under the new law, governorates are competent to issue the deportation decision, while under Law no. 5683 on Residence and Travel of Foreigners in Turkey, deportation decisions still depend mainly on the Ministry of Interior, and only exceptionally on governorates of border and coastal provinces when this power was granted by the Ministry. The issuance of the

decision by a hierarchically superior administrative authority could mean a certain “security” at the bureaucratic level; the new regulation’s provision seems debateable on this point.

Notification of the decision and instruction to leave Turkey

Under Article 53 of the LFIP, foreigners and their legal representative or lawyer shall be notified of the deportation decision and the reasons thereof. In cases where the affected person is not represented by a lawyer, the person or legal representative will be notified of the decision as well as the procedures and time limits for appeal. The introduction of this obligation is a novelty and it should be considered an important contribution with regards to the use of procedural guarantees for the person against whom a deportation decision is issued. In the absence of a similar provision in the relevant legislation actually in force, it is obligatory to refer to the general rules of Administrative Law.¹⁴

Article 56 of the new law provides that foreigners shall be granted a period between 15 days and 30 days to leave Turkey. The provision, however, also stipulates the cases where this period will not be recognized. Foreigners who may abscond or disappear, who violate rules for lawful entry and exit, who use fraudulent

documents, who attempt to obtain/are identified as having obtained a resident permit with fraudulent documents, and who constitute a threat to public order and public security or public health shall not benefit from this period. Evaluating exceptional cases as a whole, particularly the largely ambiguous notions specifying the latter situation, it can be concluded that deportation without period granted shall become the general practice. It is not difficult to envisage that in the majority of the cases, the position of the interested person may be considered as included in scope of the relevant provision. Article 19 of Law no. 5683

indicates that the foreigners shall be instructed to leave Turkey “within the specified time”. Foreigners may be expelled immediately by decision of governors in urgent situations (Art. 21), though the content of “urgent situation” is not specified by the law. The new regulation is much more detailed and clear, although it seems to not be so beneficial with regard to the multiplicity of exceptional cases.

Administrative detention

The provision on administrative detention for deportation (Art. 57 of the LFIP) is one of the most important novelties introduced by the new legislation. The detention of foreigners to be deported thus finds a real legal basis for the first time. The practice of detention of foreign persons to be deported remains unjustified by a precise regulation until the adoption of the new

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law, and consequently a special procedure of appeal in respect of the decision of detention is not provided. With the entry into force of the new relevant regulation it may be expected that appeals against Turkey will decrease.¹⁵ Briefly,

among the foreigners for whom a deportation decision is issued, those who may abscond or disappear, who violate rules for entry and exit, who use fraudulent or unfounded documents, who do not leave Turkey in the specified period without an acceptable excuse, or who constitute a threat to public order and security or public health shall be placed under administrative detention by governorates. Foreigners subjected

to this measure shall be transferred to removal centres. The period of detention shall not exceed 6 months. It is possible, however, to extend this period for 6 additional months due to non-cooperation or provision of false documents or information by the person in question. The necessity of continuing the detention shall be re-evaluated every month by the governorate.

The foreign person under detention or his/her legal representative or lawyer may appeal against the detention decision to a Magistrates' Court judge who shall conclude a review within 5 days. In the law, cases that justify the issuing of the detention decision are generally reasonable and understandable, with the exception of the criteria of public order and security/public health, which are open to abusive interpretation and consequently in danger of rendering this measure a general practice in respect to deportation decisions.

The conditions of detention, the substance and the procedure of this measure, and the methods of appeal against the relevant decision are indicated very clearly in Article 57. The operation of removal centres and the services to be provided therein are regulated by Articles 58 and 59. One interesting point regarding the removal centres concerns the regulation indicating that

the Ministry of Interior, determined as the authority competent to operate these centres, may sign protocols to delegate operation of the centres to public institutions and organizations, to the Turkish Red Crescent Society, or to other associations working in the public interest with expertise in the area of migration.

