Chapter 6:
Humanitarian Admission to Belgium

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Contents

Introduction

There are no humanitarian admission procedures in Belgian law, which provides for neither the delivery of humanitarian visas nor any other kind of protected entry procedure. These are left to the discretion of the Minister in charge and his/her Secretary of State for Asylum and Migration. It is therefore quite challenging for myself as a judge at the Council for Aliens Law Litigation ('Council') to give a comprehensive overview of the national practice on humanitarian visas in Belgium. Those who receive such visas have no reason to litigate, and the Council does not review their files. Those whose application for such visa is rejected face major practical issues in bringing their case before the Courts, to the extent that the case law is scarce. Moreover, and as discussed hereafter, few reliable data are available on the practices of the authorities in the delivery of humanitarian visas.

This chapter will nonetheless attempt to present the state of affairs in this matter, which has raised (and is still raising) considerable controversies at the national level and ultimately led to the CJEU ruling in *X. and X*. It is divided into three parts. Section 2 clarifies the content of the relevant legislation, the Aliens Act of 15 December 1980, which is silent on the is-

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sue of humanitarian visas. Section 3 explores the relevant administrative practices and case law, which are in their infancy. Section 4 concludes the chapter by highlighting the many pending questions that neither the legislation nor the case law has managed to answer so far.

1 The Legislation

Entry into Belgian territory, the stay in the territory, and the establishment and the removal of foreigners from Belgian territory are ruled by a law of 15 December 1980.[2] For ease of readability, that law will hereafter be referred to as the 'Aliens Act'. The Aliens Act has been frequently amended since its introduction in 1980, but some of the principal stipulations remain unchanged, including the conditions under which a person is to be allowed to enter the territory.

The words 'humanitarian visa' do not appear in the text of the Aliens Act, which does not establish any criteria or procedures for obtaining such a visa. Therefore, these visas are subject to the general rule regarding the entry and the stay in the country.
The rules are rather simple:

1) nobody is allowed to enter the country if he/she is not in possession of the required documents;
2) one of the required documents is a visa, except when there is an exemption foreseen by international treaty or by law;
3) the visa is delivered outside the country, by a consular or diplomatic post;
4) the visa is in principle for a short stay (90 days);
5) for a longer stay, two possibilities exist:

- Some aliens benefit from a right to stay by virtue of the Aliens Act, such as EU citizens and family members of an alien who is legally staying within the territory. As explained in Section 3, this latter category is of great interest for the topic we are dealing with.
- Others must rely on the discretionary power of the 'Minister'[3] who may allow anyone to enter and stay on Belgian territory. In principle, such

2 Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

3 The Aliens Act refers to the 'Minister', but the responsibility may also be exerted by a secretary of state attached to a minister. This was, in fact, the case for years. Since December 2018, however, a Minister is fully responsible for this matter. This

authorisation must be requested from outside the Belgian territory.[4] The Aliens Act thus establishes the discretionary power of the Minister to grant a visa for whatever reason.

Besides the Aliens Act, Article 25(1)(a) of the EU Visa Code, which as a regulation is directly applicable, mentions the possibility for a Member State to deviate from certain rules of this code including, inter alia, when the Member State concerned considers it necessary on humanitarian grounds. Since the ruling in *X. and X.*,[5] we know that this provision may not be relied upon for long-term stays, as the Visa Code regulates short-term visas only. Since *X. and X.*, we also know that, as no measure has been adopted by the EU legislature with regard to the conditions governing the issue of long-term visas and residence permits, be it on humanitarian or on any other grounds, this matter falls solely within the scope of national law. Consequently, we could conclude that, legally speaking, the humanitarian visa referred to in Article 25(1)(a) of the Visa Code may only be granted for a short stay. However, this conclusion is not completely consistent with the practice.

2 *The Administrative Practices and Case Law*

A consequence of the vagueness of the Aliens Act is that it is very difficult to have a clear idea of the actual practices of the administrative authorities regarding humanitarian visas. As there is no provision that explicitly defines the category 'humanitarian visa', the available statistical data are scarce and need to be treated with caution; they are based merely on an empirical classification made by the consular and diplomatic posts.

