**ECRE Briefing: the "Humanitarian Visas" Case (Case C-638/16 PPU, X and X v the Belgian State)**

Case C-638/16 otherwise known as the 'XX' case poses fundamental questions on the right for asylum seekers in EU law to have a safe and regular pathway to accessing Europe and protection. It has been the focus of much academic, practitioner and media attention.[1]

The questions posed to the Court of Justice of the European Union ("the Court") ask whether and under which circumstances Member States are obliged to issue a limited territorial valid visa ('LTV') under Article 25(1)(a) of the Visa Code.[2] The case, therefore, principally relates to the application and interpretation of this specific article. This briefing provides an overview of the main issues at stake; it should be read in conjunction with ECRE's position. The briefing covers, first, the national proceedings leading to the reference, second, the questions referred, and third, Advocate General Mengozzi's Opinion to the Court.

It should be noted that the Court is not obliged to follow the AG's opinion and in a number of judgments the Court does not concur with the AG. The judgment, which unlike the Opinion will be binding for all the EU Member States, will be published on 7 March 2017.

## 1. National referral

The case referred to the Court concerns a Syrian couple and their three infant children who live in Aleppo and are of Orthodox Christian faith. The applicants had travelled to the Belgian embassy in Beirut and had applied for a limited territorial validity visa relying on Article 25(1)(a) of the Visa Code on two occasions. On the second occasion they successfully registered their visa application and returned to Syria. After their return, the Syrian border with Lebanon was closed and remained closed during the proceedings.

On 18 October 2016, the application was met with a refusal under Article 32(1)(b) of the Visa Code by the Belgian national authority on the following grounds:

- The applicants' stay would extend beyond 90 days since they had the intention of applying for asylum in Belgium;
- Such a visa request fell under domestic law;
- Article 3 ECHR and Article 33 of the 1951 Geneva Convention relate to the prohibition of non-refoulement and not to the admittance of persons onto the territory;
- To use the visa procedure for asylum purposes would create a floodgate scenario and embassies are not designated as authorities in which an applicant for asylum could in fact apply for asylum.

The applicants later appealed the Belgian Secretary of State's decision to the Council of Alien Law Litigation ('CALL'). They argued the positive obligations to protect those at risk of

[1] The Commission and 14 EU MS presented submissions in the hearing of this case.

[2] Article 25(1)(a) states that 'A visa with limited territorial validity shall be issued exceptionally, in the following cases: (a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations;[…]' Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

inhumane treatment under Articles 4 and 18 of the EU Charter of Fundamental Rights ('Charter') and Article 3 of the European Convention of Human Rights ('ECHR') and that the granting of international protection is the sole means by which to vindicate these rights. The Belgian State had not taken into account the risks that they were subjected to in the visa refusal and that the conditions amounting to an exception humanitarian situation meant that Belgium was obliged to deliver a visa under Article 25(1)(a) of the Code.

In the appeal, the CALL considered the applicability of EU law and the Charter outside the territory of EU Member States, the definition to be given to the term 'international obligations' and the potential discretion that Member States may have under Article 25(1)(a) to give or not to give a LTV.

## 2. Referral to the Court of Justice of the European Union (CJEU)

The CALL requests guidance from the CJEU on the interpretation to be given to Article 25(1)(a) of the Visa Code and refers to the CJEU the following questions:

**Question 1:**

Do the 'international obligations', referred to in Article 25(1)(a) of Regulation No 810/2009 1 of 13 July 2009 establishing a Community Code on Visas cover all the rights guaranteed by the Charter of Fundamental Rights of the European Union, including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 33 of the Geneva Convention Relating to the Status of Refugees?

**Question 1A:**

In view of the answer given to the first question, must Article 25(1)(a) of Regulation No 810/2009 of 13 July 2009 establishing a Community Code on Visas 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 visa with limited territorial validity has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter of Fundamental Rights of the European Union or another international obligation by which it is bound is detected?

**Question 1B:**

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

## 3. The Advocate General's Opinion

Advocate General ('AG') Mengozzi gave his Opinion to the Court on 7 February 2017. He answered the questions as follows:

**Preliminary observations on the competence of the Court to rule on the questions**

Contrary to the submissions of the Belgian government, the Commission and the majority of other intervening States, the applicants request for a short term visa with territorial limited validity lasting no longer than 90 days falls under the scope of the Visa Code. This is evident from the form the applicants used to request the visa and the procedure the Belgian authorities undertook to deny the visa. The later intention to apply for asylum once on the Belgian territory has done nothing to change the applicants' LTV requests into long term visas or place them outside the scope of Union law. Since the applicants' are third country nationals, whose entry is subject to obtaining a visa, and they are submitting an application for a visa, they fall within the remit of EU law and the Court is competent to deliberate and rule on the questions posed to them. Additionally the AG holds that it is possible to apply for a LTV under the Code since the standard form annexed to the Code refers to 'Schengen visa' without making any distinction between the types of visa that can be applied for.

