EU Immigration and Asylum Law

A Commentary

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ISBN 978 3 406 66653 7
Format (B x L): 16,0 x 24,0 cm
Gewicht: 1747 g
an appointment shall be given immediately. Some Member States have established fast-track procedures for justified cases of urgencies and certain categories of applicants such as business persons or seafarers. The Commission has proposed changes to the formulation of the rules relating to justified cases of urgency to the effect that in such cases the Member States ‘shall’ allow applicants to lodge their application without an appointment or shall give an immediate appointment.

The requirement to obtain an appointment is not applicable to third country national family members of EU citizens covered by the Free Movement Directive 2004/38/EC as Article 5(2) of the Directive provides that the Member States shall grant them ‘every facility to obtain the necessary visas’ which ‘shall be issued as soon as possible and on the basis of an accelerated procedure’. While Article 9 is silent on this issue, the Commission proposal makes express provision for this, clarifying that both ‘core’ and ‘extended’ family members are covered (see above Article 1 MN 8–9).

Furthermore, in pursuance to its aim to facilitate family contacts (see above Article 1 MN 4), the Commission proposal extends the same treatment to third country nationals who are ‘close relatives’ of EU citizens residing in their Member State of nationality and third country nationals who are ‘close relatives’ of EU citizens residing in a third country and wishing to visit together with their EU citizen relatives the Member State of which their EU citizen relatives are nationals. The same treatment is not extended to third country national family members of third country nationals who are long-term residents of the EU. However, in the context of family reunification, Article 13 of the Family Reunification Directive 2003/86/EC provides that as soon as an application for family reunification has been accepted, the Member State concerned shall authorize the entry of the family member. In that regard, it shall grant such persons ‘every facility for obtaining the requisite visas’.

### Article 10

**General rules for lodging an application**

1. Without prejudice to the provisions of Articles 13, 42, 43 and 45, applicants shall appear in person when lodging an application.

2. Consulates may waive the requirement referred to in paragraph 1 when the applicant is known to them for his integrity and reliability.

3. When lodging the application, the applicant shall:
   (a) present an application form in accordance with Article 11;
   (b) present a travel document in accordance with Article 12;
   (c) present a photograph in accordance with the standards set out in Regulation (EC) No 1683/95 or, where the VIS is operational pursuant to Article 48 of the VIS Regulation, in accordance with the standards set out in Article 13 of this Regulation;

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78 Some visa facilitation agreements provide similar rules as the Regulation regarding the prior appointment requirement. See for example Article 7(3) EU-Azerbaijan Visa Facilitation Agreement (OJ 2014 L 128/53).
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(d) allow the collection of his fingerprints in accordance with Article 13, where applicable;
(e) pay the visa fee in accordance with Article 16;
(f) provide supporting documents in accordance with Article 14 and Annex II;
(g) where applicable, produce proof of possession of adequate and valid travel medical insurance in accordance with Article 15.

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1. Article 10(3) lists the steps that an applicant is required to follow when lodging an application in terms of presenting an application form, a travel document, a photograph, allowing the collection of his fingerprints, paying the visa fee, providing supporting documents, and producing proof of possession of travel medical insurance.

I. The requirement to appear in person

2. Article 10(1) establishes the general rule that applicants shall appear in person when lodging an application without prejudice to Article 13, on collection of biometrics, Article 42, on honorary consuls, Article 43, on external service providers, and Article 45, on accredited commercial intermediaries. Applicants will always have to appear in persons in places where the Visa Identification System has been rolled out and it is necessary to collect their fingerprints for the first time (see below Article 13(2)). When they apply through an accredited commercial intermediary, visa applicants will not have to appear in person unless it is necessary to collect their fingerprints, which commercial intermediaries are not authorized to do.