According to MYRIA, the Federal Centre on Migration,[6] 1,182 humanitarian visas were issued in 2016, the large majority of which (905) were for

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Minister is also in charge of social welfare and public health. The term 'Minister' must therefore be understood as the 'Minister in charge of asylum and migration or his Secretary of State'.

4 Under exceptional circumstances, aliens already staying irregularly in Belgium may request regularisation of their stay on humanitarian grounds. As this chapter is dealing with humanitarian visas, it does not detail that specific procedure.

5 Case C-638/16 PPU *X and X* [2017] EU:C:2017:173.

6 MYRIA, *La Migration en Chiffres* (Brussels, MYRIA, Myriatics 7, June 2017) <www.myria.be/files/Myriatics_FR_v 4.pdf> (accessed 25 November 2019).

short stays.[7] Quite surprisingly given the reasoning of the CJEU in *X. and X.*, most of the short-term humanitarian visas were granted as part of the resettlement of refugees and asylum seekers in the framework of international or domestic initiatives. This trend is not limited to 2016. Declercq claims that, in 2015, 77 per cent of the visas for a short stay granted on humanitarian grounds were issued in the context of resettlement of refugees and asylum seekers.[8] This practice may be viewed as being in contradiction to the *X. and X.* ruling and was, consequently, revoked in March 2017. Humanitarian visas are now mainly granted for long stays. According to Myria, 2,125 long-stay and only 236 short-stay humanaitarian visas were granted in 2017.[9] However, the previous administrative practice was perfectly coherent from an administrative and political point of view: a short-stay visa is granted to the aliens to let them legally enter the Belgian territory, where they can then apply for international protection. This application is subsequently dealt with by the competent authority in an accelerated procedure. I am afraid that we cannot understand the real significance of *X. and X.* if we do not analyse this judgment in relation to that well-established practice. This is further discussed hereafter.

Another major category of aliens who apply for humanitarian visas includes those who do not meet the legal requirements for family reunification, but invoke additional humanitarian circumstances on the basis of Article 8 ECHR. In such cases, the visas applied for, and sometimes granted, are generally long-term visas. But here again the available information is so limited that there is no clear understanding of how humanitarian visas are delivered for these reasons nor on the reasons which are considered valid

7 According to another source, the data are slightly different: 1,185 visas issued, 901 of which were for short stays (Ch. Repr. Sess. 2017-2018, QRVA 54 138, 04/12/2017).

8 A. Declercq, 'Het humanitair visum: balanceren tussen soevereine migratiecontrole en respect voor de mensenrechten' (2017) *T. Vreemd.* at 131. It has to be noted that the author bases her estimate on a comparison between the official data regarding the total number of humanitarian short-term visas granted and the available, not necessarily official, information on the relevant humanitarian operations. It must therefore be seen as a simple approximation that possibly underestimates the proportion of visas that are granted on the basis of a first selection made by the State in relation to those granted on the basis of the individual initiative of the applicant.

9 MYRIA, *La migration en chiffres et en droits 2018* (Brussels, MYRIA, 2018) at 38-40.

by the authorities.[10] The case law allows us to grasp the motives for rejecting these applications, but not those for accepting them.

To have a better understanding of how the administration and the Minister apply the discretionary power the law gives them, it is therefore necessary to have a look at the case law.

Any administrative decision regarding entry into the territory, the stay, the residence or the removal of foreigners may be contested by lodging an appeal with the Council for Alien Law Litigation (hereafter 'the Council'). Against the judgments of this administrative court, an appeal on the points of law may be lodged, if certain conditions are met, before the Council of State, Belgium's supreme administrative court.

The Council has the power to annul a decision taken by the Minister or his/her administration. The appeal does not automatically suspend the decision, but the judge can decide to suspend the execution of the decision challenged, sometimes in a procedure of extreme urgency, if there is a serious argument that could lead to annulment and if the immediate execution of the decision risks causing severe damage that could not be repaired by the annulment of the decision.

The Council frequently recalls that the law gives the Minister a wide margin of discretion and that the issuance of a residence permit is not a right but a favour. However, this wide margin of discretion does not release him/her from the obligation to reply to the arguments invoked by the applicant in support of the visa application. The decision to reject a visa application must clearly state why these arguments were not sufficient to justify the granting of the visa.

