Access to Legal Remedies under the Visa Code in the Case of Representation Agreements

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1. Introduction

This expert opinion was written at the request of lawyer M.J.A. Leijen, the lawyer acting for Vethanayagam in case C-680/17.[1] It concerns a case in which four preliminary questions were referred to the Court of Justice of the European Union (henceforth: CJEU) by the District Court Utrecht (*Rechtbank Den Haag, zittingsplaats Utrecht,* henceforth: the District Court) concerning the Visa Code[2] (henceforth: VC). The questions relate to the appeal procedure for a denied visa application in the context of a visa representation agreement.

1.1 Facts of the case

The case concerns a couple of Sri Lankan nationality who applied for a Schengen visa in August 2015 in order to visit their sister in-law, who has the Dutch nationality. In accordance with the representation agreement between the Netherlands and Switzerland, Switzerland was deemed competent to handle the visa applications and the appeal against the refusal of those visa applications. This representation agreement is not publically available.[3]

The applicants appealed the rejection of the visa application in both the Netherlands and Switzerland. The Swiss appeal was ultimately declared inadmissible by the Swiss Federal Administrative Court (*Schweizer Bundesverwaltungsgericht*) because the court fees had not been paid.[4] In an interim decision in the same case, the Swiss Federal Administrative Court stressed that it is not bound by Article 47 of the Charter of Fundamental Rights of the European Union (henceforth: the Charter) and that Dutch law is irrelevant in deciding the appeal.[5]

The Dutch authorities declared that they did not have the authority to take the administrative objection against the refusal of the visa application by the Swiss authorities into consideration. Moreover, they refused to decide on a new visa application submitted to the Dutch visa authorities. In both instances they referred to the representation agreement between the Netherlands and Switzerland. The preliminary questions were referred by the District Court in the appeal against these decisions.[6]

1.2 Legislative history of the right to appeal in the Visa Code

Third country nationals, who have been denied a visa to enter the European Union, have a right to appeal against this refusal. The right to appeal against visa decisions was embodied in EU law only in 2009 and should be considered a major innovation of the VC. Before that time, many Member States did not grant a right to appeal in visa cases. The European Commission proposed to include a right to appeal in the VC.[7] Many Member States in the Council opposed to this, pointing 'at the risk of their domestic courts being swamped if that right was available'. However, the European Parliament considered the right to appeal to be 'a cornerstone in safeguards for visa applicants' and advocated for it from the

[1] CJEU Case C-680/17 *Vethanayagam and Others* [2017].

[2] Council Regulation (EC) No 810/2009 of 15 September 2009 of the European Parliament and of the Council establishing a Community Code on Visa [2009] OJ L 243/1 (Visa Code).

[3] This was recognized by the Dutch Ministry of Foreign Affairs in an earlier case dealing with visa representation before the District Court of The Hague 3 April 2013, ECLI:NL:RBDHA:2013:BZ9579.

[4] Schweizer Bundesverwaltungsgerichts 12 September 2017, Geschäfts-Nr. F-115/2017.

[5] Zwischenverfügung des Schweizer Bundesverwaltungsgerichts 22 June 2017, Geschäfts-Nr. F-115/2017, p 3.

[6] District Court Utrecht 30 November 2017, ECLI:NL:RBDHA:2017:14187.

[7] COM(2006)403, p. 56 in Article 23 of its proposal.

beginning of the negotiations about the VC.[8] The Parliament prevailed and the right to appeal was codified in Article 32(3) VC.

Article 32(3) VC provides that an appeal must be taken in the Member State that has taken the 'final decision.' The Handbook for the processing of visa applications and the modification of issued visas (henceforth: the Handbook) indicates that applicants have to lodge their appeal before a court in the representing country – not in the country of destination. However, the Handbook is not a binding instrument.[9]

1.3 The preliminary questions

On 30 November 2017, the District Court referred the following questions for a preliminary ruling:

1. Does Article 32(3) VC preclude a sponsor, as an interested party in connection with the visa applications of applicants, from having a right of objection and appeal in his or her own name against the refusal of those visas?
2. Should representation, as regulated in Article 8(4) VC, be interpreted as meaning that responsibility (also) remains with the represented Member State, or that responsibility is wholly transferred to the representing Member State, with the result that the represented Member State itself is no longer competent?
3. In the event that Article 8(4)(d) VC allows both forms of representation as referred to in Question 2, which Member State must then be regarded as the Member State that has taken the final decision as referred to in Article 32(3) VC?
4. Is an interpretation of Article 8(4) and Article 32(3) VC according to which visa applicants can lodge an appeal against the rejection of their applications only with an administrative or judicial body of the representing Member State, and not in the represented Member State for which the visa application was made, consistent with effective legal protection as referred to in Article 47 of the Charter? Is it relevant to the answer to that question that the avenue of legal recourse offered should guarantee that an applicant has the right to be heard, that he has the right to bring proceedings in a language of one of the Member States, that the level of the charges or court fees for the procedures governing the lodging of objections and appeals are not disproportionate for the applicant and that there is a possibility of funded legal aid? Given the margin of discretion enjoyed by the State in matters relating to visas, is it relevant to the answer to this question whether a Swiss court has sufficient insight into the situation in the Netherlands to be able to provide effective legal protection?

1.4 Outline of the expert opinion

This expert opinion will answer the four questions referred by the District Court. In Chapter 2 it will provide background to the preliminary questions, by explaining the scope and practice of visa representation. Chapter 3 will examine the objectives of the VC and the purpose of representation agreements. It argues that ambiguous provisions should be read in the light of the VC's aim of *facilitating legitimate travel* and preventing illegal migration. The important role of the sponsor is

[8] Council document No 14628/08, 'Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas of 23 October 2008', p 3 (point 2) and Council document No. 7293/09, p 2. See also A. Meloni, 'The Community Code on Visa: Harmonisation at last?' *European Law Review* 2009, p 690.

[9] Federica Infanto, 'State-bound Visa Policies and Europeanized Practices. Comparing EU Visa Policy Implementation in Morocco' *Journal of Borderlands Studies* (2016), p 173.

addressed in Chapter 4. It is argued that EU law does not preclude the sponsor from having a remedy under national law.

Questions 2 and 3 will be addressed together in Chapter 5, because the answers to these questions are interdependent. The text of the VC seems to indicate that one Member State takes the final decision when rejecting visa applications. This can either be the represented or the representing Member State. It will be argued that in the context of representation agreements in the VC, the represented Member State retains responsibility. This also means that the represented Member State takes the final decision, and it should be possible to lodge an appeal in the represented Member State.

It is only necessary to answer question 4, if it is determined that the representing Member State takes the final decision and that the appeal should thus be directed against this Member State. This opinion nonetheless answers the fourth question by describing the minimum requirements and guarantees representing Member States must comply with in Chapter 6. On the basis of the ECtHR's and CJEU's case law it is contended that the representing Member State must offer specific protection regarding the right to be heard, language, court fees, legal aid and guarantees of full judicial review, in order to ensure an effective remedy.

Finally, Chapter 7 provides conclusions and recommends answers to the preliminary questions.

2 Practice and scope of visa representation

In July 2017, the Netherlands had representation agreements with 16 different Member States. It is represented by 16 different Member States in 60 different countries outside the EU and in over 70 different cities.[10] The representation agreements are not published. As a result of these agreements, a significant number of persons who apply for a visa for the Netherlands, have to deal with another Member State. For example, representation agreements concluded by the Netherlands with Germany, France and Spain affected more than 270,000 visa applications in 2016.[11] In at least ten cities, among which Colombo (Sri Lanka), the Netherlands has a consular or diplomatic representation, but nevertheless has concluded a representation agreement with another Member State to deal with visa applications of third-country nationals for a visit to the Netherlands in those cities. An overview of the countries and cities where the Netherlands is represented by another Member State can be found in Annex 1 to this expert opinion.

In the past, both commentators and organisations such as the Dutch Ombudsman (*Nationale Ombudsman*) and the Meijers Committee[12] have referred to practical problems for visa applicants to exercise their right to legal remedies in case of representation agreements.[13] These practical hurdles include language problems, a lack of information on where and how to appeal the refusal of the visa application and high court fees. In his letter of October 2013, the Dutch Ombudsman refers to the problems caused by both the French-Dutch and Belgian-Dutch representation agreement for visa applications in Abuja (Nigeria).[14] There, both the French and Belgian consulate represented the Netherlands and could refuse visa on behalf of the Dutch authorities.[15] This implied that the visa applicant, whose application for a visa to visit the Netherlands had been rejected by the French consulate, had to lodge an appeal in France. This required specialist legal support by a French lawyer and knowledge of the French language. If the Belgian authorities had refused a visa for the Netherlands, the applicant could only lodge an appeal against this decision in Belgium, if he chose a domicile in that country. This required a Belgian lawyer.

The Dutch Ombudsman received many complaints from visa applicants about the lack of information on the appeal proceedings in case of a visa refusal. Often, visa applicants would obtain no answer or further information on course of the proceedings, after they had lodged an appeal to the authorities of the representing Member State.

