Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 7 September 2017 [1]

Case C-403/16

Soufiane El Hassani
v
Minister Spraw Zagranicznych

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Area of freedom, security and justice — Visa Code — Right to appeal — Refusal of a consul to issue a Schengen visa — Appeal before the same administrative authority –– Article 47 of the Charter — Nature of the right to appeal — Administrative or judicial)

I. Introduction

1. Mr Soufiane El Hassani ('the Appellant') applied for a Schengen visa to visit his wife and child living in Poland. The Polish Consul in Rabat (Morocco) refused the visa, both upon the initial request and also subsequently, when deciding on an appeal lodged by the Appellant before the same authority. The Appellant sought judicial review of that refusal before the Polish courts. However, Polish law excludes, in principle, judicial review of visa decisions issued by consuls.

2. Against this factual and legal background, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) asks the Court to interpret Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) ('the Visa Code') [2] in the light of Article 47 of the Charter of Fundamental Rights of the European Union. What does the *right to appeal* contained in Article 32(3) entail? Does it establish the obligation of the Member States to provide for the *judicial* review of visa decisions? Or does an *administrative* appeal suffice? Furthermore, what impact does Article 47 of the Charter have on that assessment?

1 Original language: English.

2 OJ 2009 L 243, p. 1.

II. Legal framework

A. EU law

1. The Charter of Fundamental Rights of the European Union ('the Charter')

3. The first paragraph of Article 47 of the Charter states that:

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

2. The Visa Code

4. According to Recital 18 of the Visa Code:

'Local Schengen cooperation is crucial for the harmonised application of the common visa policy and for proper assessment of migratory and/or security risks. Given the differences in local circumstances, the operational application of particular legislative provisions should be assessed among Member States' diplomatic missions and consular posts in individual locations in order to ensure a harmonised application of the legislative provisions to prevent visa shopping and different treatment of visa applicants.'

5. Recital 29 of the Visa Code is worded as follows:

'This Regulation respects fundamental rights and observes the principles recognised in particular by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.'

6. Article 1 of the Visa Code sets out its objective and scope:

'1. This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period

…'

7. Article 2 of the Visa Code contains a number of definitions. In particular, Article 2(2)(a), defines a visa as 'an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States'.

8. Article 32(3) of the Visa Code provides that:

'Applicants 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. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.'

9. Under Article 47(1) of the Visa Code:

'"Member States"' central authorities and consulates shall provide the general public with all relevant information in relation to the application for a visa, in particular:

…

(h) that negative decisions on applications must be notified to the applicant, that such decisions must state the reasons on which they are based and that applicants whose applications are refused have a right to appeal, with information regarding the procedure to be followed in the event of an appeal, including the competent authority, as well as the time limit for lodging an appeal;

…'

10. Annex VI of the Visa Code contains the standard form for notifying and motivating refusal, annulment or revocation of a visa that each applicant must receive. It also states, at the bottom of that form, that each Member State shall indicate the national procedure relating to the right of appeal, including the competent authority with which an appeal may be lodged, as well as the time limit for lodging such an appeal.

B. Polish law

11. The second subparagraph of Article 60(1) of the Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach (Law of 12 December 2013 on Foreign Nationals) ('the Law on Foreign Nationals') reads:

'A Schengen visa or national visa shall be issued for the purpose of:

…

(2) visiting family or friends.'

12. Article 76(1) of that law also provides that:

'Refusal of a Schengen visa … by:

(1) a consul — may be challenged by a request for a review of the case by that authority;

(2) a commander of a Border Guard point — may be challenged by an appeal to the Commander-in-Chief of the Border Guard.'

13. Article 5 of the Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi (Law of 30 August 2002 on proceedings before the administrative courts) ('the Law on proceedings before the administrative courts') is worded as follows:

'The administrative courts shall not have jurisdiction in cases concerning:

…

(4) visas issued by consuls, other than visas issued to a foreign national who is a member of the family of a national of a Member State of the European Union, a Member State of the European Free Trade Association (EFTA) party to the European Economic Area, or the Swiss Confederation,

within the meaning of Article 2(4) of the Law of 14 July 2006 on the entry into, residence in and departure from the Republic of Poland of nationals of the Member States of the European Union and the members of their families.'

III. Facts, procedure and question referred

14. On 24 December 2014, the Appellant applied to the Consul of the Republic of Poland in Rabat (Morocco) for a Schengen visa. He wished to visit his wife and child, both Polish nationals living in Poland. On 5 January 2015, the Consul refused to issue the visa. The Appellant submitted a request to the Consul for re-examination of the first decision. On 27 January 2015, the Consul issued a second negative decision. The ground for refusal for both decisions was the lack of certainty that the Appellant would leave Poland before the visa's expiry date.

15. The Appellant filed an action against the second negative decision of the Consul before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) ('court of first instance'). He claimed, inter alia, that the refusal to issue a visa amounted to a breach of Article 60(1)(2) of the Law on Foreign Nationals read in the light of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention').

16. The Appellant further submitted that subparagraph (1) of Article 76(1) of the Law on Foreign Nationals did not lay down a standard of protection that is compliant with Article 13 of the Convention. In addition, he took the view that Article 5(4) of the Law on proceedings before the administrative courts infringed Article 14 of the Convention: the Appellant, whose wife and child are Polish nationals living in Poland, cannot bring an action before an administrative court, whereas the spouses of other EU nationals can.

17. By order of 24 November 2015, the court of first instance dismissed the action. It held that it lacked jurisdiction under Article 5(4) of the Law on proceedings before the administrative courts.

18. The Appellant has challenged that order before the Naczelny Sąd Administracyjny (Supreme Administrative Court), the referring court. In his submissions to that court, the Appellant restated his position in relation to the alleged infringement of Article 8(1) and Articles13 and 14 of the Convention. He further stated that Article 5(4) of the Law on proceedings before the administrative courts infringed Article 32(3) of the Visa Code and Article 47 of the Charter, which guarantee the right to an effective remedy before a court of law.

19. By order of 28 April 2016, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) stayed the proceedings and referred the following question to the Court:

'Must Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), having regard to recital 29 of the Visa Code and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as requiring the Member States to guarantee an effective remedy (appeal) before a court of law?'

