
OPINION

of 14 October 2011

of the Inspector General of places of deprivation of liberty

on the use of video conferencing vis-à-vis persons deprived of liberty

1 - Respect for the rights of the defence during court proceedings, in a disciplinary action or any formality affecting the exercise of a fundamental right is a cardinal principle of the fair trial derived from Article 16 of the Declaration of the Rights of Man and the Citizen of 1789. It presupposes, in criminal proceedings especially, for the person whose “case must be heard”, the possibility of submitting his observations, consulting the case file, being defended by counsel, and being able to lodge an appeal against the decision taken. It materialises in “the existence of just and equitable procedure ensuring balance of rights and parties” according to the formula consistently reiterated by the Constitutional Council and since 2000 incorporated into the preliminary article of the Code of Criminal Procedure: “Criminal procedure must be fair and adversarial, and preserve the balance of the parties’ rights”.

Preservation of balance between the parties in criminal proceedings is indeed one aspect of the rights of the defence. According to the European Court of Human Rights, it is a matter of guaranteeing that “every party to civil proceedings should have the opportunity to present his case to the court in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party” (ECHR, 27 October 1993, *Dombo Beheer B.V. v/ Netherlands*, Series A No. 274).

It is also a matter of the accused’s being able to participate genuinely in the proceedings; in the context of a trial, he must be able firstly to attend the hearing, and secondly to understand what happens there.

2 - These principles have no absolute effect, however. Other considerations such as security or proper administration of justice are also material.

3 - International conventions thus acknowledge the possibility of using video conference: the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters contemplates the possibility of hearing a witness or an expert from one state to another via this technical device. The European Court of Human Rights for its part has countenanced the use if it were necessitated by “legitimate aims under the Convention”, namely, prevention of disorder, prevention of crime, protection of the right to life and liberty and the safety of witnesses and victims, together with the “reasonable time” requirement in judicial proceedings (ECHR, 5 January 2007, *Marcello Viola v/ Italy*, No. 45106/04, para. 72).

4 - France makes use of video conferencing in a number of instances that now concern, firstly, places of deprivation of liberty for foreigners, secondly psychiatric hospitals, and finally criminal procedure, including execution of sentences.

With regard to places of deprivation of liberty for foreigners, it is prescribed that the intervention of the ordinary court, whether to extend the stay in a holding area of a foreigner without the necessary documents to enter France or to extend the administrative detention of a person subject to an expulsion measure, may take the form of exchanges by way of audiovisual telecommunications. Articles L.222-5 (as to the holding area) and L.155-12 (as to administrative detention) of the Code governing foreigners' entry and residence and the right of asylum make this process subject to threefold condition that there be a request for that purpose by the administrative authority (the prefect), that the foreigner, duly informed, has not objected to it, and that transmission is confidential.

For care without consent involving hospitalisation, whose termination or continuation is subject to examination by the judge supervising releases and detention, the judge may hold court in a suitably equipped room of the hospital or have the patient placed there and communicate with him via audiovisual telecommunications. Article L.3211-12-2 of the Public Health Code makes their use subject to two requirements: a medical opinion certifying that the procedure is compatible with the person's condition, and no objection on his part.

The same applies in the numerous eventualities of criminal procedure, particularly (Articles 706-71, 712-6, 712-13 of the Code of Criminal Procedure) to the examination or questioning of a person (chiefly one held by an examining judge) or of several persons to compare their testimony, for the hearing prior to the remand in custody of a person already held in connection with another case, for the extension of remand, for a person's examination before the police court or magistrate's court when already held in connection with another case, for adversarial hearings conducted by the judge supervising the application of sentences and the court for application of sentences, and appeals brought before the bench for the enforcement of sentences. In contrast to the foregoing cases, the choice of video conferencing scarcely carries conditions. The Code provides that it may be made "where justified by the needs of the inquiry and the preparatory proceedings", which is tantamount to giving the investigator or the judicial authority wide discretion. However, the text says nothing about the conditions which might apply to the other uses which it permits. The only protection which it contemplates is to guarantee the confidentiality of the exchange between the person and his lawyer, if any and if at a distance.

Two points should be added.

A provision of the Judiciary Code allows the presiding judge of any trial court, in all other cases than those specified above, to order that the hearing be held concurrently in several rooms linked by audiovisual telecommunications. No other conditions are laid down but the agreement of all parties to do so and the presence of the public in all court rooms thus opened.

Video conferencing is employed for asylum requests made by foreigners subject to a measure of administrative detention. The asylum request procedure in fact provides that the applicant is heard by the French Office for the protection of refugees and stateless persons (OFPRA), except in specific cases (Article L.723-3 of the Code governing foreigners' entry and residence and the right of asylum). A foreigner not corresponding to any of these specific cases must be heard. Video conferencing is used for this purpose where the detention centre is equipped with it, moreover without any statute circumscribing this practice to date.

5 - Several circumstances suggest that video conferencing may develop very significantly in the future.

In the first place, various ministerial instructions have recommended its development, relying essentially on the expediency of avoiding "extractions" (displacements) of persons deprived of liberty.

In the second place, it is true that these extractions generally require the use of officers of the security forces in strength, and above all for protracted periods. The economies sought

in the use of these forces, as part of the general revision of official policies, naturally prompt an effort to reduce extractions.

In the third place, where persons in detention are concerned, recent decisions assign responsibility for judicial extractions to the staff of the prison administration. The experimentation in progress may be expected to demonstrate the expediency of holding video conferencing on more occasions, rather than resort to extractions with limited staff numbers.