[10] European Commission website https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/how_to_apply_en. See further Annex 1 to this expert opinion.
[11] Ibid.
[12] Standing Committee of Experts on International Immigration, Refugee and Criminal Law, http://www.commissie-meijers.nl/en.
[13] Gerd Westendorp, 'Mag een beroep tegen weigering van een Schengenvisum bij de Franse IND worden ingediend in de Engelse taal?'*Asiel&Migrantenrecht* (2014), pp 303-304, E.R. Brouwer, 'Wanneer een staat een visum weigert namens een andere staat. Vertegenwoordigingsafspraken in het EU visumbeleid en het recht op effectieve rechtsbescherming' *SEW Tijdschrift voor Europees en economisch recht* (2015), pp 160-173, Nationale Ombudsman, *Hoe is jouw Zweeds?* Report 2015/128, 1 September 2015, Meijers Committee, *Draft Amendments to the Proposal of the Recast-Visa Code*, 3 November 2014, CM 1412, p 2.
[14] This is now Lagos, where Netherlands is represented by France and visa applications are dealt with by VSF Global, which has an agreement with France.
[15] The Dutch Ombudsman, Letters to the Minister of Foreign Affairs, 24 October 2013 and 14 February 2014.

2.1 Examples

Two examples may illustrate the practical barriers encountered by visa applicants. In the first example of 2014 an English-speaking Nigerian citizen filed an application for a visa to the Netherlands to visit his brother. He had to turn to the French consulate in Lagos due to a representation agreement between the Netherlands and France. The applicant had already visited his brother in Amsterdam in 2009. His timely return to Nigeria was certified by the Dutch Embassy. The visa was refused by the French consulate in Lagos in a decision, which was written in the English language. The decision did not provide information on where and how to appeal. The French Consulate in Amsterdam told the applicant's brother that he should go to the French representation in Brussels for more information. The brother travelled to Brussels and was advised (orally) to file an appeal with the Dutch authorities against the refusal decision taken by the French Embassy. Instead, he contacted a Dutch lawyer in Amsterdam. The lawyer filed an appeal in English with the French authorities and asked for information on the procedure in France. The French authorities declared the request for a review inadmissible, because it was not written in the French language, which is required under French law. They did not provide the requested information on the procedure. Neither the applicant nor his brother spoke French.[16] He also filed a request for administrative review against the refusal of the visa in Dutch with the Dutch authorities. The Dutch authorities decided that they were not competent to examine this request. The appeal against this was rejected by the District Court Den Bosch.[17]

In another example of 2017 the parents of an Eritrean refugee filed an application for a short-term visa for the Netherlands. The visa was rejected by the Italian embassy in Asmara (Eritrea) on behalf of the Netherlands on the basis of Article 8(4)(d) VC. As a result of the representation agreement between the Netherlands and Italy, the applicants were required to lodge an appeal against the refusal before the regional administrative court of the district Lazio. Italian law required the applicants to use an Italian lawyer and lodge an appeal in Italian. This implied financial costs, which the applicants and their son could not afford. If they would have been allowed to appeal the decision to refuse the visa in the Netherlands, they would have received free legal assistance.[18]

[16] Information provided by the lawyer of the case.

[17] District Court Den Bosch, 2 February 2016, ECLI:NL:RBDHA:2016:1762. See further on this case: E.R. Brouwer 'Gebrekkige rechtsbescherming bij visumweigering op basis van vertegenwoordiging' *Asiel&Migrantenrecht* (2016), pp 189-193.

[18] Information provided by the lawyer of the case.

3. Objectives of the Visa Code and the purpose of representation agreements

The VC must be read in light of its general objectives. The questions referred by the District Court concern representation agreements in the context of the VC. Therefore, the intended goals of these agreements must also be taken into account. This chapter provides a general overview of the aims and purpose of both the VC and representation agreements in order to contextualise the questions. Such background is especially important when interpreting ambiguous provisions of the VC.

3.1 The objectives of the Visa Code

The aim of the VC as laid down in Recital 3 is the 'further development of the common visa policy [..] aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation', as defined in the Hague Programme: strengthening freedom, security and justice in the European Union. These goals have also been reaffirmed in the Commission's proposal for a recast of the VC '[t]he proposed amendments while maintaining security at the external borders and ensuring the good functioning of the Schengen area, make travel easier for legitimate travellers and simplify the legal framework in the interest of Member States'.[19]

3.2 The objectives of representation agreements

The purpose of representation agreements under the VC is first revealed in Recital 4 which states:

> Member States should be present or represented for visa purposes in all third countries whose nationals are subject to visa requirements. Member States lacking their own consulate in a given third country or in a certain part of a given third country should endeavour to conclude representation arrangements in order to avoid a disproportionate effort on the part of visa applicants to have access to consulates.[20]

Similarly, Article 8(5) and (6) VC states that 'Member States lacking their own consulate in a third country shall endeavour to conclude representation arrangements with Member States that have consulates in that country'. Moreover it provides:

> [w]ith a view to ensuring that a poor transport infrastructure or long distances in a specific region or geographical area does not require a disproportionate effort on the part of applicants to have access to a consulate, Member States lacking their own consulate in that region or area shall endeavour to conclude representation arrangements with Member States that have consulates in that region or area.

Thus, the intended goal of representation agreements for the purposes of the VC is to facilitate efficient and easy access for visa applicants to the competent consulates. This should be seen as an integral and conditional part of the general purpose of the VC. In general, EU Member States shall be present for visa purposes in all third countries whose nationals are subject to visa requirements. Where Member States

[19] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (VC) (recast)' SWD/2014/67/final – SWD/2014/68/final - 2014/0094.
[20] Recital 4 Preamble VC.

lack a consulate in the whole territory or in a specific region of a third country whose nationals are required to apply for a visa, Member States should avoid requiring a disproportionate effort from them in order to apply. Such Member States shall conclude a representation agreement with another Member State, which has its own consulate in that country or in that specific region of that country. As a result, applicants do not need to travel long distances to apply in the nearest neighbouring city or country where a consulate of the competent Member State exists. If such agreement would not be concluded, access to consulates would become more difficult for the applicants. This would be contrary to the aim of the VC to facilitate legitimate travel and tackle illegal immigration. The analysis of these aims and purposes guides the reasoning in the following chapters.

4. Right to appeal of the sponsor

The first preliminary question referred to the CJEU is whether Article 32(3) VC opposes a national rule, which allows a sponsor, as an interested party in connection with the visa applications of applicants, a right of objection and appeal in his or her own name against the refusal of those visas. Often, visa applicants have family, professional or other ties in the represented Member State. This is clearly recognised in Article 14(4) VC, which indicates that individual applicants may have sponsors. It is common in European Member States that companies can apply for a sponsor status for employees.[21] The role of a sponsor in the context of family visits may vary between different states. In general, there is a sponsor role for the family members in the represented Member State. A uniform provision regarding sponsorship was proposed during the negotiations of the VC, but has been deleted.[22]

The question whether a sponsor may be allowed under national law to appeal the decision to refuse a visa application, should be answered in the light of EU legislation and principles. EU legislation, including the current VC, does not prohibit Member States to grant the right of appeal to sponsors in short-term visa applications. Furthermore, the option for Member States to provide sponsors with a right to a remedy against visa refusals, seems in line with the general objective of the VC to facilitate visa application procedures.

The relevant EU principles are the principle of primacy of EU law, national procedural autonomy, equivalence and effectiveness. The first principle that needs to be discussed is the principle of primacy of Union law.

4.1 The principle of primacy

Ortlep and Verhoeven describe the principle of primacy as a rule of conflict: 'if that law is incompatible with national law, EU law always prevails'.[23] In *Costa/ENEL* the CJEU first recognised it as a principle of general nature, which always applies.[24] If national states provide sponsors a right to appeal, the provision in national law would be more favourable than explicitly required by EU law. There would be no conflict between national law and EU law.

4.2 The principle of procedural autonomy

The second relevant principle is the principle of national procedural autonomy. In short, this principle entails that national procedural rules are applicable as long as the procedure is not governed by EU legislation.[25] The text of Article 32(3) VC states that appeals shall be conducted in accordance with the national law of the Member State that has taken the final decision on the visa application. According to Advocate-General Bobek this implies that 'the EU legislature left it to the Member States to decide on

[21] S. Ramasamy, 'The Role of Employers and Employer Engagement in Labour Migration from Third Countries to the EU' *OECD Social, Employment and Migration Working Papers*, No. 178, OECD Publishing, Paris, paras 35-36.
[22] See S. Peers, 'Legislative Update, EC Immigration and Asylum Law: The New VC' *European Journal of Migration Law* 2010, p 119.
[23] R. Ortlep and M. J. M. Verhoeven, 'The principle of primacy versus the principle of national procedural autonomy' *Netherlands Administrative Law Library* 2012.
[24] CJEU Case 6/64 *Costa/Enel* [1964].
[25] CJEU Case 33/76 *Rewe* [1976], para 5: '[I]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law'.

the nature and concrete arrangements of the means of redress available to visa applicants. It is primarily for them to shape the right to appeal'.[26]

National autonomy is limited by the principles of equivalence and effectiveness.[27] In *El-Hassani* the CJEU considered in the context of the VC:

> it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals [..] on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[28]

Therefore, a 'rule that allows the sponsor to use administrative and judicial remedies in his own name having a personal interest in the case, against the refusal of the visa applications of the applicants' cannot be considered less favourable than the rules governing comparable domestic situations. A procedure which grants the sponsor the right to procedural standing, increases the effectiveness and practical access to legal remedies.[29] Sponsors can be present at the hearing in the country of destination (where he is residing). In many cases, the sponsor speaks the language of the country of destination and will have easier access to a lawyer in this country. The applicant cannot be present at the hearing in the appeal against the visa refusal in the Member State, unless a visa is granted to him for this purpose (which is of course extremely unlikely). This problem may be solved by giving the sponsor the right to lodge an appeal on behalf of the applicant and to represent the applicant's interests during the proceedings.

