

Advice in Case C-638/16 PPU on prejudicial questions concerning humanitarian visa

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1. Introduction

1.1 On 8 December 2016, the Belgian court submitted prejudicial questions to the Court of Justice of the European Union (CJEU) concerning the issuing of humanitarian visas to a Christian Syrian family. The central question is whether international treaties and European Union law can oblige consuls and embassies of EU Member States to issue a humanitarian visa.

1.2 This document will discuss developments in the European Union with regard to humanitarian visas, the interpretation of the Visa Code in light of the Schengen Borders Code, the entitlement of the Syrian family in this case to asylum protection, the conditions in Lebanon as a ‘safe third country’ and the argument that a positive judgment of the Court will open the ‘floodgates’.

2. Developments in the European Union with regard to humanitarian visas

2.1 Establishing a comprehensive, harmonized regime for European humanitarian visas has been considered by institutions of the European Union for a long time. The European Parliament in particular has consistently insisted on establishing save and legal possibilities to enable refugees to reach Europe.

2.2 In the report ‘**Humanitarian visas: option or obligation?**’ from 2014, it was found that 16 EU Member States already use guidelines to issue humanitarian visas. This underlines that most Member States recognize humanitarian visas as valid legal avenues of entry.¹

2.3 The report points to a few unclear provisions in the Visa Code (Regulation 810/2009) and the need for a more uniform and coherent understanding of the EU policy on issuing humanitarian visas. While Article 25, first paragraph, states that an LTV² visa “shall be issued”³ “when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations”, Article 19, fourth paragraph, states an application that does not meet the requirements may, by way of exception, be considered

¹ See: European Parliament (Policy Department for Citizens’ Rights and Constitutional Affairs), ‘Humanitarian visas: option or obligation?’, September 2014, see:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU\(2014\)509986_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf).

² LTV: limited territorial validity, a visa with territorial limited validity.

³ See for more about the meaning of the word ‘shall’ in the context of the Visa Code: Peers, S. ‘Do Potential Asylum Seekers have the Right to a Schengen Visa?’, EU Law Analysis, 20 January 2014, see:

<http://eulawanalysis.blogspot.nl/2014/01/do-potential-asylum-seekers-have-right.html>.

admissible “on humanitarian grounds or for reasons of national interest.” In other words, where Article 25 explicitly provides for the issuing of visas on the basis of international obligations, this ground is not mentioned among the exceptions of non-admissibility of a visa application. As refugees often lack the required paperwork, the scope of Article 25 of the Visa Code, which prescribes the issuing of an LTV visa, will in these cases be undermined. In this regard it is important that appeal is possible in case the LTV visa application is refused (Article 32, third paragraph), but there is no right to appeal the admissibility decision. Secondly, the report mentions that the Visa Code is unclear with regard to the question if consulates are obliged to investigate possible ‘humanitarian grounds’, and what ‘humanitarian grounds’ precisely entails.

- 2.4 It is important to note that these provisions must be read in light of preamble 29 of the Visa Code which states that the Visa Code respects the fundamental rights and observes the principles recognized in particular by the ECHR and the EU Charter of Fundamental Rights. This includes the right to non-refoulement as guaranteed under Article 3 of the ECHR and Article 4 of the Charter and the right to asylum guaranteed under Article 18 of the Charter. Moreover, the provisions of the Visa Code must be read in conjunction with the Schengen Borders Code (Regulation 399/2016, hereafter: SBC), which itself, in Article 4, contains an explicit exception to the required conditions of admission when this is necessary on the basis of the EU Charter or international treaties, mentioning the Refugee Convention explicitly. In paragraph 3.2 of this document the relation between the Visa Code and the SBC will be discussed extensively.
- 2.5 In the policy briefing ‘**Towards an EU humanitarian visa scheme?**’ from 2016, the European Parliament once again emphasizes the importance of a harmonized EU policy with regard to the humanitarian visa. The briefing refers to policy in Brazil, endorsed by the UNHCR, which put in place special humanitarian visas for Syrian refugees.⁴
- 2.6 On April 12, 2016, the European Parliament accepted **Resolution 2015/2095(INI)** in which it advocates a harmonized policy on humanitarian visas:

“Persons seeking international protection should be able to apply for a European humanitarian visa directly at any consulate or embassy of the Member States (...) It is necessary to amend the Union Visa Code by including more specific provisions on humanitarian visas”.⁵

⁴ European Parliament (Policy Department for Citizens’ Rights and Constitutional Affairs), ‘Towards an EU humanitarian visa scheme?’, June 2016, see: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/556950/IPOL_BRI\(2016\)556950_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/556950/IPOL_BRI(2016)556950_EN.pdf); UNHCR, Briefing Notes, “UNHCR welcomes Brazil humanitarian visas for Syrians fleeing conflict”, 27 September 2013, see: <http://www.unhcr.org/news/briefing/2013/9/524574d39/unhcr-welcomes-brazil-humanitarian-visas-syrians-fleeing-conflict.html>.