20. Written observations were submitted by the Appellant, the Minister Spraw Zagranicznych (Polish Minister of Foreign Affairs) ('the Respondent'), the Czech Republic, the Republic of Estonia, the Republic of Poland and the European Commission. All of those parties, with the exception of Estonia, presented oral argument at the hearing held on 17 May 2017.

IV. Assessment

21. By its question, the referring court seeks the interpretation of Article 32(3) of the Visa Code in the light of Article 47 of the Charter. In essence, the question is whether those provisions should be construed as obliging Member States to set up a *judicial* appeal (that is, a remedy before a court of law) against visa refusals or whether an *administrative* appeal (a remedy offered by the public administration) could suffice. [3]

22. On the one hand, Article 32(3) of the Visa Code provides for a general, indeterminate 'right to appeal' against visa refusals, without further specification as to the type of such an appeal. On the other hand, the first paragraph of Article 47 of the Charter guarantees the right to an effective remedy before a tribunal for any person whose rights and freedoms protected under EU law have been violated.

23. One way of interpreting these provisions might indeed be to read Article 32(3) of the Visa Code *in the light* of the first paragraph of Article 47 of the Charter, as was essentially proposed by the Commission. Since on the face of it, Article 32(3) of the Visa Code is open-ended and indeterminate, whereas the first paragraph of Article 47 of the Charter clearly requires an appeal before a court of law, reading Article 32(3) of the Visa Code in the light of the first paragraph of Article 47 of the Charter would then simply mean that Article 32(3) ought to be automatically 'readjusted' to the 'higher standard', and also read as requiring a judicial appeal.

24. I do not think that this is the correct approach in the present case. In my view, it is more appropriate to analyse each of those two normative layers separately before looking at what they mean when read together. This is not a mere scholarly fancy, favouring detailed analytical taxonomy over pragmatic judicial minimalism. As will be further explained below in Section C of this Opinion, it has considerable practical implications.

25. This Opinion is therefore structured as follows. First, I will evaluate what requirements in relation to appeals are set out in Article 32(3) of the Visa Code (A). Next, I will examine what specifically follows from the first paragraph of Article 47 of the Charter (B). Finally, I will dwell on the consequences of joint operation of Article 32(3) of the Visa Code and the first paragraph of Article 47 of the Charter (C).

A. Requirements flowing from Article 32(3) of the Visa Code

1. Administrative or judicial appeal?

26. What does Article 32(3) of the Visa Code require? It is my understanding that Article 32(3) *does not require* the Member States to provide for a *judicial* review mechanism to assess the lawfulness of visa refusals. An appeal provided for by Member States under Article 32(3) can be administrative *or* judicial. It may also involve various hybrid bodies, finding themselves somewhere between administrative and judicial review. Article 32(3) appears at first sight to be a rather open provision: there must be a review, but its exact form is left to the Member States to determine.

27. That conclusion derives from a textual, contextual and purposive interpretation of Article 32(3) of the Visa Code.

3 It should be added, as a contextual element, that on 16 October and 26 November 2014 the Commission addressed reasoned opinions pursuant to Article 258 TFEU to the Czech Republic, Estonia, Finland, Poland and Slovakia urging them 'to provide effective judicial remedy against a visa refusal/annulment/revocation'. See the Commission's press releases: MEMO/14/589 of 16 October 2014 and MEMO 14/2130 of 26 November 2014. According to the Commission, third-country nationals have the right to non-arbitrary treatment of their visa applications and this right should be protected by a judicial appeal procedure. Further to that, at the hearing, the Commission stated that at present, those infringement proceedings only concern the Czech Republic, Poland and Slovakia.

(a) *Text*

28. First, in its different language versions, Article 32(3) predominantly uses an open-ended terminology that does not allow for a firm conclusion as to the nature of the appeal required under that provision.

29. Most of the different language versions refer to a broad and indeterminate notion of appeal, without clearly indicating a specific type of appeal. For instance, in French, the Visa Code provides for 'recours'; in Italian 'ricorso'; and in Spanish, 'recursos'. These are neutral terms that may refer either to an administrative appeal or to a judicial appeal, or both.

30. There are further nuances in some of the other language versions. On the one hand, 'beroep' in Dutch or 'Rechtsmittel' in German could be understood as leaning towards an appeal of a judicial nature. On the other hand, the terms used in some Slavic languages, such as 'odvolání' in Czech, 'odvolanie' in Slovak, or 'odwołania' in Polish, could be more clearly understood as referring to a remedy of an administrative nature.

31. Be that as it may, it is established case-law that where the language versions differ, the scope of the provision in question cannot be determined on the basis of an interpretation which is exclusively textual, but must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[4] Therefore, comparative linguistic argument is in itself clearly not conclusive.

32. Second, what might be more important on the textual level is the fact that the very wording of Article 32(3) of the Visa Code makes an express reference to national law. Indeed, that provision clearly 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.

33. Thus, the only clear lesson that emerges from the wording of Article 32(3) lies in the fact that the EU legislature left it to the Member States to decide on 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.

(b) *Context*

34. That interim conclusion does not change when looking at the context of Article 32(3), both within the Visa Code (*internal* systemic argument) and beyond (*external* systemic argument).

35. As regards the *internal systemic argument*, it should be noted that the notion of 'appeal' is also used in other parts of the Visa Code. However, it is also employed in an open, indeterminate manner there.

36. Article 34(7), which is worded in terms that are very similar to Article 32(3), merely provides for a 'right to appeal' against visa annulments or revocations. It does not define the notion of appeal either. Similarly, Article 47(1)(h) requires Member States to inform the public that visa applicants whose applications are refused have a 'right to appeal'. More particularly, it requires Member States to provide information regarding the procedure to be followed in the event of an appeal, 'including the competent authority, as well as the time limit for lodging an appeal'.

4 See, for example, judgments of 1 March 2016, *Kreis Warendorf and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 27), and of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 32).

37. That duty of information on the part of the Member States is given further expression in the standard form that is contained in Annex VI to the Visa Code. That form must be used to notify and justify refusal, annulment or revocation of a visa. In line with Article 32(3), that form also essentially confirms that it is for the national legislature to set out the appropriate procedures and then inform the applicant thereof.