In the fourth place, the recent Act of 5 July 2011, concerning psychiatric treatment without consent, opened a new area of court intervention which is to prove significant in terms of volume (some 84 000 measures of hospitalisation without consent before the reform). Having regard to the congestion of the courts, efforts of productivity will have to be made. Use of video conferencing is one possible aspect of this.

In the fifth place, under the same reform of detention on remand, the multiplication of procedures and the growth in their volume lead to the overloading of barristers, particularly those acting as officially appointed defence counsel. In legal professions of small or average numbers, it will be materially impossible for the barristers to cope with all the attendances expected of them in places sometimes distant from the chief towns. There too, more time-saving will be necessary, and video conferencing is an instrument of it.

Consequently, for a number of apparently unarguable reasons inferred mainly from practical necessities, video conferencing is destined to develop.

6 – Injudicious development of such technology carries the risk of interfering with the rights of the defence.

In certain cases, video conferencing can assist these rights. Indeed, this way of operating can, where a person's appearance in court is obviously difficult, obviate the judge's postponing the case (thereby extending the time limits) or even deciding to rule without hearing the person summoned to appear. In such instances, it is beneficial.

In many other cases however, video conferencing weakens the rights of the defence in that it eliminates the party's physical presence which is also a means of expression (all the more because many persons charged have great difficulty with their oral expression). It presupposes ease of expression in front of a camera or console and equality of persons in that respect, which are by no means assured, particularly for those who suffer from mental afflictions. Where the person has the benefit of counsel, the lawyer is compelled to choose between standing near the judge (which is done in the majority of cases) or staying close to the client: contact with either is thereby inconvenienced and the counsel's job made more difficult. Technical contingencies can aggravate the difficulties (showing a document, protesting an exhibit...).

While the use of video conferencing is a sometimes unavoidable palliative, it is not to be regarded as an unconditional facility. In order to safeguard the fundamental right held by all to make their defence, it is consequently necessary that the use of this technique, with persons deprived of liberty, be subject to perfectly clear conditions, common to the situations with which persons deprived of liberty may meet, a first approximation of which may be provided by the following principles.

7 – There can be no video conferencing without a statute that institutes it and establishes the conditions under which recourse may be had to it. In particular, even if the asylum request procedure is not judicial it constitutes, even for a foreigner in administrative detention, the exercise of a fundamental right. It is therefore desirable that a legislative provision should govern recourse to audiovisual telecommunications, today purely discretionary. The advent of such a statute is all the more necessary considering that purely factual questions predominate in this field.

8 – Video conferencing cannot be used in proceedings unless the informed consent of any plaintiff or defendant in the proceedings has been obtained. This is the case particularly in matters regarding entry and residence of foreigners, psychiatric treatment without consent, those specified in Article 706-71 (4) of the Code of Criminal Procedure and in the procedures for adjustment of penalties.

If the person is not in a condition to give consent, the agreement of another responsible individual selected outside the administration having charge of the person, where deprived of liberty, must be obtained. For foreigners not proficient in French, an interpreter must be made available before obtaining their consent.

In cases where the person has been able to choose a lawyer (apart from officially appointed counsel), the latter can supplant the client in the agreement to be given beforehand.

9 – Even where the person's agreement to it is secured, the judicial or police authority must be able, in the actual course of proceedings, to decide against the use of video conferencing of its own motion or at the request of the person or of his/her counsel, if such use is shown by the facts of the case or by any other circumstance to be liable to impair their discernment, if the examination of the case requires a hearing in the presence of the person concerned, if a technical difficulty has arisen, or if the confidentiality of the means of transmission is not certified.

10 – Where proceedings are public, the courtrooms needed for audiovisual telecommunication must without exception be open to the public. Where not public, confidentiality must rather be ensured. In particular, a record of both parties' submissions, drawn up by a person authorised to do so by whoever issues the decision, must certify retrospectively that the admission of the public was made possible or, conversely, that the staff responsible for the custody of the person deprived of liberty did not intervene in the proceedings on any account; it must mention the general conditions under which the operation was carried out.

11 – In every case, it must be ensured that counsel (or any third party, if authorised to act in defence) is present and, if not present, must at all times be able to confer with the person on trial with guaranteed confidentiality. The aforementioned record must establish this.

12 – In matters to be determined where factual questions (particularly of evidence) outweigh strictly legal questions, or where the character or the explications of the person concerned are a decisive factor in the decision to be taken.

On the other hand, video conferencing must be possible in a very general way for hearings of a purely formal or purely legal nature.

At all events, there can be no obligation to employ video conferencing, except in the following three (alternative) circumstances, which a legislative text should settle: if counsel could not otherwise assist the person concerned; if a hearing with the person present is liable to pose a serious and documented threat to public order, particularly the physical integrity of the person appearing, of third parties, of victims or of witnesses; finally, if it constitutes the sole means of complying with the reasonable time within which the procedure must be completed.

13 – The savings made on extraction costs or the difficulties of marshalling the necessary escorts do not in principle constitute adequate grounds for resorting to video conferencing.

14 – Whatever the circumstances of its use, the decision to employ video conferencing must be taken case by case and solely by the authority holding responsibility for the proceedings and for the decision. As provided by the Public Health Code for psychiatric treatment without consent, it must be linked with the possibility for the judge, where the person to appear cannot be moved, to resort to an external hearing. This must be conceived, far more so than video

conferencing, as an alternative to the hearing in court where the situation precludes transport for appearance.

These are the considerations that should guide a policy yet to be determined, which cannot be the upshot of immediate necessities.

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