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Protecting Asylum Seekers : Between Geopolitical Realities and the Legal Framework, How to Address the Challenges?

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The author specifies that her presentation does not engage in any way the High Commissioner for Refugees, the National Court of the right of asylum or the Judicial Protection of the youth office with which she works on these topics. This presentation is done independently as researcher.

Introduction

Before developing the analysis, it's important to precise that we are not generalizing when considering asylum. Indeed, when we are talking about a continent, we don't speak about all the countries, when we are talking about a country, we don't speak about all the regions. In the same way, the legislations and the realities are evolutionary and they can change in a better or a worse situation. The data is considered at the given moment, this work has thus no pretention to be absolute guaranteed information, but it is the indicator currently available.

In the following presentation we are not depreciating countries with rich and ancestral cultures, we are not criticizing them either. It is simply a matter of noting that some nationals are fleeing their own country where they have risks that they themselves denounce and identify danger. The treatment of the asylum application is not intended to have a moralistic or moralizing approach, its aim is to assess as objectively as possible the fears for the granting or not of the refugee status. It is therefore important to understand that there is no value judgment or ethnocentrism, although in some cases we may consider that there are universal rights and therefore unacceptable violations of these rights at all times and in any place.

This analysis focuses on the current issues related to the asylum application based exclusively on field facts and without entering in any value judgements. In this regard, the elements to which we refer to come from several objectified and concordant sources that fed this analysis. The references and data used in this study come mainly from the sites that provide documentation in this area, such as Refworld, European country of origin information (Ecoi), the French Office for the Protection of Refugees and Stateless Persons (Ofpra), the Office of the High Commissioner for Refugees (UNHCR) and the National Court of Asylum (CNDA) in particular. These sources are not exhaustive.

Before focusing more specifically on the stakes and the actuality of the question, it is useful to briefly recall the functioning of the asylum application in France.

In the sense of the Convention of 28 July 1951, a refugee is: "a person who is outside the country of which he has the nationality or in which he has established his habitual residence; who has a well-founded fear of persecution because of his or her community affiliation, religion, nationality, membership of a particular social group or political opinion; and who cannot or will not claim the protection of that country or return there because of that fear". The Code of Entry and Residence of Foreigners and Asylum-seekers (CESEDA) is also a reference text for the protection of asylum seekers which provides subsidiary protection and complements the Convention. To simply explain the concrete procedure, when a person seeks asylum in France, this request is examined from two possible angles. On the one hand, the ethnic, political, religious, or social group, allow the granting of conventional protection if fears are proven. On the other hand, the fears expressed suggest that the person is at risk of death or execution, or torture and inhuman and degrading treatment or punishment, or serious and individual threat in the event of internal or international conflict.

In France, the right to asylum is guaranteed by a specific procedure. In the first place, it is the French Office for the Protection of Refugees and Stateless Persons (OFPRA) which is responsible for deciding on the status of refugee. At this stage, either the protection is granted to the asylum seeker, or it is refused, and the asylum seeker (s) : person, couples, families has or have the opportunity to appeal before the national Court for the right of asylum (CNDA).

Then before the CNDA, the case is dismissed by order in the absence of operative reasons in particular in case of insufficient motivation, not sufficiently justified (lack of elements, environmental reasons, medical reasons, professional projects ...), or it is heard in a single-judge hearing, or it is enrolled in a collegiate hearing in which three judges sit (a magistrate, an assessor judge appointed by the High Commission for Refugees, an assessor judge appointed by the council of State). When the case is examined, there is an independent investigation which is carried out by the rapporteur who presents the report in hearing; the applicant is questioned by the judges with regard to his initial narrative, his interview with Ofpra, his appeal and all the elements he wishes to bring to the attention of the Court. He is assisted by an interpreter if necessary and a lawyer who can be appointed to the legal aid. There are special cases that call for developments that will not be covered here in order to remain focused on the subject (eg exclusions, reviews, terminations ...). A deliberation follows, then the decision is read three weeks later. The decision of the Court is based on all the elements of the file and on the current and personal character of the fears.

