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The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?

Evelien Brouwer

Even before the outcome of the case between Syrian asylum-seekers v. the Belgian state (*X and X v. Belgium*) was known, on the morning of the 7th of March 2017 a Dutch newspaper printed the headline: “Decision of the European Court today could lay a bomb under the European asylum system”.¹ Well, it did not. In *X and X v. Belgium*, the Court of Justice of the European Union (CJEU) decided to take a rather formal, possibly even politically motivated approach, concluding that member states have no positive obligation to issue humanitarian visa to Syrian families, even if they are at risk of ill treatment, in violation of Article 4 of the Charter of Fundamental Rights.

Answering the preliminary questions of the Belgian immigration court, the CJEU concluded that the Visa Code does not apply to applications for humanitarian visas at embassies or consular posts of EU member states in third countries with a view to lodging asylum in that member state. As the CJEU states, an application for a visa with limited territorial validity on the basis of Article 25 of the Visa Code made on humanitarian grounds

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.²

The judgment is disappointing, for two reasons. First, because by concluding that EU law does not apply to the application for humanitarian visas, as in this case, the CJEU provides too narrow an interpretation of the Visa Code. In doing so it fails to address the clear question of the Belgian court on the extraterritorial application of the Charter on Fundamental Rights (hereafter the Charter), thus neglecting Advocate General Mengozzi’s elaborate comments on

¹ See www.volkskrant.nl/politiek/het-europees-hof-kan-vandaag-een-bom-leggen-onder-ons-asielbeleid~a4470933/

² CJEU, 7 March 2017, C-638/16 PPU, *X. and X. v. Belgium* para. 51.

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this point. Second, instead of offering a more human rights based approach on EU responsibilities in this field, pointing to the already existing obligations of member states towards asylum seekers and refugees in EU law, it refers to the failing mechanism of the Dublin Regulation to substantiate its conclusions. Whereas generally the CJEU opts for a clear and logical teleological interpretation of EU law, considering the purpose of the provisions at stake against the background of a systemic reading of EU law as a whole, this judgment appears to be based on the wrong teleology.

A narrow view of the Visa Code, neglecting the extraterritorial application of the Charter

The Belgian court requested an answer to whether Article 25(1)(a) of the Visa Code requires the member state to which an application for a visa with limited territorial validity was made “to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established.” The CJEU does not answer this question at all, but instead focuses on the scope of competence of EU law, stating that the Visa Code is based on Article 62 (2) (a) and (b) of the former EC Treaty, and that to date, no legislation has been adopted on the basis of Article 79 (2) (a) of the TFEU with regard to the issuing of long-term visas and residence permits to third-country nationals on humanitarian grounds.³

The CJEU simply argues that because this particular situation is not covered by EU law, for the Syrian family applying for visas with a limited territorial validity to be able to apply for asylum in Belgium, the provisions of the Charter are not applicable to this case. The CJEU concludes that the issuing of humanitarian visas is a matter of national sovereignty “as European law currently stands.”⁴ Yet there are at least two grounds on which to disagree with these conclusions of the CJEU and to argue that member states dealing with such visa applications are bound by EU law.

First, even if we accept the reference to the current scope of competences of EU law, the CJEU neglects the fact that Article 25 of the Visa Code itself provides the legal basis to issue humanitarian visas “because of international obligations.” As established in the report of Iben Jensen in 2016, several member states do apply the Visa Code to issue a Schengen visa with limited territorial validity with the purpose of granting them international protection, which is in effect a long-term residence permit.⁵ The CJEU does recognise that in this case the application for a territorial limited visa has been ‘formally submitted’ on the basis of Article 25 of the Visa Code. It is only by reasoning that because the purpose of this visa application is to apply for asylum in Belgium, and therefore differs from a short-term visa application, the CJEU concludes that the Visa Code does not apply.⁶ This is a dangerous reasoning, as it allows

³ C-638/16 PPU, para. 40 and 44.

⁴ C-638/16 PPU, para. 45.

⁵ See Ulla Iben Jensen (2016), *Humanitarian visas: option or obligation?*, Study for the European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, September, p. 43, ff [www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU\(2014\)509986_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf)), where she describes the different policies in the EU member states and the unclear provisions of the current Visa Code.

⁶ C-638/16 PPU, para. 43 and 47.

member states to circumvent the humanitarian and international obligations included in the Visa Code itself, by framing applications based on Article 25 as long-term residence applications.

