EU Immigration and Asylum Law and Policy
Droit et Politique de l'Immigration et de l'Asile de l'UE

(LTV) ASYLUM VISAS AS AN OBLIGATION UNDER EU LAW
Case PPU C-638/16 X, X v État belge

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PART I [*Odysseus Blog*, 16 February 2016]

This post draws on chs 4 (visas), 7 (EU Charter), 8 (*non-refoulement*), 9 (asylum), and 10 (remedies) of *Accessing Asylum in Europe* (OUP, forthcoming in 2017), and takes account of previous research here, here, here, and here (see further *Academia*). It was prepared before AG Mengozzi handed down his Opinion on *X, X* and presented at the 2nd Annual Conference of the ODYSSEUS Network on 10 February 2017.

1. Introduction: Background Discussions on Humanitarian Visas

Discussions on humanitarian visas are not new. The measure was thoroughly examined in a study for the European Commission back in 2002, resurfacing the debate again in the context of the 2006 Green Paper on Asylum, and making the object of specific attention in the 2009 Stockholm Programme. A commitment to the development of a dedicated EU system of facilitated admission for asylum-seeking purposes was reiterated in 2013 in the Task Force Mediterranean Communication, propounding a 'holistic approach' to deal with maritime crossings and death at sea, including the opening of 'legal channels to safely access the European Union *to be explored*'. Momentum was somewhat lost thereafter, with the Commission establishing that protected-entry procedures '*could* complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines' in its 2014 Communication on An Open and Secure Europe. But neither the guidelines nor the coordinated approach have ever materialized. The focus has, instead, been on (voluntary) resettlement—particularly after the EU-Turkey Statement was adopted in 2016. In fact, the reference to humanitarian visas disappeared from the 2015 European Agenda on Migration, where legal channels for access to asylum were replaced with increased border control and cooperation with third countries to 'prevent hazardous journeys'. The timid approach of the Commission and its stagnation in a permanent exploratory phase of 'ways to promote a coordinated

European approach' regarding 'humanitarian permits' thus persists in the run up Towards a Reform of the Common European Asylum System.

In parallel, the negotiations of the recast Community Code on Visas, at the height of the so-called 'refugee crisis', have provided new impetus for further exchanges on this count, leading, however, to a polarization of political positions. While the European Parliament wants to clarify the regime applicable to humanitarian visas on the basis of *existing* provisions on Limited Territorial Validity visas (LTVs) in the current version of the Code, the prevailing view at the Council opposes such an advance—against the backdrop of The Bratislava Roadmap insisting on border protection to 'further bring down [the] number of irregular migrants', and without consideration of international protection needs. Yet, within the Council, there are also stark divisions, with some of the 'first entry' Member States being quite vocal on the urgency of finding a 'solution' to boat arrivals. Most notably, the current Maltese Presidency has advocated for the 'opening up [of] humanitarian corridors to allow people fleeing conflict to cross the Mediterranean'. The idea is for the EU to 'organize humanitarian safe passages…that would get recognized asylum-seekers to Europe safely', avoiding drowning and loss of life at sea—5,083 died last year, surpassing the record figure of 3,777 reached in 2015, according to IOM.

In the meantime, some Member States maintain measures of humanitarian admission in either *ad hoc* or more formalised resettlement or evacuation programmes, as a recent European Migration Network survey reveals. But these are normally considered discretionary and managed largely *ex gratia*. The Belgian programme of humanitarian visas for family members of beneficiaries of international protection residing in Belgium, that provides the background to this post, is no exception in this regard. So, the question of whether there is ever, if at all, an obligation to allow entry through the issuance of a (LTV) visa under EU law is particularly relevant.

2. Preliminary ruling request in Case PPU C-638/16 *X, X v État belge*

Case PPU C-638 *X, X v Belgium* revolves around the request of a Schengen visa by a family with two minor kids of young age from Aleppo, submitting an application under Article 25 of the Community Code on Visas (CCV) on account of humanitarian considerations, to allow them to travel to Belgium and request asylum there. They assert the derelict situation obtaining in Syria, generally, and in Aleppo, in particular, with bombings and indiscriminate violence adding to direct attacks on the civil population by terrorist groups, government forces, and other fighting factions, as proof of the 'extreme emergency' situation in which they are immersed—as documented by Amnesty International and denounced by the UN and Ban Ki-Moon himself, qualifying Aleppo 'as synonym for hell'. They also alert of the specific risk of persecution they face as Christians on religious grounds, and adduce evidence of past ill-treatment suffered by X at the hands of militia captors, who only liberated him upon ransom. These circumstances have not been disputed by the Belgian government (Conseil de contentieux des étrangers de Belgique Arrêt 179 108 du 8 décembre 2016) and are supported by statistics in Belgium, reaching a figure of 97.6% positive recognition rates for Syrians of the total 2,792 requests filed in 2015.

