



INSIGHT

HUMANITARIAN VISAS AND EU LAW: DO STATES HAVE LIMITS TO THEIR DISCRETIONARY POWER TO ISSUE HUMANITARIAN VISAS?

SÍLVIA MORGADES-GIL*

ABSTRACT: In a context of serious humanitarian and human security concerns raised by large-scale forced migration arriving at the borders of European countries from the Middle East and Africa, the Court of Justice of the European Union has restrictively interpreted the rules on visas with limited territorial validity included in the Community Code on Visas. In its judgment in the case of *X and X v. État belge* (judgment of 7 March 2017, case C-638/16 PPU [GC]), the Court radically moved away from the opinion of the AG Mengozzi, who considered that a legal way already existed in the Code “in order to recognise a legal access route to the right to international protection”. For the Court, Art. 25 of the Code on Visas does not establish any obligation for States to issue an LTV visa on humanitarian grounds, or an international obligation according to EU law because they are outside the scope of the implementation of EU law. In this *Insight*, some of the arguments providing the basis for the Court’s judgment will be discussed: First, the idea that Schengen visas with limited territorial validity, issued on humanitarian grounds or due to international obligations, are outside the scope of implementation of EU law, which leaves aside the application of the Charter of Fundamental Rights of the European Union in these cases. Second, the suggested idea that some degree of discretion on the part of States is not consistent with a limitation of this margin of discretion according to the European standards of human rights.

KEYWORDS: humanitarian visas – asylum seekers – visas with limited territorial validity – margin of discretion – international obligations – access to an international protection procedure.

I. INTRODUCTION

Since its inclusion as an EU competence in order to achieve, first, the objective of an internal market and, with the Treaty of Amsterdam, an Area of Freedom, Security and Justice, the aim of the common European immigration policy has been to ensure an “efficient management of migration flows”.¹ The idea of managing migration flows and or-

* Postdoctoral researcher, Universitat Pompeu Fabra (Barcelona), silvia.morgades@upf.edu.

¹ Art. 79 TFEU.

dering the entries of third-country nationals runs contrary to the essence of the main part of refugee and other forced migrant flows, which is the right to flee the country of origin protected by the international legal regime on human rights. However, the right to flee has been in practice limited by a restrictive policy on visas, combined with measures on carrier sanctions,² and by the reinforcement of controls at the external borders that affect in the same way asylum seekers and other third-country nationals. Taking this into account, since the beginning of the twenty-first century, the EU institutions have tried to introduce some kind of Protected Entry Procedures (PEP) for people in need of international protection.³ Nevertheless, the reduced opportunities to reach a safe European country in order to apply for international protection have not as yet been countered with legal and safe channels of entry for asylum seekers.⁴ Only a number of Member States have or have applied humanitarian admissions or resettlement programmes, or regulated the issue of humanitarian visas based on their own policies on international protection.⁵

This *Insight* will comment on the judgment of the Court of Justice of 7 March of 2017 in the case of *X and X v. État belge*, taking into account the reasoning of the Court as well as the legal context in which the discussion on the possibility/duty to issue humanitarian visas has taken place.⁶ First, the main facts of the case and arguments of the judgment are outlined. Second, we will argue that the judgment shows a mismatch with some basic components of EU law, with the previous jurisprudence of the Court of Justice, and with the European standards for the protection of human rights. Some final thoughts will be drawn at the end.

II. THE FACTS AND THE JUDGMENT OF THE COURT OF JUSTICE OF 7 MARCH 2017

The judgment in the case of *X and X v. État belge* heard by the Grand Chamber of the Court of Justice answered preliminary questions formulated by the *Conseil du Conten-*

² E. GUILD, *The Border abroad-Visas and Border Controls*, in K. GROENENDIJK, E. GUILD, P. MINDERHOUD (eds), *In Search of Europe's Borders*, The Hague: Brill, 2002, p. 87 *et seq.*

³ European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) of 22 April 2016, COM(2014)0164 – C8-0001/2014 – 2014/0094(COD), A8-0145/2016.

