Avci v Denmark: The Expulsion of Settled Migrants and the Pitfalls of Process-based Review in Strasbourg

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Avci v Denmark concerns an expulsion order and a permanent re-entry ban issued by the Danish High Court against Mr Avci, a settled migrant born and raised in Denmark. This judgment provides a clear illustration of the burgeoning trend towards process-based, procedural review by the European Court of Human Rights (hereinafter 'the Court') – a body that has long been subject to criticism for its efforts to micromanage domestic courts in their adjudication of human rights cases. Although scholars have generally welcomed the turn to procedure in Strasbourg, the ruling in *Avci* does little to assuage the fears of those who remain sceptical of the 'procedural turn' in the Court's case law. The new ruling serves to highlight the inconsistencies in the Court's application of procedural review and the continued lack of consensus on the bench. It also illustrates the existence of a potential risk that the 'procedural turn' in Strasbourg could pave the way for a check-box style approach to human rights adjudication, in which the specific circumstances of individual applicants are in danger of being overlooked.

Facts

The applicant, Mr Avci, is a Turkish national. He was born in Denmark and lived there legally until his expulsion in January 2020. In 2013 he was convicted of having tried to free a detainee and of having caused a sense of insecurity for the public as a participant in a crowd. In 2018 he was convicted of serious drug offences committed with several other persons and sentenced to four years imprisonment. The Danish High Court ordered his expulsion to Turkey, combined with a permanent ban on his re-entry to the country. He was refused permission to appeal and the order was subsequently enforced.

The High Court based its decision on the serious nature of the offences committed and the applicant's risk of re-offending. It considered his ties to both Denmark and Turkey and found that he had the prerequisite ties enabling him to establish a life in Turkey, if and when expelled. In light of its overall assessment of the situation, the High Court found that the circumstances in favour of his expulsion were sufficiently compelling to outweigh those making it inappropriate. Thus, the domestic court noted that expulsion with a permanent re-entry ban would not be a disproportionate sanction contrary to the relevant provisions of domestic law or to Article 8 of the European Convention on Human Rights (ECHR).

The applicant alleged in Strasbourg that the decision to expel him was a violation of his rights under Article 8. He argued that the Danish courts had failed to take relevant circumstances into account in the balancing test, namely that he did not have a significant criminal past, that he had never been issued with a conditional expulsion order and that

he had strong ties to Denmark and few ties to Turkey. He argued that they had not established there were ‘very compelling reasons’ to expel him, as required by ECHR case law. The government refuted this, claiming that domestic courts had struck a fair balance between the opposing interests, carefully assessed the applicant’s circumstances and considered the case specifically in the light of Article 8 and the relevant case-law of the Court. They further argued that having regard to the principle of subsidiarity, the Court should be reluctant to disregard the outcome of the domestic assessment.

Judgment

The Court accepted that the expulsion order and re-entry ban constituted an interference with the applicant’s right to respect for private life under Article 8 and found that the measures were in accordance with the law and pursued a legitimate aim. Therefore, the Court’s examination focused on the necessity of the measures in a democratic society. The Court recognized that the domestic court’s legal point of departure was the relevant sections of domestic law and the criteria to be applied in the proportionality assessment, by virtue of Article 8 and the Court’s case-law. Each criterion had been thoroughly examined at the domestic level and very serious reasons to expel the applicant had been adduced – as required in such a case concerning a settled migrant who had been born and lawfully spent his youth and childhood in the host country (see *Maslov v. Austria*). In light of this, the Court proceeded to consider whether the Danish court had been correct in coming to this conclusion.

As stated above, the Danish court had given particular weight to the nature and seriousness of drug offences like those committed by the applicant, to his separate prior convictions and to the risk of his re-offending. These arguments were accepted by the majority, who reiterated the Court’s understanding of the ‘devastating effects’ of drugs and why the authorities show great firmness to those who ‘actively contribute to the spread of this scourge’ (see *Amrollahi v. Denmark*, *Balogun v. the United Kingdom*, *Samsonnikov v. Estonia*, *Salem v. Denmark*).