A comparable strategy seems to have been chosen by the General Court in the judgment on the EU-Turkey Agreement of 18 March 2016, dismissing an action for annulment of the EU-Turkey agreement based on the ground of lack of jurisdiction.⁷ For this conclusion the Court uncritically followed the European Council's allegations that this Agreement was adopted by the heads of states of the EU member states, and not by the European Council itself on behalf of the EU. This conclusion is both worrying and unconvincing, considering the numerous references to the EU as being the author of the agreement in the statement itself, but also in several EU reports hailing the 'success' of this cooperation with Turkey for closing EU's external borders.⁸

Furthermore, the CJEU fails to take into account the general principles of EU law, included in Articles 2 and 3 TEU with regard to the protection of fundamental rights and international obligations, and in Article 78 (1) TFEU describing the goal of "offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement" in accordance with the Geneva Convention. Instead, the CJEU points to the fact that the Procedure Directive (Directive 2013/32) and the Dublin Regulation (Regulation 604/2013) explicitly exclude their application to asylum applications at embassies and consulates abroad, in order to substantiate its conclusion that in this case EU law does not apply.⁹ But the current case did not question the applicability of the Procedure Directive or the Dublin Regulation. The question, as submitted by the Belgian court, dealt with the obligation of member states under Articles 4 and 18 of the Charter when dealing with applications based on Article 25 of the Visa Code. As argued in my earlier comment on the opinion of AG Mengozzi, even if Article 25 offers member states a wide margin of appreciation to decide whether or not to issue a humanitarian visa, under specific circumstances this discretionary power may turn into a positive obligation when the absolute right of *non-refoulement* is at risk.¹⁰ It was precisely because of these circumstances that the Belgian court asked for clarification of the meaning of the words "international obligations" in Article 25, and why the Advocate General found that member states do have an obligation to issue humanitarian visas.

It is striking, and significant, that the CJEU explicitly recognises that the Belgian case in hand does concern the protection of the absolute right of *non-refoulement*. Underlining the

⁷ General Court, Order of 28 February 2017, T-192/16, *NF v. European Council*.

⁸ See the text of the Agreement (www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf) and the fourth report on the progress made in the implementation of the EU-Turkey statement of the European Commission COM (2016) 792.

⁹ C-638/16 PPU, para. 49.

¹⁰ Evelien Brouwer (2017), "AG Mengozzi's conclusion in X and X v. Belgium on the positive obligation to issue humanitarian visa. A legitimate plea to ensure safe journeys for refugees", CEPS Policy Insights, No. 2017/09, March (www.ceps.eu/system/files/PI2017-09_EB_VisaCode.pdf).

admissibility of this case for the urgent procedure on the basis of Article 107 of the Rules of Procedure of the Court, the CJEU states that

is not disputed that, at least at the time when the request that the present reference for a preliminary ruling should be dealt with under the urgent preliminary ruling procedure was examined, the applicants in the main proceedings were facing a real risk of being subjected to inhuman and degrading treatment...¹¹

The conclusion of the CJEU – that based on EU law there is no obligation to issue humanitarian visas in these circumstances – is difficult to reconcile with this statement, but nevertheless may offer the Belgian court some loophole to conclude that there is still an obligation under national procedure for the Belgian authorities to issue a humanitarian visa to the Syrian family on the basis of Article 3 ECHR. Yet, given the current political climate and the lack of explicit support from the CJEU, it would take a lot of courage to do so.

Protecting the Dublin system rather than refugees?

The judgment is a missed opportunity to further clarify the goal and purpose of Article 25 of the Visa Code. Instead, the CJEU addresses the compatibility of finding such a positive obligation to issue humanitarian visas on the basis of the Visa Code with the Dublin system. According to the CJEU,

allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice [...] would undermine the general structure of the system established by Regulation No 604/2013.¹²

This is perhaps the most contentious part of the judgment. Denying the application of the Visa Code in this particular case because it would undermine the Dublin system is an unconvincing teleological interpretation. The CJEU thus finds that the enforcement of an already failing, and very costly mechanism such as the Dublin Regulation, is more important than the obligations of member states under the EU treaties and the Charter to protect the fundamental rights of individuals.¹³ It also neglects the explicit goals of the Dublin system itself, which are not, as now seems to be suggested by the CJEU, to protect member states from refugees trying to obtain protection in the member state of their own choice, but to prevent double or multiple asylum applications, and to ensure the rapid determination of the responsible member states to guarantee effective access to international protection. With this conclusion, the CJEU seems to give priority to bureaucracy, which is a secondary outcome of the Dublin system, over one of the primary goals of the Dublin Regulation, which is swift and effective access to procedures for international protection.

¹¹ C-638/16 PPU, para. 33. Underlining mine, EB.

¹² C-638/16 PPU, para 48.

¹³ See on the deficits of the current Dublin system: Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, *Enhancing the CEAS and Alternatives to Dublin*, Study for the LIBE-Committee of the European Parliament, 2015 (www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf).

Whereas currently the EU asylum system fails to offer effective solutions to the humanitarian crisis, and member states neglect EU and international obligations to protect those qualifying for international protection by refusing to cooperate on a basis of solidarity, this judgment provides no basis for change.¹⁴ Advocate General Mengozzi in his opinion accurately addressed the shared and individual responsibilities of EU member states towards asylum seekers and refugees, but the CJEU seems to have opted for political inertia and the status quo, thereby allowing the dangerous and often fatal journeys of migrants to continue.

¹⁴ See the recent study, commissioned by the European Parliament, on the EU mechanisms of relocation of asylum seekers from Greece and Italy, also pointing to the inconsistent coexistence of the relocation scheme with Dublin transfers: Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, European Union, March 2017.