Meijers Committee
STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW
[redacted]

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Meijers Committee
Standing committee of experts on international immigration, refugee and criminal law

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Dear Members of the LIBE Committee,

In view of ongoing negotiations on the recast of the Visa Code, the Meijers Committee prepared attached note regarding adequate legal protection and effective remedies in situations of consular representation.

As always, we remain at your disposal for questions and comments.

Identical letters were sent to the Commission, the General Secretariat of the Council and the Permanent Representations of the Member States.

Sincerely,

Professor Theo de Roos,
Chairman

Draft amendments to the Proposal on the Visa Code (recast, COM(2014) 164 final) in order to safeguard the right to an effective remedy in cases of representation

Introduction

Quick and accessible procedures for the review of refusals of short-stay visa are a necessity for an effective Visa Code, as the goal of a short visit (a conference, marriage, burial ceremony, holiday) often becomes obsolete if the appeal procedure takes too long or is too hard to start. This means that the applicant must be unambiguously informed about where and how to lodge an appeal and that the appeals are conducted expediently. Ineffective remedies will hamper the realization of the objectives of the Visa Code, namely to facilitate legitimate travel and to combat irregular migration. Under the present Visa Code (Regulation 810/2009), the possibility for Member States to authorize other Member States to take a final decision on their behalf on visa applications has created serious obstacles to effectively remedy wrongful refusal decisions. The proposal for the recast (COM(2014) 164 final) does not address this problem. In fact, if the present text is adopted without the amendments proposed in this note, things may become even worse, as the number of problematic cases is very likely to increase once representation becomes mandatory.

Article 32 of the Visa Code of 2009 is ambiguous as to in which Member State the appeal against a visa refusal should be lodged in case the Member State of destination is represented by another Member State. Different views exist regarding the Member State in which an applicant may file his or her appeal against a visa refusal by the representing Member State on behalf of the represented Member State. There is case law in at least two EU Member States establishing that visa applicants whose visas are refused by a representing Member State cannot appeal against this refusal in the represented Member State.[1] This case-law is apparently influenced by the visa handbook, which states that "possible appeals should be conducted against the representing Member State that took the final decision to refuse the visa."[2] However, the Handbook is not a binding instrument and Article 47 of the Charter takes prevalence. Nevertheless, there are strong indications that most other Member States adopted the approach of the Handbook too.

Consequently, the applicants are refused access to administrative and judicial remedies in their destination Member State. The national courts and administrative authorities of those states refer applicants to the judicial authorities of the representing Member State. Most applicants, however, will experience serious problems in accessing authorities in the latter Member State, since they have no family members, business relations or other contacts in that State, which in the vast majority of cases are essential in finding the necessary legal representation and overcoming language barriers in order to access the remedies in that State.

[1] District Court The Hague 3 April 2013, Nr AWB 12/34042, LJN: BZ9579; District Court The Hague (session in Roermond) 9 December 2011, Jurisprudentie Vreemdelingenrecht 2012/67; LJN: BU8367; District Court The Hague 24 April 2013, AWB 12/30040, Jurisprudentie Vreemdelingenrecht 2013/212, LJN:BU8367; Afdeling Bestuursrechtspraak Raad van State 26 November 2012, 201110052/1/V2, Jurisprudentie Vreemdelingenrecht 2013/40. In Belgium, see the inadmissibility decision of the Immigration Appeals Court (Raad voor de Vreemdelingenbetwistingen), 28 September 2010, nr. 48646.

[2] Commission Decision of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas, p. 82.

A recent example may illustrate the practical and legal barriers: an English speaking Nigerian citizen filed an application for a visa for the Netherlands with the French consulate in Lagos, who represents the Netherlands in visa matters. The applicant intended to visit his brother living in the Netherlands. He visited his brother in 2009 and his timely return to Nigeria was certified by the Dutch Embassy. However, this time the visa was refused. The applicant's brother was told by the French Consulate in Amsterdam that he should contact the French representation in Brussels for more information on the appeal procedure. He travelled to Brussels and at the French Embassy he received oral information that he should file an appeal with the Dutch authorities against the refusal decision. He contacted a Dutch lawyer in Amsterdam who filed an appeal in English with the French authorities and asked for information on the procedure in France. The lawyer also filed an appeal in Dutch with the Dutch authorities. The French authorities declared the request for a review inadmissible because the request, according to French law, had to be in the French language. The refusal decision issued by the French consulate in Lagos to the applicant was in the English language only. That decision did not mention that an appeal had to be filed in the French language. Neither the applicant nor his brother speak or read French. A Dutch lawyer cannot reasonably be expected to write a reasoned appeal in a short time in the French language or have knowledge of French procedural rules. Having the documents translated and obtaining information from a third party in France would have been costly and protracted.

Moreover, the judges in the representing Member State do not have access to the necessary information on the situation in the Member State of destination. In the above example it will require far more effort to overcome the practical and language barriers for a court in France to gain access to reliable information from the relevant Dutch authorities on the behavior of the applicant during a previous visit or on the situation of his brother in Amsterdam or on any possible security risk in the Netherlands than for a Dutch court. This seriously limits the scope and intensity of the judicial review by the national court of the representing state, provided that the applicant would succeed in gaining access to that court at all.

