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An easy way out: the Court's judgment in X and X

Saying that the *X and X judgment* [1] was awaited with bated breath is an understatement. The referral of X and X's case gave a window of opportunity to the Grand Chamber of the Court of Justice of the European Union (?CJEU?) to rule on whether EU law obliges States to provide a limited territorial visa (?LTV?) on humanitarian grounds for those who risk treatment contrary to the [EU Charter of Fundamental Rights](#) [2] (?EU Charter?) and international law. As such the questions referred by the Belgian Council of Alien Law Litigation (?CALL?) were principally concerned with the application of the EU Charter outside the territory of the European Union and the conditions, having regard to the EU Charter, which trigger an obligation for Member States to issue a LTV under 25(1)(a) of the [EU Visa Code](#) [3]. The Grand Chamber could have concluded, as Advocate General Mengozzi [recommended](#) [4], that Member States are acting within the scope of EU law and are obliged to respect the rights guaranteed in the Charter when they deliver or refuse a short-term visa. The Grand Chamber could have also concluded that Member States can and in fact must set aside the reasons for refusal of a visa under Article 32(1)(b) where the denial of a LTV would lead to the applicant being exposed to violations of the EU Charter, most notably Articles 2, 3 and 4. Finally, the Grand Chamber could have said that the serious risks to a person of being subjected to the above violations oblige Member States to provide persons with a LTV. Instead the Grand Chamber concluded that X and X's application for a LTV was done with a view to applying for asylum upon arrival to Belgium and notwithstanding that the applications may have been based on Article 25(1)(a) of the Visa Code their applications fell beyond the remit of the objective of the Code, thus EU law and thus the EU Charter. Therefore, such applications are a matter for national law only. The judgment did not engage with any of the questions actually posed, instead it accedes to the 'flood gate' argument advanced by the Commission and national governments and pumps for a ruling which essentially states that the Belgian authorities had got ahead of themselves by describing X and X's applications as LTVs given the intention of the applicants.

Whilst an examination is clearly merited, the scope of this blog shall not focus on the Chamber's apparent exaltation of the [Dublin Regulation III](#) [5], a piece of secondary legislation, over EU primary law (para 48). Nor shall the blog delve necessarily into the analysis of the positive obligations contained in the Charter's articles towards those in need of protection and the obvious consequences of denying persons an access route to Europe. The context of this case and the examination of EU Charter rights and concomitant obligations on the State to provide LTVs was

eloquently expressed by Mengozzi in his Opinion. Instead the blog will focus on how *X and X* affects the application of EU law at large. Whilst jurisprudence in the field of the application of EU law has been somewhat tumultuous, *X and X* appears to have gone that stretch further and established a new criterion for the application of EU law, namely that 'domestic measures regulating the preliminary conditions of access to the enjoyment of subjective rights conferred by EU law, do not fall within the scope of EU law?' (see [F.Fontanelli \[6\]](#)). As detailed below this counters seminal jurisprudence from the CJEU itself and serves to reinforce a lack of clarity as to when a national measure will fall within the field of EU law.

The application of EU law and the EU Charter

In accordance with Article 51 (1) of the EU Charter, the EU Charter is only applicable to EU institutions and to Member States when they are implementing EU law.

In [Åkerberg Fransson \[7\]](#) (§ 51), as partially cited by the Grand Chamber in *X and X*, the CJEU equated 'implementation' of EU law to 'falling within the scope of' EU law, meaning the EU Charter is only applicable in instances where EU law is applicable. *Fransson* also underlines that the Court will 'undertake a subject matter analysis [8]' and that this subject matter need only be connected in part to EU law for the purposes of 'implementation' (§ 16-31).

Following *Fransson*, the Court established in [Siragusa \[9\]](#) (C-206/13, §25) a set of criteria that should be examined to establish whether national legislation involves the implementation of EU law for the purposes of Article 51 of the EU Charter. These include:

- whether national legislation is intended to implement a provision of EU law;
- the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and
- whether there are specific rules of EU law on the matter or capable of affecting a situation.

It is worth bearing in mind that the CJEU has also ruled, similarly to *Fransson*, that a national measure which partially transposes EU law (or even where the claimant meets one of the definitions of a Directive) falls within the term implementation. The EU law at stake can then act as 'a trigger norm [6]' for the provisions of the Charter, as shown in [IBV v Région wallonne \[10\]](#) where the Court found EU law to not preclude the national measure but that the national measure must still adhere to the requirements of the Charter. On a similar trajectory a margin of discretion afforded to a Member State derived from EU law amounts to the implementation of EU law, as acknowledged by the Court in [NS v Secretary of State for the Home Department \[11\]](#) (C-411/10 and C-493/10). Set against the Court's oft repeated rationale ([Melloni v Ministerio Fiscal \[12\]](#) (C-399/11)) that the objective of protecting fundamental rights in EU activity 'is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law,' one can argue that the Court has, in the past, established a relatively wide framework for the issues that involve the implementation of EU law.