II. The one-stop principle in Article 40(4)

3. In cases where a Member State cooperate with an external service provider as per Article 43, the applicant cannot be required to go to the external service provider to hand in his application and supporting documents and then to the consulate to have his fingerprints taken by virtue of the one-stop principle in Article 40(4). The external service provider will have to take the fingerprints. The Commission is currently investigating informally a Member State which had such a two stop-procedure in place.79

III. Exceptions

4. Article 10(2) establishes an exception to the general rule that an applicant must appear in person for applicants who are known to the consulate for their 'integrity and reliability'. Article 24(2)(b) lists among relevant factors to establish the 'integrity and reliability' of visa applicants, the lawful use of previous visas, the economic situation of the applicant and his genuine intention to leave at the expiry of the visa, without any further detail or clarification. The Commission has pointed out that these are not objective criteria to the effect that applicants, in practice, do not know when they are entitled to not appear in person.80

Given that the requirement to appear in person is cumbersome and costly to applicants, that it does not provide any added value in terms of detecting irregular immigrants as increasingly decision-making on visas involves no contact with applicants but it is rather a paper procedure, and that under Article 21(8) there is in any case the possibility to call in applicants for an interview, the Commission has proposed to abandon this general requirement and require applicants to appear in person only when their fingerprints need to be taken.81

Article 11
Application form

1. Each applicant shall submit a completed and signed application form, as set out in Annex I. Persons included in the applicant’s travel document shall submit a separate application form. Minors shall submit an application form signed by a person exercising permanent or temporary parental authority or legal guardianship.

2. Consulates shall make the application form widely available and easily accessible to applicants free of charge.

3. The form shall be available in the following languages:
   (a) the official language(s) of the Member State for which a visa is requested;
   (b) the official language(s) of the host country;
   (c) the official language(s) of the host country and the official language(s) of the Member State for which a visa is requested; or
   (d) in case of representation, the official language(s) of the representing Member State.

   In addition to the language(s) referred to in point (a), the form may be made available in another official language of the institutions of the European Union.

4. If the application form is not available in the official language(s) of the host country, a translation of it into that/those language(s) shall be made available separately to applicants.

5. A translation of the application form into the official language(s) of the host country shall be produced under local Schengen cooperation provided for in Article 48.

6. The consulate shall inform applicants of the language(s) which may be used when filling in the application form.

Article 12
Travel document

The applicant shall present a valid travel document satisfying the following criteria:

(a) its validity shall extend at least three months after the intended date of departure from the territory of the Member States or, in the case of several visits, after the last intended date of departure from the territory of the Member States. However, in a justified case of emergency, this obligation may be waived;

(b) it shall contain at least two blank pages;

(c) it shall have been issued within the previous 10 years.

Article 13

Biometric identifiers


2. At the time of submission of the first application, the applicant shall be required to appear in person. At that time, the following biometric identifiers of the applicant shall be collected:
   - a photograph, scanned or taken at the time of application, and
   - his 10 fingerprints taken flat and collected digitally.

3. Where fingerprints collected from the applicant as part of an earlier application were entered in the VIS for the first time less than 59 months before the date of the new application, they shall be copied to the subsequent application.
   However, where there is reasonable doubt regarding the identity of the applicant, the consulate shall collect fingerprints within the period specified in the first subparagraph.
   Furthermore, if at the time when the application is lodged, it cannot be immediately confirmed that the fingerprints were collected within the period specified in the first subparagraph, the applicant may request that they be collected.

4. In accordance with Article 9(5) of the VIS Regulation, the photograph attached to each application shall be entered in the VIS. The applicant shall not be required to appear in person for this purpose.
   The technical requirements for the photograph shall be in accordance with the international standards as set out in the International Civil Aviation Organization (ICAO) document 9303 Part 1, 6th edition.


6. The biometric identifiers shall be collected by qualified and duly authorised staff of the authorities competent in accordance with Article 4(1), (2) and (3). Under the supervision of the consulates, the biometric identifiers may also be collected by qualified and duly authorised staff of an honorary consul as referred to in Article 42 or of an external service provider as referred to in Article 43. The Member State(s) concerned shall, where there is any doubt, provide for the possibility of verifying at the consulate fingerprints which have been taken by the external service provider.

7. The following applicants shall be exempt from the requirement to give fingerprints:
   (a) children under the age of 12;
   (b) persons for whom fingerprinting is physically impossible. If the fingerprinting of fewer than 10 fingers is possible, the maximum number of fingerprints shall be taken. However, should the impossibility be temporary, the applicant shall be required to give the fingerprints at the following application. The authorities competent in accordance with Article 4(1), (2) and (3) shall be entitled to ask for

further clarification of the grounds for the temporary impossibility. Member States shall ensure that appropriate procedures guaranteeing the dignity of the applicant are in place in the event of there being difficulties in enrolling;

(c) heads of State or government and members of a national government with accompanying spouses, and the members of their official delegation when they are invited by Member States’ governments or by international organisations for an official purpose;

(d) sovereigns and other senior members of a royal family, when they are invited by Member States’ governments or by international organisations for an official purpose.