Legal framework

The Commission proposal on the recast Visa Code does not solve this problem. The proposed Article 39 of the Visa Code is unclear with regard to the Member State in which the appeal should be made when there is an agreement on representation in visa matters between two Member States. Such a conspicuous insecurity of law is unacceptable. The Visa Code should provide clarity in this respect.

The application of the EU Visa Code is covered by the EU Charter on Fundamental Rights, including Article 47, which protects the right to effective judicial protection, and by the general EU law principle of effectiveness. Since Article 32 of the Visa Code provides a right to appeal against decisions regulated in the Visa Code, Member States and the Union legislator should ensure, rather than hamper, the effectiveness and practical accessibility of this right. In various judgments, the Court of Justice of the EU has emphasized that the scope of protection of Article 47 Charter extends to third-country nationals whose legal position is regulated by EU law, even if they have not (yet) been issued a permit to stay.[3] Considering both the implementation of the current text of the Visa Code and the absence of clear provisions in the proposed recast Visa Code, the right to effective judicial protection of visa applicants is not adequately safeguarded.

[3] CJEU *Mohamad Zakaria*, 17 January 2013, C- 23/12; *M.M. v. Minister for Justice, Equality and Law Reform*, C-277/11, 22 November 2012, C-277/11.

The Meijers Committee is of the opinion that the Visa Code should clarify that the Member State which is the visa applicant's destination, the competent Member State under Article 5 of the Visa Code, is responsible for offering an effective remedy to the applicant even when the final decision on the application is taken by another representing Member State. It is the view of the Meijers Committee that this is the simplest way to resolve the current problems, while allowing Member States to comply with their obligations under Article 47 of the EU Charter of Fundamental Rights. The Meijers Committee therefore invites the Council and the Parliament to enter two amendments on the proposed recast of the Visa Code on legal protection in cases where Member States represent each other in the processing of visa applications.

Reasons for the proposed amendments

The understandable wish of Member States for cooperation and representation in order to reduce administrative costs should not result in a reduction of the fundamental rights of persons to full and effective judicial remedy in case a visa is refused. The Meijers Committee considers the most simple and comprehensible solution to designate the represented Member State – which is the Member State that is the journey's planned destination – as the competent Member State to hear the appeal. Even if the representing Member State has been authorized to take a final decision on the visa application, the represented Member State must keep the responsibility for subsequent review proceedings.

According to the Meijers Committee there are a number of good reasons for adopting this solution:

1. **Consistency and simplicity:** A clear, binding, and precisely defined rule on which national court is competent to assess decisions which are taken by one state on behalf of the other state, will reduce the risk of doubts on where to lodge an appeal and of a differentiated implementation of the Visa Code.

2. **The destination Member State is always the competent and responsible Member State:** Usually, the relevant contact persons of the applicant (family members, conference organizers, or others who invited the third country national to travel) are present in the Member State of destination. They may be both the primary interested parties and the primary providers of relevant information. They may be in a better position to engage legal advisers. The visa applicants and sponsors will experience far less language and other practical barriers in communicating with authorities of the destination Member State, than with authorities of the representing Member State. These contact persons may be confronted with practical problems and high costs if they are compelled to go to another Member State or engage legal advisers there to find redress. The proposal is also in line with the general principle in EU law, that in case of representation of one Member State by another, the represented Member State remains responsible for its acts or policies.[4]

3. **Courts and administrative authorities in the destination Member State are better informed and better able to deal with appeals in these cases than the courts and authorities of the representing Member State.** As has been underlined by the Court of Justice of the European Union (CJEU) in the *Koushkaki* case of 19 December 2013 (C-84/12), Member States have a wide discretionary power with regard to the decision making in the visa application process. While the representing state refusing a visa will take into account the national criteria or interests of the represented state, the administrative courts of the

[4] See Articles 121 (4), 126 (13), 139 (4) and 235 (1) TFEU.

representing state are not capable, or will not consider themselves empowered to review whether that decision on behalf of another state is in accordance with the law of that state, or to strike a balance between the interests of that state and the visa applicant.

4. **This solution is in conformity with the aims of the Visa Code:** the CJEU in a judgment of 4 September 2014 in the Air Baltic case (C-575/12) reminded us that, according to its preamble no. 3, the Visa Code aims at facilitating legitimate travel and tackling illegal immigration. Making access to appeals against the refusal of a visa very difficult or practically impossible does not contribute to the realization of these aims.

5. **Furthermore, it is necessary that the right to appeal is safeguarded in cases where an applicant, whose visa application is rejected by the representing Member State, makes the mistake of lodging an appeal in the wrong Member State.** The current text of the Standard Form for Notifying and Motivating Refusal, Annulment or Revocation of a Visa (Annex V) does not offer the applicant detailed reasons for the refusal. Although a remark mentions that the applicant has the right of appeal and that the Member State should inform the applicant of this right of appeal, including the competent authority with which this appeal may be lodged, this is not, like the other required information in the refusal form, explicitly included as a separate bullet. This entails the risk that applicants are not provided which the same rights of appeal or information on the applicable procedures in each Member State. The lack of effective remedies in some Member States, as required by the Visa Code, was recently addressed by the European Commission in its reasoned opinion to the Czech Republic, Estonia, Poland and Slovakia, urging these countries to take the necessary actions to ensure that the right to appeal against decisions to refuse, revoke or annul a visa, includes access to judicial authorities (Memo 14/589, 16 October 2014).