Finally, Article 51 (1) of the EU Charter contains no jurisdictional clause that limits its territorial applicability. In *Fransson*, the Court also concluded 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' (§ 21). As such, there is no territorial limitation on the scope of application of the EU Charter. This was also reiterated by the Advocate General, at §89, he states that the fundamental rights of the EU Charter 'are guaranteed to the addressees of the acts adopted by such an authority irrespective of any territorial criterion'.

(For more on the territorial applicability of the EU Charter see Dr. Violeta Moreno-Lax's [blog](#) [13]).

The Chamber's approach in X and X on the applicability of EU law and the EU Charter

In *X and X*, the Court seems to have taken a step backwards in regards to the predictability and legal certainty as to when EU law and therefore the EU Charter applies. The Court seems to have two main reasons as to why the issue at the heart of this case falls outside the scope of EU law.

The **first reason** relates to the legality of the refusal of the visa which is of limited territorial validity as per Article 25 of the Visa Code. The CJEU takes the view (§ 42 ? 43 and 47 -48), that the applicants who submitted the visas on humanitarian grounds on the basis of Article 25, with a view to later applying for asylum, went against the objectives of the Visa Code set out in Article 1. The objectives of the Code are to establish the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period. The Court then elevates the purpose of the application as a crucial factor when deciding whether they fall within the Code in light of its objectives, despite the fact that one of the objectives of the Code is to examine the conditions for granting and refusing such a visa.

The Court essentially reasons that as a result of the wrong criteria under which the family applied for the visa, the EU Visa Code and subsequently EU law doesn't apply. It ignores entirely the AG's Opinion which states that whilst a visa may be refused on the basis that the applicant(s) do not meet the criteria, this does nothing to dismiss the application of EU law itself. Indeed, the competent authorities classified, examined and processed the applicants' applications ***under the Visa Code*** and the applications were deemed to be admissible under Article 19 of that Code and were refused using the reasoning set out in Article 23 (4) (c) of the Code. The Grand Chamber's conclusion also counters the Court's own logic in *IBV* where the Member States actions were enough to fall within **a framework laid down by EU law** to be regarded as implementation. The framework that *X and X* were relying on, and which their applications were denied, was the harmonised procedures and conditions of delivering visas to 'any third country national who must be in possession of a visa when crossing the external borders of the Member States,' which applies to [all refugee-producing countries](#) [13], including Syria. The merits of the application are a secondary step under the Visa Code; **the crucial and primary point is that the applicants met the definition of Article 1(2) and that the Belgian authorities acted within the Code's framework when rejecting X and X's applications.**

In addition, the CJEU stresses the importance of the fact that the Visa Code was adopted based on Article 62 (2) (a) and (b) (ii) of the EC Treaty pursuant to which measures should be adopted concerning visas for stays of no more than three months. It subsequently found that the Belgian authorities were 'wrong to describe the applications at issue in the main proceedings as applications or short-term visas' (§50). However, as the Advocate General specifies, the applicants did not need to apply for a long-term visa, if their applications for asylum were not processed within the 90-day time limit, they could have remained because of Article 9 (1) 2013/32. Furthermore, and as [previously commented upon](#) [14], Article 25 should be interpreted with flexibility since a LTV can be in exceptional circumstances extended by another three months where the applicant has already stayed within the Member State for three months in any six month period.

It is also difficult to square the Chamber's hypothesis considering *Siragusa*. As mentioned above, the CJEU found that the implementation of EU law for the purposes of Article 51 of the EU Charter includes instances **when there are 'specific rules of EU law on the matter' or 'capable of affecting' it**. How then, can Article 25 therefore fall outside its scope? The applicants lodged applications for short stay visas under an EU regulation which harmonises the reasons for granting and refusing the visa. As put by the Advocate General, 'their situation is indeed covered by the

Visa Code both *ratione personae* and *ratione materiae*? (§58).

The **second reason** the Court takes issue with is the fact that to conclude otherwise would mean that Member States are required to allow third country nationals to submit international protection applications to the representations of Member States within third countries, that the Visa Code is not intended to harmonise international protection laws, and such measures are excluded from the scope of Article 78 TFEU. It also states that applications made under the Procedures Directive are only applicable to applications made in the territory of Member States.

