Guilty of Showing Up -

A Comparative Analysis of Administrative Restraints on Asylum Law in Portugal and the U.S.

Professor Vasco Pereira da Silva' Administrative Law II Class

Gonçalo Sá Gomes

Nº 60631

TB17

Lisbon, May 2021 (c.e.)

"So spake the fiend, and with necessity,

The tyrant's plea, excus'd his devilish deeds"

- John Milton, Paradise Lost, Book IV, line 393

Honor Pledge:

I, Gonçalo Sá Gomes, by my honor, declare that the submitted work is original and adheres to the University' highest standards of academic integrity.

Abstract:

This article is a comparative analysis of asylum law with reference to the Portuguese and U.S.' systems. It holds a special focus on the most prominent legal and constitutional restrictions on asylum decision and policy.

Table of Contents

1. Introduction

Asylum-seekers are among the most disadvantaged groups under the influence of any modern Administrative State: there is usually a language barrier, contentious administrative proceedings are often swift and opaque and administrative appeals are difficult to provide effective solutions in useful time.

Even the generally accepted principle of "*ignorantia juris, non excusat*" is put to the test, as by the very nature of asylum-seeking, one is hardly in a position to have or adequately seek procedural and substantive legal know-how.

This paper seeks to analyze the right of asylum in two legal systems - Portugal and the United States of America - focusing on asylum policy, legal framework and on the legal and constitutional restrictions of asylum decisions. It does not aim at an extensive and detailed classification framework of constitutional and legal differences between the Portuguese and U.S.' systems.

A direct and exhaustive comparison between the two is impossible within the constraints of this work as they are countries with completely different histories and legal systems, where constitutional provisions define applicable law and restrict asylum decisions in very different ways.

My main objective is to simply pursue a comparative analysis between the two systems, mindful of both the similar and contrasting natures of asylum.

The profound vulnerability of asylum-seekers is the ultimate reason for their special protection under the law.

As Shakespeare said, "strong reasons make strong actions."

2. Brief Historical Overview of Portuguese and American Asylum Law

Sketches of asylum values can be traced back to the Ancient World, where those fleeing persecution could find safe haven in the divine protection of religious temples, but only

with the Age of Enlightenment, have the philosophical foundations of asylum begun to be constructed[1].

The end of World War II marked the start of a new asylum legal framework.

The Universal Declaration of Human Rights of 1948 described the right of asylum in the following terms: "1) In the event of persecution, every person has the right to seek asylum, and to enjoy it, in any country. 2) This right cannot be invoked against a legal action actually arising from common offenses or acts opposed to the purposes and principles of the United Nations. [2]"

On July 14th, 1950, the United Nations General Assembly adopted Resolution 428A (V) establishing the United Nations High Commissioner for Refugees (UNHCR). Article 1 of the Statute provides that the UNHCR must ensure international protection for refugees and shall seek permanent solutions to the problem of refugees by helping governments and private organizations to facilitate the voluntary repatriation of refugees, or their absorption into the new national communities.

2.1. Historical Overview: Portugal

Portugal has close to 900 years of history and so any in-depth research on the matter would be inappropriate for this paper. Nevertheless, Portugal is peculiar in the sense that, throughout its history, it was never prone to major migrations and shifts in population.

The first refugees in Portugal were likely the Jews expelled from Spain in 1492 by the Catholic Kings Fernando de Aragón and Isabel de Castilla. D. João II accepted the Jewish refugees for eight months, however, following the 1496 marriage agreement of D. Manuel I de Portugal with Isabel de Castela, all Jews who did not convert to Christianity were expelled from the country[3].

[1] Art. 120º of the French Constitution of 24 June 1793 determined that the French people would offer asylum to foreigners exiled in their homeland. DANCHES, Luciana Taynã, in The historical origins of the right of asylum, in https://jus.com.br/artigos/25448/as-origens-historicas-do-direito-de-asilo

[2] Articles 14.1 and 14.2

[3] DANCHES, Luciana Taynã, ob. cit.

Centuries later, the Spanish Civil War began the most consequential "forced emigration" in Spanish history, causing a humanitarian crisis at the Spanish-Portuguese border, leading to the creation of the National Refugee Committee in 1936[4].

Notwithstanding, thousands of refugees within Portuguese boundaries were detained by the Portuguese political police – PVDE: *Polícia de Vigilância e Defesa do Estado* (Police of Vigilance and Defense of the State). Portugal lived under a fascist regime during this time and its political police extensively collaborated with Spanish nationalists. Following the events of World War II, Portugal received between 50.000 and 100.000 refugees[5] and, conversely, because of the oppressive nature of the regime many thousands left Portugal.

Following the Revolution of April 25th, 1974, and with the establishment of a democracy, political power became more sensitive to asylum issues. Law-Decree nº 189-B/76 of March 15th[6], aimed at promoting "kindred relations of friendship between Peoples" and came to recognize "any and all individuals, national or foreign, [have] the right to move freely within the national territory". In addition, the law established conditions under which foreign citizens could be expelled from the country, "not allowing the pure police arbitrariness that characterized the previous regime, but also that it does not tie the authorities to a formalism that hinders the defense and realization of national interests." – the overjoy of ceasing to live under fascism was still very present in legal writings at that time.

Thus, in 1980, with Law nº 38/80 of August 1st, the "Right of Asylum and the Status of refugees" was approved. This law granted the right of asylum on humanitarian grounds, as "foreigners and stateless persons who do not wish to return to the State of their nationality or habitual residence for reasons of insecurity due to armed conflict or the systematic violation of human rights that occur there may also be granted asylum."

---

[4] *In* SANTINO, Maria Cristina, in Refugiados e Requerentes de Asilo em Portugal: Contornos Políticos no Campo da Saúde, 2011, ISCE-IUL, in https://www.om.acm.gov.pt/documents/58428/179891/Tese48_paginacao_06_lr.pdf/700654fe-64e8-401d-9d8d-3b13b2da125c .

[5] SANTINO, Maria Cristina, ob. cit.

[6] This law was based on the new Constitutional Law Nº. 6/75 of March 26th

It is important to note that Portuguese asylum laws have been heavily influenced by the European Union. Notably, in 2008, among other modifications, the latest law on asylum created a new distinct legal figure of refugees: resettled refugees. This designation makes it possible to transfer refugees from their country of asylum (where they already have this legitimate status) to a third country (in this case, Portugal) that has agreed to receive them.