The situation in neighbouring countries, including Lebanon—where the visa was requested—Jordan and Turkey, was also presented as substantiating their plight.

Lebanon has terminated the registration process of refugees run since the beginning of the Syrian war, is not a Contracting Party to the 1951 Refugee Convention (CSR51), and is not providing adequate assistance to current asylum seekers, hosting, as it is, the equivalent of 25% of its own population in Syrian exiles. Its Minister of Labour has actually called for the expulsion of Syrians to avoid clashes with the local population, inciting harassment against the displaced, with the Foreign Minister concurring that 'the only sustainable solution to the crisis of the Syrian exodus to Lebanon is to return back the displaced persons to their homeland'. Jordan, in turn, housing over half a million Syrians and equally a non-party to the 1951 Convention, has closed its borders to further refugees, and has recently been accused of orchestrating an 'ejection campaign' back to Syria. Finally, regarding Turkey, with nearly 3 million registered refugees, reliable sources have reported that 'Turkish border guards are shooting and beating Syrian asylum seekers trying to reach Turkey'. The Turkish-Syrian passage is also closed and there are plans for a new border wall to stop crossings. Erdogan's forces have allegedly contributed to the degradation of the situation in Syria by bombing Kurdish militia, disregarding risks for civilians. In addition, as Amnesty International deplores, incidents of *refoulement* and illegal mass returns to Syria are on the rise since the conclusion of the EU-Turkey deal. Thus, none of these countries of transit towards the EU (and Belgium, in the present case) can be considered 'safe third countries' pursuant to the Union's own definition in the Asylum Procedures Directive (APD), requiring the absence of *refoulement*/ill-treatment risks and, crucially, 'the possibility…to request refugee status and, if found to be a refugee, *to receive protection in accordance with the Geneva Convention*' (Article 38(1)(e) APD). Qualification of Turkey, Jordan or Lebanon as 'first countries of asylum' is unjustified as well, considering the situation of refugees there—far from amounting to 'sufficient protection…including benefiting from the principle of *non-refoulement*' in substantive and procedural terms (Article 35 APD).

Against this background, the situation of the claimants, from both an individual and general perspective, taking account of subjective and objective factors together (Article 4 Qualification Directive), leaves no room to doubt that, if allowed to claim asylum, they would prima facie qualify as either refugees or beneficiaries of subsidiary protection—like 97.6% of Syrian claimants in Belgium in 2015 and 98% in EU-28 over the same period. This is also the view of the referring court, which however doubts as to the extent of obligations under the Visa Code in these circumstances, regarding in particular two concrete points referred to the CJEU for a preliminary ruling:

1. Do the 'international obligations', referred to in Article 25(1)(a) CCV cover all the rights guaranteed by the EU Charter of Fundamental Rights (CFR), including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations in the light of the ECHR and Article 33 of the Geneva Convention?

2. A. In such case, must Article 25(1)(a) CCV be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, a Member State to which an application for a LTV visa has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 CFR or another international obligation by which it is bound is detected?

2. B. Does the existence of links between the applicant and the Member State to which the visa application has been made (for example, family connections) affect the answer to that question?

The key issues to elucidate are therefore the applicability of the CCV to the case, the remit of LTV provisions, and the extent of protection obligations to asylum and *non-refoulement* in the (extraterritorial) visa-issuing context.

3. The Applicability of the CCV in International Protection Situations: LTVs

As Article 1 CCV makes clear, the Regulation establishes the procedures and conditions for issuing short-term visas under EU law and applies to '*any* third country national who must be in possession of a visa when crossing the external borders of the Member States' according to the Visa Regulation 539/2001—which concerns all refugee-producing countries, including Syria. The motives underpinning the visa application are irrelevant at this juncture—they serve to assess the merits of the application (Article 21 CCV), but do not by themselves determine the applicability of the Visa Code per se (concurring: Mengozzi, para. 49 ff).

