Bundesministerium
der Justiz und
für Verbraucherschutz

**Die Verfahrensbevollmächtigte
der Regierung der Bundesrepublik Deutschland**

**The Agent of the Government
of the Federal Republic of Germany**

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NO. IV C 1 – 9470/2-4E(0)- 48 141/2018

DATE Berlin, 31 August 2018

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Mr Stanley Naismith
Section Registrar of the
European Court of Human Rights
Council of Europe
F-67075 STRASBOURG - CEDEX

BY E-TRANSMISSION ONLY

Subject.: Application no. 3599/18
[redacted] and others v. Belgium

Reference: Your letter dated 17 July 2018

Encl.: - 1 -

Dear Sir,

Please find enclosed the written comments of the Federal Government dated 31 August 2018.

Yours sincerely,

Nicola Wenzel

(Dr. Nicola Wenzel)

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Europäischer Gerichtshof
für Menschenrechte
– Europarat –
F – 67075 STRASBOURG – CEDEX

NUR PER E-TRANSMISSION

Subject: Application no. 3599/18
[redacted] and others v. Belgium

here: Letter from the Court dated 17 July 2018

Written comments by the Federal Republic of Germany in the case of [redacted] *and others v. Belgium* pursuant to Article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms

1 The Federal Government of the Federal Republic of Germany would like to express its thanks to the President of the Section for the opportunity to submit written comments pursuant to Article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") regarding the case of [redacted] *and others v. Belgium*.

2 The Federal Government would like to take this opportunity to present to the Court its legal opinion on questions 1 and 3 raised by the Court. The Federal Republic of Germany

is of the opinion that questions 1 and 3 are closely linked and should be answered in the negative for the following reasons:

3 The present case does not qualify as one of the instances in which the Court has recognised the extra-territorial applicability of the Convention because of an exercise of jurisdiction by a Contracting State outside its own territorial boundaries (**I.**). We believe that the Court should not expand its established case-law and derive positive obligations from the Convention in an extra-territorial context, if authority and control over a territory or over the applicant are not firmly established. Broadening the extra-territorial responsibility of Contracting States in such a way would overstretch the Convention and could have serious consequences for the Convention system as such (**II.**). In addition, answering questions 1 and 3 in the affirmative would create an unlimited obligation on Contracting States to allow entry to individuals who might be at risk of treatment contrary to Article 3 of the Convention, regardless of where in the world these individuals might find themselves. Such a broad obligation would not only run counter to accepted principles of international migration and refugee law, but would also be impossible for Contracting States to fulfil (**III.**).

I. The present case does not fall into one of the categories in which the Court has exceptionally recognised the exercise of extra-territorial jurisdiction.

4 The Federal Republic of Germany is of the firm opinion that persons who apply for a visa at a consulate of a Contracting State do not come under the jurisdiction of that State within the meaning of Article 1 of the Convention.

5 According to the Court's established jurisprudence, a State's jurisdiction within the meaning of Article 1 of the Convention is primarily territorial (*Banković and others v. Belgium and others* [GC], no. 52207/99, §§ 61 and 67). It may, under certain, narrowly defined circumstances, extend to acts of State authorities that are performed or that produce effects outside its own territory. Whether such exceptional circumstances exist must be determined with reference to the particular facts of each case (*Al-Skeini and others v. The United Kingdom* [GC], no. 55721/07, § 132).

6 An analysis of the Court's jurisprudence shows that the exceptional exercise of extra-territorial jurisdiction may be based on two rationales: first, the exercise of authority and control over the person of the applicant by State agents (relational concept of jurisdiction), and second, the exercise of authority and control over a territory situated outside the State's borders (territorial concept of jurisdiction).

7 The territorial concept of jurisdiction is not pertinent in the present case. Embassies and consulates are located on foreign territory; their premises are part of the territory of the receiving State. They benefit from privileges and immunities, such as inviolability, in the receiving State. This does not, however, alter the fact that embassies and consulates are not extra-territorial territory of the sending State.

8 Germany contends that the relational concept of jurisdiction is not pertinent either. None of the scenarios in which the Court has exceptionally recognised the exercise of extra-territorial jurisdiction applies.

9 It is true that the Court has held that one recognised instance of extra-territorial exercise of jurisdiction are

> "cases involving the activities of its diplomatic or consular agents abroad [...]. In these specific situations, customary international law and treaty provisions have recognized the extra-territorial exercise of jurisdiction by the relevant State." (*Banković and others*, cited above, § 73)

However, the Court has also clarified that the actions of diplomatic and consular agents who are present on foreign territory in accordance with provisions of international law may amount to such an exercise of jurisdiction only when these agents exert authority and control over others (see, among many other authorities, *Al-Skeini* cited above, § 134). Authority and control is a general test that applies in all cases where the extra-territorial application of the Convention is invoked. Authority and control over the applicants, however, is lacking here.

