

Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation

Luc Leboeuf and Marie-Claire Foblets¹

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Introduction

On 7 March 2017, the CJEU adopted its much-discussed ruling in the *X. and X.* case,² by which it decided that the EU Visa Code does not regulate

1 Luc Leboeuf is a Head of Research Group in the Department of Law & Anthropology of the Max Planck Institute for Social Anthropology. Marie-Claire Foblets is Director of the Department of Law & Anthropology of the Max Planck Institute for Social Anthropology and Professor in the Law Faculty of the Catholic University of Leuven (KUL).

2 Case C-638/16 PPU *X and X* [2017] EU:C:2017:173. The case has been widely commented by legal scholars, including by some of the contributors to this volume. See, among others: Y Al Tamimi, E Brouwer, and R Coene, ‘Verplicht de Visum-

the issuing of humanitarian visas to asylum seekers.³ The *X. and X.* ruling was adopted at a time of heated controversies in Europe over migration, as the 2015 ‘refugee crisis’ created major divisions among European societies and public opinion, which still continue to this day.⁴ For that reason, the

code tot afgifte van humanitaire visa aan Syriërs?’ (2017) *Asiel en Migrantenrecht* 327-333; M Berger and G Maderbacher, ‘Erteilung eines Visums zur Ermöglichung der Asylantragstellung im Inland unterliegt allein nationalem Recht’ (2017) *Österreichische Juristenzeitung* 480-481; E Brouwer, ‘Een gemiste kans voor een uniforme en mensenrechtelijke uitleg van de Visumcode wat betreft de afgifte van een humanitair visum’ (2017) *Nederlands Tijdschrift voor Europees Recht* 69-78; J-Y Carlier and L Leboeuf, ‘Droit européen des migrations’ (2018) 26 *Journal de droit européen* 247 95-110, 97; R Colavitti, ‘Ouvrir la jarre de Pandore ou trancher le nœud gordien ? La Cour face aux conditions d’application du Code des visas aux demandes déposées pour raison humanitaire’ (2017) *Revue des affaires européennes* 139-147; J De Coninck and M Chamon, ‘Geen recht op tijdelijke visums voor Syrische vluchtelingen’ (2017) *Tijdschrift voor Europees en economisch recht* 382-387; B Delzangles and A Louvaris, ‘Visas humanitaires et Charte des droits fondamentaux : la confrontation n’a pas eu lieu’ (2017) 239 *Journal de droit européen* 170-176; P Endres de Oliveira, ‘Antrag syrischer Flüchtlinge auf humanitäres Visum bei belgischer Botschaft im Libanon’ (2017) *Neue Zeitschrift für Verwaltungsrecht* 611-615; F Gazin, ‘Motifs humanitaires’ (2017) 5 *Europe* 18-19; S-P Hwang, ‘Humanitäre Visa für Flüchtlinge: Einfallstor für ein unbeschränktes Asylrecht?’ (2018) *Europarecht* 269-288; W Kluth, ‘Das humanitäre Visum als Instrument der sicheren Fluchtmigration’ (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 105-109; H Labayle, ‘Visas dits « humanitaires » : la régulation a minima du droit d’asile par la Cour de justice de l’Union’ (2017) 18 *La Semaine Juridique* 869-873; V Moreno-Lax, ‘Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, X, X v État belge’ (2017) *EU Immigration and Asylum Law and Policy* <<http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>> (accessed on 17 October 2019); K Müller, ‘Kein legaler Zugangsweg in die EU durch humanitäre Visa: Einordnung des Verfahrens "X und X gegen Belgien" in die Europäische Migrations- und Flüchtlingspolitik’ (2017) *Zeitschrift für Europarechtliche Studien* 161-184; S Sarolea, J-Y Carlier and L Leboeuf, ‘Délivrer un visa humanitaire visant à obtenir une protection internationale au titre de l’asile ne relève pas du droit de l’Union : *X. et X.*, ou quand le silence est signe de faiblesse’ (2017) *Cahiers de l’EDEM* <<https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-c-63-8-16-ppu-arret-du-7-mars-2017-x-et-x-ecli-eu-c-2017-173.html>> (accessed on 17 October 2019); H-P Welte, ‘(Kein) Anspruch auf humanitäres Visum, Visakodex’ (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 220-221.

3 Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243.

4 On these divisions, see among others S Holmes and H Castaneda, ‘Representing the “European Refugee Crisis” in Germany and Beyond: Deservingness and Difference, Life and Death’ (2016) 43 *American Ethnologist* 12-24; D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53 *CMLRev* 1545-1574.

ruling offers an interesting case study of how the CJEU deals with the social tensions that accompanied the events of 2015. It illustrates the limitations of the current international, EU and domestic legal frameworks in dealing with societal controversies in the field of migration, when such controversies concern migrants who are outside European territory, and how attempts to bring about evolution in these frameworks through court litigation have been received by the judiciary to date.

Building upon that ruling, a workshop was held at the Max Planck Institute for Social Anthropology in May 2018, organised by its Department of Law & Anthropology and the Law Faculty of the Martin Luther University of Halle-Wittenberg. It gathered legal scholars, practitioners and anthropologists with the objective of engaging in a broader reflection on the extent to which these social controversies are channelled and managed through the positivist legal frameworks, starting from the specific case study of legal and safe access to European territory for those in search of protection. This book contains some of the proceedings of this workshop. It aims to offer a reflection on how and to what extent the existing legal frameworks guide the policy debates and controversies on humanitarian admission to Europe, as well as to engage in a broader critical reflection on the role which ‘the law’ can play in these policy debates.⁵

This introductory chapter sets the scene of the discussions that follow. It gives an overview of the current state of legal and policy debates on so-called ‘legal avenues’ and ‘safe pathways’ to Europe, and further questions whether and to what extent the law in its current form is adequately equipped to deal with these challenges. The first Section presents an overview of the main relevant policy developments of the past 10 years at EU level, culminating in the proposal by the EU Commission to establish a Union Resettlement Framework (‘URF’). The second Section addresses how policy discussions and controversies on humanitarian admission to Europe have been accompanied by attempts to open up such access to European territory through litigation. The third Section discusses the approach developed by the CJEU in response to these attempts, departing from the *X. and X.* ruling. It identifies and discusses the reasons why the CJEU opposed the judicialisation of policy discussions on humanitarian admission to European territory through EU law. The fourth Section questions the role of the law in supporting policy claims towards humanitarian

5 This chapter constantly refers to the ‘law’ in its positivist sense, as a set of State-produced norms that have been formally adopted following the applicable legislative and administrative procedures.