Contrary to the Belgian government's allegations in *X, X*, the applicants' intentions cannot alter the nature or subject of their claim, nor can they legally transform their application into one for a long-stay visa, thereby removing the applicants from the scope of application of the Visa Code. This would be tantamount to accepting, for instance, that failed asylum seekers were *ab initio* excluded from the remit of the Qualification Directive and the Asylum Procedures Directive because *ex post*, upon determination of their claims, it has been concluded that they did not qualify for refugee status or subsidiary protection. The fact that an application for either a visa or for international protection under EU law is dismissed on the merits (or even at the admissibility stage) cannot be confounded with the determination of whether the rules of the relevant instruments (i.e. the CCV or the QD+APD) apply to and govern the examination of the claim. The applicants' circumstances (including motives and intentions) can therefore lead to the rejection of the application, but do not constitute a reason for the *a priori* non-application of the rules—that would be very dangerous, leading to a legal black-hole on imputed grounds, negating the rule of (EU) law. In fact, the linking factor to the QD+APD is simply that the person be an 'applicant', that is, 'a third-country national…who has made an application for international protection in respect of which a final decision has not yet been taken' (Article 2(i) QD). Similarly, regarding the CCV, its rules apply to any 'application' meaning 'an application for a visa' submitted by a 'third-country national', that is, 'any person who is not a citizen of the Union' whose entry is subject to obtaining a visa (Article 2(10) and 2(1) CCV).

On that basis, Schengen visas are conceived of as '*authorisations* issued by a Member State with a view to transit through or stay in the territory of the Member States of a duration of no more than three months in any six-month period' (Article 2(2) CCV). But, crucially, there is no discretion to 'refuse…to issue such a visa to an applicant unless one of the grounds for refusal…listed in [the CCV] provisions can be applied to that applicant' (*Koushkaki*, para. 63). So, although visas are not issued 'as of right' to those requesting them, neither can they be considered as completely dependent on Member State whims. Sovereign discretion is delimited and constrained by EU law.

Arguably, this applies to the LTV provisions in the Code. The only difference with 'normal' visas, as to its effects, is that LTVs grant access to the territory of the issuing Member State *only*—instead of to the entire Schengen zone (Article 2(4) CCV). Otherwise, it appears that LTVs '*shall* be issued' when the criteria of Article 25 CCV are met (Concurring: Peers). That provision foresees that 'on humanitarian grounds…or because of international obligations' it may be 'necessary' for Member States 'to derogate from the principle that the entry conditions laid down in Article [6(1)] of the Schengen Borders Code must be fulfilled'. In fact, the Schengen Borders Code (SBC) applies 'without prejudice to…the rights of refugees and persons requesting international protection' (Article 3(b) SBC). The exception to entry rules on account of 'humanitarian grounds…or because of international obligations' is explicitly contemplated in the body of the Code (Article 6(5)(c) SBC)—to which visa rules explicitly refer (Article 21 CCV).

Yet, the Belgian government's interpretation highlights the discretionary elements of Article 25 CCV's formulation. The wording is indeed equivocal and could lead to opposing constructions. While the text stipulates that a LTV '*shall* be issued… for reasons of national interest or because of international obligations', it also indicates that this be '*exceptionally*' and only 'when…a Member State *considers* it necessary'. Thus, whether there is an obligation to issue a LTV under certain circumstances, and whether such circumstances must be appraised in light of fundamental rights is open to contention. That *there is* a margin of appreciation seems undisputable. What remains to be clarified is *the extent* to which this margin is subject to and structured by the 'humanitarian grounds' and 'international obligations' mentioned therein.

Leaving momentarily aside the issue of the extent of the margin of appreciation (which will make the object of Part II of this post), it is advanced that the effect of Article 25 CCV is to carve out an exception to 'normal' exclusion rules defined in Article 32 CCV, enumerating the circumstances in which a visa should 'normally' be denied. Rules on visa refusals under Article 32 CCV (i.e. the rule) should be interpreted as being 'neutralized' by Article 25 CCV (i.e. the exception). They apply '*without prejudice to* Article 25(1) [CCV]'. Article 25 CCV should thus be taken to create a parallel, exceptional regime to cater for Member State obligations arising, *inter alia*, in the context of 'the right to asylum and to international protection', as established in the Schengen Code. Indeed, Article 14(1) SBC encloses the twin provision of Article 32 CCV, requiring Member States to refuse entry to the Schengen zone to third-country nationals not fulfilling the normal conditions for admission, but indicating—as Article 32 CCV does in the framework of the visa-issuing procedure—that this be '*without prejudice to* the application of special provisions concerning [refugees]'. So, as much as refusals of entry are subject to respect for 'the Charter of Fundamental Rights [CFR]…relevant international law, including…the Geneva Convention, [and] *obligations related to access to international protection*, in particular the principle of *non-refoulement*' (Article 4 SBC), so too are visa rejections, as per the terms of the CCV Preamble (Recital 29).

