Conclusion: The Role of the Judge in Controlling the Genuine Enjoyment of the Substance of the Rights

Jean-Yves Carlier[1]

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The issue of migration is a complex one, both in law and in fact. We should avoid a Manichean presentation of a black or white choice between closing or opening borders. The visa is one of many ways to develop 'a renewed global migration governance'. Under EU migration law and policy, there are two paths to using visas as a tool for migration governance. One for the long term, the other for the short term. The long-term path is more a matter of governance, policy and future legislation. The short-term path relates more to the judiciary.

The Long-term Path: Visa Facilitation and Suppression

In the long term, it is possible to shorten the list of third countries whose nationals need a visa to enter the EU. It is not a question of eliminating border controls or even of abolishing visa requirements in one shot. Borders controls are necessary and visa facilitation and suppression is a long term path. It is a step-by-step process, reducing the number of countries whose nationals need a visa and gradually easing the procedures for other countries. There is nothing new here. This is already done. The secondary

1 Professor in the Law Faculty of the Catholic University of Louvain (UCL) and in the Law Faculty of the University of Liège (ULg).

law on visas was among the first texts on migration adopted under EU law (and even EC law). Today, Regulation 2018/1806 provides a list of third countries whose nationals must be in possession of visas or who are exempted from visa requirements to enter the EU. Annex 1 of Regulation 2018/1806 lists the countries whose nationals need a visa. The number of countries has already decreased from 127 countries in 2001 to 104 countries in 2018, ie 23 fewer countries. This is the result of successive adaptations related to EU integration and exemption agreements. Annex 2 shows that 62 countries have their nationals exempted from visa requirements. This is the case in particular for several countries in South and Central America, including Mexico. This is completed and progressively rebuilt by agreements on the facilitation of the issuance of visas signed with various countries (Albania, Macedonia, Armenia, Azerbaijan, Bosnia, Cape Verde, Georgia, Moldova, Montenegro, Russia, Serbia, Ukraine). This is also complemented by Regulation 1931/2006 on local border traffic at the external land borders of the Members States and amending the provisions of the Schengen Convention. This represents a facilitation of the mobility for thousands of people, especially at the Polish borders, including Regulation 1342/2011 amending Regulation 1931/2006 and including the Kaliningrad Oblast and certain Polish administrative districts in the eligible border area. Of course, these are short-stay visas (maximum three months). But this visa policy influences the mobility of people through the development of circular movements, which has direct consequences for migration policy by allowing greater legal mobility and reducing irregular entry.

Gradually, in the very long term, all this could lead to the abolition of short-stay visas and meeting the challenge of what I call the *Suspended Step of the Stork* paradox (le paradoxe du *Pas suspendu de la cigogne*), harkening back to the title of the film directed by Greek filmmaker Theo Angelopoulos (*To Μετέωρο Βήμα Του Πελαργού*). One of the scenes in this film contains a discussion between a border guard and a man (played by Marcello Mastroianni) who could be a refugee. Both are on the white line of the border between Greece and Albania. They have the possibility to lift a foot over the line without being able to put it down on the other side. This symbolises very well the state of art in international migration law: the right for anyone to leave any country, without having the right to enter the territory of any other country. It is a paradox in a world divided into nation states: how can I leave a State without entering another? This is symbolised by the suspended step of the stork, a migratory bird. The law doctrine explains this paradox (of the suspended step) with national sovereignty. The political scientist explains it because these texts of international law (like art. 12.2 ICCPR) emanate from the time of the Cold War, well

known in the history of Germany, with a right to leave challenged by the East and affirmed by the West, but without this right to leave being supplemented by a right of entry. But, intellectually, the question is still there. Migration is emigration and immigration.

On this long-term path, the global governance of migration would not happen so much through visas but rather through the facilitation and suppression of visas. This does not mean the suppression of control. But controls must coexist with comprehensive governance of migration. The Global Compact for safe, orderly and regular migration (GCM) might give an opportunity to build this. In particular, Objective 5 of the GCM to *Enhance availability and flexibility of pathways for regular migration* provides, as action b, to 'facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalization or multiple-country visas….'