2.2. Historical Overview: U.S.

The first naturalization statute in the United States was the "Naturalization Act" of 1790 and allowed any unindentured white male living in the country for over two years to become a citizen[7]. The scope of people able to become citizens varied over the subsequent years. For instance, the Naturalization Act of 1870, allowed for "aliens of African nativity" or "African descent" to become citizens, while the Page Act of 1875 banned criminals, prostitutes, and Chinese contract laborers from entering the U.S.

However, because there was no federal body to enforce immigration laws at the time, Congress passed the Immigration Act of 1891, creating the "Bureau of Immigration"[8] responsible for overseeing the admission of immigrants. Naturally, since there was still no separate legislation to address asylum-seekers, such individuals could resettle in the U.S. if they met the criteria for naturalization under the mentioned 1790, 1870, or 1891 laws.

Even though racial and ethnic motives in immigration policy were dominant influencers in U.S.' legislation, such was subject to interesting exceptions that would form the hallmark of early American asylum policies. For example, during the 1910-1920 Mexican Revolution, thousands of Mexican refugees were admitted in the U.S. by the Immigration Bureau, even though they were unable to meet the general requirements for immigration. The government' reasoning was as follows: when interpreting the law,

[7] In, https://www.infoplease.com/us/immigration-legislation by, ROWEN, Beth and CHAMBERLAIN, Logan

[8] In, https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline, in U.S. Citizenship and Immigration Services.

"humane considerations" are allowed. Nevertheless, the Deportation Act of 1929, resulted in the repatriation of close to 100.000 Mexicans living in the U.S[9].

The end of World War II marked a pivotal shift in refugee preoccupations and policy and, in 1948, Congress passed the Displaced Persons Act, granting more than 350.000 people into the country. These refugees were granted entry within the existing quota system and only if 1) they had found a place to live and 2) had a job that would not replace another worker.

One should acknowledge that, in the wake of World War II, and with the emergence of modern International Public Law, the U.S. played a crucial role in establishing legal grounds for refugee and asylum-seeker protections around the World. Notwithstanding its role in creating the United Nations itself, the U.S. helped draft the "Convention Relating to the Status of Refugees" (commonly referred as the 'Refugee Convention') in 1951, outlining basic legal protections for refugees. However, the U.S. did not sign this Convention, as one would have to wait until 1967 for the country to sign the "Protocol Relating to the Status of Refugees" obliging It to "apply articles 2 to 34 inclusive of the [Refugee] Convention[10]".

In 1952, Congress passed the Immigration and Nationality Act (INA). Even though, it lacked provisions specifically for refugees and asylum, it is still the main piece of legislation regulating immigration law today.

Finally, one should draw attention to the fact that, during the course of the Cold War, the U.S. was preoccupied with asylum-seekers from communist countries, authorizing thousands of "non-quota" immigrant visas on multiple occasions[11].

In 1980, Congress created the first statutory framework for asylum and removed the geographical and ideological limits to its definition, through the Refugee Act of 1980.

---

[9] In, The Law Against Family Separation, by CORDERO, Carrie F., FELDMAN, Heidi Li, and KEITNER, Chimène I., 2020, Columbia Human Rights Review

[10] Protocol Relating to the Status of Refugees, See, https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf

[11] Like the Refugee Relief Act of 1953, the Hong Kong Parole Program of 1962, or the Migration and Refugee Assistance Act of 1962.

In the aftermath of 9/11, the Immigration and Naturalization Service (INS) was divided into three organizations: the U.S. Citizenship and Immigration Services (USCIS), the U.S. Immigrations and Customs Enforcement (ICE), and the U.S. Customs and Border Protection (CBP).

3. Portugal' Asylum Law

The right to asylum is a fundamental right enshrined in Article 33º, nº 8 of the Portuguese Constitution. In their Annotated Constitution, Gomes Canotilho and Vital Moreira believe there are 3 different dimensions to the right of asylum[12]:

a) An international dimension: the right of any State to accept and give refuge to those persecuted or threatened by another State;
b) A personal dimension: an expression of a subjective right, where the individual has the right to obtain refuge from another country and not to be expelled to the country that oppresses or persecutes him or her;
c) An objective constitutional dimension: working as a means of protection of the constitutional values in "democracy, social and national freedoms, peace among peoples, of freedom, and rights of mankind".

Interestingly, and unlike its American counterpart, in this 3rd dimension, the Portuguese Constitution suggests that anyone working towards these fundamental goals, principles, and values of democracy, namely freedom and humanity, should be protected at a higher standard. To the constitutional text, it is particularly offensive that anyone working for such principles could be left abandoned by them.

Most recently, and following the accounts and accusations of torture and murder by the Portuguese authorities of an Ukrainian citizen, the Portuguese Council of Ministers approved a Resolution (nº43/2021, of April 14th) predicting fundamental changes to *SEF* (*Serviço de Estrangeiros e Fronteiras* – Foreigners and Border Service). Its purpose is to pave the way for a restructuring of the current service responsible for overseeing

[12] GOMES CANOTILHO, José Joaquim; MOREIRA, Vital. *Constituição da República Portuguesa Anotada – Vol. I*, 4ª edition, 2014, Coimbra Editora,

immigration and asylum issues into a new *SEA* (*Serviço de Estrangeiros e Asilo* – Service of Foreigners and Asylum).

The current *SEF* is integrated in the Direct Administration as a part of the Internal Administration Ministry (*Ministério da Administração Interna* - MAI) and with attributions assigned by law[13].

3.1. Legal Restraints on Administrative Decisions

Under Portuguese law, once the decision to grant asylum is made, save for a few exceptions (like the right to run for the Presidency, for example), the individual is generally entitled to the same basic constitutional rights as any other citizen. The Law of Asylum (Law nº27/2008, of June 30th) explicitly entitles those under international protection, the right to access education, to employment, social security, health, and housing (articles 70º through 74º) in equal footing as national citizens.[14]

Decisions by the European Court of Human Rights in matters of removal of second-generation immigrants, or of those fully integrated and with strong family ties to the State, has greatly influenced part of the Portuguese legislation, namely the Law 23/2007, of July 4th, regulating the entry, stay, exist and removal of aliens in national territory[15]. In fact, that very law was changed following the transposition of EU Directive nº 2008/115/CE, from Parliament and the Counsel, of December 16th[16].

So, under article 144º of Law 23/2007, save for serious threats to public order or national security, the expulsion decision or compulsory removal must be duly justified and the ban on entry must always be accompanied by an expressed timeline no greater than 5 years.

