



5.4.2018

# **WORKING DOCUMENT**

on humanitarian visas

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Juan Fernando López Aguilar

## Introduction

This document sets out the political background of the legislative own-initiative report on humanitarian visas and its procedural specificities. Its main objective is to present a number of questions for discussion. With it the rapporteur therefore seeks input in view of the preparation of the draft report.

## Background

The Parliament started to call for humanitarian visas against the background of the migration crisis and in particular the unacceptable death toll in the Mediterranean. It has expressed its views, among others, in the resolution of 12.4.2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration<sup>1</sup> and in the resolution of 10.9.2015 on migration and refugees in Europe.<sup>2</sup>

Currently, it is estimated that 90% of asylum seekers enter Europe in an irregular manner.<sup>3</sup> In reality this means that persons seeking protection need to make use of smugglers, undertake a very dangerous journey often risking their lives, travel separated from their close family given the risky nature of the trip and run the risk of severe traumatisation.

Humanitarian visas were already discussed in the EU context but the discussion did not lead to a concrete result. Currently, there are a number of targeted programmes of Member States but no legal framework in EU law.

The LIBE Committee has tried to address this legal gap as part of the review of the Visa Code (2014/0094(COD)) by inserting a number of amendments regarding the creation of a European Humanitarian Visa. In addition, amendments aiming to strengthen the existing provisions by giving a different interpretation of the current narrow interpretation of humanitarian grounds and international obligations and by closing some gaps in the Code to allow for a more coherent, protection oriented approach in this regard were added.

### Creation of a European Humanitarian Visa

#### Text adopted by LIBE on 15.3.2016:

*(26a) The possibility to apply for a European humanitarian visa directly at any consulate or embassy of the Member States should be established. The provisions to that end should, however, only become applicable two years after the entry into force of this Regulation, in order to provide the Commission with sufficient time to define the necessary specific conditions and procedures for issuing such visas. When preparing the specific conditions and procedures for issuing such visas, the Commission should conduct an impact assessment. In the event that the Commission proposes a separate legal instrument setting up a European*

---

<sup>1</sup> 27. Considers that persons seeking international protection should be able to apply for a European humanitarian visa directly at any consulate or embassy of the Member States, and, once granted following an assessment, such a humanitarian visa would allow its holder to enter the territory of the Member State issuing the visa for the sole purpose to lodge therein an application for international protection; believes, therefore, that it is necessary to amend the Union Visa Code by including more specific provisions on humanitarian visas;

<sup>2</sup> 13. [...] believes that it is necessary to amend the Visa Code by including more specific common provisions on humanitarian visas

<sup>3</sup> HEIN / DONATO (CIR) 2012: Exploring avenues for protected entry in Europe, p. 17

*humanitarian visa, it should present a proposal to modify this Regulation before its provisions on a European humanitarian visa become applicable.*

*Article 22(5a) Persons seeking international protection may apply for a European humanitarian visa directly at any consulate or embassy of the Member States. Once granted following an assessment, such a humanitarian visa shall allow its holder to enter the territory of the Member State issuing the visa for the sole purpose of lodging in that Member State an application for international protection, as defined in Article 2(a) of Directive 2011/95/EU.*

*The relevant provisions of Title III of this Regulation shall apply with the exception of Articles 11, 13a, 15 and 27.*

*The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning the specific conditions and procedures for issuing such visas, supplementing or amending Articles 9, 10, 13, and 20 of this Regulation insofar as it is necessary in order to take into consideration the particular circumstances of persons seeking international protection and of consulates and embassies of Member States.*

*Article 18(11a) In the assessment of an application for a European humanitarian visa in accordance with Article 22(5a), only the provisions of paragraphs 4, 9, 10 and 11 of this Article shall apply.*

*Article 55(3a) Article 22(5a) shall apply from [2 years after the day of entry into force].*

In the trilogue negotiations which started in May 2016 both Commission and Council have opposed to the amendments on humanitarian visas and those aimed at strengthening the existing provisions.

Arguments brought forward by them included:

- The Visa Code is not the correct place for such rules as it deals with short-stay visas;
- There are other legal pathways, in particular resettlement;
- The amendments risk to overburden consulates.

In September 2017, after months of deadlock with the Council refusing to continue negotiations if these amendments were not withdrawn, Parliament's negotiating team withdrew the amendments in relation to the creation of a European Humanitarian Visa. Instead the LIBE Committee decided to draw up this legislative own-initiative report.

Despite this step, Council and Commission discontinued the negotiations.

