



## Issuing a visa on humanitarian grounds to asylum seekers: Obligation or right of the Member States?

The CJEU's judgment in Case C-638/16 PPU, X and X against Etat belge, answers to the most topical question right now, as to whether the Member States are required by EU law to issue a visa on humanitarian grounds to persons wishing to go to their territory as asylum seekers or if they have a discretion to do so. The CJEU in its judgment on 7 March 2017 considered that the Member States "are not required to issue a visa on humanitarian grounds".

The case in question concerns a request for preliminary ruling from the Conseil du Contentieux des Etrangers, before which a Syrian family that was threatened with persecution for religious reasons, challenged the decision that rejected its application for issuing a visa. More specifically, the applicant in the main proceedings was a Syrian family consisting of three minor children, who lived permanently in Aleppo, Syria. Because of the ever-worsening situation in Syria in general and in Aleppo in particular, the family resorted to the neighboring Lebanon and on 12-10-2016 it submitted a request to the Belgian Embassy in Beirut under Article 25 of the EU Visa Code seeking the grant of visas with limited territorial validity, so that all its members could travel to Belgium and seek asylum there. The Syrian couple mentioned a situation of "absolute emergency" and, as a proof, the Syrian nationals referred to frequent bombings and assaults against the civilian population by terrorist groups and government forces. Indeed, one of them stated that, in the past he had been kidnapped and tortured by

terrorists, who eventually set him free following the payment of a ransom. The applicants in the main proceedings had any reason to worry about their safety, taking also into consideration that they were Orthodox Christians, so they were at risk of persecution on account of their religious beliefs too.

Article 1 and 2 of the EU Visa Code provide for the procedure and conditions for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 6-month period. According to Article 32 par. 1(b) of the Visa Code, no visa shall be issued if there are reasonable doubts as to the applicant's intention to leave the territory of the Member State before the expiry of the visa issued. On 18 October, the Belgian Immigration Office rejected their applications. According to the Office, the Syrian nationals applying for a visa with limited territorial validity in order to seek asylum in Belgium, apparently intended to stay in Belgium for more than 90 days. In addition, the Office pointed out, firstly, that Article 3 of the ECHR cannot be interpreted as requiring the Contracting States to accept within their territory anyone experiencing a catastrophic situation, and, secondly, that under the Belgian law the Belgian diplomatic authorities are not included in those before which an alien can apply for asylum. If, therefore, an entry visa could be granted to the applicants in the main proceedings in order to be able to apply for asylum in Belgium, that would be tantamount to allowing an asylum application to be lodged before a diplomatic authority.

As a result, the Syrian couple appealed before the Council for asylum and immigration proceedings of Belgium seeking suspension of the decision that rejected their applications for issuing a visa. Basis of their appeal was Article 4 (prohibition of torture and inhuman treatment) and 18 (right to asylum) of the Charter of Fundamental Rights of the European Union, as well as Article 3 of the ECHR. The applicants argued that the Member States are obliged by EU law to take positive measures for granting international protection in order to avoid the risk of violation of the prohibition of torture and degrading treatment of people experiencing extreme situations.

As a result, the Asylum Council addressed to the Court of the European Union two preliminary questions: the first concerned the interpretation of the Visa Code, while the second concerned the interpretation of Articles 4 and 18 of the Charter. First of all, the Court emphasized that the Visa Code was adopted on the basis of Article 62 par. 2(a-b) of the EC Treaty, which provides for a uniform visa regime for an intended stay in a Member State not exceeding a 3-month period. The Court, therefore, considered that the Syrian family did not fall into the scope of the Visa Code, even though it formally submitted its visa applications under Article 25 - given that the purpose of its applications was to seek asylum upon its arrival in Belgium, this is an objective that differs from and exceeds that of a short-term visa application. In addition, according to the Court of the EU, since the European legislator has so far not received any provision for the issuance of visas under Article 79 par. 2 of the TFEU (long-term visas and residence permits for humanitarian reasons), the case under examination falls only within the scope of the national law and, so, the Charter, as part of the EU law, is not applicable. A contrary opinion would be tantamount to allowing third-country nationals to apply for a visa seeking international protection in the Member State of their choice, which would jeopardize the smooth functioning of the Dublin Regulation.

This Regulation (604/2003) provides for the mechanisms for determining the Member State responsible for assessing the asylum application of a third-country national. The criteria used for this purpose under the Regulation do not take into account the applicant's wish but are instead based on facts such as, for example, through which Member State the applicant has entered the territory of the European Union. In the present case, the Court found that the Syrian applicants has submitted a visa application for humanitarian purposes to the Belgian Embassy in Lebanon, that is to say to the Delegation of the Member State of their choice within the territory of a third country, in order to submit there an application for international protection upon their arrival and, thus, remain in that Member State for more than three months within a 6-month period. Therefore, in the Court's view, this case is not governed by EU law but solely by national law.

Contrary to the Court's judgment, the Advocate General Paolo Mengozzi argued that the present case does fall within the scope of the Visa Code, which is part of EU law under the meaning of Article 51 par. 1 of the Charter, therefore is generally governed by that law. In his view, when the provisions of the Charter are applicable, the Member States must exercise their discretion with full respect for the rights guaranteed by it. In other words, the Advocate General considers that a Member State is obliged to issue visas for humanitarian reasons where there is a serious risk of violation of Article 4 of the Charter, without taking into account territorial criteria, that is to say irrespective of whether the applicant has links with the State from which a visa is requested.

According to Mengozzi, there is no doubt that the Syrian applicants were in real danger of being subjected to extremely serious inhuman treatment during their stay in Aleppo, which falls within the scope of the prohibition contained in Article 4 of the Charter. Therefore, the Belgian authorities were obliged to take positive measures to grant international protection on humanitarian grounds, given the unprecedented critical situation in Syria, and to issue visas respecting the Charter's guarantees.

Although the Court in its judgment did not agree with the Advocate-General's opinion, the latter's proposals raised reasonable concerns regarding the responsibility of the governments of the Member States for the victims of mass violence and persecution outside European borders. Mengozzi stressed that this conclusion was taken solely by taking into account the universal values on which the EU is based, including the protection of the fundamental rights of the most vulnerable, such as asylum seekers Syrian refugees, and the right to international protection. The Advocate General emphasized the need for these values to be protected both within the territory of the Member States and in their relations with third countries, because the credibility of the European Union is based precisely on faithful observance of EU law. In response to the Belgian Government, which on 30 January 2017 had expressed the view that the obligation to issue visas for humanitarian reasons would lead everyone to claim that "is

experiencing catastrophic situations" and this would result in an "unmanageable tide of visa applications", the Advocate General referred to the specific situation of the Syrian family with three minor children. According to him, the specific features of the case undoubtedly suggest that the applicants fall within the strict protection of Article 4 of the ECHR.

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