---

[13] Law-Decree nº 240/2012, of October 16th

[14] And Article 83º of Law n.º 23/2007, of July 4th, regulating the entry, stay, exist and removal of aliens in national territory specifies a number of other rights to those authorized to reside in the country.

[15] RITA GIL, Ana, *in Imigrantes e Direitos Fundamentais Sociais*, "*O contencioso de direito administrativo relativo a cidadãos estrangeiros e ao regime da entrada, permanência, saída e afastamento do território português, bem como do estatuto de residente de longa duração*", 2.ª Ed., 2017*, Centro de Estudos Judiciários, Coleção Formação Inicial*

[16] Also called the 'Return Directive' – regulates "common standards and procedures in Member states for returning illegally staying third-country nationals".

This, of course, allows for some degree of discretion by the Administration, concerning what would be considered permissible reasons for removal and what are serious threats to national security or public order. When deciding, the agent must attempt to recreate the intent of the legislator, is bound by the legal purpose prescribed by law (and general principles and rules of Public Administration) and should decide accordingly[17].

The initiative to commence expulsion procedures is *ex officio* but never breaches a person' right of audience and defense - article 148º.

Nonetheless, under article 146º, nº5, the Administration is barred of initiating expulsion procedures under certain circumstances: if the applicant asked for asylum before a law enforcement entity, within 48 hours[18] upon irregular entry, or if the person holds a valid residential visa, or any other title that allows him or her to stay in another member State and fulfils the obligation to address that State.

Finally, article 149º determines that the National Director of *SEF* is the entity responsible of deciding coercive removal. This office should convey the decision and its justification to the concerned party, the High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural* – ACIDI) and the Advisory Council for Immigration Affairs, and must contain the list of obligations impending on the alien and the aforementioned ban deadline.

The appeal of the decision to expel the individual does not have a suspensive effect and can be executed before judicial oversight takes place. However, the decision to grant or deny asylum does have a suspensive effect: the applicant can exercise his or her' judicial prerogative in a court of law to stop the effects of such a decision.

[17] Considerations *in* FREITAS DO AMARAL, Diogo, *Curso de Direito Administrativo*, vol. II, 4th Ed., 2020, Almedina

[18] PINTO OLIVEIRA, A. Sofia considers this deadline unconstitutional for being unreasonably short and violating art. 33º, nº8 of the Portuguese Constitution. *In*, *Limitações várias ao poder de afastamento dos estrangeiros do Território Nacional*, *in Imigrantes e Direitos Fundamentais Sociais*, "*O contencioso de direito administrativo relativo a cidadãos estrangeiros e ao regime da entrada, permanência, saída e afastamento do território português, bem como do estatuto de residente de longa duração*", 2.ª Ed., 2017, *Centro de Estudos Judiciários, Coleção Formação Inicial*

3.2. Constitutional Restraints

To the Portuguese Constitution a "foreigner" is anyone not having Portuguese nationality, and "stateless" are those who do not have another nationality, and it allows for different regimes depending on the country of origin and respective Treaties with the country. Under the Constitution, aliens have different rights depending on whether or not they are from Portuguese-speaking countries, member States of the European Union, and as a function of reciprocity between specific countries[19].

Article 33º, nº2 of the Portuguese Constitution allows for the expulsion of foreigners, but explicitly requires the decision to be "ordered by a judicial authority." One should note that this rule only applies to those legally permitted to be in Portugal. A. Sofia Pinto Oliveira[20] even goes so far as to consider that*, a contrario sensu*, the Portuguese Constitution seems to admit the expulsion of illegal aliens by administrative authorities without judicial controls. With respect to the author, I personally consider that, in this Article, the Constitution guaranteed controls and judicial oversight to the most basic of scenarios: lawful stay and residence of a foreigner. However, as we will see in a moment the Principle of Assimilation endows illegal aliens of some fundamental constitutional rights, one of which should be the right to an effective judicial protection, under Article 20º.

As mentioned, this paper does not aim at an extensive and detailed classificatory framework of constitutional and legal differences between the Portuguese and the U.S.' systems. In this paper, I will simply make a brief review of the major constitutional principles disciplining asylum law[21].

Each Principle tends to be substantive in nature, as they attribute to individuals certain subjective rights.

As a result, the Portuguese Constitution enshrines several complementary and fundamental principles:

---

[19] OLIVEIRA, Carlos Pamplona de, *in Jurisprudência Constitucional sobre Cidadãos Estrangeiros,* Report presented on *encontro trianual dos Tribunais Constitucionais de Portugal*, 2008

[20] PINTO OLIVEIRA, A. Sofia, ob. cit.

[21] For a more detailed analysis of Constitutional Principles in Portuguese Administrative Law, see REBELO DE SOUSA, Marcelo, Lições de Direito Administrativo, vol. I, 1999, Lex

3.2.1. The Principle of Human Dignity

Article 1º of the Portuguese Constitution states that "Portugal is a sovereign Republic, based on the dignity of the human person." In fact, some authors even tend to assert it as a *supraconstitutional* value, mandating the political organization of Portugal itself, and upon which all other fundamental rights are docked, as it stands beyond the compounds of Portuguese nationality and cannot be denied to any human being.[22]

3.2.2. The Principle of Equality

Article 13º mandates that the operational content of any right should be equal to all, and different treatment under the law should only be allowed if the measure of difference is appropriate[23]. Hence, Marcelo Rebelo de Sousa explains that the Principle of Equality mandates that "*there should not be an unequal treatment when the subject should be treated equally, in light of constitutional and legal values*"[24].

The Portuguese Constitution also establishes special conditions of equality for some social rights – Article 59º, nº1 assures, to all workers, constitutional rights regardless of citizenship.

3.2.3. The Principle of Proportionality

Article 266º dictates the Fundamental Principles that permeate Administrative action. Administrative organs and agents "must act with respect for the principles of equality, proportionality, justice, impartiality and good faith".

The Principle of Proportionality is crucial in establishing limits to decision-making and even the law itself. Freitas do Amaral, following a well-known doctrinal conceptual construction divides the Principle of Proportionality into 3 different components[25]:

[22] OLIVEIRA ASCENSÃO, José de, *O Direito, Introdução e Teoria Geral*, 7th Ed., 1993, Almedina
[23] In Judgment of the Supreme Administrative Court, nº 0375/09, of May 12th 2010.
[24] REBELO DE SOUSA, Marcelo, ob. cit.
[25] FREITAS DO AMARAL, Diogo, *ob. cit.*

i) Adequacy: the measure must be suitable to the purpose it serves. It must fulfill its intent;

ii) Necessary: the measure should be the least aggressive, and the least harmful to private citizens;

iii) Equilibrium (or Proportionality *stricto sensu*): the measure should consider the relationship between means and ends, in light of material parameters of decision-making.

