The X. and X. case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?

by Jean-Yves Carlier, Professor at the University of Louvain (UCL) and at the University of Liège, Avocat, and Luc Leboeuf, Guest Professor at the University of Antwerp, Research Associate at the University of Louvain (UCL) and at the Max Planck Institute for Social Anthropology, Avocat. Both are members of the ‘Équipe droits européens et migrations’ of the University of Louvain (EDEM).

This post does not intend to provide a detailed analysis of Advocate General Mengozzi’s opinion in the X. and X. case (analysed further on this blog and elsewhere). Rather, it aims to contribute to the debate by developing two thoughts that might guide the Court’s reasoning. The first thought is that a parallel might be drawn between a situation which is purely internal to a Member State and a situation which could be seen as purely external to the EU. Both could fall under the scope of EU law when the ‘genuine enjoyment of the substance of the rights’ of those concerned is at stake. Such genuine enjoyment is threatened when an EU citizen has, in fact, to leave the territory of the Union. It could also be threatened when a third country national would, in fact, have to enter the territory of the Union. The second thought is that Member States might not necessarily have an obligation to issue a visa. Instead, the Member State might have a duty to give reasons for the rejection of a visa application with respect to the prohibition of inhumane and degrading treatments. These thoughts might lead towards a middle way between the opposing positions at stake.

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The issue of humanitarian visas requested by Syrian asylum seekers in order to reach the territory of the EU legally and safely is born out of a sharp Belgian controversy. The Belgian judge that deals with asylum and immigration matters, the Council for Aliens Law Litigation (hereafter: the CALL, in French the ‘CCE’ for ‘Conseil du contentieux des étrangers’), suspended in extreme urgency three successive decisions of the Belgian administration, the Aliens Office, that rejected a request for a humanitarian visa introduced by a Syrian family, who volunteers had offered to welcome in Belgium. The CALL considered that these decisions were not sufficiently motivated with respect to fundamental rights, notably the prohibition of inhuman and degrading treatment.

After three suspensions, the judge ordered the issuance of the visa. This led to the authorities’ public dismay, as well as to various judicial procedures intended to obtain the enforcement of the judgement of the CALL under penalty (see, for example, here, here, here and comment here). Following those procedures, the legitimacy of the judicial power was questioned by a vast media campaign originated by some politicians, that criticized a ‘government by the judges’ who are ‘disconnected from realities on the ground’. Concerned
by this controversy, the General Assembly of the CALL addressed preliminary references to the Belgian Constitutional Court and to the ECJ in a similar case.

The CALL seeks a clarification from the Constitutional Court of the extent of its competence of judicial review. Is the CALL competent to deal with emergency applications against a decision that refuses to issue a visa? Or can such decisions only be contested following the (much longer) ordinary annulment procedure? From the ECJ, the CALL seeks a clarification of the applicable EU rules. Does EU law, notably the Visa Code, consecrate an obligation to deliver a humanitarian visa under certain circumstances, to prevent serious fundamental rights violations? (see for comment on this case here)

The questions addressed to the ECJ concern a significant paradox of EU and international asylum law: international protection only benefits those who succeeded in leaving their home country and reaching the territory of another country. That rule rests on straightforward reasons. International protection is granted by a national authority to a fugitive, who finds himself on the national territory. Protection, which is a right, is conditioned to the crossing of borders, which is a favor. A preliminary authorization, the visa, is requested for regular border crossing.

Humanitarian visas are scarcely issued. Member States consider that humanitarian visas, even of limited territorial validity, fall outside of the scope of the Visa Code. The Visa Code would only apply to visas for short stays on the EU territory, the so-called ‘touristic visas’. Such an humanitarian visa requested with the view of a longer stay based on refugee status, falls under the sovereign competence of the Member States. Refugees do not have the right to choose their country of asylum. Hence, every State should have the sovereign prerogative to refuse any request for a humanitarian visa without giving reasons.

So far, this point of view of the Member States has been supported by the European Commission. In its written observations in the aforementioned case concerning the visa to Belgium requested by a Syrian family, the Commission considers that a request for a humanitarian visa does not fall under the Visa Code, whose material scope is limited to short stay visas. Applicants' wishes to reside on the EU territory for a long stay, in their future status as refugees or beneficiaries of subsidiary protection, imply that their request for a short stay visa must be considered as a request for a long stay visa. Also, even if it was to be assumed that the Visa Code covers humanitarian visa applications, article 25 of that Code, which provides that a visa with limited territorial validity shall exceptionally be issued, notably when Member States consider it necessary for humanitarian reasons, does not impose any constraint on States. States can derogate from the Visa Code to issue a short stay humanitarian visa with limited territorial validity, but have no obligation to do so. Such ability escapes to any judicial review under the EU Charter of Fundamental Rights, the European Convention on Human Rights and the Geneva Convention. Further, the concerned applicants find themselves outside of the EU territory, so that they do not fall under the territorial scope of EU law, most notably the EU Charter of Fundamental Rights.

