

Inter-parliamentary Committee Meeting of 24 January 2018

The European Agenda on Migration: What about Legal Avenues and Integration?

-

SECOND SESSION

The Role of Visas for Legal Avenues

by [Dr. Violeta Moreno-Lax](#), Queen Mary University of London

This statement draws on [Accessing Asylum in Europe](#) (OUP, 2017), and takes account of previous research [here](#), [here](#), [here](#), [here](#), and [here](#) (see further [Academia](#)).

Thank you very much for having me here today (if virtually), to address the role of visas for legal avenues. I'd like to do this in 5 steps, starting first with an introduction.

Introduction: Role of Visas for Legal Avenues

Discussions on humanitarian visas at EU level are not new. The measure was first thoroughly examined in a [study for the Commission](#) in 2002, resurfacing the debate in 2006 and in 2009, in the context of the [Green Paper on Asylum](#) and the [Stockholm Programme](#). A proposal to develop a dedicated EU system of facilitated admission for asylum-seeking purposes was tabled in 2013, in the [Task Force Mediterranean](#) Communication, promoting a 'holistic approach' to maritime migration governance. But momentum was lost thereafter, with the Commission establishing, in its 2014 [An Open and Secure Europe](#) Communication, that protected-entry procedures 'could complement resettlement', suggesting to start 'with a coordinated approach to humanitarian visas and common guidelines'. Yet, neither the guidelines nor the coordinated approach have materialized. In fact, the reference to humanitarian visas disappeared from the [European Agenda on Migration](#) that we are discussing today.

This is the background against which the [negotiations](#) of the [recast Community Code on Visas](#) (CCV) have taken place, leading to political deadlock. While the [European Parliament](#) wants to clarify the rules applicable to humanitarian visas on the basis of *existing* provisions, the [Council](#) resists such an approach.

In turn, the [X and X](#) judgment, denying any obligation under the current *acquis* to issue visas for the purpose of claiming asylum, appears to support the Council's view. So, the Parliament amendments have now been withdrawn. Instead, a [Legislative Initiative Report](#) will be adopted to request the Commission to take legislative action on a dedicated instrument, separate from the [CCV](#).

In this context, several questions are pending. Is the Court of Justice's reading, dismissing the applicability of EU law 'as it currently stands', correct?

In the time remaining, I'd like to address this issue, in four main steps, touching upon:

- 1) The scope of application of EU law, and specifically that of the CCV;
- 2) The impact of the Charter of Fundamental Rights;
- 3) The issue of EU competence for a prospective instrument; and
- 4) The policy options available to the EU legislator.

1. The Applicability of the CCV in International Protection Situations

Regarding the applicability of the CCV, Article 1 makes clear that the Regulation establishes the procedures and conditions for issuing short-term visas under EU law and that it applies to 'any third country national who must be in possession of a visa to cross the external borders of the MSs' (including prospective refugees). The *motives* underpinning the application are irrelevant at this point—they will serve to assess the merits of the application at a later stage (Art 21 CCV), but do not determine the applicability of the Visa Code per se (contrary to the CJEU's interpretation).

The opposite would be tantamount to accepting, for instance, that failed asylum seekers were to be excluded from the remit of the [Qualification Directive](#) from the beginning, because after having determined their claims, it is concluded that they do not qualify for protection. The fact that an application for either a visa or for asylum under EU law is finally dismissed cannot be confounded with the determination of whether the rules of the relevant instruments apply to the examination of the claim—the opposite risks that we pre-judge applications, which is against the rule of law.

The observation by the Court in *X and X* that visas for the purpose of seeking asylum would lead to the applicant remaining in a MS beyond the period allowed under Schengen rules is, actually, precisely addressed in the exception clauses of the Visa Code itself. So, that is also not a valid reason to exclude the application of the CCV.

Indeed, Article 25 CCV on Limited Territorial Validity (LTV) visas provides that LTVs 'shall be issued' among others 'on humanitarian grounds...or because of international obligations', which may render it 'necessary' for the MS concerned 'to derogate from the principle that [Schengen] entry conditions...must be fulfilled'. In fact, the [Schengen Borders Code](#) (SBC) itself establishes that entry rules must be applied in conformity with 'the rights of refugees and persons requesting international protection' (Article 3(b) SBC).

2. Impact of the Charter

And this links with my point two, on the impact of the Charter:

Just like entry refusals under the Schengen Code are subject to respect for 'the Charter [CFR]...[and] obligations related to access to international protection, in particular the principle of *non-refoulement*' (Article 4 SBC), so too are visa rejections, as per the very terms of the CCV Preamble (Recital 29).

