

1. COURT OF JUSTICE OF THE EUROPEAN UNION, JUDGEMENT OF 24 NOVEMBER 2020, JOINED CASES *RNNS AND KA* (JOINED CASES C-225/19 AND C-226/19), EU:C:2020:951

No objection without substantiation? The visa applicant's right to an effective remedy in the case of consultation procedures

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A. Facts and ruling

The preliminary ruling of the Court of Justice of the European Union (CJEU) in *RNNS and KA* (C-225/19 and C-226/19) concerns the interpretation of the provision on visa refusal of the [Visa Code](#) (Article 32) in light of the right to an effective remedy. It rules on the specific situation of a refusal decision by a Member State is based on the objection expressed by another Member State in the context of the prior consultation procedure.

The judgment gives additional clarifications on the scope of the right to an effective remedy enshrined in Article 47 of the [EU Charter of Fundamental Rights](#) and guaranteed to third country nationals who apply for Schengen short-term visa against visa refusal. As regards consultation procedures, part of the legal problem in these cases arise from the vagueness of the wording of the standard form for the notification of visa refusal to the applicant. However, this does not mean that the procedural guarantees can be disregarded, including the scope of the duty to state reasons for the decision of refusal, which surround the right to an effective remedy of the visa applicant. Those clarifications will help the national immigration authorities who, in their everyday practice, deal with the consultation procedures. If, on the one hand, they provide clearer procedural safeguards to visa applicants in discerning their chances of appeal, yet on a more negative note, they also risk discouraging appeal procedures.

Opportunely, the wording of the standard form for the notification of visa refusal was amended by the EU legislature with the reform of the Visa Code ([Regulation \(EU\) 2019/1155 amending Regulation \(EC\) No 810/2009 establishing a Community Code on Visas](#)). In the new standard form, the various grounds for refusal referred to in Article 32 are now set out separately. The *RNNS and KA* judgment complements this legislative improvement.

1. *Facts and circumstances of the case (§ 12-31)*

The preliminary questions have been referred by the Dutch District Court of The Hague in the context of disputes opposing failed visa applicants to the Dutch Minister of Foreign Affairs. In the pre-pandemic era, travelling for tourism, economic activity or family matters was much easier than today. *RNNS*, an Egyptian national married to a Dutch citizen, was willing to visit his parents-in-law in the Netherlands (C-225/19) and for that purpose applied for a short-term visa at the Dutch consulate. *KA*, a Syrian national who lives in Saudi Arabia, applied for the same visa to visit her children living in the Netherlands (C-226/19). Both visa applications were rejected by the Dutch Minister, applying Article 32 (1) to (3) of the Visa Code, on the ground that one or more Member States had considered

RNNS and KA to be a threat to public order, internal security, the public, or to the international relations of one of the Member States. In fact, Hungary objected to the issuing of a visa to RNNS while Germany objected to the issuing of KA's. Neither country had issued an alert for the purpose of refusing a visa in the Visa Information System (VIS). Since data on consultation procedures are not available, it is difficult to evaluate their use and outcomes, and it is unclear whether the objection automatically results in the refusal of the visa (see the comprehensive [expert opinion](#), p. 11-14). That was the case for RNNS and KA who were notified the visa refusal decision by means of the standard form (Annex VI of the Visa Code). The form did not contain any mention of the identity of the Member State objecting the issuing of the visa, the reasons for the objection or any information concerning the possibility of bringing proceedings in the objecting Member States. Both applicants submitted a complaint – later rejected – against the refusal decision to the Minister in order to seek information about the identity of the Member State and the reasons behind the objection it had raised.

In the main proceedings, the applicants argued that they have been deprived of their right to effective remedy since they were not able to challenge the Minister's decisions or their substance. Therefore, the domestic judge decided to refer four main questions (§ 30), identical in the joined cases, to the Court of Justice concerning the interpretation of Article 32(1)(a)(vi) of the Visa Code.

In essence, the domestic Court wonders whether Article 32(2) and (3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning: 1) first, that a Member State which has adopted a final decision of visa refusal on the basis of a Member States' objections as an outcome of the consultation procedure [Article 32(1)(a)(vi)] is required to indicate, in that decision, the identity of the Member State which raised that objection, the specific ground for refusal based on that objection and the remedies available against that objection and, 2) secondly, that, where an appeal is lodged against that decision on the basis of Article 32(3) of that code, the courts of the Member State which adopted that decision must be able to examine the substantive legality of the objection raised by that other Member State to the issuing of the visa.

