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EU Charter and the dialog of the judges in asylum and
immigration cases

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Abstract

The purpose of this paper is to examine the added value of the judicial dialogue on the application of the EU Charter from the point of view of a national asylum and immigration court.

Keywords

EU Charter of Fundamental Rights, asylum, immigration, CJEU, Belgian Council of Alien Law Litigations.

1. Introduction*

First and foremost, we would like to thank the members of the Centre for Judicial Cooperation for organising the eNACT Workshop on the Techniques of Judicial Interaction in the Application of the EU Charter: asylum and immigration.

As national judges in asylum and immigration law, we are increasingly applying European Union law, including the EU Charter of Fundamental Rights (“EU Charter”).

To help us in doing so we have the case law of the Court of Justice of the European Union (“CJEU”) and the preliminary reference procedure. But informal exchanges such as those we have today are no less important. These discussions do not only facilitate the endorsement of the principles guiding the jurisprudence of the CJEU but also allow discovering or rediscovering that most practical and theoretical questions that arise, rarely substantially differ from one country to another.

Bearing this in mind, this contribution presents three examples of cases brought before the Belgian Council of Alien Law Litigations (“Council”), where the judges either used the case law of the CJEU in their judgment or decided to ask the CJEU for a preliminary ruling.

The first case received significant media coverage in our country (Belgium): the so-called “Syrian humanitarian visa case”.¹ Two other cases did not resort to direct judicial dialogue, but to an indirect form of dialogue with the CJEU. Finally, the case under consideration in the last part of the lecture shows how national judges have to answer similar, if not identical questions at times, in their daily activities. Sometimes these questions are then referred to the CJEU, which decides to join preliminary references originating from different Member States, with different legal backgrounds.

2. The Syrian humanitarian visa case: *X and X v Belgium*

First, let us briefly remind the facts of this judicial saga.

In September 2016, the Belgian administration refused the application for short stay visas requested on humanitarian grounds by a Syrian Christian family living in Aleppo (Syria). In a nutshell, the reasons for the refusal were that the applicants had no particular and close relation with Belgium and that they, in fact, did not intend to come for a short stay, but to apply for asylum. The Council ordered a stay of execution of the administration’s decisions based on the lack of motivation regarding a possible violation of Article 3 of the European Convention of Human Rights and Fundamental Freedoms (“ECHR”).² It also ordered the administration to take new decisions. Although the administration adopted new decisions three days later, these were more or less similar to the previous ones. The Council suspended again these decisions.³ New decisions were then taken, yet they failed to respect the authority of *res judicata* of the previous judgments and a new suspension was ordered... This time, the Judge became nervous and also ordered the administration to deliver a *laisser-passer* or a short stay visa.⁴

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A draft version of this paper was first presented on 25th of February 2019 at the eNACT Transnational Training Workshop organized by the Centre for Judicial Cooperation in Florence. The paper was amended in order to take into account developments that arose after February 2019.

¹ Case C-638/16 PPU *X and X v Belgium* ECLI:EU:C:2017:173.

² Council, Judgment No 175973, 7 October 2016.

³ Council, Judgment No 176363, 14 October 2016.

⁴ Council, Judgment No 176577, 20 October 2016.

And then it became a bit “rock’n roll”...

Mostly due to the political campaign developed by the former State Secretary for asylum and migration around this case. He has repeatedly and publicly argued that he refuses to obey the order of the Council and used its twitter account as a “massive destruction weapon” to attack the so-called “irresponsible judges”. He also filed an appeal before the Belgian Council of State, but this appeal has legally no suspensive effect. The lawyer of the applicants then applied to different Tribunals and Courts to compel the State Secretary to comply with the decision of the Council. He won the case at different levels but the State Secretary still refused to issue the visa as ordered by several domestic courts.

Incidentally, it was recently made public that more or less during the same period, the same State Secretary informally asked a private person, member of the Belgian Assyrian community (as well as of the State Secretary’s political party), to select himself Christian Syrians to whom a humanitarian visa would be issued. And it now appears that this informal intermediary is suspected to have asked significant amounts of money to put the names of the applicants on his lists ! But, as Kipling said, it is another story...

