Refugee Survey Quarterly, 2025, **00**, 1–19
https://doi.org/10.1093/rsq/hdae028
Article

Failing Asylum-Seekers: Limited Judicial Review of Refugee Status Determination Decisions in Brazil

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ABSTRACT

This article seeks to show how Brazilian courts' unwillingness to perform judicial review over the merits of administrative refugee status determination (RSD) decisions is both founded on unfounded premises and incompatible with Brazil's obligations under international law. To that effect, the article promotes an analysis of the case law issued by Brazilian appellate courts on this issue until April 2024. These courts have overwhelmingly held that RSD decisions are political acts over which the executive branch of government holds absolute discretion and are thus excluded from judicial review. Nevertheless, this reasoning is based on misconceptions about the normative refugee protection framework and is inconsistent with the declaratory nature of refugee status. Lack of a review of the merits of RSD decisions also goes against the right to judicial protection under Article 25 of the American Convention on Human Rights, ultimately voiding the right to asylum in its Article 22(7) for many asylum-seekers. This article finds that Brazilian courts' erroneous conclusions about the nature of RSD decisions compromise effective refugee protection in the country, essentially subsuming this protection into a policy choice.

KEYWORDS: Brazil, refugee status determination, refugee protection, judicial review, due process

1. INTRODUCTION

This article examines compatibility under international law of a practice that is often obscured by Brazil's reputation as a "welcoming" country for refugees[1]: the refusal of Brazilian

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I would like to thank Fekade Alemayhu Abebe, Rodolfo Ribeiro C. Marques, and Pedro Henrique Rezende, as well as the two anonymous reviewers, for their comments and suggestions in the preliminary versions of this article. Any errors are my own.

[1] "Brasil pode ser 'campeão global' no acolhimento de refugiados", *Nações Unidas Brasil*, 10 Jan. 2024, available at: https://brasil.un.org/pt-br/257539-brasil-pode-ser-%E2%80%9Ccampe%C3%A3o-global%E2%80%9D-no-acolhimento-de-refugiados (last visited 2 Jul. 2024). Naturally, being a truly welcoming country goes beyond admitting refugees into its territory and includes ensuring refugees" rights and opportunities for social inclusion after admission. Criticism to the Brazilian state's stance on these issues can be seen notably in: J. Bertino Moreira, "Refugee Policy in Brazil (1995–2010): Achievements and Challenges", *Refugee Survey Quarterly*, 36(4), 2017, 25–44; "Reception of Migrants in Brazil Depends on Race and Skin Color,

courts to review the merits of administrative refugee status determination (RSD) decisions. This lack of review is concerning given how the RSD procedure is structured in the country, with little transparency as to how decisions are taken. Moreover, it casts doubts upon the effectiveness of the refugee protection framework in Brazil, especially as the relevant administrative bodies may be more susceptible to fluctuations in the government's and society's views on immigration.

In principle, Brazil maintains a remarkably high rate of recognition of asylum[2] claims[3]: from its creation in 1997 until 2022, the National Committee for Refugees (*Comitê Nacional para Refugiados*—CONARE)[4] recognised refugee status in relation to 86.7 per cent of the applications examined on the merits. However, this historical average hides important variations: in 2015, CONARE's recognition rate for asylum applications fell from 92.3 per cent to 70.2 per cent. In 2016 and 2017, it fell further to 50.9 per cent and 44.5 per cent, respectively, and, in 2018, only 14.3 per cent of asylum applicants in Brazil were recognised as refugees – the lowest recognition rate achieved since the Brazilian Refugee Act (BRA) was enacted in 1997. In 2019, the recognition rate was back to its high average of 97.3 per cent and has kept above 80 per cent in subsequent years.

This abrupt increase in recognition rates can be explained by the fact that it was in 2019 that Brazil started to increasingly recognise displaced Venezuelans as refugees through simplified procedures that allowed RSD to be carried out much more quickly.[5] On the other hand, the reasons for the decrease in recognition rates between 2015 and 2018 are not clear; since administrative decisions on RSD are not accessible to the public,[6] it is not possible to assess what kind of reasoning the CONARE has adopted to reject asylum applications, if this reasoning changed over the years, or if any policy considerations may have influenced this shift.

Further obscurity is present at the appeal level. According to the Brazilian Ministry of Justice and Public Security in response to a request filed by me, data on administrative appeal decisions in RSD proceedings is only available from 2018 onwards.[7] From 2018 to May 2024, 935 asylum appeals were decided on the merits, and 97.43 per cent of these decisions

Says Datafolha", *Conectas*, 7 Jun. 2023, available at: https://www.conectas.org/en/noticias/reception-of-migrants-in-brazil-depends-on-race-and-skin-color-says-datafolha/ (last visited 16 May 2024).

[2] Although the terms "asylum" and "refuge" have different legal connotations in Portuguese, with only the latter referring to the refugee status framework, the term "asylum" in English is most often used to denote the protection granted in connection with refugee status. In this article, "asylum" will also be used to refer specifically to the legal framework of refugee status, unless otherwise indicated. For further analysis, see V. Chetail, 'Asylum', in Vincent Chetail (ed.), *Elgar Encyclopedia of Migration Law*, Edward Elgar Publishing, 2025 (forthcoming); M.-T. Gil-Bazo, "Asylum as a General Principle of International Law", *International Journal of Refugee Law*, 27(1), 2015, 3–28, 3–4.

[3] The data was obtained through CONARE's interactive portal "Asylum in Numbers" (*Refúgio em Números*): Ministério da Justiça e Segurança Pública, *Refúgio em Números*, available at: https://app.powerbi.com/view?r=eyJrIjoiZTk3OTdiZjctNGQwOC00Y2FhLTgxYTctNDNlN2ZkNjZmMWVlIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9&pageName=ReportSection (last visited 15 May 2024).

[4] The CONARE is the Brazilian administrative body responsible for receiving asylum applications and carrying out RSD proceedings.

[5] Namely, the recognition of a situation of grave and generalised human rights violations in Venezuela by the CONARE, which constitutes an expanded ground for refugee status under Article 1(III) of the BRA. See Brazil, *Lei n. 9.474, de 22 de julho de 1997*, art 1(III), available at: https://www.planalto.gov.br/ccivil_03/leis/l9474.htm#:~:text=LEI%20N%C2%BA%209.474%2C%20DE%2022,1951%2C%20e%20determina%20outras%20provid%C3%AAncias. (last visited 15 May 2024). For a translation, see Refworld, *Brazil: Law No. 9.474 of 1997, Establishing Arrangements for the Implementation of the 1951 Status of Refugees and Related Provisions*, available at: https://www.refworld.org/legal/legislation/natlegbod/1997/en/18339 (last visited 15 May 2024).

Indeed, in 2019, of the 21.848 RSD decisions taken by the CONARE, 20.696 concerned Venezuelan applicants. That year, 100% of these Venezuelan applicants received a favourable RSD decision. See Ministério da Justiça e Segurança Pública, *Refúgio em Números*.

[6] This is so even if one requests access through Brazil's Access to Information Law (Law No. 12.527/11). The justification for that given by the relevant bodies is the principle of confidentiality that permeates RSD procedures under Article 23 of the BRA.

[7] Information provided on 10 June 2024 within administrative proceeding 08198.020751/2024-70.

were negative. In other words, only about 25 negative RSD decisions have been overturned on appeal, and this has occurred within the past 6 years. The reasons for this trend of massive rejection are not clear either, since, again, the content of such decisions is not public.

In summary, one cannot know for certain not only the rationale adopted in Brazilian RSD decisions but also what kinds of factors may have influenced them, especially extralegal ones. Refugee and immigration policy is, after all, a rather volatile field, prone to fluctuations according to public opinion and states' interests; it is not uncommon for administrative decision-makers to be sensitive to these considerations and sway between stricter or laxer interpretations of the legal norms according to perceived concerns held by states or the society at large.[8] Brazil itself has experienced such fluctuations,[9] including the recent decision to prohibit transit air passengers arriving in the country without a visa from applying for asylum.[10] In this context, independent judicial review can be key to preventing the crumbling of the rights of refugees, asylum-seekers, and non-nationals, in general, in ways that are incompatible with both domestic and international law.[11] For instance, review by Brazilian courts was paramount to ensure that asylum-seekers that had entered Brazil irregularly were able to access RSD procedures during the COVID-19 pandemic, despite the restrictive regulations in place at the time.[12]

Despite these considerations, Brazilian courts have repeatedly framed the recognition of refugee status as a question of administrative discretion, excluding it from judicial review. Whereas this trend has been discussed by other scholars,[13] these analyses have been focused on specific courts and the (in)compatibility of this reasoning with Brazilian law. The present article seeks to expand on this discussion by, firstly, providing a broader examination of how all competent courts across Brazil deal with applications for judicial review of administrative RSD decisions and, secondly, analysing how this practice fails to conform with Brazil's obligations under the American Convention on Human Rights (ACHR)[14] and risks undermining the effectiveness of the 1951 Refugee Convention in the country.[15] With this, the article seeks to show that current Brazilian judicial practice does not afford sufficient oversight to ensure that RSD decisions are taken in accordance with Brazil's domestic and international obligations.