This Principle is of paramount importance because these 3 components must be applied conjointly and if the ruling fails one of these 'tests', then the Principle is breached[26]. Consequently, any analysis of asylum-law decisions should draw particular attention to the "Necessity" parameter of the Principle of Proportionality.

3.2.4. The Principle of Assimilation

Article 15º is the foundational basis for the application of constitutional rights[27] as it states that "Foreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens."

The Portuguese Constitutional Court has considered that this Article is a manifestation of the Principle of Equality, as it establishes fundamental rights to people based on their inherent human dignity and are not dependent upon the existence of a Portuguese citizenship[28] and when, in doubt over the scope of the rule, the interpreter must presume that the right was attributed to all foreigners and stateless in Portugal[29].

The Assimilation Principle spreads its influence throughout the legal system as it pertains to duties like for example, the obligation to pay taxes or contribute to Social Security.

[26] In Judgment nº 00680/11.1, of May 15th 2020, *TCA Norte* (Central Administrative Court), the court considered that a decision must have some discretionary leeway for the Principle of Proportionality to be breached.
[27] In Judgment nº727/2002, the Constitutional Court (*Tribunal Constitucional*, or *TC*) considered the law distinguishing nationals and aliens, in the context of establishing retirement, to be unconstitutional.
[28] Judgment nº96/2013 of the Portuguese Constitutional Court.
[29] Judgments nº423/2001 and nº 72/2002, *TC*.

One should also note that the Assimilation Principle tends to be construed broadly. For example, in Judgement 365/2000 the Portuguese Constitutional Court applied this regime to an Angolan citizen who did not reside in Portugal and had lost his Portuguese citizenship in the decolonization process.

Finally, it is important to mention that the constitutional validity of reciprocity between countries is very debated among academics, but the Portuguese Constitutional Court has ruled it to be acceptable and a reasonable foreign policy mechanism[30].

3.3. EU Law and Relevant Jurisprudence

The official website of the European Parliament states that "Individual citizens' rights and European citizenship are enshrined in the Charter of Fundamental Rights of the European Union (EUCFR), the Treaty on the Functioning of the European Union (TFEU) and Article 9 of the Treaty on European Union (TEU). They are essential factors in the formation of a European identity."[31] [32]

The notion of "immigrant"[33] is not to be confused with the notion of "foreigner" as, there are foreigners who have never immigrated, such as second and third generation immigrants, who were born in the host country and are descended from immigrants. The notion of foreigner is thus broader than the notion of immigrant.[34]

Most member States of the European Union (except Ireland, Cyprus, Romania, and Bulgaria) and other non-Community States (Iceland, Switzerland, Norway) are governed by border policies created in 2004, when the Schengen area and Frontex agency were established. The creation of this agency resulted from several treaties and agreements including the Treaty of Amsterdam, as well as the agreements of Tampere, Laeken, Seville and Thessalonica. The main objective referred to by this agency was to strengthen and boost cooperation between member States in border control.

---

[30] Judgment nº 433/2003, *TC*
[31] Fact Sheets on the European Union, European Parliament, in https://www.europarl.europa.eu/factsheets/en/sheet/145/the-citizens-of-the-union-and-their-rights,
[32] Judgment n. º 296/2015, *TC*
[33] International Organization for Migration, Glossary on Migration Richard Perruchoud & Jillyanne Redpath-Cross (ed.), 2nd Edition, IOM, 2011, p.31. cited by RITA GIL, Ana, *in,* ob. cit.
[34] See, RITA GIL, Ana, *Imigração e Direitos Humanos*, 2017, Petrony

The Dublin Regulation, established by the Council of Member States of the European Union, has determined the obligation to review each asylum application in the country where it is applied for, on the basis of certain pre-established criteria, to avoid the phenomenon referred as "asylum shopping", *i.e.* the supposed practice of applying for asylum in several States, after being initially refused in a particular one.

International and European courts have been recognizing foreigners' access to fundamental social rights[35] based of the Principle of non-discrimination of nationality (or even legal status). In this respect, the United Nations Human Rights Committee, in light of Article 26 of the International Covenant on Civil and Political Rights, found the French law calculating the pensions for Senegalese military personnel who had served France, to be discriminatory, because it relied on nationality and was not only based on time served. Contrarily, in Van Oord c. Netherlands, the Committee considered that an International Treaty establishing preferential treatment for nationals of contracting States did not offend the principle of non-discrimination because it was an objective and reasonable criterion for differentiation. [36]

Nonetheless, the European Court of Human Rights (ECtHR) did not consider that the treatment of individuals based solely on nationality constituted a breach of Article 14 of the EU Charter of Fundamental Rights until 1996.[37] The issue stemmed from an Austrian law which excluded foreigners from access to unemployment benefits, where the court considered that foreigners contributed in the same ways as nationals to the Social Security system and, with regard to social benefits, should thusly stand in the same position as nationals.

Case-law of the ECtHR has been a pioneer considering the administrative status of foreigners, as it has deemed impermissible for States to refuse social benefits to holders of temporary residence permits[38]. In 2011, in its General Conclusions, the Committee even stated that the right to Education is essential for the life and development of all children, regardless of their residence status. Under Article 17(2) of the European Social

[35] See, *Abdida*, proc. C-562/13
[36] Case Dec. de 23/07/1997, *Van Oord c. Netherlands*, n. º 658/1995.
[37] Case Dec. De 16/09/1996, *Gaygusuz c. Austria*, complaint n. º 17371/90.
[38] Cases Dec. De 25/10/2005, *Niedwiecki* c. Germany, complaint n.º 58453/00 e Dec. 25/10/2005, *Okpisz* c. Germany, complaint n.º 59140/00.

Charter, States are required to ensure that such children have effective access to education[39]. The Committee has also recognized that internal legislation of countries cannot deprive undocumented children of their rights to Housing, and has understood that the eviction of undocumented persons is sanctionable, as it could effectively make the undocumented children homeless[40].

Most importantly, Protocol nº 4 to the European Charter on Human Rights (ratified by Portugal) prohibits collective expulsions. In fact, Italy violated this provision when it intercepted a vessel of immigrants and refugees on the high seas, not allowing them to access Italian territory and accompanying it back to the Libyan coast[4142].