⁵ European Parliament resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, 12 April 2016, see: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0102&language=EN&ring=A8-2016-0066>.

2.7 Meetings between the European Commission, Council and the Parliament on humanitarian visas have recently commenced.⁶ The meetings concern the ‘**Visa Code report**’ of the European Parliament (22 April 2016) which contains suggested amendments to the Visa Code.⁷ The amendments introduce a provision that allows people that need international protection “[to] apply for a European humanitarian visa directly at any consulate or embassy of the Member States” (amendment No. 95). In an amendment to the preamble of the Visa Code the role of consulates in issuing visas to refugees is emphasized (amendment No. 7). In the justification of the amendment, the European Parliament mentions the extraterritorial jurisdiction of European duties, which will be discussed at length below:

“The review of the Visa Code provides an occasion for putting possible protection needs stronger in the focus of consulates and thereby could provide one element of a solution. The proposed recital recalls that according to the case law of the European Court of Human Rights, in some situations, states have certain obligations even outside their territory when they exercise jurisdiction. See *Hirsi and others v. Italy*.”

Furthermore, an adjustment to the preamble is suggested in which obligations that flow from the Refugee Convention and other international treaties are made explicit (amendment No. 8):

“When applying this Regulation, Member States should respect their respective obligations under international law, in particular the United Nations Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child and other relevant international instruments.”

2.8 The foregoing demonstrates that the idea of a comprehensive regime of humanitarian visa in Europe already enjoys considerable preparation and support from relevant institutions of the European Union.

3. With regard to the entitlement of the Syrian family in the present case to asylum protection

3.1 In the present case of the Syrian family, two factors are important for the question if humanitarian visas should be issued: the entitlement of the Syrian family to asylum protection and their position in Lebanon. Both factors are relevant for the question if the extraterritorial effect of international treaties and European Union Law obliges the Belgian embassy to issue a humanitarian visa to the Syrian family.

⁶ European Parliament, ‘Towards an EU humanitarian visa scheme?’.

⁷ European Parliament, Visa Code report on the proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (COM(2014)0164), see: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0145+0+DOC+PDF+V0//EN>.

- 3.2 For the decision whether or not to issue a visa under the Visa Code, as mentioned above, the authorities are bound by international obligations amongst which Article 3 ECHR and Article 4 of the EU Charter. Moreover, the provisions of the Visa Code must be read in conjunction with the Schengen Borders Code, as discussed earlier. On the basis of Article 21 of the Visa Code, for every visa application, it should be ascertained whether the applicant fulfils the entry conditions set out in Article 5 SGC.⁸ Article 25, first paragraph, of the Visa Code provides an exception to this: if the SBC requirements are not met, a visa will be issued under the conditions listed in the Article. However, the SBC itself also contains an explicit exception to the required conditions of admission when this is necessary on the basis of the EU Charter or international treaties, mentioning the Refugee Convention explicitly. Article 4 SBC states that in applying the Schengen Borders Code, Member States have to act in accordance with the relevant Union Law, ‘including the EU Charter, relevant international law, including the Refugee Convention and obligations relating to the admission to international protection, especially when it comes to the principle of non-refoulement and human rights’. On the basis of the Visa Code, visa-authorities can only and exclusively issue or refuse a visa in accordance with the admission requirements stated in the SBC (see also: CJEU Kouskhaki C-84/12, 19 December 2013, para. 55). This means that if the admission requirements under Article 5 SBC cannot be enforced because this would be in violation of EU or international obligations, including the Refugee Convention, this obligation should also have effect in the application of the Visa Code.⁹ In other words, on the basis of the Visa Code read in conjunction with the SBC, a visa refusal cannot lead to a situation where the abovementioned provisions of EU and international law are violated.
- 3.3 Moreover, acts of embassies and consulates are used as standard examples of extraterritorial jurisdiction in the case law of the European court of Human Rights (ECtHR). Guiding in the explanation of jurisdiction within the meaning of Article 1 ECHR is the judgment of *Banković and others v. Belgium*:

“recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.”¹⁰

⁸ See also: *Air Baltic*, C-575/12, 4 September 2014, where the CJEU decides that Article 24 Visa Code gives a limitative enumeration of refusal grounds for visa, with reference to Article 5 (old) SBC: ‘It follows that a Member State does not have discretion allowing it to refuse a third-country national entry to its territory by applying a condition that is not laid down in the Schengen Borders Code.’ (para. 69).