To facilitate the comprehension of the judgments discussed herein, the article starts by briefly describing the structure of the Brazilian RSD framework and of the institutions responsible for RSD decisions. The standards applied in the Brazilian practice for judicial review of administrative decisions are also presented.

[8] See, for instance: D. G. Papademetriou, N. Banulescu-Bogdan & K. Hooper, *The Future of Migration Policy in a Volatile Political Landscape*, MPI, 2018.

[9] F. A. Filomeno & T. J. Vicino, "The Evolution of Authoritarianism and Restrictionism in Brazilian Immigration Policy: Jair Bolsonaro in Historical Perspective", *Bulletin of Latin American Research*, 40(4), 2021, 598–612.

[10] "Brazil to restrict entry of immigrants without visas", *Agência Brasil*, 22 Aug. 2024, available at: https://agenciabrasil.ebc.com.br/en/geral/noticia/2024-08/brazil-restrict-entry-immigrants-without-visas (last visited 26 Aug. 2024).

[11] L. L. Jubilut, "A Judicialização do Refúgio" in A. de Carvalho Ramos, G. Rodrigues & G. Assis de Almeida (eds.), *60 anos de ACNUR: Perspectivas de Futuro*, Editora CL-A, 2011, 163–178, 165–168; S. Kneebone, "The Rule of Law and the Role of Law: Refugees and Asylum Seekers" in S. Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, Cambridge University Press, 2009, 32–77, 48–64. See also, more generally, A. Mason, "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights", *Australian Journal of Human Rights*, 1(1), 1994, 3–11.

[12] See, notably, TRF-4, *Agravo de Instrumento No 5032494-4320214040000*, 8 Nov. 2021; TRF-2, *Remessa Necessária No 5002223-9420224025101*, 28 Feb. 2023; TRF-3, *Apelação Cível No 0014820-52.2011.4.03.6100*, 9 Aug. 2021. For further discussion, see: A. G. de Paiva Gonçalves, "Judicialização Da Política Migratória e de Refúgio Brasileira: Um Reflexo Pandêmico?", *Século XXI*, 14(1), 2023, 94–133.

[13] Most notably Jubilut, "A Judicialização do Refúgio"; B. Baía Magalhães & G. T. Sousa Corrêa, "A Judicialização do Refúgio no STJ: Deferência ao Executivo e Incoerência Interpretativa", *Revista da Faculdade de Direito UFPR*, 64(1), 2019, 137–164.

[14] 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1978).

[15] Convention relating to the Status of Refugees, 189 UNTS 137, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

Following that, the article examines how Brazilian courts have understood the permissible scope of judicial review over negative RSD decisions. This section takes into consideration judgments rendered from 1988 (date of the current Brazilian Constitution) to April 2024 from all domestic courts that are in principle competent to review these administrative acts: the Federal Supreme Court (*Supremo Tribunal Federal* – STF); the Superior Court of Justice (*Superior Tribunal de Justiça* – STJ); and all six Federal Regional Tribunals (*Tribunais Regionais Federais* – TRFs). Only judgments rendered by the appellate bodies of each TRF will be considered since there exists no public database for researching first-instance decisions. Additionally, only judgments from collegiate bodies are considered, thereby excluding monocratic decisions from individual members of these courts. The analysis corroborates previous findings of scholars in the sense that Brazilian courts tend to review only the formal procedure through which RSD decisions have been adopted, but not the merits of the administrative decisions themselves. This practice is at odds with the rationale laid down by the STF in the only case to date where it was required to review an RSD decision. Furthermore, it is grounded on the fundamental misconception that recognition of refugee status is a discretionary act.

After engaging with the Brazilian judicial practice, the article then assesses the compatibility of this practice with the ACHR. It is argued that the limited judicial review over RSD decisions violates the right to judicial protection (Article 25 of the ACHR) according to the standards developed in the case law of the Inter-American Court of Human Rights (IACtHR). This scenario, in turn, creates a risk that RSD decisions may be influenced by extralegal factors in ways contrary to the 1951 Refugee Convention, thereby also potentially violating the right to seek and be granted asylum (Article 22(7) of the ACHR). The article concludes that Brazil lacks oversight over whether RSD decisions correctly assess the conditions for refugee status under both Brazilian and international law, heightening the risk that these decisions may be influenced by political shifts. To avoid that, more attention ought to be paid to judicial practice on asylum matters in Brazil, and an understanding of Brazil's obligations under refugee and human rights law must be fostered among domestic courts and legal practitioners to avoid the misconceptions discussed in this article.

2. UNDERSTANDING REFUGEE STATUS DETERMINATION IN BRAZIL

Brazil is a party to the 1951 Refugee Convention, which was internalised in its domestic legal framework through Decree No. 50.215/61,[16] and to the 1967 Protocol, incorporated through Decree No. 70.946/72.[17] The refugee definition under the Convention is repeated in the BRA (Law No. 9.474/97) and expanded to also cover persons fleeing from the grave and generalised human rights violations. The BRA further sets out the details of how the 1951 Refugee Convention is to be implemented, including the procedure to be followed for RSD, which is entirely administrative. At the same time, it is a core tenet of the Brazilian legal system that no act affecting a right may be excluded from judicial review.[18] This includes decisions relating to the recognition of refugee status, as clarified by the STF.[19]

[16] Brazil, *Decreto Nº 50.215*, 28 Jan. 1961, available at: https://www.planalto.gov.br/ccivil_03/decreto/1950-1969/d50215.htm (last visited 2 Jul. 2024).

[17] Brazil, Deceto No. 70.946, 7 Aug. 1972, available at: https://www.planalto.gov.br/ccivil_03/decreto/1970-1979/d70946.htm (last visited 26 Dec. 2024).

[18] Brazil, *Constitution of the Federative Republic of Brazil*, 5 Oct. 1988, art 5(XXXV), available at: https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf (last visited 20 May 2024) (text provided by the Supreme Federal Court, updated until May 2022).

[19] STF, *Extradição 1085/República Italiana*, 16 Dec. 2009, 281.

Accordingly, understanding the Brazilian RSD framework requires a brief overview of how the administrative procedure is conducted (Section 2.1) and an analysis of the interplay between administrative and judicial spheres under the Brazilian legal system and of the extent of judicial review over administrative acts (Section 2.2). This section will address each of these issues in turn.

2.1. The administrative procedure: CONARE and the Minister of Justice

Asylum applications in Brazil can be made either online or before a representative of the Federal Police, which is the police branch generally responsible for enforcing immigration law. Once the application is made, it is sent to the CONARE for analysis.

The CONARE is a collegiate body composed of seven members, namely one representative each from: the Ministry of Justice; the Ministry of Foreign Affairs; the Ministry of Labour; the Ministry of Health; the Ministry of Education and Sports; the Federal Police; and a non-governmental organisation (NGO) dedicated to the assistance and protection of refugees in Brazil (Article 14 of the BRA). The BRA does not specify how these representatives should be chosen or if they should have specific experience or training in issues regarding refugee protection. In principle, the Ministries have complete discretion as to whom to recommend for the position, and the President of Brazil shall ultimately nominate them (Article 14(2) of the BRA). As for the NGO representative, although the BRA does not indicate which NGO shall be chosen, historically, it has always been Caritas, an organisation linked to the Catholic Church that has promoted refugee protection in Brazil since before the enactment of the BRA.[20] In addition to its voting members, Article 15 of the BRA lays down a permanent invitation to the United Nations High Commissioner for Refugees (UNHCR) to attend the CONARE's sessions as a speaking but non-voting member.

