

Using multi-member panels to tackle RSD complexities

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Research across a range of European jurisdictions suggests that the use of multi-member judicial panels at appeal stage improves the quality and fairness of RSD.

Appeals against negative refugee status determination (RSD) decisions are an essential component of fair asylum procedures and provide crucial oversight of the quality and accuracy of initial decisions. And yet, a worrying trend among signatories of the 1951 Refugee Convention sees States grappling with how to make appeals as quick and cheap as possible. One key tactic has been the reform and re-configuration of appeal bodies, notably in relation to the identity and number of participating judges.

Our findings, based on observational and interview data from the ASYFAIR Project,¹ indicate that appellants, their legal representatives and judges appreciate

multi-lateral teamwork in this complex area of law – an area which a) often depends on credibility assessment, b) is dependent on high levels of discretion and c) is infiltrated by cultures of denial and disbelief. While many States are retreating to single-judge procedures as a way of cutting costs and achieving efficiency, collaborative elements help promote accurate, high-quality decision-making, and future policy should reflect this.

A mediating effect

Democratic legal systems around the world recognise that matters of great importance should be deliberated and decided by a panel of adjudicators, rather than by a single judge.

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The ‘higher up’ a legal system you go, and the greater the significance of the legal issue, the greater the number of judges that are usually assigned to the case. In asylum appeals, the stakes are such that only the highest degree of fair and just decision-making will suffice. Yet when it comes to the construction and composition of asylum appeal adjudicatory structures we observe a troubling shift towards streamlining. This reduces what we see as necessary checks on the high levels of discretion involved in credibility assessment and the determination of asylum claims.

Quantitative academic studies have consistently demonstrated that some judges are much less likely than the majority to grant refugee protection.² Our own qualitative work, furthermore, has revealed judges’ occasional lack of knowledge and vicarious traumatisation, as well as instances of poor professional practice during appeals, including shouting, sneering and laughing at appellants, not paying attention to them, and not giving them an opportunity to share their evidence. In these situations, the involvement of other judges can have an indispensable mediating effect.

Three of the European asylum jurisdictions studied by ASYFAIR – France, Greece and Italy – currently regularly use some form of judicial panel at the first appeal stage. In **France**, at the National Asylum Court, under the ‘regular procedure’ a legally qualified President sits alongside two Assessors, one nominated by the Vice-President of the highest French Administrative Court (Conseil d’Etat) and the other (often an academic with legal or geopolitical expertise) nominated by UNHCR. Until 2015, all first-instance hearings were heard by a panel. Reforms introduced in 2015 now mean that of those appeals that progress to oral hearing, only around two thirds are heard by a panel, with those appeals which are deemed to be less well-founded (via a triage process which is itself problematic) being funnelled into an accelerated single-judge procedure. In a June 2020 decision, the Conseil d’Etat recognised the procedural significance of judicial panels in providing a higher level of justice, and suspended a

measure (taken purportedly as a response to COVID-19) that would have meant that all appeals heard by the National Asylum Court would take place using the accelerated single-judge procedure. This decision by the Conseil d’Etat confirmed that derogation from hearings by judicial panels must be the exception, rather than the norm.

Our fieldwork exploring judicial panels in France showed that judges followed up on each other’s lines of questioning where they saw gaps, or where something was not sufficiently clear. Judges with different specialisms often complemented each other, and applied different perspectives and approaches in dealing with claims through their interactions during hearings.

In **Greece**, Appeals Committees are now formed of two administrative judges plus one independent member who has experience in the field of international protection, human rights or international law and is appointed by UNHCR or by the National Commissioner for Human Rights. Our interview data suggests the independent member (who may also be a social scientist) uses their experience to sensitise the other judges, who, in the words of one respondent, as administrative law judges “don’t necessarily know about asylum”. One of our Greek interviewees (a former independent Appeals Committee member) explained how this interdisciplinary approach had helped, noting that social scientists could offer insights, especially relating to credibility assessments, and that their more flexible view could bring in cultural dimensions that someone with only legal training may lack.