The Court has jurisdiction and can consider a case over any geographical areas that do not appear on the list of so-called "safe" countries, which is regularly updated. All continents are concerned: Africa, Asia, Latin America, the Middle East and even some European countries. For example, in 2018, files of 86 different nationalities were cases investigated. The case law is very rich and it gets richer every year, so it can not be transcribed exhaustively. We will choose only a few main points to mention here.

PART I: Combining legal basis and international dimension to evaluate the need for protection

To evaluate the need for protection the jurisdiction has to determine if the asylum seeker is concerned by some criteria. To get the refugee status it has to be proved that there is a risk to be persecuted without any possibility to find a protection from the authorities. The asylum seekers can come from all over the world and there are various situations considered both geographically and from juridical prospective.

Eurostat published 2018 asylum data in mid-March: 580 800 first-time asylum seekers applied for international protection in the Member States of the European Union (EU), dropping 11% compared to 2017. France meanwhile records + 20% with 110,485 requests in 2018. France is the second country after Germany having the most demands in Europe. In France, the first three nationalities of first-time applicants in 2018 were Afghanistan (9%), Albania (7%) and Georgia (6%). Contrary to what is often thought, Europe hosts a much lower number of refugees than Africa because for example South-North transfers are less important than South-South movements within the African continent, due to the fact that exile is very expensive, complex and dangerous. In France, the asylum application remains substantial and the conditions of analysis and treatment are rigorous. I will focus on the appeal procedure that I know best and which is more decisive because we are in the recourse phase.

- *The search for objectification as a condition for a fair examination of the situation*

In order to allow an asylum claim to be objectively adjudicated and to be assessed as accurately as possible, it requires a thorough examination of all the elements of the case file in an exhaustive manner, as the rapporteurs do. The fact that hearings are public is also an element of transparency, as is the publication of the decision. On the other hand, specific situations of confidentiality or intimate stories may be the subject of closed session to respect the fragility and vulnerability of the asylum seeker. Impartiality is further guaranteed by the collegiate dimension of deliberation since the decision is made by crossing the eyes and opinions of the three judges. In case of uncertainty if elements are not clear enough or if time is needed for reflection or additional documentation, extension of deliberation may occur. In addition, applicants have the right to legal aid assistance. If they cannot afford to pay for it in their personal capacity, they must then submit an application to that effect within a certain period of time and they may solicit an interpreter in his native language or dialect. Despite the sometimes difficult conditions of treatment of the demand due to the increasing number of applications - such as time constraints and the complexity of the procedures - all the actors involved in the asylum application try to maintain rigor and coherence in a register that is human and therefore requires special attention. Study is to be done, case by case, because even if situations seem similar, they are different. The common factor to all requests, to which one never gets used to, is the suffering, the chaotic course and the fear of a return in the country of origin; in all the cases one needs a lot of benevolence.

- *<u>Examination of the present and personal nature of the fears for an individualized evaluation</u>*

On one hand, with regard to the current nature of the fears, it is important to be informed of the geopolitical, cultural and legal realities of the country in order to evaluate the demand in an appropriate way. In addition to the fact that judges are chosen and appointed because of their complementary knowledge and skills, relevant and concordant documentary resources are compiled and made available to the professionals of the Court. The Court also has a dedicated legal and geopolitical research centre (CEREDOC) attached to it that specializes in these matters. Regularly missions are carried out in the field, in the countries concerned, to be closer to realities and to collect information at source, in connection with OFPRA and sometimes with non-governmental organizations. The Court closely monitors the developments in the countries, for example a political or legal change in a repressive sense, the emergence of a conflict or a crisis, or on the contrary the lulls, the return to normal and the evolutions favourable to the citizens' rights. This allows them to understand the context and make an informed judgment. On the other hand, as far as the personal aspect is concerned, it relies heavily on the bundle of evidence from the documents in the file: the initial narrative written by the person concerned or an association, the transcript of the interview before OFPRA, the recourse usually made by agency assistants' assistance to asylum seekers or by lawyers, these are the common rooms. Added to this evidence, there are personal items such as identity documents, certificates of relatives or associations, photographs, videos, extracts from websites or articles referring to the applicant, administrative documents (land register in case of land conflict, professional documents ...) , medical documents attesting the physical and / or mental ill effects of the alleged persecutions, the state of the military service, judicial documents during abusive prosecution and cases (arrest warrant, convictions, notices of research ...) and any other element that the person (s) wishes to communicate in his file or orally in court. Fears must be serious (intensity and / or recurrence), threats or persecutions suffered or fears, but insults for example are not sufficient. It is also necessary that the person cannot rely on the protection of the authorities, if they are complicit or indifferent to the particular situation for instance.

