forum internationale wissenschaft bonn
ZiF Zentrum für interdisziplinäre Forschung
Center for Interdisciplinary Research
Universität Bielefeld
ReligionundPolitik
EXZELLENZCLUSTER | WWU MÜNSTER




Proceedings of the 2018 ZiF Workshop

Studying Migration Policies at the Interface between Empirical Research and Normative Analysis

Matthias Hoesch & Lena Laube (eds.)

Veit Bader

Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of *Entscheider* in the Asylum Procedure

Photos:
Diliff, Wikimedia Commons (CC BY-SA 3.0) | Ggia, Wikimedia Commons (CC BY-SA 4.0)
Mattes, Wikimedia Commons (public domain) | An-d, Wikimedia Commons (CC BY-SA 3.0)
Herzi Pinki, Wikimedia Commons (CC BY-SA 4.0)

Veit Bader
Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of *Entscheider* in the Asylum Procedure
DOI: 10.17879/95189427161

This text is based on a talk at the workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis", held at ZiF Bielefeld, 2018 September 10-12.

The workshop as well as the publication of the proceedings were kindly supported by the Center for Interdisciplinary Research Bielefeld (ZiF), the Cluster of Excellence "Religion and Politics" Münster, and the Forum Internationale Wissenschaft Bonn (FIW Bonn).

Recommended citation: Bader, Veit 2019: "Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of Entscheider in the Asylum." In *Proceedings of the 2018 ZiF Workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis"*, ed. Matthias Hoesch and Lena Laube, ULB Münster (miami.uni-muenster.de), 157–160. doi: 10.17879/95189427161

Comment on Nicolas Kleinschmidt & Jessica Krüger: The Role of *Entscheider* in the Asylum Procedure

Veit Bader[1]

Department of Humanities, University of Amsterdam

Abstract

This paper comments on a talk given by Nicolas Kleinschmidt and Jessica Krüger at the 2018 ZiF Workshop "Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis", September 2018, in Bielefeld. Kleinschmidt and Krüger's paper is available under doi: 10.17879/95189429199.

Keywords

Entscheider; Ethics of Entscheider; empiricism; German Asylum Procedure; law

DOI

10.17879/95189427161

Kleinschmidt and Krüger's paper gives an excellent overview of the historical development of the "*Entscheider's"* role in the German asylum application system and provides an ethical analysis of the three most debatable characteristics regarding their role. My brief comments raise two more general issues from a philosophical and sociological perspective that are relevant for Kleinschmidt and Krüger's discussion of the role of the *Entscheider* before addressing the authors' provisional answers to the questions of whether *Entscheider* should be subjected to directives, decide single-handedly and also conduct the hearing of asylum seekers.

[1] Email: V.M.Bader@uva.nl.

1. With regard to the "ethical analysis" (p. 149), the framework is, in my view, under-developed and under-argued. Firstly, the *normatively relevant reasons* do not only include the "moral point of view" (p. 149) or '*moral oughts*' (we should do what universalist moral principles require) and "*consequentialist*" (p. 150) *ones* – including '*prudentialist oughts*' (whatever we do we should do it 'efficiently' or least costly) – but, in addition and distinct from prudential ones, '*realist oughts'* ('feasibility' or 'effectiveness' versus 'justice be even if the heavens fall' telling us not what to do but what we should not do) and also '*ethical oughts'* (we should do what 'values' and cultural practices require). These four normative reasons do not work in harmony but are often in serious tension with each other. They have to be clearly distinguished and the tensions have to be taken seriously (see Bader/Engelen 2003: 379–382). Instead, we find in the paper by Krüger and Kleinschmidt phrases in which 'consequentialist' prudential arguments seem to simply overrule other ones: e.g. "higher resource expenses" (p. 152) seem decisive and "a threat of wasting private and state resources, that is hard to be morally legitimized" (p. 152) not only ceteris paribus, but in any case.
Secondly, it looks as if there would be two and *only two "meta-ethical approaches*" and that we would have to choose between an "idealistic" one and a "pragmatic" (p. 149) or "consequentialist" one. This picture is drastically under-complex and the choice for a consequentialist position is presupposed without any further arguments. In addition, it is at odds with the argument that "the purpose of morality is to diminish suffering caused by human actions" which seems to be a variety of a minimalist Millian 'no-harm principle'.

