

Case C-299/23 [Darvate and Others] ¹**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

11 May 2023

Referring court:

Tribunal de première instance francophone de Bruxelles (Belgium)

Date of the decision to refer:

10 May 2023

Applicants:

Ordre des barreaux francophones et germanophone de Belgique

CIRÉ asbl (coordination et initiatives pour et avec les réfugiés et étrangers)

Defendant:

État belge (Secrétaire d'État à l'Asile et la Migration)

1. Subject matter and circumstances of the dispute

- 1 The applicants criticise the conditions in which study visas are granted or refused, and, in particular, the absence of an effective remedy allowing, where appropriate, the initial refusal to grant a visa to be challenged in good time for the start of the academic year in Belgium. For several years, the conditions for granting and refusing visas have, according to the applicants, been particularly prejudicial towards Cameroonian nationals.
- 2 Given the length of the preliminary procedures for determining the equivalence of qualifications and for being admitted to the chosen higher education institution, as well as the time limit for examining the visa application, third-country nationals who are refused a visa will, owing to the absence of an effective remedy, be unable to complete their enrolment at the chosen institution in Belgium before the

¹ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

deadline of 31 October, for French-language institutions at least, in order to secure a place for that academic year (which starts in mid-September).

- 3 First, students may only submit their visa application to the competent consular post at the end of the procedure for admission to the higher education institution, which can take several weeks. The 90-day period in which the Belgian State is required to examine the visa application only commences from the date of acknowledgement of receipt of the visa application.
- 4 For some students, particularly from Cameroon, the Belgian State has imposed additional requirements:
 - students must make an appointment with an organisation in Cameroon ('Viabel', since 1 April 2019), authorised to conduct preliminary interviews to assess the authenticity of the documents accompanying the application, as well as the credibility of the applicant's study plans; according to the website of the Belgian Embassy in Cameroon, this year the interviews took place from 17 April onwards;
 - following the interview, students must make another appointment with a Belgian State contractor, TLS Contact, to submit their study visa application.
- 5 The visa application is then forwarded via diplomatic channels to the Immigration Office in Brussels, which is responsible for the administrative processing of visa applications in chronological order of receipt.
- 6 Some students are not notified of the Belgian State's decision regarding their visa application until August, September or October of that academic year; some visa applications become devoid of purpose if they are not processed before the date scheduled for the entrance exams or the deadline set for the student's admission.
- 7 If the visa is refused, this lengthy procedure also undermines the effectiveness of an appeal, since students must arrive in Belgium no later than 31 October to complete their enrolment at the chosen institution, assuming they have been granted an exemption, since the academic year commences much earlier.
- 8 In addition, since the landmark ruling of 24 June 2020 by which the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium; 'the CCE') put an end to a long-running dispute over the remedies available, inter alia, in the event of visa refusal,² the 'application for suspension on grounds of extreme urgency' – a special procedure by which the lack of a visa could be remedied by suspending the decision to refuse to grant the visa in an

² Council for asylum and immigration proceedings (General Assembly), judgment No 237.408 https://www.rvv-ccce.be/sites/default/files/arr/a237408.an_.pdf; for the dispute settled by that judgment, see the request for a preliminary ruling made by this court on 10 September 2019, registered with the Court of Justice under case numbers C-671/19 and C-672/19.

interim judgment accompanied by interim measures, mainly in the form of an order addressed to the State to issue a new decision not vitiated by the defect affecting the suspended decision, all within a time limit set according to the circumstances of the case – is now reserved solely for removal or refoulement measures, to the exclusion, inter alia, of visa refusals.

- 9 Although foreign students may still make an application for (ordinary) suspension and annulment of the contested decision, the fact remains that such procedures take an average of 3 to 10 months (see paragraphs 25 et seq. of the summary).
- 10 The applicants argue that the students thus deprived are hindered from pursuing their studies, and as a result could even miss a whole academic year.
- 11 Therefore, the applicants essentially seek an order for the Belgian State to provide an effective remedy against decisions refusing to grant study visas by granting students a remedy equivalent to the ‘application for suspension on grounds of extreme urgency’ before the CCE, accompanied, where appropriate, by interim measures.

2. Legal framework

European Union law

Charter of Fundamental Rights of the European Union

- 12 Article 7 provides:

‘Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.’