4.3 Conclusion

It should be concluded that the answer the first question is that a rule, which allows the sponsor to use administrative and judicial remedies in his own name against the refusal of the visa applications of the applicants, is not in conflict with the text of Article 32(3) VC, EU legislation or the principles as established by case law of the CJEU.

[26] CJEU Case C-403/16 *El-Hassani* [2017], Opinion of AG Bobek.
[27] CJEU Case 33/76 *Rewe* [1976], para 5.
[28] CJEU Case C-403/16 *El-Hassani* [2017].
[29] See also section 5.2.

5. Responsibility under representation agreements and meaning of final decision

This chapter will deal with preliminary questions 2 and 3 referred to the CJEU by the District Court, since the answers to these questions are interdependent. The second question asks whether representation as regulated in Article 8(4) VC should be interpreted as meaning that responsibility remains with the represented Member State, such that that responsibility is not wholly transferred to the representing Member State. The third question asks whether the Member State that has taken the final decision as referred to in Article 32(3) VC under Article 8(4)(d) VC is either the represented Member State or the representing Member State.

In order to answer these questions, this chapter first considers the different forms of representation agreements in the VC. It then argues that the text of the VC does not make clear which Member State takes the final decision under Article 32(3) VC in combination with Article 8(4) VC. However, as we will explain below, it is most in line both with the objective of the VC, the text of the VC, other instruments of EU law and Article 47 of the Charter that the represented Member State should be considered the one that takes the final decision.

5.1 Forms of representation agreements within the Visa Code

Article 8 VC regarding '[r]epresentation arrangements' is the most relevant provision regarding representation. It provides different types of representation, which can be divided into two categories: a) representation under Article 8(1) and 8(2), which constitutes the general rule and b) representation under Article 8(4)(d), which should be seen as an exception to the rule of Article 8(1) and 8(2).

In Article 8 paragraph 1, the general definition of representation states: 'A Member State may agree to represent another Member State that is competent in accordance with Article 5 for the purpose of examining applications and issuing visas on behalf of that Member State'. Furthermore, '[a] Member State may also represent another Member State in a limited manner solely for the collection of applications and the enrolment of biometric identifiers'. In addition, according to Article 8(2), '[t]he consulate of the representing Member State shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application'.

In representation agreements based on Article 8(1) and 8(2) VC, the authorities of the representing Member State have powers which are limited to either (1) examining applications and issuing visas on behalf of the represented Member State; or (2) collecting applications and enrolling biometric identifiers. Significantly, the authorities of the representing Member State are not provided with the power to reject a visa application. Thus, the general rule of representation agreements made under Article 8(1) and 8(2) VC is that the authorities of the represented Member State remain responsible and competent.

This view is in line with the general purpose of representation agreements to facilitate efficient and easy access for visa applicants to the competent consulates (see also Chapter 3 of this expert opinion). It is also supported by the general comments on the articles of the Explanatory Memorandum of the Commission's proposal where it is stated that

> [p]aragraph 6 [of Article 7] clarifies the situation in cases where the diplomatic mission or consular post of the representing Member States envisages refusing a visa applicant. In such case the entire file shall be submitted to the central authorities of the represented Member State in order for them to take the final decision on refusal and Article 23(3) on information of

the refused applicant shall apply. In this manner, it is ensured that a final decision is taken on the application, and the applicant is not, as it is currently often the case, just asked to submit the application again to the nearest consular office of the represented Member State.[30]

Article 8 (4)(d) VC provides for an exceptional form of representation. It reads: 'By way of derogation from paragraph 2, [the represented Member State] may authorize the consulate of the representing Member State to refuse to issue a visa after examination of the application'. Thus, the competent authorities of the representing Member State are empowered to refuse the application without submitting it to the represented Member State. Representation under Article 8(4)(d) VC is an exception to the rule that the rejection of the application is an exclusive competence of the authorities of the represented Member State, which is the applicant's intended destination.

5.2 Member State taking the 'final decision' in the Visa Code

Article 32(3) VC indicates that '[a]pplicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken *the final decision* on the application and in accordance with the national law of that Member State'.[31] According to the aforementioned provision of the VC, it appears that the 'final decision' is taken by a singular state. As a result, it must be determined which state takes the final decision in the form of the representation agreement under Article 8(4)(d) VC.

The concept of 'final decision' is not defined in Article 2 VC. Throughout the VC the term 'final decision' is used in three different provisions, namely in Articles 8(2), 32(3) and 37(1). From these articles, it becomes clear that the term 'final decision' in the VC means the decision in first instance taken regarding the application for visa, against which the applicant should have the right to appeal in case of rejection (as provided by Article 32(3) VC). It should be noted that the meaning of the term 'final decision' in the VC differs from the usual meaning of the term under other EU law provisions.[32] There, 'final decision' is the decision which is taken on an appeal or a review against a decision in first instance and which is not subject to another remedy.

According to Article 8(2) VC the final decision in the case of rejection is in principle taken by the competent authorities of the represented Member State. Additionally, Article 8(4)(d) provides an exception to this rule, under which, the decision for the rejection is taken by the representing Member State by way of derogation from paragraph 2. However, the text of this provision does not specify whether this means that the final decision is taken by the representing Member State or by the represented Member State.

There appear to be no specific references in the negotiation history of the VC, which indicate which Member State should be considered to have taken the final decision. This may be due to the fact that the negotiations mostly focused on the right to appeal in visa cases. As a result the relevance of the

[30] Article 7 of European Commission, 'Explanatory Memorandum of the Commissions Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas' COM(2006) 403 final 2006/0142 (COD).

[31] Emphasis added.

[32] See eg Art 2(c) and 29(1) Council Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31 (Dublin Regulation) and Art 2(e) of Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (Procedures Directive).

relation between Article 8 and Article 32(3) VC and the possible consequences of the representation form of Article 8(4)(d) VC for the appeal, may have been overlooked.

In conclusion, the text of the VC does not provide a clear answer to the question which Member State takes the final decision in the case of Article 8(4)(d) VC. At this point we refer to the amendments of the European Parliament to the (withdrawn) Commission proposal for the recast Visa Code[33], in which the Parliament proposed to clarify that in case of refusal the represented state must be considered as the Member State taking the final decision. The amendment states: 'When it intends to refuse a visa, the consulate or embassy of the representing Member State shall forward the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application within the time limits set out in Article 20(1), (2) or (3)'.[34] It also provides that 'appeals shall be instituted against the Member State that has taken the final decision'.[35] In the following sections, it will be argued the represented Member State takes the final decision.

5.3 Meaning of responsibility in the Visa Code

Article 32(3) VC indicates that there is only one Member State which takes the final decision. In the case of Article 8(4)(d) either the represented or the representing Member State should be considered to take the final decision. Therefore, there can only be one Member State responsible to deal with the appeal against the decision to refuse the application. Another possible interpretation would be that, since under Article 8(4)(d) VC both the represented and the representing Member State are responsible for the decision on the visa application, the applicant should be offered a choice as to where he files the appeal against the visa refusal.

Representation is not a standard procedure that exists as a concept in EU migration law or in other fields of Union law. Thus, it remains to be discovered how representation agreements concluded under Article 8 VC and, more specifically, the responsibility for the visa decisions are connected to the term 'final decision' and the right to appeal. Four arguments lead to the conclusion that the represented Member State remains responsible regardless of a possible representation agreement. Following this argumentation, the represented Member State is the Member State taking the final decision, even under a representation agreement as referred to in 8(4)(d) VC.

5.3.1 No complete transfer of competence

First, Article 8(1) VC states that a Member State may agree to represent another Member State 'for the purpose of examining applications and issuing visas *on behalf of* [the represented Member State]'. Thus, representing Member States are not acting on their own initiative but instead as a part of the represented Member State. Language similar to 'on behalf of' is included in the representation agreement between the Netherlands and Switzerland and in the actual decision to refuse the visa in this case.

Additionally, the represented Member State remains competent to end the representation agreement with the representing state at any moment. Both Article 17(5) VC and Article 8(7) VC indicate that the represented Member State maintains the competence to end the representation agreement at

[33] Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), COM (2014) 164 final.
[34] See amendment 128 proposing a new Art 39(1)(a).
[35] See amendment 106 to proposed Article 29(3).

any given time.[36] This means that there is no complete transfer of competence, since that would make ending the representation agreement impossible. Since the represented Member State keeps this competence, it is also responsible for the decisions taken by the representing Member State.

5.3.2 Facilitation of visa applications

The original purpose of representation agreements is to facilitate visa applications, if the represented Member State has no consulate in the place where the applicant applies for a visa. Interpreting Article 8(4)(d) VC as meaning that the representing Member State takes the final decision, would not be in line with the purpose of facilitating the visa application. In such situation the applicant would be required to appeal the decision to refuse the visa application in another country than the country of his destination. This interpretation would create many practical difficulties in the exercise of the right to appeal. It would create serious doubts regarding the compatibility of Article 32(3) VC read in conjunction with Article 8(4)(d) VC with the right to an effective judicial remedy guaranteed in Article 47 of the Charter. Chapter 6 of this expert opinion, concerning the right to an effective remedy, will further explain why this interpretation constitutes a problem in practice.