In the appeals lodged against a decision to refuse a so-called humanitarian visa, the issues at stake are frequently related to the violation of two Articles of the ECHR: Article 8 (Right to Respect for Private and Family Life) and Article 3 (Prohibition of Torture).

When a violation of Article 8 is alleged, the Council refers to the case law of the ECtHR and considers that even if the concerned person is not present within the territory of the Contracting State, 'the Contracting State's obligations under that provision may, in certain circumstances, require family members to be reunified with their relatives living in that Contracting State'.[11] To evaluate the extent of that positive obligation in

10 277 visas granted in 2016 and 777 applications during the same year, see MYRIA (n 6); In 2017, the data are quite different, 2.125 visas granted and 279 refusals but there is no available information about the distribution between asylum related applications and other grounds for granting the visa, see: MYRIA (n 9) at 39.

11 e.g. judgment of 22 December 2017, no 197238.

the concrete cases that are brought before him, the Council performs a case-by-case analysis in which great importance is given to the facts and reasons mentioned in the contested decisions.

For instance, the Council annulled a decision refusing a visa to a young Syrian man who had been tortured and suffered serious trauma. The applicant wanted to be reunited with his brother, who had been granted refugee status in Belgium. He provided medical evidence in support of his application, as well as various documents from the UNHCR and the tracing service of the Red Cross to establish his strong dependence on his brother.[12] The Council also considers that being recognized as a refugee in Belgium implies the impossibility of pursuing a family life in the country of origin. For that reason, the State must take that particular circumstance into account when deciding on a visa application introduced by the family members of a refugee, even when the conditions set out by the law for a family reunification visa are not fulfilled.[13] In other cases, the Council held that a *de facto* family life between a child and his or her stepmother has to be taken into account, especially when it is not disputed that the biological parents are dead or disappeared.[14] Generally speaking, when specific humanitarian circumstances are invoked, the administration cannot refuse the visa on the sole consideration that the claimant does not fall into the categories entitled to a right to family reunification as set out by the law.[15] On the other hand, the responsibility lies with the applicant to communicate the relevant information to the consular authority.[16]

The problematic is a bit different and more complicated when dealing with Article 3 ECHR. In the case of *Abdul Wahab Khan v. UK*, the Court excluded the transposition of the Article 8 ECHR positive obligation to Article 3 ECHR.[17] The Court considers that extending its reasoning under Article 8 ECHR to Article 3 ECHR 'would, in effect, create an unlimited

12 Judgment of 29 February 2016, no 163192.

13 Judgment of 14 June 2016, no 169761 Art 10, § 1, 5° to 7°, Aliens Act, gives a limitative list of the family members who may be taken into account for a family reunification, Art 10 § 2 further requires that certain income and housing criteria be met. Those conditions are slightly different for EU citizens (art 40 and 40bis) as well as for Belgian nationals who want to reunify with an alien family member (art 40ter).

14 Judgments of 28 April 2017, no 186197 and 186198.

15 Judgment of 31 October 2017, no 194545 (ascendant of an adult foreigner in Belgium).

16 Judgment of 28 July 2017, no 190162.

17 It has to be noted that the Court made this statement in response to the 'applicant's argument that the State's obligations under Article 3 required it to take that

obligation on Contracting States to allow entry to an individual who might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself'.[18] Some recent judgments of the Council follow the principle set out in *Abdul Wahab Khan* and conclude that no positive obligation for the State arises from Article 3 ECHR.[19]

These judgments were rendered in the ordinary annulment procedure. However, the Council must often deal with litigation on humanitarian visas in the so-called 'extreme urgency procedure'. The judgment is then adopted in a strict time frame and is provisional and limited to the question of whether the execution of the decision should be suspended or not, pending the examination of the appeal in the ordinary annulment procedure. A distinctive feature of this procedure is that the Council has to make an *ex nunc* and complete examination of the case, especially regarding the risk of a violation of a fundamental right to which no derogation is possible according to art. 15(2) ECHR. In an order adopted in 2013, the Council of State ruled that, given the absolute character of Article 3 ECHR, the Council made no error of law when ordering the suspension of a refusal to grant a short-term humanitarian visa because of an arguable claim that such refusal would have exposed the applicant to Article 3 ECHR violations.[20] The issue of the jurisdiction of the Belgian State in the meaning of Article 1 ECHR was not raised then.