38. Yet again, in failing to be specific about the nature of the competent authority — whether judicial or administrative — to hear appeals against negative decisions on visas, it appears that the Visa Code, taken as a whole, intentionally leaves the issue to the Member States to provide for the specific type of appeal that they deem to be most appropriate in view of their own institutional structures. [5]

39. This understanding is clearly confirmed by the broader contextual, *external systemic argument*, when the focus moves beyond the Visa Code, to other secondary law instruments that also regulate the entry of third-country nationals into EU territory. On the one hand, in cases of both short and long stays, those instruments do not generally require *judicial* review of decisions precluding entry. On the other hand, and in contrast, where the EU legislature deemed a judicial appeal before a court of law necessary, it provided for it expressly.

40. Within the first category, a number of secondary law instruments governing the admission of third-country nationals to EU territory do not expressly require a *judicial* appeal mechanism to be available. Some instruments fail to specify the nature of the appeal against negative decisions on entry, such as the refusal of a single permit for work purposes; [6] the rejection of an application for family reunification; [7] or — and perhaps the closest analogy to the present situation — the decision taken at the border to refuse entry to the territory of the Member States. [8] Other instruments explicitly provide for the possibility to lodge an appeal either before a court of law or before an administrative authority. That is notably the case for the refusal of a residence permit to a foreign student [9] or for any negative decision on applications for authorisation to carry out seasonal work. [10]

41. Despite these differences, it is notable that long stays are not treated more 'favourably' than short stays in respect of the right to appeal against negative decisions on entry. However, if those decisions do not necessarily warrant judicial review, that conclusion must a fortiori be the same in the context of short stays.

5 It might be added that the (Commission's) Handbook on processing visa applications also fails to specify the nature of the appeal (Commission Decision C(2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas, pp. 77 and 89). It is certainly true that the Handbook is not legally binding. One could nonetheless safely assume that if it were clearly understood that a judicial appeal was indeed required under the Visa Code, the Commission would certainly not have omitted such a significant fact in an otherwise rather detailed handbook.

6 See Article 8(2) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1).

7 See Article 18 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) ('the Family Reunification Directive').

8 See Article 14(3) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 establishing a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

9 See Article 34(5) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L 132, p. 21). It might be added that within the context of the predecessor to this directive, Advocate General Szpunar doubted that the exclusion of judicial remedy would be in line with Article 47 of the Charter (Opinion of Advocate General Szpunar in *Fahimian* (C-544/15, EU:C:2016:908, point 75)).

10 See Article 18(5) of Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L 94, p. 375).

42. As far as the second category is concerned, it appears that a few other secondary law instruments that cover the entry of third-country nationals into the Member States' territory explicitly provide for judicial review of negative decisions. That is the case for the entry of the family members of EU citizens [11] or for asylum seekers. [12] That shows that when the EU legislature wishes for judicial review to be provided, it can state so explicitly.

43. Overall, this variety of approaches shows that the EU legislature may foresee both types of appeal and, when clearly requiring a judicial appeal, such requirement can be stated expressly. Apart from specific situations mainly connected with Union citizenship and asylum, it also appears that Member States tend not to be required to guarantee judicial review of negative decisions on the entry of third-country nationals.

(c) Purpose

44. From what can be ascertained, it appears that the intention of the EU legislature was to leave the choice of the nature of the appeal to the Member States. This flows not only from the specific objective of Article 32(3) of the Visa Code, but also from the overall purpose of the Visa Code.

45. When considering the *specific* purpose of Article 32(3) of the Visa Code, the few documents available suggest that several Member States were reluctant to expressly provide for a right to *judicial* appeal. At the hearing, the Czech Government argued that the precise nature and characteristics of the appeal were deliberately left open to interpretation during the negotiations that led to the adoption of the Visa Code. Although those suggestions find some support in the legislative history of that provision, [13] in the absence of a clear articulation of legislative intent on this matter, this argument remains inconclusive.

46. As regards the *overall* rationale of the Visa Code, it appears that by adopting a 'Community Code on Visas', the Parliament and the Council have strived to put an end to the disparate rules that existed before, especially regarding substantive entry conditions and procedural safeguards, such as the obligation to state grounds and the right to appeal against negative decisions. [14] It is therefore clear that they wished to unify those conditions in order to avoid 'visa shopping' and to guarantee equal treatment of visa applicants, as follows from recital 18.

47. However, even if the EU legislature unified *the existence* of an appeal, it stopped short of fully harmonising it as to *its nature*. All things considered, it appears that the drafters were deliberately ambiguous, leaving the exact nature of the remedy open.

11 See Articles 15 and 31 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) ('the Citizens Directive').

12 See Article 27(1) of 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 (recast) (OJ 2013 L 180, p. 31; and corrigendum at OJ 2017 L 49, p. 50). On the scope of the review under that regulation, see judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409). See also Article 46(1) of 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 (OJ 2013 L 180, p. 60).

13 It seems that during the negotiations both the European Parliament and the Commission pushed for a judicial appeal while many Member States opposed it for fear of their courts being overburdened — 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, at p. 3 (point 2).

14 Before the entry into force of the Visa Code, Member States had very different practices regarding the handling of visas. In particular, the right to appeal was not provided for everywhere. For a comparative overview of the current arrangements in the Member States, see the 2012 Annual Report of the European Union Agency for Fundamental Rights, *Fundamental rights: challenges and achievements in 2012*, Publications Office, Luxembourg, pp. 91 to 95.

(d) Interim conclusion

48. Article 32(3) of the Visa Code requires the possibility of an appeal to be provided. However, it does not impose, as such and per se, the specific nature of that appeal. That matter is left to the Member States. Thus, the appeal may administrative, or judicial, or a combination of both.

2. The equivalence and effectiveness of the type of appeal chosen

49. As Article 32(3) of the Visa Code is left open, Poland has opted to provide for an *administrative* appeal against visa refusals: an appeal against the first decision of the consul can be lodged with that consul, who will review his or her decision.

50. It is to be recalled that at this stage, the first paragraph of Article 47 of the Charter, which enshrines the principle of effective *judicial* protection, does not yet come into the picture. However, the *choice* as to the nature (level) of the remedy does not mean that the *realisation* of that choice, once exercised, would escape any scrutiny of EU law.

