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

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To (by email) Ms Cecilia Malmström
Commissioner for Home Affairs
European Commission
B-1049 BRUSSELS

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Regarding Response Meijers Committee to the Open Consultation- Improving procedures for obtaining short-stay 'Schengen' visas
Date 17 June 2013

Dear Commissioner Malmström,

In response to the open consultation by the European Commission on the improvement of procedures for obtaining short- stay 'Schengen' visas, the Meijers Committee would like to draw attention to Dutch jurisprudence on some issues of competence, responsibility and representation in the processing of visa applications under the Visa Code.

From these judicial decisions it appears that the Visa Code raises complicated questions between Member States on the access of the individual applicants to effective remedies against the refusal of a visa, which in our view should be answered at EU level. As yet these topics are only dealt with by national courts of Member States. These judgments do not bind national courts in other Member States. The result is legal uncertainty affecting both the applicants and the Member States.
In the following, the Meijers Committee discusses three cases illustrating this.

Case 1

In a recent case before the Dutch District Court The Hague[1] the question arose as to whether the Belgian consulate in Abuja, Nigeria, was competent to refuse a visa application on behalf of the Netherlands. This came up in a procedure against the Belgian decision before a Dutch court as the applicant stated that the Netherlands had remained the only competent State under Article 5 of the Visa Code. The question was, inter alia, whether the Dutch or the Belgian judiciary should be addressed in this case.

According to Article 8 Visa Code, 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. According to the second paragraph of that provision, the consulate of the representing Member State shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application. However, under the fourth paragraph of Article 8, under d, a Member State may, by way of derogation from paragraph 2, authorise the consulate of the representing Member State to refuse to issue a visa after examination of the application.

The Dutch District Court asked the Dutch Government for the text of the bilateral agreement between the Netherlands and Belgium on this matter. The Government stated however that the agreement was confidential and might only be read by the Court without disclosing the content to the other party. The Court studied the secret text and concluded that there was no evidence that the Belgian consulate was competent to independently issue a negative decision on behalf of the Netherlands.

The Dutch court referred the applicant to the Belgian courts to challenge the decision because the decision *de facto* was made by the Belgian consulate. However, the Belgian courts are not bound by the views of their Dutch colleagues, and there is no reason why a Belgian judge would not come to another

[1] District Court The Hague 3 April 2013, Nr AWB 12/34042, LJN: BZ9579.

interpretation of the bilateral agreement. This could result in a situation where no effective access to a court is provided, which would be in violation of Article 47 of the EU Charter on Fundamental Rights.

Case 2

In a case where the Belgian consulate in Kinshase (Congo), representing the Netherlands, refused the application of a third-country national for a Schengen visa for the Netherlands, the District Court The Hague (session in Roermond) held that the Dutch courts have no competence to deal with an appeal against a decision of a Belgian authority.[2] In a similar judgment with regard to the refusal of a Schengen visa for the Netherlands by the Belgian consulate in Abuja (Nigeria) it was held that the Dutch authorities and Dutch courts have no competence with regard to decisions of Belgian consular authorities refusing Schengen visa when representing the Netherlands. Moreover, the Dutch court held that the obligation under Dutch administrative law to refer an administrative review filed with an incompetent authority to the competent authority, does not apply in cases falling under the Visa Code.[3] The same interpretation of Dutch administrative law and (implicitly) of the relevant Union law on judicial remedies was included in the judgment in Case 1 above. Under Article 6:15 Algemene wet bestuursrecht (the Dutch code of administrative law) the administrative body or administrative court, to which an appeal is wrongly addressed, immediately should send the appeal to the competent appeal body or court. The date of issuing the appeal at the wrong address is considered the date of issuing at the correct appeal body to which the appeal is passed. Thus, the right of an effective remedy is safeguarded.

Accordingly, a third-country national living in Congo, intending to visit a family member in the Netherlands would have to file the administrative and judicial remedies against the decision to refuse the visa in another Member State than the one he wants to visit and where his family members or other sponsors live. It is obvious that this obligation creates all kinds of practical problems with regard to how the necessary information on the relevant remedies can be obtained, the language to be used and the actual access to legal aid or other forms of representation before the authorities or courts in a Member State where neither the applicant nor his family members or other sponsor reside. According to the Meijers Committee, this case law excluding the competence of the authorities and courts in the Member State represented on the basis of the Visa Code raises serious issues under Article 47 of the EU Charter of Fundamental Rights.

