The CJEU on Humanitarian Visa: Discovering 'Un-Chartered' Waters of EU Law

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On 7 March 2017 the Grand Chamber of the CJEU handed down a judgment in *X and X* on humanitarian visa applications. The Court disposed of the referred case by establishing that it does not fall within the scope of EU law. The issue of humanitarian visa has sparked a minor crisis in Belgium where among others the state secretary for migration celebrated 'winning' the case.

I am confident much will be written about *X and X*, not least in connection with the bold Opinion of AG Mengozzi which was left on the sidelines by the Court. Here I want to focus on one specific aspect of the case: the scope of application of the Charter.

From the murky waters of 'implementing EU law'...

Before moving on to the case itself, I want to recall some of the basic principles in the CJEU's case law on the cursed legal meaning of 'implementing EU law' in Article 51(1) of the Charter, the relevant part of which reads as follows:

> ***The provisions of this Charter are addressed*** *to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and* ***to the Member States only when they are implementing Union law****.*

We know from *Åkerberg Fransson* that the core test regarding when the Charter applies is whether the situation falls within EU law. Plainly, "the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter" [21]. The Charter could not, of itself, form the basis of the Court's jurisdiction though [22]. This was still overall a good moment for EU law, as the CJEU avoided creating a rift between the applicability of the Charter and the general principles of EU law.

The difficulty has of course always rested in determining which national measures fall within the scope of EU law. In *Fransson*, the CJEU stretched that concept pretty far, much to the annoyance of the BVerfG, and for a while it seemed that the threshold for triggering the application of the Charter could be rather low.

Then came judgments like *Siragusa* and *Torralbo Marcos* and with them an all too familiar EU law reality check. The former pointed to relevant criteria for the interpretation of Article 51 of the Charter, such as the intention – or the lack thereof – of national measures to implement EU law (which was not an issue in *Fransson*), nature and objectives of the implementing national measure and specific rules of EU law on the matter. Citing *Anibaldi*, the Court emphasised that an indirect effect on EU law of an implementing measure is not a sufficient connection to make it fall within its scope. Bref, the applicability of the Charter was brought back to earth.

... to the 'un-Chartered' waters of EU law

But these judicial disputes focused primarily on the strength or weakness of the link between national legislation and EU law which is where *X and X* is different. Here the referred case concerned a legal situation (a refusal to issue visa) directly emanating from the application of the EU Regulation on short-term visa (Article 25 of the 'Visa Code'). Surely the Charter must apply to EU laws?

Not according to the Court. The CJEU admitted that the visa application was made formally on the basis of Article 25 of the Regulation [43]. However, since the applicants submitted this short-term visa request with a view [42] to apply for a long-term one once in Belgium, the situation fell outside of the scope of EU law. Why? Because unlike short-term visa, long-

term residence is exclusively a national prerogative, not least due to the non-adoption of EU measures in this regard [44]. Outside of EU law, the Charter, with its provisions on right to asylum and prohibition of torture, does of course not apply either. Case closed.

In other words, the CJEU now looks beyond formal (or obvious and explicit) connections of legal situations to EU law. There can now be a sort of 'ulterior motive' – ironically even a humanitarian one – which, if identified by the Court, will disqualify the situation from the ambit of EU law. In my opinion, such an interpretation verges on denying the legal effects produced by a statute of positive law (the Visa Code), something which is incompatible with the basic tenets of modern legal systems based on binding legal norms. It also potentially opens up a whole new level of possibilities to restrict the applicability of the Charter and is a significant step beyond *Siragusa*.

One could object that Belgium was exercising its discretion to reject the visa application under the Visa Code. It does not matter – the Charter would still apply. AG Mengozzi correctly recalled in his opinion [82] that according to the Court's case law [N.S. and Others, 68], even where a Member State has some discretion under an EU Regulation, any exercise of such discretion derived from EU law is still covered by the Charter in line with Article 51(1) thereof. The CJEU did not go into this issue in *X and X*, presumably in order not to contradict its own case law.

Additionally, the judgment in *X and X* appears very much at odds with the ruling in *Fransson* where the Court established a link with EU law in rather improbable circumstances, in the absence of an intention to implement relevant EU laws, never mind a formal link. The CJEU made no reference to *Siragusa* or its criteria on determining the scope of EU law in *X and X*.

Limiting the scope of EU law vis-à-vis national legislative measures is one thing but creating un-Chartered territory in EU law is another. It is understandable why the Court would want to stay away from the currently toxic migration politics. But it is worrying that it is willing to further limit the scope of the Charter when it might be needed the most.

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