⁹ Moreover, Article 3 SBC states that the SBC applies to any person crossing the external borders of Member States, without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.

¹⁰ ECtHR *Banković and others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK*, No. 52207/99, 12 December 2001, para. 73; see also ECtHR *Ilaşcu and others v. Moldova and Russia*, No. 48787/99, 8 July 2004, para. 314.

3.4 The extraterritorial jurisdiction of the ECHR in consulates or embassies was affirmed again in *Medvedyev and others v. France*.¹¹ Moreover, in a migration dispute the British House of Lords recognized that this principle applies to state authorities acting outside their own territory:

“a member state could, through the actions of its agents outside its territory, assume jurisdiction over others in a way that could engage the operation of the [European Convention on Human Rights].”¹²

3.5 In the literature on extraterritorial jurisdiction of human rights treaties it is believed that a strict territorial notion of state responsibility is untenable.¹³ Moreover, it is held that the silence of the Refugee Convention on the ambit of the prohibition of refoulement (Article 33 Refugee Convention) is less constraining than the “within [a state party’s] jurisdiction” provision of Article 1 ECHR.¹⁴ Lauterpacht and Betlehem maintain that the prohibition of refoulement from Article 33 has extraterritorial effect:

“Persons will come within the jurisdiction of a State in circumstance in which they can be said to be under the effective control of that State *or are affected by those acting on behalf of the State more generally, wherever this occurs.*”¹⁵

3.6 The family concerned is a Christian family from Aleppo. The entitlement of the family to asylum protection is undisputed. The family is in a situation of emergency that was recognized by the Belgian government. In fact, the Belgian government had already decided on a policy to issue humanitarian visas for people affected as in this case. This intended issuance of visas purportedly stagnated in the fall of 2016 solely on the basis of practical reasons.¹⁶ That the refoulement of the family to Syria would be in violation of Article 3 ECHR and Article 33 of the Refugee Convention is therefore beyond dispute.

3.7 Such a judgment is not without precedent. On 16 September 2014, the court of Nantes has, by way of a provisional measure, decided that a Syrian family (Armenian Christians from Aleppo) should be issued a visa to travel to France in order to allow them to apply for asylum on the basis

¹¹ ECtHR *Medvedyev and others v. France*, 29 March 2010, para. 65. See also James C. Hathaway and Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, (2014) Law & Economics Working Papers, University of Michigan Law School, Paper 106, p. 35-36.

¹² *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, UKHL 55 (UK HL, 9 December 2004).

¹³ Hathaway, J.C. (2005) *The Rights of Refugees Under International Law*, Cambridge: Cambridge University Press, p. 169.

¹⁴ Hathaway, p. 167.

¹⁵ Lauterpacht, E. en Betlehem, D. (2003) ‘The scope and content of the principle of non-refoulement’ in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee protection in international law*, Cambridge: Cambridge University Press, p. 111 (our italicization).

¹⁶ See *Standaard* of December 15, 2016, which quotes an email from an involved official, stating that the procedure of humanitarian visas was virtually stopped in the period mid-July to mid-November 2016 due to “leave procedures and the large number of students visa records which have a higher priority than such files”.

of the right to asylum as guaranteed under the French Constitution. The visa application was submitted in Beirut, where the family apparently had traveled.¹⁷

3.8 As the CJEU has also underlined in *M'Bodj v. Belgium* (C-542/13, 18 December 2014, para. 46), the discretion of a Member State to give someone a status of national protection “on compassionate or humanitarian grounds” should be distinguished from a residence status issued for the reason of ‘the need for international protection’ within the meaning of the Qualification Directive.¹⁸ In the present case it is clear that the Syrian family qualifies for international protection. As the visa application falls within the scope of European Union law, the decision on the application cannot be considered a discretionary power.

4. With regard to safe third countries and the conditions in Lebanon

4.1 A second relevant factor concerns the conditions in Lebanon. The family in this case has a undisputed claim to asylum protection, but this does not mean that they immediately fall under the responsibility of the Belgian state. The ‘safe third country’ principle in refugee law states that a country can refuse an asylum application when the refugee already has been or can be granted protection by another country.