- *<u>Defining the type of protection to be granted depending on the type of persecution</u>*

To illustrate the two types of protection, it seems useful to give some illustrations to understand the main issues, even if we will not be able to make a complete list.

- Conventional protection:

Conventional protection covers five categories of persecution. The first corresponds to political opinions. This is a commitment that may be at the root of a fear of persecution. The case law also accepts the concept of imputed political opinion when a person who has not expressed any political opinion is nevertheless considered by the authorities of his country as a political opponent. One example is the case of Bangladesh where opponents of the Bangladesh Nationalist Party clash with supporters of the Awami League. There is also the conflict between the Liberation Tigers of Tamil Eelam (LTTE) and Sinhalese. The second coincides with the notion of race used in the text of the Geneva Convention but which must be understood in a broader sense. It refers to a group characterized by a language, an origin, a culture, a specific ethnic group. Fears experienced as a result of a mixed marriage between two people of different ethnicities may for example be taken into account for this reason. For example, enslaved Moors in Mauritania or Kurds from Turkey, Iran or Iraq committed to the cause of their community. The third covers the concept of religion and is understood broadly, including the freedom to choose one's religion and to exercise it freely. Fears experienced because of atheism are also covered by this notion. There are Christians in Egypt or in some Asian countries, Sunni Muslims in Syria and Uighur Muslims in China, but all religions are concerned around the world. The fourth category is that of nationality. This motive is understood in a broad sense also. It covers the notion of legal citizenship, but also the notion of ethnic and linguistic group, understood as a national minority or as a people without a recognized state structure, for example the Roma, Palestinians or Nepalis of Bhutan. Finally, the notion of belonging to a certain social group that does not have a precise definition in the convention corresponds to a group whose members share a common characteristic, identity or history that cannot be changed. It is an objective social fact, but which gives rise to discrimination and persecution because of the way the surrounding society or institutions look at these people, such as homosexuals in Guinea or Cameroon or albinos in Mali.

- Subsidiary protection:

Subsidiary protection occurs in three types of situations. The first case is where the person faces the death penalty or execution such as homosexuals in Arabia, Emirates and Yemen for instance. The second most common case is the risk of torture or inhuman or degrading treatment or punishment. This is the protection that applies in the context of intra-family land conflicts in Africa, the application of *kanun* in Eastern Europe, particularly in Albania, people fleeing a sect or a brotherhood and any unconventional persecution involving physical integrity various cases exist. Finally, subsidiary protection also applies in the case of a civilian, a serious and individual threat to his life or person because of violence that may extend to persons regardless of their personal situation and resulting in a situation of internal or international armed conflict. The most recent example is Syria, which will be discussed further.

These different dimensions cover all situations of persecution. We can both feel useful through the opportunity to protect persecuted people and at the same time regret that we have to do it. But other challenges must also be addressed.

PART 2: New challenges to address building appropriate jurisprudence and implementing the new law

The new law of the 10th of September 2018 named “For a controlled immigration, an effective right to asylum and a successful integration” has brought some changes. There are three main objectives: to reduce the period of instruction, strengthen the control of illegal immigration and improve the welcoming of foreigners admitted for a stay linked to their competencies and talents. It will be interesting to enter into some explanations regarding the way this law brings new answers and challenges as well as the last major jurisprudences.