Decisions within the CONARE are taken by majority vote and, in case of a tie, the deciding vote is that of the representative of the Ministry of Justice, which also acts as the CONARE's president (Articles 14(I) and 16 of the BRA). Article 26 of the BRA solidifies a well-established reasoning in refugee law practice and scholarship,[21] namely that decisions recognising an individual as a refugee are declaratory in nature. Accordingly, a person is a refugee not because a state has pronounced them so, but because they meet the relevant criteria set out in international and domestic law, and thus should be entitled to the corresponding refugee protection even before official recognition.[22] Articles 26 and 29 of the BRA further reinforce that the CONARE's decisions shall be duly reasoned regardless of their outcome.

In case of a decision rejecting the asylum application, the asylum seeker may file an administrative appeal with suspensive effect to the Minister of Justice (Articles 29 and 30 of the BRA). The Minister alone is responsible for deciding on the appeal, and their decision is final and unappealable (Article 31 of the BRA).

2.2. Judicial review of administrative acts in Brazil

Scholarship and judicial practice in Brazil traditionally classify administrative acts as either bound (*atos vinculados*) or discretionary (*atos discricionários*) in nature.[23] Bound acts are

[20] For more about the Caritas's role in this domain in Brazil, see L. L. Jubilut, "Refugee Law and Protection in Brazil: A Model in South America?", *Journal of Refugee Studies*, 19(1), 2006, 22–44; L. L. Jubilut, *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*, Método, 2007, 171–177, 196–198.

[21] See, notably, J. C. Hathaway & M. Foster, *The Law of Refugee Status*, 2nd edn, Cambridge University Press, 2014, 25–26; G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 4th edn, Oxford University Press, 2021, 54.

[22] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, Feb. 2019, para 28.

[23] C. A. Bandeira de Mello, *Curso de Direito Administrativo*, 32 edn, Malheiros, 2015, 438–441.

those that a public authority is required to perform if the conditions set out under the law are met. There is no room for the authority to choose not to perform the act, even if its consequences could potentially be deemed contrary to state and public interests. A common example of such an act is the granting of a driver's license: if an individual passes the necessary exams, they must be granted the driver's license, regardless of any reasons public authorities may have to believe that is not the best course of action. Conversely, discretionary acts are those regarding which the law grants the public authority the choice between different means of performing the act or between performing the act or not. In other words, the law sets out the circumstances in which the administrative act may be performed; once these circumstances occur, it is up to the public authority to assess how to perform (or not perform) the act in a way that satisfies the public interest. Discretionary acts include, for instance, decisions to expropriate private property, as they encompass assessments that are not exclusively legal on the part of the authority, such as the usefulness of the expropriation, its cost-benefit, and other values and social interests this course of action may touch upon. This discretion is commonly referred to as a "convenience and opportunity analysis" (*análise de conveniência e oportunidade*). An administrative act may have both bound and discretionary elements, depending on how the law stipulates the conditions that the act must observe;[24] notably, the law may give no choice as to whether the act should be performed or not but lets the public authority decide the place, the manner, or the timeframe for carrying it out.

The intensity of the judicial review varies according to the nature of the act (or the elements thereof). Bound acts are subject to judicial review in their entirety. This means that courts can inquire not only into whether the proper administrative procedure was followed, but also whether the public authority's assessment was correct and whether the act should or should not have been performed at all. It is a review of the merits of the act. Such a broad review is not allowed in relation to discretionary acts. When these are involved, courts may only analyse whether the act was preceded by the applicable formalities and procedural guarantees – notably, whether the interested parties were given opportunity to be heard, whether the administrative decision was duly reasoned, and whether all relevant arguments and facts were appropriately taken into consideration by the decision-maker. The merits of the act, including the convenience and opportunity analysis, are, however, excluded from judicial review.[25]

In this context, once the administrative RSD procedure is concluded through a decision from the Minister of Justice – or from the CONARE itself, if the applicant has not filed an administrative appeal within the BRA's time limit – the applicant may challenge this decision before a court. The central question is how the administrative decision rejecting an asylum application ought to be classified and, hence, what the extent of the judicial review is.

Brazilian legal scholarship has been virtually unanimous in affirming the nature of these decisions as bound acts.[26] This assessment is indeed correct. After all, both domestic and international law lay down specific conditions that, when met, immediately and automatically qualify an individual as a refugee. Given the declaratory nature of this status, there is no room for the public authority to decide that recognising refugee status would be

[24] STF, *Ag Reg em Mandado de Segurança 26849/DF*, 10 Apr. 2014, 9.

[25] For a deeper analysis of judicial review of discretionary administrative acts in the Brazilian system, see E. Meiras Pires de Azevedo, M. E. Alencar Advíncula D'Assunção & A. B. Ferreira Rebello Presgrave, "Judicial Limits over the Administrative Discretionary Act: Analysis of the Decisions of the Injunctions Granted in Aco 3.451/DF by the Brazilian Supreme Court", *Revista Internacional Consinter de Direito*, 9(17), 2023, 539–558.

[26] A. de Carvalho Ramos, "Direito ao acolhimento: principais aspectos da proteção aos refugiados no Brasil" in J. C. de Carvalho Rocha, T. H. Parreiras Henriques Filho & U. Cazetta (eds.), *Direitos humanos: desafios humanitários contemporâneos: 10 anos do Estatuto dos Refugiados: (Lei n. 9.474 de 22 de julho de 1997)*, Del Rey, 2007, 126; Jubilut, "A Judicialização Do Refúgio", 176; T. Guedes Alcoforado de Moraes, "O Papel Do Judiciário Na Proteção Aos Refugiados", *Revista da Faculdade de Direito da UFRGS*, Special Volume, 2014, 164–181, 171.

"inconvenient" or "inopportune", or take into consideration any interests alien to the criteria set out in the BRA. If a person meets the refugee definition and their corresponding rights are not ensured, the state incurs a violation of the 1951 Refugee Convention – and, in the Brazilian case, also of the BRA. Incidentally, refugee status is often contrasted with the granting of political asylum (*asilo político*) – a concept often linked with the practice of Latin American countries, through which a state may offer protection, in its territory or diplomatic premises, to a person who is being charged with a "political crime" by another state.[27] When it comes to political asylum, no international norms require states to grant it or establish a declaratory status of "political asylee": rather, the decision on whether to grant political asylum depends entirely on the state's discretion.[28]

Brazilian and international law therefore confirm that the recognition of refugee status is "bound" to the applicable legal norms and does not allow public authorities any margin of discretion as to whether this recognition should or not occur. Despite how clear this absence of discretion is in both frameworks, Brazilian courts have reached the opposite conclusion: they have framed recognition of refugee status as a purely discretionary act and thus unduly limited judicial review of RSD decisions, as discussed next.

3. JUDICIAL REVIEW OF ASYLUM DECISIONS IN BRAZIL

This section explores the inconsistencies and divergences in how Brazilian higher courts have interpreted the scope of judicial review of administrative RSD decisions (Section 3.1) and how these inconsistencies have fuelled lower courts' misconceptions on the topic (Section 3.2).

3.1. The higher courts: confusion and miscommunication

Brazil has two higher courts which are in principle competent to review RSD decisions. Firstly, the STF, which is Brazil's highest court. The STF is mainly charged with constitutionality control and with adjudicating disputes between Brazil and other states or international organisations, as well as extradition requests.[29] Secondly, the STJ, whose primary function is to adjudicate the conformity of acts (private and public) with federal law. When seized at the appeal level, neither of these courts may promote a re-examination of the facts as laid down by lower courts; similarly to the courts of cassation that exist in other judicial systems, the STF and the STJ may only interpret the law.

The STF has been called to review RSD decisions not in appeals, however, but in extradition proceedings. This happened in only two cases. The first judgment was rendered in 2007, known as the *Medina* case. It concerned the request for extradition of a Colombian national, a member of the Revolutionary Armed Forces of Colombia, who had been recognised as a refugee by the CONARE.[30] This judgment reveals great confusion by the court's majority on the distinction between the institutions of refugee status and political asylum[31]; STF precedents on the extradition of political asylees were thus invoked to back the majority's understanding that the granting of refugee status was a political and

[27] For further discussion on this practice and its legal framework, see Inter-American Court of Human Rights (IACtHR), *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System*, Advisory Opinion, Ser. A No. 25, 30 May 2018, paras 72–163. The concession of political asylum listed as one of the guiding principles of Brazilian foreign policy under Article 4(X) of the Brazilian Constitution.

[28] Jubilut, "A Judicialização Do Refúgio", 176.