⁴ C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, 2016, p. 91. The European Parliament pleads for “including more specific provisions on humanitarian visas”; European Parliament resolution 2015/2095(INI) of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, para. 27.

⁵ European Migration Network, *Resettlement and Humanitarian Admission Programmes in Europe – What Works?*, November 2016, ec.europa.eu.

⁶ Court of Justice, judgment of 7 March 2017, case C-638/16 PPU, *X and X v. État belge* [GC]. In this context, authors have considered this judgment to be a “missed opportunity”: A. DEL GUERCIO, *La sentenza X. e X. della Corte di Giustizia sul rilascio del visto umanitario: Analisi critica di un'occasione persa*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 271 *et seq.*

tieux des Étrangers of Belgium on the interpretation of Art. 25, para. 1, let. a), of the Regulation (EC) 810/2009 (Community Code on Visas, or Visa code).⁷ In essence, the Court was asked to clarify how the expression “international obligations” should be interpreted. Specifically, the Belgian court wished to know if this expression referred to the entire Charter of Fundamental Rights of the European Union (the Charter), to Arts 4 and 18, or also to the principle of *non-refoulement* included in Art. 33 of the Geneva Convention on the status of refugees. The Belgian court also asked if “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 or another international obligation by which it is bound is established”. The Court of Justice had to rule on whether the expression “shall be issued exceptionally” means that the margin of discretion of the State was reduced or even eliminated as regards issuing a visa with limited territorial validity (LTV) in the event of a real risk of violation of internationally recognized human rights. If this was the case, the margin of discretion would be limited to the assessment of the risk in each case.

The applicants in the main proceedings were a married couple of Syrian nationals and their three minor children who lived in Aleppo. They submitted applications for LTV visas to the Belgian Embassy in Beirut on 12 October 2016, before returning to Syria on the following day. In order to support their request, they explained their intention to apply for asylum in Belgium. They also explained their fears of being subjected to ill-treatment due to the “precarious security situation in Syria”, the risk that they were facing on religious grounds, and the impossibility to register as refugees in the neighbouring countries. On 25 October, the *Office des Étrangers* notified the applicants that their application for visas had been rejected, stating, *inter alia*, that they intended to stay more than 90 days in Belgium, and as such their applications were not in fact applications for short visas according to the Visa Code. In addition, the resolution stated that Belgian diplomatic posts were not able to receive applications for asylum, and that they were therefore unable to issue the visas. In the decision to refuse their application, the Belgian authorities also referred to the effects that the issuing of visas in these cases could have for the Schengen system based on legitimate confidence, and that this possibility should be maintained as “exceptional”.⁸ The ap-

⁷ Art. 25, para. 1, let. a), of the Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code): “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”.

⁸ “Considérant que, conformément à l'article 25 du code communautaire des visas, la délivrance d'un visa à validité territoriale limitée doit rester exceptionnelle, notamment parce que sa délivrance déroge aux règles générales de délivrance des visas pour un court séjour communes aux états Schengen et fondées sur la légitime confiance et la coopération loyale entre eux, / que la délivrance d'un visa à validité territoriale limitée à un requérant qui a l'intention de demander l'asile en Belgique en-dehors de tout programme de réinstallation avalisé par la Belgique créerait un précédent dérogeant gravement au caractère exceptionnel de la procédure et susceptible d'entamer dangereusement la

plicants challenged those decisions under the “emergency national procedure” before the *Conseil du Contentieux des Étrangers*, which referred the question of the admissibility of the request under that procedure and the possibility of suspending challenged decisions to the *Cour constitutionnelle*, and some preliminary questions on the interpretation of Art. 25 of the Visa Code to the Court of Justice. The main questions to be resolved by the Court referred to the meaning of Art. 25, para. 1, let. a), of the Community Code on Visas. First, how the expressions “humanitarian grounds” and “international obligations” should be interpreted; and, second, whether the Member State had only some degree of discretion with regard to the circumstances of the case, or had also discretion *vis-à-vis* the decision to issue a visa according to Art. 25, para. 1, let. a), in which a risk of infringement of “international obligations” is established (the meaning of “shall be issued”). Ultimately, the key question was whether having established that there was a real risk of the applicants to be subjected to serious inhuman treatment or to persecution, States applying the Visa Code had the obligation to issue an LTV visa or had some discretion in that regard.