51. It is well-established case-law that in the absence of harmonisation of national procedures, the detailed rules establishing the right of appeal are matters falling within the legal order of each Member State, in accordance with the principle of procedural autonomy. Nonetheless, those rules should be no less favourable than those governing similar domestic situations (*principle of equivalence*) and they should not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (*principle of effectiveness*). [15]

52. Thus, it ought to be examined whether the administrative appeal, assessed on its own and looked at independently, complies with the dual requirement of equivalence (a) and effectiveness (b). It is clear that in this regard, this subsection can only provide some guidance on the assessment that is ultimately for the referring court to make, in full knowledge of the relevant national law and procedure.

(a) Equivalence

53. Assessing equivalence with regard to the processing of visa applications is not a straightforward exercise. Today, most short-stay visas are 'Schengen visas' or visas that are issued in accordance with the Visa Code. Thus, it is not an easy task to determine what is or could be the closest parallel regime in national law in order to establish an appropriate comparator for the assessment of equivalence.

54. Two comparison frameworks were discussed at the hearing: first, discretionary administrative decisions on entry (in particular visa refusals under the Visa Code and refusals of entry taken on the basis of the Schengen Borders Code), and second, other decisions taken by consuls (such as potential decisions on civil status, legalisation of documents, or issuance of passports). The first potential comparator covers the same *subject matter* (decisions on entry to the national territory) but the decision-making bodies are different. The second one concerns the same *decision-making body*, but the subject matter of decisions issued by that body is different.

15 See, for example, judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 48); of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 31); and of 17 March 2016, *Bensada Benallal* (C-161/15, EU:C:2016:175, paragraph 24).

55. First, as regards discretionary administrative decisions on entry, it appears that under Polish law the scope of review of the legality of visa decisions depends on the identity of the national administrative authority that is competent to issue decisions, and of the status of the person applying for leave to enter. In particular, it seems that judicial review is available for visa decisions taken by the Minister for Foreign Affairs, the Voïvode, or the Commander-in-Chief of the Border Guard. [16]

56. Second, for decisions taken by consuls, it seems that the re-examination procedure for decisions made by a consul only applies to visa refusals. As appears to have been suggested by the Polish Government at the hearing, other types of decisions that a consul makes are reviewable following different procedures.

57. The classical assessment of the requirement of equivalence normally has the latter type of comparison in mind: EU law-based claims are compared with non-EU law-based claims as they are being handled before the same authority in the course of similar proceedings — in the present case, that is the consul.

58. However, since not much information has been provided on this to the Court, it indeed remains for the referring court to determine what are the *similar* claims treated by the consuls and whether such claims are being treated differently.

(b) *Effectiveness*

59. As already stated, the requirement of effectiveness means that national remedies should not render the realisation of EU law on the national level impossible or excessively difficult in practice.

60. Under Polish law, it appears that, subject to verification by the referring court, the same consul who issued the first decision will be tasked with handling the appeal against his or her own decision. Can such a re-examination procedure be deemed effective?

61. According to the referring court, the Appellant and the Commission, there is uncertainty as to the effectiveness of a re-examination by the same consul.

62. By contrast, the Polish Ministry of Foreign Affairs maintained that re-examination by the consul is effective. It presented statistics to prove its point: according to the figures advanced by the Ministry, on average and seen globally with regard to all Polish consulates, more than a third of the decisions refusing to issue a visa are reversed. Specifically with regard to the Consul of the Republic of Poland in Morocco, that figure is even said to amount to around 60% of cases.

63. From my point of view, the issue of effectiveness of a procedure is primarily a structural, legal question, not an exercise in statistics. Statistical data is of course relevant, but only secondarily, *within* the legal analysis: to confirm or rebut that a certain legal regime operates in a certain way. Or to support the suspicion that a legal regime, which, on its face, is applicable without distinction has quite a different impact in reality. Detached from the legal analysis, statistical data is of limited relevance.

64. However, for what it is worth, I am not sure that by advancing such figures, the Polish Government is actually helping its claim as to the effectiveness of its procedures. Quite the contrary: a 60% reversal rate on appeal rather casts some serious doubts on the entire procedure, in particular the quality of the decision-making at first instance.

16 Respectively for decisions on visas concerning diplomats (Minister for Foreign Affairs), prolongation of visas (Voïvode) and issuance of visas at the border (Commander-in-Chief of the Border Guard).

65. Turning back to the structural, legal level: when can an administrative appeal be said to be an effective remedy?

66. As a matter of common sense, for a procedure to be called an appeal, there must be some element of novelty to it. If the *same* person were to be asked to look again at the *same* set of information, such an endeavour could be branded a number of names,[17] but hardly that of 'appeal'. Novelty typically means that someone else casts a fresh eye over the same case, which is normally supplemented by further information, documents, or arguments. Thus, there are two elements that can be said to define an appeal: a different reviewer or adjudicator and different documentation presented for examination.

67. Whether and to what extent these requirements were met with regard to the re-examination of the visa refusal by the consul under Polish law is a matter for the referring court. When asked about this specific point at the hearing, the Respondent suggested that unsuccessful applicants are allowed to submit new documentation to the consul with the appeal. The Respondent also hinted at the existence of an internal circular of the consular department of the Ministry of Foreign Affairs which recommends that consuls assign appeals, as far as possible, 'horizontally': namely, to a different consular official within the same consulate.

68. Ascertaining the exact national law and practice in this regard is a matter for the referring court. One might add only that the special context of diplomatic missions is naturally relevant in the present case. On the one hand, diplomatic missions are well equipped to evaluate visa applications owing to a deep knowledge of concrete facts relating to the visa applicant. They are therefore also particularly well-suited to hear appeals against visa refusals, though it must be ensured that the type of administrative appeal provided by national law is effective. On the other hand, it is also quite clear that not all diplomatic missions and consular posts might have sufficient personnel and other staff senior to the person issuing the first decision. However, even in such cases, a number of options remain open to a Member State to ensure that even in face of such constraints, an administrative appeal is effective in the sense outlined above, such as entrusting the handling of appeals to another person within the same consular authority (horizontal delegation).

(c) Interim conclusion

69. In the light of the foregoing, it is my view that Article 32(3) of the Visa Code must be interpreted as leaving it to each Member State to decide on the nature of the appeal against visa refusals, provided that the appeal complies with the principles of equivalence and effectiveness.

