

The Digital Administration of Foreigners in France*

Quentin Ricordel

(PhD in public law at the University of Limoges)

French Council of State, 3 June 2022, *La Cimade et autres*, n. 452798

French Council of State, 3 June 2022, *La Cimade*, n. 461694

In two decisions of 3 June 2022, the French Council of State ruled on the legality of the digital administration of foreigners in France. While it largely accepted the possibility for the administration to propose, and even impose, the use of a teleservice, it attached several guarantees to this option.

ABSTRACT This case note analyses the decisions *La Cimade* ruled by the French Council of State. It is a question of knowing how far the reception of foreigners can be dematerialized and to replace these solutions in the perspective of the evolution of user's rights faced with the digitisation of the administration.

1. Introduction

Like others, foreigners are not immune to the phenomenon of digitisation of the administration. The dematerialization of procedures quickly appeared to the public authorities as the best way to put an end to the infringements of fundamental rights observed in the context of the physical reception of foreigners in the administrations.

Numerous reports¹ had noted the serious consequences of the administration's inability to properly organize the reception of foreigners, in particular the endless queues outside, with no guarantee of being able to access the counter. The Government has therefore sought to resolve these difficulties by gradually digitising reception procedures and developing a teleservice for foreigners. Notably, it has dematerialized the booking of appointments and the submission of a number of required documents. The decree of 24 March 2021² constitutes a new stage in this

process by creating a dedicated online service for submitting applications for certain residence permits.

This text was referred to the Council of State for several reasons. On the one hand, an association for the defense of the rights of foreigners, *La Cimade*, has asked the administrations to provide alternative methods for receiving users. She then contested the implicit refusals which were opposed to her before the administrative courts. Two of them seized the Council of State with a request for an opinion on the basis of article L. 113-1 of the Code de justice administrative, which allows a court to transmit to the supreme administrative judge a "new question of law, presenting a serious difficulty and arising in many disputes". On the other hand, the same association directly attacked the decree of 24 March 2021 which instituted teleservice and the decree of 27 April 2021 which specified certain terms and conditions.

The questions put to the administrative judge were therefore relatively numerous, but they can be summarized as to what extent the administration can require foreigners to carry out their formalities by means of a dematerialized procedure.

In an opinion³ and a decision⁴ *La Cimade*, returned in section – the second most solemn

* Article submitted to double-blind peer review.

¹ In particular: General Administration Inspectorate, *Reception of foreign nationals by prefectures and sub-prefectures*, 2014, 31, in www.interieur.gouv.fr; Defender of Rights, *The fundamental rights of foreigners in France*, 2016, 44, in www.defenseurdesdroits.fr; Defender of rights, *Dematerialization and inequalities of access to public service*, 2019, 21, in www.defenseurdesdroits.fr; Council of State, *Twenty proposals to simplify litigation for foreigners in the interest of all*, 2020, 54, in www.conseil-etat.fr.

² Decree n. 313, 24 March 2021, relating to the establishment of a teleservice for submitting

applications for residence permits.

³ Council of State, 3 June 2022, *La Cimade*, n. 461694.

⁴ Council of State, 3 June 2022, *La Cimade et autres*, n. 452798.

formation –, the Council of State provided important details on the legal regime of the digitisation of the public service for foreigners. Although he widely accepted the principle (2.), it accompanied this approach with a certain number of guarantees which, not fulfilled by the texts, led to their partial cancellation (3.).

2. The consecration of the digitisation of the administration of foreigners

The development of the digitisation of administrative activities requires the removal of various obstacles. If it is necessary to build a flexible framework allowing the administration to easily dematerialize its procedures (2.1.), the generalization of the process sometimes implies imposing it, which raises other difficulties (2.2.).