The judgement of the Court of Justice, which departed from the Opinion of AG Mengozzi delivered on 7 February, established in quite a contradictory way that an application for a visa with LTV on humanitarian grounds, regulated in Art. 25 of the Visa Code, with the intention to lodge an application for asylum was beyond the scope of application of the Code and of EU law. Even if this kind of visa (LTV) was foreseen in the Code, it regulated only “the procedures and conditions for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period” (Art. 1):

“Article 1 of Regulation (EC) No 810/2009 [...] establishing a Community Code on Visas (Visa Code), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law”.⁹

The first main argument of the Court of Justice was that “the purpose of the application differs from that of a short-term visa”.¹⁰ The second argument was a systemic interpretation based on what the Court intends to be the “general structure of the system

confiance des autres États Schengen”, *Belgian Conseil du Contentieux des Etrangers*, judgment of 8 December 2016, no. 179 108, p. 3.

⁹ *X and X v. État belge* [GC], cit., para. 52.

¹⁰ *Ibid.*, para. 47.

established by Regulation 604/2013” i.e. the Dublin III Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.¹¹ The third argument was teleological and *a contrario*: if States had to issue visas in such kind of cases, this would interfere with the harmonization of the access to the procedures of international protection, which was not the objective of the Visa Code. The fourth argument is that the European norms on procedures applicable to requests for international protection and the Dublin III regulation of the Common European Asylum System (CEAS) are only applicable to applications made on the territory of a Member State, including borders or transit zones, and excluding “requests for diplomatic or territorial asylum submitted to the representations of Member States”.¹²

In the next section, we will discuss the arguments of the Court of Justice and defend: first, that the Belgian public authorities were applying EU law when they decided on the requests for visas with limited territorial validity; and second, that they should have issued the visas taking into account the European standards for the protection of human rights.

III. THE LEGAL CONTEXT: THE CEAS, THE VISA CODE AND THE EUROPEAN STANDARDS FOR THE PROTECTION OF HUMAN RIGHTS

The final judgment of the Court of Justice and its reasoning raise many doubts, and may appear in some way inconsistent with the legal European context on the rights of asylum seekers. These rights do not only arise from the CEAS or from the international legal regime on the status of refugees or other kind of forced migrants. In international law, as well as in EU law, the rights of individuals must be recognised according to all the legal rules and standards of protection applicable to a given situation.

In our opinion, at least two arguments of the Court are questionable taking into account some of its previous judgments and the European standards of protection of human rights: First, that an application for a visa with LTV does not fall within the scope of the Code on Visas; and second, that Member States have a margin of discretion which is not limited by EU law.

III.1. THE FIRST STEP (OR TRAP): THE *SCOPE* OF EU LAW

“An application for a visa with territorial validity made on humanitarian grounds by a third country national, on the basis of Article 25 of the (Visa) code, to the representation

¹¹ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹² *X and X v. État belge* [GC], cit., para. 49.

of the Member State of destination that is within the territory of a third country (...) does not fall within the scope of that code".¹³

There seems to be two main grounds for leaving aside the decision to be taken by the Belgian authorities in Beirut from the scope of application of EU law, even if the judgment is quite unclear on this point. First, even if it is based on Art. 25 of the Visa Code, an application for an LTV visa made on humanitarian grounds by a third-country national does not fall, normally, within the scope of application of that norm. Second, an application for a visa made on humanitarian grounds outside the territory of one EU Member State is therefore not subject to EU law.

a) Does an application for an LTV Visa as foreseen in Art. 25 never fall within the scope of the Visa Code?

