COUNCIL OF STATE, ADMINISTRATIVE LITIGATION DIVISION

THE PRESIDENT OF THE XI CHAMBER IN SUMMARY PROCEEDINGS

DECISION

Number 249.163 of 7 December 2020

A. 232.323/X1-23.313

Plaintiff **1. THE FRENCH AND GERMAN SPEAKING BAR ASSOCIATION**
2. A.S.B.L. COORDINATION AND INITIATIVES FOR AND WITH REFUGEES AND FOREIGNERS,
3. A.S.B.L VLUCHTELINGSENWERK VLAANDEREN,
4. THE NANSEN NON-PROFIT ASSOCIATION,
5. THE LEAGUE FOR HUMAN RIGHTS,
Address for service :

Mr. Michel KAISER, lawyer,
boulevard Louis Schmidt 56
1040 Brussels,

against

the General Commissioner for
Refugees and Stateless Persons.

I. *Subject of the request*

On the 27th of November 2020, the French and German speaking Bar Association, the a.s.b.l. Coordination and Initiatives for and with Refugees and Foreigners, the non-profit association Vluchtelingenwerk Vlaanderen, the non-profit organisation Nansen and the League for Human Rights requested through an extreme urgency procedure, the suspension of the execution of "the decision, taken on an unknown date around the 18th of November 2020 by the General Commissioner for Refugees and Stateless Persons, which has not been published and the *instrumentum* of which is currently inaccessible and unknown to them, to organise an unspecified number of personal interviews in the context of applications for international protection by the means of videoconferencing".

II. *Procedure*

On the 30th of November 2020, the Court set the case for hearing on the 4th of December 2020.

Mr Yves Houyet, President of the Chamber, presented his report.

Mr. Pierre Robert, lawyer, appearing on behalf of the applicants, and Mr. Grégory van Witzenburg, lawyer, appearing on behalf of the other party, were heard in their observations.

Mr Benoit Cuvelier, First Auditor Head of Section at the Council of State, was heard in his opinion and in accordance with this judgment.

The provisions on the use of languages contained in Title VI, Chapter II of the Council of State Acts, coordinated on the 12th of January 1973, were applied.

III. *Facts*

In an annex to their request, the plaintiffs produced a document drafted by the opposing party on the 18th of November 2020 entitled "Presentation of the pilot project for video-conference interviews of asylum seekers staying in open centres".

In this document, the opposing party set out rules for the organisation, in the short term, of videoconference interviews of asylum seekers staying in open centres and the modalities of these interviews. The opposing party also mentions its decision to develop, in the longer term, a structural framework for videoconference interviews, "in addition to face-to-face interviews at the CGRA (Office of the Commissioner General for Refugees and Stateless Persons)".

The above-mentioned act, which lays down the rules for the short-term organisation by videoconference of asylum seekers interviews, staying in open centres and on the modalities of such interviews, constitutes the contested measure.

IV. Admissibility of the request for suspension

Arguments of the parties

The applicants argue that "(...) the contested act modifies, in a general and abstract manner, the international protection procedure, initially for applicants residing in the Kapellen, Poelkapelle, Bovigny and Mouscron centres, and subsequently for other applicants", that (…) the determination of the conditions under which the personal