8. In the cases referred to in paragraph 7, the entry ‘not applicable’ shall be introduced in the VIS in accordance with Article 8(5) of the VIS Regulation.

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I. Exemptions

It is worth noting that third country national family members of EU citizens covered by the Free Movement Directive 2004/38/EC are not included among the categories exempted from the requirement to have their fingerprints collected and stored.

II. Biometric identifiers and Articles 7 and 8 of the CFR

Biometric identifiers must be collected, stored and used in accordance with the ECHR, the CFR and the UN Convention on the Rights of the Child. Detailed rules on the use of the Visa Identification System by visa authorities are contained in the Visa Information System (VIS) Regulation (EC) No 767/2008 which also establishes the rights and remedies available to individuals.82

While the legality of both the Regulation, in relation to the collection of the biometrics of visa applicants, and the VIS Regulation (EC) No 767/2008, in relation to the storing and use of such biometrics, has not been challenged, there have been challenges, under Articles 7 and 8 of the CFR, on respect for private and family life and on protection of personal data, to other EU measures providing for the collection and storing of personal data which may be relevant in this context. In the case of Schwarz, the German Administrative Court, Gelsenkirchen, made a preliminary reference to the ECJ concerning the validity of the EU passports Regulation (EC) No 2252/2004 under Articles 7 and 8 of the CFR on the basis that the Regulation obliges individuals applying for a passport to provide fingerprints which are stored in that passport. The ECJ held that although the taking and storing of fingerprints in passports constitutes an infringement of the rights to respect for private life and the protection of personal data, those measures are justified by the aim of protecting against any fraudulent use of passports with a view to pursuing the general interest objective of preventing illegal entry into the EU. The Court found that there was no evidence suggesting that the measures in question did not respect the essence of the fundamental rights at issue, and that the measures were appropriate and did not go beyond what was

82 OJ 2008 I 218/60, Chapters II and VI.
necessary to achieve their general objective. The Court however noted that the EU passports Regulation (EC) No 2252/2004 explicitly limited the use of fingerprints to verify the authenticity of a passport and the identity of its holder. It also did not provide for the storage of fingerprints except within the passport itself. This also meant that it could not be interpreted as providing a legal basis for the centralised storage of data collected or for the use of such data for purposes other than the prevention of illegal entry in the EU.83

The scope of the Visa Information System, on the other hand, is broader as data are stored centrally and law enforcement authorities have access to it.84 Following the ECJ judgment in Digital Rights Ireland and Seitlinger and Others on the validity of the Data Retention Directive,85 it is clear that the Visa Information System, as an instrument which envisages ‘mass data collection, storage of the data of a very large number of unsuspected persons and access and use of such data by law enforcement authorities’, is subject to the requirement of a high level of protection of personal data.86 In its judgment, the Court has clarified that these kind of measures will be assessed strictly with regard to their proportionality and necessity and their legality will require the existence of adequate safeguards.87

Article 14
Supporting documents

1. When applying for a uniform visa, the applicant shall present:
   (a) documents indicating the purpose of the journey;
   (b) documents in relation to accommodation, or proof of sufficient means to cover his accommodation;
   (c) documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or that he is in a position to acquire such means lawfully, in accordance with Article 5(1)(c) and (3) of the Schengen Borders Code;
   (d) information enabling an assessment of the applicant’s intention to leave the territory of the Member States before the expiry of the visa applied for.

2. When applying for an airport transit visa, the applicant shall present:
   (a) documents in relation to the onward journey to the final destination after the intended airport transit;
   (b) information enabling an assessment of the applicant’s intention not to enter the territory of the Member States.

3. A non-exhaustive list of supporting documents which the consulate may request from the applicant in order to verify the fulfilment of the conditions listed in paragraphs 1 and 2 is set out in Annex II.