In the 2018 work programme the Commission announces its intention to withdraw the proposal on the Visa Code. By referring to this announcement the Estonian Presidency wrote to the rapporteur on 10.11.2017 suggesting "that it is no longer reasonable to pursue further trilogues under the Estonian Presidency on the existing proposals. "

### The legislative own-initiative report

On 6.12.2017, the Conference of Presidents authorised the request of the LIBE Committee for a legislative own-initiative report on humanitarian visas.

Such reports are based on Article 225 TFEU:

*The European Parliament may, acting by a majority of its component Members, request the*

*Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.*

The rules of procedure provide for:

*Rule 46: Requests to the Commission for submission of proposals*

*1. Parliament may request the Commission, pursuant to Article 225 of the Treaty on the Functioning of the European Union, to submit any appropriate proposal to it for the adoption of a new act or the amendment of an existing act. Parliament shall do so by adopting a resolution on the basis of an own-initiative report drawn up by the committee responsible in accordance with Rule 52. The resolution shall be adopted by a majority of the component Members of Parliament in the final vote. Parliament may, at the same time, set a deadline for the submission of such a proposal.*

...

*3. Parliament's resolution shall indicate the appropriate legal basis and shall be accompanied by recommendations concerning the content of the required proposal.*

#### Issues for discussion

Prior to preparing the draft report the rapporteur seeks input. For the report it will be necessary to make choices as regards the legal basis and the content of the proposal. Below the rapporteur lists a number of issues and gives first indications as to his preferred course of action in order to start the political debate.

#### **Do we not already have humanitarian visas? What is the current legal situation?**

Besides some targeted programmes of Member States, based on national law, there is no EU legal framework for humanitarian visas. While the Visa Code allows for certain derogations from procedural and substantive criteria on “humanitarian grounds”, it does not foresee the issuing of Schengen short stay visas for the purposes of reaching the territory of the Member States in order to seek protection. The Handbook for the processing of visa applications and the modification of issued visas used by consular staff includes as examples for “humanitarian reasons” cases like “sudden serious illness or death of a close relative living in a Member State” or accidents.

The Court of Justice in C-638/16 PPU ruled that “Article 1 [of the Visa Code] must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law.”

For the rapporteur the reference to EU law as it “currently stands” implies that EU law may be changed to cover the issuing of visas to such persons.

**Should there be a separate instrument?**

Given that the Commission and the Council have repeatedly argued that the Visa Code is not the right instrument, the rapporteur considers that Parliament should in the legislative own-initiative report call for a separate instrument to be proposed by the Commission.

**What would be a possible legal basis for EU legislation on Humanitarian Visas?**

The rapporteur considers that Art. 78(2)(g) TFEU which provides for “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”, combined with Art. 77(2)(a) on the common policy on visas and other short-stay residence permits would provide for a sufficient legal basis.

The objective of the proposal would be to “manage the inflows of people” by means of a visa.

**What procedural and substantial requirements should be laid down in such an EU legislation on Humanitarian Visas?**

The rapporteur considers that the proposal should not cover the extraterritorial assessment of an application for international protection. Rather the proposal should be about a procedure by which a third country national could apply for a visa with limited territorial validity issued for the sole purpose of allowing the holder to travel to the territory of the Member States in order to lodge an application for international protection there.

It should be possible to apply for such a visa at the consulate or embassy of any Member State with a Member State granting such a visa subsequently being responsible for the asylum procedure. A relocation system could, however, also be envisaged. It would be crucial that consulates and embassies remain directly accessible as it should not be via an external service provider that such an application should be submitted. Possibly certain aspects, as the provision of information and the management of appointments, could be managed by external service providers.

It would be up to the applicant to demonstrate that he or she is in need of international protection. The requirements should take into account that such a person is fleeing persecution, i.e. could be outside his/her country of residence, could lack certain documents etc. The admissibility and substantive assessment would focus on the question of whether an application is *prima facie* not manifestly unfounded.

Deadlines for an assessment of an application should be relatively short and should involve, possibly via modern means of communication (applications can be electronically submitted and sent to the Member States, interviews could take place remotely), asylum experts of the Member State.

The instrument should foresee a security check.

The instrument should not foresee any specific hosting or reception of the person during the assessment of the application.

Once issued or refused, the results of the assessment should be taken into account in a future application for international protection to avoid any double work.

A person refused such a visa should have the possibility for an appeal as is currently foreseen in the case of a refusal of a visa or a refusal of entry at the border.