

**GLOSSARY TO THE JUDGMENT OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION C-638/16 X AND X V ÉTAT BELGE**

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ABSTRACT

The subject of the glossary is to consider certain aspects concerning issuing of humanitarian visas. Its aim is to demonstrate the need for humanitarian visas in order to allow individuals to cross the external borders of the European Union in hopes of protection in one of its Member States. The prohibition of torture, inhuman or degrading treatment derives from the European Union and international law. It confirms the importance of granting international protection to foreigners and accessibility to this procedure. This article is generally based on the Advocate General's opinion and the judgment of the Court of Justice of the European Union in case C-638/16 X and X v État belge. It is also noted that the Court did not comply with the recommendations of the Advocate General. The arguments used in this article are to show that people in need of international protection should be able to apply for a humanitarian visa under European Union and international law.

Keywords: humanitarian visa, international protection, European Union, Court of Justice of the European Union.

When examining a visa application, Member States should take into consideration appropriate legal provisions of European Union and international law. A Member State is required to issue a visa under

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art. 25(1)(a) of Regulation 810/2009 if there are substantial grounds to believe that in case of refusal that national will face direct consequences of treatment prohibited by art. 4 of the Charter of Fundamental Rights. Such a request should be considered as a short-term visa application and be processed in accordance with the provisions of mentioned above regulation.

1. INTRODUCTION

On 7 March 2017, the Court of Justice of the European Union (CJEU) issued judgment in case C-638/16 X and X v État belge¹. The judgment concerned applicability of the European Union (EU) law in case of issuance of short-term visas due to humanitarian reasons. The case concerned interpretation of art. 25(1)(a) of the Regulation 810/2009² (the Visa Code) that was later changed by the Regulation 610/2013³ and the application of art. 4 and 18 of the Charter of Fundamental Rights⁴ (the Charter). Regulation 810/2019 refers to the process and conditions for the issuance of short-term visas with a planned stay not exceeding 3 months over a 6 month period. Art. 25(1)(a) of the Visa Code says 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,

¹ Judgment of the CJEU (Grand Chamber) of 7 March 2017, C-638/16, X and X v État belge (ECLI:EU:C:2017:173).

² 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), OJ L 243, 15.9.2009.

³ Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council, OJ L 182, 29.6.2013.

⁴ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

- (i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;
- (ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or
- (iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out”.

Thus, art. 4 and 18 guarantee the right for individuals to request international protection in an EU Member State (the MS) and prohibit any kind of torture or inhuman or degrading treatment upon themselves. The case is particularly interesting because it was the first time the CJEU was to consider ruling on a visa application that could allow entry into the EU in order to apply for international protection in one of the MSs. Furthermore, particular attention should be paid to the fact that the CJEU did not agree with the opinion introduced by the Advocate General⁵ (the AG) who suggested that the visas should be issued on humanitarian grounds. However, the final judgment brings some doubt. The Court considered the application for a short-term visa as inappropriate and therefore stated that this issue should only be regulated at the state level. Most of this glossary is based on the AG’s opinion, as it suggests a more rational way of understanding. Even if it was not fully followed by the Court, it at least seems to be fair in the circumstances faced by the applicants in this particular case.

2. FACTS

The applicants consisted of two parents and their three minor children. All the applicants were citizens of Syria (residents of Aleppo), who arrived in Lebanon on 12 October 2016, where the nearest Belgian embassy is located, in order to apply for a visa. They explained that the visa would allow them to leave Aleppo and apply for asylum in Belgium. Such a visa could be issued on the basis of art. 25(1)(a) of the Visa Code. One of the applicants testified that he was abducted, beaten and tortured by

⁵ Opinion of Advocate General Paolo Mengozzi delivered on 7 February 2017, C-638/16, X and X v État belge (ECLI:EU:C:2017:93).

a terrorist group. He also mentioned the persecution of Christians and the overall dangerous situation in Syria. In a week they received negative decisions from the Belgian Office for Foreigners, explaining that their actual intention to stay in Belgium would be longer than 90 days. There is no obligation under the European Convention of Human Rights⁶ (ECHR) to accept victims of catastrophic situation. It was also mentioned that Belgian diplomatic posts were not places where foreigners can apply for asylum. The ruling was not clear, so the case was brought before the Belgian Constitutional Court. In order to avoid infringement of art. 4 of the Charter and art. 3 of the ECHR, the Belgian authorities referred to the CJEU for a preliminary ruling⁷. The Belgian State mentioned that according to international agreements, there is no obligation to issue visas under art. 3 of the ECHR (because it was not under its jurisdiction) or art. 33 of the Geneva Convention⁸, which establishes the principle of *non-refoulement* (because it only provides obligations to refrain from deportation). However, the protection of the rights guaranteed in art. 4 of the Charter, depends on the proper applicability of EU law. The Court mentioned that there is an obligation to issue humanitarian visa when it is necessary and in accordance with international obligations, but according to art. 25 of the Visa Code it is in the hands of the states to decide when it necessary⁹.