In order to decide that the application for a visa with LTV on humanitarian grounds is beyond the scope of application of the Visa Code, the Court of Justice considered the applicants' aim of requesting asylum on Belgian territory. For the Court, this indicated the applicants' unwillingness to leave the country before the expiry of the deadline indicated in the Schengen Visa. The Court considers that the applicants are in fact applying for asylum when they are applying for a humanitarian visa. There is a clear difference between the two options. As pointed out in the Opinion of AG Paolo Mengozzi, "[t]he intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium *cannot alter the nature or purpose of their applications*".¹⁴ The applicants only try to arrive to a safe country in order to apply for international protection using the legal instruments of the immigration policy. After arriving at their destination, the possibility of remaining legally in Belgium would depend on the triggering of a process to obtain international protection according to the internal legal regime, and on a positive decision on the admissibility of their application. The sole purpose of the applicants is to obtain an LTV visa according to the rules on immigration, rather than to be treated according to the international protection regime in a direct way. The Court of Justice argument is based on a confusion between the legal immigration regime and the international protection regime. Although the two regimes are based on different rules and legal instruments, there are some aspects where the line between them is very thin. This is the case of Art. 25, para. 1, let. a), of the Visa Code. The fact that applicants invoke humanitarian grounds related to a situation of persecution or a serious risk of violations of human rights (which would qualify them as refugees or beneficiaries of some kind of international protection) in order to obtain a visa with LTV does not make an application for a visa into an application for asylum. Nevertheless, it is true that the stronger the grounds for invoking the applicability of a humanitarian LTV visa, the more well-founded an application for interna-

¹³ *Ibid.*, para. 52.

¹⁴ Opinion of AG Mengozzi delivered on 7 February 2017, case C-638/16 PPU, *X and X v. État belge*, para. 50.

tional protection will be considered.¹⁵ As a result of the interpretation of the Court of Justice, even if foreseen in Arts 1, 19 and 25 of the Visa Code and in that respect, “subject to a *harmonised set of rules*”,¹⁶ the decision on issuing LTV visas on humanitarian grounds shall become beyond the scope of the implementation of EU law if those grounds can be interpreted as grounds for applying for asylum in the receiving State. It is difficult to imagine when this would not happen.

b) Does the argument of extraterritoriality have any impact?

One of the consequences of the confusion between the scope of application of the norms on immigration and the norms on international protection is the Court’s restrictive interpretation of the scope of application of the Community Code on Visas. As the Dublin III Regulation and the 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 are only applicable to applications for international protection brought before national authorities in spaces subject to the territorial jurisdiction of Member States, in this judgment, applications for humanitarian visas made to diplomatic representations of the state in a third country are considered beyond the scope of application of the Code on Visas. This is inconsistent with the aim of the Community Code on Visas, taking into account that its main object is by definition applicable to decisions made by the diplomatic or consular authorities of States when they are outside the territorial jurisdiction of an EU Member State.¹⁷

According to the jurisprudence of the European Court of Human Rights, even though the concept of “jurisdiction” that determines the scope of application of the European Convention of Human Rights (ECHR) must essentially be interpreted as covering the territory of States, it should also under exceptional circumstances cover situations where the *effective control* can be attributed to a signatory State,¹⁸ even in spaces not

¹⁵ Against the argument based on the risk of creating “floodgates” raised by the Belgian government, Violeta Moreno-Lax stressed the improbability of “clogging of member States embassies” taking into account the number of visas issued every day. In addition, she rightly pointed out that “the fear of numbers does not constitute a *legal* argument”. V. MORENO-LAX, *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part II)*, in *EU Immigration and Asylum Law and Policy*, 21 February 2017, eumigrationlawblog.eu.

¹⁶ Opinion of AG Mengozzi, *X and X*, cit., para. 80.

¹⁷ “It can hardly be denied that EU law applies whenever a third-country national applies for a visa from a Schengen Member State”. S. PEERS, *External Processing of Applications for International Protection in the EU*, in *EU Law Analysis*, 24 April 2014, eulawanalysis.blogspot.com.