Besides issues under Article 1 ECHR regarding the extraterritorial scope of Article 3 ECHR, the question of whether the extreme urgency procedure applies to visa applications arises. The relevant provision in the Aliens Act[21] only considers the return or the refoulement of a foreigner, but part of the case law recognizes that an extreme urgency may also occur in other situations and that in regard to the non-suspensive effect of the appeal, this procedure is the only way to offer an effective remedy. The problem is, of course, that the suspension of a decision to refuse a visa does not mean that

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provision into account when making adverse decisions against individuals, *even when those individuals were not within its jurisdiction*' (emphasis added). In this case, the Court found no territorial jurisdiction in respect of an immigrant applicant who had voluntarily returned to his country of origin. See: *Abdul Wahab Khan v the UK* (App No 11987/11) ECHR (dec.) 28 January 2014 at para 26.

18 ibid. at para 27.

19 Judgment of 22 December 2017, no 197201; Judgment of 22 December 2017, no 197 238; Judgment of 23 April 2018, no 202817.

20 Order of 22 May 2013, no 9681 *Revue de droit des étrangers* 173 at 258.

21 Art. 39/82, § 4, al. 2, of the Aliens Act.

the applicant is granted a visa. The only effect is that the administration has to take a new decision, and even this is not uncontroversial.

Additional and major issues arise when the administration refuses to adopt a new decision or adopts a new decision that rests on reasons that are almost identical to the ones the Council had deemed insufficient. This practice gave rise to a judiciary saga at the end of 2016. In September 2016, the administration rejected the application of a Syrian Christian family living in Aleppo for a short-stay visa on humanitarian grounds. In short, the reasons for the refusal were that the applicants had no particular and close relationship with Belgium and that they, in fact, did not intend to come for a short stay, but to apply for asylum. A judgment of the Council decided on 7 October 2016[22] to suspend the execution of the decision due to a failure to address arguments regarding a possible violation of Article 3 ECHR. The judgment also ordered the administration to take a new decision. On 10 October, the administration adopted a similar decision that did not address the criticisms expressed in the ruling of the Council; the Council, therefore, again ordered the suspension of the decision.[23] On 17 October, a new yet still similar decision was adopted by the administration, prompting a new appeal before the Council and a new suspension order. The Council then decided to order the authority to deliver a pass or a visa for a short stay to the claimants.[24] To say it in non-legal language, that decision of the Council was a bit *rock'n roll* because it is generally agreed that the Council has no competence to issue a positive injunction to the Minister or his administration because such competence is not attributed to it by the Aliens Act.

The Secretary of State who was at the time in charge of asylum and migration built a political campaign around that case (and became very popular through it), letting it be known that he would not obey the order of the Council. He also lodged an appeal with the Council of State. The claimants then applied to different tribunals and courts to compel the Secretary of State to respect the decision of the Council. They won the case at different levels, but in vain: the Minister still refused to deliver the visa, claiming that he would wait until the judgment of the Council of State, although the appeal before this supreme administrative court does not suspend the decision of the Council.

22 Judgment of 7 October 2016, no 175973.
23 Judgment of 14 October 2016, no 176363.
24 Judgment of 20 October 2016, no 176577.

On 31 October, a new but similar case was brought before the Council. This time, mindful of the tumult caused by the previous case and hoping to avoid further discrepancies in the case law as some judges disagreed with the reasoning of their colleague,[25] the previous First President of the Council took the decision to refer the case to the general assembly of the Council. The general assembly considered it necessary to apply for two preliminary rulings, one from the Belgian Constitutional Court and other from the CJEU.

The question to the Constitutional Court concerned the competence of the Council to deal with extreme urgency requests against denials of visa applications. Briefly, the purpose behind the question was to know whether or not the Aliens Act must be interpreted in a way that restricts the procedure in extreme urgency for return decisions *lato sensu*, and whether such an interpretation is compatible with the principles of equality and non-discrimination and with the right to an effective remedy. As we will see, these questions remain unanswered.