[29] Brazil, Constitution of the Federative Republic of Brazil, art 102.

[30] STF, *Extradição 1008/República da Colômbia*, 21 Mar. 2007.

[31] The lack of preparation of Brazilian courts to deal with questions of refugee status is further highlighted in relation to the STJ by Andrea Maria Calazans Pacheco Pacífico, *O capital social dos refugiados: bagagem cultural* versus *políticas públicas*, PhD Thesis in Social Sciences, Pontifícia Universidade Católica de São Paulo, 2008, 84.

discretionary act.[32] The Justices even alluded to the idea that only the executive branch could decide on whether the individual in question was being charged with a political crime in their country of origin, even though refugee status is not linked to the commission of any crime, but to the existence of a well-founded fear of persecution. Any discussions about the conditions for refugee status under international and domestic law, including potential causes for exclusion from this status, were completely sidelined.

The second judgment came about 2 years later, with the *Battisti* case.[33] Cesare Battisti was an Italian national who had been sentenced to life imprisonment in Italy due to his participation in a far-left armed group and commission of murders. Battisti eventually fled to Brazil and applied for refugee status. The CONARE rejected the application, but this decision was overturned by the Minister of Justice on administrative appeal, thereby recognising Battisti as a refugee. This appeal decision was heavily influenced by political and ideological considerations, as Fischel de Andrade notes in a historical reconstruction of the case.[34] Given Italy's request for Battisti's extradition, the case was brought before the STF, where debates occurred about the legality of the Minister of Justice's decision.

The majority of the STF followed the rapporteur's understanding that "the recognition of refugee status constitutes an act bound to the express and exhaustive requirements" of the law, which does not leave room for analyses of convenience and opportunity.[35] Accordingly, the STF reviewed the merits of the RSD decision, finding that Battisti's situation did not meet the criteria for refugee status, particularly since Battisti's conviction for murder fell within the BRA's and the 1951 Refugee Convention's exclusion clauses.[36] Nevertheless, four justices put forward emphatic dissents,[37] claiming that the granting of refugee status was linked to the executive branch's competence to conduct international relations and was essentially a political act. According to the dissenters, if courts were meant to review RSD decisions, then competence for RSD should have been attributed to the judiciary in the first place. As it had not, courts should respect the separation of powers and assess only the formal aspects of RSD decisions, notably whether they are clear and coherent.

The dissenters' reasoning does not explain, however, which legal provisions supposedly grant public authorities a margin of choice in analysing asylum applications. Nor how this allegedly discretionary character of RSD decisions could be conciliated with the declaratory nature of refugee status, which is expressly established under Article 26 of the BRA. The argument that RSD decisions should be subject to limited judicial review because they are under the competence of administrative authorities is equally groundless – otherwise, it would be impossible to speak of bound acts under Brazilian law, and all administrative acts would entail limited judicial review, which is not the reality in the country. While the conditions for refugee status allow a certain interpretive margin to the decision-maker – notably, in deciding what "persecution", a "particular social group", or "grave and generalised human rights violations" are – this interpretation is performed within the limits of the law itself.[38] It

[32] *STF, Extradição 1008/República da Colômbia.*, 256–258.

[33] STF, *Extradição 1.085/República Italiana*. For further details of Cesare Battisti's flight to Brazil and the related judicial proceedings, see José H. Fischel de Andrade, "The *Battisti Case*: A Legal-Historical Reconstruction", *Refugee Survey Quarterly*, 41(1), 2022, 108–130.

[34] *Ibid.*, 115.

[35] *Ibid.*, 22, 254, 440. My translation. Original: "o reconhecimento da condição de refugiado constitui ato vinculado aos requisitos expressos e taxativos que a lei lhe impõe como condição necessária de validade".

[36] Article 3(III) of the BRA excludes from refugee status those who committed "heinous crimes", and, under Brazilian law, certain kinds of murder fall within this category. Moreover, Article 1(F)(b) of the 1951 Refugee Convention excludes those who have committed a serious non-political crime, of which murder is a common example.

[37] STF, *Extradição 1.085/República Italiana*, 227–229, 233–239, 308–311, 335–338.

[38] For instance, according to the standards set out in Article 31 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entry into force: 27 Jan. 1980), which reflect customary international law according to International Court of Justice, *Oil Platforms (Preliminary Objections)* ICJ Rep 1996, 803, 12 Dec. 1996, para. 23.

cannot be said, therefore, that public authorities have discretion to freely decide what persecution is, though different meanings can be put forward depending on the interpretive standards they adopt, just like it happens for any legal rule.

The *Battisti* judgment should therefore have settled the discussion and led all Brazilian courts to exercise broad judicial review over the merits of RSD decisions when faced with such cases. However, this did not happen; in a judgment rendered almost 1 year after *Battisti*, the STJ ignored that precedent and held that RSD decisions are political discretionary acts whose merits are never subject to judicial review.[39] In reaching that conclusion, not only did the STJ base itself on its own previous case law[40] and the already overridden *Medina* judgment, but also presented a reasoning fraught with contradictions and misconceptions.

Firstly, the STJ stated that, "in cases involving public policies on migration and foreign affairs, it is inappropriate for the Judiciary, except in exceptional situations, to delve into the reasons that motivated the act of admission of foreigners into the national territory".[41] Refugee status is not, however, part of immigration policy or the conduction of relations with other states, but a declaratory status established under a treaty to which Brazil is a party. If a person falling within this status enters Brazilian territory, the state must provide this person with the rights enshrined in the 1951 Refugee Convention regardless of its policies and preferences. The RSD procedure is only a means to formally attest whether an individual indeed has this status, and, strictly speaking, does not entail a choice between "granting" or not refugee status. In light of this, refusing to review an RSD decision and recognising a person's rights as a refugee might even be said to go against the Article XXXV of the Brazilian Constitution, which, as mentioned previously, stipulates that no act affecting a right shall be excluded from judicial review.

Secondly, to corroborate its reasoning, the STJ said that other states parties to the 1951 Refugee Convention with "solid democratic institutions and an independent Judiciary"[42] also limited judicial review to the legality of the RSD proceeding, and not the RSD decision itself. Despite this categorical affirmation, the court mentioned the practice of only one state, Australia.[43] The comparison is far from accurate, though. In Australia, rejected asylum applications can be reviewed entirely by two administrative courts before being taken to judicial courts, where, indeed, the scope of the review is narrower. In contrast, Brazil has no such system of administrative courts. Appeals to CONARE decisions are examined by a single person, the Minister of Justice, who may or may not have experience with questions of international law and refugee protection. The chances of obtaining a deep and well-founded review of the initial RSD decision are thus substantially weaker in the Brazilian case. Moreover, the Australian practice is not without criticism either, regarding its compatibility with the state's obligations.[44] Even if Australia were a valid example, the practice of only one state clearly is not enough to guide the interpretation of a treaty. Since the 1951 Refugee Convention does not establish the exact procedure through which states should ascertain

[39] STJ, *Recurso Especial No 1174235 - PR*, 4 Nov. 2010.

[40] STJ, *Mandado de Segurança No 11417 - DF*, 11 Oct. 2006; STJ, *Mandado de Segurança No 13383 - DF*, 28 May 2008.

[41] STJ, *Recurso Especial No 1174235 - PR*, 1. My translation. Original: "Em casos que envolvem políticas públicas de migração e relações exteriores, mostra-se inadequado ao Judiciário, tirante situações excepcionais, adentrar as razões que motivam o ato de admissão de estrangeiros no território nacional."

[42] *Ibid*., 9. My translation. Original: "com sólidas instituições democráticas e um Judiciário independente".

[43] *Ibid*., 9–10.

[44] See notably E. Dunlop, J. McAdam & G. Weeks, "A Search for Rights: Judicial and Administrative Responses to Migration and Refugee Cases", in M. Groves, J. Boughey & D. Meagher (eds.), *A Search for Rights: Judicial and Administrative Responses to Migration and Refugee Cases*, Hart Publishing, 2019, 335–353.

whether a person qualifies as a refugee, this practice has varied considerably across states parties. Across the European Union, for instance, the European Court of Justice (ECJ) has held that national courts should be able to exercise a "thorough review", including of the merits, of administrative decisions that rejected an application for international protection as unfounded or made in bad faith.[45]

Thirdly, the STJ also referred[46] to the judgment of the ECJ on Cases C-175/08, C-176/08, C-178/08, and C-179/08, which, nevertheless, does not discuss judicial review of RSD decisions, but rather how to interpret conditions for cessation of refugee status.[47] The reasons for this reference are unclear, though it seems from the subsequent paragraphs that the STJ sought to show the precariousness of refugee status, thereby arguing that the 1951 Refugee Convention should be interpreted in conformity with state sovereignty.[48] No incompatibility between the two norms exists; however, the undertaking of international obligations under the 1951 Refugee Convention is, in itself, a sovereign act. Through this act, states chose to limit the possibility of expelling from their territory people who qualify as refugees. The STJ's reading would imply that states can always invoke sovereignty as an excuse to rid themselves of any international obligation, rendering international law meaningless.