In the first question, the Belgian authorities asked for an interpretation of the international obligations deriving from art. 25(1)(a) of the Code to see if they include the rights guaranteed by art. 4 and 18 of the Charter, as well as the obligations arising from the ECHR and art. 33 of the Geneva Convention. In the second question, the Court asked whether the MS is obligated to issue visas on the basis of art. 25(1)(a) of the Visa Code when there is a risk of infringement of art. 4 and art. 18 of the Charter, and if

⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953, ETS 5.

⁷ Art. 4 of the Charter and art. 3 of the ECHR have identical content and state that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

⁸ The Convention Relating to the Status of Refugees 1951, which was adopted on 28 July 1951 and entered into force on 22 April 1954, United Nations, Treaty Series, vol. 189, p. 137.

⁹ See point 19-27 of the judgment.

any relationship between the applicant and the MS should be taken into consideration (as sponsors, family links, etc.). The Court asked the CJEU for urgent action¹⁰.

3. OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The AG delivered his opinion on 7 February 2017, he mentioned that MS issuing a territorially restricted visa applies EU law and, therefore, is supposed to protect rights guaranteed by the Charter. The AG emphasized that in the present case the CJEU should confirm the need to protect the rights listed in the Charter, while in the case of refusal, the persons would be subjected to torture, inhuman or degrading treatment. This finding is contradictory to the explanation introduced by the Belgian authorities. The Belgian government states that the Visa Code regulates the issuance of visas not exceeding three months. Art. 32(1)(b) of the code says: MSs shall refuse to issue visa if they are not sure that a third country national would leave the territory before the expiry of the visa. In discussed case the applicants do not meet the criteria for receiving short-term visas, and therefore this situation is not covered by EU law. The same opinion as of the Belgian government was introduced by the Commission, stating that a visa application that would allow requesting protection in a MS cannot be considered as a short-term visa application. Therefore, only national law should be applied. The AG did not accept such statements and explained them in such a way that the refusal was issued on the basis of the Visa Code: “Decisions refusing the visas sought were taken in accordance with Article 23(4)(c) of that code, and using an application form for a short-stay visa decision”¹¹. The AG also said that there is no need to apply for long-term visas. The right to remain in Belgium after 90 days would result from the status of the person applying for asylum in accordance with art. 9(1) of the

¹⁰ Point 28 of the opinion.

¹¹ Point 49 of the opinion.

Directive 2013/32¹². “It follows from all the foregoing observations that, contrary to the submission of the Belgian Government, the situation of the applicants in the main proceedings **does indeed fall within the scope of EU law**”¹³. This confirms that the CJEU is responsible for issuing the judgment in this case.

Answering the first question, the AG noted that the MS authorities issuing a decision on the basis of art. 25 of the Visa Code “adopt a decision concerning a document authorising the crossing of the external borders of the Member States, which is subject to a harmonised set of rules and act, therefore, in the framework of and pursuant to EU law”¹⁴. Consequently, according to art. 51(1) of the Charter, when implementing EU law, MSs shall respect the rights conferred by the Treaties. In addition, the AG mentioned that: “**it is indisputable that the ECHR and the Geneva Convention constitute both a parameter of interpretation of EU law on entry, stay and asylum and a parameter of the action of the Member States in implementing that law**”¹⁵. The AG pointed out that the ECHR and the Geneva Convention are the sources for interpretation of EU law. Thus, when interpreting EU law, these documents should be taken into consideration. Hence, the answer to the first question proposed by the AG was: “Article 25(1)(a) of the Visa Code must be interpreted as meaning that the expression ‘international obligations’ which appears in the wording of that provision does not cover the Charter, but that the Member States must comply with the Charter when examining, on the basis of that provision, a visa application in support of which humanitarian grounds are invoked, and when adopting a decision in relation to such an application”¹⁶.

In the light of the second question, the AG stated that the answer should be positive. The obligation to issue such a visa results from the humanitarian views that in case of refusal, individuals would be exposed to the treatment prohibited by art. 4 of the Charter. Analyzing the second

¹² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013.