¹⁸ “The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State’s jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see *Drozd and Janousek*, cited above, § 91; *Loizidou* (preliminary objections), cited above, § 62; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković and Others*, cited above, § 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases cited, is very broad: the Court merely states that the Contracting

submitted to territorial sovereignty.¹⁹ In the key case of *Al-Skeini and others v. the United Kingdom*, the European Court of Human Rights identified the defining principles as such, concerning agents acting in representation of the State in third countries: “Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others”.²⁰

If the Belgian authorities were acting in the framework of EU law, they should apply the rights recognised in the Charter, and in particular, those included in Arts 4 and 18, “*irrespective of any territorial criterion*” as pointed out by AG Paolo Mengozzi²¹ and authors including Violeta Moreno-Lax.²² Otherwise, if the Belgian agents deciding on the application for humanitarian visas in Beirut were acting “solely” applying internal law, they would be obliged to take into account the applicants’ risk of being subjected to treatments prohibited by the European Convention on the Protection of Human Rights and Fundamental Freedoms and by international law.²³ Accordingly, they should take into account, in the same way as if they were applying EU law, the *non-refoulement* principle that covers refugees (according to the 1951 Geneva Convention on the Status of Refugees)²⁴ and other people at risk of being subjected to serious violations of human rights (protected by the European Convention on the Protection of Human Rights and Fundamental Freedoms).²⁵ States would be bound by the extraterritorial application of the European Convention on the Protection of Human Rights and Fundamental Freedoms if they were not “implementing Union law”. Whether the Belgian authorities had to “implement Union law” or not was a decisive question to be assessed by the Court of Justice.

Party’s responsibility “can be involved” in these circumstances”. European Court of Human Rights, judgment of 7 July 2011, no. 55721/07, *Al-Skeini and others v. the United Kingdom*, para. 133.

¹⁹ European Court of Human Rights, judgment of 23 February 2012, no. 27765/09, *Hirsi Jamaa v. Italy* [GC], paras 76-82.

²⁰ *Al-Skeini*, cit., para. 134. On the evolution of the jurisprudence of the European Court of Human Rights on this issue, see S. MORGADES-GIL, *La aplicación extraterritorial del Convenio Europeo de Derechos Humanos y Libertades Fundamentales: El concepto de jurisdicción en perspectiva cosmopolita*, in C. GARCÍA SEGURA (ed.), *La tensión cosmopolita. Avances y retrocesos en la institucionalización del cosmopolitismo*, Madrid: Tecnos, 2016, p. 149 *et seq.*

²¹ Opinion of AG Mengozzi, *X. and X.*, cit., para. 89.

²² “The only threshold criterion for the application of the Charter relates to the ‘EU-relevant’ nature of the situation at stake”: V. MORENO-LAX, *Asylum Visas*, cit.

²³ The consideration of Art. 52, para. 3, of the Charter would not change the final result, as in this field, the European Convention on the Protection of Human Rights and Fundamental Freedoms also has an extraterritorial effect.

²⁴ Geneva Convention on status of refugees of 28 July 1951.

²⁵ H. LAMBERT, *Protection against refoulement from Europe: Human Rights law comes to the rescue*, in *The International and Comparative Law Quarterly*, 1999, p. 513 *et seq.*; E. LAUTERPACHT, D. BETHLEHEM, *The scope and content of the principle of non-refoulement: Opinion*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds), *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003, p. 87 *et seq.*

III.2. THE SECOND STEP (OR TRAP), THE *MARGIN OF DISCRETION*

As the application was made with a view “to lodging, immediately upon (their) arrival in (a) Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period” their application for a visa with limited territorial validity did fall “solely” within the scope of national law.²⁶

In the *X and X v. État belge* judgment, the Court of Justice did not follow its previous jurisprudence on the problem of whether States are implementing EU law when they act within the scope of fields covered by EU rules implementing shared competences that leave some margin of discretion to the Member States. From Art. 51, para. 1, of the Charter, and from the case-law of the Court of Justice, it follows that “the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law”.²⁷

a) Is the margin of discretion in the implementation of a norm determinant in its exclusion from the scope of EU Law, even if formally provided for in an EU Regulation?