The questions asked to the CJEU concerned the interpretation of Article 25(1)(a) of the Visa Code. What is meant by the words 'international obligations'? Does this provision impose a positive obligation when a decision risks interfering with the rights guaranteed by the ECHR, the Geneva Convention, and Articles 4 and 18 of the Charter? A subsidiary question addressed the possible impact of existing links with the Member State to which the visa application was made (one of the grounds for the refusal was the absence of a close relationship with Belgium).[26]

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25 See, e.g., Judgment of 17 June 2016, no 170076; in that judgment the judge considered that the procedure in extreme urgency is, in principle, not applicable to challenges regarding the refusal to grant a visa.

26 These questions were laid out in *X and X* (n 5): (1) Do the "international obligations" referred to in Article 25(1)(a) of the Visa Code cover all the rights guaranteed by the Charter, including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention? (2) (a) Depending on the answer given to the first question, must Article 25(1)(a) of the Visa Code be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, 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? (b) Does the existence of links between the applicant and the Member State to which the visa application was made (for example, family connections, host families, guarantors and sponsors) affect the answer to that question?'.

And as we know, the Court decided not to answer or, more precisely, not to answer frankly, as it found that the Visa Code was not applicable. According to the Court, it was 'apparent […] that the applicants in the main proceedings submitted applications for visas […] with a view to applying for asylum in Belgium immediately upon their arrival in that Member State and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days'.[27] Such an application does not aim to obtain a short-term visa and consequently does not fall within the scope of the Code. The Court added that 'since […] no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law'.[28]

This could have been the only reason for the ruling. Yet the Court added two *obiter dicta* that are maybe more important than the main reason for its ruling. In what appears to be an *ad absurdum* argument, it tries to demonstrate that no other reasoning could have been compatible with the scope of EU asylum law. Firstly, according to the Court, 'to conclude otherwise […] would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by Regulation No 604/2013 (the Dublin Regulation)'.[29] Secondly, it 'would mean that Member States are required, on the basis of the Visa Code, *de facto* to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country [while] the measures adopted by the European Union […] that govern the procedures for applications for international protection do not impose such an obligation and, on the contrary, exclude from their scope applications made to the representations of Member States'.[30]

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27 Ibid. at para 42.

28 Ibid. at para 44.

29 Ibid. at para 48.

30 The Court then referred to Art 3(1) and (2) of 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 [2013] OJ L180/60 and to the 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

With this reasoning, the Court clearly tries to demonstrate that agreeing to the possibility of submitting an application for a short-term humanitarian visa based on the need for international protection would not be compatible with the common European asylum system. It could be understood as a way for the Court to indirectly signify to the Council that there are no 'positive obligations' under EU law to deliver a visa in the case of a risk of violation of Article 3 ECHR. The Court did not limit itself to stating that the question falls outside its area of competence; it also indicated that there is no right to seek asylum from abroad under EU law. The outcome of the *X. and X*. ruling then converges with the ECHR's reasoning in *Abdul Wahab Khan*, albeit in a less direct and gentler formulation.

One may doubt, however, that this will bring the controversies to an end. The European Parliament took steps towards establishing a European Humanitarian Visa that would give access to European territory – that is, the territory of the Member State issuing the visa exclusively – for the sole purpose of submitting an application for international protection.[31] Moreover, the other Belgian humanitarian visa case mentioned earlier has led to further litigation before the ECtHR (*M.N. and Others v. Belgium*).[32] Contrary to the application in *Abdul Wahab Khan*,[33] the application in *M.N.* was declared admissible. The Grand Chamber held a hearing on 24 April 2019. It remains to be seen whether the ECtHR will add a new chapter to the saga.

Conclusion: The Pending Questions

As the visa saga seems far from being over, this conclusion limits itself to highlighting some legal questions that remain unresolved.

First, and from the Belgian perspective, is the question of the right to an effective remedy against denials of visa applications. As discussed earlier in the chapter, a preliminary ruling was referred to the Constitutional Court

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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 [2013] OJ L180/31.

31 European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas, 2018/2271(INL). On that initiative and subsequent developments, see the contribution of Eugenia Relaño Pastor in this volume.