B. Requirements stemming from the first paragraph of Article 47 of the Charter

70. Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', codified the general principle of effective legal protection previously established by the Court.[18] Recently, the Court also held that 'the obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right'.[19]

17 I believed that it was Albert Einstein who quipped that 'Insanity is doing the same thing over and over again and expecting different results'. That quote is in fact incorrectly attributed to Einstein — see Calaprice, A., (ed.), *The Ultimate Quotable Einstein*, Princeton University Press, 2011, p. 474, who traces the quote to the novel *Sudden Death* by Rita Mae Brown, Bantam Books, New York, 1983, p. 68.

18 See, on the principle of effective judicial protection, judgments of 15 May 1986, *Johnston* (222/84, EU:C:1986:206, paragraph 18), and of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 14); later, in connection with Article 47 of the Charter, see judgments of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 37); of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 33); and of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 45).

19 See judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 44).

71. According to the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

72. What does the first paragraph of Article 47 of the Charter require in the context of the Visa Code in general and of Article 32 in particular? In my view, the first paragraph of Article 47 requires that Member States provide for the review of visa refusals before a tribunal, that is, before a court of law.

73. After examining the applicability of the first paragraph of Article 47 to the present case, especially with regard to the Union right(s) or freedom(s) that have been affected (1), I will evaluate the precise meaning of 'an effective remedy before a tribunal' (2).

1. What 'rights and freedoms' guaranteed by EU law?

74. In order for the first paragraph of Article 47 of the Charter to be applicable, two cumulative conditions must be met. First, the situation at hand must fall within the scope of EU law for the Charter as a whole to be applicable (Article 51(1) of the Charter as interpreted by the Court in *Åkerberg Fransson*[20]). Second, as expressly follows from the wording of the first paragraph of Article 47, the applicant must have a concrete 'right or freedom' guaranteed by EU law that can trigger the specific provision of the first paragraph of Article 47.

75. I would strongly hesitate before embracing the proposition that the right to an effective remedy before a tribunal derives from the *mere* applicability of the Charter,[21] for at least four reasons.

76. First, there is the text of the first paragraph of Article 47 of the Charter. It clearly refers to the fact that 'rights or freedoms guaranteed by the law of the Union' have been violated in order to render that provision applicable. If the drafters had intended the first paragraph of Article 47 to be a universally applicable provision, triggered by Article 51(1), irrespective of any *concrete* rights or freedoms, they would have simply provided that 'everyone has the right to an effective remedy before a tribunal', omitting any further specifications or limits.

77. Second, in the Court's case-law, although there are some exceptions,[22] it appears that the Court tends to make the remedy subject to the existence of a Union right or freedom, the violation of which may be alleged by an applicant. This connection made by the Court between right and remedy is not in any way new.[23]

20 Judgment of 26 February 2013, C-617/10, EU:C:2013:105.

21 See, for instance, Opinion of Advocate General Wathelet in *Berlioz Investment Fund* (C-682/15, EU:C:2017:2, point 51 et seq.). See also Prechal, S., 'The Court of Justice and Effective Judicial Protection: What has the Charter changed?', in Paulussen, C., et al. (eds), *Fundamental Rights in International and European Law*, 2016, p. 143.

22 See, for example, judgments of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588), and of 17 September 2014, *Liivimaa Lihaveis* (C-562/12, EU:C:2014:2229), where the Court did not strive to identify a specific right or freedom protected by EU law.

23 See for instance, in the context of the general principle of effective judicial protection, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 14); and in the context of Article 47 of the Charter, judgments of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 35); of 23 October 2014, *Olainfarm* (C-104/13, EU:C:2014:2316, paragraphs 33 to 40); and of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 51 to 52).

78. Third, the proposition that the mere applicability of the Charter also triggers the first paragraph of Article 47 would as a consequence impose an obligation on the Member States to provide for judicial appeal in any and every question governed by EU law. I find such a consequence difficult to reconcile with Article 51(2) of the Charter, which provides that the Charter does not extend the field of application of EU law beyond the powers of the European Union, as well as with the repeatedly expressed intent of the Member States[24] that the Charter shall not create new and independent obligations on its own.[25]

79. Fourth, there is also the broader context of the procedural autonomy of the Member States. Subjecting the applicability of the first paragraph of Article 47 of the Charter effectively to the alleged violation of mere legal interests that might be hovering somewhere within the penumbras of the scope of EU law, as opposed to concrete, discernible individual rights and freedoms guaranteed by EU law, would require, in terms of its implementation, considerable readjustments in the legal traditions of those Member States where standing (active legitimacy to bring a claim) depends on the violation of a *subjective* right.[26]

80. Thus, the applicability of the first paragraph of Article 47 of the Charter depends both on the overall applicability of the Charter *and* on the existence of a concrete right or freedom guaranteed by EU law.

81. On the other hand, it is fair to admit that in practical terms, the difference between the two positions is not likely to be that significant. In the majority of cases, a dispute falls under the scope of EU law and thus Article 51(1) of the Charter precisely because the individual is seeking to assert his or her EU law-based rights in national proceedings. Stated differently: if there is a clearly identifiable right or freedom guaranteed under EU law that is solid enough to trigger the operation of the first paragraph of Article 47 of the Charter, it is clear that that issue also falls within the scope of EU law under Article 51(1) of the Charter (the *a maiore ad minus* argument). However, as I tried to explain in the preceding paragraphs, the reverse logic does not apply.

82. Moreover, requiring a concrete right or freedom which benefits the specific litigant in question for the applicability of the first paragraph of Article 47 in addition to Article 51(1) is not just a scholarly debate. It has practical consequences, such as inter alia the weeding out of *actio popularis*. There must be a *concrete* right provided by EU law which benefits the *specific* litigant.

83. In the case at hand, concerning the *first* condition, the overall applicability of the Charter has not been contested by any participant to the proceedings. Under Article 51(1), the Charter is applicable where Member States implement EU law. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter. Thus, the Charter naturally applies when the provisions of the Visa Code are being applied by the Member States' authorities, whether that means those relating to entry conditions, to the application procedure, or to the procedural safeguards. In particular, it applies when a Member State adopts decisions on the basis of the Visa Code, such as a decision refusing to issue a visa under Article 32(1).

24 See Article 6(1) TEU and Declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

25 Or, put more poetically, fundamental rights are the 'shadow' of EU law (Lenaerts, K., and Gutiérez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., (eds), *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, 2014, p. 1568). A fundamental rights 'shadow' follows another, substantive or procedural, provision of EU law. But a shadow cannot cast its own shadow.