In previous cases, the inherent discretion in the application of a rule had not been the decisive factor for considering that States were not within the scope of the implementation of EU law. In the *N.S. and M.E.* judgment, the Court of Justice established that:

“the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the CEAS. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter”.²⁸

Mutatis mutandis, it would be possible to argue that the regulatory provisions of Art. 25, para. 1, let. a), of the Visa Code “forms part of the mechanisms” for issuing a kind of visa “provided for under that Regulation and, therefore, merely an element of the Common European” Visa Policy. Even if it is debatable whether the discretion of States in this case is limited to the assessment of the circumstances of the case (if there is a real risk of persecution or of serious violations of human rights) or if it attains the decision of issuing a Visa with LTV,²⁹ it is undeniable that two provisions of the Visa Code regulate the effects of humanitarian circumstances and of international obligations within the overall system

²⁶ *X and X v. État belge* [GC], cit., para. 49.

²⁷ Court of Justice: judgment of 13 July 1989, case 5/88, *Wachauf*, para. 19; judgment of 18 June 1991, case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Others (ERT)*, para. 42; judgment of 18 December 1997, case C-309/96, *Daniele Annibaldi*, para. 13.

²⁸ Court of Justice, judgment of 21 December 2011, case C-411/10 and C-493/10, *N.S. and M.E.*, para. 68.

²⁹ Because the meaning of “shall be issued exceptionally” according to Art. 25 of the Visa Code is not clear.

of the European Visa Policy (Art. 19, para. 4, concerning the admissibility criteria³⁰ and Art. 25, which regulates the issuing of a visa with LTV). In addition, the title of the EU norm uses the term “code” which suggests the idea of a complete system. Furthermore, the *X and X* judgment departs from the jurisprudence settled in the *Koushkaki* case, in which the Court ruled out the possibility that States may refuse to issue a uniform visa unless one of the grounds for refusal stipulated in the Visa Code applied. However, given the “complex nature of the examination of visa applications” States have “a wide discretion [...] to the assessment of the relevant facts” in order to apply the rules.³¹ Following this reasoning, States should be recognised a “wide discretion” in assessing whether humanitarian grounds are sufficiently important to trigger the application of Art. 25. However, this discretion will be limited by the standards set out by the Court of Justice and the European Court of Human Rights on the protection of human rights and by the fact that “humanitarian grounds” is a “concept of EU law”.³²

In its reasoning, the Court of Justice establishes that, in the circumstances of the case, the application for a visa with limited territorial validity did fall “solely” within the scope of national law. With this statement, it appears that the Court is indicating that the authorities of the Member State are completely free to decide on whether or not to issue the visa, because EU standards on the protection of individual rights are not applicable.

b) Can the margin of discretion in the implementation of a norm be interpreted as encompassing an obligation to do something if some requirements related to human rights are met?

European standards for the protection of human rights are applicable both within the scope of the implementation of EU Law and otherwise. For example, the Court of Justice pronounced on the limits to the discretion of States in its judgment on *N.S. and M.E.* in the context of the application of the CEAS. The Court established that the “sovereignty clause” included in Art. 3, para. 2, of the Dublin II Regulation should be applied by the State where the applicant was present in order to assume the examination of an application for international protection if: *a)* the return of the applicant would amount to inhuman or degrading treatment in the sense of Art. 4 of the Charter, due to “systemic flaws” in the asylum procedures and the reception conditions of the State identified as responsible according to the criteria of the norm; and *b)* the examination of the subsequent criteria with the aim of identifying another State as responsible would worsen “a situation where the fundamental rights of that applicant have been infringed by us-

³⁰ “By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest”.

³¹ Court of Justice, judgment of 19 December 2013, case C-84/12, *Rahmanian Koushkaki* [GC], paras 58-60. The articles interpreted in the *Koushkaki* case also contained the term “shall”, which suggests that States are obliged to issue LTV visas “when this follows from refugee and human rights obligations”: U. IBEN JENSEN, *Humanitarian Visas: Option or Obligation?*, Study for the LIBE Committee, 2014, p. 26.

