Decision of the European Ombudsman closing his inquiry into complaint 851/2011/(BEH)KM against the European Commission

Decision
Case 851/2011/KM - **Opened on** 16/05/2011 - **Decision on** 17/06/2013 - **Institution concerned** European Commission (Critical remark) |

The background to the complaint

1. On 9 April 2010, the complainant, a German national, wrote to the European Commission in order to raise a number of issues concerning the conditions under which Member States in general and Germany in particular handled visa applications submitted by third-country nationals who are members of an EU national's family.

2. On 25 November 2010, the complainant again wrote to the Commission. In his letter, he stated that he wished to renew the complaint he made in his e-mail of 9 April 2010 and according to which Germany systematically violated the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [1] (the 'Agreement') as well as the corresponding agreements with other countries.

3. More specifically, the complainant criticised that Germany (a) refuses, in most instances, to issue multiple-entry visas of a duration of up to five years to Ukrainian nationals, or at least wrongly limits the time for which such visas are valid, and (b) requires, as a matter of principle, visa applicants to appear in person in order to obtain a visa.

4. As regards the first of the above-mentioned issues, the complainant explained that Germany took the view that long-term visas could only be issued to Ukrainian nationals if they also fulfilled the conditions for issuing a visa that were not set out in the Agreement. In particular, applicants had to show that they have sufficient means of subsistence. According to the complainant, Germany took the view that this could only be assumed if the applicant proves his integrity and reliability, in particular the lawful use of previous visas, as foreseen in Article 24(2)(b) of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2] (the 'Visa Code'). The complainant objected to this view on the grounds that the Visa Code had not been in force when the Agreement was concluded and could thus not have negative consequences for the persons covered by that

Agreement. He further submitted that the said restriction was incompatible with Article 5(1) of the Agreement, according to which the maximum validity of the multiple-entry visa was determined by the validity of the applicant's passport.

5. The complainant further called on the Commission to examine the handling of multiple-entry visas by Germany on the basis of the Agreement and other visa facilitation agreements as well as the Visa Code. In the complainant's view, the practice of the German authorities was not satisfactory, given that visas for several years were issued too restrictively and that visas covering a period of five years were hardly ever issued.

6. On 2 December 2010, the Commission informed the complainant that it had asked its services for a translation of his e-mail of 25 November 2010. In its reply of 4 April 2011, the Commission referred to the explanations it had already provided to the complainant in previous letters. As regards the issuance of multiple-entry visas to persons covered by Article 5(1) of the Agreement, the Commission confirmed that the grant of such visas could not be made dependent on the lawful use of previous visas. An applicant could therefore not be required, in order to prove his integrity and reliability as foreseen in Article 24(2)(b) of the Visa Code, to prove that he had made proper use of previous visas. The Commission added, however, that the issuance of such visas required that the applicant proved to have sufficient means of subsistence.

7. The Commission pointed out that, in accordance with Article 14(6) of the Visa Code, the consulates of a Member State may only waive this requirement in the case of an applicant known to them for his integrity and reliability, in particular the lawful use of previous visas, if there is no doubt that he will fulfil the requirements of Article 5(1) of Regulation (RC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [3] (the 'Schengen Borders Code'). In the Commission's view, it was thus in conformity with the Agreement to grant a person covered by Article 5(1) of the Agreement the benefit of Article 14(6) of the Visa Code only on condition that he proved the lawful use of previous visas. However, such an applicant also had the possibility to prove that he had sufficient means of subsistence by other means than by establishing that he had made lawful use of previous visas. The Commission pointed out that the information provided by the complainant did not make it possible to ascertain whether the German authorities respected that latter possibility.

8. In his complaint to the Ombudsman, the complainant first of all criticised that it had taken the Commission one year to reply to his e-mail of 9 April 2010. He also submitted that the Commission had not thoroughly assessed his complaint. Instead of informing him that the evidence he had submitted was not sufficient, it should in the complainant's view have acted on his complaint and asked Germany for an opinion on the matter. The complainant added that the Commission had not commented on the details of the case on which his complaint was based.

9. The complainant therefore asked the Ombudsman to ensure that the Commission assesses the case and that, in the future, it replies within a reasonable time, that is, in about three months, to serious complaints about a breach of EU law by a Member State.

The subject matter of the inquiry

10. The Ombudsman opened an inquiry into the following allegations and claims:

Allegations:

1. The Commission failed properly to deal with the substance of the complainant's infringement complaint concerning (i) the period of validity of multi-entry visas and (ii) the requirement for visa applicants to appear in person at the embassy or consulate of the Member State issuing the visa.

2. The Commission failed to deal with the complainant's infringement complaint within a reasonable period of time.

Claims:

1. The Commission should deal properly with the substance of the complainant's infringement complaint.

2. In future, the Commission should analyse serious infringement complaints within a reasonable period of time.

The inquiry

11. On 16 May 2011, the Ombudsman asked the Commission for an opinion on the allegations and claims submitted by the complainant.