- 13 Article 14 provides:

‘Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.’

- 14 Article 47 provides:

‘Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

15 Article 52 provides:

‘Scope and interpretation of rights and principles

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

...’

Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast)

16 Article 5 of Chapter II, headed ‘Admission’, provides:

‘Principles

...

3. Where all the general conditions and relevant specific conditions are fulfilled, the third-country national shall be entitled to an authorisation.

Where a Member State issues residence permits only on its territory and all the admission conditions laid down in this Directive are fulfilled, the Member State concerned shall issue the third-country national with the requisite visa.

17 Article 34 provides:

‘Procedural guarantees and transparency

...

5. Any decision declaring inadmissible or rejecting an application, refusing renewal, or withdrawing an authorisation shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time limit for lodging the appeal.’

3. Findings of the referring court

18 The applicants have brought an action arguing that the State is liable for the unlawful absence of an effective remedy against the refusal of a study visa and

seek compensation in kind by means of a legislative act introducing the appropriate effective remedy.

- 19 To establish wrongful conduct, they raise a first plea alleging infringement of Article 47 of the Charter. They allege, in particular, that the Belgian State has not taken adequate and sufficient legal measures to enable foreign students wishing to pursue their studies in Belgium to exercise an effective remedy against a decision not to grant them a visa.
- 20 They submit that the lack of an effective remedy also infringes the right to education guaranteed to foreign students under Article 14 of the Charter and the right to respect for private and family life enshrined in Article 7 of the Charter. Moreover, under Article 52 of the Charter, the meaning and scope to be conferred on Articles 7 and 47 of the Charter are the same as those conferred on Article 8 and Articles 6 and 13 of the ECHR.
- 21 It is not disputed that those provisions apply in the present case, since the study visa application forms part of the Belgian State's implementation of EU law and, specifically, of Directive 2016/801/EU. Nor is it disputed that the remedy provided for in Article 34(5) of that directive is subject to the application of EU law, particularly the Charter.
- 22 Furthermore, it is appropriate to bear in mind that the objectives of Directive 2016/801/EU to strengthen procedural guarantees offered to third-country nationals and to facilitate the arrival of foreign students in the European Union.
- 23 Indeed, with regard to the second of those objectives, the recitals of the directive read as follows:

‘(3) ... Immigration from outside the Union is one source of highly skilled people, and students and researchers are in particular increasingly sought after. They play an important role in forming the Union's key asset, human capital, and in ensuring smart, sustainable and inclusive growth, and therefore contribute to the achievement of the objectives of the Europe 2020 Strategy.’

‘(7) Migration for the purposes set out in this Directive should promote the generation and acquisition of knowledge and skills. It constitutes a form of mutual enrichment for the migrants concerned, their country of origin and the Member State concerned, while strengthening cultural links and enhancing cultural diversity.’

‘(14) In order to promote Europe as a whole as a world centre of excellence for studies and training, the conditions for entry and residence of those who wish to come to the Union for these purposes should be improved and simplified. This is in line with the objectives of the agenda for the modernisation of Europe's higher education systems, in particular within the context of the internationalisation of European higher education. The approximation of the Member States' relevant national legislation is part of this endeavour. In this context and in line with the

Council conclusions on the modernisation of higher education, the term “higher education” encompasses all tertiary institutions which may include, inter alia, universities, universities of applied science, institutes of technology, grandes écoles, business schools, engineering schools, IUTs, colleges of higher education, professional schools, polytechnics and academies.’

‘(39) As regards students, volumes of admission should not apply since, even if they are allowed to work during their studies in accordance with the conditions provided for in this Directive, they seek admission to the territory of the Member States to pursue as their main activity a full-time course of study which could encompass a compulsory training.’

24 Directive 2016/801/EU also aims to strengthen procedural guarantees for foreign students, as shown by the following:

- Commission working document: ³

‘Weaknesses in procedural guarantees were also identified. One of them is the lack of any provision on time limits within which applications for admission would need to be assessed and decided on by Member States.’

‘3. OBJECTIVES

The main general policy objective is to improve the legal framework applied to third-country nationals who want to come and temporarily stay in the EU for more than three months for research and study purposes and to acquire experience and/or participate in various activities to increase their skills and competences, including by being a school pupil, volunteer, unremunerated or remunerated trainee or au pair.

