A matter of value Exploring what underlies adjudication in the French Court of Asylum

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Abstract
In this paper, I examine the decision-making process in the French Court of Asylum, which reviews appeals about decisions of the French Office for the Protection of Refugees and Stateless Persons, granting or refusing refugee status. I consider the relationship between the substantial refusals of the claims and the adjudicators' conception of what asylum is. Drawing on data collected between 2009 and 2011 over 14 months of ethnographic fieldwork at the Court, I argue that refugee status is imagined as an ideal and that it is therefore very difficult to consider real claimants worthy of it.

Keywords: Decision-making process, asylum courtroom, suspicion, values, ethnography.

Introduction

After the signature of the Geneva Convention of 1951, which provided a formal definition of a refugee as a person who is outside his or her country and has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"[1], two institutions were created in France to deal with this population: the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and the Appeal Commission for Refugees, which in 2007 became the French Court of Asylum (*Cour nationale du droit d'asile*). The OFPRA spent the first few years both organizing the asylum system and managing the large influx of European refugees, while the Appeal Commission was a very small institution whose major concern was to build a coherent jurisprudential corpus. In 1971, France ratified the 1967 New York Protocol that removed the geographical and temporal restrictions of the legal definition, opening the possibility for hosting refugees from all over the world.

When in July 1974 the French government decided to suspend labour migration, applicants for refugee status continued to be admitted to the territory. Since then the OFPRA's acceptance rate has dropped dramatically. Forty years ago most of the foreigners applying for asylum would be granted refugee status; today most of the candidates will be rejected. At the same time,

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[1] At the time of the ratification of the Convention relating to the Status of Refugees, two versions of the definition were available whereby each State could choose between either a definition limited to events that took place in Europe before January 1st 1951, or an expanded definition that included events and persons "in Europe or elsewhere."

there was an important growth in the number of applications.[2] This increase is often interpreted as derived from being an indirect means of obtaining a residence permit. However, until the suspension of labour immigration, as Spire (2004) has shown, it was easier and faster to get a work permit than refugee status so many potential candidates for protection under the Convention did not claim asylum as they already had legal residence in France.

Today a large majority of applicants are refused protection under the Geneva Convention or the Subsidiary protection[3] by the OFPRA and by the appeal Court, whose structure and size have been developed. In 2011, the OFPRA acceptance rate was 11%, and the Court's 17.7%.[4] Issues of asylum, and more generally those concerning migration, have become highly politically contested in France and elsewhere in Europe. Public discourse associates asylum seekers with "bogus refugees" who come not for political reasons but for purely economic motives. Although many scholars have argued that the distinction between political and economic causes of exile is difficult to sustain (Castle and Miller 2009; Schuster 2003; Zolberg 1983), this interpretation appears in most political discourse (Kobelinsky 2012). Contemporary representations and practices regarding asylum are undermined by suspicion (Daniel and Knudsen 1995, Bohmer and Shuman 2008, D'Halluin 2012, Valluy 2009).

In this article, I examine the decision-making process in the French Court of Asylum, which reviews appeals about the decisions of the OFPRA, granting or refusing refugee status and subsidiary protection. I consider the relationship between the substantial refusals of the claims and the adjudicators' conception of what asylum is. I argue that refugee status is imagined as an ideal and that it is therefore very difficult to consider real claimants worthy of it. The analysis draws on data collected between 2009 and 2011 over 14 months of ethnographic fieldwork at the Court. Most of the material was collected from the observation of public hearings, of *in camera* deliberations (when judges allowed me to attend the meeting taking place behind closed doors), of the everyday activities of rapporteurs in charge of examining the appeals in-depth before the hearings, and from interviews and conversations with the different agents of the Court.

[2] As an illustration, in 1974 the OFPRA received 2 188 claims and its acceptance rate was 90%. In 1994, there were 25, 964 new asylum claims and the OFPRA granted protection to 23.6%. Ten years later, the number of new claims was 50, 547 and the OFPRA acceptance rate was 9% (see Fassin and Kobelinsky 2012).