2.1. The right to propose the use of a teleservice

In general, users have the right to contact the administration electronically. This possibility was granted to them by an ordinance of 8 December 2005,⁵ since codified in articles L. 112-8 and following of the Code des relations entre le public et l'administration (CRPA). This right is reflected into an obligation for the administration to put in place the digital tools suitable for allowing citizens to address it electronically and by the possibility of creating teleservices for this purpose.⁶

The difficulty is that several procedures involve a personal presentation of the foreigner.⁷ This requirement directly conflicts with the obligation for the administration to set up a digital procedure and logically prevents users from requesting dematerialization.⁸ On the other hand, it does not necessarily exclude the possibility of creating a teleservice for carrying out the steps prior to the personal presentation of the foreigner, such as making an appointment.

⁵ Ordinance n. 1516, 8 December 2005, relating to electronic exchanges between users and administrative authorities and between administrative authorities.

⁶ Decree n. 685, 27 May 2016, authorizing teleservices aimed at implementing the right of users to contact the administration electronically.

⁷ Former article R. 311-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

⁸ Article L. 112-10 of the CRPA; Decree n. 1423, 5 November 2015, relating to exceptions to the application of the right of users to contact the administration electronically.

The basis for such digitisation was not obvious since it cannot be sought in the right of citizens to seize the administration by electronic means, since this right is precisely excluded. The Council of State has therefore chosen to link this option to the organisational power of the head of department⁹ “Unless there are special provisions, the prefects can create teleservices for the accomplishment of all or part of the administrative procedures for users”.¹⁰ The rapporteur public – a judge who publicly and independently expresses his or her opinion on the issues to be decided in the applications and on the solutions they call for – also recalled the relevance of dematerialization in this case, as “it is a priori quite paradoxical to have to come and queue in front of the prefecture to obtain an appointment, that is to say in the sole purpose of being able to come back a few days or weeks later”.¹¹

The decree of 24 March 2021 relaxed the requirement of the personal presentation of the applicant by reducing it to certain specific requests. Since its entry into force, the situation has therefore been as follows: either the foreigner's request is part of a procedure which requires him to physically present himself before the administration, in which case digitisation is only possible for certain stages of the procedure, either his approach is not affected by this obligation, in which case the administration is free to provide for an entirely dematerialized system, or even to impose it.

2.2. The right to impose the use of a teleservice

The main grievance against the digitisation process concerns the possibility of forcing foreigners to use digital services to contact the administration. It is true that the Council of State had not really pronounced on the question.

A first decision could have been interpreted as preventing the administration from forcing users to contact it digitally.¹² It was a question

⁹ Council of State, 7 February 1936, *Sieur Jamart*, n. 43321, in *Les grands arrêts du droit administratif*, XXIII ed., Paris, Dalloz, 2021, 293.

¹⁰ Council of State, section, opinion, 3 June 2022, *La Cimade*, n. 461694.

¹¹ L. Domingo, *Téleservice public : institution et fonctionnement - Le cas des demandes de titre de séjour des étrangers*, in *Revue française de droit administratif*, 2022, 761.

¹² Council of State, 27 November 2019, *La Cimade et*

of deciding on the scope of article L. 112-9 of the CRPA, which affirms that “when it has set up a teleservice reserved for the performance of certain administrative procedures, an administration is regularly contacted electronically only through the use of this teleservice”. La Cimade had challenged the Prime Minister’s refusal to modify the implementing decree for this text.¹³ She criticized him for not having specified the optional nature of the digital referral to the administration. The administrative judge considered that the purpose of the contested decree was not to make the use of a teleservice compulsory in general, but only to allow the administration to impose its use on users wishing to enter into contact by digital means. This therefore left open the possibility of seizing the administration by the traditional route, by post or by physically going to its counter.

This decision should not be interpreted as conditioning the legality of a teleservice procedure on its optional nature. The decision is limited to considering that the decree which was challenged did not have the scope attributed to it by the applicants, which does not mean that it would have been illegal if it had had it. The plea was ineffective, that is to say incapable of influencing the legality of the decision, which does not prejudice its merits. The decision is therefore not, as was thought, “a brake on the digital transformation of the public service”,¹⁴ but a simple clarification of the scope of one rule, which does not prevent another rule from imposing the dematerialization of a procedure.