The practice of returning someone to their country of origin when the person expresses fear of returning (also known as *refoulement*) is also impermissible[43].

Finally, in Article 19(2), the Charter of Fundamental Rights of the European Union enshrines the absolute obligation of member States not to expel someone to where there is a risk of suffering the death penalty, torture or other cruel, inhumane, or degrading treatment or punishment.

4. U.S.' Asylum Law

I would like to begin my overview with a brief examination of a known practice in immigration policy, that I believe perfectly illustrates how simple it is to distort the system itself: the denial of visa applications to nonimmigrants (like student visas, for example) based, not on individual information of the applicant, but rather on statistical and meta-information of the country of origin. Through this practice, visa applications are denied with seemingly illegal justifications, with the expectation that only a small number will challenge them[44]. What I found particularly interesting in this case was the degree by which some justifications directly contradicted the law they invoked: Section

[39] European Committee on Social Rights, Conclusions 2011. General Introduction, *in* https://rm.coe.int/1680593904
[40] Case Dec. 20/10/2009, *Defence for Children Internacional* c. Holland, complaint n.º 47/2008.
[41] Case *Hirsi Jamaa e outros* c. Itália, February 23th, 2012.
[42] PINTO OLIVEIRA Sofia, ob. cit.
[43] Directive 2004/38/CE, of the Council, April 29th, 2004
[44] See https://visarefusal.com/214b/ White and Associates, Attorneys at Law

214 (b) of the INA disciplines the admission of nonimmigrants and legally restricts administrative power: visa applications can only be denied (or approved, for that matter) if the legal criteria is met. Nevertheless, there have been justifications for denial on grounds of "limited ties" to their home countries (because, for example, the applicant has no children, is unmarried, or does not own property in his or her' respective countries) or if simply a pattern of overstays or asylum applicants from certain countries emerges[45]. Unsurprisingly, no such legal foundation can be found in Section 214 (b).

This, of course, means that a significant number of decisions could very well be illegal or unconstitutional, but since there's often no specific legislative or administrative act to assort them together, since there's often no executive order that mandates the summary denial of visas or asylum applications, judicial oversight is thereupon compromised: few will have the disposition or ability to litigate.

This small interjection is essential to understand the nuanced innerworkings of administrative power in immigration in general and asylum in particular.

4.1. Legal Restraints on Administrative Decisions

In the U.S., immigration, naturalization and asylum policies and enforcement are federal issues and the INA (Immigration and Nationality Act of 1965) is the key body of legislation regulating them.

Although the U.S. Citizenship and Immigration Services (USCIS) is the agency responsible for refugee and asylum affairs, most people entering the country face an immigration officer from the CBP (U.S. Customs and Border Protection).

This is especially true whenever people mass migrate into the U.S. Recently, the "epidemic levels" of violence in Honduras, El Salvador, Guatemala and some parts of Mexico has led to thousands of people seeking refuge in the U.S. and other countries in

[45] Ibid.

the region.[46] Distinguishing those seeking asylum from those simply seeking to move to the country under these conditions is CBP' responsibility.

By itself, unlawful presence in the U.S. does not constitute a crime but a civil offense. Notwithstanding, improper entry, avoidance of inspection or misrepresentation of facts can result in a fine or up to 6 months imprisonment as a first offense and up to two years' imprisonment for subsequent offenses[47]. Even still, repeated unauthorized reentrance into the country can impose criminal sentences on the offender[48].

4.1.1. Asylum Process - Affirmative or Defensive

There are two types of Asylum processes in the U.S.: Affirmative and Defensive. In the affirmative asylum process, one needs to be physically present in the U.S. and may apply regardless of immigration status, while in the defensive application one requests asylum as a defense against removal from the U.S.. Affirmative processes are run through USCIS and defensive procedures presuppose a removal by the Executive Office for Immigration Review (EOIR).

Through the Affirmative Process, the Administration wields great discretionary[49] power, as the Immigration and Nationality Act (INA) is allowed a great degree of leeway and deference in some decisions.

USCIS can only grant asylum under conditions specified by law and if the decision of the officer were to deny asylum, or to summarily issue an order of removal from the U.S., then the Defensive Process can be accessed.

In order to expedite removal of non-citizens without documents or with invalid documents, in 1996, Congress allowed for the summary removal by immigration officers instead of immigration judges. Initially, "expedited removal" was limited to airports and other ports of entry but has since been expanded to encompass any encounter within

[46] Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico: A Study Conducted by the United Nations High Commissioner for Refugees, (2015), *in*, https://www.unhcr.org/publications/operations/5630f24c6/women-run.html
[47] INA § 275 (a)
[48] INA § 276
[49] For a better understanding of Administrative Discretion see, SHAPIRO, Martin, Administrative Discretion The Next Stage, 1983, Yale Law Journal, Vol. 92

100 miles from the border by those who cannot prove they have been in the U.S. for at least 14 days.[50]

This of course means that, in certain conditions, an immigration officer can order the removal of anyone he or she has ascertained to have violated the INA.

According to a report by the ACLU, citing the Department of Homeland Security[51], "in 2013, the United States conducted 438,421 deportations. In more than 363, 2793 of those deportations—approximately 83 percent—individuals did not have a hearing, never saw an immigration judge, and were deported through cursory administrative processes where the same presiding immigration officer acted as the prosecutor, judge, and jailor."[52] This seems an anticipated result, considering few will have the wherewithal to litigate.

There are four stages[53] in the summary removal process, each giving the officer different discretionary leeway:

1) CBP Interview: as previously stated the CBP officer can invoke expedited removal unless the applicant expressed the desire to apply for asylum or a fear of persecution in the country of origin[54]. If the prescribed criteria is met, the CBP officer cannot issue the order for removal and must instead refer the individual to USCIS[55].
2) Credible Fear Interview: USCIS then attempts to determine if there is a "significant possibility" that the individual meets the requirements for asylum. If so, the officer refers the process to regular immigration courts where the applicant can formally apply for asylum. And if the officer accesses that there is no such possibility, then the removal can be expedited. However, immigration judges can be called to review this decision[56].