¹³ Point 70 of the opinion.

¹⁴ *Ibidem*, point 80.

¹⁵ *Ibidem*, point 103.

¹⁶ *Ibidem*, point 108.

question, the AG emphasized that “it is apparent from the wording of Article 32(1) of the Visa Code that this provision applies ‘without prejudice’ to Article 25(1) of that code¹⁷”. In the AG’s interpretation, art. 25(1) expressly authorises a Member State to issue a territorially limited visa where the applicant is not even in possession of a valid travel document authorising its holder to cross the border. It should not be a barrier to issue this type of visas, as requested by the applicants.

The CJEU did not follow the statements submitted by the AG. The Court stated that according to art. 1 of the Visa Code, transit visas may only be issued for terms not exceeding 90 days in each 180 day period. Issuance of visas under art. 25 of the Visa Code, on the basis of which individuals applied for asylum, cannot be limited to 90 days. To counteract this, the CJEU held that the issuance of such visas is not covered by art. 25 of the Visa Code. Furthermore, the Court emphasized that there is no document adopted by the EU on long-term visas under the Treaty on the Functioning of the European Union¹⁸. Thus, such applications in the interpretation of the CJEU are covered only by national law¹⁹. The CJEU also confirmed that the request was made for a different purpose than simply a short-term visa. The Court stated that the Belgian authorities made a mistake by recognizing requests as short-term visas applications and starting any administrative proceeding²⁰. The CJEU ruled that such a request should be subject only to national law and not to EU law, because a stay exceeding 90 days over a 180 day period does not fall within the scope of the Visa Code.

4. ANALYSIS

The respect for fundamental rights developed by the CJEU is one of the general principles of EU law and is an alienable condition of its legal-

¹⁷ Point 114 of the opinion.

¹⁸ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

¹⁹ Point 44 of the judgment.

²⁰ *Ibidem*, point 50.

ity²¹. The issuance of a visa cannot be denied, as MSs should fully follow appropriate legal provisions of EU and international law. In particular, such as: the Charter of Fundamental Rights, which became legally binding with the adoption of the Treaty of Lisbon²², the Geneva Convention, and following from its provisions the principle of *non-refoulement*. Article 18 of the Charter of Fundamental Rights guarantees the right to asylum. It states that: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”. Therefore, when the EU Member States made the Charter legally binding, they agreed to protect the right to asylum as well as the legal provisions deriving from the Geneva Convention. The right to asylum is an extension of the right to life and the prohibition of torture and inhuman and degrading treatment referred to in articles 2 and 4 of the same Charter. The principle of *non-refoulement* shows us that: “No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The principle of *non-refoulement* is therefore a practical illustration of how the aforementioned rights can be applied in case of life threatening due to the return of a foreigner. “If the right to non-refoulement must be respected by States from the moment a person claims protection or applies for asylum, then an asylum seeker as well as a refugee or a person in need of protection should be entitled to this right”²³. That means that a foreigner should be able to receive at least some kind of protection. As mentioned above, such documents as the Geneva Convention and the Charter should be used for the interpretation

²¹ The European Union and International Human Rights Law, United Nations Human Rights Office of the High Commissioner, 11. July 29, 2017 <http://www.europe.ohchr.org/EN/Publications/Pages/Publications.aspx> .

²² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

²³ Nicolas Wisard, “The protection of refugees and their right to seek asylum in the European Union”, Institut Européen de l’université de Genève, 2016, p. 35.

of EU law, and should therefore be taken into consideration in this case. Unfortunately, there are many cases in which the authorities of EU Member States failed to take into account all sufficient information before the deportation of a foreigner, as it was in case of *X v. Switzerland*²⁴. It should be born in mind that just satisfaction may not always compensate for the harm a person experienced, and in such cases it may even be too late to grant any compensation. Returning to the facts of *X* and *X v Etat Belge*, it was confirmed that the situation in Syria is disastrous. The city where the family used to live was destroyed and the living conditions are not acceptable. People staying there are in a dangerous position. The city was generally destroyed and living there, if even possible, constitutes a serious threat to life. Children are deprived of the right to education and appropriate living conditions. Numerous human rights violations have been registered in Syria, including kidnappings and executions²⁵. It is obvious that the family would be granted, if not refugee status, at least subsidiary protection. Furthermore, it was acknowledged that the applicants faced a real risk of being subjected to inhuman and degrading treatment²⁶. In my opinion the interpretation of the CJEU is problematic and it is difficult fully accept it. As it follows from the Regulation 604/2013²⁷ (the Dublin Regulation), MSs are not obligated to deal with applications lodged outside their borders. In this case only visa application should be considered. The whole asylum procedure would be processed in Belgium. Even if EU law cannot be directly applied (as it is not binding if the application was lodged in a diplomatic post), MSs should not refuse to issue a visa due to the obligations deriving from the Visa Code. Articles 19 and 25 of the Visa Code provide for the possibility to issue humanitarian visas with limited

²⁴ Judgment of the ECtHR delivered on 26 January 2017, Application no. 16744/14, Case of *X v. Switzerland* (ECLI:CE:ECHR:2017:0126JUD001674414).