interview takes place was done per Royal Decree of the 11th of July 2003 establishing the procedure before the General Commissioner of Refugees and Stateless Persons and its functioning, and in particular, with regard to the physical presence during the interview, by Articles 13 and 13/1, paragraphs 1 and 2 and, subordinately, by paragraph 9 of the Royal Decree", that "consequently, the contested act derogates the scope of the Royal Decree and modifies the legal system", that "it therefore constitutes an act that may be challenged before the State Council", that "(. . .) the opposing party shall not be followed if it claims that the organisation of the hearings was an element of detail and that its modification does not posses a normative character', that comparable questions had been raised in the context of the law of the 29th of January 2016 on the use of videoconferencing for the hearing of accused persons in pre-trial detention', that "in its judgment 76/2018, the Constitutional Court, appealed for annulment, ruled that the holding of hearings by videoconference required by its very nature a number of essential guarantees that had to be included in the law (points E. 10.4.2. and B. 10.4.3.), even though the requirements of Article 6 ECHR were not as such applicable in the pre-trial phase of criminal proceedings (point B. 10.4.1.)', that the organisation of hearings by videoconference involved the processing of particularly sensitive data, as referred to in Article 9 of the GDPR', that '(. . .) the intervention of the Court of Justice in the organisation of hearings by videoconferencing is a regulatory action and thus susceptible of appeal in the sense of art. 14 of the consolidated laws, that the opposing party wrongly argued that the contested act could not be appealed because the intervention constituted what it describes as a 'pilot project", that the name given to an act, which form is furthermore unknown, has no bearing on the reality of its legal classification, that "on the one hand, the contested measure, which would modify the legal system even if it were to apply only to a limited number of individual situations, is potentially aimed at a large number of applicants for international protection, since the four centres concerned by the project have a combined total capacity of 1,885 persons", that "the contested measure is not a legal instrument, but a tool for the implementation of the project". The letter from the CGRA of the 18th of November indicates that the project will allow "a greater number of departures from the Fedasil reception centres", which means that decisions will be taken more quickly and therefore the number of people potentially concerned will be much greater than the capacity of the four centres at any given time, that "on the other hand, it is clear from the above-mentioned letter of the 19th of November that the opposing party envisages that the project set up will be of indefinite duration", that "an initial 'pilot project' has, by the opposing party's own admission, already been carried out, first in a closed centre and then in June and July 2020 for the hearing of unaccompanied foreign minors, so that the description of the contested decision as a 'pilot project' appears to be inaccurate and, in fact, misleading" and that "the fact that a 'pilot project' has been set up implies, in spite of everything, a change in the procedural rules for all the persons concerned, which can only be carried out by means of a regulation, unless the normative authority is allowed to escape the

control of your Court". The plaintiffs explain why they consider that they each have the necessary ability to act (locus standii). They explain that "the contested act has the specificity of not having been published, nor formally explained in its entirety, neither in its operative part or in its reasons, which makes the starting point of the time limit of extreme urgency difficult to determine, "that "(the plaintiffs) were informed by Fedasil of the organisation of the hearings by videoconference at the contact meeting organised by Myria on the 18th of November 2020", that "the plaintiffs did not have sufficient knowledge of the substance of the measure before that date, nor information as to its definitive nature and the concrete possibility of its implementation", that this act has never been published to date", that it was therefore impossible for the plaintiffs to usefully refer the matter to your Court", that it would have been all the more unthinkable to want to initiate an action before that date since the CGRA had asked on the 28th of October for "feedback, comments or additional suggestions", which implicitly but certainly meant that it would take them into account in the drafting, that "even if it were necessary, in the case of the plaintiffs who were informed at the earliest possible stage, to bring forward the start of the period of diligence to the 18th of November 2020, which would be particularly demanding in view of the circumstances of the case, this condition of diligence has been fulfilled", that one should, in fact note that the time that has elapsed since that moment to the date of lodging the present appeal is nine calendar days, which includes a weekend and limits to seven working days the period for lodging the appeal", that this must, in the sense of the usual case law of your Council, be considered as reasonably sufficient in terms of diligence", that "(...) Article 48/6 of the law of the 15th December 1980 also provides that the applicant for international protection must present all the elements necessary to support his application", that "the presentation of these elements takes place during the hearing of the applicant by the opposing party", that "this personal interview is crucial in the assessment of the applicant's credibility and need for protection, i.e., *in fine*, his risk of persecution in the event of a return to the country of origin", that "applicants for international protection are invited to communicate particularly sensitive data during these personal interviews", that "the transmission of these personal data without any control over their interception and storage, in particular by foreign intelligence services (see, on this subject, the Schrems judgment commented in the second legal argument), will lead to self-censorship, the only reasonable attitude of an applicant for international protection who fears that his or her statements may endanger third parties, or endanger him or herself", that the examination of applications for international protection must be carried out in compliance with the guarantees of Article 47 of the Charter and of the rights of the defence", that it "must also be carried out in compliance with Articles 7 and 8 of the Charter, 8 of the ECHR and 22 of the Constitution", that "it is precisely these guarantees that are violated by the contested act", that "the individual interviews will be carried out in circumstances that do not allow the applicants to express fully and in confidence the reasons for their application, in a context that significantly increases