26 The same yardstick would then of course have to be applicable to judicial review and standing before the Union courts as the first paragraph of Article 47 of the Charter covers *any* activity or decision of the EU institutions (and bodies, office and agencies) by virtue of Article 51(1).

84. The assessment of the *second* condition is somewhat more complex. What are the concrete right(s) or freedom(s) guaranteed by EU law to the visa applicant that trigger the first paragraph of Article 47 in the present case? Three different sets of potential rights have been discussed in the course of these proceedings: the right to family life, the right to a visa, and the right to have one's visa application fairly processed.

85. I will examine these three rights in turn. The right to family life, as put forward by the Appellant, appears to be of limited relevance for the purpose of triggering the first paragraph of Article 47 of the Charter in the present case (a). Next, in my view, there is no 'right to a visa' under EU law (b). There is, however, the right to have one's visa application fairly and properly processed which in the present case can trigger the first paragraph of Article 47 (c).

(a) Right to family life

86. With respect to the right to family life, the Appellant has argued in his written submissions that the visa refusal has impaired his right to nurture regular personal relationships with his wife and child.

87. The right to family life is certainly relevant in the context of the application of the Visa Code and in the later assessment of the case on merits. However, it is the Visa Code, that is to say, the substantive and procedural provisions of secondary EU law applicable in this case, that triggers the first paragraph of Article 47 of the Charter.

88. It is clear that family considerations are not absent from the Visa Code. In particular, Article 24(2) provides that multiple-entry visas shall be issued when the applicant proves the need or justifies the intention to travel regularly due to his family status.[27] Thus, business or touristic purposes aside, visas may also be applied for in order to visit family members. Accordingly, family life is one of the features underlying the Visa Code.

89. On the other hand, family life implies long-term commitment and stability. It is therefore likely to be less relevant in the context of short-stay visas than it is in the case of long-stay visas or residence permits.[28] Furthermore, unlike other EU law instruments such as the Citizens Directive[29] or the Family Reunification Directive,[30] which are not applicable in the present case,[31] the Visa Code aims to facilitate legitimate international travel and tackle illegal immigration, not to create or strengthen family ties.[32]

90. Thus, the right to family life, both as provided for in the Visa Code and as a fundamental right guaranteed by the Charter, certainly pertains to the potential later assessment of the case on merits. However, seen in and of itself, that is, in isolation from the Visa Code, the reference to a Charter-based right to family life cannot trigger the application of the first paragraph of Article 47 of the Charter.[33]

27 See also Article 14(4) of the Visa Code.

28 See, for instance, judgment of the European Court of Human Rights of 3 October 2014, *Jeunesse v. The Netherlands* (CE:ECHR:2014:1003JUD001273810), where the ECtHR held that refusing a residence permit to the Surinamese mother of three children born in the Netherlands breached their right to respect for their family life.

29 Directive 2004/38.

30 Directive 2003/86.

31 The Appellant cannot rely on the Citizens Directive since his wife and child are Union citizens who have not exercised their right to free movement across the European Union (see judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734)). He cannot rely either on the Family Reunification Directive because his sponsor is not a third-country national.

32 As recently stated by the Court in a somewhat different context, the Visa Code cannot be relied on when what is being aimed at in substance is not a short-term visa. See judgment of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraphs 47 to 48), delivered in the context of an application for a visa with limited territorial validity with a view to lodging an application for international protection.

33 In general above, points 74 to 80 of this Opinion.

(b) *Is there a right to a visa?*

91. The Appellant and the Commission (mainly in its written submissions, as it embraced a more nuanced view at the hearing) have argued that there is a subjective, although not automatic, right to a visa. According to them that proposition follows from the judgment in *Koushkaki*.[34]

92. All the other participants to the proceedings argue that the Visa Code cannot be interpreted as establishing a (subjective) right for a third-country national to be issued a Schengen visa.

93. I agree with the latter proposition. There is no right to a visa under EU law.

94. First, I read the judgment in *Koushkaki* somewhat differently from the Applicant and the Commission. True, in paragraph 55 of that judgment, the Grand Chamber of this Court stated that the competent authorities cannot refuse to issue a uniform visa unless one of the grounds for refusal listed in Article 32(1) and Article 35(6) of the Visa Code applies to the applicant.[35]

95. However, that statement does not, in my view, mean that the individual has a subjective right to a visa, protected by EU law. Context matters. In the section of the judgment leading to point 55, the Court was not concerned with individual rights, but with the overall purpose of the Visa Code and the permissible discretion of the Member States' authorities applying it. In paragraphs 50 to 54, immediately preceding that statement, the Court recalled that the purpose of the Visa Code is to harmonise the conditions for the issue of a visa, thus providing a genuinely uniform visa, and preventing visa shopping. The criteria established in the Visa Code are to be respected. Member States must apply them uniformly.

96. Read in this light, paragraph 55 of the judgment essentially recaps the requirement of uniform legality imposed on the Member States by the relevant provisions of the Visa Code. However, it certainly does not follow from the statement that national administrative authorities must comply with their obligations under the Visa Code, that an individual has a subjective right to a visa. Put differently, it does not follow from the fact that a referee must strictly apply the rules of the game and cannot refuse to call a timeout or punish a foul when the rules so require, that any of the competitors has a subjective right to win the game.

97. Second, and perhaps more fundamentally, acknowledging the existence of a subjective right to a visa would, in my view, presuppose the existence of a right of entry into the EU territory. However, there is no such right.

98. The mere existence of the visa requirement itself already precludes, per se, the idea of a subjective right of entry into the Member States' territory. As stated in Article 2(2)(a) of the Visa Code, a visa is 'an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months …'.

99. When looking at the rationale underpinning visas, they are the expression of the State sovereignty on its territory, 'a tool to control entries, and thus migration flows, just as it may also be seen [as] an instrument of foreign and security policy'.[36] It is therefore for the Member States to use their discretion to decide who can enter their own territory, even under exceptional circumstances.[37] A fortiori in

34 Judgment of 19 December 2013, C-84/12, EU:C:2013:862.

35 Judgment of 19 December 2013, C-84/12, EU:C:2013:862, paragraph 55. For a similar approach in the context of a refusal of entry on the basis of the Schengen Borders Code and a refusal to grant a residence permit for study purposes, see judgments of 4 September 2014, *Air Baltic Corporation* (C-575/12, EU:C:2014:2155), and of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187).