The consequences and the execution of deportation

As mentioned above, the new law provides for a ban on entry for foreigners deported from Turkey (Art. 9). The ban may not exceed 5 years, but in cases where a serious threat exists to public order and security, this period may be extended for another 10 years. While the consequences are very serious, there are attendant rules for foreigners who leave Turkey in the specified period and for those who apply to leave before it is established that the validity of their visa or residence permit has expired. Additionally, a deportation decision causes the refusal, non-extension, or cancellation of any short-term, family, or student residence permits (Art. 33/ç, 36/c, 40/ç).

Law no. 5683, by contrast, subordinates the return of deported persons to Turkey to the authorisation of the Ministry of Interior. It may be concluded that the

consequences regulated by the new law are more serious and systematically designed.

The execution of the deportation decision is regulated in Article 60 of the new Law. This regulation is more detailed in comparison to the old legal regulation in Law no. 5683. It can briefly be said that all travel costs are to be covered by the deported persons or, in cases where this is not feasible, by the Directorate General. The provision which states that the Directorate General shall cooperate with international organizations, the institutions of relevant countries, and non-governmental organizations with regard to deportation procedures (Art. 60 (4)) is an important novelty to note.

Procedural guarantees

The new law introduces a specific procedure of appeal against the deportation decision (Art. 53 (2), and (3)). Because of the absence of specific regulation in this respect, the old legislation rendered it obligatory to refer to the general rules of administrative jurisdiction. The LFIP states that the foreigner or his/her representative or lawyer is entitled to appeal to the administrative court against the decision within 15 days of notification of the decision. The decision of the court shall be pronounced in 15 days and

is final. No further application to the Council of State against the decision of the administrative court is possible. This new regulation is susceptible to paralyzing the development of case law and increasing overly elaborate decisions. There are examples which show that the Council of State effectuated an efficient and “inclusive” control in respect of deportation decisions.¹⁶ An appeal has a suspensive effect on deportation as the foreigner may not be deported until the finalization of the judgment. The suspensive effect is undoubtedly beneficial for foreign persons, although the process of appeal is to be achieved within 30 days. The advantage provided by this guarantee is therefore questionable, and the procedure may be qualified as “fast-track”.

Conclusion

The new Law on Foreigners and International Protection brings very important modifications in respect to foreigners’ entry into, residence in, and deportation from Turkey. It is difficult to summarize our evaluations so as to give a single qualification, positive or negative. The new legal regulation is much more detailed and systematic and may be characterized as an “aliens’ code” in comparison to the old legislation. The principle points to be appreciated

are the granting of special procedural guarantees in respect to entry, residence, and deportation, the indication of the cases on which rejection, cancellation, and non-extension of residence permits shall be based, the introduction of a category of non-deportable persons, and the new types of residence permit reveal that the links of foreigners with Turkey and humanitarian concerns have been taken into consideration. It may also be said that many guarantees are in relation to the non-refoulement principle.

On the other hand, the new legislation reflects the priority given to public policy and security concerns. This tendency may be detected especially in the provisions that give considerable importance to the discretionary power of the administration. The entry of foreigners is subjected to many barriers (formal requirements, categories of foreigners who are not permitted entry into Turkey, visa refusal, bans on entry, etc.) and public policy grounds are present in all of these barriers. Enumeration of all kinds of irregularity of entry and residence as grounds for deportation give all indicate this priority. The regulation of detention

in the framework of deportation is a positive aspect, except the “fast-track” character of appeals which could invite some doubts about its efficiency as a guarantee. Deportation on the grounds of public order, security, and health render indispensable a vigorous judicial review practice that should not be content with limited control over the administrative initiative. The brevity of the process of appeal and the definitive character of the decision of the administrative court (the suppression of review by the Council of State) are susceptible to reducing the effectiveness of such guarantees.

Both the recognition of special procedural guarantees for foreigners’ benefit and the introduction of new barriers on entry, new grounds for deportation and the probable generalization of exceptional procedures and detention in the execution of deportation are contrasting aspects of the new regulation. It may be expected that, if the procedural guarantees prove ‘effective’ in practice, this effectiveness will depend largely on the scope of the judicial review.