the risk of misjudging their fear of persecution, without the benefit of adequate assistance from a lawyer, and without the necessary confidentiality of the interview being truly guaranteed", that "these rights cannot be adequately compensated in the further proceedings of these persons", that "for example, it is not possible to compensate for the fact that information has been disclosed without respecting the principle of confidentiality, or when this information has been intercepted by persons with malicious intent", that it is also particularly difficult to compensate for the damage consisting of the loss of credibility of the applicant due to the use of the video conference, that "the fundamental nature of the rights at stake, whose defence the applicants are responsible for ensuring, and the potentially very rapid realisation of the risk, justify your Council's recognition of the extreme urgency of the need to emit a decision", that "the applicants cannot overemphasise the fact that the proposed experimental phase is likely to have significant consequences that have not been anticipated", that "the incomplete and experimental nature cannot justify administrative action on such a scale, implemented in procedures that are so vital for the addressees", that the extreme weakness of the safeguards, combined with the importance of the issues raised that "the CGRA wrote on the 29th of October that hearings by videoconference would take place 'in the near future', and then, on the 18th of November, that interviews by videoconference would take place in the 'short term'", that "it was announced to the second, third, fourth and fifth applicants that the first interviews in this context would take place at the beginning of December", that "(. . .) if, as will be shown in the pleadings, the fundamental guarantees surrounding the right to an individual interview are not fulfilled, the Aliens Litigation Council (Conseil du Contentieux des Etrangers hereinafter the CCE), which is seized by appeals against decisions of the opposing party following interviews conducted by videoconference, will have no choice but to annul the decisions, which will then force the opposing party to conduct the hearings in person", that "this situation would further disorganise the services of the opposing party, burden the CCE and the applicants' lawyers with a potentially large amount of litigation and ultimately slow down the procedure considerably", that this would also entail major expenses for all the parties, which the contested act claims to avoid", that "the question potentially concerns a great many applicants and therefore a great many procedures", that "the CCE could only avoid the pitfall of a forced annulment of all the decisions of the opposing party following the hearings held by videoconference by carrying out itself the complete investigation normally carried out in each case by the opposing party, which is totally impracticable and unrealistic, as it is not the role of the magistrates to take over ab initio and on their own behalf the task of the administration", that "this duty of investigation would be all the more surreal as it would be in this case the direct consequence of an illegal act, namely the decision taken, emanating from the administration concerned itself", that "the damage that could be caused by the application of the contested act, after only a few weeks or months, if one follows the reasonable and usual timing of an ordinary

