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

Secretariat
P.O. Box 201, 3500 AE Utrecht/The Netherlands
telephone 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

To: Mr. Hendrik LAX
Member of the European Parliament
Rapporteur on the draft proposal for a Community Code on Visas.

Reference: CM07-04

Regarding: Note on the draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas.
COM (2006) 403 final; 2006/0142 (COD).

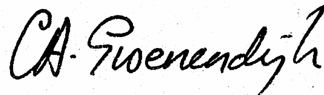
Date: 8 February 2007.

Dear Mr. Lax,

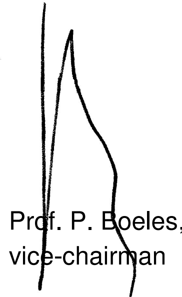
Please find enclosed a note by the Standing Committee of Experts in international immigration, refugee and criminal law on the draft proposal for a Regulation establishing a Community Code on Visas. (COM (2006) 403 final; 2006/0142 (COD))

We trust you find our comments useful. Should you require clarification on any comment made in the enclosed note, the Standing Committee will be glad to provide more information and/or explanation.

Yours sincerely,



Prof.dr. C.A. Groenendijk
Chairman



Prof. P. Boeles,
vice-chairman

Cc:
- **Members of the LIBE Committee**
- **European Commission**

Note on the draft proposal for a Community Code on Visas

COM (2006) 403 final; 2006/0142 (COD).

In the view of the Standing Committee, it is an important development that the Schengen acquis is gradually replaced by comprehensive regulations, creating a more consistent and clear set of Community rules. This replacement offers a crucial opportunity to systematically rethink the law governing entry to the common territories of the continental part of the EU. In this note, the Standing Committee will concentrate on issues related to the right to effective remedies for individuals affected by any visa decision. First some preliminary remarks will be made on the definition and legal character of a visa.

<u>Summary of our remarks:</u>

- A visa in itself should already entail a *right* to enter and a *right* to stay (during its period of validity);
- The right to appeal should be extended to all decisions regarding visas, not only refusal of a visa but also when an application is declared non-admissible, revoked or annulled or when the period of validity is not extended or shortened;
- All decisions regarding visas must be given in written and contain the reasons for the decision;
- The present form under Annex IX is too rigid and gives no room for supplementary or explanatory remarks;
- If the refusal or annulment is based on an alert in the SIS, there should be a possibility for the affected individual to challenge the reasonableness of the SIS alert in relation to the legitimate interests of the visa applicant in the appeal procedure regarding the visa;
- As to the issuing of visas with limited territorial validity because of international obligations, no room for discretion – other than implied by the relevant international obligations themselves – should be left to the Member States;
- Finally, the Standing Committee advocates a consistent phrasing of the requirement that an applicant asking for a visa should be able to return after his temporary visit.

a. Visa: right or precondition?

There is an as yet unsolved definition problem with respect to visas. This is that visas do not merely cover entry but also, to a certain extent, legal residence during period of their validity. The present definition in the proposal for the Visa Code however solely focuses on authorisation with a view to *entry*, coupled to an *intention* of short stay or transit, but which does not entail authorisation to stay.
According to Article 2(2), a “visa” is an authorisation issued by a Member State with a view to (a) entry for an intended stay (…) of a duration of no more than three months in total (b) entry for transit (…) or (c) transit.
The question is what the impact and meaning should be of the “period of validity”, mentioned in Article 28 of the proposed regulation and in Article 19 SIC. Holders of a uniform visa are allowed, according to the latter provision, to move freely within the Schengen territories throughout the period of validity of their visa. Obviously, the period of validity of the visa coincides with a limited right to free movement which can – logically - only exist if the temporal validity of a visa, after the moment of entry, also entails a right of residence as long as the validity is not terminated. See also the proposed Article 31. So, the first conclusion should be that a visa is not only necessary for entering the territory but also for lawfully residing on the territory (during the period of validity of the visa).

The next question is, whether a visa should entail a right to enter and to stay, or whether it is just a precondition for obtaining such a right in a later stage. In the system of the draft regulation, it is a precondition, and the only conceivable later stage for granting the (final) right to enter and to reside would be when passing the checkpoint at the external borders. The presumption seems to be that the border authorities give a visa its final effect by allowing its holder to enter. Apparently, this is the purport of the proposed article 24 which expressly states that “mere possession of a short stay visa or a transit visa does not confer automatic right of entry”. It goes without saying that, in this approach, a visa would not confer any automatic right to free circulation either. For most travellers this legal moment is invisible and at any rate extremely short: most travellers show their passports with a visa in it to the controlling authorities and are allowed to pass without any further comment. Most people will naturally conceive the visa as the proof of their right to enter and not the short nod of the civil servant at the checkpoint. Of course, public awareness in itself is no argument against the proposed system of the regulation. But it is, in general, not advisable to create a system of rights coming into being at an unclear or at another moment than generally understood by the persons concerned. This is not beneficial for the transparency, trustworthiness and controllability of the system.