To date, the STJ has not reviewed its position on this issue. The court had the opportunity to do so in only one other case, where it acknowledged that the *Medina* precedent had been overcome in *Battisti*.[49] Nonetheless, the court still framed the granting of refugee status as a "manifestation of Brazilian sovereignty"[50] and did not specify how broad the judicial review over RSD decisions should be.

In addition to this reluctance to review the merits of RSD decisions, the STJ has been hesitant to find illegalities in RSD proceedings even in situations that could reasonably be understood as contrary to due process guarantees. In particular, in one case the STJ acknowledged that the negative RSD decisions from the CONARE and the Minister of Justice had been vague and merely stated that the applicant was not a refugee under the BRA, without specifying the grounds for this decision.[51] The STJ nevertheless rejected the judicial application because it did not challenge specific points of the RSD decisions – though one may wonder how specific a challenge can be against such vague decisions.[52] In another case, the STJ was seized by a writ of mandamus that challenged the fact that the Minister of Justice who rejected the administrative appeal had previously been a member of the CONARE during the initial assessment of the asylum application and, within the CONARE, had voted to reject that application.[53] Though the STJ rejected the writ because

[45] Court of Justice of the European Union (CJEU), *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment, Second Chamber, Case C-69/10, 28 Jul. 2011. Though differing interpretations have been put forward as to how this ruling should be interpreted, as seen in R. Widdershoven, "The European Court of Justice and the Standard of Judicial Review", in J. de Poorter, E. Hirsch Ballin & S. Lavrijssen (eds.), *Judicial Review of Administrative Discretion in the Administrative State*, TMC Asser Press, 2019, 39–62, 49–50.

[46] STJ, *Recurso Especial No 1.174.235 - PR*, 11.

[47] Court of Justice of the European Union (CJEU), *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v. Bundesrepublik Deutschland*, Grand Chamber, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, 15 Sep. 2009.

[48] In making that argument, the STJ even referred to Article 31(3)(b) of the Vienna Convention on the Law of Treaties. STJ, *Recurso Especial No 1.174.235 - PR*, 13–14.

[49] STJ, *AgRg no Mandado de Segurança No 17.612 - DF*, 9 Nov. 2011, 6.

[50] My translation. Original: "uma manifestação da soberania brasileira".

[51] STJ, *AgRg no Mandado de Segurança No 12.212 - DF*, 8 Nov. 2006, 6.

[52] The lawfulness of the administrative RSD decision in this case could have been further impugned for not meeting the due process standards set out by the IACtHR, notably in: Inter-American Court of Human Rights (IACtHR), *Pacheco Tineo Family v. Bolivia*, Judgment, Ser C No. 272, 25 Nov. 2013, para 159(c); Inter-American Court of Human Rights (IACtHR), *Chocrón Chocrón v Venezuela*, Judgment, Ser C No. 227, 1 Jul. 2011, para. 118; Inter-American Court of Human Rights (IACtHR), *López Mendoza v. Venezuela*, Judgment, Ser C No. 233, 1 Sep. 2011, para. 141.

[53] STJ, *Mandado de Segurança No 17611 - DF*, 13 Mar. 2013.

the applicant had not produced the RSD decisions, the court noted that, since the CONARE is a collegiate body and the future Minister's vote had not been determinant for the CONARE's final decision, there was no illegality in that regard. The STJ's conclusion in this case is still difficult to conciliate with the impartiality required in RSD proceedings,[54] however, since the Minister had already formed his conviction about the case before even receiving the appeal.

3.2. The lower courts: a study in avoidance

Given the volatile and confusing case law of the higher courts, it is not surprising that the TRFs have overwhelmingly chosen to limit judicial review of RSD decisions, repeating the same misconceived arguments about recognition of refugee status' being a political and discretionary act. From 1988 to April 2024, the TRFs rendered 17 judgments dealing with this topic. Thirteen judgments declined to exercise judicial review, and only four granted it. It is interesting to note that most of these judgments are fairly recent: 12 of them were rendered after 2010 and, among these, only one granted judicial review to an RSD decision, in 2011.[55] Since then, all judgments by TRFs have denied the review. The situation is systematised in Table 1 at the end of this article.

As can be seen, the TRF-4 is the court most frequently seized by applications to review the merits of RSD decisions and, since 2010, has constantly rejected such claims.[56] This trend is equally present in other TRFs.[57] In none of these judgments did the TRFs refer to the STF's *Battisti* judgment. Instead, some refer to the STJ's practice of not allowing this kind of review.[58] Alarmingly, two judgments by the TRF-4 went as far as to state that recognition of refugee status could create friction between Brazil and the refugee's country of origin, so that it was important to ensure that individual conditions would not override Brazil's sovereignty.[59]

Only a handful of judgments, most of them curiously from before the *Battisti* judgment, allowed for judicial review of the merits of the RSD decision. One concerned a Lebanese national that claimed to have been a victim of religious persecution. The TRF-4 noted that the administrative appeal had been rejected by the Minister of Justice in a vague decision that did not analyse the merits of the case. Furthermore, the court held that a full judicial review of the RSD decision did not interfere with the separation of powers, since the BRA did not leave any discretion for public authorities to refuse to recognise someone as a refugee as long as the applicable criteria were met.[60] The same understanding was voiced in another TRF-4 judgment, concerning a group of Cuban sailors who claimed that their protests for better work conditions in Cuba had resulted in persecution on the grounds of political opinion.[61] Another TRF-4 judgment upheld the judgment of a first-instance judge that had

[54] Inter-American Court of Human Rights (IACtHR), *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion, Ser A No. 21, 19 Aug. 2014, para. 120.

[55] TRF-1, *Apelação Cível No 0001186-9320064014200*, 22 Feb. 2011.

[56] TRF-4, *Apelação Cível No 5018374-5020174047108/RS*, 6 Dec. 2018; TRF-4, *Apelação Cível No 5002093-5220134047013/PR*, 5 Nov. 2014; TRF-4, *Apelação Cível No 20077000025627-1/PR*, 30 Nov. 2011; TRF-4, *Apelação Cível No 20077000029163-5/PR*, 23 Nov. 2010; TRF-4, *Agravo de Instrumento No 20080400004529-8/PR*, 29 Oct. 2008; TRF-4, *Agravo de Instrumento No 20080400011472-7/PR*, 29 Oct. 2008.

[57] TRF-2, *Apelação Cível No 0003687-5920134025101*, 11 May 2016; TRF-2, *Apelação Cível No 0018619-5720104025101*, 28 Jan. 2016; TRF-2, *Agravo de Instrumento No 0014633-0420124020000*, 10 Jun. 2014; TRF-2, *Agravo Interno no Agravo de Instrumento No 0008253-6220124020000*, 5 Sep. 2012; TRF-2, *Apelação Cível No 0020402-3120034025101*, 5 Oct. 2011; TRF-3, *Apelação Cível No 0014820-52.2011.4.03.6100*; TRF-5, *Apelação Cível/Reexame Necessário No 0014020-1820104058100*, 14 Feb. 2012. No judgments discussing the review of RSD decisions were found within the TRF-6, which was created in 2021 and only became operational in mid-2022.

[58] TRF-2, *Apelação Cível No 0018619-57.2010.4.02.5101*.

[59] TRF-4, *Agravo de Instrumento No 2008.04.00.004529-8/PR*; TRF-4, *Agravo de Instrumento No 2008.04.00.011472-7/PR*.

[60] TRF-4, *Apelação Cível No 2008.70.00001631-8*, 16 Dec. 2008.

[61] TRF-4, *Apelação Cível No 2004.71.00030706-1*, 22 Oct. 2008.