5.3.3 Consistency with Article 12 of the Dublin Regulation

An interpretation of Article 8(4)(d) VC as meaning that the representing state takes the final decision, would be in contradiction with Article 12(2) of the Dublin Regulation. This provision explicitly states:

> Where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection, unless the visa was issued on behalf of another Member State under a representation arrangement as provided for in Article 8 [VC]. In such a case, the represented Member State shall be responsible for examining the application for international protection.

Article 12 Dublin Regulation concerns an issued visa, and not a refusal decision as meant in 8(4)(d) VC. However, it is important to see that although the decision in this situation may be taken by the representing Member State, the represented Member State remains responsible and competent. By analogy, Article 8(4)(d) VC should be interpreted as meaning that the represented Member State is the responsible Member State, and therefore the Member State which has taken the final decision.

5.3.4 Annulment and revocation of visa

A final argument that the represented Member State should retain responsibility can be found in Article 34 VC, concerning the annulment and revocation of an issued visa. Article 34(1) and 34(2) VC create the opportunity for a third Member State (neither the representing nor the represented Member State) to annul or revoke an issued visa. Furthermore, Article 34(7) VC states that '[a] visa holder whose visa has been annulled or revoked shall have the right to appeal [..] Appeals shall be conducted against the Member State that has taken the decision on the annulment or revocation and in accordance with the

[36] See Art 17(5) Visa Code: 'The Member State(s) concerned shall maintain the possibility for all applicants to lodge their applications directly at its/their consulates.', and Art 8(7): 'The represented Member State shall notify the representation arrangements or the termination of such arrangements to the Commission before they enter into force or are terminated'.

national law of that Member State'. When a visa is annulled or revoked, the 'authorities of the Member State that issued the visa shall be informed of' this action.

If the representing Member State is deemed to be the responsible Member State this would imply on the basis of Article 34(7) VC that the representing Member State is to be informed of the annulment or revocation. As a result, only the representing and not the represented Member State would be informed about the annulment or the revocation of the visa, even though the represented Member State is the state of destination. It would be illogical if the represented Member State, being the country of destination, would not be informed about the annulment or revocation.

5.4 Conclusion

The answer to the second question should be that, if the representing Member State has the competence to reject visa applications in accordance with Article 8(4)(d) VC, the represented Member State remains responsible for this decision. Furthermore, the represented Member State should be considered as taking the final decision under Article 32(3) VC in combination with Article 8(4) VC. This means that appeals against the decision to refuse a visa should be lodged in the represented Member State (the Member State of destination).

This interpretation is in line with the text of Articles 17(5) and 8(7) VC, the aims and purposes of the VC and provisions in other instruments of EU law. Moreover, this interpretation ensures best an effective and equivalent application of the EU rules on representation. It also avoids that Article 8(4)(d) in combination with Article 32(3) VC should be considered incompatible with Article 47 of the Charter.

It is possible that the CJEU finds that Article 8(4)(d) VC means that the representing Member State takes the 'final decision' and the appeal should be lodged in the representing Member State. The next chapter will argue that then a series of additional guarantees are required in order to comply with Article 47 of the Charter, in particular with regard to the right to be heard, the language of proceedings, court fees, legal aid and the scope of judicial review.

6. Representation and the right to effective judicial protection

In its fourth question, the District Court asks whether an interpretation according to which the right to appeal can only be lodged in the representing Member State, complies with Article 47 of the Charter. The District Court specifically refers to the right to be heard, the right to bring proceedings in a language of one of the Member States, the proportionality of the level of charges or court fees, the possibility of legal aid, and the guarantees of full judicial protection. It should be noted that the CJEU is not required to answer this question, if it decides that appeals should be lodged in the represented Member State, or, alternatively, either in the represented or in the representing Member State. The examination of the implications of Article 47 of the Charter in this paragraph thus departs from the assumption that the appeal against the decision to refuse the visa should be lodged in the representing state.

In order to provide an answer to the fourth question, this chapter first examines the applicability of Article 47 of the Charter to the VC and representation agreements. Next, it provides an analysis of the five factors referred to by the District Court on the basis of case law of the CJEU and the European Court of Human Rights (henceforth: ECtHR). Additionally, it examines the problems resulting from the fact that non-EU Member States (such as Switzerland) are not bound by Article 47 of the Charter and the impact this has on effectiveness of the national remedies in these states.

6.1 Applicability of Article 47 of the Charter

This section will explore the relationship between the VC and the Charter more generally. It argues that the conclusions of the CJEU in *El Hassani* can be extended to cover representation agreements. Both Recital 29 of the preamble to the VC and the CJEU in the *El Hassani* case stress that the VC must be interpreted in light of Article 47 of the Charter. The CJEU held that it 'is clear that the Charter is applicable where a Member State adopts a decision refusing to issue a visa under Article 32(1) of the Visa Code.'[37] The *El Hassani* case did not concern representation agreements specifically. However, in the *Koushkaki* judgment the CJEU held that Member States cannot refuse to issue uniform visas by relying on a ground not provided for in Article 32(1) VC.[38] This means that any rejection of a visa application is within the scope of EU law, rendering the Charter applicable. It is not relevant whether this rejection is taken by the Member State of destination or a representing Member State.

Outside of the VC, the CJEU has noted the importance of Article 47 of the Charter in various other migration contexts. For example, in the context of the Schengen Borders Code (SBC), the CJEU was asked whether Article 13(3) provides the right to appeal a decision refusing entry into a Member State and infringements in the procedure used to reach the decision.[39] The language of Article 13(3) SBC[40] is very similar to that used in Article 32(3) VC, since it also provides for a right to appeal in accordance with national law. In the case of *Zakaria*, the CJEU did not ultimately decide whether the alleged facts were governed by EU law.[41] However, it emphasized that if the facts were governed by EU law, the national court must ascertain whether effectively barring his claim 'infringes the rights recognized in Article 47'.[42] Thus, even within the framework of external border policy, the CJEU has noted that Article 47 of the Charter limits the discretion or competencies of Member States.

[37] CJEU Case C-403/16 *El Hassani* [2017], para 33.
[38] CJEU Case C-84/12 *Koushkaki* [2013], paras 47 and 51.
[39] CJEU Case C-23/12 *Zakaria* [2012], para 31.
[40] Council Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L 105/1.
[41] CJEU Case C-23/12 *Zakaria* [2012], para 40.
[42] Ibid.

The CJEU has also recognised that the right to an effective remedy is of even greater importance where the individual lacks control over which Member State is responsible for examining his application, as is the case for a representation agreement. Dealing with the implementation of the relocation scheme and the right to appeal for asylum seekers, the CJEU considered

> it is because applicants do not have the right to choose which Member State is to be responsible for examining their applications that they must have the right to an effective remedy against the relocation decision, so as to ensure respect for their fundamental rights.[43]

This reasoning raises the larger point that a restrictive interpretation of Article 32(3) and Article 8(4) VC runs the risk of being incompatible with the Charter. The CJEU was confronted with a similar dilemma in *Ghezelbash*, in the context of the Dublin Regulation. In this case it ultimately noted that a restrictive interpretation of the scope of the right to appeal would 'thwart the attainment of that objective by depriving the other rights conferred [..] of any practical effect.'[44] In *Ghezelbash*, the CJEU highlighted that the scope of appeal should be determined 'in the light of the wording of the provisions of that regulation, its general scheme, its objectives and its context, in particular its evaluation in connection with the system of which it forms part'.[45] Thus, the right to appeal provided in Article 32(3) VC should be viewed in light of the Charter, but also in light of the aims and purposes of the VC.

6.2 Specific guarantees deriving from Article 47 of the Charter

As the European Commission has noted, there are significant obstacles confronting a cross-border litigant.[46] These obstacles are compounded when the litigant is a third-country national visa applicant, with or without ties in the host country, who is potentially subject to legal procedures before multiple states.[47] Regardless which Member State is determined to be taking the final decision, procedural guarantees for appeals comply with Article 47 of the Charter.[48] However, if the appeal against a decision to refuse a visa must be lodged in the representing Member State, this presents additional obstacles to applicants and requires additional guarantees in order to comply with Article 47.

Several EU principles, which are closely linked to the right to an effective remedy, are relevant in visa appeal cases. This includes the principle of effectiveness and the right to equality of arms. Effectiveness was specifically highlighted in the case of *El-Hassani.* The CJEU noted that national procedural rules for appeals under 32(3) VC, 'must not [..] render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order.'[49] The CJEU has also recognized the principle of equality of arms under Article 47 of the Charter. This principle entails that 'each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.'[50]

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[43] CJEU Case C-643/15 *Slovakia and Hungary v Council* [2017], para 336.
[44] CJEU Case C-63/15 *Ghezelbash* [2016], para 53.
[45] Ibid, para 36.
[46] European Commission, 'Green Paper on legal aid in civil matters: *The problems confronting the cross-border litigant*' COM (2000) 51 final.
[47] It should be highlighted again here that the Netherlands has representation agreements with 16 Member States such that appeal processes, under the interpretation of final decision presupposed by question four, would occur in a diverse set of jurisdictions.
[48] CJEU Case C-403/16 *El Hassani* [2017].
[49] Ibid, para 30.
[50] CJEU Case C-199/11 *Europese Gemeenschap v Otis NV* [2012], paras 48 and 71.