50 8 C.F.R. § 287.1 – Code of Federal Regulations
[51] SIMANSKI, JOHN F., Annual Report - Immigration Enforcement Actions: 2013, in https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf
[52] ACLU, American Exile: Rapid Deportations that Bypass the Courtroom, ACLU, 2014, in https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom
[53] U.S. Detention and Removal of Asylum Seekers – ibid.
[54] INA § 235(b)(1)(A)(i)-(ii)
[55] 8 C.F.R. § 235.3(b)(4) (2015)
[56] INA § 235(b)(1)(B)(v)

3) Detention or Parole by the ICE: Pending decision by the immigration judge, the ICE has discretion to detain the applicant or release him/her on parole. ICE directive nº 11002.1[57] determines that the applicant must be paroled if "the alien poses no flight risk, nor a danger to the community and no additional factors weight in against the release of the alien". The same directive then provides guidelines that specify what "flight risk" or "danger to the community" mean, but ultimately explicitly recognize the underlying power of the ICE officer, as "parole remains an inherently discretionary decision."
4) Defensive Asylum Hearing: The immigration court, with the Executive Office for Immigration Review (EOIR), grants or denies asylum.

It is important to note that it is not illegal to detain people for a short time, while attempting to confirm their identities, even if they do not necessarily pose a danger to the community or a flight risk, as this still complies with the fundamental values of the system. But can the U.S., under the formal power to detain asylum-seekers without parole, "extend" the period of detention in order to deter others from seeking asylum in the U.S.? This was precisely what happened under President Trump's "Zero Tolerance" policy. I will examine this question later, as it mainly poses constitutional questions.

The USCIS official website illuminates the nature of the defensive asylum quite clearly: "Immigration judges hear defensive asylum cases in adversarial (courtroom-like) proceedings.[58]"

Interestingly, the wordings are not disingenuous at all, but rather quite accurate: "courtroom like". And here lies a key difference between asylum law in Portugal and the U.S.: unlike in the Portuguese system "immigration judges" are not administrative judges, they're not part of the judicial branch, but instead are employed by the Department of Justice (DOJ), can be fired, and consequently are not isolated from the

[57] See ICE, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, 2010, *in* https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf
[58] USCIS official web page: https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states

administrative hierarchy.[59] Personally, I think that this anachronism seems more akin to the "Aggressive Administration" systems of years past[60], and not so much of the modern "rule of law" and "judicial oversight" types of contemporary Administrative Law.

One should also note that in the Portuguese system it is generally inconceivable to consider that legal representation constitutes a mere optional extra when someone is presented before a judge. To some extent, the same rationale exists in the U.S., as immigration courts are not technically courts of law. Nevertheless, decisions by immigration judges are made in these "adversarial proceedings" pitting the attorney from the ICE against the applicant even though, in the vast majority of cases, he or she is not accompanied by a lawyer.

4.2. Constitutional Restraints [61]

Congress' authority to pass immigration laws stems from the U.S. Constitution, as Article I, Section 8 bestows upon Congress the power "to establish an uniform Rule of Naturalization." It is generally accepted among constitutionalists that this power does not only refer, *stricto sensu*, to naturalization and enables Congress to legislate on analogous matters. In fact, in 1963, through a special act, Congress famously made "Sir Winston Churchill an honorary citizen of the United States of America."[62]

Through Article II of the U.S. Constitution, the executive branch is empowered to enforce the law and ensure national security. Border protection and the enforcement of immigration and asylum law are within the scope of presidential powers.

I find it necessary to mention the Administrative Law Principle of non-delegation. Under the non-delegation doctrine, Congress is unable to bestow legislative power onto other entities, meaning that Congress cannot empty itself of useful legislative powers and

[59] U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis, by DOMÌNGUEZ, Lara, LEE, Adrienne and LEIRSON, Elizabeth, supervised by METCALF, Hope and SILK, James, 2016, Yale Law School

[60] PEREIRA DA SILVA, Vasco, *Em busca do Acto Administrativo Perdido*, 2016, Almedina

61 For a more thorough analysis of U.S. Constitutional Law, See, CHEMERINSKY, Erwin, Constitutional Law: Principles and Policies, 5th Edition, 2015, Aspen Publishers

[62] 77 Stat. 5, in, https://www.govinfo.gov/app/details/STATUTE-77/STATUTE-77-Pg5-2, Office of the Federal Register, National Archives and Records Administration (NARA)

allow the Executive, or any other entity, to assume its fundamental roles. Naturally, the U.S. Constitution does not presume a complete and absolute separation of power[63] as envisioned by John Locke[64], as it allows Congress for the creation of statutory standards and policy vectors that ought to be followed by the executive branch[65].

Even though, in *INS v. Chadha*[66] the Supreme Court considered unconstitutional the INA provision authorizing either House of Congress to veto deportation rulings of the U.S. Attorney General[67], it is apparent that non-delegation does not require Congress to specify all policy determinations. In *Yakus v. United States*[68] the Supreme Court ruled that Standards should be "sufficiently definite and precise [enough] (…) to ascertain whether the will of Congress has been obeyed".

Also, there is a general consistency in Supreme Court rulings that the responsibility to create and enforce immigration law is federal and hardly enforceable on a state level.

But what are the constitutional restraints on administrative power?

"While Fourth Amendment case law provides substantive examples of protecting rights on non-U.S. persons at and near the border, aliens also have a wide range of rights under the constitution, including (but not limited to) First, Fourth, Fifth and Eighth Amendment rights."[69] In fact, it is generally accepted that, while in U.S. territory, the Constitution provides binding constitutional rights whenever applicable[70].

---

[63] MADISON, John, The Federalist, nº 47 and nº 48, *in* https://guides.loc.gov/federalist-papers/full-text
[64] LOCKE, John, The Second Treatise of Government, *in* https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf
[65] *MCMAHON, Emily S.,* Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, in https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6935&context=ylj
[66] In, https://www.oyez.org/cases/1981/80-1832, Oyez, Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law
[67] For a more extensive overview of its implications, see, AMAN, Alfred C., Administrative Law and Process, Third Edition, 2014, Lexis Nexis
[68] In, https://www.oyez.org/cases/1940-1955/321us414, Oyez, Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law
[69] The Law Against Family Separation, ibid.
[70] One should remember the post 9/11 rationale for detaining people at Guantanamo Bay. See, Rights Beyond Borders, KEITNER, Chimene I. 2011, Yale Journal of International Law, *in* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1395&context=yjil

4.2.1. Restrictions under the 1st Amendment

The 1st Amendment protects freedom of assembly, religion, speech, the press, and the right to petition the government.

Even though this amendment is of paramount importance and obviously applicable to non-citizens, it is rarely a legal issue in the context of asylum law. In fact, from a constitutional and administrative standpoint, even the "travel ban" from "certain Muslim countries" by President Trump was generally considered a question pertaining the powers of the President and not necessarily a 1st Amendment issue.