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83 ECJ, Schwarz, C-291/12, EU:C:2013:670. See also ECJ, Willems and Others, C-446/12, C-447/12, C-448/12 and C-449/12, pending, on whether the EU Passports Regulation (EC) No 2252/2004 (OJ 2004 L 385/1), should be interpreted as requiring the Member States to give a statutory guarantee that the biometric data collected and stored pursuant to that Regulation may not be collected, processed and used for any purposes other than the issuing of passports.
86 Council doc. 9009/14 of 5 May 2014, para 20, p. 8.
87 ECJ, Digital Rights Ireland and Seitlinger and Others, C-293/12, EU:C:2014:238.
4. Member States may require applicants to present a proof of sponsorship and/or private accommodation by completing a form drawn up by each Member State. That form shall indicate in particular:
(a) whether its purpose is proof of sponsorship and/or of accommodation;
(b) whether the host is an individual, a company or an organisation;
(c) the host’s identity and contact details;
(d) the invited applicant(s);
(e) the address of the accommodation;
(f) the length and purpose of the stay;
(g) possible family ties with the host.

In addition to the Member State’s official language(s), the form shall be drawn up in at least one other official language of the institutions of the European Union. The form shall provide the person signing it with the information required pursuant to Article 37(1) of the VIS Regulation. A specimen of the form shall be notified to the Commission.

5. Within local Schengen cooperation the need to complete and harmonise the lists of supporting documents shall be assessed in each jurisdiction in order to take account of local circumstances.

6. Consulates may waive one or more of the requirements of paragraph 1 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 the Schengen Borders Code at the time of the crossing of the external borders of the Member States.

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I. Harmonization of supporting documents

Article 14(1) and (2) provides that an applicant for a uniform visa shall present documents relating to the purpose of his journey, accommodation, sufficient means of subsistence and intention to leave the territory of the Member States before the expiry of the visa applied for.

There is no formal substantive harmonization as to which supporting documents a visa applicant must present. This position has been justified in terms of the difficulties in drawing up detailed rules in a situation where there is great diversity of individual circumstances and local conditions worldwide. Lack of harmonization does however cause unequal treatment of applicants and visa shopping. The Regulation has nevertheless improved the pre-existing situation in that Article 14(3) envisages a non-exhaustive list of supporting documents which may be required by consulates. This list is contained in Annex II to the Regulation. The Visa Handbook also provides for detailed guidelines. It was expected that these guidelines would eventually be replaced by harmonized lists corresponding to local circumstances as a result of Local Schengen

88 Visa facilitations agreements may contain provisions on this matter. See, for example, Article 4 EU-Azerbaijan Visa Facilitation Agreement (OJ 2014 L 128/53).
Cooperation as envisaged by Article 14(5). However, progress on this front has been limited. The Commission reports among the reasons for lack of progress ‘reluctance on the part of Member States at local level, seemingly unaware of the legal obligation to carry out this assessment’ and ‘lack of awareness by consulates of certain Member States regarding application of a common visa policy’.  

Under the Commission proposal for amending and recasting the Regulation (see above Article 1 MN 4), the list of supporting documents in Annex II becomes exhaustive. Furthermore, under the proposal, the Commission is to establish the list of supporting documents to be used in each jurisdiction in order to take account of local circumstances by means of implementing acts, adopted under the ‘examination procedure’ (see below Articles 50–52 MN 1).

II. Proof of sponsorship and/or private accommodation

2 Under Article 14(4), the Member States may also require applicants to present proof of sponsorship and/or private accommodation by completing a form which must meet a number of minimum requirements. Practices among the Member States vary widely in this respect, and it appears that many Member States have used the forms explicitly to impose the financial risks of an extended stay on the signee of the form. Also, while the information provided in this form is inserted in the Visa Information System, many Member States do not inform the signee of this as required by Article 37 of the Visa Information System (VIS) Regulation (EC) No 767/2008.

III. Discretionary exemptions

3 Consulates have the power to waive some of the requirements on supporting documents in relation to applicants known to them for their ‘integrity and reliability’. However, as already mentioned in the context of Article 10(2), the Commission claims that the subjectivity of this notion has precluded its practical application by consulates. The issue is exacerbated by heavy reliance on outsourcing, as external service providers (or commercial intermediaries) are not entitled to assess the content of applications under Article 43(4). The Commission proposal introduces the possibility of providing exemptions in the case of applicants attending major international events in the territory of the Member States particularly important due to their tourism and/or cultural impact.

IV. The Free Movement Directive 2004/38/EC and compulsory exemptions

4 Consistently with the general approach of the Regulation, Article 14 is silent on the position of third country nationals who are covered by the Free Movement Directive 2004/38/EC (see above Article 1 MN 9). The Visa Handbook clarifies that they may only be required to present documents establishing that they are beneficiaries of the

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