Furthermore, Article 47 of the Charter should be interpreted in the light of Article 6 and 13 of the European Convention on Human Rights (ECHR)[51]. Therefore – in addition to CJEU case law – case law of the ECtHR will be used in the examination.[52] Attention will also be given to the role of the sponsor in the examination. The role of the sponsor may vary between Member States. However, the role they have in the visa application and appeal process will necessarily be restricted, if the appeal must be lodged in the representing Member State.[53]

The following sections discuss Article 47, with specific reference to the five factors mentioned in the fourth question of the District Court: the right to be heard, the right to bring proceedings in a language of one of the Member States, the proportionality of court fees, the possibility of funded legal aid and guarantee of full judicial review. These elements will be addressed separately. Furthermore, special attention will be given to the Schengen states which are not EU Member States and therefore not bound by the Charter in the context of representation agreements.

6.2.1 Right to be heard

Article 47(2) of the Charter states that 'Everyone [whose rights and freedoms are guaranteed by EU law] is entitled to a fair and public hearing'. The CJEU held in *Mussa Sacko* that the opportunity to be heard in an appeals procedure is part of the rights of the defence, which in its turn forms part of the principle of effective judicial protection enshrined in Article 47 of the Charter.[54] The right to be heard is not absolute. It may be restricted

> provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[55]

In this context, the CJEU referred to the ECtHR's case law.[56]

The ECtHR stated that in principle the right to a public hearing implies an oral hearing.[57] However, the decision-making body can renounce from a hearing if they can 'fairly and reasonably decide the case on the basis of the parties' submissions and other written materials'.[58] Whether this is possible depends on the specific circumstances of the case and the importance of the rights at issue.[59] Procedures involving questions of law only can be in line with the standards of the right to be heard without a personal hearing.[60] Also cases concerning very technical issues, in which for example medical expertise plays an important role, may be dealt with without an oral hearing.[61] On the other hand, if an

[51] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Art 52(3) of the Charter.
[52] CJEU Case C-348/16, *Mussa Sacko* [2017], paras 39-40, Case C-562/13, *Abdida* [2014], paras 47, 52 and Case C-465/07, *Elgafaji* [2009], para 28
[53] The role of the family, professional or other ties in the represented Member State (the sponsor) depends on national legislation of the Member State concerned, as is elaborated in Chapter 4 of this expert opinion.
[54] CJEU Case C-348/16, *Mussa Sacko* [2017], para 37.
[55] Ibid, para 38.
[56] Ibid, paras 39-40,
[57] ECtHR 12 November 2002, *Döry v Sweden*, Appl no 28394/95, para 37.
[58] ECtHR (GC) 23 November 2006, *Jussila v Finland*, Appl no 73053/01, para 41.
[59] ECtHR 23 April 2009, *Sibgatullin v Russia*, Appl no 32165/02, para 36. See also M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford and Portland Oregon, Hart Publishing, 2014), pp 174-179.
[60] ECtHR 21 July 2009, *Seliwiak v Poland*, Appl no 3818/04, para 55.
[61] ECtHR 12 November 2002, *Döry v Sweden*, Appl no 28394/95, para 41.

appeal court needs to assess the credibility of a person's statements or to establish the facts of the case, an oral hearing cannot be dispensed with.[62]

Appeals against visa refusals do not concern questions of law only. In the case in which the preliminary questions discussed in this expert opinion were referred, the applicants were refused a visa because the Swiss authorities believed they did not have sufficient means for their stay in the Netherlands. Moreover, their intention to leave the territory of the Member States before the expiry of the visa could not be ascertained. Appealing this decision requires the ability for the applicant to present factual evidence and for the court to correctly evaluate those facts.

The refusal of visa applications is of great importance for the applicants for a variety of reasons. Important rights are at stake for individual who apply for a visa, notably the right to family and private life. Moreover, visa refusals are notified in the Visa Information System (VIS).[63] This may have significant consequences for possible subsequent applications.[64] The VIS will be consulted automatically with new visa applications.[65] Even if the VIS Regulation prohibits the automatic refusal of a visa on the basis of a prior refusal, a registered visa refusal in the VIS system will affect a subsequent application negatively.

In this context it should be added that refusals in visa cases are often standard decisions, which are not reasoned in detail. Generally reasons for refusal are only provided by using the standard form of Annex VI to the Visa Code. Frequently, the underlying arguments of the refusal are presented during the procedure in court. This lack of information urges the need of an oral hearing to comply with Article 47 Charter.

In conclusion, taking into consideration that visa cases often concern the facts and/or credibility of the applicant (such as the risk of overstaying the visa), the importance and impact of a visa refusal, and the lack of reasons for the rejection, the applicant should be able to question all the grounds of the visa refusal in an oral hearing. Article 47 of the Charter therefore requires that the applicant or the sponsor can effectively be heard in person before the court in the representing Member State.

Effectiveness of the right to be heard

Under the principle of effectiveness, national provisions that make it impossible in practice or excessively difficult to exercise the right to be heard are contrary to Article 47 of the Charter.[66] Applicants may rely on their sponsor to exercise the right to be heard during the appeal proceedings, either formally or informally (see also Chapter 4 of this expert opinion).[67] National legislation of the representing Member State may allow the sponsor to exercise the rights of the applicant. Then the sponsor - resident of the represented Member State - may have to travel to the representing Member State in order to exercise the right to be heard of the applicant. This may render the right to be heard

[62] See eg ECtHR 28 November 2017, *Özmurat Inşaat Electrik Nakliyat Temizlik San. Ve Tic LTD ŞTİ v Turkey*, Appl no 48657/06, paras 28-37 and ECtHR 12 February 2013, *Krastev v Bulgaria*, Appl no 26524/04, paras 62-63. See also M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford and Portland Oregon, Hart Publishing, 2014), pp 174-179.

[63] Art 5 Council Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [2008] OJ L 218/60 (VIS Regulation).

[64] E.R. Brouwer, 'The Use of Biometrics at the Borders: A European Policy and Law Perspective', in: S. van der Hof and M. Groothuis (eds), *Innovating Government:* Normative, policy and technological dimensions of modern government (The Hague, T. M. C. Asser Press, 2011), pp 140-141.

[65] Article 16(2) VIS Regulation.

[66] CJEU Case C-166/13 *Mukarubega* [2014], para 51.

[67] CJEU Case C-166/13 *Mukarubega* [2014]. In the underlying case of the preliminary questions, the sponsor actually lodged the appeal on behalf of the applicant.

excessively difficult, for example as a result of geographical distance, legal resources and/or costs.[68] In such situation the principle of effectiveness would be violated and the purpose of the VC to facilitate legitimate travel would not be met.

6.2.2 Language

In its fourth question the District Court asked whether it is relevant for the compliance with Article 47 Charter that visa applicants who lodge an appeal against the refusal of visa in the representing Member State have 'the right to bring proceedings in a language of one of the Member States'. The VC does not provide guidelines about the language of the appeal procedure. National legislation is thus guiding during the appeal procedures. Nonetheless, in the absence of specific provisions in EU law 'it is for the national court to apply national law while taking care to ensure full effectiveness of Community law'.[69] In doing so, the principles of effectiveness and equivalence should be guiding.[70]

Also with regard to language, the important role of the sponsor should be stressed. In visa cases the applicant is a third-country national, who does not necessarily have knowledge of any language of the EU Member States. However, the sponsor will generally master the language of the Member State of destination and have access to the assistance of a lawyer in that state. The sponsor can thus be crucial for the applicant for the translation of (judicial) documents.

As a result of a representation agreement, the appeal procedure may take place in the representing state. In that situation both the applicant and the sponsor may not be able to understand the language used in the appeal proceedings. If the applicant or his sponsor does not have the right to bring proceedings and file documents in the language of the represented Member State, this will seriously restrict their access to the administrative authorities or courts in the representing Member State.

Language problems and barriers are common in EU cross-border litigation. Different solutions have been found across different fields of law. In its early case law, the CJEU held that claims and other documents in an official language of another Member State than the one where the competent court is residing must be accepted in the context of social security law.[71] The acceptance of documents in the official language of another Member State than the one where the procedures take place is common in different fields of EU law.[72] For example, the CJEU held that in criminal proceedings EU citizens should have the same rights in another EU Member State regarding the language in which they conduct proceedings in court as nationals.[73] The same applies to civil proceedings brought before a court in another Member State.[74]

In several regulations and directives concerning third country nationals, the Union legislator has adopted special provisions concerning the use of foreign language, with the aim to ensure the

[68] Compare ECtHR 01 March 2016, *Arlewin v Sweden*, Appl no 22302/10, concurring opinion of judge Silvis, para 7.
[69] CJEU Case C-233/08 *Kyrian* [2010], para 61.
[70] Ibid, para 62.
[71] CJEU Case 55/77 *Maris* [1977], para 19.
[72] See Art 22 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84/1, Art 10(2) Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L 26/41, and Art 6 Council Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.
[73] CJEU Case C-274/96 *Bickel & Franz* [1998], para 16.
[74] CJEU Case C-322/13 *Grauel Rüffer* [2014], para 20.

effectiveness of legal proceedings. They provide that the reasons for the decision[75] and information concerning rights and obligations[76] and the available remedies[77] should be provided in a language a migrant understands or is reasonably supposed to understand. They also state that the applicant should have access to linguistic assistance during the appeal proceedings.[78]

Language requirements should not render the appeal in the representing Member State inaccessible or ineffective. This means that visa applicants should be effectively informed about the course of the proceedings in the representing Member State in a language they understand. Moreover, they should have the possibility to lodge the appeal in any of the official languages of the representing Member State of the represented Member State or another language permitted by the national court. Alternatively, the representing Member State can provide for free legal aid in order to ensure that the language requirements do not render the appeal inaccessible or ineffective.