4.2.2. Restrictions under the 4th Amendment

The 4th Amendment prohibits unreasonable searches and seizures and dictates requirements for search warrants.

Under the current doctrine, it is acceptable, under certain circumstances (within a certain distance from the border, for instance), to conduct a search without a warrant, and in *Carroll v. United States*[71] the Supreme Court even clarified that warrantless searches could encompass an automobile.

This does not mean that searches could be arbitrary or oppressive. In *United States v. Martinez-Fuerte*[72] Justice Powell wrote that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion". The decision did not eliminate the discretion criteria of the decision, but rather upheld that some basic suspicion should exist under penalty of being arbitrary and capricious actions. The mere "ethnic appearance" of an individual is also insufficient grounds for search or inquiry[73].

[71] In, https://www.oyez.org/cases/1956/571
[72] In, https://www.oyez.org/cases/1975/74-1560
[73] In United States v. Brignoni-Ponce the Supreme Court weighted the necessity of enforcing immigration law against individual freedoms. In, https://www.oyez.org/cases/1974/74-114

4.2.3. Restrictions under the 5th Amendment

The 5th Amendment upholds the right to due process, establishes rules for indictments by grand jury, self-incrimination, and double jeopardy, and enshrines the "Takings Clause", limiting the power of eminent domain and civil forfeiture.

In *Murray's Lessee v. Hoboken Land & Improvement Company*[74] the Supreme Court famously stated that the 5th Amendment "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

Due process mandates that legal matters should be settled according to rules and principles, acts as a prohibition on arbitrary lawmaking and decision-making, and sets basic standards of fairness upon which other rules and principles are built.

The Supreme Court has held that all persons, including illegal aliens, are constitutionally entitled to due process. In fact, in *Wong Wing v. United States* the Court considered that Due Process proceedings "are universal in their application to all persons… without regard to any difference of race, of color or nationality. [75]"

This of course means that asylum-seekers cannot be detained indefinitely. In *Zadvydas v. Davis*[76] the Supreme Court ruled that holding a removable alien indefinitely for more than 90 days was unconstitutional, stating that "indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the government "to deprive any person… of .. liberty… without due process of law". Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects."[77]

Under the 5th Amendment "outrageous government conduct" is also impermissible. It occurs when a conduct is "so outrageous that due process principles would absolutely bar the government from invoking judicial process to get a conviction.[78]"

[74] In, https://www.oyez.org/cases/1850-1900/59us272
[75] In The Law Against Family Separation, ibid. citing Wong Wing v. United Sates, in https://www.oyez.org/cases/1850-1900/163us228
[76] In, https://www.oyez.org/cases/2000/99-7791
[77] In, The Law Against Family Separation, ibid. taken from Zadvydas, 533 U.S. at 690.
[78] U.S. v. Russell in, https://www.oyez.org/cases/1972/71-1585

The "Zero Tolerance Policy" of President Trump in which children were separated from their parents for "deterrence" purposes was considered unconstitutional also because it violated Due Process. As Sergio Garcia[79] pointed out, the practice presupposes an "element of compulsion", acting as a "coercive tactic", that strikes at the heart of Due Process procedures: a defendant's guilty plea should be voluntary[80] and one of several options available[81].

4.2.4. Restrictions under the 8th Amendment

The 8h Amendment prohibits "cruel and unusual punishments", excessive fines and excessive bail.

During the Trump Administration, the family separation policy also raised this issue: if one considers the separation of children from their parents to be punitive in nature[82], is it unconstitutional?

Personally, I tend to agree with Carrie F. Cordero, Heidi Li Feldman and Chimène I. Keiner[83]: In *Wong Wing*, the Court assessed that "hard labor", or "confiscation of property" were unacceptable measures or punishments for controlling illegal immigration. In their paper, the authors use an "*a fortiori*" argument claiming that "certainly, separating parent from child is more punitive than confiscation of property, both for the parent and the child", and therefore the family separation policy is prohibited under *Wong Wing*.

[79] GARCIA, Sergio, The Unconstitutional Prosecution of Asylum-Seeking Parents under Trump's Family Separation, 2019, Hastings Constitutional Law Quarterly
[80] Mabry v. Johnson in, https://www.oyez.org/cases/1983/83-328
[81] Boykin v. Alabama in, https://www.oyez.org/cases/1968/642
[82] Notwithstanding the legal defense of the Administration itself, the American Bar Association's Commission on Immigration also characterized the policy as punitive. In, https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/
[83] The Law Against Family Separation. Ibid.

5. Conclusion

Portugal fits into the Roman-Germanic 'family' of law[84], and as such, a clear distinction between Public and Private Law is possible. This difference from the U.S.' system is especially relevant in the context of contentious administrative law.

In the Portuguese system the "margin of discretion" allowed by law must comply with the rights enshrined in the Constitution and ordinary legislation. Asylum is a fundamental right under the Portuguese Constitution, and, to the extent that should apply to them, asylum-seekers have the same rights and obligations as any other national citizen (as described in Section 3 of this paper). Also, unlike its American counterpart, any decision by the Administration that affects basic subjective rights may be judicially contested. The decision to deny asylum is no exception and the applicant can contest the decision to deny asylum in a court of law suspending its effects until the decision is final. Also, if unable to pay for an attorney during this process, the applicant should be able to have a public defender.

It is also important to point out that under European Law the rights of children are especially protected, and there are specific provisions against removal of individuals in risk of suffering the death penalty, torture or other cruel, inhumane, or degrading punishments. This of course means that, under some conditions, expelling someone to the United States is impermissible under Portuguese and Union Law, as the death penalty is still legal in some states.

The U.S' system on the order hand, is based on common law and judicial decisions by courts of law offer substantive and material operational content, defining applicable law. As seen in this paper, Statutes approved by Congress (like the INA, for example) play an important role but decisions by the courts enlighten the appropriate interpretation of the law and limit the decision-making process of administration officers. In section 4 of this paper, one should be able to detect a result-oriented and pragmatic sense of decisions and law, as even constitutionally strengthened criteria tends to have procedural undertones and significances. The Principle of Due Process, for example, plays central role in establishing lawful behavior.