Data from **Italy** further corroborated the view that collegiality provided some level of safeguard in a jurisdiction where facts and law are often open to interpretation in many different ways. Judges told us that they valued the opportunity to discuss and debate with other judges and that panels provide a safeguard against gaps in knowledge or individual preferences.

Avoiding politicisation

Experiences in both Greece and Italy show how vulnerable panels are to politicisation.

In Greece, prior to 2016 the three-member Appeals Committees comprised two independent members and one government-appointed official. In response to Appeals Committee decisions stating that Turkey was not a safe third country (contradicting the presumption that underpins the EU–Turkey agreement), the Greek parliament reformed the Committees, reducing the number of independent human rights experts.³ One such expert and research respondent characterised this as “a serious blow to the independence of the Committee”. Following this reform, in the second half of 2016 success rates on appeal in Greece fell from a rate of 15.9% in the previous year to just over 1%.⁴

In Italy, judicial panels were introduced to the asylum appeal process in 2017. Appellants are still heard by a single judge but decisions are now taken by a panel of three professional judges. What might be considered at first impression to be an improvement on single judge procedures, however, actually came at a cost, as this was part of a controversial reform intended to speed up asylum procedures and increase deportations. The reform also abolished a second level of appeal, and established that in-person hearings are no longer the rule.⁵

Making panels work effectively

Various practical concerns also need to be considered in order to make panels work effectively. First, Italian judges observed that deliberation through panels took longer than working on their own, implying that the panels need to be properly resourced. In general, panels can only work if sufficient judicial time can be set aside. This is a question of resources and, ultimately, of the political will to safely meet international obligations.

Second, panels are likely to work best when they are set within a dynamic professional culture of exchange and openness. Without this, there is a possibility that – paradoxically – panels may actually contribute to homogenisation and the continuation of less desirable decision-making cultures. What is more, at smaller or more remote hearing centres with a smaller overall

pool of judges, there is limited opportunity for in-person judicial panels. Roving judges or rotating panels could offer solutions or, even if it proves impossible to include multiple judges at the hearing itself, it may be beneficial to develop judges’ consciousness of how other judges reason, by encouraging group work during training activities.

Third, close attention should be paid to how communication is conducted between a panel’s members, and between the members and the appellant. Appearing before a panel can dilute the personal interactions between adjudicators and appellants. The appellant may only spend a couple of minutes interacting with each judge, and questioning may seem disjointed or contradictory. There is also a temptation for the members of the panel to talk to each other, often in a language not spoken by the appellant, leaving them feeling excluded or unsure what was discussed. Issuing clear guidance to panel judges about how to communicate with each other and with the appellant would limit these practices.

Evidence suggests that asylum appeals improve quality, accuracy and fairness of decisions when multiple voices are heard in the deliberations. Judicial panels provide one formal method for ensuring this, but there are other opportunities for diverse perspectives to play a part. For instance, independent rapporteurs can assist judges to distil facts and apply law. Ongoing professional training, peer observation and feedback, and opportunities for exchange through national and international judicial networks can also go some way towards moderating the risks of single-judge decision making. We should also not overlook the significance of informal meetings and discussions between judges. Larger hearing centres and centres with facilities like libraries and other common spaces can help to nurture this sort of interaction, as can a culture of breaking for lunch.

These measures require considerable thought. However, bearing in mind the high stakes involved in RSD, the evidence of variability in outcomes, and both the complexity and discretionary burden that refugee law often places on judges,

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working in panels can help to safeguard justice and, ultimately, save lives.

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2. See for example Rehaag S (2012) 'Judicial review of refugee determinations: The luck of the draw', *Queen's Law Journal*, 38, 1; Ramji-Nogales J, Schoenholtz A I and Schrag P G (2007) 'Refugee roulette: Disparities in asylum adjudication', *Stanford Law Review*, 60, 295.

3. 'Greece: Appeal rules amended after rebuttal of Turkey's safety', Asylum Information Database, 16 June 2016
bit.ly/AIDA-Greece-160616

4. Greek Council for Refugees 'Regular Procedure: Greece'
bit.ly/Greece-RegularProcedure

5. Decree Law 13/2017 converted into law by Law 46/2017 does, however, set out a list of cases in which in-person hearings are mandatory.