6.2.3 Proportionality of court fees

In its fourth question the District Court asked whether it is relevant for the compliance with Article 47 Charter that 'the level of the charges or court fees for the procedures governing the lodging of objections and appeals are not disproportionate for the applicant'. The text of Article 32(3) VC does not address fees for the appeal phase. However, under established CJEU and ECtHR case law, court fees and fees for residence permits must be proportionate and cannot have 'the object or the effect of creating an obstacle to the obtaining of the [..] status conferred' by EU law.[79]

The CJEU has not ruled on court fees under the VC yet. However, it held in *DEB* that Article 47 of the Charter may require dispensation from advance payment of the costs of proceedings (court fees). When examining whether such dispensation is necessary to ensure access to court the national court must take into consideration 'the subject-matter of the litigation', including 'whether the applicant has a reasonable prospect of success', 'the importance of what is at stake for the applicant in the proceedings' and 'the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts'.[80] It also follows from the CJEU's judgment in *Orizzonte Salute* that court fees amount to detailed procedural rules governing actions for safeguarding rights conferred by EU law and must not compromise the effectiveness of EU legislation.[81]

The ECtHR has considered under 6 ECHR that court fees should 'secure a proper balance between [..] the interest of the State in collecting court fees for dealing with claims, and [..] the interest of the applicant in vindicating his claim through the courts.'[82] Fees should thus be 'assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed' in order to determine whether 'the right of

[75] Art 12(2) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (Returns Directive), Art 12(1)(f) Procedures Directive, Art 26(3) Dublin Regulation.
[76] Art 12(1)(a) Procedures Directive and Art 4(1)(c), (f) and (2) Dublin Regulation.
[77] See eg Art 12(2) Returns Directive, Preamble Recital 25 and Art 12(1)(f) Procedures Directive and Art 4(1)(d) and (2) and 26(3) Dublin Regulation.
[78] Art 13(3) Returns Directive, Art 12(2) and (1)(b) Procedures Directive, Art 27(5) Dublin Regulation.
[79] CJEU Case C-508/10 *Commission v Kingdom of the Netherlands* [2012], para 69.
[80] CJEU Case C-279/09 *DEB* [2010], para 63.
[81] CJEU Case C-61/14 *Orizzonte Salute* [2015] para 47. This case concerned Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33.
[82] ECtHR 19 June 2001, *Kreuz v Poland*, Appl no 28249/95, para 66.

access to a court has been impaired'.[83] In sum, for visa applicants, fees in the representing Member State that are so high that they restrict the individual's ability to first lodge an appeal may violate the right of access to court, guaranteed by Article 47 of the Charter.

The CJEU has also ruled that fees for residence permits under the Long-Term Residents Directive[84] and fees related to integration measures under the Family Reunification Directive[85] may not undermine the effectiveness of these Directives. In *K and A*, the CJEU noted that

> whilst the Member States are free to require third country nationals to pay various fees related to integration measures adopted [..] as well as to determine the amount of those fees, the fact remains that, in accordance with the principle of proportionality, the level at which those costs are determined must not [..] have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of Directive 2003/86 and render it redundant.[86]

By analogy, the fees required in order to initiate appeal procedures should not undermine the right to an appeal or the right to be granted a visa.

When looking at the specific amount charged, the CJEU has also found particular fees to be disproportionate. In *CGIL,* the CJEU ruled that fees between 80 and 200 EUR for a renewal of a residence permit were 'disproportionate in the light of the objective pursued', namely, integrating third country nationals.[87] Similarly, in *Commission v. Netherlands*, the CJEU held that the Netherlands failed to meet its obligations under the Long-Term Residence Directive, where it required fees from third-country nationals that had obtained status in another Member State that were seven to twenty-seven times higher than those imposed on Union citizens.[88]

Articles 16 and 17 VC address fees for the initial phase of the visa application and indicate that, '[a]pplicants shall pay a visa fee of EUR 60' and '[a]n additional service fee may be charged by an external service provider'. However, the service fee shall not exceed half of the initial fee, meaning that the total fee that could be required is EUR 90. Notably, Article 16 of the VC notes that when fees are charged in currencies other than euro, 'consulates shall ensure under local Schengen cooperation that they charge similar fees'.

Representation agreements may result in a difference in treatment between individuals who may appeal the decision to refuse a visa in the Member State of destination and individual who are forced to appeal in the representing Member State. The facts of the case in which the preliminary questions discussed in this expert opinion were referred, provides an example of such situation. The court fee in the Netherlands for administrative appeals is EUR 170.[89] However, visa applicants who must appeal in Switzerland following representation agreements must pay procedural costs of 800 Swiss Franc (EUR 691). This fee is almost ten times higher than the highest possible initial visa application fee.

These differences are not compatible with the aim of the VC to harmonise visa proceedings. Moreover, such high fees undermine the objective of the VC to facilitate legitimate travel and tackle illegal immigration and should be considered disproportionate. The applicants in this case were unable to pay the 800 Swiss Franc fee levied by the Swiss Federal Administrative Court. On this ground that

[83] ECtHR 26 July 2011, *Stoicescu v Romania*, Appl No 9718/03, para 69.
[84] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.
[85] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003], OJ L 251/12.
[86] CJEU Case C 153/14 *K and A* [2015].
[87] CJEU Case C-309/14 *CGIL* [2015], para 32.
[88] CJEU Case C-508/10 *Commission v Netherlands* [2012], paras 47 and 79.
[89] De rechtspraak, 'Tarieven bestuurszaken m.u.v. belastingzaken 2018'.

court declared held the appeal inadmissible. Thus, the applicants were prevented from having the substance of the appeal heard by the Swiss court.

6.2.4 Legal aid

In its fourth question the District Court asked whether it is relevant for the compliance with Article 47 Charter that in the representing Member State 'there is a possibility of funded legal aid'. Article 32(3) VC does not address the right to (free) legal aid. However, Article 47 of the Charter states that legal aid shall be made available to those lacking resources 'in so far as legal aid is necessary to ensure effective access to justice.' This clause thus requires states to grant legal aid in the context of the appeal against a denied visa application, if this is necessary to ensure effective access to justice.

Moreover, Article 47 of the Charter and the Union law principle of non-discrimination, as reflected in Article 20 and 21 of the Charter, require that applicants should have at least the same entitlement to legal aid as nationals of the representing Member State in appeals before a court against decisions of a public authority. Visa applicants may be required to file an appeal in the representing Member State in a language and a procedure, with which generally they nor their sponsors are familiar. In such a situation, treating them less favourably than nationals with respect to legal aid solely on the ground of their nationality, is hard to justify under the Union law principle of non-discrimination and incompatible with Article 47 of the Charter. The Directive, which aims to improve access to justice in cross-border disputes, states under '[n]on-discrimination' that '[m]ember states shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State'.[90] Within a criminal-law context, access to legal aid should be ensured by Member States[91], even when the individuals face criminal proceedings outside of the Member State where they are domiciled.[92] Similar provisions appear in a number of migration-related directives, indicating that third-country nationals are also entitled to legal assistance in many instances.[93]

Visa applicants should receive free legal aid, where needed to ensure access to justice. In *DEB*, the CJEU provided national courts several factors to consider when granting legal aid is necessary to ensure effective judicial protection as enshrined in Article 47 of the Charter. These factors include 'the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedures; and the applicant's capacity to represent himself effectively.'[94] The ECtHR has similarly held that Article 6(1) ECHR may require States to provide legal assistance 'when such assistance proves indispensable for an effective access to court [..] by reason of the complexity of the procedure or of the case'.[95]

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[90] Article 4 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

[91] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Recital 26, Article 18; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (LAFS).

[92] For example, under Article 5 LAFS, both the Member State that executes and the Member State that issues a European arrest warrant have a responsibility to ensure that requested persons have a right to legal aid.

[93] See Recital 22, 23, Articles 19-21: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Article 27 (5) and (6) Dublin Regulation.

[94] CJEU Case C-279/09 *DEB* [2009], para 61.

[95] ECtHR 09 October 1979, *Airey v Ireland*, Appl no 6289/73, para 26.

It should again be noted that important rights are at stake for individual who apply for a visa. Visa applications have a direct impact on family and private life. Moreover, visa denials have a practical effect on individuals' right to apply for visas in the future. The procedural hurdles faced by visa applicants in the representing country are significant. They may have to appeal in a language they do not understand without the support of sponsors in the country of destination and unable to be able to be represented by the lawyer who has previously assisted them or their sponsors. Individuals who apply for a visa for the Netherlands alone face potentially 16 different national procedures, depending on the representation agreements.

In conclusion, Article 47 of the Charter in combination with the Union law principle of non-discrimination guaranteed in Articles 20 and 21 of the Charter require that visa applicants or their sponsors should have the possibility of free legal aid on the same basis as nationals of the representing Member State in procedures against public authorities. Moreover, free legal assistance should be offered in accordance with Article 47 of the Charter, if this is necessary to ensure access to court. In this context the representing Member State should consider the factors established in *DEB*. The high stakes involved and the specific hurdles encountered by visa applicants who need to appeal the visa rejecting in a representing Member State should be taken into account in the assessment.