In his opinion, however, Advocate General Mengozzi emphasizes that the applicants have indeed requested a short stay visa with limited territorial validity, on the basis of article 25 of the Visa Code. The mere fact that they have also expressed their intention to ultimately file an asylum application, would not imply that their visa application must be considered as an application for a long stay visa which escapes the scope of the Visa Code and, hence, of EU law. The Advocate General underlines that ‘the applicant’s intent to request asylum once they have reached the Belgian territory should not modify the nature of their application, nor its object’.

http://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visa...
Therefore, Member States would have the duty to respect the EU Charter of Fundamental Rights, which constrains their action when they implement EU law, including the Visa Code, whatever territorial ties the applicants may or may not have with the EU legal order. Member States would then be obliged to issue a visa, if serious grounds are shown to prove that the rejection of the visa application would have the direct consequence of the applicant to inhuman and degrading treatment prohibited by the EU Charter. Such debate reveals the tension between the principle of sovereignty (of States or of the EU) and fundamental rights, which is inherent to international migration law. It is now for the ECJ to solve this problem.

An interesting link could be made between external migration (the asylum and immigration policy) and internal mobility (free movement of persons within the internal market). It is well-known and settled case-law that, in principle, situations that are purely internal to a member State do not fall under the rules governing the free movement of persons. Pressed by national jurisdictions, embarrassed by reverse discrimination which hampers the fundamental rights of citizens who have not exercised their free movement rights, however, the ECJ deduced from article 20 TFEU, in the Ruiz Zambrano case, that purely internal situations fall under the scope of EU law when ‘genuine enjoyment of the substance of the rights conferred by virtue of the status as citizens of the Union’ is at stake. It further noted, in Dereci, that such ‘genuine enjoyment’ is exceptionally threatened when the EU citizen ‘has in fact to leave the territory of the Union’.

Following a similar line of reasoning, the Court could integrate within the scope of EU law a purely external situation when, and only when, a third country national ‘has in fact to’ enter on the territory of the Union to genuinely ‘enjoy the substance of the rights conferred by virtue of’ his/her status of human being according to international human rights law, to use the wording of the Zambrano jurisprudence. Such interpretation, although uncommon, would offer the advantage of coherently structuring the free movement of persons with the EU’s external migration policy. It would, also, offer an answer to the paradox of international human rights law, which consecrates the right to leave one’s country, such as under article 12(2) ICCPR, but does not impose an obligation on States to grant access to their territory.

Such interpretation does not imply the abolition of borders nor an obligation to issue a visa. It would rather imply an obligation to give reasons for a decision refusing a visa, in the light of the ‘substance of the rights’. It must be recalled, as did the Advocate General in his opinion, that, without a visa, refugees will cross borders irregularly, risking their lives, as is widely known, and for the benefits of smuggling networks that everyone condemns. Statistics of the International Organisation of Migration (IOM) show that, during the past 3 years, an average of 10 migrants per day have died in the Mediterranean. In 2016, 5,000 people drowned in the Mediterranean, and 3,771 in 2015.

When it published those statistics at the end of December 2016, the UNHCR called on the EU to organise legal migration routes for refugees. In 2015, the UN Special Rapporteur on the rights of migrants, Pr. François Crépeau, had also launched such a call. Within the UN, the New York Declaration of 13 September 2016 consecrates a ‘global compact for safe, orderly and regular migration’ and a ‘global compact for refugees’. The Declaration clearly addresses migration from a human rights perspective. States are called on to cooperate, notably to facilitate ‘safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies; this may include the creation and expansion of safe, regular pathways for migration’ (see here for commentary).

Among the EU institutions, a courteous silence echoed those proposals. EU Member States,
like Belgium, expressed their outright refusal. Any slight opening from some jurisdictions meets with fierce opposition. In the future, this might surprise the lawyers, as we are surprised today that slave trade was prohibited by the end of the 19th century but slavery itself was only prohibited later, during the 20th century. It took more than 60 years not to realize that slave trade existed because of slavery, but rather to acknowledge everyone’s responsibility. The building of a common asylum and immigration policy within the EU, in partnership with countries of origin, will also be a long process.

The opinion of the Advocate General supports the legitimacy of the Belgian judiciary. It demonstrates that the judge did not adopt a ridiculous position when it ordered the Belgian State to motivate the refusal to issue a humanitarian visa with respect to fundamental rights. The judge acted within the limits of his competence of judicial review and did not exceed his prerogative by pursuing political objectives. Quite the contrary, he raised an essential legal question.

The question will not be easy for the ECJ to adjudicate. From a political perspective, some could argue that the whole common system would collapse if each visa application from asylum seekers must receive a motivated reply. Others could respond that, in its current state, the system is already on the brink of collapsing. If some legal pathways to the EU territory are not developed for asylum seekers, irregular migration would become impossible to control. Smuggling and human trafficking would bring the whole system down while causing the suffering of migrants.

From a legal perspective, the ECJ might be tempted to give priority to a strict understanding of the division of competence between Member States and the EU. It could consider that the question, which would not strictly fall under the scope of EU law, must be dealt with by national jurisdictions, with the control of the European Court of Human Rights if necessary. Tempting as it may be, such silence would amount to hypocrisy. The EU cannot wish to achieve common border control and a common asylum policy, on the one hand, while giving to Members States such a wide margin of appreciation that they are dispensed from the duty to give reasons to their decisions to reject a humanitarian visa application, on the other hand. The rejection of a humanitarian visa application entails consequences for the EU common policies, even if that visa is of limited territorial validity. The duty to give reasons might hence achieve a balance between the respect of national sovereignty and the protection of fundamental rights.