suspension procedure, is likely to be irremediable in terms of slowing down the administrative procedures, as far as the opposing party is concerned, and the judicial procedures, as far as the CCE is concerned", that "this would also entail the violation of the fundamental rights of hundreds and potentially thousands of applicants for international protection, but also an immense uncertainty of several months as to the validity of their procedure", that "this would entail for the plaintiffs a significant infringement of their social objectives since their mission is to defend the interests of the applicants with regards to the first applicant and to ensure international protection with regards to the other applicants", that "(… the risk that several hundred or several thousand applicants for international protection be deprived of a substantial part of the guarantees surrounding the central element of their procedure constitutes at the very least a serious moral prejudice for the plaintiff associations, taking into account their social purpose, which is better described in the presentation of their standing and ability to act", that "(...) it follows from the contested measure that the plaintiff associations are not able to defend their interests in the case of the first applicant and that they are not able to defend their interests in the case of the other applicants".), that this results from the contested act, which is a priori already applicable, with regard to its so-called 'short-term' phase, that due to the nature of the contested act and its consequences, the ordinary summary procedure would not allow to prevent the realisation of the alleged prejudice", that "on a daily basis, several persons, or even dozens of persons, are deprived of essential guarantees to present their application for international protection and thus run an increased risk that it will not be correctly assessed, moreover with the risks regarding the confidentiality of the hearings", that "the imminent danger is therefore also linked here to the fact that the implementation of the contested measure is currently under way" and that "in the present situation, the implementation of the contested act also causes sufficiently serious harm to the interests of the persons whom the applicants intend to defend in accordance with their social purpose

The other party does not contest the admissibility *ratione personae* of the action. However, it submits that the action is inadmissible *ratione materiae* and *ratione temporis*. It explains in substance that the act of the 18th November 2020 only refers to plans to organise via videoconference interviews of asylum seekers staying in open centres, that it does not contain any decision and that it only provides for implementing arrangements. The opposing party concludes that it is not a legally effective act that can be appealed against under Article 14(1) of the laws of the Council of State.

The opposing party also argues that videoconference interviews of asylum seekers in closed centres have been organised since 2016 and that the appeal is belated. It considers that the contested act does not give rise to any serious harm to the interests of the applicants, as all the guarantees are respected and that the videoconference interviews are conducted with respect for the rights of the applicants for international protection. It considers that the alleged risks are hypothetical. The party explains that applicants for international protection could invoke the illegality of videoconference interviews before the Aliens Litigation Council and that this court had already ruled in several cases that such interviews were legal.

Assessment

According to Article 17(F) of the Law of the Council of State, consolidated on the 12th of January 1973, the suspension of the execution of an administrative decision is subject to two conditions, namely urgency, incompatible with the time limit for processing the annulment case and the existence of at least one serious plea that could, *prima facie*, justify the annulment of the decision.

Urgency requires, on the one hand, the presence of an inconvenience of sufficient gravity caused by the immediate execution of the contested act and, on the other hand, the finding that the normal course of the proceedings on the merits does not allow a judgment of annulment to usefully prevent this inconvenience.

The cited paragraph 4 of Article 17 refers to the possibility of an appeal for suspension as a matter of extreme urgency, which must indicate how the handling of the case is incompatible with the time limit for processing the application for suspension referred to in paragraph 1. This extreme urgency procedure must be capable of effectively preventing the damage feared by the applicant, whereas the ordinary summary procedure could not. Recourse to the extreme urgency procedure, which reduces to a strict minimum the exercise of the rights of the defence, the investigation of the case and the adversarial debate, must remain exceptional and may be allowed only on condition that the plaintiff has taken all possible steps to bring the matter before the

Council of State as soon as possible. The plaintiff's diligence and the imminence of the danger are conditions for the admissibility of the request for an emergency suspension.

It appears from the explanations given in the application and the documents attached to it that the appeal is admissible *ratione personae*. The opposing party does not contest this.

The opposing party failed to file an administrative file. The Council of State is therefore obliged to rule solely on the basis of the documents that the plaintiffs have produced in support of their request.

Exhibit 4, annexed to the appeal, is a document drawn up by the opposing party on the 18th of November 2020, entitled "Presentation of the pilot project for video-conferencing interviews of asylum seekers staying in open centres".

In this document, the opposing party sets out rules for the organisation, in the short term, of videoconference interviews of asylum seekers staying in open centres and the modalities of these interviews. The opposing party also mentions its decision to develop, in the longer term, a structural framework for videoconference interviews, "in addition to face-to-face interviews at the CGRA".