6.2.5 Scope of judicial review: consultation of the represented Member State

In its fourth question the District Court asked whether it is relevant for the compliance with Article 47 Charter 'whether a Swiss court has sufficient insight into the situation in the Netherlands to be able to provide effective legal protection'. The text of the VC provides no mandatory mechanisms for the national authorities and courts of the represented Member State to share information regarding procedure or the basis on which applications are approved or denied. Article 22 VC indicates that '[a] Member State may require the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries'. However, this applies only in the examination rather than denial or appeal phase, and is permissive rather than obligatory.

Article 21 VC provides for several criteria, which Member States must assess when determining whether to issue a visa. The criteria include general information, such as whether the visa applicant is in possession of a valid travel document, but also considers the circumstances at the intended destination. For example, the means for subsistence in the intended destination and the coherence of the itinerary may be assessed by authorities of representing Member State, in the case of a representation agreement. Additionally, applications deemed to be inadmissible may 'be considered admissible [..] for reasons of national interest.'[96] Thus, the concerns of the national authorities of the destination Member State may need to be specifically considered by the court in the representing Member State. The CJEU also confirmed this in *Koushkaki* where it noted that Member States have 'a wide discretion' when addressing the conditions for refusing visa applications.[97]

In cases covered by a representation agreement, the applicant may have to appeal a decision based on the representing Member State's understanding of the represented Member State's policies and practices. If this appeal needs to be lodged in the representing Member State, the lack of information sharing between the authorities of the represented Member State and the court in the representing Member State may limit the effectiveness of the remedy. It becomes the burden of the visa applicants and their attorneys to provide information, which may not be accessible to them and perhaps is only available in a language neither party speaks. In the case, in which the preliminary

[96] Art 19(4) VC.
[97] CJEU Case C-84/12 *Koushkaki* [2013], para 60.

questions discussed in this expert opinion were referred, the Swiss court indicated in its decision that Dutch law is not applicable to the case. This, despite the fact that the Netherlands was the intended destination and the Swiss authorities issued the decision on behalf of the Dutch authorities.[98]

The question is whether the court of the representing Member State provides an effective remedy, if it does not take into account the applicable national visa policy rules and the circumstances of the case in the represented Member State. It should be noted that under EU law, a court or tribunal should be able to address 'all the questions of fact and law that are relevant to the case before it'.[99] In *Samba Diouf*, which concerned asylum procedures, the CJEU considered that it follows from this requirement that for the right of an effective remedy to be 'exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.[100] This is in line with the case law of the ECtHR concerning Article 6 ECtHR, which requires national courts to have 'full jurisdiction'. This means that courts should have 'jurisdiction to examine all questions of fact and law relevant to the dispute before it.'[101] This requirement is fulfilled if the court reviews 'the applicants' submissions on their merits or grounds of appeal were examined point by point, without the court having to decline jurisdiction in replying to them or in ascertaining various facts'.[102] Where, 'the reviewing court is precluded from determining the central issue in dispute, the scope of review will not be considered sufficient for the purposes of Article 6'.[103]

Thus, in an appeal on the refusal of a visa, the reviewing authorities must be able to understand the case and rule on the merits of the appeal, addressing the grounds of appeal in the specific case before them. Therefore, it may be argued that, in order to comply with Article 47 of the Charter, the authorities in the representing must have sufficient information on the application of the national visa policies and the circumstances of the case in the represented Member State, if necessary to make a well-founded decision on the appeal.

6.3 Applicability of the Charter to non-EU Member States

As discussed above, applicants that lodge an appeal must be guaranteed several procedural safeguards deriving from Article 47 of the Charter. This is easier if the applicant can appeal the decision to refuse a visa application in the represented Member State, than if he should lodge the appeal in the representing Member State. An additional problem occurs, when Member States conclude representation agreements with non-EU Member states, such as Switzerland. These States are not bound by the Charter. This means that individuals, who need to appeal the decision to reject a visa for a Member State in a representing non-EU Member State, are not protected by Article 47 of the Charter. If these applicants would have been able to appeal the decision in the Member State of destination, they would have had the full protection of this provision. Such differential treatment cannot be justified by the aim of the VC.

This problem would not exist if all states implementing the VC would guarantee the full protection of Article 47 of the Charter regardless of their EU membership. This could be done, for example, by guaranteeing compliance with Article 47 of the Charter in representation agreements.

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[98] Zwischenverfügung des Schweizer Bundesverwaltungsgerichts 22 June 2017, Geschäfts-Nr. F-115/2017, p 3.
[99] CJEU Case C-199/11 *Europese Gemeenschap v Otis NV* [2012], para 49, CJEU Case C-506/04 *Wilson* [2006], paras 60-62.
[100] CJEU Case C-69/10 *Samba Diouf* [2011], para 61.
[101] ECtHR 15 November 1996, *Terra Woningen B.V. v The Netherlands*, Appl no 20641/92, para 52
[102] ECtHR 21 July 2011, *Sigma Radio Television LTD. v Cyprus*, Appl nos 32181/04 and 35122/05, para 156.
[103] Ibid, para 157.

However, the Swiss Federal Administrative Court explicitly stated in the case at hand, but also in other cases dealing with visa representation, that Article 47 of the Charter is not applicable.[104]

Before the Swiss court, the applicants and sponsor complained about the effectiveness of the procedure in Switzerland. They pointed, amongst others, to their rights under the Charter in relation to the cost of the court appeal. The Swiss court rejected these arguments, stating that Switzerland is not bound by the Charter. Switzerland is bound by Article 6 ECHR. However, the ECtHR held that Article 6 ECHR is not applicable in immigration cases.[105] Thus applicants in Switzerland can rely only on the procedural guarantees of Article 13 ECHR. This results in less protection than is required by Article 47 of the Charter, which is based on both Article 6 and 13 ECHR.[106]

[104] Zwischenverfügung des Schweizer Bundesverwaltungsgerichts 22 June 2017, Geschäfts-Nr. F-115/2017, p 3 and Schweizer Bundesverwaltungsgerichts 4 March 2016, C-6239/2015, para 3.3.
[105] ECtHR 5 October 2000, *Maaouia v France*, Appl no 39652/98.
[106] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Art 52(3) of the Charter.

7. Conclusion

7.1 Summary of general findings

The preliminary questions asked by the District Court focus on the representation agreements explicitly allowed for under the Visa Code. The questions concern two main themes. First, the District Court wants to know whether representation agreements relieve the represented Member State of responsibility for the visa application. Second, it raises questions about the scope of procedural guarantees for visa applicants using their right to appeal under Article 32(3) VC, read in light of Article 47 of the Charter. This expert opinion addresses the preliminary questions, under these broader themes, by interpreting ambiguous provisions and considering the object and the purpose of the Visa Code and representation agreements. Moreover, it examined these provisions in the light of the case law of the CJEU and the ECtHR, when dealing with the issue of effective remedies. This expert opinion concludes as follows.

The VC does not preclude the sponsor from having a right of appeal
This expert opinion stresses the important role the sponsor may play, in ensuring the accessibility and effectiveness of the available remedies against the decision to reject the visa requested by the applicant. It contends that the VC and EU principles do not preclude the sponsor from having a right of objection or appeal against the decision to reject the visa requested by the applicant under national law. Article 32(3) VC explicitly refers to the national law of the Member State concerned. There is no requirement that visa applicants have sponsors under the VC. However, the text seems to presuppose that many will.[107] Moreover, there is no provision in the VC of EU principle that forbids a national rule providing for the right of appeal of the sponsor of the visa applicant. Considering the purpose of the VC and the explicit right to an appeal, a national rule facilitating the sponsor's right of appeal seems to be in conformity with Article 47 of the EU Charter on Fundamental Rights.

The represented Member State retains responsibility under 8(4) VC
Four arguments suggest that the represented Member State retains responsibility regardless of the scope of representation agreement. First, the representing Member State takes the decision 'on behalf of' the represented Member State and is competent to end the representation agreement at any stage of the agreement under 17(5) and 8(5) VC. Second, representation agreements are, according to the text of the VC, intended to facilitate visa applications. Appeal processes which hinder this facilitation are contrary to this purpose. Third, under the Dublin Regulation, the represented Member State, on which behalf a visa has been issued, remains responsible for processing an application for international protection irrespective of the content of a possible representation agreement. Finally, the provisions on annulment and revocation of a visa logically lead to the conclusion that the represented Member State retains responsibility.

The represented Member State is the Member State taking the final decision
It follows from the previous conclusions regarding responsibility that, if the represented Member State retains responsibility, the representing Member State can only issue a decision 'on behalf of' the Member State. It is thus not the representing Member State, but the represented Member State, which takes the final decision on the visa application. As a consequence, appeals against visa refusals must be brought against the represented Member State.

[107] Arts 14(4), 21(5) and 53(1) VC.

On the other hand, a more literal interpretation of the text of the VC suggests that when representation agreements are made under Article 8(4) VC, the representing Member State is given the competence to make the final decision. However, this does not relieve the represented Member State of all responsibility. Thus, under this interpretation, the representing Member State takes the final decision and therefore the appeal must be made in the representing Member State under Article 32(3) VC. This raises significant questions of compliance with Article 47 of the Charter, as is addressed in the answer to the fourth preliminary question.