[3] The Geneva Convention was incorporated into domestic law in 1952 and the 2003 Reform (the Immigration Law of December 10, 2003) introduced subsidiary protection as a protection regime which can be granted – by the OFPRA and the Court – to those who are subject to serious threats in their country. More precarious than conventional asylum, subsidiary protection requires an annually renewable residency permit.

[4] This year, the OFPRA received 40, 464 new asylum claims (OFPRA 2011) and the Court made 34, 595 rulings (CNDA 2011).

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The screening process

Once on French territory, asylum applicants must go to the *Préfecture* in order to start the procedure[5]. If his or her fingerprints are not registered in another EU country, the asylum seeker has to fill in an application form and send it to the OFPRA for evaluation. After a personal interview with the applicant, with the assistance of an interpreter, the decision is notified in writing. Applicants can challenge negative outcomes.

The remedy body is the French Court of Asylum, the national administrative jurisdiction located in the city of Montreuil, near Paris, where I conducted my study. Decision-making in this Court nowadays involves three moments or steps. First, when an appeal is recorded by the registry and the case file is requested from the OFPRA, the Court first of all evaluates whether or not it is admissible. The Court can give a direct ruling to reject certain cases due to foreclosure (i.e. when the deadline for appeal has expired). Since 2004, it can also reject cases after an initial evaluation of the well-founded nature of the claim (i.e. when applications for re-examination[6] do not present any new facts). In 2011, 22% of the cases were rejected after this initial examination. The remaining 78% of the cases continued along the path to further evaluation (CNDA 2011).

The next step implies an in-depth examination of the case carried out by a rapporteur, who works for the Court either under contract or as a civil servant after obtaining a *concours de la function publique*. After the study of the narrative (i.e. the story of persecution generally co-constructed by the applicant and legal representatives or advocates), of the synopsis of the interview the claimant had at the OFPRA, and of other documents provided to support the story, the rapporteur has to give a recommendation to the judges. Either he or she thinks protection should be granted or, on the contrary, that the appeal should be dismissed. Sometimes the rapporteur may reserve his or her judgment and does not provide any clear recommendation.

Despite sociological differences between rapporteurs – in terms of values, principles and political ideas – the outcome of their examinations (i.e. the recommendation) differs little. They all advise refusing asylum status on frequent basis.[7] How is it that rapporteurs who have a background connected with different forms of advocacy in the field of aliens' rights end up contributing to the decision-making process in the same way as other more detached and un-

[5] If the *Préfecture* decides to grant a temporary residence permit, applicants are channelled into the regular asylum procedure. If no residence permit is granted, applicants are channelled into a fast-track determination process which does not give them access to reception conditions and financial allowances while their claim is pending. If applicants arrive at the border in an airport and lack the required documents, they are likely to be held in a waiting zone where they can apply for asylum. Undocumented migrants arrested in the territory and confined in detention centres can also apply for asylum in these facilities. In both cases, the procedure is accelerated.

[6] The re-examination corresponds to the fresh claim in the British Asylum Process.

[7] In a corpus of 400 cases observed in this study, there were only 16 recommendations of granting a protection by rapporteurs.

engaged rapporteurs? A female rapporteur with an NGO background, who had been working at the Court for three years, told me that: "At the beginning I said , Cool, I will advise the judges to grant asylum status to everybody. But then you realize it is not possible. It's not fair. Now I almost always agree with adjudication." In the same vein, another rapporteur with the same background, who had been working at the Court since 2006, told me during an informal conversation that the most important difference between her former job in an NGO and her present work at the Court was that "compared to the NGO, here it is...., how can I put it, more fair, or, well, not fair but more objective."

For rapporteurs, fairness derives from particular technicalities which are part of the "professional ethos" (Zarca 2011), that is, the set of dispositions they have learnt since their arrival in the Court and through experience. Indeed, rapporteurs assess a number of elements in order to determine what most of them call the "truth" of the cases: the internal coherence or "logic" of the story; its plausibility regarding its more general political context; or the evidence provided such as official documents, pictures, newspaper articles, or testimonies (see D'Halluin 2012; Good 2007). These elements constitute concrete technical details that create detachment and distance from the narrative, giving the aura of objectivity referred to by the rapporteur mentioned above. These technicalities thus lay claim to eroding the subjective elements taken into consideration by rapporteurs, both socially and individually constructed, that are involved in adjudication.