³² Opinion of AG Mengozzi, *X and X*, cit., para. 130.

ing a procedure for determining the Member State responsible which takes an unreasonable length of time".³³

The Court of Justice had also to decide on the meaning of a clause in the Dublin II Regulation headed "Humanitarian Clause", according to which Member States not responsible under the criteria set out in the Regulation "shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States" in the event of dependency (Art. 15, para. 2, of the Dublin II Regulation). The first paragraph of this clause also established that Member States "may bring together family members, as well as other dependent relatives, on humanitarian grounds".³⁴ For the Court, this paragraph encompassed "an optional provision which affords the Member States extensive discretion with regard to deciding to 'bring together' family members and other dependent relatives on humanitarian grounds based in particular on family or cultural considerations".³⁵

By contrast, paragraph 2 of the same article:

"however, restricts that power in such a way that, where the conditions laid down in that provision are satisfied, the Member States (shall) 'normally keep together' the asylum seeker and another member of his family. [...] [T]his must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen".³⁶

Mutatis mutandis in this case as well, the term "shall" in Art. 25, para. 1, let. a), of the Visa Code could be interpreted as encompassing an "obligation" of the Member States concerned to issue a visa with LTV when "humanitarian grounds" or international obligations" are at stake. All those limitations to the discretion of the States are based on the idea that they are "implementing EU law" when they apply provisions of EU regulations that are within the scope of EU competences. As explained above, the European standards on the protection of human rights would lead to similar results if, as the Court said, the State was "solely" implementing internal law.

IV. FINAL THOUGHTS

In the European Area of Freedom, Security and Justice, policies on immigration and asylum are complementary in order to fulfil their common aim of controlling the secondary movements of third-country nationals within the common area of freedom of move-

³³ *N.S. and M.E.*, cit., paras 96 and 98.

³⁴ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

³⁵ Court of Justice, judgment of 6 November 2012, case C-245/11, *K. v. Bundesasylamt* [GC], para. 27.

³⁶ *Ibid.*, paras 27 and 46.

ment. Nevertheless, they scarcely regulate legal ways of gaining access to the EU legal area for non-citizens excluded from the right to circulate. The common policy on visas and other tools of the European policy on immigration can only manage and facilitate the powers of the States concerning their sovereignty over control of entry into their territory. Holding a Schengen or an LTV visa at the point of entry does not entitle a third-country national to the right of entry under either European or international law. Similarly, being a refugee according to the criteria of the Geneva Convention does not allow asylum seekers to enter a specific safe country, if they do not have reached to be placed under their territorial jurisdiction.³⁷ There are many arguments in favour of considering that third-country nationals presenting themselves to the authorities acting as representatives of one EU State in a third country (other than the country of the applicants' nationality, which is a constitutive element for being *refugees*) are under the jurisdiction of that State. Nevertheless, according to the Court of Justice, and in the absence of a common regulation on humanitarian visas as part of Protected Entry Procedures in the CEAS, this issue will be covered by national law and by international regional law on human rights. The position of third-country nationals as holders of a right to *non-refoulement* according to the international legal regime on refugees after this judgment is weakened instead of being reinforced. Refugees placed under the jurisdiction of EU Members abroad will not have guaranteed the right to be safe from persecution or serious violations of human rights through the application of the EU law provisions on visas with limited territorial validity. To be placed under the jurisdiction of one Member State through the contact with its public agents does not make that State responsible for the fate of the applicant under the framework of EU law. The words of Paolo Mengozzi on this issue are particularly appropriate: "It is [...] crucial that at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law or, if you will allow me the expression, *their* EU law and *our* EU law".³⁸

³⁷ This can be considered to stem from Art. 31, para. 1, of the Geneva Convention on the status of refugees that establishes that "[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

³⁸ Opinion of AG Mengozzi, *X and X*, cit., para. 4.