12. The Commission provided its opinion on 10 November 2011. This opinion was forwarded to the complainant, who submitted his observations on 15 November 2011.

The Ombudsman's analysis and conclusions

Preliminary remarks

13. In his letter opening the present inquiry, the Ombudsman asked the Commission to explain whether it considered that it had treated the complainant's infringement complaint in accordance with its Communication on relations with the complainant in infringement cases [4] (the 'Communication').

14. In its opinion, the Commission submitted that the issues raised by the complainant could not be qualified as complaints within the meaning of the said Communication as they did not 'point to measures or practices contrary to [EU] law', as defined in point 1 of the Communication. In fact, according to the Commission, the first issue did not constitute an infringement of EU law, whereas the second concerned an act of EU legislation that had not entered into force at the relevant point in time. The Commission acknowledged, however, that it did not explicitly inform the complainant of its decision not to deal with his submissions as an infringement complaint.

15. In his observations, the complainant did not comment on the Commission's remarks.

16. The Ombudsman does not find the Commission's explanations convincing. The complainant had made it clear that he considered the German authorities to have infringed EU law. His e-mail of 9 April 2010 should therefore have been treated as an infringement complaint. If the Commission nevertheless considered that, on the basis of one of the exceptions set out in point 3 of the Communication, it did not need to deal with the said e-mail as an infringement complaint it should, as explicitly foreseen in point 4 of the Communication, have informed the complainant of its position.

17. The Ombudsman notes, however, that the Commission has acknowledged that it failed to comply with the Communication in this case. He therefore considers that there is no need for further inquiries into this aspect of the case.

A. Allegation of failure to deal with the substance of the complainant's infringement complaint and related claim

Arguments presented to the Ombudsman

18. The complainant alleged that the Commission failed properly to deal with the substance of his infringement complaint concerning (i) the period of validity of multi-entry visas and (ii) the requirement for visa applicants to appear in person at the embassy or consulate of the Member State issuing the visa. He claimed that it should deal properly with the substance of his infringement complaint.

19. In its opinion, the Commission submitted that it had already dealt with the *first* of the above issues in an earlier letter which it had sent to the complainant on 9 April 2010.

20. In that letter, the Commission pointed out that the specific person to whom the complainant had referred had been given a multiple-entry visa that was valid for two years by the German authorities. The Commission explained that this was in line with Article 5(1)(c) of the Agreement, which envisaged the issuance of 'multiple-entry visas with the term of validity of up to five years'.

21. As regards the further arguments that the complainant had put forward in this respect in his e-mails of 9 April and 25 November 2010, the Commission referred to its reply of 4 April 2011.

22. As regards the *second* of the above issues, the Commission submitted that, in his e-mail of 25 November 2010, the complainant had not asked the Commission to investigate this issue but rather to keep the specific incident that he had mentioned in this context in mind in the future when monitoring the correct application of the Visa Code, which entered into force only after this incident. It was for this reason that the Commission did not reply in substance to this issue. The Commission added that it emerged from the correspondence the complainant had submitted to it concerning this incident that the German authorities had acknowledged that the requirement of personal appearance could have been waived in this case if the presence of the applicant's previous visas had been noted in time and had regretted the mistake.

23. In his observations, the complainant pointed out that he had submitted to the Commission a letter dated 25 November 2010 from the German Foreign Office. In the complainant's view, this letter showed that the problem he had raised was not an isolated incident but that the approach of the German authorities was based on a fundamentally flawed interpretation of the Agreement. The Commission should therefore have investigated the matter and asked the German authorities for an opinion.

The Ombudsman's assessment

24. The Ombudsman notes that the grievances that the complainant raised as regards the first of the two issues mentioned in his first allegation, that is to say the grievances relating to the period of validity of multi-entry visas, effectively cover two separate questions. The first of these concerns the length of the visas granted by the German authorities. The second concerns the alleged insistence of the German authorities that applicants who had already been given visas should prove that they lawfully used these visas before a new visa could be issued.

25. As regards the first of the above questions, the Ombudsman notes that, as the Commission correctly observed in its letter of 9 April 2010, Article 5(1)(c) of the Agreement envisages the issuance of 'multiple-entry visas with the term of validity of up to five years'. In light of the clear wording of this provision, and in the absence of any convincing argument to the contrary, the fact that a Member State grants such a visa for a period of less than five years can thus not be considered to constitute an infringement of EU law. It is true that the complainant argues that Germany hardly ever issues multiple-entry visas for a period of five years. However, the complainant does not appear to have submitted any further evidence to the Commission that would support this view.