6. **There is no cause for disputes as to which Member State is responsible for processing an asylum application under the Dublin Regulation: the represented state.** Article 12 (2) of the recast Dublin Regulation 604/2013 explicitly provides that the represented Member State on behalf of which a visa has been issued will be responsible for the application for international protection, and not the issuing state.

7. The Meijers Committee therefore suggests the inclusion of a provision in the Visa Code according to which such an appeal, if made within the prescribed term under the national law of the representing state, is considered and dealt with as a timely appeal in the represented Member State, being the competent Member State. **It is necessary that such a provision be laid down in EU legislation, as the individual Member States lacks the legal competence to include such a trans-border provision in their national legislation.**

Suggested amendments to Articles 29 and 39 of the recast proposal (underscored between square brackets)

Article 29

Refusal of a visa

3. Applicants who have been refused a visa shall have the right to appeal. Appeals shall be instituted 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 ensure that their national appeal procedures in visa cases are swift and easily accessible. A written indication of contacts able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.] Member States shall provide applicants with detailed information regarding the procedure to be followed in the event of an appeal, as specified in Annex V.
[4. In case where a Member State is represented by another Member State in accordance with the provisions in Article 5 or 39, the represented state is considered as the Member State taking the final decision as provided in paragraph 3.

Explanatory note to the amendment of Article 29:
The addition of a new paragraph 3 obliges Member States to secure swift and easily accessible appeal procedures.
The addition in paragraph 4 clarifies and ensures that in the case of representation arrangements, the represented state is responsible for final decisions on visa applications, including visa refusals. Therefore, in accordance with Article 29 (3), legal remedies against this refusal should be submitted to the authorities of that represented state.

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Article 39

Representation arrangements

1. A Member State may agree to represent another Member State that is competent in accordance with Article 5 for the purpose of examining applications and issuing visas on behalf of that Member State. A Member State may also represent another Member State in a limited manner only for the collection of applications and the enrolment of biometric identifiers.
2. Where the representation is limited to the collection of applications, the collection and transmission of files and data to the represented Member State shall be carried out in compliance with the relevant data protection and security rules.
3. A bilateral arrangement, [the text of which shall be made publicly available according to the national law of the represented Member State], shall be established between the representing Member State and the represented Member State. That arrangement :
(a) shall specify the duration of the representation, if only temporary, and the procedures for its termination;
(b) may, in particular when the represented Member State has a consulate in the third country concerned, provide for the provision of premises, staff and payments by the represented Member State;

[4. If the representing Member State refuses a visa on behalf of a represented Member State on the basis of a representation arrangement, the provisions in Article 29 (3) and (4) apply.
5. An appeal lodged in the representing Member State within the term laid down in the legislation of that Member State, shall be treated by the represented Member State as a timely appeal in accordance with the legislation of that Member State. The authorities of the representing Member State will without delay forward the appeal to the competent courts or authorities competent under the law of the represented Member State.]
6. Member States lacking their own consulate in a third country shall endeavour to conclude representation arrangements with Member States that have consulates in that country.
7. With a view to ensuring that a poor transport infrastructure or long distances in a specific region or geographical area do not require a disproportionate effort on the part of applicants to have access to a consulate, Member States lacking their own consulate in that region or area shall endeavour to conclude representation arrangements with Member States that have consulates in that region or area.
8. The represented Member State shall notify the representation arrangements or the termination of such those arrangements to the Commission at least two months before they enter into force or are terminated.
9. The consulate of the representing Member State shall, at the same time that the notification referred to in paragraph 6 takes place, inform both the consulates of other Member States and the delegation of the European Union in the jurisdiction concerned about representation arrangements or the termination of such arrangements before they enter into force or are terminated.
10. If the consulate of the representing Member State decides to cooperate with an external service provider in accordance with Article 41, or with accredited commercial intermediaries as provided for in Article 43, that cooperation shall include applications covered by representation arrangements. The central authorities of the represented Member State shall be informed in advance of the terms of such cooperation.

Explanatory note to the amendment of Article 39:
The addition in paragraph 3 ensures the transparency of representation arrangements, informing visa applicants planning to travel to one Member State that their visa applications will be conducted, or the information necessary for this application will be processed, by other Member States on behalf of the destination Member State according to the rules of the Visa Code.
The new paragraph 4 clarifies that with regard to representation arrangements, the rules in Article 29 (3) and (4) on the responsibility of the represented state and the right to appeal in the represented state, apply in the situation where a visa has been refused on behalf of the represented state.
Paragraph 5 safeguards the right of appeal and the applicable time limits of the visa applicant and obliges Member States to submit their appeals without delay to the competent authorities of the represented state, if a visa applicant erroneously lodges his/her appeal in the representing state.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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