The conditions under which the hearing of an applicant for international protection must take place are governed by the Royal Decree of 11 July 2003 laying down the procedure before the Office of the Commissioner-General for Refugees and Stateless Persons and its operation. The modification of these conditions, in particular by adding rules relating to the holding of hearings by videoconference, which the Royal Decree of 11th of July 2003 does not provide for and does not allow, can only be done by the adoption of a Royal Decree. The opposing party cannot modify these conditions since it lacks the competence to adopt such rules and has not been attributed to it.

The contested act lays down new rules, which, although issued by an incompetent author, are general, mandatory, change the conditions under which the hearings must be carried out in the open centres and are likely to apply to an indeterminate number of applicants for international protection. This act is of regulatory nature and is subject to appeal under Article 14 of the Law of the Council of State. The application is admissible *ratione materiae*.

The fact that the opposing party has already enacted such rules, applicable in closed centres since 2016, does not imply that those provided for in the contested act for open centres are not new. Through the contested act, the opposing party has now

decided to modify the rules of the hearings for applicants for international protection in open centres, as it had previously done for closed centres.

These are therefore new rules. According to Exhibit 4 attached to the application, the applicants appear to have had sufficient knowledge of these rules only on the 18th of November 2020. By bringing the present action on the 27th of November 2020, the applicants not only did not act belatedly but also did so with the diligence required in the circumstances of the case to bring an application for interim relief of extreme urgency. The application is therefore admissible *ratione temporis*.

The contested rules, imposed on applicants for international protection in open centres, are provided for outside the legal framework in which they should fall, namely a Royal Decree. The opposing party cannot validly maintain that the required guarantees are provided. Such guarantees, if they could be provided at all, could only be provided within the required legal framework, by being adopted by the competent authority. .

The rules undertaken, in such a sensitive area as that of international protection, do not provide any guarantee to applicants for such protection since they are enacted by an incompetent author and outside the required legal framework. They are therefore likely to seriously prejudice the rights of applicants for international protection and to harm in a sufficiently serious manner the interests of the applicants who are acting to protect the rights of those applicants.

This sufficiently serious infringement of the interests of the applicants is imminent since the opposing party announced on the18th of November 2020 its intention to apply the contested rules in the short term. A judgment, given under the ordinary summary procedure, could not be given in time to prevent the implementation of the contested act from leading to the violation of the rights of applicants for international protection in a large number of cases.

The fact that these applicants could challenge the other party's decisions concerning them before the Aliens Litigation Council in no way implies that the present application for urgent interim relief would not be admissible. On the contrary, the requirements of good justice require that the application of these rules be prevented by suspending their execution rather than allowing the effects of the contested act to occur and allowing the development of significant litigation before the Aliens Litigation Council.

For the above reasons, the request for an emergency suspension is therefore admissible.

V. The first legal argument

Arguments of the parties

The plaintiffs make a first legal argument of "the lack of competence on the part of the author of the act, violation of Articles 37, 105 and 108 of the Constitution, as well as violation of Article 160 of the Constitution, Articles 3 and 84 of the coordinated laws of 12 January 1973 on the Council of State and Article 57/5ter, I' paragraphs 1 and 2 of the law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners."

Firstly, the applicants submit that the contested measure is "addressed in a general, impersonal and abstract manner, for an indefinite period, to global categories of applicants for international protection", that "the persons making up these categories were, at the time the contested measure was adopted, neither identified nor identifiable a priori", that "the contested measure is therefore an administrative measure of a regulatory nature", that "(…) the physical presence of each of the four participants, namely the applicant, the protection officer, the interpreter and the lawyer, during the individual interview is one of the main conditions that the King must regulate", that "(...) the physical presence during the interview is certainly not a secondary and detailed measure either, *a fortiori* in view of the issues it raises in terms of the quality of the interview and the confidentiality, In addition, by 'claiming to regulate this issue by means of an act other than a Royal Decree, the opposing party is arrogating itself a competence that it does not have, and is violating Articles 37, 105 and 108 of the Constitution and Articles 57/5ter, SF, paragraphs I and 2 of the Act of 15 December 1980'.

