Standing committee
of experts on
international immigration,
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Reference CM06-13

Regarding Proposal to amend EC Visa Regulation (EC) No. 539/2001 (COM(2006) 84 final).

Date 25 September 2006

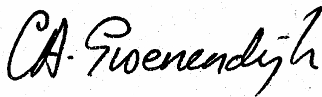
Dear Mr. FRATTINI,

Please find enclosed a Note on the recent proposal by the Commission to amend the EC Visa Regulation (EC) No. 539/2001 (COM(2006) 84 final).

The Standing Committee of Experts in international immigration, refugee and criminal law with all due respect suggests that the European Commission should seriously consider using its powers under Article 250(2) of the EC Treaty to amend its proposal to make it compatible with international human rights law.

The Standing Committee is prepared to provide you with further information on this subject.

Sincerely yours
On behalf of the Standing Committee



Prof.dr. C.A. Groenendijk
Chairman

Note on the recent proposal by the Commission to amend the EC Visa Regulation

1. The Commission in July 2006 proposed to amend the EC Visa Regulation (EC) No. 539/2001, see COM(2006) 84 final. The main elements of the proposal are that some countries are added to the list of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (Annex I) and others are added to the list of the countries whose nationals are exempt from that requirement (Annex II). Besides, the Commission proposes to amend the rules on refugees and stateless persons. They remain eligible for visa exemption if they reside in a third country listed in Annex II, but enjoy automatic exemption if they reside in a Member State.
This last amendment will allow, among others, the stateless non-citizen residents in Estonia and Latvia, most of whom are born or have long residence in those countries, but were not granted the nationality of those countries when they regained their independence, to circulate without a visa for a period up to three months in the Schengen area. It will end the anomalous situation that a large share of the lawfully resident population of those two Member States are not only excluded from the free movement within the EU but even obliged to apply for a visa before travelling to other Member States.

2. The Commission also proposes to add to both Annexes certain categories of British citizens who are not nationals of the UK for the purpose of Community law. According to the Commission's proposal four categories of British citizens (British Overseas Territories Citizens, British Overseas Citizens, British Subjects and British Protected Persons) should be mentioned in Annex II and thus be subject to the visa obligation when entering the EU, whilst a fifth category "British Nationals (Overseas)" should be added to Annex I and thus be exempt from the visa obligation.
The Standing Committee of Experts in international immigration, refugee and criminal law is extremely worried by this part of the proposal, since it proposes to introduce distinctions between categories of British citizens, developed since 1981 in British nationality law, into EC immigration law.
The other elements of the Commission's proposal relate to groups of persons defined on the basis of their nationality or on their status under international law (refugees and stateless persons). However, this part of the proposal introduces into Community law distinctions between different classes of British citizens that in practice are closely linked to the ethnic origin of the persons concerned.
The eminent expert on British nationality law, Ann Dummett, stated: "*There is no indication at all in our nationality law of ethnic origin being a criterion. But the purpose of the law since 1981, and the manner in which it is implemented, make sure that ethnic origin is in fact and in practice a deciding factor.*" (letter of 27 August 2006 to the chairman of the Standing Committee).

3. This part of the Commission's proposal is incompatible with Article 1(1) and Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 1(3) CERD exempts distinctions in nationality law of the State Parties from the scope of the Convention. Immigration law, however, is not covered by that exceptional exemption. The House of Lords in 2004 explicitly confirmed that the Convention covers distinctions made in national immigration law and the application of that law. Baroness Hale in her opinion in the judgment of the House of Lords in the case of the Czech Roma, that, on the basis of instructions by the Home Office, were stopped by British immigration officers acting at Prague Airport, stated: "*Article 1(2) [CERD] …. certainly does not mean that State Parties can discriminate between non-citizens on racial grounds.*" (House of Lords 9 December 2004, R v. Immigration Office at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants) [2004] UKHL 55 par. 101).

