

# EXPLORING JUDICIAL ACTIVISM'S ARGUMENTS OF THE ECTHR IN RESPECT OF SYSTEMIC INEQUALITIES TO ACCESS REFUGEE PROTECTION: THE IMPACT OF THE “PROCEDURAL TURN”

7TH ANNUAL CONFERENCE, REFUGEE LAW INITIATIVE, UNIVERSITY OF LONDON, “INEQUALITY AND FAIRNESS IN REFUGEE PROTECTION”



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# ACCESS TO THE REFUGEE SYSTEM IN CONTRACTING STATES OF THE ECHR: SOME AREAS AND POLICIES OF SYSTEMIC INEQUALITIES

## Racial discrimination

- *De facto* discriminatory acts on the basis of racial reasons carried out by border guards and public authorities
- I.e. Systematic refusal of border guards to accept asylum applications or practices of misrepresenting statements given by certain third-country nationals

## Modes of entry

- Categorization between irregular migrants who 'behaved badly' and 'good migrants' attempting to enter the States' territory peacefully and legally
- I.e. Pull and push-backs resulting in 'non-departure/arrival policies' and 'hot returns' at the border or 'non-disembarkation policies'

## Vulnerability assessments

- 'Instrumentalization' of the vulnerability paradigm
- I.e. the practice of selectively allowing disembarkation of migrants rescued at sea who are deemed 'vulnerable' by governments

# CAN THE ECTHR PLAY A ROLE IN ADDRESSING SYSTEMIC INEQUALITIES AND EXPLORE POSSIBILITIES OF JUDICIAL ACTIVISM?

## a) Pilot and b) semi-pilot judgment

- a) Procedure *ad hoc* for dealing with structural or systemic problem(s) (Rule 61 of the Court's Statute)
- b) It identifies structural dysfunctions, but it does not prescribe general measures to be taken within a certain time frame, leaving the government greater discretion in how to respond to the judgment

## Intersectionality approach

- Configuration of 'new intersectional rights' (or at least a minimum core) in a legally binding form based on a contextualized analysis of existing relevant provisions. Individually, these provisions may not provide the same level or nuance of protection (Moreno-Lax:2021)

## Procedural approach (Arnadóttir:2017;Gerards:2017)

# THE “PROCEDURAL TURN” OF THE ECTHR: A TWOFOLD APPROACH

## Procedural turn

**‘Procedural rights review’:**  
extrapolation of positive obligations in respect of Contracting States from the Convention’s provisions, albeit they are not explicitly contemplated therein

A narrower margin of appreciation should be granted to Contracting States

**‘Procedural review *stricto sensu*’:**  
whereas the Court evaluates the balance between different issues, special attention is paid to the robustness and quality of procedures performed at the domestic level

A wider margin of appreciation should be granted to Contracting States

**What could be the impact of the ‘procedural turn’ of the ECtHR on systemic inequalities in accessing the refugee protection?**

# THE PROCEDURAL APPROACH IN CASES INVOLVING DETENTION IN HOTSPOT AND REMOVAL ORDERS

## ■ *J.A. and Others v. Italy*, no. 21329/18, 30 March 2023

### Violation of Art. 3 (substantive), Art. 5 §§ 1 (f), 2 and 4, and Art. 4 P4

Unlike the *Khlaifia* case, removal orders had been issued without proper consideration of the **applicants' individual situations**, and the affected individuals did not have a **genuine and effective opportunity to present arguments against their (collective) expulsion**. Specifically:

- No interview was conducted with the authorities prior to the applicants signing the refusal-of-entry orders, of which they received no copy;
- The text of the orders was standardized and did not indicate any examination of the applicants' personal circumstances;
- The information sheet used in the Lampedusa hotspot could not be considered a proper interview but rather a concise questionnaire that was difficult for the individuals concerned to understand;
- Due to the short period of time between the applicants' signature of the refusal-of-entry orders and their removal, they allegedly did not understand the content of the orders, and two of the applicants were not provided with a copy.

