
EP COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

HEARING

VISA CODE AND HUMANITARIAN VISAS

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OUTLINE

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- *The perspective: taking the rule of law seriously*

- Visa law as an under-researched topic and a sensitive area for testing the genuine adherence to the rule of law
 - Wide margins of discretion for MSs against a scarce chance for applicants to predict the outcome, to receive adequate explanations for refusals, for exerting their rights
 - Visa Code is a relevant tool for governing regular mobility, but it may transform into an indirect driver for irregular movements or for abusive practices
 - Transparency, non-discrimination, good administration, estoppel, access to justice as guiding principles
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- *Requisites for obtaining a visa: the strange case of the “sincerity of the intention to leave”*
 - This requisite implies the enquiry into a negative state of mind, something that criminal lawyers rightly target as a manifestation of authoritarian States
 - How to detect it? A wide range of documents and objective conditions are already required to the applicant. The officers deciding on the application enjoy a tremendously wide margin of appreciation
 - The Visa Code and the Procedures Manual elaborate on a “logics of suspect” that is open to arbitrariness; unpredictability; discrimination on grounds of age, sex, economic and social condition, marital status
 - Requisite to abolish, or to rigorously restrict to well-defined situations
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- ***Motivation of a refusal: ticking only the appropriate box or something more?***
 - The absence of a subjective right to obtain a visa does not imply that public authorities are allowed to apply the law and to exert their discretionary powers without being accountable for their choices. Additionally, motivation is fundamental for the effectiveness of the right to appeal
 - The duty to state reasons is conceived in a purely formalistic and unsatisfactory way (especially for grounds such as public security, international relations, intention to leave)
 - This is a *vulnus* for the respect of the principles of the rule of law and situates applicants in an extremely weak position *vis-à-vis* the public administration (a sort of subjection).
 - Five additional lines are not enough
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- ***Appeals: restating the last ECJ's judgement is enough?***
 - The ECJ gave clear indications on the right to a judicial appeal, and the 2018 Proposal reproduces almost *verbatim* the relevant *dictum* (13-12-2017, C-403/16, El Hassani)
 - Nevertheless, the peculiarities of the situation make the recourse to a judicial redress illusory, especially if e-justice, speedy procedures, elimination/reduction of costs are not implemented and if the adjudicating authority does not hold the power to issue the visa and to order payment of costs and damages
 - Additionally, a soft system of on-site peer review should be explored, exploiting the tools of the local Schengen consular cooperation. It would be preliminary to the judicial appeal proper and might offer a quick and accurate review
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■ *Visa issued: a right to entry?*

- Article 30 (Rights derived from an issued visa): *Mere possession of a uniform visa or a visa with limited territorial validity shall not confer an automatic right of entry.*
- This statement needs some clarification
- Applicants have a legitimate expectation that, after having successfully undergone a “intimate” screening of their planned travel, the relevant MS will keep its “promise”
- The only acceptable grounds for rejection at border may be the discovery of false documents or declarations (occurred at a stage between the delivery of visa and the actual arrival at the border) or the subsequent change of circumstances highlighting the dangerousness of the visa holder
- In such instances, an enhanced duty to state reasons should be due by the MS refusing entry

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- *The uncomfortable triangular situation: the MS, the TC not cooperating on readmission and the applicant*
 - The 2018 Proposal introduce a system of “sanctions” against nationals of TCs not cooperating on readmission issues
 - We must ask if it is legitimate to impose stricter conditions to individuals (and so, to punish them) for behaviors not attributable to them but to another entity unconnected with them (their State of nationality)
 - This approach resembles the (debatable) one followed in the Return Directive about the possibility to extend the period of detention of persons subject to a removal procedure
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