2. Judgement and reasoning of the Court (§32-57)

The Court's reasoning on the interpretation of Article 32(2) and (3) of the [Visa Code](#), read in the light of Article 47 of the [Charter](#), is built around two main points:

First, the scope of the statement of reasons in the decision of visa refusal by a Member State (§34-47): the Court states that a Member State which has adopted a final decision refusing to issue a visa on the basis of Article 32(1)(a)(vi) of the Visa Code – because another Member State objected to the issuing of that visa – must indicate, in that decision, under the "remarks" section of the standard form, 1) the identity of the Member State which raised that objection, 2) the specific ground for refusal based on that objection, (3) accompanied, where appropriate, by the essence of the reasons for that objection, and the authority which the visa applicant may contact in order to ascertain the remedies available in that other Member State.

Second, the scope of the judicial review (§48-56): the Court drew a distinction between the judicial review of the legality of the final decision of visa refusal carried out by a Member State and the judicial review of the substantive legality of the objections raised by another Member State, in the context of the prior consultation procedure. Where an appeal is lodged against that decision based

on Article 32(3) of the Visa Code, the courts of the Member State which adopted that decision cannot examine the substantive legality of the objection raised by another Member State to the issuing of the visa. The examination of the merits of the objection raised by another Member State is a matter for the national courts of *that other* Member State.

B. Discussion

This is not the first time that the CJEU interprets the Visa Code and aspects related to the visa applicant's right of appeal against a decision of refusal. I will first recall the principles governing visa application procedural safeguards in general, and the right of appeal against the visa refusal, by particularly summarizing the previous case-law of the CJEU. Then, I will comment individually on the two points decided upon by the Court, namely the scope of the obligation to state reason and the scope of the right to an effective remedy in the context of visa refusal decisions.

- The principles governing the duty to state reasons for visa refusal and right of appeal against a refusal decision

The adoption of the Visa Code in 2009 made public a number of rules relating to visa policy that had never been published before in several Member States. By regulating the procedures and conditions for issuing short-term visa – which allow the visa holder to stay anywhere within the EU territory – the harmonization of visa policy had the effect of increasing transparency (including transparency of the visa refusal process) and fostering the equal and dignified treatment of visa applicants. These positive effects stem from the strengthened procedural guarantees, such as the obligation to state reasons for refusal and the right of appeal against that refusal.

In [Koushkaki](#) (C-84/12, EU:C:2013:862), the Court held that the grounds for refusal are exhaustive (§38 and 47). If the entry conditions that a visa applicant must fulfil for the issue of a uniform visa are harmonized, there cannot be differences between the Member States as regards the *determination* of the grounds for refusal (§45). However, national authorities are left with a wide margin of discretion as regards the conditions for applying the grounds for refusal and the evaluation of the relevant facts, as long as the decision of refusal is substantiated in concrete terms following a complex individual examination of the visa application (for a commentary see [here](#)).

In [El Hassani](#) (C-403/16, EU:C:2017:960), the Court affirmed that the provisions of the Visa Code must be interpreted in accordance with the fundamental rights and principles recognized by the EU Charter (§32), including when the Member States adopt a decision of visa refusal. By limiting the procedural autonomy of Member States, the Court affirmed that Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, requires Member States who have taken the *final* decision to provide for an appeal procedure against visa refusal decisions in their national law (§24). The procedure must, at a certain stage, guarantee a judicial appeal (§41 and 42). While the Member States retain a certain degree of autonomy in the implementation of the effective remedy, two cumulative conditions must be met, namely the respect for the principle of equivalence (these rules are not less favorable than those governing similar domestic situations) and the respect for the principle of effectiveness (they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU) (§26).

In [Vethanayagam](#) (C-680/17, EU:C:2019:627), the Court dealt with the effective remedy against a *final* decision of visa refusal when more than one Member State is involved. The case concerned the interpretation of visa representation agreements concluded according to Article 8 of the Visa Code (for a commentary of this case, see a [previous edition](#) of the Cahier de l'EDEM). Those agreements have a strong impact on the applicant's right to an effective remedy in the case of visa refusal: where a representation arrangement is in place, the Member State competent for examining and deciding on the visa application (the *representing* State) is also *exclusively* competent to rule on the appeal (§77) on behalf of the Member State of destination (the *represented* State). The Court held that such interpretation is consistent with the fundamental right to effective judicial protection (§88). Advocate General Sharpston expressed a different view in her opinion (EU:C:2019:278): she suggested to privilege the "natural *forum*" of the applicant, that of the Member State which is the "sole or main destination of the visa applicants" (§81 of her opinion).