[84] MOURA VICENTE, Dário, *Direito Comparado*, vol. I, 2020, Almedina

In fact, studying primarily Portuguese law, there are aspects of U.S. Constitutional jurisprudence that are quite foreign to me: the analysis by constitutional lawyers of the due process rights of children is an obvious one. The procedural-minded standpoint of the U.S legal system suggesting that toddlers "are able" to exercise procedural rights in order to act against the American Administration seemed strange to me. Nevertheless, due process is more significant than the mere procedural act of being able to take action against someone in the classical 'No Writ, No Right' sense-- neither is the U.S. opposed to the idea of subjective rights bestowed upon asylum seekers, immigrants or illegal aliens.

Finally, I feel I should conclude this paper with a brief reflection:

I find that facilitating the right of asylum and constructing its framework is not only a practical necessity of Constitutional Democracies that emerges from recent migration waves or socio-political catastrophes, but instead should be an automatically motivated phenomena driven by humanitarian concerns: "the better angels of our nature".

In "The Hunchback of Notre-Dame", the humanity and brilliance of Victor Hugo already explained best the burden and urgency of asylum-seeking:

> "A moment later, he re-appeared upon the upper platform, with the gypsy still in his arms, still running madly, still crying, "Sanctuary!" and the throng applauded. Finally, he made his appearance for the third time upon the summit of the tower where hung the great bell; from that point he seemed to be showing to the entire city the girl whom he had saved, and his voice of thunder, that voice which was so rarely heard, and which he never heard himself, repeated thrice with frenzy, even to the clouds: "Sanctuary! Sanctuary! Sanctuary!"

Let us hope somebody answers.

6. References

- AMAN, Alfred C., Administrative Law and Process, 3th Edition, 2014, Lexis Nexis
- CHEMERINSKY, Erwin, Constitutional Law: Principles and Policies, 5th Edition, 2015, Aspen Publishers
- CORDERO, Carrie F., FELDMAN, Heidi Li and KEITNER, Chimène I., The Law Against Family Separation, 2020, Columbia Human Rights Review
- DANCHES, Luciana Taynã, The historical origins of the right of asylum, *in* https://jus.com.br/artigos/25448/as-origens-historicas-do-direito-de-asilo
- DOMÍNGUEZ, Lara, LEE, Adrienne and LEIRSON, Elizabeth, U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis, supervised by Hope Metcalf and James Silk, 2016, Yale Law School
- FREITAS DO AMARAL, Diogo, *Curso de Direito Administrativo*, vol. II, 2020, Almedina
- GARCIA, Sergio, The Unconstitutional Prosecution of Asylum-Seeking Parents under Trump's Family Separation, 2019, Hastings Constitutional Law Quarterly
- GOMES CANOTILHO, José Joaquim; MOREIRA, Vital. *Constituição da República Portuguesa Anotada*, Vol. I, 4th edition, 2014, Coimbra Editora,
- KEITNER, Chimene I., Rights Beyond Borders, 2011, Yale Journal of International Law, in https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1395&context=yjil
- LOCKE, John, The Second Treatise of Government, *in* https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf
- MADISON, John, The Federalist, nº 47 and nº 48, *in* https://guides.loc.gov/federalist-papers/full-text
- *MCMAHON, Emily S.,* Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, in

https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6935&context=ylj

- MOURA VICENTE, Dário, *Direito Comparado*, vol. I, 2020, Almedina
- OLIVEIRA ASCENSÃO, José, *O Direito, Introdução e Teoria Geral*, 7th Ed., 1993, Almedina
- OLIVEIRA, Carlos Pamplona de, *A Jurisprudência Constitucional sobre Cidadãos Estrangeiros*, 2008, Report presented in '*encontro trianual dos Tribunais Constitucionais de Portugal*'
- PEREIRA DA SILVA, Vasco, *Em busca do Acto Administrativo Perdido*, 2016, Almedina
- PINTO OLIVEIRA, A. Sofia, *Limitações várias ao poder de afastamento dos estrangeiros do Território Nacional*, in *Imigrantes e Direitos Fundamentais Sociais*, "*O contencioso de direito administrativo relativo a cidadãos estrangeiros e ao regime da entrada, permanência, saída e afastamento do território português, bem como do estatuto de residente de longa duração*", 2nd Ed., 2017, Centro de Estudos Judiciários, Coleção Formação Inicial
- *REBELO DE SOUSA, Marcelo, Lições de Direito Administrativo, vol. I, 1999, Lex*
- RITA GIL, Ana, Imigrantes e Direitos Fundamentais Sociais, "*O contencioso de direito administrativo relativo a cidadãos estrangeiros e ao regime da entrada, permanência, saída e afastamento do território português, bem como do estatuto de residente de longa duração*", 2nd Ed., 2017, Centro de Estudos Judiciários, Coleção Formação Inicial
- RITA GIL, Ana, *Imigração e Direitos Humanos*, 2017, Petrony,
- *SHAPIRO, Martin, Administrative Discretion The Next Stage, 1983, Yale Law Journal, Vol. 92*
- SANTINO, Maria Cristina, *in Refugiados e Requerentes de Asilo em Portugal: Contornos Políticos no Campo da Saúde*, 2011, ISCTE-IUL, https://www.om.acm.gov.pt/documents/58428/179891/Tese48_paginacao_06_lr.pdf/700654fe-64e8-401d-9d8d-3b13b2da125c

Web:

- American Bar Association memo, in: https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/
- ACLU, American Exile: Rapid Deportations that Bypass the Courtroom, 2014, https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom
- Fact Sheets on the European Union, European Parliament, *in* https://www.europarl.europa.eu/factsheets/en/sheet/145/the-citizens-of-the-union-and-their-rights,
- European Committee on Social Rights, Conclusions 2011. General Introduction, *in* https://rm.coe.int/1680593904
- ICE, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, 2010, *in* https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf
- Office of the Federal Register, National Archives and Records Administration (NARA), https://www.govinfo.gov/app/details/STATUTE-77/STATUTE-77-Pg5-2
- Oyez, Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law, *in* https://www.oyez.org
- ROWEN, Beth and CHAMBERLAIN, Logan , *in* https://www.infoplease.com/us/immigration-legislation
- SIMANSKI, JOHN F., Annual Report - Immigration Enforcement Actions: 2013, https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf
- UNHCR, The UN Refugee Agency, Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico: A Study Conducted by the United Nations High Commissioner for Refugees, (2015), https://www.unhcr.org/publications/operations/5630f24c6/women-run.html
- U.S. Citizenship and Immigration Services https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline

- USCIS official web page: https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states
- WHITE AND ASSOCIATES, Attorneys at Law, https://visarefusal.com/214b/