4.2 The family in the present case fled from Aleppo, applied for visas at the Belgian embassy in Beirut, and returned to Syria after the application was declined. The family did this because they could not endure in Lebanon and did not want to live on the streets. The question is how this return to Syria should be assessed under international law. Is this a case of voluntary return for which only the persons themselves are responsible; or is this a forced return to which they felt compelled because their position in Lebanon was untenable? The question is, therefore, whether their stay in Lebanon was in violation of international law standards. Specifically, the question is if Lebanon meets the requirements of a safe third country. Although these requirements were established in a different context (namely if an asylum seeker can be sent back to a third country), the question revolves around an identical normative issue, namely what international legal standards the stay of a refugee in a country should meet. The importance of the international law concept of ‘safe third country’ is underlined by the facts in this case. The core of the concept is that the state of affairs of refugees in a country may not be so dreadful that they feel compelled to return to the country where they have grounded fear of persecution, where they are subjected to torture or to inhuman or degrading treatment. To prevent that refugees are forced to return to the country because of a lawless situation, criteria of general international law apply, amongst which

¹⁷ There was no appeal in this case. On June 18, 2014, the French Council of State (CE n ° 366 307) did determine that the requirement of a transit visa for Syrians (so in general) is not in itself a violation of the right to asylum. This opinion does not necessarily contradict the ruling of the court of Nantes on September 16, 2014, because that case concerned an individual visa applications and the Council of State ruled on the visa requirement in general, without detracting from the individual right to asylum. See more about this: <http://revdh.revues.org/886>. In a more recent judgment concerning visa applications from Syrians in Beirut, the French Council of State ruled, contrary to the court of Nantes, that there was no obligation for visas issuing visas because in that case there was not ‘une atteinte grave et manifestement illégale au droit d’asile’ since the persons involved were under UNHCR protection (CE July 9, 2015, n ° 391 392). This statement also does not affect the court of Nantes’s ruling that in certain cases an obligation exists for the French authorities to issue visas.

¹⁸ See also judgment *B and D v. BAMF*, 9 November 2010, joined cases C-57/09, paragraph 118.

the rights guaranteed under Articles 17-24 of the Refugee Convention. European Union law provides specific provisions for safe third countries in Article 38, first paragraph, of Directive 2013/32.¹⁹ The provision includes the requirement that the refugee must have the possibility in the third country to apply for refugee status within the meaning of the Refugee Convention (Article 38, first paragraph, under e). Here the European law provides one of the most important codifications of the international law concept of safe third countries. Even if, on the basis of Article 3 of the Procedures Directive, one has to assume that this Directive does not apply to visa applications at embassies or consulates, member states are still bound by the obligations of international and primary EU law on asylum and non-refoulement (Article 4 and 18 of the Charter), which prohibits expulsion to a country which cannot be considered a safe third country.

- 4.3 Lebanon is not a party to the Refugee Convention. Nevertheless, 1.017.433 registered Syrian Refugees are staying in Lebanon.²⁰ In May 2015, the Lebanese government informed the UNHCR that the registration of more Syrian refugees would be in suspended.²¹ Even among the registered refugees only 21% has legal residence.²² Approximately half the funds that are needed to shelter this population is contributed by the international community.²³ This is evident from the deplorable state of the registered Syrian Refugees in Lebanon. Only 48% of the children from age 6-14 years is able to go to school²⁴, while children from age 15-18 years only 16% goes to school.²⁵ Of the people that require medical care 16% is not able to get it.²⁶ The amount and quality of the available food is declining, and leads to malnutrition on a relatively large scale.²⁷ Only 15% of Syrian children in Lebanon gets enough food to meet WHO standards.²⁸ Next to the more than 1 million registered Syrian refugees, there are also non-registered refugees. The number of non-registered refugees is estimated at a half million. This group is regarded as illegal by definition and does not have access to the aids that are being distributed by the international community. The situation of this group, therefore, will be even more precarious.
- 4.4 Therefore, the requirements that must be met to qualify as a safe third country, as discussed earlier, are far and away from being met considering the state of affairs in Lebanon. The rights under the Refugee Convention only apply to ‘refugees lawfully in territory’ or ‘lawfully staying’, and the Syrian family cannot be or become lawfully in territory of lawfully staying because Lebanon no longer registers any refugees. Moreover, Lebanon does not meet the conditions under Article 38, first paragraph, under e, of the Directive 2013/32 and obligations of international and primary EU law on asylum and non-refoulement: refugees can no longer register and thus cannot

¹⁹ 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.

²⁰ See: <http://data.unhcr.org/syrianrefugees/country.php?id=122>.