After the study by the rapporteur – whatever the recommendation is –, a board of three judges examines the case during a public hearing in which they confront the applicant, who can be provided with an interpreter on oath, and with the advice of a legal representative. The board of judges is composed of three members: a chair who is usually a magistrate from civil or criminal justice[8], an assessor who is either a law scholar or a former officer of the United Nations High Commissioner for Refugees (UNHCR) in the field[9], and another assessor who is usually a mid-level bureaucrat, a former ambassador or teacher[10]. The judges making up the board are very often on temporary con-

[8] The chair is appointed by the vice-president of the *Conseil d'Etat* (the highest administrative court) from the sitting or honorary members of the *Conseil d'Etat* or the bodies of the Administrative Tribunals and Administrative Courts of Appeal, or by the first president of the *Cour des comptes* (Revenue Court) from the sitting or honorary magistrates of the *Cour des comptes* and *Chambres régionales des comptes* (Regional Revenue Chambers), or appointed by the *garde des Sceaux* (Minister of Justice), from amongst the sitting magistrates and the honorary magistrates of the judiciary.

[9] A "qualified individual" of French nationality, appointed by the UNHCR upon agreement from the vice-president of the *Conseil d'Etat*. The expression "qualified individual" (*personne qualifiée*) appears as such in the official documents and is never clearly defined, but the agents consider that this means someone who, as a rapporteur explained to me, has "a serious career path, a substantial CV".

[10] This is a "qualified individual" appointed by the vice-president of the *Conseil d'Etat* upon the suggestion of one of the ministers represented on the governing board of the OFPRA.

tracts. This is the case not only for all the assessors but also for the majority of chairs, despite the fact that, since 2009, 12 permanent magistrates from administrative and legal jurisdictions have been posted to these functions on a full-time basis.

During the hearing, the rapporteur summarizes the facts cited by the claimant and the decision made by the OFPRA, presents the supporting documents and suggests a solution. The board of judges then listens to the claimant's legal representative. As in any other legal proceeding, the asylum courtroom is a ritualized space where everyone takes on a role and pursues an objective, and where body language and discourse are crucial. The claimant's "bodily hexis" (Bourdieu 1977), including his or her language skills, the documents provided (objects, pictures, etc.), and the legal fundamentals of the case, are all elements that are going to be articulated in a particular way during the hearing. Sometimes it just takes a look, a gesture or a phrase that causes a reaction and eventually convinces the judges that the claim is well-founded, or not. For example, after the hearing of an applicant from Darfur who claimed he had been arrested and abused by Sudanese government forces assisted by Janjaweed militiamen, and that his entire family had been murdered, a judge expressed her emotion and commented that the claimant's tears while explaining his life in detention persuaded her of the truthfulness of this story.

Decisions are then made during *in camera* deliberations after the hearing, which normally do not take more than 30 minutes for the whole set of cases (between 6 and 13). The rulings are posted three weeks later in the entrance hall of the Court. The Court either overturns the OFPRA decision and grants a protection or upholds the negative evaluation and the dismissed person is asked to leave France within 30 days. In the case of rejection, the dismissed person has one final opportunity to request that the case be re-opened. This procedure entails applying to the *Préfecture*, which evaluates the existence of new evidence. In this case, the OFPRA provides a certificate for re-examination and the *Préfecture* has to extend the residency permit. The case then passes via the OFPRA and finally back to the Court, where the claimant is given a new public hearing. If this is not successful, the rejection of the application is final. The foreigner then has 30 days in which to leave the country before the *Préfecture* issues an "Obligation to leave France", which, after the 30 days, is a binding measure of removal and can be enforced.[11]

Asylum as a true value

Most of the time judicial processes entail attempts at the discovery, construction or determination of the "truth". Many formal procedures and informal practices are displayed in the courtroom to emphasize "the requirement of honesty" (Barnes 1994: 37). Truth is, in this legal context, what is related to