So, coming back to the point on discretion, whatever the margin of manoeuvre allowed to Member States under Article 25 CCV, it must be concluded that it remains subject to the fundamental rights *acquis*, as literally foreseen in Recital 29 CCV. In any case, subjection to primary law (including fundamental rights) within the EU

legal order does not require specific assertion to this effect. Its primacy is constitutionally scheduled in the Treaties and in case law. Hence, whether the term 'international obligations' used in Article 25(1)(a) CCV implicitly encompasses CFR obligations, as per Question 1 of the referring court, is not crucial (similarly: Mengozzi, para. 73 ff). The very structure of *internal* EU sources mandates subordination of rules of secondary law to the dispositions of primary law. As the Court of Justice (ECJ/CJEU) has consistently held, where 'the wording of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty' (*Ordre des Barreaux*, para. 28). This same tenet has been reiterated in the asylum context, with *NS & ME* making clear that 'Member States must…make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law' (*NS & ME*, para. 77). This is in line with the place reserved to fundamental rights within the hierarchy of sources, as founding values of the Union (Article 2 TEU) and as standards of validity/legality of EU acts (Article 6 TEU and 263 TFEU).

Consequently, the fact that the Visa Manual fails to contemplate the situation of asylum seekers as specific scenarios in which the issuance of a LTV may be justified is without consequence. Whether the list of examples provided therein is intended to be exhaustive is also irrelevant, as is the legal nature of the Manual (as either binding or non-binding). Being an act of the European Commission, its interpretation and application remains subject to the Treaties (and the Charter). And neither the Manual nor, ultimately, the Visa Code can limit the effect of primary law (*Siples*, para. 17).

The applicability of the CCV to X and X' plight, as third-country nationals from a country requiring visas for entry into Schengen territory and the fact that the LTV provision and the margin of appreciation under Article 25 CCV must be interpreted in light of (and in line with) primary law, should, therefore, be beyond doubt. What remains to be determined is the extent of that margin, which in turn depends on the determination of the precise scope of application of EU fundamental rights, so as to provide a complete answer to the first question referred to the CJEU. This issue will be fully assessed in Part II of this post.

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PART II [*Odysseus Blog*, 21 February 2017]

Drawing on Part I of this post, the object of Part II is to determine the extent of the margin of appreciation available to Member States under Article 25 CCV. On the basis of the conclusion from Part I that the Community Code on Visas (CCV) applies to X and X (Case PPU C-638 *X, X v Belgium*), what remains to be established to answer thoroughly the questions of the referring court is the applicability of the Charter of Fundamental Rights (CFR) and the consequences ensuing in such situation.

1. LTVs, Extraterritoriality, and the Charter of Fundamental Rights

I have argued elsewhere that 'jurisdiction' has no bearing in the interpretation of the scope of application of the EU Charter (concurring: Mengozzi, para. 75 ff). Statist notions of 'sovereign authority' and 'effective control', as they operate in the framework of the ECHR, are inapplicable within EU law. The only threshold criterion for the application of the Charter relates to the 'EU-relevant' nature of the situation at stake. If there is a connecting link making EU law relevant to the case, then the Charter provisions apply as well. This is the conclusion of *Fransson*, establishing that 'situations cannot exist which are covered in that way by European Union law without…fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter' (para. 21).

Thus, territoriality plays no role in this regard. What counts is whether the EU or the Member States are acting within the remit of EU law. Charter provisions are addressed to 'the institutions, bodies, offices and agencies of the Union…and to the Member States only *when they are implementing Union law*'. As a result, they 'shall' respect Charter rights and principles, promoting the application thereof within the realm of their respective powers (Article 51(1) CFR).

Following the Charter Explanations, the issuance or refusal of visas under the CCV amounts to a clear instance of 'implementing EU law', as it entails direct application of an EU Regulation to the case at hand. Indeed, as per the CJEU, a 'Regulation is binding "in its entirety" for Member States. In consequence, it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a [EU] Regulation so as to render abortive certain aspects of [EU] legislation which it has opposed or which it considers contrary to its national interests' (*Commission v. Italy*, para. 20). Consequently, where activities covered by the Visa Code take place (e.g. consideration of LTV requests under Article 25 CCV), *a fortiori* the guarantees therein become applicable as well (as per Recital 29 CCV. See Part I of this post).