Freed from a misinterpretation of its previous case law, the Council of State provides a nuanced response to the question of the mandatory nature of teleservices. Firstly, although the prefect may, as part of his power to organise the service, propose a teleservice to users, he does not derive the power to impose it on them. This means that before the decree of 24 March 2021 came into force and, since then, for cases not covered by it, the teleservices set up in the prefectures are

optional and do not prevent foreigners from contacting the administration by more traditional means.

On the other hand, the prefect can impose a teleservice on users who wish to contact him electronically. This point is not directly addressed in the decision or the commented opinion, but it follows from certain solutions they provide. Since the right of citizens to contact the administration electronically authorizes the public authorities to impose the use of a teleservice for this purpose, it seems obvious that they can do so when the user can’t assert any rights, as is the case for foreigners. In other words, as long as the administration is not required to propose a means of contacting it digitally, it must remain free, if it does so, to organise the arrangements for this contact as it wishes, including by imposing the use of a teleservice.

Above all, the administrative judge considers that there is no principle that requires citizens to be free to choose their method of contact with the administration. This position should not come as a surprise, as the Council of State had adopted an identical solution with regard to the procedures for registering applications before the courts and ruled that “no principle of administrative litigation procedure, nor any legislative provision, requires that applicants be given the option of bringing an application directly before an administrative court”.¹⁵ It was at the time of the obligation to address his request by mail rather than directly to the registry, the reasoning is perfectly transposable to digitisation and indeed has not failed to be so.

It follows that by adopting a special text, the Government can impose on users the use of a teleservice in their procedures, “in particular to request the issuance of an authorization”.¹⁶ However, it is precisely the object of the contested decree to force the use of digital services. The decision therefore marks the possibility of a new impetus for the digitisation of public services by allowing, in principle, the elimination of all physical or epistolary contact between users and the administration. Naturally, such a possibility cannot be envisaged without being accompanied by a certain number of guarantees.

autres, n. 422516; note A. Sée, *Le recours aux téléservices ne peut être obligatoire*, in *Droit administratif*, n. 7, 2020, 49.

¹³ Decree n. 685, 27 May 2016, authorizing teleservices aimed at implementing the right of users to contact the administration electronically.

¹⁴ A. Sée, *Le recours aux téléservices ne peut être obligatoire*, 49.

¹⁵ Council of State, 18 March 1988, *Association “ France Terre d’Asile ”*, n. 66807.

¹⁶ Council of State, 3 June 2022, *La Cimade et autres*, n. 452798.

3. The restriction of the digitisation of the administration of foreigners

Administrative case law is permissive, but it offers citizens certain guarantees. On the one hand, it prevents the digitisation of the administration from resulting in the exclusion of certain categories of citizens (3.1.). On the other hand, it imposes on the administration a certain number of obligations to ensure that the digitisation of the public service does not lead to a reduction in the level of service offered to users (3.2.).

3.1. The obligation to provide alternative means

The decision of 3 June 2022 specifies that “the regulatory power can only enact such an obligation on the condition of allowing users normal access to the public service and guaranteeing the persons concerned the effective exercise of their rights. It must consider the purpose of the service, the degree of complexity of the administrative procedures in question and their consequences for the interested parties, the characteristics of the digital tool implemented as well as those of the public concerned, in particular, the case where appropriate, of his difficulties in accessing online services or in their use”.

This solution is consistent with the idea that users have the right to access the public service under normal conditions. The administrative case law on this issue is not the densest, but it shows some consistency. Already in 1911, the Council of State censured, under the angle of the fault, a post office which had closed during its opening hours.¹⁷ As the rapporteur public pointed out, the principles of continuity of public service and equal treatment lead to the prohibition of unreasonable restrictions on access to public services. The administrative judge thus conditioned the adaptation of certain services on Saturdays, such as a post office¹⁸ or a library,¹⁹ to the absence of abnormal restrictions on user access.