[11] The decisions of the Court can be appealed before the *Conseil d'Etat* on matters of procedure or law.

evidence. In the asylum sphere, evidence other than the claimant's narrative are, by definition, very difficult to obtain (D'Halluin 2012). Judges and rapporteurs – most of whom have studied law – have to face a contradiction between what they learnt during their training in law school – truth being related to material evidence – and the reality of asylum law, which escapes this principle. If granting asylum relies only on the narrative of the applicant, then judges have to evaluate whether it is trustworthy. "Do you believe it?" is the question that the chair of the board often puts to the other judges during the deliberation. It is also the question that rapporteurs ask themselves after reading a case. All my interlocutors agree that the rulings ultimately rely on the inner conviction (*intime conviction*)[12] of adjudicators, pointing out the "subjective" elements of decision-making.

Rapporteurs and judges implement a set of techniques and practices to reach the truth of the applications and form an opinion on every case. By the way they work rapporteurs seem to have a particular vision of what a true account is. It is a chronological narrative, relatively precise and detailed, in accordance with known facts about the political context of the country or region the claimant comes from; a story in which the different versions (the first written narrative, the interview at the OFPRA and the written narrative in the appeal) are similar and present no contradictions; a story that is supported by official documents, medical certificates or news articles. A successful asylum narrative cannot have any "plot hole" (Coutin 2001: 84). Errors in the dates of the events narrated or a confused account about the people involved in the events mentioned are seen as indicators of insincerity or deception. Such disjunctures lead rapporteurs to question "the truthfulness of the statements" and to consider that most narratives are "not credible." Judges also rely on this conception of the true claim as their judgment is partly based on the work of the rapporteur – who is most of the time the only person who has read and reviewed the entire case. But judges give great importance to the encounter with the applicant as they compare the file to the impression they have of the person they are listening to and see before them. For judges, a true story is told in a precise and fluid way; it is also the one that does not leave them indifferent when face-to-face with the claimant.

Adjudication is, then, based on these conceptions of whether a narrative is true. But it is also based on the adjudicators' conception of asylum. For all the agents working at the Court I was able to speak with, whether they are benevolent or harsh in their practices, or left or right in their political views, asylum is to preserve. A judge told me once, during a conversation "We have to guarantee this possibility of receiving persons who cannot live in peace in their countries because they have chosen a different way of life or because they follow a different ideology. It is our duty to preserve this right". Another

[12] This concept does not appear in any asylum law. It comes rather from the *Code de procédure pénale* where it refers to the unique standard (never clearly defined) for ascertaining judicial truth. In common law contexts, it would take the form of the (three basic) standards of proof.

magistrate affirmed, in the same vein, "People make up stories and we have to find what is closest to reality to help those who really need it" and then added "We have to help those who have been persecuted and we also have to preserve the Geneva Convention." The two judges employed almost the same words to reflect both their willingness to help the needy and to preserve the institution of asylum. This is what appears in the words of a rapporteur who argued in an interview, "We have a long tradition in France of protecting the persecuted; it is a something important and our job is to contribute to that tradition."

The emphasis on this dimension of the protective activity of the Court is often put forward when discussing with judges and rapporteurs how they understand their work. It often appears through their mention of a history and tradition of refugee protection that they must continue. A chair judge told me at the end of a session where no cases had been cancelled "We cannot violate the principles of asylum; we cannot grant the status to anyone; we must respect these principles that come from the aftermath of war."

Asylum emerges, in all cases, as an institution with a powerful moral content and value to defend. The "fake narrative", purchased or made up, almost appears as immoral, as it is the opposite of the foundations of asylum. There would then be a truth of asylum, defended by all the agents working at the Court (and probably beyond). The high distrust towards applicants in the courtroom is not simply an echo of the general suspicion at the national and European levels. It should also be related to the practical difficulty for legal scholars to assess the "truth" exclusively from oral statements as well as the idealization of asylum. Conceived as an aestheticized entity, it becomes more and more difficult to establish correspondences between the real narratives, the real people and the abstract institution.

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