26. As regards the second of the questions referred to in point 24, the Ombudsman notes that the complainant does not object to the Commission's interpretation of the relevant provisions of EU law. According to this interpretation, an applicant who wishes to receive a visa needs to establish that he has sufficient means of subsistence. However, this requirement can be waived, in accordance with Article 14(6) of the Visa Code, where an applicant has already established

his integrity and reliability, in particular by the lawful use of previous visas. In other words, Article 14(6) of the Visa Code provides applicants with an alternative possibility to show that they fulfil one of the central requirements that they need to fulfil to receive a visa. This is clearly in an applicant's interest. Seen against this background, the fact that the Visa Code was not in force at the time of the events to which the complainant referred is irrelevant.

27. An infringement of EU law could only arise in this context if a Member State were to insist that an applicant who already benefitted from previous visas needs to show that he made lawful use of these visas and prevent this applicant from otherwise establishing that he has sufficient means of subsistence. In fact, this seems to be precisely the complainant's reproach against the German authorities.

28. In its letter of 4 April 2011, the Commission took the view that the information provided by the complainant did not make it possible to ascertain whether the complainant's reproach was justified. The Ombudsman considers this position to be reasonable. In order to support his own view, the complainant referred to a letter dated 25 November 2010 he had received from the German Foreign Office. In that letter, the German Foreign Office pointed out that given that in relation to the issuance of long-term visas 'proof of the financing of all future stays [within Germany] could not realistically be demanded, the proper financing of such future stays was assumed, in the interest of the applicant, if his integrity and reliability within the meaning of Article 24(2)(b) of Regulation (EC) No. 810/2009 (Visa Code) could be taken for granted'. In the complainant's view, this statement meant that applicants who had already benefitted from visas in the past were obliged to prove that they had made lawful use of these visas. The Ombudsman is not convinced that this is indeed the conclusion to be drawn from the said statement. In fact, that statement reflects an approach that is clearly guided by the interest of the applicant and indicates that applicants cannot realistically be 'required' to show that they have sufficient means of subsistence. This does not necessarily mean that applicants are prevented from establishing that this is the case.

29. As regards the second of the issues referred to in the complainant's first allegation, i.e, the alleged requirement for visa applicants to appear in person at the embassy or consulate of the Member State issuing the visa, the Ombudsman is not convinced by the Commission's argument that the complainant had not made it clear that he wished it to deal with this issue. However, the Ombudsman considers reasonable the Commission's view that no further action was needed in this regard, given that the German authorities had acknowledged that a mistake had occurred.

30. In view of the above, the Ombudsman considers that there was no maladministration on the part of the Commission as regards the first allegation.

B. Allegation of failure to deal with the complainant's infringement complaint within a reasonable period of time and related claim

Arguments presented to the Ombudsman

31. The complainant alleged that the Commission failed to deal with his infringement complaint within a reasonable period of time. He claimed that in the future, the Commission should analyse serious infringement complaints within a reasonable period of time.

32. In its opinion, the Commission submitted that its letter of 9 April 2010 had already addressed the issue of multiple-entry visas. According to the Commission, the complainant's e-mail of 9 April 2010 sent shortly thereafter had raised the same issue in an identical manner without putting forward new facts or arguments. As regards the e-mail of 25 November 2010, the Commission noted that it replied by letters of 2 December 2010 and of 4 April 2011.

33. The complainant did not address this issue in his observations.

The Ombudsman's assessment

34. The Ombudsman notes that the complainant wrote to the Commission on 9 April 2010 and 25 November 2010 and that the Commission only addressed the substance of these e-mails in an e-mail that was sent on 4 April 2011, that is to say, nearly a year after the complainant's first e-mail and more than four months after his second e-mail. There is nothing to suggest that the issues raised by the complainant were particularly difficult to deal with. In fact, if the complainant's first e-mail of 9 April 2010 did indeed raise an issue with which the Commission had already dealt and did not include any new facts or arguments, it is difficult to see what could have prevented the Commission from informing the complainant accordingly shortly after it had received that e-mail.

35. In view of the above, the Ombudsman concludes that the Commission failed to handle the complainant's e-mails within a reasonable period of time. This constitutes an instance of maladministration.

36. In so far as the complainant's related claim is concerned, the Ombudsman takes the view that no further action is need, given that the Commission did not dispute the need to handle infringement complaints within a reasonable period of time.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

It is good administrative practice to reply to correspondence from citizens within a

reasonable period of time. In the present case, the Commission only replied to the substance of the complainant's two e-mails nearly a year and four months respectively after they were sent, without being able to justify this delay. This constitutes an instance of maladministration.

The complainant and the European Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 17 June 2013

[1] OJ 2007 L 332, p. 68. This Agreement entered into force on 1 January 2008.

[2] OJ 2009 L 243, p. 1.

[3] OJ 2006 L 105, p. 1.

[4] OJ 2002 C 244, p. 5. This text has since been replaced by a new Communication issued in 2012 (COM(2012) 154 final).