Endnotes

- 1 For basic information on the relevant legislative work in the context of Turkey's EU accession process, see, Cavidan Soykan, "The New Draft Law on Foreigners and International Protection in Turkey", *Oxford Monitor of Forced Migration*, Vol. 2, No. 2 (November 2012), pp. 38-39.
- 2 Law no. 6458 of 4.4.2013, O.J. 11.4.2013, 28615. Most of the provisions of the new law will entry in force on 11.4.2014.
- 3 O.J. 30.11.1994, 22127.
- 4 Article 4 of the LFIP indicates that no one who falls under the scope of this law shall be returned to a place where he or she may be subject to torture, inhuman or degrading punishment or treatment, or where his or her life or freedom may be under threat on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
- 5 Law no. 5682 of 15.7.1950, O.J. 24.7.1950, 7564. Most of the provisions of this law will be abrogated by the entry in force of all the provisions of the LFIP.
- 6 Law of 14.7.1950, O.J. 24.7.1950, 7564.
- 7 Decision no. 2306 indicates that the duration shall be applied as 90 days within 180 days preceding exit from Turkey in cases where the duration of visa exemption or the duration of stay in Turkey stipulated in the visa is sufficient.
- 8 Law no. 4817 of 27.2.2003, O.J. 6.3.2003, 25040.
- 9 See, Bülent Çiçekli, *Yabancılar Hukuku*, Ankara, Seçkin, 2013, pp. 111-118.
- 10 Aysel Çelikel-Günseli Gelgel (Öztekin), *Yabancılar Hukuku*, 18th ed., İstanbul, Beta, 2012, p.112.
- 11 See the Action Plan related to the application of Amsterdam Treaty, *Journal Officiel des Communautés Européennes*, n° C 19, 23.1.1999.
- 12 See, Çiçekli, *Yabancılar Hukuku*, pp. 194-195.
- 13 It has been maintained in doctrine that article 55 shall not be applied to deportation decisions issued by virtue of international agreement as it, here, clearly refers to deportations occurring in accordance with article 54: See, Nuray Ekşi, İstanbul, Beta, 2012, p.161.
- 14 It is generally accepted in doctrine that the notification of administrative acts is obligatory: See Kemal Gözler, *İdare Hukuku Dersleri* Bursa, Ekin, 2004, p.262; A. Şeref Gözübüyük and Turgut Tan, *İdare Hukuku*, Vol.2, *İdari Yargılama Hukuku*, Ankara, Turhan, 2006, p. 508.
- 15 It has been announced by the European Court of Human Rights many times that Turkey has violated article 5 of the European Convention on Human Rights, because of the detention of the foreigners to be deported, without recognizing an effective right of appeal for the interned persons. See, Ekşi, *Yabancılar ve Uluslararası Koruma Kanunu Tasarısı*, pp.164-167.

- 16 In some cases, the Council of State has exercised a vigorous control on deportation decisions, regarding their legal grounds. For example, one decision pronounced on 24.4.1978 concerned the deportation of the team of the Swedish Radio and Television Corporation. In this case, the Council of State examined in which way the discretionary power accorded to the competent authority should be exercised. This power should be exercised in accordance with objective criteria and the requirements of public service. The High Court concluded that the deportation decision had been issued without sufficient investigation as required by national and international regulations and consequently annuled it. See, Rona Aybay, "Implementation of the Helsinki Final Act by a Turkish Court", *The Turkish Yearbook of International Relations*, Vol. 18, 1978, pp.76-79. For an analysis of the jurisprudence of the Council of State with regard to deportation decisions see, Esra Dardađan Kibar, "Türk İdarî Yargısında Sınır Dışı Etme Kararlarının Ele Alınması", *Uluslararası Sempozyum: Vatandaşlık, Göç, Mülteci ve Yabancılar Hukukundaki Güncel Gelişmeler- Eskişehir 15-16 Mayıs 2009*, Türkiye Barolar Birliği Yayınları, Ankara, 2010, p.531.