Specific objectives were identified in light of the problems outlined above:

...

o to improve procedural guarantees, such as time limits for decisions on applications;’

- the proposal for a directive: ⁴

³ Commission staff working document – Executive summary of the impact assessment accompanying the document: Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, recasting and amending Directives 2004/114/EC and 2005/71/EC {COM(2013) 151 final} {SWD(2013) 77 final}, <https://data.consilium.europa.eu/doc/document/ST-7869-2013-ADD-2/en/pdf>.

⁴ Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing

‘Increased information and transparency are introduced, as well as time limits for decisions and improved procedural guarantees, such as written reasons for a decision and rights of appeal. Fees charged would have to be proportionate.’

- the recitals of the directive:

‘(30) Once all the general and specific conditions for admission are fulfilled, Member States should issue an authorisation, within specified time limits.

...

(43) National authorities should notify the applicant of the decision on the application. They should do so in writing as soon as possible and at the latest within the period specified in this Directive.’

- 25 In view of the different procedures and interviews required and the length of the procedure (see paragraphs 3 to 6 of this summary), it is frequently the case that applicants cannot take legal action until shortly before the start of the academic year for which the visa application was made. The CCE, which is the only body competent to hear applications for (ordinary) suspension or annulment of decisions refusing to issue a study visa, conducts a review of legality which does not allow it to substitute its assessment for that of the administrative authority responsible for visas.⁵
- 26 Although the time limit for deciding on an application for (ordinary) suspension is 30 days in principle, case-law shows that in practice, the CCE can take up to 6 to 10 months to reach a decision.
- 27 In any event, the statutory 30-day period for deciding on an application for (ordinary) suspension already seems too long since, if the CCE’s decision is not accompanied by an interim measure requiring the State to reach a new decision, there is a strong risk that no new decision will be made on the visa application within a period that is not liable to hinder or even irretrievably compromise the academic year for the person concerned.
- 28 There is no guarantee that the CCE will reach a decision within a reasonable time frame – in other words, by the date on which the student is required to attend the education institution. Many appeals are rejected on the ground that students no longer have any interest in continuing the procedure, since they are no longer able to enrol for the academic year covered by the visa application.

[RECAST] /* COM/2013/0151 final – 2013/0081 (COD) */, <https://eur-lex.europa.eu/legal-content/EN-FR/TXT/?from=EN&uri=CELEX%3A32016L0801>.

⁵ On the limits of the action, see the request for a preliminary ruling sent by the Conseil d’État (Council of State, Belgium) on 23 December 2022 (Case C-14/23, second plea, p. 9 et seq.).

- 29 The application for suspension on grounds of extreme urgency, which would have allowed a decision to be made in time and, if necessary, would have compelled the Belgian State to immediately reach a new decision on the visa application, can no longer be made by a foreign student who has been refused a study visa (see paragraph 8 of this summary).
- 30 Judges hearing applications for interim measures in judicial courts tend to consider that they lack jurisdiction to order the Belgian State to reach a new decision on a foreign student's visa application. Moreover, they have no jurisdiction to suspend the contested decision or to issue a visa themselves.
- 31 The only remedy available to foreign nationals who are deprived of access to education at the start of the academic year is to bring an action for compensation against the Belgian State, without being able to make up for the year of teaching they have irretrievably lost.
- 32 According to the case-law, the European Court of Human Rights provided in Article 13 of the ECHR:
- that a remedy is effective where it prevents the alleged violation or its continuation, or provides adequate redress for any violation that had already occurred;⁶
 - that, to be effective, the remedy must be capable of directly remedying the impugned situation;⁷
 - that a remedy which will not bear fruit in sufficient time is inadequate and ineffective;⁸
 - that an *ex post facto* remedy cannot always provide adequate redress in respect of the alleged violations of the Convention.⁹
- 33 In the present case, the question that arises is whether the remedy offered by the Belgian State to foreign students against a decision refusing to grant a study visa complies with Article 34(5) of Directive 2006/801/EU, in conjunction with Articles 7, 14 and 47 of the Charter, and with the principle of effectiveness, in the light of all the factors set out above, and specifically the fact that:

⁶ ECtHR, *Kudla v. Poland*, 26 October 2020, ECLI:EC:ECHR:2000:1026JUD 003021096, paragraph 158.