Case 3

According to Article 5 of the Visa Code, there is only one Member State competent for examining and deciding on an application for a uniform visa. The competent Member State is determined according to the criteria laid down in that Article.
The Visa Code contains no general rule on who may decide on competence and who decides in case of conflicting views. However, under Article 6 of the Visa Code, the decision is in practice always made by the consulates. According to the first paragraph of that Article, an application shall be examined and decided by the consulate of the competent Member State in whose jurisdiction the applicant legally resides. If a consulate decides to take the application and to issue a visa, it implicitly decides that it is competent.

In a case before the Judicial Division on Administrative Law of the Dutch Council of State[4] the question arose whether the French consulate in Turkey had been competent to issue a visa to a Turkish applicant who had misled the consulate about his plan to travel to the Netherlands for business purposes. The Dutch border authorities controlling the entry of the Turkish visa holder had telephoned the French consulate in Turkey and learned that the Turkish applicant had mentioned a different travel purpose to the French consulate when applying for a visa. What does that mean for the validity of the visa and who is competent to give the answer? The answer suggested by Article 34 of the Visa Code is that the visa should be annulled if there are serious grounds for believing that the visa was fraudulently obtained, either by the French consulate or by the competent authorities of the Netherlands. In such a case, the annulment decision could be challenged on the merits. This could be important when, for instance, two travel purposes were mentioned at the application, one in France and one in the Netherlands and there are defendable conflicting

[2] District Court The Hague (session in Roermond) 9 December 2011, Jurisprudentie Vreemdelingenrecht 2012/67; LJN: BU8367.
[3] District Court The Hague 24 April 2013, AWB 12/30040, Jurisprudentie Vreemdelingenrecht 2013/212, LJN: BU8367.
[4] Afdeling Bestuursrechtspraak Raad van State 26 November 2012, 201110052/1/V2, Jurisprudentie Vreemdelingenrecht 2013/40.

views on what the “main destination” was. For future visa applications it may be in the interest of the applicant to clear his reputation.

However, the Dutch Council of State held that such a visa simply is not valid rather than that the visa should be annulled. This judgment may have serious consequences for the actual availability of effective remedies against decisions of border guards or immigration authorities that simply declare that the visa has never been valid. Whether other courts in other Member States will take the same position is by definition unclear as national judicial decisions do not bind courts in other Member States.

Questions

From these cases it becomes clear that many related questions were at stake:

- What is the status of the assessment by the consulates of their own competence under Article 6 of the Visa Code? Should such an assessment be held valid until it is overruled by a competent authority? Which authority is competent to make such decisions?

- If a visa is granted by a consulate founding its competence on the basis of wrong information given by the applicant, is that visa then void and non-existent or is it valid till it is annulled?

- What is the legal character of “representation”? Is it a concept of Union law? Does it under all circumstances leave the final responsibility with the represented state? Or may a Member State by means of a representation agreement as meant in Article 8 paragraph 4 under d amend the competence determination scheme of Article 5 of the Visa Code, and shift responsibility/competence from the represented state to the representing state?

- Can a bilateral agreement shift the responsibility for access to an effective remedy against a refusal to issue a visa from the Member State represented to the representing Member State?

- Is such a transfer of the obligation to provide effective remedies compatible with Article 47 EU Charter of Fundamental Rights?

- Should not a clause comparable to Article 111 of the Schengen Implementing Agreement be inserted in the Visa Code and, for the time being, in the bilateral agreements on the representation regarding the issue of Schengenvisa?

- What are the responsibilities of the representing Member State vis à vis the applicant in respect to systematically informing him in writing about the legal remedies against a negative decision and on the availability of legal aid or other forms of legal representation in the representing Member State of the represented Member State? Should not a clause comparable to Article 13(3) of the Schengen Borders Code be inserted in the Visa Code?

- Is it acceptable under EU law that such bilateral agreements remain secret? Should those agreements not contain extensive and unambiguous information about legal remedies?

- What is the consequence, in terms of national judicial competence, of the assessment that the consulate of another Member State wrongly assumed competence to refuse a visa?

- What responsibility have Member States under Article 32 paragraph 3 of the Visa Code and Article 47 Charter of the Fundamental Rights of the EU to make bilateral arrangements safeguarding the admissibility of a remedy in Member State B if an applicant abusively started proceedings in Member State A (and vice versa)?

Final remarks

Some of these questions could be clarified by the Court of Justice, if it would be addressed by national courts to answer preliminary questions. However, as yet the Dutch courts did not show inclination to choose that avenue. This is highly undesirable as individuals become the victims of an apparent lack of effective and understandable solutions on how to realize their Union law right to an effective remedy. The individuals

concerned will often remain invisible, as their goal to obtain a visa for a simple short visit is normally not compatible with lengthy, complicated proceedings in a Member State where they have no contacts whatsoever.
Therefore, a legislative initiative by the Commission, seeking to effectively solve these and similar questions is needed.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,

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Chairman