Even the use of an option/derogation/exception provided for by the CCV—such as that contemplated in the wording of Article 25(1)(a), employing the terms 'when…*consider[ing] it necessary*'—is covered by this notion (concurring: Mengozzi, para. 80 ff). Borrowing from the CJEU, a 'discretionary power' conferred on the Member States by an instrument of EU law forms part of the system regulated thereby and, as such, 'a Member State which exercises that discretionary power must be considered as implementing EU law within the meaning of Article 51(1) of the Charter' (*NS & ME*, para. 68). Thus, the applicability of the CCV and the Charter provisions to the case of *X, X* cannot be disclaimed.

2. LTVs and EU *Non-Refoulement*

The principle of *non-refoulement* forms part of the fundamental rights *acquis* as an absolute protection; the substance of Article 3 ECHR has been 'absorbed' within the EU legal order in several guises. *Non-refoulement* forms part of the general principles of EU law (*Elgafaji*, para. 28), it has been codified in primary law in Articles 4 and 19 CFR, and it has equally entered the text of EU acts of secondary law regarding external borders (Articles 3(b) and 4 Schengen Borders Code (SBC)). The principle thus penetrates the Union system all-pervasively—in line with its standing as a canon of customary international law (Bethlehem/Lauterpacht), if not a *jus cogens* norm (Allain).

Focusing on its concrete manifestation as a rule of primary law, drawing on the Charter Explanations, Article 4 CFR must be read as including the substance of the protection enshrined in Article 3 of the European Convention on Human Rights (ECHR)—and, it is posited, also that of Article 33 of the 1951 Refugee Convention (CSR51). This 'cumulative standards' approach (*Accessing Asylum in Europe*, ch 7) understands Charter provisions to 'reaffirm' individual rights 'as they result, in particular, from the constitutional traditions and *international obligations common to the Member States*', including those flowing from the ECHR and the CSR51 taken concurrently—this is the interpretative technique generally followed in EU asylum case law (e.g. *Abdulla*, paras 51-53). Following AG Trstenjak in her Opinion on *N.S.*, '[e]ven though an infringement of the Geneva Convention or the ECHR…must be distinguished strictly, *de jure*, from any associated infringement of EU law, there is, as a rule, a *de facto* parallel in such a case between the infringement of the Geneva Convention or the ECHR and the infringement of EU law' (para. 153)—accordingly, Member States' 'legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded *by these conventions*' (*mutatis mutandis*, *Amuur*, para. 43; confirmed: *M.S.S.*, para. 216).

Therefore, *ratione materiae*, any measure 'the effect of which is to prevent migrants from reaching the borders of the State [concerned]' may amount to *refoulement* if it exposes the applicant to ill-treatment (*Hirsi*, para. 180; confirmed: *Sharifi*, paras 112 and 115). There is no need to prove direct causation, as the matter is one of *prospective* harm; foreseeability of a 'real risk' suffices in this regard. So, a visa refusal the consequence of which is to prevent access to safety may well impinge upon Article 3 ECHR and Article 4 CFR. The fact that the applicant may have (in the abstract) a possibility to address her request to a different State is immaterial, particularly because 'this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in' (*Amuur*, para. 48; confirmed: *M.S.S.*, para. 216)—as is the case of X and X.

Yet, any restrictions *ratione loci* or *ratione personae* attached to Article 3 ECHR or Article 33 CSR51 are not transposable to Article 4 CFR in disregard of its specific design (see, resisting similarly limitative transplants from international humanitarian law, focusing instead on the text/context/purpose of EU law: *Diakité* and commentary). The protection against *refoulement* envisaged in the Charter covers everyone without exception (unlike Article 33 CSR51). And its territorial reach depends only on Article 51 CFR. As noted by Mengozzi (paras 97-101), the ECHR (and arguably also the CSR51) work as minimum floors of protection below which the CFR cannot descent, but they should not be taken to prevent the more extensive protection EU law can and does provide in several respects (Article 52(3) CFR; *cf. Elgafaji vs.* Article 3 ECHR case law prior to *Sufi & Elmi*). The incorporation of foreign, unwritten limitations into the text of the Charter would violate the principles of legality and narrow interpretation of exceptions under EU law (Article 52(1) CFR) and go equally against the autonomous construction of EU notions as per the independent requirements of the system, constraining their application on the basis of restrictions imposed elsewhere and for purposes alien to the CFR—whose ultimate goal is explicitly to '*strengthen* the protection of fundamental rights' (Recital 4).