²⁵ FCO - UK Foreign and Commonwealth Office: Human Rights and Democracy Report 2016 - CHAPTER VI: Human Rights Priority Countries - Syria, 2017. July 30, 2017 http://www.ecoi.net/local_link/344426/475452_en.html .

²⁶ See point 33 of the judgment.

²⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013.

territorial validity²⁸ and even the CJEU mentioned that the Visa Code was adopted on the basis of art. 62(a) and (b) of the TEC²⁹. It demonstrates the importance of protecting of its provisions as a guarantee of action in accordance with EU law. These individuals must receive a visa because the intended stay does not exceed 90 days and applicants only need a valid document allowing them to cross the border legally after receiving the permit. It is henceforth not clear why the CJEU stated that the Belgian government made a mistake by recognizing requests as short-term visa applications. The applicants requested exactly a visa not exceeding 90 days period what was consistent with EU law. Meanwhile, the ECJ has considered the consequences of issuing visas, which in fact may not happen. Only after the submission of an asylum request, the applicants may be issued a residence permit instead of a temporary visa. This practice could guarantee a high level of protection in the EU when there is a real risk of suffering serious harm and even threat to life³⁰.

The CJEU emphasized that issuance of visas on the basis of the Visa Code would in fact mean the same as allowing third country nationals to apply for asylum in diplomatic posts located in third countries³¹. However, it does not mean to allow requesting protection in diplomatic posts, only the enforcement of legal acts regulating such matters. According to art. 6(c) of the Regulation 2016/399/EU³² such third country nationals could enter the MS due to international obligations. Furthermore, such individuals do not constitute a threat to public safety, health or order. In the system of issuance of entry visas, EU legislation allows for effective control over those who might constitute such a threat. The visa issuance procedure will therefore not pose a burden on the EU system in this regard. As stated by

²⁸ Ulla Iben Jensen, “Humanitarian visas: option or obligation?”, Brussels: European Parliament, 2014, p. 6.

²⁹ Point 40 of the judgment.

³⁰ See more Gammeltoft-Hansen, Thomas and Noll, Gregor, “Humanitarian Visas Key to Improving Europe’s Migration Crisis”, Lund: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2016.

³¹ Point 49 of the judgment.

³² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

the AG, it is crucial in times of closing borders not to omit obligations following from EU law. Furthermore, the lack of legal migration channels for refugees poses multiple challenges for Europe³³. Decision issued by the CJEU seems to be partly a response to political problems faced by the Union and international community. MSs are afraid of massive humanitarian visa applications. According to art. 32(1)(b) of the Visa Code MSs shall refuse to issue visas in case if they are not sure whether a person will leave the territory of the state before the validity of the visa expires. Therefore, it cannot be said that the issuance of humanitarian visas is not covered by EU law. As mentioned by the AG: “Depending on the interpretation that the Court will be led to give of Article 25 of the Visa Code and of its relationship with art. 32 of that code, such an intention could at the very most constitute a ground for refusal of the applications of the applicants in the main proceedings, pursuant to the rules of that code, but certainly not a ground for not applying that code³⁴”. The applicants may not be places outside the scope of the Visa Code, since the procedures and conditions of issuance of aforementioned visas are governed by that code and their applications were dealt with and rejected on the basis of its provisions.

The main question is whether a person will leave the territory of the state before the expiry of a visa or not and if MSs are able to properly manage such a migration flow. It seems unacceptable to say that issuance of humanitarian visas is not within EU law while at the same time the EU establishes the CEAS, creates agencies, collects country of origin information, takes common actions and negotiates agendas. The judgment was a chance to open the door for people in need of international protection, but this door was effectively closed.

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³³ Santos Silva, “Improving the Responses to the Migration and Refugee Crisis in Europe”, Lisbon: Calouste Gulbenkian Foundation, 2016, 34.

³⁴ Point 51 of the opinion.

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