A bit later a new similar case was brought before the Council. Bearing in mind the trauma caused by the previous similar case, and also to avoid discrepancies in the jurisprudence, not all judges being ready to follow the reasoning of their colleague⁵, the First president of the Council took the decision to refer the case to the general assembly of the jurisdiction. And the General assembly considered it necessary to refer a preliminary reference, to the Belgian Constitutional Court and to the CJEU.

We can already see here a first major value of addressing preliminary questions: to allow the debate to be raised, to get out of a deleterious situation of institutional deadlock and jurisprudential confusion.

The questions asked to the CJEU were related to the interpretation of Article 25(1)(a) of the Visa Code.⁶ They mainly referred to the meaning of the words “international obligations”; does this provision impose a positive obligation when a decision may result in interference with the rights guaranteed by Articles 4 and 18 of the EU Charter, by the ECHR and the Geneva Convention? As we know, the CJEU did not reply on the substance of the question on the ground of lack of jurisdiction. The CJEU indeed considered that the Visa Code was not applicable, because the application did, actually, not aim to obtain a short-term visa but to apply for international protection. Consequently, the CJEU decided that the EU Charter did not apply to this case.

It could have stopped here...

But the CJEU added some *obiter dicta* that are might be more important than the main reason of the judgment. In what appears as an *ad absurdum* argument, the CJEU tries to demonstrate that no other reasoning could have been compatible with the general scope of EU law regarding asylum procedure. According to the CJEU, admitting the possibility to submit an application for a short-term humanitarian visa related to a need of international protection would not be compatible with the Common European Asylum System (“CEAS”)

Do we have to understand that no positive “international obligation” could prevail on the secondary EU law? Probably not. We should rather read this sentence as giving us a method of interpretation of

⁵ See, for example, Council, Judgment No 170076, 17 June 2016; in that judgment the judge considers that the procedure in extreme urgency is, in principle, not applicable to appeals regarding the refusal to grant a visa. In this respect, the Council has just submitted a request for a preliminary ruling concerning the obligation, or not, for Member States to provide for a procedure to deal, at least provisionally, in extreme urgency with appeals against refusal of visas laid down in Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast). See Council Judgments No 225986 and 225987, 10 September 2019.

⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

the EU asylum and immigration law, as it is currently. No more, no less. Firstly, it says that in order to decide if a rule of EU law applies, the judge must not limit himself to the explicit formulation of a demand. He also has to take into account the real purpose of the application. Secondly, the CJEU applies a full reading of the various relevant secondary EU rules: when assessing the validity of the interpretation of a rule, it is necessary to check its compatibility with the purposes pursued by other relevant secondary rules of the CEAS.

But it is not yet the end of this visa-saga... The first visa-case I mentioned at the beginning is indeed before the European Court of Human Rights⁷ as *MN and Others v Belgium*.⁸ Unlike a previous case of 2014, that is the *Abdul Wahab Khan v United Kingdom* case⁹, the *MN and others* was declared admissible. The Grand Chamber held a hearing on 24 April 2019 and will render its judgment in a near future. It will be very interesting to see what contribution the ECtHR will make to the CJEU approach.

So, what was the added value of engaging in dialog with the CJEU in this case? We can see three of them:

- Firstly, and very pragmatically, it was an intelligent way to put an end to a deleterious twitter campaign;
- Secondly, happy or not, the national judge received an answer;
- Thirdly, the CJEU gave a method of interpretation, *i.e.* the teleological interpretation, that can be used in other similar cases.

3. Implicit decision under the Dublin III Regulation^{10 11}

Let us now shortly address two cases where the Council engaged in a reasoning by analogy with the CJEU case law on the application of the EU Charter in another area where the administration exercises discretionary powers.

In both cases, the Council had two legal issues before it.

The first issue relates to the admissibility of the appeal.