Yet, as evidenced during discussions at the 2nd Annual Conference of the ODYSSEUS Network, there are some who insist that the phrase in Article 52(3) CFR providing that 'the meaning and scope of [CFR] rights [which correspond to ECHR rights] shall be the same as those laid down by the [ECHR]' mandates incorporation within the remit of application of Article 4 CFR of the territorial restrictions applicable to Article 3 ECHR due to Article 1 ECHR. This, however, would negate the specific nature and objectives of the Charter within the (separate) EU legal order and break the coherence governing the entire system—fractioning the territorial scope of Charter provisions depending on exogenous conditions originating in a different legal regime, so that CFR rights drawing on ECHR rights would depend on Article 1 ECHR to define their scope of territorial application, while the remit *ratione loci* of other CFR provisions would be determined by Article 51 CFR alone. This would contravene the explicit terms of Article 51 CFR, which, as its title clearly indicates, is the *lex specialis*, within the Charter system, governing its (entire) 'field of application'. Constraining the territorial application of Article 4 CFR to Article 1 ECHR through a selective interpretation of Article 52(3) CFR (which explicitly foresees that 'this provision *shall not* prevent EU law providing more extensive protection'), sidelining the literal tenor of Article 51 CFR, constitutes a *contra legem* interpretation that is unsustainable under EU law. Paraphrasing the Strasbourg Court, to accept this and 'to afford [Article 4 CFR in line with Article 1 ECHR dispositions] a strictly territorial scope, would result in a discrepancy between the scope of application of the [Charter] as such [as governed by Article 51 CFR] and that of [Article 4 CFR], which would go against the principle [of coherence]', demanding that the Charter 'be interpreted as a whole' (*Hirsi*, para. 178).

A similar move was attempted in the context of the *Bank Saderat Iran* case, where the General Court refused the import of limitations ensuing from Article 34 ECHR in the interpretation of CFR provisions (in an extraterritorial case), chiefly on the ground that 'Article 34 ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union' (para. 36). The same should occur regarding the import of Article 1 ECHR constraints on Article 3 ECHR (and equivalent interpretations of Article 33 CSR51) when appraising visa-issuing proceedings under the CFR.

Otherwise, if the CJEU decided to break the coherence of Charter provisions and accept a reduction of the scope of application of Article 4 CFR through the back door, it would still be confronted with the fact that visa issuance is one of the undisputed legal bases granting extraterritorial *de jure* jurisdiction to Member States that the Strasbourg Court has consistently acknowledged as triggering the action of Article 1 ECHR. Indeed, 'recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad…In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State' (*Bankovic*, para. 73; confirmed: *Al-Skeini*, para. 134). And, according to Article 5(d) Vienna Convention on Consular Relations, visa issuance cannot but be considered part and parcel of those 'activities', being explicitly listed as consular functions exercised on behalf of the issuing State and, as such, as a manifestation of its sovereign right to control entry by foreigners into territorial domain. Thus, even if the territorial scope of Article 4 CFR was to be subjected to Article 1 ECHR, the

applicability of EU *non-refoulement* to the case of *X, X* would be inescapable (in this line: Spijkerboer/Brouwer/Al Tamimi).

Regarding the possible margin of appreciation left to Member States to assess the circumstances in which the refusal of a LTV may lead to *refoulement*, in light of the circumstances (general and personal) of the applicants in *X, X*, this is non-existent in the present case—considering the dire situation in Aleppo, Syria, and neighbouring States (see Part I of this post). Generally, as Mengozzi underlines (paras 121, 129, 131), the exercise of discretionary clauses in EU instruments is subject to Member State obligations under the Charter. Thus, before refusing a visa under Article 32 CCV, account must be taken of the consequences, in light, especially, of the (absolute) prohibition of *refoulement* under Article 4 CFR. If the refusal may lead to a 'real risk' of exposing the applicant to irreversible harm, the *option* to issue a LTV contemplated in Article 25 CCV turns into an *obligation* to deliver one to avoid the risk from materialising (concurring: Mengozzi, para. 132 ff). If there are no other practicable alternatives to ensure (in law and in practice) the *effet utile* of *non-refoulement*, the issuance of a LTV becomes compulsory. Any other construction would render 'practically impossible or excessively difficult the exercise of rights conferred by [Union] law' (*Unibet*, para. 43), contrary to the aspiration of the Charter to 'guarantee real and effective…protection' (*mutatis mutandis*, *Von Colson*, para. 23).