This seems to be completely beside the point and against the spirit of the questions posed to the Court. The question to be answered was whether international obligations as referred to in Article 25 include compliance with the rights guaranteed by the EU Charter. The issue is whether, if Article 25 falls within the scope (see answer above), the EU Charter applies or is it of limited territorial validity. This is at the heart of the matter, not whether the Visa Code could then be turned into an instrument that would allow applications from abroad. Instead, the Court takes an approach analogous to the one advocated in [Torralbo](#) [15] C-265/13, that any pre-steps to operationalise and benefit from substantive EU law rights do not fall within the scope of EU law. However, it is worth stating that unlike in *X and X*, *Torralbo* concerned national legislation which was not intended to implement provisions of EU law. In fact EU law did not contain any specific rules relating to the national law in *Torralbo* or any which were likely to affect it. Moreover, attempts **which delineate EU law's application between access and substance not only counters the *effet utile* principle but also the rationale in *Melloni* and *IBV* which sought to protect the unity, primacy and effectiveness of EU law against national divergence**. In this respect it is worth bearing in mind that the question referred by the CALL on what definition is to be given to international obligations under Article 25(1)(a) of the Visa Code in and of itself demonstrated that the [national administration and the judiciary](#) [16] differed over the interpretation of the Article, leading to divergences in its application and that of the EU Charter's.

Lastly, following the ruling it is incredibly unclear what actually now is the purpose of Article 25(1)(a) of the Visa Code and the relevance of humanitarian grounds or international obligations. On the basis of the Chamber's logic the above reasons have to be temporally limited to 90 days. Since conflicts tend to last more than 90 days the only conceivable cases which may fall into this would be a short-term death threat(!), attending a relative's funeral (an event which the AG ruled out in his opinion), medical treatment (presumably at the cost of the applicant) or for pedagogical purposes. Whether international obligations i.e. the UN Convention on the Rights of Child may also apply to Article 25(1)(a)'s application is anyone's guess (note that the wording of the Convention, as other international instruments in general, intends to establish durable and sustainable conditions for the individual). Indeed, these questions are those that were specifically asked of the CJEU by the CALL.

Conclusion

It is important to note that the CJEU has placed the ball in the Member State's courts with their judgment in *X and X*. National law, the [European Convention of Human Rights](#) [17] and the [1951 Geneva Convention](#) [18] apply and should dictate the issuance of LTVs. Nonetheless, aside from the other consequences emanating from this judgment, not to mention the family at the heart of this case, *X and X* calls into question once more the meaning of Article 51 (1) of the EU Charter. The Court's finding that a national act which walks, talks, and acts as if implementing the Code doesn't fall within its scope and subsequently the field of EU law is at odds with its previous case law regarding what 'implementing EU law' means and demonstrates that the Court was guided rather by the political considerations that surrounded the judgment. By restricting the scope of EU law and the Charter even further in *X and X* the Court has exacerbated jurisprudential divergence

on the scope of EU law and created a schism in EU fundamental rights law. It remains to be seen what exactly the effects will be in terms of the scope of the EU Charter and the respect of fundamental rights in the future.

Caoimhe Sheridan, former Senior Policy Officer at ECRE,

Amanda Taylor, EDAL Coordinator, ECRE

(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE)

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Links:

[1] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-63816-x-and-x-7-march-2017>

[2] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

[3] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0810>

[4]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=187561&pageIndex=0&docId=187561&docType=JURIS&docFormat=HTML>

[5] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

[6]

http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsP

[7] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML>

[8] <http://www.bloomsburyprofessional.com/uk/the-eu-charter-of-fundamental-rights-9781782251828/>

[9] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0206>

[10] <http://curia.europa.eu/juris/liste.jsf?num=C-195/12>

[11] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-411-10-and-c-493-10-joined-cases-ns-v-united-kingdom-and-me-v-ireland>

[12] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0399>

[13] <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>

[14] <http://europeanlawblog.eu/2017/03/10/cjeu-case-c-63816-ppu-x-and-x-dashed-hopes-for-a-legal-pathway-to-europe/#more-3590>

[15] <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-265/13>

[16] <http://www.asylumlawdatabase.eu/en/case-law/belgium-council-alien-law-litigation-8-december-2016-no-179-108#content>

[17] http://www.echr.coe.int/Documents/Convention_ENG.pdf

[18] <http://www.unhcr.org/uk/3b66c2aa10>