32 Application no 3599/18.

33 *Abdul Wahab Khan v. United Kingdom* (n 17) at para 26.

regarding the admissibility of an appeal made in extreme urgency against a refusal to issue a visa. However, after the ruling by the CJEU, the Council considered it unnecessary to wait for a complementary ruling by the Constitutionnal Court, and rejected the application.[34] Consequently, the Court struck the case off the list. The Council tried to put the same question in another case, but the Court determined that its reply was not necessary to decide on the case and left the question unanswered.[35] In a few cases this uncertainty may lead to discrepancies in the case law. Anyway, even if the Council considers it admissible to lodge an appeal in extreme urgency against a refusal to issue a visa, it does not necessarily imply that the remedy is effective. What happens when the Minister does not comply with the ruling of the Council? There is little chance that lawmakers would consider giving to the Council the competence of issuing a visa in such case.

A second pending question relates to the logic behind the *obiter dicta* of the CJEU in *X. and X.*: Does the Dublin regulation always prevent asylum seekers from submitting their applications for international protection to the Member State of their choice? It clearly does so in many cases, but not when the asylum seeker was granted a visa by a Member State, which is then responsible for dealing with the asylum application. In practice, such a visa is granted because the Member State was not aware of the applicant's intention to apply for international protection once he or she arrived on its territory. But is this really what the CJEU means – that Dublin III and, more generally the CEAS, encourage fraud and lies? And *quid* for the other people, i.e., those who do not travel with a visa? It is a fact that they have no choice but to risk their lives in the Mediterranean Sea, to pay exorbitant amounts to a mafia of smugglers, to cross the borders illegally. However, do we have to admit that this is the logic beyond the CEAS? I would say no, and I am sure that it is not what the Court had in mind. But why, then, would it be contrary to Dublin III and to the APD (directive on procedures) to allow some individuals to seek safety through a legal way? Would it, in particular, really 'undermine the general structure of the system established by Regulation No 604/2013'?[36] In any case, the Court does not exclude the possibility that Member States grant humanitarian visas according to national law, and we have seen that Belgium continued to grant such long-stay visas even after the ruling of the CJEU. The ruling is then maybe nothing more and nothing less than a reminder that, in a matter

34 Judgment of 30 March 2017, no 184 913.
35 Judgment of 18 October 2018, n° 141/2018.
36 *X and X* (n 5) at point 48.

where questions of sovereignty are pervasive, the scope of application of EU law has to be understood in a very strict, even restrictive, way.

Lastly, what is the meaning of the reference to the 'international obligations' in Article 25(1)(a) of the Visa Code? *X. and X.* made it clear that it cannot be used as a means to indirectly apply for long-term international protection status. But the question remains: to what kind of international obligation does it refer? Not to Article 8 ECHR, which *prima facie* also presupposes a long-term stay. To what then? I could not find any examples of such 'international obligations' that would warrant a short stay for humanitarian reasons in the Belgian case law or in administrative practice, except in the context of the resettlement of refugees.

Do we have to conclude from *X. and X.* that the delivery of short-term humanitarian visas to implement resettlement programs is necessarily contrary to the Visa Code? That seems to be how the Belgian authorities read it. But is this really the intended consequence of the ruling? The message is rather that this remains a matter of sovereignty. EU law does not prevent a Member State from applying Article 25(1)(a) to grant short-term humanitarian visas if it wishes to do so, but the State cannot be forced to grant such a visa to an individual submitting an application on his own.

The confrontation between this well-established State practice, which *in se* offers significant advantages from a humanitarian perspective, and the legal reasoning of the CJEU results from the fact that the Court, consciously or not, establishes the discretionary competence of the Member States to decide on humanitarian visa applications. There is nothing abnormal or shocking here. An issue may arise, however, when that discretionary competence is exercised in an arbitrary way. In this respect, it is worth noting that controversies have recently arisen in Belgium regarding the delivery of humanitarian visas to Syrian asylum seekers, as it appeared that the Secretary of State who was at the time in charge relied on a private individual – a member of the Assyrian community in Belgium – to help him select the Christian Syrians to whom he issued humanitarian visas. This informal intermediary is now charged with various criminal offences, including smuggling, as he would have requested payment from the asylum seekers. Such abuses are likely to occur when the limits of the discretionary competence are too vague and when no clear criteria or procedures are established. The international obligations of a State open a doorway that may allow the judge, as well as the administrative authority, to build a framework within which discretionary competence may be exercised without falling into arbitrariness. With *X. and X.*, an opportunity has been missed to give concrete form to that framework.