The Court then reviewed the Danish court’s consideration of other relevant criteria including ‘the solidity of [the applicant’s] social, cultural and family ties with the host country and with the country of destination’ and concluded it was adequate. They accepted the Danish court’s conclusion that the measure was proportionate. Although the applicant’s expulsion from Denmark and the permanent ban on his re-entry would be particularly burdensome due to the strength of his ties with Denmark, the Court referred to the Danish courts that his knowledge of the Kurdish language, customs and culture meant he had the prerequisite ties enabling him to establish a life in Turkey.

Furthermore, while the Court acknowledged that the duration of a ban on re-entry has been deemed important in previous cases (*Ezzouhdi v France*, *Keles v. Germany* and *Bousarra v France*), it recalled that it had never set a minimum requirement as to the sentence or seriousness of the crime resulting in the expulsion or qualified the relative weight to be accorded to each criterion in the individual assessment. Conversely, the Court held that it is for national authorities to decide this on a case-by-case basis, subject

to European supervision (see *Munir Johana v. Denmark*).Ultimately, the majority of the judges distinguished this case from earlier cases as the applicant's previous offences posed a threat to public order. They concluded that the domestic courts had adequately adduced 'very serious reasons' for the measures imposed and had thoroughly assessed whether such measures were compatible with Denmark's international obligations. Making an express reference to the principle of subsidiarity, the majority held that there had been no violation of Article 8.

Dissenting Opinion of Judges Pejchal, Ranzoni and Yüksel

A compelling dissent by three judges highlights several issues with the majority's conclusions, pointing to divisions on the bench regarding how the procedural approach is to be applied. While the dissent acknowledged that the role of the Court within the Convention system is a fundamentally subsidiary one, they emphasised that this does not render the decisions of national authorities immune from scrutiny. They criticised the majority's reasoning, arguing especially that it was inconsistent with previous case law on Article 8 concerning the expulsion of settled migrants.

In particular, the dissent noted that the majority had failed to give sufficient weight to the criteria previously found relevant, especially regarding the duration of the ban on re-entry. The dissenting judges disagreed that the applicant's prior convictions were so egregious as to meet the threshold required in the case law to justify his permanent expulsion – namely that he posed an 'extremely serious threat to public order' (see *Bousarra, Ezzouhdi,* and *Keles*).The dissenters also highlighted inconsistencies between the majority's findings in this case and the previous jurisprudence of the Court. They could not understand how this case was distinguished from *Bousarra* and even more so, from *Abdi v Denmark,* as both these cases dealt with strikingly similar offences and facts. Neither could they fathom how *Avci* was deemed comparable to *Balogun* – a case which differed significantly on the facts both in terms of the applicant's ties to the host country and the nature of the offences committed and did not concern a permanent re-entry ban.

The dissent also identified flaws with the majority's assertion that the applicant has the prerequisite ties to establish a life in Turkey, pointing towards a misreading of the Danish court's reasoning in respect of the criterion "the solidity of social, cultural and family ties with the host country and with the country of destination". While the Danish court had referred to the applicant's knowledge of Kurdish to show he had ties to the culture and customs of Turkey, the majority transposed this reasoning into the judgment as evidence that he has the prerequisite to establish a life there.

The dissent finally also criticised the proportionality assessment as conducted at the domestic and European level. The Danish court did not undertake any assessment of the proportionality of the permanent re-entry ban and with the exception of the seriousness of the offences at stake, did not advance any element constituting the 'very serious reasons' required to justify such measures in the case of settled migrants, who have lawfully spent

all or the major part of their youth in the host country (see *inter alia Maslov*). Thus, this test did not meet ECHR requirements and yet it was accepted by the majority who conducted no separate proportionality assessment.

Comment: Pitfalls of the Procedural Turn in Strasbourg?

This commentary will focus on two main pitfalls in the majority ruling in this case. The first centres around the Court's inconsistent application of the case law and the second on the incoherence of its application of the procedural turn itself. To understand why these issues are potentially problematic, it is necessary to first reflect on the justifications and purported benefits of the turn to process-based review by the Strasbourg Court.

In 2013, the adoption of Protocol 15 amended the preamble of the ECHR to include an explicit reference to subsidiarity and the margin of appreciation in the Convention's text for the first time. This amendment responded to calls for an increasing focus on the subsidiarity of the Court, seen in declarations from consecutive High-Level Conferences on the Court's future from Interlaken (2010) to Copenhagen (2018). These calls by Contracting States encouraged the Court to develop a more robust concept of subsidiarity and adopt a more procedural approach in its jurisprudence, demonstrating a 'willingness to defer to reasoned and thoughtful assessment by national authorities of their Convention obligations.'