**Question 1:**

The Union judicial order is a separate and distinct order from the international regime. Therefore the obligations within the Charter do not fall within the term 'international obligations' as specified in Article 25(1)(a). Nonetheless, Member States must respect and give effect to the Charter where the State acts within the field of EU law. Since the delivery or refusal of a LTV means that Member States are acting in the area of EU legislation, they are obliged to respect the rights guaranteed in the Charter. This is a crucial point since the Belgian government had argued that where Charter rights are the same as ECHR rights, the Charter can only apply outside of the territory when the State is exercising 'effective control'. The AG strongly opposes such a conclusion which would go beyond the scope of the specific case and mean that an institution or Member State acting outside of the territory would not be obliged to adhere to its obligations under the Charter.

The AG follows the provisions of the Charter itself and established jurisprudence in arguing that the Charter applies extraterritorially. The AG further surmises that there is little need to go into the definition of international obligations since Articles 4 and 18 of the Charter guarantee an equivalent protection to Articles 3 ECHR and 33 of the Geneva Convention.

**Question 1A:**

Member States are authorised to apply Article 25(1)(a) notwithstanding the reasons for refusal of a visa under Articles 32(1)(a) and (b). These provisions allow Member States to refuse a visa, for example, where they have serious doubts as to whether the applicant will leave the territory after the expiry of the visa. However, Article 32(1) is without prejudice to Article 25(1)(a) meaning that Member States are allowed to set aside the reasons for refusal where the conditions in Article 25(1)(a), namely humanitarian reasons, are met. The AG goes further to say that Member States must examine whether humanitarian reasons exist in the applicant's case and if such reasons do exist the Visa Code requires the Member State to issue a LTV to the applicant.

Whilst Member States have a certain margin of discretion in defining humanitarian reasons there is no doubt that the conditions in Syria, especially Aleppo, along with the applicants' individual circumstances fall squarely within the definition of humanitarian reasons. If, in the alternative,

Member States do not agree, their discretion is limited by EU law and, therefore, the Charter. Thus, States must assess whether the refusal to issue a visa under Article 25 of the Visa Code leads to an infringement of its obligations under the Charter, namely the right to human dignity, the right to life, the right to integrity, the prohibition of inhumane treatment as well as the best interests of the child.

The prohibition of torture requires the State to take positive actions to prevent persons from being subject to a violation of this right and as in the assessment of Article 3 ECHR, an examination of the individual's situation as well as the general context must be borne in mind. When assessing whether the State has breached Article 4 of the Charter by refusing a visa under Article 32(1) of the Visa Code, an assessment of the facts that the State had or should have had when refusing the visa must be taken into account. From the facts of this specific case it is undeniable that the applicants were exposed to a risk of inhumane treatment, as prohibited by Article 4 of the Charter, and that the Belgian State's refusal to deliver a visa to the family equally constituted a violation of the same. Member States must, therefore, issue a LTV under Article 25(1)(a) if there exists serious reasons to believe that the refusal of a visa will directly lead to the applicant being exposed to an Article 4 Charter violation.

The argument that the applicants could have sought protection in Lebanon does nothing to change the AG's conclusion since in 2015 the Lebanese government suspended registration of Syrian refugees and it is not a contracting party to the 1951 Convention. Without any possibility of status the applicants, as others, risked being arrested and detained. They also risked living a highly precarious life without limited access to food, water, education and health whilst reports of violence and discrimination towards Syrian refugees were and are rife. The AG refuses to accept the argument that there was no obligation to issue a LTV since the applicants could avail themselves of protection in Lebanon.

Given that the foundations of the Union rest on the safeguarding of fundamental rights, especially for those in need of international protection, the floodgate argument should be set aside. The absolute nature of Article 4 of the Charter means that Member States must respect and protect this right in all circumstances. Moreover, administrative burdens on embassies should be set against the context of the difficulties in accessing embassies for Third Country Nationals.

Finally, the AG's conclusion is entirely coherent with the fight against human trafficking and human smuggling since creating a legal pathway means that individuals will not use irregular and dangerous means of entry to the Union territory. Any argument on the free choice of the asylum seeker to choose a destination by virtue of an application made under Article 25(1)(a) is similarly redundant since this depends on which embassies the applicant has access to.

**Question 1B:**

The existence of links between the applicant and the Member State to which the visa application has been made has no effect on the above conclusions.