²¹ UNHCR, Vulnerability Assessment of Syrians in Lebanon 2016, p. 13, see: http://documents.wfp.org/stellent/groups/public/documents/ena/wfp289533.pdf?_ga=1.162716988.1055070605.1482869704.

²² Ibid., p. 13.

²³ Ibid., p. 1.

²⁴ Ibid., p. 27.

²⁵ Ibid., p. 28.

²⁶ Ibid., p. 32.

²⁷ Ibid., p. 35 and further.

²⁸ Ibid., p. 45.

apply for refugee status. The refusal of the Belgian visa therefore forced the persons involved, of whom the return to Syria would be in violation of international law, to stay in a state where their residence was illegal and where they could claim none of the rights that the Refugee Convention or the EU Charter guarantees them, and where their position does not meet the European legal requirements to be considered a safe third country. As a result of the circumstances in Lebanon, the family saw themselves compelled to return to Syria after the rejection of the visa application. Such a return, forced by a stay that evidently does not meet the requirements under international law, must be understood as a forced return that in this case amounts to a violation of the prohibition of refoulement under international law.

4.5 In this context a parallel can be drawn between the responsibility of Member States on the basis of the non-refoulement principle as was also determined in the judgment *Hirsi Jamaa*.²⁹ In that case the Grand Chamber of the ECtHR unanimously decided that the Italian State violated Article 3 ECHR, even though it concerned an act of the Italian government outside Italian territory. Due to the actions of Italian crew on ships in international waters, the persons involved were transferred to Libyan authorities. According to the ECtHR, this entailed direct and indirect refoulement because plaintiffs in Libya would be subjected to torture or to inhuman or degrading treatment and were at risk of being sent back to Eritrea and Somalia where they could face persecution. In the present case the decline of the visa to the Syrian family also leads to direct subjection to inhuman and degrading treatment in violation of Article 3 ECHR/4 Charter given the lack of humane shelter in Lebanon (see the *M.S.S.* judgment, para. 254-263³⁰), and also to indirect subjection to inhuman and degrading treatment as a consequence of the forced return to Syria.

4.6 As indicated, in the *Hirsi Jamaa* judgment the ECtHR denounced the ‘push back’ policy of a EU Member State, even if applied outside their territory, because this resulted in subjection of asylum seekers to treatment that is in violation of Article 3 ECHR. When it comes to the responsibility of Member States under European Union law, including the principle of non-refoulement, the difference between ‘push back’ and rejecting visas is not substantive. By declining visas the consequences are also, as the circumstances of the present case show (see the above mentioned situation in Lebanon and Syria), that the applicants in Lebanon are subjected to a treatment in violation of Article 3 ECHR/ 4 Charter and consequently to indirect refoulement because of the forced return to Syria.

5. With regard to the ‘floodgates’ argument

5.1 The problem in the present case is caused by the fact that Lebanon in absolute terms (20 to 30% of the population consists of Syrian refugees) as well as financially (only 50% of the needed funds) is left on its own. The international community could have prevented these emergency situations by (a) large-scale resettlement out of, in the first place, Lebanon and (b) raise enough funds.

²⁹ ECtHR *Hirsi Jamaa and others v. Italy*, 23 February 2012, No. 27765/09.

³⁰ ECtHR *M.S.S. v. Belgium and Greece*, 21 January 2011, No. 30696/09.

5.2 The expected effect of a positive decision for the Syrian family in this case is not the opening of ‘floodgates’ for other Syrian refugees. Such a decision would in fact be an impetus for the international community to support the region by resettlement and financing. A judgment from the CJEU as argued above would indeed constitute a powerful incentive for EU Member States to advance the stay of Syrian refugees in Lebanon in order that it will meet the required obligations, as opposed to the situation now. If that condition is attained then international obligations no longer require issuing visas to Syrian refugees.

6. Conclusion

6.1 This document considers the question whether international treaties and Union law can oblige consulates and embassies of EU Member States to issue a humanitarian visa under Article 25, first paragraph, of the Visa Code. It is found that the wording of the Visa Code and the extraterritorial obligations of Member States under the EU Charter and the ECHR imply that consulates in fulfilling their duties must take account of the prohibition of refoulement as stated in the Refugee Convention and the ECHR. Considering the current state of affairs of refugees in Lebanon, the country cannot be regarded as a safe third country – to European and international standards – where the Syrian family could be returned. Moreover the entitlement of the family to asylum protection is undisputed. Therefore, the impact of a judgment to issue humanitarian visa can be limited to the group of refugees of which the entitlement to asylum protection is undisputed. This is a step that aligns with recent developments towards which the European Union is headed.