2. From a sociological or *socio-legal perspective*, the opposition between either "independence of directions and instructions" (p. 146) or the "requirement that every act of the administration can be traced back to the respective state minister as the supreme administrative authority, in this case, the Federal Minister of the Interior, who is chosen by the chancellor, accountable to the state parliament and thereby democratically legitimized" (p. 147) – *Weisungen, Verwaltungsvorschriften, Gehorsamspflicht* – seems to be based on a fairly strict hierarchical interpretation of *demokratischer Legitimationszusammenhang* required by Art. 20 II 1 GG. Such a strict hierarchical interpretation of an "uninterrupted chain of legitimacy" tends to reproduce a mythical picture known from legal positivism and has difficulties to address conflicts of rights and laws (see Luhmann for some necessary 'illegality' of any administrative act), broad margins of discretion/appreciation and the need for and also presence of forms of 'heterarchical' democratic legitimacy and control (see recently Teubner). The opposition also tends to prevent a sober discussion of the first question.

3. *Should Entscheider be subjected to directives by the government?* (p. 150f.) It seems that we are confronted with an exclusive choice: either to accept the influence of the government on the individual asylum procedure or to deny it, depending on the good or "ill" or "bad intentions". While Kleinschmidt and Krüger "do not deny the possibility of immoral consequences due to the influence of the government", their conclusion is that "it seems to be […] morally demanded to obligate *Entscheider* to follow the instructions of the government", with an added hesitation: "at least for the moment" (p. 151). Kleinschmidt and Krüger trust that instructions and directions are bound by the constitution and that decisions are contestable before administrative courts so that "all legally and probably most immoral consequences" would be revised (p. 151) neglecting the possibility and any evidence to the contrary. Furthermore, they do not discuss what to do if this is not the case. 'Bad' asylum-policies may not be effectively blocked by courts and this may require morally legitimate 'administrative disobedience' (e.g. by Dutch municipalities against expelling so-called '*uitgeprocedeerde'* asylum seekers) or by disobedience of *Entscheider* in addition to 'civil disobedience', Church asylum etc.

4. '*Should Entscheider decide single-handedly?'* (p. 151f.) Obviously, also single-handedly, they have margins of discretion within 'the legal framework' (p. 152). The fact that almost 40% of the decisions were overruled by administrative judges is alarming (time-pressure, not properly trained, etc.). Yet the discussion of decisions by a panel is, in my view, insufficient for two reasons. First, the argument that panel decisions are "*not necessarily legal or legitimate*" is rather strange: at issue is rather whether panel decisions significantly increase the chances in this regard; and, if true, this argument could also be mobilized against panel-decisions by higher courts and constitutional courts. Second, the argument of *"significantly higher resource expenses" and more time* (p. 152) has to be properly balanced with moral reasons which should not simply be overruled by prudentialist reasons (see above).

5. *Should Entscheider also conduct the hearing?* The argument that the division implies the dangers of a "threefold distorted testimony" seems convincing to me. The division is, indeed, "morally untenable and altogether not efficiency-raising" (p. 153). Here, we are lucky to find a case in which moral reasons and efficiency reasons are in line.

I agree with the conclusion that "the importance of this specific area of administrative law on the life of human beings demands high standards of not only legal but also moral justification" (p. 155) and also that a more developed and balanced "professional ethics of *Entscheider*" (p. 155) is badly needed. But I have raised some

doubts whether the 'pragmatic' or 'consequentialist' approach is promising in this regard.

References

(2003) Bader, V. and Engelen, E.: Taking Pluralism Seriously. Arguing for an institutional turn in political philosophy. In: Philosophy and Social Criticism 29/4, 375–406.