Similarly, the RNNS and KA case also concerned with a visa refusal when more than one Member State is involved: the consultation procedure envisaged in Article 22 of the Visa Code.

- **The consultation procedure resulting in the objection to the issuing of visa**

According to Art. 32 (1)(a)(vi) of the Visa Code, a visa is to be refused if the applicant is considered to be a threat to public order, internal security or public health as defined in Article 2(21) of the [Schengen Borders Code](#) or to the international relations of any of the Member States. In order to verify this entry condition, the Member State examining the visa application consults the central authorities of the other Member States which can raise objections to the issuing of the visa as the Art. 22(1) and (2) of the Visa Code on consultation procedures.

Logically, if the entry conditions at Art. 21(2) are not fulfilled, the visa *can* be refused. I say *can* because Member States still have the option in exceptional circumstances to issue a visa with limited territorial validity, despite an objection by the Member State consulted in accordance with Art. 22 of the Visa Code (Art. 25 (1)(a)(ii) of that same Code).

- **The scope of the duty to state reasons of a visa refusal (§ 34-47)**

As it has been recalled, the authority refusing a visa to the applicant has the duty to substantiate the reasons for refusal. To reaffirm the importance of the duty to state reasons for visa refusal, the Court relies on the right to a good administration as a general principle of the EU (§34 referring to [PI](#), C-230/18) and on the caselaw on the effectiveness of the judicial review guaranteed by Article 47 (§43 [Heylens and Others](#), 222/86, EU:C:1987:442 and [ZZ](#), C-300/11, EU:C:2013:363). As recalled by Advocate General Pikamäe, Article 47 might be given a more limited scope provided that the limitation does not amount to disregarding the essence of the right (§50 of his [opinion](#), EU:C:2020:679). It follows from the fundamental right to an effective remedy that an applicant who is refused a visa because of an objection raised by a Member State on one of the grounds referred to in Article 32(1)(a)(vi) must be able to ascertain the *specific* ground for refusal underlying the decision as well as the identity of the Member states which objected to the issuing of the visa (§46).

- **The scope of the judicial review of the decision of refusal (§ 48-55)**

In order for the judicial review to be effective, the applicant must not only be able to ascertain the reasons upon which the decision on the visa was taken, but also have full knowledge of the relevant facts surrounding the visa denial to make the appeal against the visa refusal possible and, ultimately, to decide whether there is any point in appealing (§43).

Additionally, the respect of the duty to state reasons is also functional to put the Court in a central position to review the legality of the decision (§ 43). The obligation for Member States to guarantee a right to an effective remedy against a decision refusing a visa, within the meaning of Article 47 of the Charter, means that the judicial review of that decision cannot be limited to a formal examination of the grounds set out in Article 32(1) of the Visa Code. For these reasons, the review must also cover the legality of that decision, considering all of the elements in the file, both factual and legal, on which the competent national authority based that decision (§48). Since the competent national authorities have broad discretion in examining visa applications, the judicial review of that discretion is limited to ascertaining whether the visa refusal decision is based on a sufficiently solid factual basis and verifying the absence of a manifest error (§49, by analogy, [Fahimian](#), C-544/15, EU:C:2017:255, §45 and 46).

The Court drew a distinction between the review carried out by the courts of the Member State which adopted the final decision refusing a visa (in the case at stake: the Netherlands), which is limited to the examination of the legality of *that* decision, and, the review of the merits of the objection to the issuing of a visa raised by another Member State (in the case at stake: Hungary and Germany) in the context of the prior consultation procedure, which is for the national courts of that other Member State to carry out.