In such cases, a negative obligation not to *refouler* enjoins Member States to engage in positive action. As adjudged in *Căldăraru* (paras 90 and 94), 'it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the [Member] State[s]…a positive obligation' to ensure compliance with the prohibition of ill-treatment, which applies in relation to Article 4 CFR as well (as the provision shares the same 'meaning and scope' *ratione materiae* pursuant to Article 52(3) CFR).

In these circumstances, like in similar scenarios governed by the principle of mutual trust, the requirement to comply with fundamental rights requires Member States to set their reciprocal confidence aside so as to honour absolute obligations under the CFR (*NS & ME*, paras 79-86 and 94-98). Mutual trust cannot 'undo' CFR duties, nor can it modify their nature and extent. So, an interpretation that would make observance of international obligations into 'exceptions' to the system of inter-State confidence (to be narrowly construed) would amount to putting the cart before the horses, ignoring the hierarchy of sources within Union law (*Kadi I*, paras 169-170). It is the margin of appreciation of Member States that is subordinate to compliance with CFR duties, not the scope of CFR provisions which are subject to sovereign discretion. EU countries do have an 'undeniable sovereign right to control aliens' entry into and residence in their territory', but that right 'must be exercised in accordance with [CFR obligations]' (*mutatis mutandis*, *Amuur*, para. 41).

Accordingly, the reply to Question 2 of the referring court must be in the affirmative, so that Article 25(1)(a) CCV be interpreted as meaning that a Member State to which an application for a LTV visa has been made is *required* to issue the visa applied for, where a real risk of infringement of Article 4 CFR is detected (Mengozzi, paras 3 and 163).

To that end (and in accordance with the rights to good administration and effective judicial protection in Articles 41 an 47 CFR), national authorities must take account of both the general and particular circumstances of the applicant concerned (Article 4 Qualification Directive (QD)), relying on published sources and taking proactive steps to ascertain the reality of the risks faced by the him/her, 'carrying out a thorough and individualised examination of the situation of the person concerned' (*Tarakhel*, para. 104; Article 4 SBC), '*before* any individual measure which would affect him or her adversely is taken' (*MM*, para. 83). Knowledge of the circumstances will otherwise be imputed on the Member State (*M.S.S.*, para. 358; *Hirsi*, para. 121; *NS & ME*, para. 88; Mengozzi, para. 140 ff) and failure to adopt preventative means to spare the applicant from foreseeable harm will amount to a violation of the CFR.

The absence of links between the applicant and the Member State to which the visa application is made has no effect in this constellation (concurring: Mengozzi, para. 161). As much as '[t]he source of the risk does nothing to alter the level of protection guaranteed by [*non-refoulement*]', neither does the concurrence of additional connecting factors to the requested Member State (*Tarakhel*, para. 104). Requiring additional criteria would actually amount to indirectly introducing a (prohibited) limitation to *non-refoulement* (*cf.* Article 52(1) CFR), upsetting its absolute nature.

3. LTVs and the EU Right *to* Asylum

Space constraints impede the thorough examination of the additional effect on LTVs of the right to asylum enshrined in Article 18 CFR. I invite readers to peruse ch 9 of *Accessing Asylum in Europe* for a detailed account. Suffice it to note here that the principle of effectiveness pleads against a reductionist construction of Article 18 CFR that would render the protection it affords redundant or subsumed within Article 4 or 19 CFR. Its content shall be appraised as being distinct from a (reiterative) protection against *refoulement*. That it entails a right to recognition for one of the international protection statuses recognised within EU law should be beyond doubt (Article 78 TFEU). Both Articles 13 and 18 QD use the imperative 'shall' to establish the obligation on Member States to accord asylum to those qualifying under the QD provisions—an issue that the CJEU has also clarified, noting that '[u]nder Article 13 of the Directive, the Member State is *required* to grant refugee status to the applicant if he qualifies…' (*Abdulla*, para. 62), applying the same logic to Article 18 QD, according to which 'Member States *are to grant* that status to a third-country national eligible for subsidiary protection' (*M'Bodj*, para. 29). In this framework, the QD provisions should be considered to constitute concrete specifications of the right to asylum in the CFR (*mutatis mutandis*, *Mangold*)—which, however, do not exhaust its independent substance.