Appeal before a court in the representing Member State: Article 47 of the Charter requires extra procedural guarantees

It is only necessary to answer the fourth question , in case the CJEU would hold that the representing Member State takes the final decision under 32(3) VC. Such an interpretation presents substantial practical hurdles for applicants and their sponsors. Appeal procedures against decisions to reject a visa which take place in representing states must offer specific guarantees in order to comply with Article 47 of the Charter.

The right to be heard

It was argued in this expert opinion that, taking into consideration that visa cases often concern the facts and/or credibility of the applicant (such as the risk of overstaying the visa), the importance and impact of a visa refusal, and the lack of reasons for the rejection, the applicant should be able to question all the grounds of the visa refusal in an oral hearing. Article 47 of the Charter therefore requires that the applicant or the sponsor can effectively be heard before the court in the representing Member State. Factors such as geographical distance, legal resources and/or costs may render the exercise of the right to be heard excessively difficult, which would violate the principle of effectiveness.

Language

Language requirements may not render the appeal in the representing Member State inaccessible or ineffective. This means that visa applicants should be effectively informed about the course of the proceedings in the representing Member State in a language they understand. Moreover, they should have the possibility to lodge the appeal in any of the official languages of the representing Member State of the represented Member State or another language permitted by the national court. Alternatively, the representing Member State can provide for free legal assistance in order to ensure that the language requirements do not render the appeal inaccessible or ineffective.

Court fees

Considerable differences in court fees between the represented and the representing Member State are incompatible with the Union law principle of equal treatment and with the aim of the VC to harmonise visa proceedings. In any case, court fees may not render the appeal inaccessible and should comply with the EU principle of proportionality.

Legal Aid

The right to appeal guaranteed by Article 32(3) VC, read in light of Article 47 of the Charter and the Union law principle of non-discrimination requires that visa applicants or their sponsors, who can only file remedies in the representing Member State, should be entitled to free legal aid on the same basis as nationals of the representing Member State in procedures against public authorities. Moreover, free legal assistance should be offered if this is necessary to ensure access to court. In this context the representing Member State to consider the factors established in *DEB*, including the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedures and

the applicant's capacity to represent himself effectively. The high stakes involved in visa cases and the specific hurdles encountered by visa applicants who need to appeal the visa rejecting in a representing Member State should be taken into account in the assessment.

Scope of judicial review: consultation of the represented Member State
It was argued that Article 47 of the Charter requires that in an appeal on the refusal of a visa, the reviewing authorities must be able to understand the case and rule on the merits of the appeal, addressing the grounds of appeal in the specific case before them. Therefore, the authorities in the representing must have sufficient information on the application of the national visa policies and the circumstances of the case in the represented Member State, if necessary to make a well-founded decision on the appeal.

Applicability of the Charter to non-EU representing States
Non-EU Member States may represent an EU Member State in the context of the VC. These non-EU Member States are not bound by the Charter. As a result individuals, who appeal the decision to reject a visa for a Member State in a representing non-EU Member State, are not protected by Article 47 of the Charter. This problem could be solved by including guarantees that appeals filed in the representing non-EU Member State are processed in full compliance with Article 47 of the Charter in the visa representation agreement with such State.

7.2 Answers to the preliminary questions

On the basis of the foregoing findings we would recommend the following answers to questions asked by the District Court:

1. Article 32(3) of the VC does not preclude a Member State from granting a sponsor, as an interested party in connection with a visa application, the right of objection and appeal in his or her own name against the refusal of those visas.

2. Representation as regulated in Article 8(4) of the VC should be interpreted as meaning that responsibility remains with the represented Member State, such that that responsibility is not wholly transferred to the representing Member State. As a result, the represented Member State itself remains responsible.

3. The Member State, which has taken the final decision as referred to in Article 32(3) of the VC under Article 8(4) VC is the represented Member State. An alternative solution, also compatible with Article 47 of the Charter is that both the represented Member State and the representing Member State are considered to have taken the final decision.

4. An interpretation of Article 8(4) VC, which would assign to the representing Member State exclusive competence to deal with appeals against the refusal of a visa, read in light of Article 47 of the Charter, requires that:
    - the applicant or sponsor can effectively be heard in person at the court of the representing Member State;
    - applicants are effectively informed about the course of the proceedings in the representing Member State in a language they understand and that the appeal can be filed in one of the official languages of the representing Member State of the represented Member State or another language permitted by the national court;

- the administrative charges and court fees in the representing Member State do not prevent effective access to the available remedies and are in conformity with the EU law principle of proportionality;
- the applicant or his or her sponsor in the representing Member State are entitled to publicly financed legal aid on the same basis as nationals of that Member State in procedures against public authorities and when necessary to have effective access to court;
- the administrative authorities and court of the representing Member State have sufficient information, or ensure the exchange of necessary information, on the application of the national visa policies and the circumstances of the case in the represented Member State to make a well-founded decision on the merits (facts and law) of the appeal; and
- the visa representation agreement between an EU Member State and a non-EU Member State guarantees that appeals filed in the representing non-EU Member State are processed in full compliance with Article 47 of the Charter and CJEU case law.

Annex I

Countries/Cities where the Netherlands is being represented by another Member State[108]	Numbers of applications submitted in 2016
Andorra (Andorra La Vella) by FR	-
Armenia (Yerevan) by DE **NL has a consular post in Tbilisi**	14.515
Azerbaijan (Baku) by FR **NL has a consular post in Baku**	13.450
Bahrain (Manama) by DE	7.714
Bangladesh (Dhaka) by SE **NL has a consular post in Dhaka**	4.935
Belarus (Minsk, Vitebsk) by DE*, LV	(41.207 & 21.698) 62.905
Bolivia (La Paz, Santa Cruz de la Sierra) by ES	(7.850 & 6.441) 14.291
Burkina Faso (Ouagadougou) by BE	2.928
Burundi (Bujumbura) by BE **NL has a consular post in Bujumbura**	2.955
Cambodia (Phnom Penh) by DE	2.146
Cameroon (Yaoundé) by BE	3.983
Cape Verde (Praia) by PT	15.888
Central African Republic (Bangui) by FR	5.620
Chad (N Ndjamena) by FR	6.222
China (Chongqing) by HU **NL has consular posts in Beijing*, Guangzhou*, Shanghai* and in Wuhan and Chengdu uses ESP without having a consular post**	5.583
Comoros (Moroni) by FR	4.176
Congo (Brazzaville, Pointe-Noire) by FR	(7.898 & 5.376) 13.274
(Democratic Republic of) Congo (Kinshasa, Lubumbashi) by BE **NL has a consular post in Kinshasa**	(20.734 & 1.492) 22.226
Cote d' Ivoire (Abidjan) by BE	2.281
Cyprus (Nicosia) by DE **NL has a consular post in Nicosia**	1.954
Djibouti (Djibouti) by FR	3.196
Ecuador (Quito, Guayaquil) by ES	(18.719 & 14.310) 33.029
El Salvador (San Salvador) by ES	20
Equatorial Guinea (Malabo) by ES	11.224

[108] This table is based on the information provided by the European Commission on its website and the list of consular presence and representation https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/how_to_apply_en

Eritrea (Asmara) by IT	2.047
Gabon (Libreville) by France	15.912
Guatemala (Guatemala city) by ES	143
Haiti (Port-au-Prince) by FR	6.591
Honduras (Tegucigalpa) by ES	43
Jamaica (Kingston) by BE	767
Kazakhstan (Almaty, Astana) by HU, AT respectively **NL has a consular post in Astana**	(8.203 & 3.608) 11.811
Kyrgyzstan (Bishkek) by DE	7.974
Laos (Vientiane) by FR	2.202
Madagascar (Antananarivo) by CH	818
Malawi (Lilongwe) by NO	1.634
Mauritania (Nuoakchott) by FR	4.444
Moldova (Chisinau) by HU	624
Monaco (Monaco) by FR	17
Mongolia (Ulan Bator) by DE	9.807
Montenegro (Podgorica) by SI	603
Namibia (Windhoek) by DE	5.408
Nicaragua (Managua) by ES	23
Niger (Niamey) by FR	5.800
Nigeria (Abuja, Lagos) by BE, FR respectively **NL has embassy in Lagos**	(2.841 & 19.211) 22.052
Panama (Panama City) by ES	451
Paraguay (Asuncion) by ES	30
Russian Federation (Arkhangelsk, Pskov, Petrozavedsk, Irkutsk, Kaliningrad) by NO, EE, FI, PO respectively **NL has consular posts in Moscow* and St. Petersburg***	(11.046 & 25.136 & 2.168 & 58.003) 96.359
Rwanda (Kigali) by BE	6.460
St. Lucia (Castries) by FR	-
San Marino (San Marino) by IT	602
Sao Tome (Sao Tome) by PT	-
Sri Lanka (Colombo) by CH **NL has a consular post in Colombo**	5.997
Tajikistan (Dushanbe) by DE	3.586
Togo (Lome) by FR	6.747
Turkmenistan (Ashgabat) by DE	3.693
Uruguay (Montevideo) by ES	99
Uzbekistan (Tashkent) by FR	4.531
Vanuatu (Port Villa) by FR	1.204
Zambia (Lusaka) by SE	3.182
Occupied Palestinian Territory (East Jerusalem, Gaza) by BE, SE respectively **NL has a consular post in Ramallah**	-

*The representing Member State is cooperating with ESP.