4. Article 6(2) EU Treaty states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. The Court in its case law has constantly drawn inspiration from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. Recently, the Court of Justice in the case EP v. Council on the Family Reunification Directive has stated:
„*The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. (…) That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.*" (judgment of 27 June 2006, C-540/03, not yet published in the ECR, par. 35-37).
All EU Member States are bound by the Convention on the Elimination of All Forms of Racial Discrimination. That Convention is another human rights instrument that is a relevant source of human rights and, according to Article 6(2) EU Treaty has to be respected by the Union. Thus, the part of the Commission's proposal that intends to introduce distinctions closely related to the ethnic origin of persons into Community immigration law and obliges Member States to act in accordance with the Regulation, would be contrary to primary Community law. The Court of Justice in the same judgment has held: "*Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it*

required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.“ (ibidem, par. 23)

5. The Standing Committee wishes to draw the attention to the fact that this part of the proposal is also contrary to Article 3 and Article 14 of the European Convention of Human Rights, and to Article 26 of the International Covenant on Civil and Political Rights. Recently, the European Court of Human Rights in the case Timishev v. Russia has held: “*In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.*” (ECrtHR 13 December 2005 par. 58). This judgment does not apply to Russia only, but to all 25 EU Member States that are all parties to the ECHR.

6. Directive 2000/43/EC of 29 June 2000, OJ 2000 L 180/22, implementing the principle of equal treatment between persons irrespective of racial and ethnic origin stipulates in Article 3(3): “*Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of third country nationals and stateless persons concerned.”* This exemption, however, only restricts the scope of the Directive. It does not limit the obligations of the Member States under international human rights law. Neither does this provision of secondary Community law change the obligations of the Member States under primary Community law.

7. According to the Explanatory Memorandum, the primary argument of the Commission for this part of its proposal is Article 62(2)(b)(i) EC Treaty requires that “*the lists of third countries must be exhaustive an must cover all third-country nationals*”. The text of Article 62 EC Treaty does not mention this requirement. Moreover, Article 62 EC Treaty could never be interpreted in such a manner as to impose the adoption of Community measures that would oblige Member States to act in violation of their obligations under international human rights treaties.

8. In the Explanatory Memorandum it is contended that the four classes of British subject that, according to the proposal, should be added to the list in Annex I “*have what can only be regarded as a tenuous link with the United Kingdom*”. However, these persons may have been issued with nationality documentation by UK authorities, they may be entitled to diplomatic representation by UK authorities, they may look for protection by UK authorities in case they have to leave their country of residence because of persecution in that country. Finally, some of these persons may have lawful residence in the UK. In all those circumstances, there is appears to be a real link with the UK.

9. The present position of British subjects who are not British nationals for the purpose of Community law is the consequences of the fact that those persons were unable to acquire the nationality of their country of residence at the time that country acquired its independence. This applies to the stateless non-citizens in Estonia and Lativia mentioned above in paragraph 1 as well. It is odd that the Commission proposes to introduce a visa obligation for the one group and, at the same time, to exempt the other group from that obligation. In both cases the legal status of the persons concerned after independence of their country of residence is not due to their behaviour, but a result of political choices made in the process of decolonisation.

10. The Explanatory Memorandum justifies the proposal to exempt the nationals of six islands states, all former British colonies, with the statement that imposing the visa requirement is “no longer justified by the statistics or other information confirming that the country represents a risk in terms of […] illegal immigration and public policy” and with the desire to put an end with “the practical difficulties” in issuing visa to nationals of those six countries.
However, no such information is available in the Explanatory Memorandum with regard to the British subjects for whom it is proposed to introduce a visa obligation. What is the actual number of persons concerned by the introduction of the visa obligation? How many of those British subjects have actually tried to enter illegally or have been expelled from the Member States that are bound by Regulation (EC) No. 539/2001 in recent years? It should be remembered that the UK is not bound by that Regulation.

11. In the view of the Standing Committee there are two simple ways to amend the Commission’s proposal in order to make it compatible with international human rights law: either add all British subjects who are not British nationals for the purpose of Community law to Annex II or deleted all five categories from the proposal. In the first option they will all be exempted from the visa requirement. In the second option there will remain a probably relatively small number of persons who are not covered by the Regulation. That is a small price to be paid by the Community and the Member States for living up to their obligations under international human rights law

Utrecht, September 2006