As for the first point, the legality of the final decision to refuse a visa is limited to the control over the correct implementation of the procedure of prior consultation of central authorities of other Member States carried out by the Member States refusing the issuing of the visa. The domestic court should check whether the applicant was correctly identified as the subject of an objection as well as the respect of procedural guarantees, such as the obligation to state reasons (§51). To the contrary, that court cannot review the substantive legality of the objection by another Member State (in the cases at stake: Hungary and Germany). It stems from Article 47 of the Charter that the visa applicants have the right to challenge the objection to the issuing of a visa (§52). If the Visa Code leaves procedural autonomy to Member States, the Court states that it is for the Member State which adopts a final decision refusing a visa to indicate the authority which the applicant may contact to ascertain the remedies available in that other Member State (§52) and to establish procedural rules which help to ensure that the rights of defence and the right to an effective remedy of visa applicants are guaranteed (§52).

The Court only lists possible mechanisms to ensure the right to an effective remedy, such as a request for information to the competent authorities of the Member States that objected to the issuing of a visa, as well as the possibility for those authorities to intervene in the appeal procedure under Article 32(3) of the Visa Code or any other mechanism that will ensure that the appeal brought by those applicants cannot be dismissed definitively without them having had the practical possibility of exercising their rights (§54).

This decision complexifies the system of appeal against visa refusal and places a certain burden on the visa applicant, similarly to the case of [Vethanayagam](#) (as underlined by Advocate General Pikamäe, § 132). The visa applicant, which in principle has no ties with the objecting Member State (and might very well have no knowledge of the language, the legal system, or the procedures) will have to deal with the authorities of two Member States, the one refusing the visa and the one objecting (see also [expert opinion](#), p. 18).

Conclusion

This case note is an occasion to reflect on the evolution of the effective remedy against visa refusal. If it is true that the Visa Code has removed visa rules from the broadest discretion, the interpretation of the Court of Justice, particularly with regards to the Member State responsible for the appeal and the scope of the judicial review, appears somewhat severe towards the visa applicants.

A Member State's objection to the issuing of a visa is not a veto, as is demonstrated by the fact that Member States are free – although exceptionally – to issue visa with limited territorial validity. When objections are raised by other Member States those should be substantiated and allow the applicant to challenge them in a manner that is consistent with the right to an effective remedy.

C. Suggested Reading

To read the case:

CJEU, Judgment, 24 November 2020, [RNNS and KA](#), Joined cases C-225/19 and C-226/19, EU:C:2020:951

[Opinion of the Advocate General Pikamäe](#), delivered on 9 September 2020, *RNNS and KA*, Joined cases C-225/19 and C-226/19, EU:C:2020:679

Case law:

CJEU, judgement of 24 November 2019, [Vethanayagam](#), C-680/17, EU:C:2019:627

[Opinion of Advocate General Sharpston](#), delivered on 28 March 2019, *Vethanayagam*, C-680/17, EU:C:2019:278.

CJEU, judgment of 13 December 2017, [El Hassani](#), C-403/16, EU:C:2017:960;

CJEU [GC], judgment of 4 April 2017, [Fahimian](#), C-544/15, EU:C:2017:255;

CJEU, judgment of 19 December 2013, [Koushkaki](#), C-84/12, EU:C:2013:862.

Doctrine:

J.-Y. CARLIER and L. LEBOEUF, [Droit européen des migrations](#), *Journal de droit européen*, 2020, p. 134

F. GAZIN, Droit à un recours effectif, *Europe*, 2019, no 10.

G. RENAUDIERE, [La décision de refus de visa : une autonomie procédurale encadrée](#), *Cahiers de l'EDEM*, June 2019;

K. EISELE, [Public Security and Admission to the EU of Foreign Students: Fahimian](#), 2018, *Common Market Law Review*, 55, p. 279-294

D. TRAJILOVIC, [Refus de visa pour études en raison d'un risque élevé de collectes d'informations confidentielles](#), 10 avril 2017, www.ceje.ch

M. DI FILIPPO, [Contrasto dell'immigrazione irregolare e conseguenze negative sullo status del migrante: il caso del richiedente visto nel diritto dell'Unione europea](#), 2018, M.C. Amato et alia (eds.), *Immigrazione, marginalizzazione, integrazione*, Giappichelli, 2018, ISBN 9788892117747;

S. PEERS, [Do potential asylum - seekers have the right to a Schengen visa?](#), *EU Law Analysis*, 20 January 2014.

Resources:

Migration Law Clinic of the VU University Amsterdam, Expert opinion "[Access to legal remedies against a visa refusal based on an objection of another Member State](#)", April 2019

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