36 Opinion of Advocate General Mengozzi in *Koushkaki* (C-84/12, EU:C:2013:232, point 51).

37 Hence, pursuant to Article 25 of the Visa Code, even humanitarian visas shall be issued only when the Member State considers it *necessary* to derogate from the principle that the entry conditions laid down in the Schengen Borders Code must be fulfilled.

ordinary circumstances, it is for the Member States to ultimately evaluate whether, for instance, the visa applicant may constitute a threat to public policy, whether he has the necessary means of subsistence, or whether there is reasonable doubt that the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.

100. Finally, not all foreigners are equal with regard to the visa requirement. The very fact that some individuals (such as Union citizens and their family members or third-country nationals that are exempted from the visa requirement [38]) do not have to obtain a visa to enter the EU territory shows that those who must show a valid visa at the border do not enjoy a right to a visa, nor a right of entry, [39] as opposed to some of those abovementioned 'privileged' persons who do.

101. In this regard, I agree with Advocate General Mengozzi's doubts in his Opinion in *Koushkaki* about the adoption of the Visa Code in the form of a regulation and that this meant that 'the Member States de facto consented to such a fundamental leap in qualitative terms as that of the passage from the obligation on the Member States to refuse to issue a visa… to the establishment of a subjective right to the issue of a visa which may be relied upon by third-country nationals'. [40]

102. In sum, there is no subjective right to a visa that could trigger the application of the first paragraph of Article 47 of the Charter.

(c) A right to have one's application fairly and properly processed

103. However, despite the absence of a substantive right to a visa that could be invoked in support of the application of the first paragraph of Article 47 of the Charter, it is clear that the statement of the Court in *Koushkaki* quoted above remains relevant on a different level. If there is an obligation on the part of the administration to apply the Visa Code and its provisions in a certain way, there must be a correlating right, corresponding to that legality obligation. That right is not a substantive right to be issued a visa, rather, it is of a procedural nature. It is not a right to a visa, but the right to have one's application treated and processed in a fair and proper manner.

104. Thus, coming back to the sports metaphor, although the competitor does not have the right to the actual result of the game, he has, by the very fact of entering the game, the right to fair play.

105. It might be added that such an understanding is in no way uncommon in other areas of EU law: a parallel can be drawn with matters such as public procurement, applications for a subsidy, or for a residence permit. [41] In all of those cases, there is no right as such to the result, namely to obtain the tender, the subsidy or the permit. However, there is a right to have one's application properly and lawfully processed and that right can be the basis for judicial review of the decision on the application.

106. Applied to the present case, that means that the Appellant enjoys a procedural right that is protected under EU law, namely the right to have his visa application lawfully examined. Thus, since he has a right guaranteed under EU law, his right to an effective remedy before a tribunal in accordance with the first paragraph of Article 47 of the Charter must be recognised.

38 See Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

39 In Article 30, the Visa Code itself disconnects the visa and right of entry by stating that the 'mere possession of a uniform visa or a visa with limited territorial validity shall not confer an automatic right of entry'.

40 Opinion of Advocate General Mengozzi in *Koushkaki* (C-84/12, EU:C:2013:232, point 54).

41 See, for example, judgments of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094); of 17 September 2014, *Liivimaa Lihaveis* (C-562/12, EU:C:2014:2229); and of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688).

2. An 'effective remedy before a tribunal' in the context of a visa refusal

107. Three concluding remarks will be made with regard to the nature of an effective judicial remedy required in the context of a visa refusal under Article 47(1).

108. First, under *Koushkaki*, Member States are to issue visas when the conditions foreseen in the Visa Code have been met. This is because there is an exhaustive list of grounds for refusing, annulling or revoking a visa in the Visa Code.[42] However, and also in *Koushkaki*, the Court insisted on the 'wide discretion' that Member States enjoy when examining visa applications.[43] In particular, it pointed out that the assessment of the individual position of a visa applicant entailed complex evaluations. Those evaluations involve predicting the foreseeable conduct of the applicant and must be based, inter alia, on an extensive knowledge of his country of residence.[44]

109. Second, the wide margin of discretion available to the Member States' authorities logically translates into a lighter standard for judicial review to be carried out by the Member States' courts.[45] Thus, in situations such as the one at issue in the main proceedings, it is sufficient for national courts to ensure that the visa refusal was not arbitrarily decided, but corresponded to the facts as ascertained by the administrative authority and was taken within the confines of the administration's discretion.

110. Third, the duty of the Member States under the first paragraph of Article 47 of the Charter is to guarantee the very core or essence of the right enshrined therein, namely access to the courts.[46] To preserve that core, judicial review of decisions cannot be excluded when an EU right or freedom has been infringed.[47] However, that does not imply, in the specific context of cases like the present one, any further positive obligations on the part of the Member States to actively facilitate that access.

111. At the end of the day, such a reasonably conceived right of access to court in visa matters respects not only the right of the applicants to be treated fairly and correctly, stemming from the right to human dignity, but also the particular interest of the EU and its Member States to uphold and control the exercise of public power and (European) legality. That need might be even stronger in geographically distant places, such as Member States' consulates scattered across the world, where the instructions and guidance originating from the centre might be interpreted and carried out in a number of ways. An individual action therefore might be equally beneficial to shed some light on the genuine practice in such place.[48] Thus, let there be light.

42 See judgment of 19 December 2013, C-84/12, EU:C:2013:862, paragraphs 38 and 47.

43 Ibid., paragraphs 60 to 63.

44 Ibid., paragraphs 56 to 57.

45 To that end, see Opinion of Advocate General Szpunar regarding the refusal to issue a student residence permit in *Fahimian* (C-544/15, EU:C:2016:908, point 72).

46 See, for instance, judgments of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 59), and of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 44).

47 See, for instance, judgment of 17 March 2011, *Peñarroja Fa* (C-372/09 and C-373/09, EU:C:2011:156, paragraph 63). Already before the entry into force of the Charter, see, for instance, judgment of 3 December 1992, *Oleificio Borelli* v *Commission* (C-97/91, EU:C:1992:491, paragraphs 13 and 14).