More recently, the administrative judge has shown concern for preserving a certain level

of accessibility to users. In a decision *Commune de Saint-Méen-le-Grand* of 1 October 2018, it ruled, with regard to the closure of a local treasury, that “the regulatory power could legally take into account, in particular, the criterion of the level of activity of the accounting posts that it planned to restructure, it had to combine it with other requirements, in particular the accessibility of public services and equal access for users to these services”.²⁰ The decision is interesting in that it justifies the reduction in the level of activity of the service by the development of digitised procedures and ensures that, despite the elimination of the treasury, citizens do have access to a physical counter in a perimeter reasonable geography. As we can see, the Council of State’s decision is the extension of well-established case law that it was very easy to transport to the field of digitisation of public services.

Moreover, the administrative judge had already ruled out the possibility for a university to organize a selection procedure based on the order of connection to a digital service – the Minitel – “in view of the conditions of telematics and computer equipment of the interested parties, the technical connection possibilities and the resulting differences in the conditions for routing their calls to the university’s telematics server”.²¹ The opinion is very interesting in that it does not exclude in principle the use of a dematerialized process, nor even the obligation to use it, but surrounds this use with conditions which, when they are not met, require the administration to provide alternative methods. The decision of 3 June 2022 is a continuation of this solution.

It is interesting that an identical balance has been sought by the European Court of Human Rights, which, in a judgment of 9 June 2022, condemned France for having imposed disproportionately the use of digitisation for the referral judicial courts.²² The reasoning followed by the Council of State is therefore part of a logic that is not unknown to European law, which should not come as a surprise.

Naturally, the point of balance between

¹⁷ Council of State, 3 February 1911, *Anguet*, n. 34922.

¹⁸ Council of State, 25 June 1969, *Vincent*, n. 69449; note R. Denoix de Saint-Marc, J.L. Dewost, *Chronique générale de jurisprudence administrative française*, in *Actualité juridique droit administratif*, 1969, 334.

¹⁹ Council of State, 26 July 1985, *Association “Défense des intérêts des lecteurs de la Bibliothèque Nationale”*, n. 50132.

²⁰ Council of State, 1 October 2018, *Commune de Saint-Méen-le-Grand*, n. 404677.

²¹ Council of State, 15 January 1997, *M. Gouzien*, n. 182777.

²² European Court of Human Rights, 9 June 2022, *Xavier Lucas versus France*, n. 15567/20.

digitisation and the guarantee of access to the public service cannot be the same in all cases. From this point of view, the rapporteur public noted that foreigners, although they certainly do not constitute a homogeneous category, form a group which is more sensitive to changes in the public service, considering, notably an insufficient command of the language. This situation is reinforced by the complexity inherent in contemporary foreigner's law, which "has become a law for experts, [whereas] foreigners are not".²³ It follows that the administration must, on the one hand, provide support for foreigners who encounter difficulties in using the digital service offered and, on the other hand, provide a means of substitution when this support is not sufficient to guarantee them access to public service.

The first point did not present much difficulty in this case since the decree itself provided for support. Article R. 431-2 of the CESEDA, which results therefrom, provides that "persons who are not in a position to carry out the online filing of their application benefit from a welcome and support allowing them to complete this formality". This support takes the form of a call center as well as the creation, in the prefecture, of a reception point to help foreigners complete their formalities on the teleservice. Beyond the obvious shortcomings of this system – in particular the fact that the reception points are often only accessible by appointment, made on the internet – this guarantee, which is necessary, is sometimes insufficient.