Table 1. TRF judgments about the review of the merits of Refugee Status Determination decisions

Court	Judgment number	Date of judgment	Review of merits of RSD decision
TRF-1	*Apelação Cível No 0001186-9320064014200*	22 February 2011	Yes
TRF-2	*Apelação Cível No 0003687-5920134025101*	11 May 2016	No
TRF-2	*Apelação Cível No 0018619-5720104025101*	28 January 2016	No
TRF-2	*Agravo de Instrumento No 0014633-0420124020000*	10 June 2014	No
TRF-2	*Agravo Interno no Agravo de Instrumento No 0008253-6220124020000*	5 September 2012	No
TRF-2	*Apelação Cível No 0020402-3120034025101*	5 October 2011	No
TRF-3	*Apelação Cível No 0014820-52.2011.4.03.6100*	09 August 2021	No
TRF-4	*Apelação Cível No 5018374-5020174047108/RS*	6 December 2018	No
TRF-4	*Apelação Cível No 5002093-5220134047013/PR*	15 November 2014	No
TRF-4	*Apelação Cível No 20077000025627-1/PR*	30 November 2011	No
TRF-4	*Apelação Cível No 20077000029163-5/PR*	23 November 2010	No
TRF-4	*Agravo de Instrumento No 20080400004529-8/PR*	29 October 2008	No
TRF-4	*Agravo de Instrumento No 20080400011472-7/PR*	29 October 2008	No
TRF-4	*Apelação Cível No 2008.70.00001631-8*	16 December 2008	Yes
TRF-4	*Apelação Cível No 2004.71.00030706-1*	22 October 2008	Yes
TRF-4	*Apelação Cível/Reexame Necessário No 2008.70.00000303-8*	21 January 2009	Yes
TRF-5	*Apelação Cível/Reexame Necessário No 0014020-1820104058100*	14 February 2012	No

recognised refugee status to an Israeli national on the argument that the armed conflicts in Israel's territory created a situation of grave and generalised human rights violations.[62] Furthermore, it is possible to identify a trend within the TRF-4 to provisionally grant refugee status to avoid the removal of an asylum seeker until the administrative RSD proceeding is concluded.[63] The more technically correct view, however, would have been simply to recognise those individuals as asylum seekers and apply Articles 10 and 36 of the BRA, which suspend any removal procedures until the end of the RSD proceedings.[64]

The only judgment reviewing the merits of an RSD decision post-*Battisti* was rendered by the TRF-1 in a case concerning a medical professional from Cuba who claimed to have been persecuted due to his political opinion.[65] The TRF-1 understood that the judicial review did not encompass the merits of the administrative decision, but rather its legality, by reassessing whether the asylum-seeker had met the requirements established under domestic law to qualify as a refugee. This formulation is odd, however, since the assessment of these requirements is precisely the substantive content of the administrative decision – in other words, its merits. The TRF-1 thus seems to have tried to circumvent the domestic judicial debate on whether RSD decisions are or not discretionary acts. This impression is reinforced by the fact that the judgment did not refer at all to the then-recent *Battisti* decision.

[62] TRF-4, *Apelação Cível/Reexame Necessário No 2008.70.00000303-8*, 21 Jan. 2009.

[63] TRF-4, *Agravo de Instrumento No 5031994-74.2021.4.04.0000*, 5 Nov. 2021; TRF-4, *Agravo de Instrumento No 5032315-12.2021.4.04.0000*, 24 Nov. 2021; TRF-4, *Agravo de Instrumento No 5025028-95.2021.4.04.0000*, 8 Oct. 2021; TRF-4, *Agravo de Instrumento No 5024544-80.2021.4.04.0000*, 25 Aug. 2021; TRF-4, *Agravo de Instrumento No 5024084-93.2021.4.04.0000*, 25 Aug. 2021; TRF-4, *Agravo de Instrumento No 5036666-28.2021.4.04.0000*, 1 Dec. 2021; TRF-4, *Agravo de Instrumento No 5036642-97.2021.4.04.0000*, 24 Nov. 2021; TRF-4, *Agravo de Instrumento No 5031993-89.2021.4.04.0000*, 29 Sep. 2021.

[64] TRF-4, *Agravo de Instrumento No 5033958-05.2021.4.04.0000*, 1 Dec. 2021; TRF-4, *Agravo de Instrumento No 5020426-61.2021.4.04.0000*, 29 Jun. 2021.

[65] TRF-1, *Apelação Cível No 0001186-9320064014200*.

Indeed, the only mention of *Battisti* found in this research was done by Judge Almeida in a concurring opinion to another TRF-1 judgment, concerning the suspension of a first instance decision mandating the Brazilian State not to hinder the entry of Haitians in its territory in any way and to process their asylum applications according to the BRA.[66] This case arose when an increased number of Haitians made their way to Brazil after Haiti had been hit by an earthquake in 2010. At that time, Brazilian legal scholars and practitioners debated over whether these Haitians could qualify for refugee status under the idea that they were "environmental refugees". In her opinion, Judge Almeida argued that the concession of refugee status is a bound act because both international law and the BRA define who a refugee is, thereby creating a declaratory status. She highlighted the majority's conclusions in *Battisti* as well as the opinion of other legal scholars corroborating the nature of RSD decisions as bound acts subject to extensive judicial review. Nevertheless, the case did not concern the review of an RSD decision, but whether Brazil had an obligation to keep its borders open to incoming Haitians, regardless of whether they held the necessary documentation to enter Brazil. Judge Almeida thus sided with the majority in understanding that these Haitians did not qualify as refugees under either international or Brazilian law, and that, therefore, the issues under analysis concerned Brazilian immigration policy, in which the Judiciary could not intervene.

As can be seen, the overwhelming practice of Brazilian courts is to deny judicial review of the merits of RSD decisions on the erroneous ground that "granting" refugee status is a political decision falling within the executive branch's sovereign discretion. Consequently, in the face of a negative RSD decision by the CONARE, the reversal of this decision depends on the position of only one person: the Minister of Justice. And, as previously mentioned, there exists a significant trend from the Minister to uphold CONARE decisions, with only 2.57 per cent of RSD decisions having been overturned on appeal since 2018. Although it is impossible to reach a conclusion as to the quality of the Minister of Justice's decisions without having access to their content, the great disproportion between positive and negative decisions is enough to raise doubts as to the effectiveness of this administrative review and its conformity with international law, as explored below.

4. THE BRAZILIAN JUDICIAL PRACTICE ON REFUGEE STATUS DETERMINATION DECISIONS UNDER INTERNATIONAL LAW

Towards the end of its 2010 judgment that expressly framed RSD decisions as discretionary acts, the STJ stressed that its decision was not meant to close Brazil's door for immigration, especially since "aliens have always been welcome in Brazil".[67] Here, the court invoked the stereotypical view about the openness of Brazilian immigration and refugee policy to try to attenuate the harsh reality of the judgment: it deprives asylum seekers of effective remedies against negative RSD decisions in administrative instances. By emphasising Brazil as a "welcoming country", an assertion that does not hold true for people of all origins, as research has shown,[68] the lack of judicial review seems to be a minor detail, a circumstance that will only impact a handful of people. However, as mentioned before, only in 2018, the CONARE rejected 5,654 asylum applications, representing 85.7 per cent of all RSD decisions delivered that year. In other years, though the number of rejections was lower,

[66] TRF-1, *Suspensão de Liminar/Antecipação de Tutela No 0009420-4420124010000*, 11 Jan. 2013.

[67] STJ, *Recurso Especial No 1.174.235 - PR*, 17. My translation. Original: "Estrangeiros sempre foram bem-vindos no Brasil."

[68] See especially K. Jensen, *The Color of Asylum: The Racial Politics of Safe Haven in Brazil*, The University of Chicago Press, 2023.

hundreds of people were still affected. Perhaps most of those people truly did not qualify for refugee status. But perhaps some of them did. And having only one possibility of a full review of their asylum applications, carried out by a single person whose primary function is a political one, and not one specialised in legal issues of refugee protection, raises serious concerns about the fairness and effectiveness of this review. This is even more so considering the astoundingly high rejection rates of administrative appeals by the Minister of Justice – 97.43 per cent. In at least two cases, courts noted that the RSD decisions in the concrete case had been vague and not explained their reasoning for rejecting the asylum application.[69] Furthermore, studies in other states have suggested that administrative bodies tasked with RSD may be subject to greater political pressure and influences of public opinion than independent courts.[70]

It is not within the scope of this article to assess whether the CONARE has been subject to such influences in its decisions – especially since, as mentioned, the impossibility of access to CONARE decisions makes this task nearly unfeasible – or whether Brazil is truly a welcoming country. Nevertheless, one cannot ignore the risk that, with changes in refugee and immigration policies and changes in the CONARE's and the Ministry of Justice's compositions, legally questionable interpretations regarding the refugee criteria may arise. In this context, a full judicial review of RSD decisions is paramount to ensure that refugees have their status and rights recognised in Brazil. Without such review, the effectiveness of the 1951 Refugee Convention is severely compromised. Refugee status thus becomes a privilege granted solely according to the state's interests.