# THE PROCEDURAL APPROACH IN CASES INVOLVING INEFFECTIVE INVESTIGATIONS INTO REMOVALS

- ***Alhowais v. Hungary*, no. 59435/17, 2 February 2023:**
  - Violation of both the **substantive and procedural aspects of Art. 2 and Art. 3** occurred when the applicants were expelled to Serbia, resulting in the death of one of them.
  - The State's criminal investigation was deemed insufficient by the Court, as it neglected several important elements and exhibited procedural deficiencies. Specifically, the decision by the prosecutor to terminate the investigation relied heavily on oral testimonies, primarily from the officers involved, and contradictions in the migrants' statements regarding the factual circumstances of the incident.
- ***B.Y. v. Greece*, no. 60990/14, 26 January 2023**
  - Violation of Art. 3 occurred solely in its procedural aspect due to Greece's ineffective investigation into the forced removal of an asylum seeker to Turkey, despite the individual's attempts to claim international protection based on their political opinion.
  - ❖ Can we consider this as a broad application of the ***par ricochet* protection** and the **principle of the effectiveness of rights?**

# THE PROCEDURAL APPROACH IN CASES INVOLVING COLLECTIVE EXPULSIONS: THE 'CONDUCT OF MIGRANTS' ARGUMENT

- ❖ ***N.D. and N.T. v. Spain*, nos. 8675/15 e 8697/15, 13 February 2020**: summary returns conducted by the *Guardia Civil* at the Spanish Melilla enclave were not found to be a violation of Art. 4 P. 4 and 13
  - The decision was based on the following reasons: 1. **the migrants' own culpable conduct**; 2. **the existence of legal, genuine, and effective alternative means to enter the country and seek asylum**; and 3. **the lack of compelling reasons on the part of the migrants for not utilizing official entry procedures**.
- ❖ ***M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17, 23 July 2020** (*T. and Others v. Poland*, no. 41764/17, 13 October 2022; *A.B. and Others v. Poland*, no. 42907/17, 30 June 2022; *A. I. and Others v. Poland*, 39028/17, 30 June 2022): Polish border guards systematically refused and disregarded the applicants' requests for international protection, particularly those of Chechen origin. This resulted in a **violation of Art. 3, 13, and 4 P. 4**.
  - However, the Court emphasizes that in these cases, **the applicants attempted to cross the border through legal means**, using an official checkpoint and subjecting themselves to border checks as required by relevant laws.

# THE PROCEDURAL APPROACH IN CASES INVOLVING COLLECTIVE EXPULSIONS: THE 'STANDARD OF THE PROOF' ARGUMENT

- ❖ ***Safi and others v. Greece, no. 5418/15, 7 July 2022***: ineffective investigation into a fatal accident involving migrants intercepted at sea. The Court found a **breach of both the procedural requirements and the positive obligations under Article 2**.
- However, while examining the facts related to the violation of the substantive aspect of Article 2, the Court highlighted that **the applicants' complaint of an attempted *refoulement* could not be proven 'beyond reasonable doubt'** due to the absence of an effective investigation by the national authorities into the accident.
- Therefore, the **lack of quality in the procedures** followed by the State during the investigation constitutes a violation of the procedural limb of Art. 2, as well as an insufficient standard of proof in assessing evidence to meet the required level of severity for a violation of the substantive aspect of Art. 3.
  - ❖ **Could this argument potentially undermine the right to access the asylum system?**



# CONCLUSIVE REMARKS AND OPEN-ENDED QUESTIONS

The procedural turn of the ECtHR can be seen as a '**double-edged sword**' in relation to access refugee protection:

- On one hand, it can enhance the substantive guarantees for asylum seekers, particularly in cases involving ancillary issues such as the right to enter the territory of States or deficiencies in asylum procedures affecting migrants who enter the country legally.
- On the other hand, especially the employment of the procedural review *stricto sensu* risks reinforcing inequalities between migrants who are deemed to have 'behaved badly' and those considered 'good migrants' and may not sufficiently take into account the presence of *de facto* discriminations. This approach can lead to distorted outcomes in cases where States' investigations into potential *refoulement* of applicants are deemed ineffective. Additionally, it remains uncertain how the Court will handle less straightforward situations.
- ❖ **Do these arguments fully uphold the *non-refoulement* principle? Or does the ECtHR still demonstrate a States-oriented approach when strictly dealing with the access of asylum seekers to national territory?**

**THANK YOU FOR YOUR ATTENTION!**

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