The Standing Committee is of the opinion that a visa in itself should already entail a *right* to enter and a *right* to stay (during the period of validity). The Standing Committee would like to underline, that the proposed regulation provides for an extensive check of all entry conditions in the application procedure for a visa. There are ample possibilities for prior consultation of the central authorities of the own Member State and other Member States, biometric data are captured, all relevant documents and statements may be asked for, the VIS may be consulted, there must be medical insurance, fees should be paid. The reasons for refusing a visa (Article 23) are essentially the same as the reasons for which entry must be refused according to Articles 5, 7 and 13 Schengen Border Code (Regulation 562/2006, *OJ* L 105/1). It would be highly arbitrary and unreasonable not to grant a right to enter and stay once it has been established that the conditions are met. From a systematic point of view, the concept of a visa which confers clearly defined rights on its holder is more consistent and better to understand for the public than the ambivalent approach of the present draft.
This is also consistent with paragraph 31 of the Jia judgment (Case C-1/05, 9 January 2007) of the Court of Justice EC, where the Court considered that a third country national was lawfully residing in a Member State during the period of validity of a short term visa.

Conferral of clearly defined rights of course does not prevent the authorities from revoking or annulling them. According to the explanatory memorandum, the background of the proposed Article 24 is that border control authorities check that entry conditions are fulfilled when the holder of a visa presents himself to the border. The Standing Committee fully agrees that there should be a possibility for the competent authorities to check travelers at the external borders and to refuse entry to a holder of a visa if the conditions are not or no longer met (see Article 5 and 13 Schengen Border Code). But if the authorities do so, they should provide a reasoned and written decision in which (a) the visa is annulled and in which (b) entry is refused.

The Standing Committee therefore suggest to delete Article 24 and to add the following sentence to Article 2(2):

> **“The authorisation entails a right to enter and a right to stay in the designated transit area, territory or territories during the period of validity of the visa”.**

b. Effective remedies

The Standing Committee is pleased to note that Article 23 (3) of the proposal grants the applicants a right to appeal against the refusal of a visa. There are, however, some gaps in the present proposal that should be filled. These gaps are:

1. Appeal is excluded in cases of non-admissibility (Article 19(3)) and not explicitly granted in cases of refusal of extension (Article 28), annulment (Article 29), revocation (Article 30) and shortening the length of duration of stay (Article 31).
Further, it is not clear whether refusal of a visa with limited territorial validity is subject to appeal as well. It is unclear, in this respect, what the meaning is of the words "without prejudice to Article 21(1) in Article 23(1)". If the implicit reason for excluding visa with limited territorial validity from appeal would be that these visas were deemed to be national visas, this reason appears to be false.
According to the Standing Committee, an EU visa does not lose its Community law character when a Member State uses an option expressly given in the regulation to limit the validity of such a visa to its territory. (See Court of Justice EC 27 June 2006, Case 540/03, para 22).

According to the Standing Committee, the right to appeal should explicitly be extended to these types of decisions. The exclusion of appeal for non-admissibility is defended in the explanatory memorandum on the ground that "inadmissibility is not a formal refusal of an application". It is, however, a material refusal. Non-admissibility effectively bars a person from entering a European country of destination. The reasons for declaring an application non-admissible may touch on important material issues. If a person is for an excusable reason not able to produce the additional information or documentation mentioned in Article 19(a) or if the request for such information or documentation is unreasonable or arbitrary, this person may never be able to repair the deficiency of his visa application if he cannot invoke the impartial opinion of an independent judge.
Further, there are no reasons why a right to an effective appeal should not exist in cases of refusal of a territorially limited visa, of non-extension, annulment, revocation and shortening of the period of duration of stay. Important interests may be at stake and a lack of judicial control may facilitate arbitrariness. The Court of Justice EC has repeatedly stressed the importance of the general principle of Community law of the right to effective judicial protection. For instance in the Panatoya judgment[1], Case C-327/02, 16 November 2004, para. 27, the Court said:
"It follows in particular that the scheme applicable to such temporary residence permits must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings (see, by analogy, Case C-157/99 Smits and Peerbooms [2001] ECR I-5473, paragraph 90). It should be remembered, in this last respect, that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law, and that this principle of effective judicial protection constitutes a general principle which stems from the constitutional traditions common to the Member States and is enshrined by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, in Articles 6 and 13 of the Convention (see, in particular, Case 222/84 Johnston [1986] ECR 1651, paragraphs 18 and 19, and Case C-467/01 Eribrand [2003] ECR I-6471, paragraph 61).