Whatever the discretion allowed to MS under the exceptional LTV provisions, it has to be exercised in conformity with fundamental rights.

This is what the Court of Justice has consistently held, ruling that ‘Member States must...make sure they do not rely on an interpretation of an instrument of secondary legislation [like the CCV] which would be in conflict with the fundamental rights protected by the EU legal order’ ([NS & ME](#), para. 77).

Equally, the Court reminds us that ‘situations cannot exist which are covered...by EU law without...fundamental rights being applicable. The applicability of EU law entails [the] applicability of...the Charter’ ([Fransson](#), para. 21).

As a result, MS ‘when they are implementing Union law’ (such as when dealing with a LTV visa application) ‘shall’ guarantee Charter rights, including the prohibition of *refoulement* and the right to asylum. Therefore, if the refusal of a LTV may lead to a ‘real risk’ of irreversible harm, the *option* to issue it in Article 25 CCV, arguably, turns into an *obligation* (so as to avoid the risk from materialising).

3. The Issue of EU Competence

Regarding my point 3: The issue of EU competence to regulate humanitarian visas, I think that, as EU law stands, there is sufficient competence under the current provisions of the Treaty (Articles 67, 77 and 78 TFEU). In particular, Article 78(2)(g) TFEU can be said to provide a specific legal basis, as it foresees that: the Union ‘shall adopt’ measures for a Common European Asylum System including those aimed at ‘managing *inflows* of people applying for [international] protection’.

This does not affect ‘the right of MS to determine volumes of admission’, as per Art 79(5) TFEU (governing immigration policy). Why? Because the persons concerned cannot be considered as ‘third-country nationals coming...to seek work’.

4. Possible Policy Options

If this is correct, there are several policy options the EU legislator can explore:

1) The easiest is to **temporarily suspend visa requirements** imposed on nationals coming from unsafe third countries, where abuse and persecution are endemic (such as Syria, Libya or Yemen), until the circumstances change.

2) A more sophisticated option would be for **EU humanitarian visas to be issued on a case-by-case basis by MS consulates and embassies abroad**, according to a dedicated EU Regulation, harmonising issuing criteria and procedures (in compliance with good administration and effective remedy standards under Arts 41 and 47 CFR).

3) The most ambitious plan would be for an overhaul of the Dublin system and the **complete centralisation of admission procedures** by an EU body (such as the EU Asylum Agency soon to replace EASO), possibly with the assistance of EEAS delegations in third countries. An allocation mechanism, similar to the one of the 2016 Relocation scheme, would ensure solidarity in line with Art 80 TFEU.

Conclusions

Whatever the approach, the cards are on the table. The key is that EU co-legislators realize that **options become obligations when non-derogable rights are at stake.**

There is a pressing need to de-politicize these rights and interpret / apply them as any other EU right (making them accessible, actionable, and effective in practice).

* * * [IF TIME ALLOWS]

'Floodgates' fears are unsubstantiated (and irrelevant) in this context:

- The point is empirically unproven. According to the [European Commission](#), in 2015 alone, MS managed to issue a total '14.3 million visas for short stays' without incidents. And, in the remote case of a mass influx to MS embassies, the [Temporary Protection Directive](#) provides the tools to cope.
- In any event, the floodgate argument is misplaced on a more fundamental level. It reifies beneficiaries of Charter entitlements reducing them to a 'mass' or a collective figure, discounting the agency and dignity of individual rights holders. The fear of numbers does not constitute a *legal* argument, let alone one capable of limiting *absolute* rights.

In truth, compliance with the Charter is not optional under EU law. It is not open to negotiation (Article 6 TEU and Article 51 CFR). And given the 'absolute character' of the rights concerned (to asylum and to *non-refoulement*), even a mass influx or other similar difficulties 'cannot absolve a [Member] State of its obligations under [international and EU law]' (mutatis mutandis, [Hirsi](#), paras 122-23).

[Dr Violeta Moreno-Lax](#), Associate Professor / Senior Lecturer in Law

Founding Director, [Immigration Law Programme, Queen Mary University of London](#)

EU Asylum Law Coordinator, [Refugee Law Initiative, School of Advanced Study, University of London](#)

Visiting Professor, [College of Europe, EU International Relations and Diplomacy Studies Programme](#)

Queen Mary Law School, Mile End Road, London E1 4NS, Tel. +44 (0)20 7882 7040

NEW MONOGRAPH: [Accessing Asylum in Europe \(OUP, 2017\)](#) Academia research page:



<https://qmul.academia.edu/VioletaMorenoLax>