The Council had to determine whether the decision to extend the transfer time limit provided for in Article 29(2) of the Dublin III Regulation was an administrative act against which an appeal could be lodged. The Immigration Office was arguing that an appeal against the decision to extend the transfer time limit by a maximum to 18 months was in itself inadmissible because such a decision was only an implementing measure to carry out the transfer.

The Council did not follow this reasoning, despite the fact that it had previously ruled in that regard. The Council considered that legal consequences arise from the decision to extend the transfer time limit. It found that it is clear from the *Shiri*¹² judgment of the CJEU that the lawfulness of the decision to extend the transfer time limit has a direct impact on the responsibility of the Member State. The CJEU clearly stated that the expiry of the six-month transfer time limit without a transfer having taken place would automatically shift the responsibility for examining the application for international protection

⁷ The "ECtHR".

⁸ Application No 3599/18.

⁹ Application No 11987/11, para 26.

¹⁰ 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 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 (the "Dublin III Regulation").

¹¹ Council, Judgments No 203.684 and 203.685, 8 May 2018.

¹² Case C-201/16 *Shiri* ECLI:EU:C:2017:805 paras 34-39.

from the Member State initially responsible to the requesting Member State, without any further decision or appreciation being required. The regulation of transfers was held to be more than an inter-Member States agreement.¹³

The Council further elaborated that the CJEU stated in its *Shiri* judgment that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of that Regulation and Article 47 of the EU Charter, must be interpreted as meaning that an applicant for international protection must have an effective and rapid legal remedy enabling him to argue that the time limit of six months after the adoption of the transfer decision has expired.¹⁴ The Council concluded therefore that it is clear from the case law of the CJEU¹⁵ that the effective remedy, as provided for in Article 27 of the Dublin III Regulation, does not only relate to the transfer decision itself. Therefore, the appeal against the decision to extend to transfer period cannot be declared inadmissible.¹⁶

The second issue relates to the merits of the case.

The Council was seized with the question whether or not a decision taken under Article 29(2) of the Dublin III Regulation to extend the time limit to carry out a transfer requires a written measure although this is not expressly provided for in this article.

In the two cases, third-country nationals submitted an application for international protection before the Belgian authorities, but, on the basis of the Dublin III Regulation, it was established that Italy was the Member State responsible for examining the applications for international protection.

The applicants received a decision of refusal of residence and an order to leave the territory, against which they lodged an appeal with the Council. During this procedure, it appeared that the six-month transfer period had expired but that in the meantime the Immigration Office had informed the Italian authorities by letter that the time limit for transfer was extended to 18 months, due to the absconding of the persons concerned. These decisions were not formally communicated to the persons concerned. Subsequently, both applicants lodged a new appeal with the Council against the implicit decisions to extend the time limit for carrying out the transfer. They argued *inter alia* that the Belgian authorities

¹³ In this regard, it is also interesting to refer to *Jawo* (Case C-163/17 ECLI:EU:C:2019:218) pending before the CJEU at the time of the Council's judgments. From points 71 to 75 it appears that, in order to extend the transfer time limit by a maximum of 18 months, it suffices that the requesting Member State informs the Member State responsible before the expiry of the six-month transfer time limit, that the person concerned has absconded and specifies a new transfer time limit. It should be noted that the CJEU hereby clarifies that there should be no correspondence between the Member States concerned beforehand and that they should not agree upon the extension of the time limit. Doing so would make the second sentence of Article 29(2) of the Dublin III Regulation hard to apply. This reasoning does not in any case affect its position previously taken that an applicant for international protection must have an effective and rapid remedy which enables him to rely on the expiry of the six-month period (see the *Shiri* judgment) and that the applicant concerned in this regard retains the possibility of demonstrating that he has not absconded (*Jawo* judgment, para 70).

¹⁴ See also Case C-163/17 para 68.

