

**JUDICIAL TRAINING PROJECT FUNDAMENTAL RIGHTS IN  
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ASYLUM AND MIGRATION**

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(VIRTUAL MODE)**

**Articles 14 and 17(1) APD (personal  
interview/report) in light of the right to an effective  
remedy as in Article 46 (3) APD and Article 47 of the  
CFREU**

**Judge Katelijne Declerck**

**Immediate Past President of the International Association of  
Refugee and Migration Judges (Global)**

## Article 47 of the CFREU

- Right to an effective remedy and to a fair trial

## Article 46 (3) Directive 2011/95/EU (APD)

- 3. (...) Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU at least in appeals procedures before a court or tribunal of first instance.

## Article 14 APD

- Personal interview

## Article 17 APD

- Report and recording of personal interviews

## A personal interview

Statements made by an applicant during the personal interview are essential in the assessment of an asylum claim and is recognize in Article 14 APD (1) – see also Article 5 of the Dublin III Regulation

Only an asylum seeker can explain the reasons why he or she fled his or her country.

- in order to be able to make a full and *ex nunc* examination of both facts and points of law
- in order to avoid the risk of refoulement
- to ensure an effective remedy

# A personal interview

## Jurisprudence by the Court of Justice of the European Union

The Court of Justice has not yet interpreted the right to a personal interview guaranteed in Article 14 of the Procedures Directive Recast.

CJEU, Case C–277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 85-89.

It is a general principle of EU law guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect his interests.

The CJEU considered in *M.M.* that this right ‘must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System’.

Right to be heard

## A personal interview : The right to be heard

CJEU, C-383/13, *M. G. and N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, paras . 34, 38, 40.

34. (...) the question whether there is an infringement of the rights of the defence must be examined in relation to the **specific circumstances of each particular case** (see, to that effect, Case C-110/10 P *Solvay v Commission* [2011] ECR I-10439, paragraph 63), including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (*Commission v Kadi*, paragraph 102 and the case-law cited).

38 (...) it must be noted that, according to European Union law, an infringement of the rights of the defence, **in particular the right to be heard, results in annulment only** if, had it not been for such an irregularity, the outcome of the procedure might have been different (...).

40 To make such a finding of unlawfulness, the national court must (...) assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.

## preparing the hearing - the written questionnaire

The questionnaire at the Immigration Department (Office des Étrangers - Dienst Vreemdelingenzaken'), on the reasons for flight serves as an instrument to prepare the hearing report at the first level

- the asylum seeker is not assisted by a lawyer (however minors do have a guardian)

The RvV-CCE (Raad voor Vreemdelingenbewistingen-Conseil du Contentieux des Étrangers / Council for Alien Law Litigations) ruled that:

- this does not mean that this questionnaire that must be filled out - may not be used when assessing the asylum application

RvV-CCE 29 May 2012, nr. 81.855

- Articles 15 and 16 APD does not oblige the Immigration Department to allow the lawyer to be present when filling in the questionnaire.

RvV-CCE October 2010, nr. 50.343

- Nor is Article 6 ECHR applicable to Asylum cases.

ECtHR, Mamatkulov v. Turkey, Askarov v. Turkey, No. 46827/99 and 46951/99 4 February 2005;

ECtHR, Maaouia v. Frankrijk, no. 39652/98, 5 October 2000;

Constitutional Court of Belgium 27 May 2008, nr. 81/2008; RvV-CCE 9 October 2015, nr. 154.200;

## The effective personal interview : qualified official

The officials are trained on interviewing asylum seekers, on intercultural communication and on the specific needs of vulnerable groups – They examine the asylum application individually, objectively and impartially.

The Council of State considers that the impartial official has no personal interest in misrepresenting the asylum seeker's statements

Council of State, nr. 223.963, 19 June 2013

Inappropriate comments or only closed questions from the official can lead to the annulment by the RvV-CCE, but insisting on accuracy or clarification does not constitute an error on his part.

RvV-CCE 29 October 2013, nr. 113.044.

RvV-CCE 30 November 2015, nr. 157.242.

RvV-CCE 28 January 2013, nr. 95.961.

## The language of the procedure – The language of the report

Language of the procedure in international protection in Belgium is Dutch or French.

An interpreter is present at all levels of the procedure if requested at the Immigration Department.

The asylum seeker can request, at the beginning or during the interview, that another interpreter be assigned. The Council for alien law litigation will check whether there was a valid reason and/or whether the asylum seeker was in breach of his duty of cooperation in doing so.

RvV-CCE 9 January 2014, nr. 116.666; RvV-CCE 22 October 2015, nr. 155.110

It is not required that the interpreter, who translates the asylum seeker's statements at the CGRS, must do so directly in the language of the procedure as long as the CGRS uses the procedural language when drawing up the interview report, and when taking the decision.

RvV-CCE 1 September 2011, nr. 66.048; RvV-CCE 5 December 2013, nr. 115.135

## The language of the procedure – The language of the report

Nor is there a provision that forbids the official to express himself in a foreign language during the interview and to take on the role of interpreter when he has mastered that language.

This may not prevent the lawyer or guardian from following the hearing. The language of the hearing must thus not be the same as the language of the proceedings.

RvV-CCE 24 November 2015, nr. 156.904

The lawyer's notes during the hearing are a one-sided document drawn up by a party whose task lays with his/her client's interests, which is not the same as the task of the official.

The lawyer's notes are not part of the administrative file and nor objective evidence of any inaccuracies in the contested decision. However, comparing the hearing report and the lawyer's notes can be taken into account when assessing the reliability of the hearing report.

RvV-CCE 15 January 2014, nr. 116.918; RvV-CCE 11 August 2011, nr. 65.543;

RvV-CCE 20 November 2015, nr. 156.765

**Thank you**

*10 jaar Raad voor Vreemdelingenbetwistingen: daadwerkelijke rechtsbescherming / 10 ans du Conseil du Contentieux des Étrangers: la protection juridictionnelle effective, Brugge, die Keure / la Charte, 2017.*