There are indeed cases in which the digital tool does not meet the expectations of users because their situation is too specific to be processed automatically. The rapporteur public indicated, for example, that the teleservice in question did not manage changes of status, which are however common in foreigners law. By the way, administrative justice had already noted the shortcomings of this type of website.²⁴ Certainly, there are cases in which "digital interaction cannot completely replace human interaction".²⁵ In

this situation, it is important that the administration provides, on a subsidiary basis, a means for foreigners to access the public service and to be able to register their request.

No means of substitution being provided for by the contested decree, the Council of State canceled it insofar as it did not provide for alternative methods of referral. This solution, which must be supported in that it makes it possible to promote the development of digital tools while preserving the very essence of public service, contributes to perfecting the legal regime for the dematerialization of public services, which case law had already begun to build.

3.2. The obligation to maintain a certain level of service

While they undoubtedly do not exhaust the question of the digitisation of the administration of foreigners, the decision and the commented opinion are also the culmination of a whole jurisprudential movement born of the recent development of a dispute over digitisation. Faced with the difficulties arising from the dematerialization of administrative procedures for foreigners, the administrative judge has sought to circumscribe the disadvantages.

The administrative judge has, for several years, frequently been seized of the refusal of appointments opposed to foreigners by the teleservice with which they are supposed to register. In a decision *M. Bhiri* of 10 June 2020,²⁶ the Council of State considered, about a foreigner who had unsuccessfully asked to be received, that it "is incumbent on the administrative authority, after having fixed an appointment, to receive him at the prefecture and, if his file is complete, to register his request, within a reasonable time". The conclusions of the rapporteur public let it be understood that the administration could not reasonably leave the foreigner without an answer for more than a month "access to public service, which itself conditions here access to rights, cannot be altered by referring the user to a faulty computer system".²⁷ The decision of the Council of State is even more demanding since it allows the foreigner to obtain an injunction from the judge if he testifies to several attempts "not having been

²³ L. Domingo, *Téleservice public : institution et fonctionnement - Le cas des demandes de titre de séjour des étrangers*, in *Revue française de droit administratif*, 2022, 761.

²⁴ Council of State, 18 February 2022, *Mme D.*, n. 455740.

²⁵ D. Charbonnel, *Une relecture des lois du service public*, PHD thesis, University of Limoges, Limoges, 2018, 474.

²⁶ Council of State, 10 June 2020, *M. Bhiri*, n. 435594.

²⁷ M. Le Corre, *Opinion on Council of State*, 10 June 2020, *M. Bhiri*, n. 435594, in www.conseil-etat.fr.

carried out in the same week”.

Jurisprudence has also been confronted with the related problem of foreigners for whom an appointment is fixed, but at a date too distant for the renewal of their permit to take place before its expiry. From this point of view, the dematerialization of procedures takes the user away from the public service, but it also takes the administration away from the decision that is taken. The administrative judge considered that the decision to set an appointment for a foreigner on a specific date did not reveal the refusal to place him on an earlier date.²⁸ The rapporteur public considered that, since the decision had been taken by an algorithm, its scope could not exceed the scope of the foreigner’s request.²⁹ In other words, the administration can take decisions digitally without having an exact awareness of their scope and without, what is more serious, having to assume the consequences from a legal point of view. Except in an emergency, it is therefore up to the foreigner who wishes to obtain an appointment at an early date to make a request to the administration, then to wait for the algorithm’s response indicating a specific date, then to ask the administration to bring this appointment forward, then to contest the possible refusal before the judge. The digitisation of procedures is not always a guarantee of simplification.

²⁸ Council of State, 1 July 2020, *M. et Mme Labassi*, n. 436288; note G. Éveillard, *Le statut contentieux de la convocation des étrangers en préfecture en vue du dépôt d'une demande de titre de séjour*, in *Droit administratif*, n. 11, 2020, 44.

²⁹ G. Odinet, *Opinion on Council of State*, opinion, 1 July 2020, *M. et Mme Labassi*, n. 436288, in www.conseil-etat.fr.