⁷ ECtHR, *Guide on Article 13 of the Convention – Right to an effective remedy*, updated to 31 August 2022, p. 14.

⁸ ECtHR, *Kadikis v. Latvia*, 4 May 2006, ECLI:CE:ECHR:2006:0504JUD006239300, paragraph 62.

⁹ ECtHR, *Alexeiev v. Russia*, 21 October 2010, ECLI:EC:ECHR:2010:1021JUD000491607, paragraph 100.

- applications for (ordinary) suspension or annulment which they may submit to the Council for asylum and immigration proceedings alone will not, in most cases, enable them to obtain a decision in time – in other words, within a period that does not hinder the pursuit of the studies in question;
 - the Council for asylum and immigration proceedings may only conduct a review of legality; it cannot substitute its assessment for that of the administrative authority, nor reach a new decision in its place, nor order the Belgian State to issue a visa;
 - the application for interim measures before the judicial court offers no guarantee of effectiveness, since the chance of obtaining a decision ordering the Belgian State to reach a new decision on the visa application is uncertain; judges hearing applications for interim measures have no jurisdiction to substitute their assessment for that of the Immigration Office and to alter the latter's decision; neither may they order the Belgian State to issue a visa;
 - missing a whole academic year is irreversible and cannot be adequately remedied by compensation.
- 34 Where the student has exercised all due diligence and the extreme urgency procedure is the only way to prevent the alleged harm, would preventing access to that procedure not be contrary to the abovementioned provisions?
- 35 Would the impossibility of bringing such an appeal not make it impracticable or excessively difficult for foreign students to exercise their right to obtain authorisation if they fulfil the general and specific conditions (as guaranteed in Article 5(3) of Directive 2016/80/EU)?
- 36 Would such an impossibility not, moreover, run counter to the objectives pursued by the directive, which aim, inter alia, to strengthen procedural guarantees for third-country nationals and to encourage students from third countries to come to the European Union?
- 37 In order to deliver its judgment in the present case, the referring court considers it necessary to ask the Court of Justice to rule on the following questions.

4. Questions referred for a preliminary ruling

- 38 The referring court puts the following three questions to the Court of Justice, noting that the third question is essentially identical to the third question which the Belgian Council of State referred to the Court in its request for a preliminary ruling of 23 December 2022 (Case C-14/23):

‘Does Article 34 of Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, alone or in conjunction with Articles 7, 14.1 and 47 of the Charter of Fundamental Rights and the principle of effectiveness, and in the light of the objective pursued by that directive to strengthen the procedural guarantees available to third-country nationals and to encourage foreign students to come to the European Union, require:

1. that a foreign student have the option of bringing an exceptional appeal, in conditions of extreme urgency, where he or she demonstrates that he or she has exercised all due diligence and that compliance with the time limits imposed in order to conduct an ordinary procedure (for suspension/annulment) could hamper the pursuit of the studies in question?

If the answer to that question is in the negative, must the same negative answer be given where failure to adopt a decision in a short period of time risks causing the person concerned irretrievably to lose a year of study?

2. that a foreign student have the option of bringing an exceptional appeal, in conditions of extreme urgency, where he or she demonstrates that he or she has exercised all due diligence and that compliance with the time limits imposed in order to conduct an ordinary procedure (for suspension/annulment) could hamper the pursuit of the studies in question, in the context of which, concomitantly with the suspension, he or she may request that other interim measures be ordered to ensure the effectiveness of the right to obtain authorisation if he or she fulfils the general and specific conditions, as guaranteed in Article 5(3) of Directive 2016/80/EU?

If the answer to that question is in the negative, must the same negative answer be given where failure to adopt a decision in a short period of time risks causing the person concerned irretrievably to lose a year of study?

3. that the remedy in the form of an appeal against the decision refusing to grant the visa allow the court to substitute its own assessment for that of the administrative authority and to review the decision of that authority, or is it sufficient to have a review of legality which allows the court to censure any illegality, particularly a manifest error of assessment, by setting aside the administrative authority’s decision?’