The 1951 Refugee Convention does not directly establish an obligation to provide full judicial review of RSD decisions,[71] instead leaving states with flexibility to decide how to determine which persons fall under the refugee definition. Nevertheless, a more direct obligation to provide this kind of judicial review can be deduced from the ACHR. Unlike other international instruments, the ACHR expressly formulates a right to seek *and be granted* asylum according to applicable domestic and international law (Article 22(7)). The IACtHR has interpreted this provision in light of other international instruments dealing with the institution of asylum, including the 1951 Refugee Convention. Accordingly, the Court has clarified that Article 22(7) encompasses, among others, the duty of states to "provide effective access to a fair and efficient procedure for determining refugee status", to "ensure the minimum guarantees of due process in fair and efficient procedures to determine refugee status or condition", and to "grant international protection if the refugee definition is met and ensure the maintenance and continuity of refugee status".[72]

States bound by the ACHR are thus meant to carry out RSD procedures in a way that effectively ensures refugee protection to those who meet the relevant criteria. The IACtHR has also adopted the view that the due process guarantees enshrined in Article 8 of the ACHR are also applicable to administrative proceedings involving the determination of individual rights, including immigration and RSD proceedings.[73]

[69] STJ, *AgRg no Mandado de Segurança No 12.212 - DF*; TRF-4, *Apelação Cível No 2008.70.00.001631-8*.

[70] N. Zaun, M. Leroch & E. Thielemann, "Why Courts Are the Life Buoys of Migrant Rights: Anti-Immigrant Pressure, Variation in Judicial Independence, and Asylum Recognition Rates", *Journal of European Public Policy*, 31(5), 2024, 1206–1230.

[71] For deeper discussion, see R. Moffatt, "Reviewing Review: The Standard of Review in Asylum Decision-Making", in S. S. Juss (ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, 2019, 417–428.

[72] Inter-American Court of Human Rights (IACtHR), *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System*, para 99.

[73] Inter-American Court of Human Rights (IACtHR), *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, para 111; Inter-American Court of Human Rights (IACtHR), *Pacheco Tineo Family v Bolivia*, paras 130, 157. For a comparison of how different human rights bodies have interpreted the source and scope of refugees' and asylum seekers' due process rights, see D. J. Cantor, "Reframing Relationships: Revisiting the Procedural Standards

Article 8(2)(h) of the ACHR establishes that a person accused of a criminal offense has the right to appeal the judgment to a higher court. Despite the terminology of this provision, in *Vélez Loor v. Panama* the IACtHR extended the applicability of this provision to any decision taken regarding deprivation of liberty, including by an administrative authority.[74] Later, in its advisory opinion on children in the context of migration, the IACtHR further expanded its interpretation to encompass "the right of everyone to appeal all final decisions of an administrative or judicial nature adopted in immigration proceedings".[75] The Court has admitted that states have a margin of discretion in regulating how this appeal ought to be structured;[76] however, states must not establish conditions that render the appeal ineffective.[77] In this sense, the IACtHR has established that the appeal must allow for the comprehensive review, including a "thorough analysis or examination of all the issues debated and analyzed in the lower court".[78] In principle, these conditions are satisfied by the right to appeal to the Minister of Justice (Article 29 of the BRA). The Minister has broad powers to review every aspect of the CONARE's decision and access to the appeal does not involve any specific limitations or even the payment of fees. Furthermore, the IACtHR has never specified that the right to appeal administrative decisions under Article 8(2)(h) ACHR must be exercised before a judicial body. Nonetheless, such a rationale can be found in another ACHR provision: Article 25, on the right to judicial protection.

Under Article 25, states must ensure that individuals claiming a violation of their rights as enshrined in the ACHR, the state's constitution, or the state's domestic law are able to make their case before a competent court or tribunal. Given that Article 22(7) of the ACHR establishes a right to be granted asylum, and the BRA also provides that refugee status *shall* be recognised to persons who meet the relevant criteria, being recognised as a refugee under the BRA is thus a right encompassed under the meaning of Article 25 of the ACHR.

The IACtHR has provided important clarifications as to the scope of Article 25's protection. Judicial remedies must be simple, prompt, and effective.[79] Effectiveness is measured by whether the remedy allows, in practice, the court to determine whether a violation has occurred and to establish measures to revert any violation.[80] An effective remedy does not necessarily entail an examination of the merits in every case; according to the IACtHR, "[t]he existence and application of conditions for the admissibility of a remedy is compatible with the American Convention".[81] However, when these preconditions are met, the judicial body must be able to rule on the merits of the case.[82]

for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence", *Refugee Survey Quarterly*, 34, 2015, 79–106.

[74] Inter-American Court of Human Rights (IACtHR), *Vélez Loor v Panama*, Judgment, Ser C No 218, 23 Nov. paras 179–181.

[75] Inter-American Court of Human Rights (IACtHR), *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, para. 140.

[76] Inter-American Court of Human Rights (IACtHR), *Herrera Ulloa v Costa Rica*, Judgment, Ser C No. 107, 2 Jul. 2004, para. 161.

[77] *Ibid.*

[78] *Ibid.*, para. 167.

[79] Inter-American Court of Human Rights (IACtHR), *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, Judgment, Ser C No. 198, 1 Jul. 2009, para77. In the refugee context, these criteria were also implied in Inter-American Court of Human Rights (IACtHR), *Pacheco Tineo Family v. Bolivia*, para. 160.

[80] L. Hennebel & H. Tigroudja, *The American Convention on Human Rights: A Commentary*, Oxford University Press, 2022, 745.

[81] Inter-American Court of Human Rights (IACtHR), *Castañeda Gutman v. Mexico*, Judgment, Ser C No. 184, 6 Aug 2008, para. 94.

[82] Inter-American Court of Human Rights (IACtHR), *Claude Reyes et al v. Chile*, Judgment, Ser C No. 151, 19 Sept. 2006, para 139.

Regarding the scope of judicial review of administrative decisions, there is only one case in which the IACtHR dealt with this question to date, *Barbani Duarte et al. v. Uruguay*.[83] The case concerned a Uruguayan private bank that had transferred funds belonging to several of its customers to a bank in the Cayman Islands without these customer's permission. The state of Uruguay enacted a law creating an administrative body, named the Advisory Commission, and tasked it with deciding on the customer's complaints about this situation. Many customers disagreed with the Advisory Commission's decisions and sought to revert them before domestic courts.

In its judgment, the IACtHR clarified that judicial review is insufficient if the domestic court in question is barred from determining the main object of the dispute, for example in cases where the domestic court is limited to the factual and legal assessment made by the administrative body and that were decisive to the case's administrative resolution.[84] In other words, the domestic court must be able to nullify the administrative decision based on an incorrect interpretation of the facts or the law.[85] At least one level of full judicial review of the administrative decision is thus warranted. In the case, the IACtHR found a violation of Article 25 in relation to 11 victims precisely because the domestic courts had failed to consider all aspects of their claims against the administrative decisions.

As seen in the previous section, this kind of effective review does not happen in Brazil. Both the STJ and the TRFs have considered themselves bound by the conclusions of the CONARE and the Minister of Justice, thereby limiting judicial review as to whether RSD decisions were duly motivated and coherent, or whether due process guarantees were observed during the RSD proceeding. If an incorrect interpretation of the facts or the law occurred at the administrative instances, these courts thus refuse to review it, effectively denying judicial protection to asylum seekers.

This is not to say that Article 25 of the ACHR prohibits any measure of administrative discretion. However, if this allegedly discretionary administrative act interferes with rights protected under the ACHR, domestic courts must be able to review the aspects of these acts that directly interfere with the enjoyment of human rights, ensuring that the latter remain real and effective. Leaving RSD decisions entirely to the administrative instances, without the possibility of having domestic courts review the adequate application of the legal conditions for refugee status, as done in Brazil, is thus inconsistent with Article 25 of the ACHR. Lack of access to judicial review, in turn, leads to a violation of the right to seek and receive asylum (Article 22(7) of the ACHR), since it denies *bona fide* applicants from enjoying their international legal status and connected rights in the host state.