48 Two recent decisions of the Grand Chamber of the *Nejvyšší správní soud* (Supreme Administrative Court, Czech Republic) might be referred to as illustrations. In its judgment of 30 May 2017, Case No 10 Azs 153/2016-52, the *Nejvyšší správní soud* (Supreme Administrative Court) dealt with structural problems at the Czech Embassy in Hanoi, where the processing of applications for working permits was made subject to a truly Kafkaesque procedure, effectively disabling any regular submission of an application. Referring to its previous case-law on the matter and stating that the continuous practice of the Czech civil service was wholly unacceptable and disgraceful (point 56 of the decision), the *Nejvyšší správní soud* (Supreme Administrative Court) added that 'the Czech civil service established for applicants for some Czech resident permits in particular in Vietnam and Ukraine a completely opaque system, dependent on the arbitrary behaviour of the competent civil servants controlling access to submitting those applications, thus disabling even a gleam of external control, but with strong inkling towards corruption and abuse' (point 57 of the decision; see also a parallel judgment from the same day in Case No 7 Azs 227/2016-36).

C. Article 32(3) of the Visa Code and the first paragraph of Article 47 of the Charter applied together

112. Under Article 32(3) of the Visa Code, the right to appeal is open-ended as to the nature of that right: it might be realised, depending on the choice exercised by the Member State, by an administrative appeal, by a judicial appeal, or also by a hybrid type of appeal with elements of both. By contrast, the first paragraph of Article 47 of the Charter clearly requires recourse before a court of law, namely, a judicial appeal.

113. In its question, the referring court suggested that Article 32(3) of the Visa Code be read *in the light* of the first paragraph of Article 47 of the Charter. What would that mean in practice?

114. 'Read in the light of',[49] as suggested by the Commission in the present case, would mean that the right to appeal provided for by Article 32(3) of the Visa Code refers to a judicial appeal. However, such an interpretative readjustment of the notion would, at the same time, effectively remove the option of an administrative appeal under the Visa Code.

115. By contrast, if Article 32(3) of the Visa Code and Article 47 of the Charter were to be read and applied together, in parallel, the outcome would be a different one. It would mean that the Member States can clearly retain the freedom to choose the type of appeal under Article 32(3) of the Visa Code, although, ultimately, there must be the possibility of judicial review under the first paragraph of Article 47 of the Charter.

116. That latter reading is, in my view, the correct one. I fail to see why, in the present case, the first paragraph of Article 47 of the Charter should effectively deprive Member States of the option of creating an (administrative or hybrid) appellate system that they may deem to be appropriate in view of their legal traditions and of the specificity of the matter at hand.

117. It could be suggested that by analogy to other areas, the principle of effective judicial protection does not preclude national legislation which imposes prior implementation of an out-of-court settlement procedure or recourse to a mediation procedure as a condition for the admissibility of legal proceedings.[50]

118. However, such an analogy, or rather its necessity in the first place, seems very peculiar to me. It would effectively mean first removing the (specifically provided) choice from the Member States by reducing the scope of Article 32(3) of the Visa Code via the first paragraph of Article 47 of the Charter, only to reinsert the same choice via (arguably generally applicable) case-law relating to prior settlement mechanisms inherently compatible with the first paragraph of Article 47 of the Charter.

119. It may therefore be suggested that the first paragraph of Article 47 of the Charter does not question the existence itself of other means of redress, such as administrative remedies provided for in a number of Member States. Nor does it alter the content of Article 32(3) of the Visa Code. The first paragraph of Article 47 of the Charter merely adds an obligation for the Member States: at some stage of the proceedings, there must be the possibility of bringing the matter before a court. Before that, it is for each Member State to decide to opt for a purely administrative review (before the same authority or another one); or for a review carried out by mixed tribunals composed of both judges and civil servants; or, of course, should the Member State wish to do so, also directly allow for a review before a tribunal within the meaning of the first paragraph of Article 47.

49 For a case where the Court read EU secondary law 'in the light of' Article 47 of the Charter, in the context of public procurement, see judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688).

50 See judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146), and of 14 June 2017, *Menini and Rampanelli* (C-75/16, EU:C:2017:457).

120. That brings me to my very last point, also addressed at the hearing in the present case: what would a 'tribunal' under the first paragraph of Article 47 of the Charter in the present context mean? [51]

121. For the purpose of the requirements of the first paragraph of Article 47 of the Charter, it appears rather clear to me that what is aimed at by that provision is a truly independent and impartial body of a judicial nature which fulfils all the defining criteria of a court or tribunal in the sense of Article 267 TFEU. Thus, that body must be established by law; it must be permanent; its jurisdiction must be compulsory; its procedure must be *inter partes* — that is, of a contradictory judicial nature; it must apply rules of law; and it must be independent. [52] However, in contrast to the flexibility shown by the Court in terms of applying these criteria for the purpose of admissibility of preliminary rulings under Article 267 TFEU, in order to ensure compliance with the first paragraph of Article 47 of the Charter, *all of these criteria* ought to be met. [53]

122. Yet again, however, as already stated above, the first paragraph of Article 47 of the Charter requires that at some stage, cases involving refusal of a visa *can* be brought before a jurisdiction meeting all these criteria. That does not mean that the case would have to go immediately before such a body or that any of the previous bodies would also have to meet those criteria.

V. Conclusion

123. In the light of the foregoing considerations, I propose that the Court answer the question referred to it by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

– Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) must be interpreted as leaving it to each Member State to decide on the nature of the appeal against visa refusals provided that the appeal complies with the principles of equivalence and effectiveness.

– The first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted in the way that Member States cannot exclude the possibility of judicial review of visa refusals by a tribunal within the meaning of Article 267 TFEU.

51 The Court was already faced with this issue in *Zakaria*, in the context of the Schengen Borders Code on the equivalent provision of Article 32(3) of the Visa Code. There the question, which in the end was not dealt with by the Court, was raised as to whether Article 13(3) of the Schengen Borders Code required the Member States to guarantee an effective remedy 'before a court or before an administrative body which, from an institutional and functional perspective, provides the same guarantees as a court' (judgment of 17 January 2013, C-23/12, EU:C:2013:24).

52 See, for example, judgments of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23); of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraph 46 et seq.); and of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 23). See also, regarding the Irish Refugee Appeals Tribunal, judgment of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45, paragraph 95 et seq.).

53 Further see my Opinion in *Pula Parking* (C-551/15, EU:C:2016:825, points 101 to 107).