[1] See also Organisation des Modjahedines du peuple d'Iran (Case T-228/02, Court of First Instance 12 December 2006) para. 152 *et seq.*

What has been said by the Court on temporary residence permits is applicable on visas as well.

2. A written decision to refuse a visa must, according to Article 23(2) be given by means of a standard form. **The Standing Committee is of the opinion that the present form under Annex IX is too rigid and gives no room for supplementary or explanatory remarks.** Further, the form does not take into account that refusal of a visa to third country nationals who may invoke freedom of movement as meant in Article 1(2) should probably be based on more specific reasons than foreseen in the standard form. Similarly, the grounds for refusal could be more complicated than foreseen in the standard form, if a right to asylum (Directive 2004/83), to family life (Directive 2003/86) or to freedom of movement (Directive 2004/38) is at stake.

3. If decision regarding a visa application is based on an alert in the SIS, there should be a possibility for the affected individual to challenge the reasonableness of the SIS alert in relation to the legitimate interests of the visa applicant in the appeal procedure regarding the visa. Therefore, the court handling the appeal should be given the explicit right to ask the Member State who entered the alert in the SIS, to reveal the reasons for the alert. At any rate, the affected individual should be informed about the Member State which entered the alert in the SIS and the reasons for listing him.
An obligation for the Member State who issued the alert, to inform a Member State where a third country national applies for a visa was already assumed by the Court in Commission v. Spain, case C-503/03, para 56:
"As regards that verification, it must be observed that, although the principle of genuine cooperation underpinning the Schengen acquis implies that the State consulting the SIS should give due consideration to the information provided by the State which issued the alert, it also implies that the latter should make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat that the person for whom an alert has been issued is likely to represent."
The principle of equality of arms requires that not only member States but also the individual affected should have access to "supplementary information" as referred to by the Court.

Proposed amendments:
"Article 23(3) Applicants refused visa shall have the rights to appeal. ***These rights also apply when an application is declared non-admissible, revoked or annulled or when the period of validity is not extended or shortened. Decisions declaring an application non admissible, decisions revoking or annulling a visa, decisions in which extension of the period of validity is refused or in which the period of validity is shortened, must be given in written and contain the reasons for the decision*****. Appeals shall be conducted in accordance with national law** ***and in accordance with the general principle of community law of effective judicial protection*****. A written indication of contact points able to provide information on representatives competent to act on behalf of the applicants in accordance with national law shall be given to the applicants.** ***If the refusal, revocation, annulment ort decision on the period of validity is based on an alert in the Schengen Information System, the national Court handling the appeal is entitled to ask a Member State who entered the alert to reveal the reasons for the alert and to give any further available information which the Court deems appropriate. The Court provides the applicant with the acquired information unless weighty security reasons compel a limited access.***

The form under Annex IX must be extended with a general option to mention other reasons for the refusal of a visa.

c. Visas with limited territorial validity

The phrasing of the proposed Article 21(1) (a and b) is different from that of the equivalent Article 5(4)c) Schengen Border Code. The draft Regulation appears to leave too much room for discretion to the Member States. According to Article 5(4)c) Schengen Border Code, third-country nationals who do not fulfill one or more conditions for entry may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Especially when international obligations exist, there might be a situation in which no margin of appreciation is left to the Member State to "consider" whether or not to comply with these obligations. It is therefore correct that the Schengen Border Code does not make the decision of a Member State to grant territorially limited entry dependent on whether this Member State "considers it necessary".

Accordingly, the first part of Article 21(1) should be rephrased as follows:

> **"(1) A visa with limited territorial validity (LTV) may be issued:**
> **(a) on humanitarian grounds, for reasons of national interest or because of international obligations, even if the prior consultation procedure has given rise to objections on the part of the consulted Member States or if prior consultation has not been carried out for reasons of urgency;**
> **(b) if there are urgent reasons, justified by the applicant, to issue a new visa for a stay during the same six-month period if the applicant, over his six-month period, has already used a visa allowing for a stay of three months."**

d. Intention of returning: to which country?

In the proposed Article 4 the applicant's intention to return is only mention with regard to "return to the country of residence". On the other hand, Article 14(1)d) only speaks of an intention to return to "the country of departure". Article 18(1) is about "the applicant's intention of returning" - without any specification as to the country to which the applicant should return. Article 23(1)b) mentions "the country of origin or departure".

As far as the Standing Committee can see, the only interest at stake is that the holder of a visa leaves the Schengen territory within the period of validity of his or her visa. For that purpose, it is not relevant to what country outside that territory the applicant will go, as long as there is a reasonable expectation that he will be allowed entry and residence there. **Therefore, we suggest that all articles concerned are rephrased such that they all mention "the intention to return to a country where the applicant will be allowed to enter and reside". Normally, but not necessarily, this will be the country of origin or departure.**

Utrecht, The Netherlands
February 2007