A further point of concern relates to states' obligation to ensure that decisions in RSD proceedings are duly and expressly founded, a duty the IACtHR derives from Articles 8, 22(7), 22(8), and 25 of the ACHR.[86] According to the Court, "the considerations of a ruling and certain administrative decisions must reveal the facts, grounds and laws on which the authority based itself to make its decision in order to eliminate any sign of arbitrariness".[87] While it is not possible to ascertain whether there exists a trend on the part of the CONARE and the Minister of Justice of inadequately founding RSD decisions – since these decisions are not made publicly available – excerpts from STJ and TRF-4 judgments show that this happened at least twice: in one case, the CONARE's decision solely affirmed that the

[83] Inter-American Court of Human Rights (IACtHR), *Barbani Duarte y otros vs Uruguay*, Judgment, Ser C No. 234, 13 Oct. 2011.

[84] *Ibid*., para. 204.

[85] *ibid*., para 210. For further discussion, see Hennebel & Tigroudja, 751–752.

[86] Inter-American Court of Human Rights (IACtHR), *Pacheco Tineo Family v. Bolivia*, para. 159(c).

[87] Inter-American Court of Human Rights (IACtHR), *Chocrón Chocrón v. Venezuela*, para. 118.

applicant did not qualify for refugee status, without pointing out any facts or legal interpretations to ground this conclusion[88]; in another, the Minister of Justice rejected an administrative appeal without indicating the reasons for that.[89] Hence, one cannot ignore the risk that the lack of effective judicial review of these administrative decisions may lead to the consolidation of further violations of due process guarantees under the ACHR.

5. CONCLUSION

Policies change, and they may do so quickly. Brazil's reputation as a welcoming country to refugees – merited or not – is not set in stone; indeed, this reputation has witnessed variations in recent years and could be further affected in the future. The question of whether a country is welcoming does not necessarily mean that refugees' rights are adequately safeguarded in accordance with international law. Effective protection of refugees and respect for the state's international obligations require independent and effective judicial review through which the lawfulness of the acts of administrative authorities in RSD proceedings can be constantly monitored and, if found to be wrong, corrected. This kind of review is even more pressing where, like in Brazil, RSD decisions are not made available to the public, and thus one cannot know what kind of reasoning administrative authorities followed or even if political considerations played a role in the decision.

Despite its significance, this article has shown that full judicial review of RSD decisions is not currently practiced in Brazil. Confusion about the distinction between refugee status and political asylum, misconceptions about the nature of the administrative act recognising refugee status, and a curious omission regarding the case law of the highest court in the country all result in a scenario where Brazilian courts repeatedly refuse to review the merits of RSD decisions. The logic adopted in Brazilian judicial practice, in the sense that refugee status is "granted" as a discretionary political act based on considerations of sovereignty, is contrary to the declaratory nature of this status under the 1951 Refugee Convention and the BRA and poses a major risk to refugee protection in the country. With such limited judicial review, potential shortcomings in the CONARE's assessment of the facts or the law in RSD procedures are subject to the review of one single person, the Minister of Justice, who occupies a political position and is not necessarily familiar with the frameworks of refugee or human rights protection. The fact that the vast majority (over 97 per cent) of appeal decisions from the Minister in the past 6 years have been negative casts further doubts as to the fairness and effectiveness of this administrative review.

In this scenario, Brazilian courts' limited exercise of judicial review goes against not only the rationale of refugee status but also human rights guarantees. The right to judicial protection under Article 25 of the ACHR mandates states to ensure that domestic courts are able to review the interpretation of both the facts and the law on which an administrative decision is grounded. Without this kind of thorough judicial review, the very right to seek and receive asylum (Article 22(7) of the ACHR) is at risk of being voided, since the fate of asylum seekers rests entirely in the hands of one collegiate body and one individual state Minister, with little oversight as to how their decisions are reached. Even though Brazilian courts have indicated that violations of due process guarantees during the RSD procedure are still subject to judicial review, the court's unwillingness to seriously consider claims against RSD decisions creates the risk that certain procedural flaws in the administrative procedure might

[88] STJ, *AgRg no Mandado de Segurança No 12.212 - DF*, 8 Nov. 2006, 6.
[89] TRF-4, *Apelação Cível Nº 2008.70.00.001631-8*.

be overlooked, as has indeed been the case in judgments from the STJ and the TRF-4, highlighted previously.

Without proper judicial review of RSD decisions, Brazil remains in violation of its international and domestic obligations and cannot be said to provide effective protection to asylum seekers. Overcoming this situation requires work on two fronts: first, and perhaps more obviously, regarding Brazilian courts. As the article has shown, the exacerbated deference these courts tend to grant administrative authorities in RSD procedures stems from lack of proper knowledge and understanding of the legal frameworks on refugee protection. Training judges on these frameworks is therefore imperative, including by highlighting the distinction between refugee status and political asylum, an endeavour that could benefit from the support of UNHCR offices in Brazil. It is also important to enhance judges' awareness as to the limits of states' sovereignty and discretion in the admission not only of refugees but migrants in general. The IACtHR's case law is particularly valuable in clarifying these limits. Although Brazilian courts regularly engage with IACtHR judgments, not all aspects of the Inter-American case law have received the same level of attention or been given effect by domestic courts.[90] Further training and distribution of informative materials to judges, especially on the IACtHR's judgments regarding refugee protection and judicial guarantees, remains important. Finally, more awareness among judges about the STF's own case law on judicial review of RSD decisions is needed. Given the notoriety of the *Battisti* saga across the country, it is surprising that most Brazilian courts seem oblivious to the STF's conclusion that the merits of RSD decisions are subject to judicial review. Equally surprising is that the STF has not sought to reinforce its conclusions across lower courts through guides or other informative publications. It is high time such initiatives be undertaken.

The second front of work concerns enhancing the knowledge of lawyers, both from the private sector and public defenders, on RSD and applicable procedural guarantees. The scope of action of courts is, after all, quite restricted if lawyers do not submit the appropriate arguments before them. The limited number of judgments addressing the judicial review of RSD decisions identified across the TRFs – only 17 judgments in a period of 16 years, from 2008 to 2024 – suggests that the majority of negative RSD decisions are not challenged before courts. It is not possible to conclusively pinpoint the reasons for that – for instance, whether the asylum seekers in question decided not to insist on the matter, did not know of the possibility of judicial review, or were advised against it. It is important to note, however, that knowledge of refugee and human rights normative frameworks and experience with litigation on refugee protection are still limited among practitioners in Brazil. As such, one can imagine that many lawyers might be hesitant to seek judicial review of RSD decisions, and even more so after they learn of the unfavourable judicial response to such attempts. This perspective can change through a better comprehension of the applicable domestic and international norms and the Inter-American case law, which, as shown in this article, require that domestic courts be open to review the merits of RSD decisions. By understanding these

[90] The most notorious example is Brazilian courts' refusal to abide by the IACtHR's judgment declaring that the provisions of the Brazilian Amnesty Law preventing the investigation and punishment of human rights violations occurred during the country's military dictatorship (1964–1985) were without legal effect. Instead, Brazilian courts continue to follow the STF's precedent, which considered that the Amnesty Law was valid. See: Inter-American Court of Human Rights (IACtHR), *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment, Ser C No. 219, 24 Nov. 2010, para 325(3); STF, *ADPF 153–DF*, 29 Apr. 2010. In a similar vein, James Cavallaro and Stephanie Brewer have noted that "the impact of inter-American decisions in [Brazil] has varied not according to their content but, rather, in accordance with the degree of pressure brought to bear by the public and especially by the media". James L. Cavallaro & Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', *American Journal of International Law*, 102(4), 2008, 768–827, 793.

frameworks, lawyers can then make a more informed assessment of whether judicial review is worth pursuing and convey their arguments more effectively to the competent courts. In so doing, lawyers can actively seek to change these courts' practices in conformity with international law.

As the role of Brazil as a refugee-hosting country grows, the time is ripe to promote a deeper and more comprehensive understanding of the normative framework on refugees, both among courts and legal practitioners. Only then can RSD proceedings in the country benefit from the judicial oversight needed to ensure respect for Brazil's obligations and effective refugee protection.

Refugee Survey Quarterly, 2025, 00, 1–19
https://doi.org/10.1093/rsq/hdae028
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