



28.8.2013

NOTICE TO MEMBERS

Subject: **Petition 1437/2012 by Olga Baltag (Moldovan), on alleged infringement by Italy of the Schengen Agreement**

1. Summary of petition

The petitioner, who enrolled in August 2009 as a student at the University of Strasbourg, obtained a long-stay student visa in Moldova. Following her arrival in France, she completed the necessary formalities to obtain the visa 'vignette' and, on 28 October 2009, set off for Moldova from Strasbourg by train. At Milan airport, having completed the security checks, she was denied boarding on the grounds that she did not have documentation which was valid on Italian territory. The petitioner argues that this is an infringement of her rights under Regulation (EC) No 562/2006 of the European Parliament and the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code) and Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

2. Admissibility

Declared admissible on 29 April 2013. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 28 August 2013

Article 2(j) of Regulation (EC) No 261/2004 on air passenger rights defines 'denied boarding' as a refusal to carry passengers on a flight, although they have presented themselves for boarding on time and with a confirmed reservation, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.

The fact that a passenger has inadequate travel documentation is regarded as reasonable grounds for refusing to carry him/her on a flight, except in cases where airline or airport staff have made mistakes when checking passenger documentation, and does not therefore constitute 'denied boarding' within the meaning of Regulation (EC) No 261/2004. This means that the regulation does not apply to passengers who have been denied boarding to a flight on the grounds that they did not meet the visa requirements for the Schengen area.

As regards the rules applicable in the Schengen area in particular, under the terms of Article 18 of the Convention implementing the Schengen Agreement prior to 5 April 2010 long-stay visas (type D) were deemed to be national visas authorising holders to reside only in the Member State that issued the visa, even if the visas also enabled the holders to transit through the territories of other Schengen countries in order to reach the territory of the country which issued the long-stay visa.

Nationals of third countries required to be in possession of short-stay visas in accordance with Regulation (EC) No 539/2001 (such as Moldovan citizens), even though they were legally present on the territory of the Member State which issued the type-D visa, were not authorised to make short visits to other Member States during the long stay for which their type-D visa had been issued; they were also not authorised under their type-D visa to transit through other Member States when returning to their country of origin.

Article 18 of the original version of the Convention implementing the Schengen Agreement reflected the standard procedure applied by Member States at the time, whereby type-D visas were converted into residence permits once the holder of the visa had arrived on the territory of the issuing Member State. These residence permits enabled nationals of third countries to move freely throughout the Schengen area. This explains why the Member States, when concluding the Schengen Agreement, did not deem it necessary to lay down rules governing type-D visa holders' movements within the Schengen area, their return to their country of origin or a second journey to the Member State which had issued the type-D visa.

In practice the real problem was that Member States gradually stopped replacing third country nationals' type-D visas with residence permits, or were very slow in doing so. As a result, the persons in question, who had only a type-D visa, were 'stuck' in the Member State which had issued that visa. Third country nationals in possession of a type-D visa who were required to have a visa under Regulation (EC) No 539/2001 needed a short-stay Schengen visa (type-C visa) in order to travel to other Schengen countries, including transit journeys through the territory of other Schengen countries when returning to their country of origin or to their Member State of residence.

Regulation (EU) No 265/2010 (amending the Convention implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa) was adopted against that backdrop on 25 March 2010. The regulation seeks to facilitate the movement within the Schengen area of third-country nationals who are legally resident in one of the Member States on the basis of a long-stay type-D visa issued by that Member State.

The regulation entered into force on 5 April 2010; from that date, therefore, holders of valid long-stay visas were entitled to move freely with the Schengen area for three months in any six-month period. A third-country national holding a long-stay type-D visa issued by a

Member State is entitled to travel to other Member States for three months in any half year under the same conditions as the holder of a residence permit. Visa holders are also entitled to enter and leave the Schengen area an unlimited number of times.

The previous rules were still applicable when the petitioner made her journey on 20 October 2009. As a result, the petitioner's type-D visa did not authorise her to transit through Italy on her return to Moldova. She took a train within the Schengen area (from Strasbourg to Milan) and then a flight to leave the Schengen area (to Moldova). The petitioner therefore had to transit through Italian territory to reach Milan/Malpensa international airport, a journey for which a Schengen visa would have been a requirement.

Conclusion

It can therefore be concluded that the Italian authorities acted correctly. The authorities thus had reasonable grounds for not allowing the passenger to board the flight to Moldova, and the provisions of Regulation (EC) No 261/2004, referred to by the petitioner, do not therefore apply in this case. However, the new rules on type-D visas should prevent these kinds of problems from occurring in the future.