The Short-term Path: Judicial Control

Along with this long-term evolution, in the short term, it is necessary to examine the extent to which the judiciary has a right of scrutiny on this issue of visas. It is certainly possible at the national level. This volume offers a very interesting set of diverse and topical studies on how the question of humanitarian visa is debated and regulated in different countries. As often in Human Rights, this confirms that the national level remains the first level of protection of fundamental rights.

But what about the European level under the Visa Code? The issue is obviously that of visa applications, called humanitarian visas, which are formally short-stay visas, but with the intention of seeking asylum and thus paving the way for a long stay.

We know that the ECJ considers that such a request does not fall within the scope of the EU law. We know that Advocate General Mengozzi was of a different opinion. The debate is possible. The question is not a question of extraterritoriality. The Visa Code always applies to persons outside of the EU territory. It is not a question of the **territorial** scope of EU law but of its **material** scope. I will not repeat here the legal analysis of the case *X. and X.* Let us simply examine this *X. and X.* case in connection with the EU-Turkey statement in the light of the importance given to the 'intention'. In the EU-Turkey statement case, the General Court (with implicit confirmation of the ECJ) did not at all take into consideration the intention of the parties, which clearly was to create an agreement between the EU and Turkey. Using only an analysis of the format of this statement, the

Court said that it was not an EU Council decision but a decision of the Member States 'réunis en Conseil'. On the contrary, in *X. and X.*, the reasoning of the Court concentrated on the 'intention' of the applicant, saying that even if, formally, the request was a request for a short stay visa, and seen as such by the national authorities, including the national jurisdiction, the ECJ, requalifying the question, said that since the applicant had the intention to ask for refugee status after his arrival in Belgium, the request fell outside the scope of the short-term Visa Code.

Let us think outside this box of 'intention' to examine the material scope of EU law. Let us think from the perspective of the protection of fundamental rights. With regard to free movement within the EU, the Court is increasingly referring to fundamental rights and to the Charter of Fundamental Rights. It does so, in particular, to enter into purely internal situations which, in principle, are beyond its control. The Court did it, in 2017, in the *Chavez-Vilchez* case and again in 2018 in *K.A. et al.*

For this, the Court refers, since 2011, to a notion of *genuine enjoyment of 'the substance of the rights'* of the citizen (*Des Kernbestands der Rechte*). For instance, in *Chavez-Vilchez*, the Court in Grand Chamber held that: 'there are very specific situations in which, despite the fact that secondary law … does not apply (because) the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen … if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status.' In other words, *the substance of the rights* is a way of entering within the material scope of EU law to avoid compromising the effectiveness of EU citizenship. And this 'substance of the rights' must be seen in the light of fundamental rights, especially the best interests of the child. In each case, 'It is the duty of the authority to examine an application' without procedural issues preventing it.

What is interesting in this case law is the place given to fundamental rights in purely internal situations. The Charter of Fundamental Rights is no longer only a key to interpreting EU law when the material scope falls within the scope of EU law, but the Charter of Fundamental Right is also a key to entering EU law.

Can the same reasoning based on 'the substance of the right' be held with regard to the right to asylum and the request of humanitarian visa? Some would say no, because it has nothing to do with European citizenship and the rights derived for certain third country nationals as family members and it would be a 'conceptual revolution'. Others would say yes,

this parallelism of reasoning is possible if one took into account the competences of the EU in the field of asylum, the reference to the right of asylum in the Charter and 'the substance of the rights' as a general principle. Of course, in the case of humanitarian visas the criterion could not be, as for citizens, the obligation to leave the territory of the EU, but conversely, the obligation to allow entry into the EU territory, because it would otherwise also violate the substance of the rights of the persons concerned.

This is part of a broader question: how much is global free movement of persons linked to citizenship (or how much will it be)? This is also part of the question of how to find a legal concept rather than a discretionary one for this notion of humanitarian visa. Here, with *the substance of the rights* we have a legal concept, which is, for the moment, a work in progress developed by the Court.

In 1942, just before he died, Stefan Zweig wrote in *Die Welt von gestern. Erinnerungen eines Europäers*: 'Wir konnten reisen ohne Paß und Erlaubnisschein, wohin es uns beliebte' (neither passport nor visa was necessary to travel where we wished). Those times are long gone. Maybe, one day, we will say: no visa is necessary to travel where we wish to, mobility is a reality and migration is under control.