10 The only link between the Contracting State and the applicants in cases such as the present one is the fact that the applicants initiated an administrative procedure by applying for a visa. This link is not sufficient, in Germany's understanding, to justify the exceptional application of the Convention in a situation that is by, its very nature, extra-territorial.

11 To date, the Court has recognised the applicability of the Convention based on an exercise of extra-territorial jurisdiction under the relational concept of jurisdiction only in the case of physical authority and control over the applicant. When a person on foreign territory applies for a visa at a consular division or consulate, however, said person is not under the physical authority and control of the sending State's agents. Whereas the State agents handling visa requests abroad are competent to reach decisions on visa applications by foreign nationals and therefore on the question of whether permission will be granted to the applicants to enter the sending State's territory, they do not exercise phys-

ical authority or control over the applicants located abroad. Consular agents are, under public international law, not empowered to take coercive action against persons located on the consulate premises. If such coercive action should ever be necessary, the head of the consular post or his or her designee or the head of the diplomatic mission of the sending State must give their consent to the authorities of the receiving State to enter the diplomatic or consular premises (Article 31 § 2 of the Vienna Convention on Consular Relations; Article 22 § 1 of the Vienna Convention on Diplomatic Relations) and must rely on the cooperation of the authorities of the receiving State. The applicants in the present case are therefore in a position that is very different to the one of the applicants in *Al-Skeini,* who were killed by State agents in the course of a security operation and of the applicant in *Öcalan* (*Öcalan v. Turkey*, no. 46221/99), who was taken into the custody by State agents abroad.

12 Even if one were to consider that when activities of consular agents are involved, their decisions could be seen to constitute an exercise of jurisdiction with regard to Convention rights directly relevant to the visa application procedure and thus the simple fact of applying for a visa may be held to constitute a jurisdictional link to the sending State, the applicants could still not be said to come under the jurisdiction of the relevant Contracting State in relation to the specific violations of the Convention referred to in the current application.

13 Under the territorial rationale for extra-territorial jurisdiction, a State that exercises authority and control over a foreign territory has to secure, within the area under its control, the entire range of substantive rights set out in the Convention and any additional Protocols that it has ratified *(Al-Skeini*, cited above, § 138). Where the State, through its agents, exercises control and authority not over foreign territory, but over an individual abroad, it is only obliged to secure to said individual the rights of the Convention "that are relevant to the situation of that individual" (*Al-Skeini*, cited above, § 137). Insofar, the Convention rights can be "divided and tailored" (*Al-Skeini*, cited above, § 137) in the sense that, when examining whether in a specific case an exceptional instance of extra-territorial jurisdiction is to be recognised, the subject matter of the applicants' complaints must be taken into account (see *Abdul Wahab Khan v. The United Kingdom* (dec.), no. 11987/11, § 28).

14 Since the only link between the Contracting State and the applicants in the kind of case currently under examination is the administrative procedure initiated by the applicants, only Convention rights closely linked to this procedure itself could possibly be relevant. When treating the applicants during the administrative procedure at the consulate, consular agents would, of course, ensure that no ill-treatment of the applicants occurs there and then. This fact may, however, not entail responsibility on the part of consular agents

for any treatment of the applicants that occurs elsewhere and outside this administrative procedure and in this case even outside the receiving State where the consular agents are located. Namely, the applicants in the current case do not allege that a violation of their Convention rights occurred or would occur in Lebanon, where they lodged their visa application at the Belgian Embassy's consular division, through any treatment undergone or received there in Lebanon. Their claims relate to risks incurred in their home country, from which they travelled to Lebanon, a country where they do not incur such a risk. The mere fact that the applicants availed themselves of the option provided for by Belgian law to apply for a short-term visa at a consular division abroad has no direct bearing on whether their complaints relating to the alleged risk of treatment contrary to Article 3 of the Convention back in their country of origin fall within the jurisdiction of Belgium (see *mutatis mutandis Abdul Wahab Khan*, cited above, § 28). If the Court were to decide otherwise, applicants could, by availing themselves of a procedure provided for by the Contracting State at a diplomatic or consular post abroad and not related to the substantial complaint, trigger the application of any substantive Convention right unrelated to the concrete procedure.

II. Positive obligations should not be derived from the Convention in an extra-territorial context without firmly established authority and control.

15 The fact that consular authorities are involved and that an administrative procedure has been initiated by the applicants against the respondent Contracting State outside its territory should not obscure the fact that this kind of case really is about an omission. The applicants allege that the Contracting State has not taken the necessary steps to protect them against treatment contrary to Article 3 of the Convention in their home State. What the applicants request is for the Court to infer positive obligations for Contracting States in an extra-territorial situation where no authority and control exists. Not actual authority and control, but the simple theoretical ability to take action would be the basis for establishing the exceptional exercise of extra-territorial jurisdiction.