The personal scope of the EU right to asylum, despite the absence of a subject in the wording of the Charter provision, should be considered to cover third-country nationals generally (in line with the Asylum Protocol and as confirmed by the CEAS instruments adopted so far). And territorially speaking, the remit *ratione loci* of Article 18 CFR should not vary from that of the (entire) Charter. Here again, the principle of coherence points in this direction, as does the fact that Article 51 CFR is a horizontal provision governing the 'field of application' of the Charter as a whole.

If this is true, the exercise of the right to asylum must be made possible, both in law and in practice—regardless of territorial considerations. There must be a *legal* means to ensure safe an regular access to asylum for refugee visa applicants, as in *X, X*, to be capable of effectively enjoying their entitlement to international protection under EU law. Depriving the claimants of a legal channel to exercise what is their legitimate right under the Charter cannot be considered a good faith interpretation / application of the CFR provisions (similarly: Mengozzi, para. 163).

4. Conclusions and Implications

Several conclusions derive from the analysis undertaken in Part I and Part II of this post that can be briefly recounted:

1. First of all, there is a pressing need to de-politicize refugee / asylum seeker rights and interpret / apply them as any other of the subjective entitlements deriving from the EU *acquis*;

2. In this line, EU law interpreters / implementers ought to stop importing legal categories / limitations from exogenous systems and treat the CFR as first rank primary law, faithfully adhering to its provisions, in light of their object and purpose (as made explicit in its Preamble and the Charter Explanations);

3. Relatedly, since the EU is not a State, the import of statist notions of sovereignty and territory as litmus tests determining the applicability of Charter protections is unwarranted;

4. The scope of application of EU rights is the same of EU law generally, as determined by the Court (*Fransson*);

5. And the applicability of EU law (simply) depends on the concurrence of a connecting factor / relevant link that renders the particular situation 'EU-relevant';

6. Therefore, measures of EU border and pre-border control remain subject to compliance with EU fundamental rights, including in the context of visa-issuing procedures under the CCV;

7. So, where the CCV applies, the CFR follows, and, with it, so does EU protection against *refoulement* under Article 4 CFR (as well as the right to asylum in Article 18 CFR);

8. As a result, when contemplating the denial of a visa under Article 32 CCV, where this could lead to a 'real risk' of a *prospective* violation of Charter rights (specially those of an absolute nature), the faculty foreseen in Article 25 CCV *must* be used to deliver a LTV to ensure protection in conformity with CFR standards;

9. Indeed, where there are no other legal and practicable alternatives, as in the case of X and X (Mengozzi, para. 157), positive action must be adopted by the Member States to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' (*Artico*, para. 33);

10. The 'floodgates' point raised by the Belgian government is irrelevant in this context—regardless of its hypothetical potential side-effect as a positive incentive to step up international assistance to Lebanon and ensure effective protection within the region of origin (*cf*. Spijkerboer/Brouwer/Al Tamimi, para. 5.2). There are several reasons buttressing this conclusion—some of which have already been identified by Mengozzi himself (para. 169 ff):

    10.1 The point is empirically unsubstantiated, as demonstrated by the numbers concerned in past experiences with evacuation and resettlement schemes. Plus, in the remote case of a mass influx deriving from an application of Article 25 CCV in line with the CFR, the Temporary Protection Directive provides the tools to cope with the issue. The clogging of Member State embassies is anyway improvable. The number of visas issued daily in EU-28 is in the thousands, with the system having never collapsed on that account—according to the European Commission, in 2015 alone, Member States managed to issue a total '14.3 million visas for short stays' without incidents. But if a rationalization of the LTV system was desired nonetheless, the CCV provides tailor-made options to this effect, leaving ample freedom for Member States to manage applications electronically, for instance, or with the collaboration of honorary consuls or via Common Application Centres (Article 40 ff CCV), which would allow coordination with Dublin rules.

    10.2 Yet, the floodgate argument is misplaced on a more fundamental level. It reifies beneficiaries of Charter entitlements reducing them to a 'mass' or a collective figure, diminishing the agency and dignity of right bearers. Above all, the fear of numbers does not constitute a *legal* argument, let alone one capable of warranting the limitation of *absolute* rights. In truth, compliance with the CFR is not optional or open to negotiation (Article 6 TEU and Article 51 CFR), and given the 'absolute character' of the rights concerned, even a mass influx or other commensurate difficulties 'cannot absolve a State of its obligations under [the relevant] provision[s]' (*Hirsi*, paras 122-23). Potential 'problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State's obligations…' (*Hirsi*, paras 179). Thus, the CJEU, when deciding on *X, X* should strictly adhere to EU law (Article 19 TEU), avoiding political or ideologically motivated temptations.