



30.1.2015

NOTICE TO MEMBERS

Subject: Petition 0090/2013 by Richard de Jong (Dutch), on refusal of an entry visa

1. Summary of petition

The petitioner is complaining about the German embassy in Ghana. His Ghanaian wife had applied for an entry visa there, but it was refused by the embassy staff. The petitioner contends that he and his wife had submitted all the documentation required under Directive 2004/38/EC with regard to the right of free movement and residence on the territory of the Member States for citizens of the Union and their family members to obtain a visa. The embassy first wanted to investigate the identity of the petitioner's wife, despite the fact that she held a passport validated by the Dutch embassy. This investigation was to cost EUR 600, to be paid for by the petitioner. He claims this contravenes Directive 2004/38/EC. The petitioner and his wife have now been waiting for several months for the visa and are seeking assistance from Parliament.

2. Admissibility

Declared admissible on 4 November 2013. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 30 January 2015

The petition dates from January 2013, and the petitioner claims that at that time, there had still not been a decision on the visa for his wife.

At the same time as the petition, the petitioner introduced a complaint to the Commission on this issue. The complaint was closed on the basis of the reasons below which were set out in a letter to the petitioner in September 2013.

Article 21 of the Treaty on the Functioning of the European Union stipulates that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

The respective limitations and conditions are to be found in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States¹. Directive 2004/38/EC applies to EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them (Article 3(1) of the Directive). Family members of such EU citizens have the right to enter (Article 5(1) of the Directive) and under the conditions of Article 7(1)(d) of the Directive to reside in the Member State. However, according to Article 5(2) of the Directive, Member States may require the family member who is a non-EU national to have an entry visa.

As confirmed by the Court of Justice of the European Union², such family members have not only the right to enter the territory of the Member State but also to obtain an entry visa for that purpose. Member States must grant such persons every facility to obtain the necessary visas which must be issued free of charge as soon as possible and on the basis of an accelerated procedure.

As this right is derived from the family ties only, the national authorities may require family members to present the following documents:

- proof of identity – e.g. their valid passports – this allows the national authorities to ascertain whose application they consider;
- proof of family ties – e.g. a valid marriage certificate – this allows the national authorities to ascertain that the applicant is family member of an EU citizen; and
- proof that the EU citizen is exercising EU free movement rights in the host Member State at the moment or will be exercising these rights at the moment of his or her family members' arrival to the host Member State - this allows the national authorities to ascertain that the applicant will be residing in the host Member State together with the EU citizen.

The burden of proof applicable in the framework of the visa application under the Directive is on the applicant: it is up to him to prove that he is a beneficiary of the Directive.

The right to obtain an entry visa is not, however, unconditional as EU law enables Member States to prohibit family members of an EU citizen from entering their territory where they represent a risk to the requirements of public policy, public security or public health within the meaning of Chapter VI of Directive 2004/38/EC or in the event of abuse or fraud

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, OJ L 158, 30.4.2004, p.77.

² See, *inter alia*, judgment of the Court of 31 January 2006 in case C-503/03 *Commission v Spain* (Rec. 2006, p. I-1097)

Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code) sets out the general rules on the conditions and procedures for issuing short stay visas. A Handbook for the processing of visa applications and the modification of issued visas was adopted to provide harmonised guidelines for the implementation of the Regulation.

Part III of this Handbook also contains a chapter on how to process visa applications from applicants covered by the Directive. It is based on the principle that Directive 2004/38/EC represents a *lex specialis* with regard to the Visa Code which means that it only applies where the Directive does not have specific rules. Part III of the Handbook describes visa facilities Member States must grant to non-EU family members of EU citizens.

The Handbook is not legally binding but it sets a benchmark against which the Commission examines whether the facilities of the Directive have been duly observed.

Point 3.8 of Part III of the Handbook regarding refusal to issue a visa provides that a family member may be refused a visa exclusively on the following grounds:

- the visa applicant failed to demonstrate that he is covered by the Directive on the basis of the visa application and attached supporting documents under point 3.6;
- the national authorities demonstrate that the visa applicant is a genuine, present and sufficiently serious threat to public policy, public security or public health; or
- the national authorities demonstrate that there was abuse or fraud.

In the latter two cases, the burden of proof lies with the national authorities, as do any possible cost of related investigations, as they must be able to present evidence to support their claim that the visa applicant (*who has presented sufficient evidence to attest that he/she meets the criteria in the Directive*) should not be issued with an entry visa on grounds of public policy, public security or public health or on grounds of abuse or fraud.

The authorities must be able to build a convincing case while respecting all the safeguards of Directive 2004/38/EC which must be correctly and fully transposed in national law. The decision refusing the visa application on grounds of public policy, public security or public health or on grounds of abuse or fraud must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It must be notified in writing, fully justified (*e.g. by listing all legal and material aspect taken into account when concluding that the marriage is a marriage of convenience or that the presented birth certificate is fake*) and must specify where and when the appeal can be lodged so that the person concerned may take effective steps to ensure his defence.

Moreover, in relation to notification and motivation of a refusal, Point 3.9 of Part III of the Handbook clarifies that Article 30 of the Directive provides that family members must be notified in writing of the refusal. Refusal to issue a visa to a family member of an EU citizen must always be fully reasoned and list all the specific factual and legal grounds on which the negative decision was taken, so that the person concerned may take effective steps to ensure his defence.

Conclusion

In addition to the fact that at the time when the petition was introduced the visa application was not finally decided, the elements that the petitioner provided do not allow to conclude that the rules of EU law as explained above have been breached.

Moreover, as the above provisions of Directive 2004/38/EC are correctly transposed into German law it is primarily for national courts to examine a potential refusal to grant an entry visa.

The Commission hopes that this information helps clarify the legal framework.