- *<u>The challenge of video hearing</u>*

Without pronouncing an opinion or a judgment of value, we can look into this new provision of the law, which has both advantages and disadvantages. It should be known that the asylum application is centralized and that it is done in the Paris region for the OFPRA phase in Fontenay-sous-Bois and for the CNDA phase in Montreuil-sous-Bois. Applicants converge from all over France when they are summoned (unless they decide not to come). Mobile hearing already happened when people are far away in Guyana or Mayotte for example but it costs a lot to organise it. In that context, video hearing also happened. But the fact that these video hearings are now in metropolitan France on the national territory in Lyon and Nancy is new and raises difficulties. It is defended by the Court for reasons of lower costs for the applicant who does not need to finance his travel and the fluidity of the processing of the application, but rejected by lawyers who speak of dehumanization, consultation problems of original documents and technical problems and also because they have probably little interest in letting their colleagues of the province get their potential clients. This subject remains a subject of tension but there is no definite position possible because of the strengths and constraints with and without this system.

- *<u>The search for appropriate delays and treatment modalities</u>*

The new law aims to reduce the waiting time for the asylum application to an average of six months. Foreigners arriving in France will have 90 days from their arrival to apply for asylum, instead of 120 previously. The original text provided that the deadline for appealing to the National Asylum Court for asylum seekers after a refusal by the French Office for the Protection of Refugees and Stateless Persons be reduced to fifteen days. Parliament finally kept the one month deadline. Thus, a balance is maintained between the applicants' entitlement for a sufficient period of time to introduce the application and an instruction sufficiently rapid to enable them not to remain unnecessarily in waiting.

The recrudescence of the requests called for new means. In 2018, the number of cases before the Court increased and is more and more increasing every year (despite the cancelling of many hearings last year for various reasons). Nevertheless, the professionals of the court managed to reduce the time of the procedure around four months instead of 7 months in average.

New resources are available to meet the increasing needs, namely more than hundred additional assessor judges, dozens of permanent judges, around fifty new rapporteurs on several recruitment sessions, many new secretaries of hearing, five new courtrooms among other means to stay up to the challenges.

- *Emergence of new situations and adaptation to vulnerability:*

From the legal point of view, the transposition of the European procedure directive of 2013 in France with the law of 29 July 2015 already provided for special examination procedures before the OFPRA for potential victims of trafficking in human beings, namely an adapted length of procedure (rather rapid or rather lengthy depending on the needs and "needs-expressed" by the applicants concerned), the consideration of vulnerability on objective criteria (including age, sex, ...) and subjective (for example related ill effects due to the escape route), the possibility of choosing the sex of the interpreter and protection officer (if needed and if it is the request of the asylum seeker, for example asking to be heard by a woman if the person is a woman who has suffered sexual violence), the creation of groups since 2013, as unaccompanied minors, trafficking in human beings, torture, sexual abuse or violence against women.

The new law also provides enhanced protection for girls who are at risk of female genital mutilations (FGM) and contains protective provisions for victims of domestic violence.

In recent times there have been several requests from Nigeria for women who are trapped by prostitution networks, who are promised work in Europe, who are threatened by voodoo and juju ceremonies and are victims of human trafficking.

The Syrian conflict has also generated Syrian exiles; victims were heard in Turkey, mostly protected at OFPRA on the basis of subsidiary protection because of armed conflict, but they are also now seeking greater protection from the CNDA because of insubordination and the risk of forced recruitment in the army.

Those cases are more and more known, the victims are better accompanied and people working in the field of asylum are better informed and trained.

Conclusion

Recently, situations have emerged and there are constantly different new cases that appear. It is necessary to re-examine the way in which situations are handled, to harmonize case law and to change the law and the treatment of situations if necessary, keeping both the rigor and the seriousness, but also, and most importantly the humanity essential to a fair assessment of the situation with empathy, openness and fairness. Even if a system can always be improved we can say that the French system of asylum aims at protecting in the best way, keeping in mind the necessary understanding of the situation, the required empathy with the applicant and the essential care in the processing of the request. Asylum is the right claimed by the victims and our obligation to consider. I do believe that benevolence is not only possible in an asylum Court but even indispensable.

Author's biography *: Soraya Mehdaoui has four Master degrees in philosophy, law, political sciences and social work. She is a PHD candidate working on international law at the University of Paris. She is currently judge at the National Court for Asylum in France and she was previously Rapporteur for three years in this Court dealing with refugees issues. She is also international officer at the Ministry of Justice at the legislation and legal affairs Department. Her field of interest and work is mainly focused on human rights, international law, asylum, restorative justice, juvenile justice, human trafficking and the international criminal court.*