Characterized as the 'procedural turn' in the literature, this development has been said to herald the coming of a new 'age of subsidiarity' by the current President of the Court, Robert Spano. The stronger emphasis on the quality of domestic procedure signals a shift in the Court's focus from evaluating the substantive impact of alleged Convention violations on applicants to a more process-orientated examination of how the law was applied and interpreted by the national authorities.

Spano has characterized the procedural turn as a 'qualitative democracy enhancing approach', since the Court displays a willingness to defer to states based on the quality of the decision-making process in domestic courts and democratically elected bodies. The procedural dimension occasioned by this approach assumes the development of clear factors triggering more lenient review of which defendant governments are aware. By adopting this more deferential approach, the Court grants domestic courts and parliaments, democratically elected representatives of the people, more leeway to safeguard rights in the way they see fit. Thus, the 'procedural turn' in Strasbourg goes some way to address the claim that the Court's case law has given rise to a significant democracy deficit in some areas of social policy.

Scholars have argued that the shift from substantive to process-based review can also lead to thicker accountability for safeguarding human rights. By giving states clear guidance on how they should proceed and by empowering them to become co-authors of rights protection, these scholars argue, the Court can return the responsibility for human rights protection to states while retaining oversight of the process.[1] Closer alignment of national decision-making processes and judicial procedures with the standards developed

by the ECtHR in its case law is also expected to reduce the number of repetitive cases on the Court's docket, allowing it to devote more time to complex and novel cases and improve the expedience at which justice is delivered.

An important precondition for these benefits to take hold, however, is that the Court itself provides a high level of consistency and clarity in the application of procedural review. If the procedural approach is intended to motivate states to behave in a certain way and to adopt a rights-based approach at the domestic level, then the Court's guidance across cases must be clear. *Avci v. Denmark* is an interesting case in this respect, for although the majority applied the procedural approach, the key elements of consistency and clarity were arguably lacking – as highlighted by the dissent. *Avci* thus illustrates how the potential of procedural review as a tool of empowerment for domestic authorities can be undermined by inconsistent and unclear reasoning.

Even when consistently applied, procedural review can still pose certain risks. Brems has, for example, urged that caution be taken to ensure that the focus of procedural protection is limited to complementing and optimizing substantive protection rather than *substituting* it. Problems may arise when the Court draws positive inferences from state compliance with procedural obligations as 'even after consulting all relevant expertise and hearing all interested parties in a fair procedure' it is entirely plausible that domestic authorities may nevertheless make decisions that violate the substantive rights of the individual.

This is perhaps even more likely to occur where minorities, including settled migrants, are concerned, given that their voices may not be adequately represented within the democratic process. Indeed, the majority ruling in *Avci* suggests that this risk is a worthy subject of concern. In their review of the Danish court's decision, the majority focused heavily on the fact that the domestic courts had paid attention to all relevant criteria developed by the Court under Article 8 ECHR. In doing so, or so the dissenters claim, the majority appears to have overlooked the fact that a proper proportionality assessment was not carried out. The majority may also have misread the domestic courts' determination that the applicant had social and cultural links to Turkey as meaning he had the prerequisites to establish a life there.

Conclusion

Avci illustrates a potential pitfall of the procedural approach, namely that it may lead to a hollowing out of substantive ECHR protections and a check-box style approach to rights protection, where an undue focus on procedure causes the Court to lose sight to the specific circumstances of individual applicants. This warning must come with an important caveat, however. In opting for process-orientated review, the Court was under no obligation to defer entirely to the domestic authorities. Given that proportionality is a key element in determining the necessity of a measure under Article 8.2, it would have been entirely appropriate for the majority to conduct a more thorough review of the adequacy of the domestic courts' assessment thereof – even while choosing to focus on the procedural elements of the case. This could have led the majority to align with the dissenters on the lack of proportionality of the permanent re-entry ban for instance.

[1] Janneke Gerards, ‘The Prism of Fundamental Rights’ (2012) 8 European Constitutional Law Review 173; Eva Brems, ‘The “Logics” of Procedural-Type Review by the European Court of Human Rights’ in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press).