¹⁵ Reference is also made to the following cases: C-63/15 *Gheselbash* ECLI:EU:C:2016:409; C-155/15 *George Karim* ECLI:EU:C:2016:410 and C-670/16 *Mengesteab* ECLI:EU:C:2017:587.

¹⁶ In this regard, it is worth noting that an appeal in cassation was lodged against judgment No 203.684 before the Belgian Council of State. In its application, the Immigration Office argued that the Council had wrongfully concluded that a decision to extend the transfer time limit by a maximum of 18 months is in itself a decision open to challenge. According to the Immigration Office it is clear from the wording of Article 27 in conjunction with Article 29 of the Dublin III Regulation and from the relevant case law of the CJEU that the transfer period consists only in an implementing measure intended to allow the Member States concerned to carry out a transfer and to organize it among themselves. As a secondary matter, the Immigration Office required that a reference for a preliminary ruling should be made to the CJEU, since it has never ruled on the question of law whether a decision to extend the transfer time limit by a maximum to 18 months is in itself a decision open to challenge. It considered that this cannot be inferred from the case law of the CJEU cited in the Council's judgment. In its judgment No 246.006 of 6 November 2019, the Belgian Council of State finds that the applicant has no longer an interest in cassation of a judgment annulling an earlier decision to extend the transfer time limit, considering that, in the meantime, the applicant has been granted refugee status. For this reason, the appeal in cassation was declared inadmissible.

violated the obligation of motivation since they did not explain in fact and in law their decisions to extend the time limit of the transfer due to the absconding of the applicants.

The Council reasoned by analogy with the *Mahdi*¹⁷ judgment of the CJEU, which addressed the decision to extend the detention taken in the framework of the Return Directive.¹⁸ According to this judgment, a written decision is required not only when the detention is ordered but also when deciding about the extension of detention, even though Article 15 of the Return Directive does not expressly provide for this.

The Council followed the same reasoning and stressed that when the requesting Member State considers that the time limit of 6 months may be extended to 18 months if the person absconds, this State must take a written decision in this regard. It further determined that even if Article 29 of the Dublin III Regulation does not explicitly require that a decision to extend the transfer period be made in writing, the obligation to adopt the transfer decision in writing (enshrined in Article 26 of the Dublin III Regulation) must also be understood as referring to the decision to extend the transfer period.

The Council underlined that the requirement of a written measure for decision to extend the transfer period under Dublin III Regulation is the only way to guarantee the rights of defense as laid down in Article 41 of the EU Charter and the right to an effective remedy provided for in Article 47 of the EU Charter.

In this case the judicial dialogue was indirect, as the Council followed a reasoning by analogy with a previous judgment of the CJEU. In comparison with the previous case, the added value of the dialogue is, in such a case, to give the national jurisdiction a kind of a “readymade” answer. The CJEU gives a method of interpretation and the national judge can rely on it to solve a similar, but in some regard also different, question.¹⁹

4. Validity of provisions of the Qualification Directive²⁰ relating to the revocation of and refusal to grant refugee status in light of the Geneva Convention and the EU Charter : *X and X v Commissaire général aux réfugiés et apatrides*

Let us now turn to the last part of this lecture and address briefly two Belgian cases joined with a Czech case on which the CJEU recently ruled.²¹

In the two Belgian cases, the challenged decisions were adopted pursuant national provisions implementing respectively Article 14(5) and (4) of the Qualification Directive which allow Member States to refuse or to revoke refugee status.

The individuals challenged these decisions before the Council, arguing mainly that these national provisions infringe the Geneva Convention. The Council noted indeed that there is no provision in the Geneva Convention for refusing to recognize refugee status on grounds of public security

¹⁷ C-146/14 PPU *Mahdi* ECLI:EU:C:2014:1320 para 44.

¹⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the “Return Directive”).

¹⁹ See the Council’s Judgments No 208.438, 30 August 2018, No 209.749, 20 September 2018, No 210.911, 13 October 2018 and No 211.018, 16 October 2018. These judgments underline the lack of written and motivated decisions to extend the transfer period taken by the Immigration Office.

²⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (the “Qualification Directive”).

²¹ Joined C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et apatrides* ECLI:EU:C:2019:403.

considerations.²² It questioned therefore the interpretation and the validity of Article 14(4) and (5) of the Qualification Directive in light of primary EU law and decided to refer its questions to the CJEU. *In sum*, the Council was asking whether these two provisions of the Qualification Directive create a new ground for exclusion from refugee status as laid down in the Geneva Convention, and, therefore, whether these articles are compatible with the Geneva Convention and, consequently, with Article 18 of the EU Charter and Article 78 of the Treaty on the Functioning of the European Union (“TFEU”).

In its judgment, the CJEU notes, first of all, that although the Qualification Directive establishes a refugee protection system peculiar to the European Union, it is based on the Geneva Convention and its purpose is to ensure that this Convention is complied with in full.²³ It also notes that the Geneva Convention permits States to derogate from the principle of *non-refoulement* on grounds of public security considerations and that, although the Qualification Directive transposes this derogation, it must be conform with the rights guaranteed by the EU Charter, in particular Articles 4 and 19(2), which exclude the possibility of *refoulement* to a country where the life or freedom of a foreign national would be threatened.²⁴ The CJEU finds therefore that, in those circumstances, EU law provides more extensive international protection than that guaranteed by the Geneva Convention.²⁵

Furthermore, in line with the Advocate General’s Opinion, the CJEU recognizes that “being a refugee” and “being granted refugee status” are different and underlines, in that regard, that being a refugee is not dependent on the formal recognition of that fact through the granting of refugee status.²⁶ The CJEU considers that the refugee status of a person who has a well-founded fear of persecution in the country of origin could be revoked or refused and this person would not be afforded the rights belonging to the refugee status. However, this person would still be a refugee and should be guaranteed certain rights stipulated in the Geneva Convention which, as the CJEU states, does “not require a lawful stay, but merely the refugee’s physical presence in the territory of the host Member State”.²⁷ In addition, Member States concerned have the obligation to comply with the relevant provisions of the EU Charter, such as those set out in Article 7, relating to respect for private and family life, Article 5, relating to the freedom to choose an occupation and the right to engage in work, Article 34, relating to social security and social assistance, and Article 35, relating to health protection.²⁸

The CJEU concludes that the relevant provisions of the Qualification Directive do not infringe the Geneva Convention and, accordingly, are compatible with the rules of the TFEU and of the EU Charter.²⁹

In light of this judgment, one may understand that the Council is “relieved” to learn about the preliminary ruling of the CJEU. The judicial interaction in these cases has led to the clarification of an European position on the absolute nature of the principle of *non-refoulement*. With respect to this principle, the CJEU has made clear that fundamental rights guaranteed by the EU Charter must be respected when interpreting and applying the Qualification Directive. As a result, Member States cannot return refugees to their home countries if these fundamental rights are threatened. In doing so, the CJEU removes some confusion as to the understanding of the principle of *non-refoulement*, confusion that may have arisen from the reading of the texts of EU secondary law on derogations from this principle.

²² Council, Judgment No 181.955 of 8 February 2017 and Judgment No 182.109 of 10 February 2017.

²³ Joined Cases C-391/16, C-77/17 and C-78/17, paras 83-84.

²⁴ *Ibid*, paras 94-95.

²⁵ *Ibid*, para 96.

²⁶ *Ibid*, para 92.

²⁷ *Ibid*, paras 99 and 107.

²⁸ *Ibid*, para 109.

²⁹ *Ibid*, paras 111-112.

Another good reason to have waited impatiently for it was the “freeze” of all cases dealing with this issue since the Council applied for a preliminary ruling, that is to say February 2017...

And we may conclude with this politically incorrect consideration: yes, there is certainly a juridical, and sometimes pragmatic, added value of engaging a dialogue with the CJEU, but a national judge may also have sometimes an hesitation to enter into this dialog when knowing that it may result in the freezing of a certain number of pending files for years...

We thank you for your attention.

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