16 To date, the Court has recognised positive obligations in an extra-territorial context on the basis of firmly established authority and control, either territorially or with respect to the applicant. In the *Hirsi Jamaa* case (*Hirsi Jamaa v. Italy* [GC], no. 27765/09), for example, the applicants had been rescued at sea and subsequently transferred on board ships of the Italian armed forces from where they were transferred to Libya (*Hirsi Jamaa*, cited above, § 81). The Court found that Article 3 had been violated because Italy had not complied with its positive obligation under Article 3 not to expose the applicants to the risk of treatment contrary to Article 3 by a third State. But this positive obligation could only be inferred from the Convention because the applicants were under "the continuous

and exclusive de jure and de facto control of the Italian authorities" in the first place (*Hirsi Jamaa*, cited above, § 8).

17 Such authority and control is lacking in the present case (see I. above), which should therefore be distinguished from the *Hirsi Jamaa* case. In Germany's understanding, the present case should rather be decided in line with the Court's rationale in *Abdul Wahab Khan* (cited above). In that case, the applicant, who was residing in Pakistan, had engaged judicial proceedings in the United Kingdom asking to be admitted to the United Kingdom and arguing that, in Pakistan, he was exposed to treatment contrary, inter alia, to Article 3 of the Convention. The Court held that the complaint was incompatible with the provisions of the Convention. In particular, it considered that there was not

> "any support in the Court's case-law [...] that the State's obligations under Article 3 require it to take this Article into account when making adverse decisions against individuals, even when those individuals are not within its jurisdiction." (*Abdul Wahab Khan*, cited above, § 26).

As in *Abdul Wahab Khan*, there is no firmly established authority and control of the Contracting State over the applicants. If the fact of engaging judicial proceedings from abroad was not sufficient to establish a State's jurisdiction in that case, then the fact of applying for a visa at a consulate of a Contracting State in a third country is not sufficient, either.

18 We believe that, if the Court were to depart from the *Abdul Wahab Khan* jurisprudence in the present case and recognise positive obligations without a sufficient jurisdictional link as its basis, it would overstretch Contracting States' responsibility under the Convention. The door would be open to a wide array of new applications invoking positive obligations in extra-territorial contexts. Even cross-border environmental and health issues for example could be litigated before the Court. In the end, the already overburdened Convention system would be jeopardized.

III. An unlimited obligation on Contracting States to grant humanitarian visas would be at odds with international migration and refugee law and would be impossible to fulfil.

19 Finally, Germany would like to point out that answering questions 1 and 3 in the affirmative would run counter to established principles of international migration and refugee law. Immigration control is traditionally part of the *domaine réservé;* States freely decide whom to admit to their territory. According to the Court's established case-law,

> "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens" (*Hirsi Jamaa*, cited above, § 113; see also *J.K. and others v. Sweden* [GC], no. 59166/12, § 79; *F.G. v. Sweden*, no. 43611/11, § 111; *Saadi v. Italy* [GC], no. 37201/06, §§ 124-133).

20 This State prerogative is limited by the prohibition of *refoulement*. Article 33 of the 1951 Refugee Convention states:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The words "expel or return" demonstrate clearly that the prohibition of *refoulement* applies to persons on a State's territory on the one hand or to persons presenting themselves at the border of the State on the other. *Non-refoulement* does not apply to persons on the territories of third States. Neither does it imply that States are under an obligation to grant a visa to persons in third States in order to enable them to create a situation in which the guarantee of *non-refoulement* applies. For the reasons set out above, the same reasoning applies *mutatis mutandis* to the Convention. The Convention cannot be interpreted in such a way as to oblige Contracting States to grant visas to applicants to enable them to create a situation in which Article 3 of the Convention applies.

21 To decide otherwise would mean creating an unlimited obligation on Contracting States to allow entry to individuals who might be at risk of ill-treatment contrary to Article 3 of the Convention, regardless of where in the world those individuals might find themselves (see *Abdul Wahab Khan*, cited above, § 27). Such a ruling would have considerable practical consequences: contracting States would be faced with an obligation that is impossible to fulfil. At the same time, if it were possible and they were to fulfil the obligation, the consequences for Contracting States would be incalculable. The Court itself has recognised that Contracting States

> "are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers (*Hirsi Jamaa*, cited above, § 122).

These difficulties would multiply considerably and, as a consequence, present a serious challenge to the cohesion of societies in Contracting States.

22 This having been said, the Federal Government would like to emphasise that Contracting States are aware of the dire human rights situation in Syria and are actively engaged in seeking political solutions to address the situation. Humanitarian admittance and assistance programmes are in place on a voluntary basis. The Federal Government of Germany for example admitted more than 20,000 Syrian refugees through humanitarian admission programs from 2013-2015. Since 2016, Germany has admitted about 5,000 Syrian refugees through resettlement and humanitarian admission programs, particularly from Turkey. In 2018 and 2019 Germany has committed to admit 10,200 refugees (including 7.500 Syrian nationals) via resettlement and humanitarian admission programs. In addition, around 25,000 visa have been issued since 2013 through various humanitarian admission programs of *Land* Governments. This, however, is a matter of humanitarian policy choices. It should not be turned into an issue of directly enforceable individual human rights.

Nicola Wenzel

(Dr. Nicola Wenzel)