Secondly, the plaintiffs argue that it is impossible to argue that a hearing takes place at the place of detention when the applicant and the CGRA protection officer are in different places", that "if the protection officer interviews the applicant from his home, then the hearing takes place both at that home and at the place of detention", that "the fact of 'bringing into the presence' referred to in Article 13/1 obviously is a reference to a hearing in person", that "presence is defined as the "fact of being physically somewhere, near someone" or as the "fact that someone or something is physically, materially present in a given place, as opposed to being absent", that "it is therefore a physical presence of all those involved in the personal interview that is organised by the Royal Decree", that "only a Royal Decree can therefore derogate this", that "this is further confirmed by Article 9 of the Royal Decree", that "(. . .) the applicant is therefore obliged to appear, and therefore to be physically present at the Office of the Commissioner General for Refugees and Stateless Persons, that "the organisation by the Royal Decree of a face-to-face interview is not in doubt", that "in addition, the plaintiffs point out that Article 105 of the Constitution, although expressly referring only to the King, contains a general principle applying to the whole of the executive power", that "all powers being of attribution, the administration has no powers other than those conferred on it by law", that "Article 108 of the Constitution specifies that the general regulatory power belongs to the King", that "no regulatory power of its own or autonomous is recognised to a minister and even less to civil servants", that "the author of the contested act does not have the power to intervene in a legal field to adopt regulatory provisions" and that "the contested act is devoid of any legal basis and its author had no competence to adopt it".

The opposing party responds in substance that it is competent to organise interviews of applicants for international protection in the open centres and that a regulatory act is not necessary to provide for such hearing arrangements.

Assessment

In the contested act, the opposing party formulates general and mandatory rules which modify the conditions under which the hearing must be carried out in open centres and which are likely to apply to an indeterminate number of applicants for international protection. The contested act is thus of a regulatory nature.

The conditions under which the hearing of an applicant for international protection must take place are governed by the Royal Decree of the 11th of July 2003 laying down the procedure before the Office of the Commissioner-General for Refugees and Stateless Persons and its operation.

The modification of these conditions, in particular by adding rules on the holding of hearings through videoconference, which the Royal Decree of the 11th of July 2003 does not provide for, and does not allow, can only be done by the adoption of a Royal Decree.

There is no legal provision that grants the opposing party the competence to enact the rules contained in the contested act. The act was therefore adopted by an incompetent author. The first and second parts of the first legal argument are significant.

The conditions, required by Article 17(F) of the Law of Council of State, consolidated on the 12th of January 1973, for the Council of State to order the suspension of the execution of the contested act are met.

FOR THESE REASONS,
THE COUNCIL OF STATE DECIDES :

Article 1.

on the suspension of the implementation of the rules, set out by the Commissioner General for Refugees and Stateless Persons in the act of the 18th of November 2020, which organise by videoconference, in the short term, interviews of asylum seekers staying in open centres and which provide for the modalities of these interviews.

Article 2.

on the immediate execution of this judgment.

Article 3.

In accordance with Article 3, Section 1, paragraph 2, of the Royal Decree of 5 December 1991 determining the procedure for summary proceedings before the Council of State, this judgment will be notified by fax to the opposing party.

Article 4.

The costs, including the procedural indemnity, are provided.

Delivered in Brussels, at a public hearing of the XI Chamber, in summary proceedings, on the 7th of December 2020 by:

Yves Houyet, President of the Chamber,
Xavier Dupont, Registrar.

Le Greffier,

Xavier Dupont (Signature) Signature numérique de Xavier Dupont (Signature) Date : 2020.12.07 14:41:38 +01'00'

Xavier Dupont

Le Président,

Yves Houyet (Signature) Signature numérique de Yves Houyet (Signature) Date : 2020.12.07 14:27:56 +01'00'

Yves Houyet