The place of orality before the specialized administrative courts: the National Court of Asylum

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- **National Court of Asylum** = Specialized administrative court to **judge applications against refusals of international protection of the French Office for the Protection of Refugees and Stateless Persons** (FOPRSP) and end-of-protection decisions.
- The **right to a legal remedy** in France is unconditional. **The hearing** of the applicant remains the ordinary law regime, which is far from being the case in the other States of the European continent (example of Ireland) where sometimes the applicant is heard only when the judge considers it necessary.
- **Composition:** as a **single judge** (created by the law of July 29, 2015) or as a **collegiate body** comprising a **judge of the administrative, financial or judicial order**, as president, and **two associate judges**, one of whom is the representative of the Office of the United Nations High Commissioner for Refugees.
- **Conduct of the hearing** : Article R.532-42 of the Code of Entry and Residence of Foreigners and the Right of Asylum (CERFRA)

"*the legal asylum consultant* (in French, the "rapporteur") *shall read out the report, which shall analyze, in complete independence, the subject-matter of the application and the factual and legal elements set out by the parties* [...] *without taking sides on the meaning of the decision.* [...] *After reading the report, and unless the applicant's counsel requests to present observations, the formation of the court may ask the parties any question likely to enlighten it*"

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- The President of the Formation of the Court give the floor to the applicant and to the representative of the French Office for the Protection of Refugees and Stateless Persons (FOPRSP). The relatively accessible framework of the system of legal remedies concerning the contested decision (in contrast to Belgium, for example) allows lawyers in practice to take over the case entirely.
- **The hearing** of the applicant immediately precedes the **deliberation**, which gives orality an unofficial power, but quite decisive.
- Although there is no procedural requirement in the Procedure Directive as currently drafted on June 26, 2013 obligation to organize a hearing, the principle was identified by the case **CJEU, February, 9 2017, *M. v. Ireland* (C-560/14)** : **the asylum seeker must be able to explain himself orally**, including in matters of subsidiary protection, where this is necessary to explain circumstances or documents in the case.

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- **Decree Vigouroux 2013-751 of August 16, 2013** is, as a whole, marked by the **strengthening of the adversarial nature of the procedure**, as noted by Ms. Catherine Teitgen-Colly (« La procédure devant la CNDA à l'heure de la réforme », *Dictionnaire permanent du droit des étrangers*, Bulletin No. 226). The recognition of the importance of orality goes in this direction. Before this decree, the scarcity of written observations from FOPRSP (the NCA hoped that this would reach 6% of cases in 2014) and the scarcity of his oral presence means that oral explanations and questions to the applicant constitute a decisive step for judges to form an opinion on the credibility of the asylum seeker.
- The orality may give rise to a **written procedure** : Article R.532-51 of the Code of Entry and Residence of Foreigners and the Right of Asylum (CERFRA) highlights the possibility of additional instruction after hearing because of the statements of a party without forgetting the note under deliberation which is common to all administrative courts.

A written procedure that restricts these misleading appearances

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- **The principle** : The NCA is an **administrative court** although it is specialized in a matter whose administrative nature is not always obvious (against a unique example in Europe : Italy since the constitution of 1947 where asylum, considered as a subjective right, is judged by the Civil Courts).
- It is because orality at the National Court of Asylum has been abundant that the **Decree Vigouroux** has attempted to redefine the essentially written nature of the procedure. Before this decree, asylum judges were perceived as lacking sufficient procedural tools to frame the proceedings and ensure respect for the primacy of the written procedure.
- The new Article R. 532-42 paragraph 5 clarifies the **recognition of the oral part of the procedure**. The fifth paragraph recalls that the parties make any useful observations orally in so far as they are **"appropriate for clarifying their writings"**. This provision enshrines a principle of case-law according to which new factual or legal circumstances relied on orally by the parties are not taken into account by the asylum judge if they have not been confirmed in writing (French High Administrative Court, March, 14 2011, *Ahmad*, No 329909).

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- **The procedure therefore remains, in principle, written,** which constitutes a reaffirmation of the **membership of the National Court of Asylum in the administrative order.** The reference to the oral observations of the parties, introduced by Article R. 532-52 paragraphs 4 and 5 of the Code of Entry and Residence of Foreigners and the Right of Asylum (CERFRA), is part of this logic: it is only in the event that those oral observations, whose relevance, coherence or force is/are considered by the judge(s) as decisive for the meaning or basis of the decision that they are mentioned it and when they differ from the content of the writings.
- **This is both a reminder of the written nature of the procedure before the National Court of Asylum and a recognition of the importance of orality.**

A written procedure that restricts these misleading appearances 3/4

- The additional instruction under Article R. 532-51 of the Code of Entry and Residence of Foreigners and the Right of Asylum is part of this limitation :

"The parties are invited to submit a memorial or additional documents for the purposed of this additional instruction. The same judge(s) of the court shall deliberate, at the end of the period fixed to the parties to produce these elements or, where appropriate, to reply them ; the period may not exceed 30 days from the date of the hearing. The parties shall be summoned to a new hearing only if the President of the Formation of the Court considers it necessary to hear oral argument on only the new elements which have been produced"

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- **The special case of Ordinances**: concerning "new ordinances" introduced by the **Law of December 10, 2003**, which must be distinguished from conventional ordinances (withdrawal, dismissal, inadmissibility including lateness). Concerning "new ordinances", they refer to the hypothesis of summary applications whose chances of success before the asylum judge are marginal.
- This a source of controversy and the compliance with the European union law is allowed subject to strict judicial review (CJEU, 28 July 2022, *Samba Siouf*). The "new ordinances" account for 25% to 30% of the cases dealt with before the National Court of Asylum.

A difficult and inconsistent reconciliation between texts and practice

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A difficult and inconsistent reconciliation between texts and practice 1/2

- An example of this issue is the case **CJEU, July 26, 2017, *Moussa Sacko v. Italy* (C-348/16)** : an asylum court seized of an application for international protection may decide only on the basis of written evidence, including the transcript of a preliminary hearing, not to hold a hearing of the applicant in the context of the legal remedy before it. However, this is provided this is on condition that the provisions of the Procedure Directive of June 26, 2013 are in fact very restrictive on the obligations of instruction are respected.
- In the same way, **CJEU, July 28, 2011, *Samba Diouf v. Minister for Labour, Employment and Immigration* (C-69/10)** and already cited **CJEU, February 9, 2017, *M. v. Ireland* (C-560/14)**.
- The case-law of the Court of Luxembourg tolerates a certain limitation of orality if and only if this is allows a complete instruction and if the adversarial principle is respected.

A difficult and inconsistent reconciliation between texts and practice 2/2

- Orality nevertheless remains a **marker in asylum litigation, the importance of which is unparalleled in French administrative litigation**. According to a formula consecrated among specialists, we find this importance of orality only in criminal law. Would the Italians have been right to entrust asylum litigation to the civil courts?
- Generally speaking, in the litigation of foreigners, it should be noted that the CJEU, in a judgment admittedly highly contested by the doctrine **– CJEU, November, 5 2014 *Mukarubega v. Prefect of Police, Prefect of Seine-Saint-Denis* (C-166/13) –**, accepted the principle that a hearing before the Court could compensate for the absence of a hearing before an administrative authority, which has specialists in this type of hearing. This would suggest in the future that the asylum seeker, whether or not he is heard by the administrative authority, except in the case of ordinances, should be heard by judges who take into account the vulnerability of the applicant or the specificity of his application.

Thank you for your attention

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