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Keywords

Charter applicability, scope of EU law, *X and X*, Belgium, Visa Code, humanitarian visa, teleological interpretation.

A Introduction

On 7 March 2017 the Court of Justice of the European Union (CJEU) delivered a much anticipated judgment in the case of *X and X v État belge*.¹ The Court ruled that the rejection of an application for visa based on the Community Code on Visas (“Visa Code”),² sought on humanitarian grounds, falls outside the scope of EU law and is to be examined purely in light of national law. As a corollary, the EU Charter of Fundamental Rights (CFR) was equally found to be inapplicable. The decision was made in the context of the preliminary ruling procedure of Article 267 of the Treaty on the Functioning of the European Union (TFEU) on the request of the Belgian Council for Asylum and Immigration Proceedings.

1 CJEU, *X and X v État belge*, Judgment of 7 March 2017, ECLI:EU:C:2017:173.

2 Regulation (EC) No. 810/2009 of the Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ L 243 of 15 September 2009.

The case concerned a refusal of the Belgian state to grant visa with limited territorial validity (only for Belgium), in accordance with Article 25 (1)(a) of the Visa Code, to two Syrian nationals from Aleppo. The Syrians applied for the visa at the Belgian Consulate in Beirut with reference to Articles 18 and 4 CFR on, respectively, the right to asylum and the prohibition of torture and inhuman or degrading treatment. The Belgian state rejected the visa request on the grounds provided for by Article 32 (1)(b) of the Visa Code, namely that the applicants intended to stay longer than would be permitted by the requested short-term visa. The Syrian nationals subsequently appealed the decision to the Council for Asylum and Immigration Proceedings, reiterating their precarious fundamental rights situation as persecuted members of the Christian minority.

The present contribution aims to critically analyse the CJEU's judgment and reasoning in *X and X* which led to the conclusion that the Charter was inapplicable to the legal circumstances at hand. It will be argued that by adjudging the situation to fall outside EU law, despite the formal link between the visa application and an EU Regulation (the Visa Code), the Court has circumscribed the scope of applicability of the Charter in a way previously unseen in its case law and by having recourse to a counter-intuitive interpretation of the law.³ The novelty and potential gravity of breaking the path to "un-Chartered" territory in EU law is of worrying significance for the future of fundamental rights protection in the EU legal order.

B The Scope of Application of the Charter

X and X is an addition to a substantial list of cases regarding possibly the most contentious issue – and a constant source of legal uncertainty – in the EU fundamental rights framework: in which legal situations does the Charter apply to member states? It is well-known from Article 51 (1) of the Charter that its provisions "are addressed [...] to the member states only when they are implementing Union law".⁴

At the outset of the entry into force of the Charter, there were in principle two general ideas about the possible meaning of Article 51(1) CFR. The first option was that the drafters of the Charter intended to make the scope of applicability of the Charter narrower than the scope of fundamental rights as general principles of EU law which had been developed by the CJEU in its case law.⁵ Academic circles

3 This contribution builds on a previous analysis by the present author. See Michal Ovádek, The CJEU on Humanitarian Visa: Discovering 'Un-Chartered' Waters of EU Law, *VerfBlog* (13 March 2017), <http://verfassungsblog.de/the-cjeu-on-humanitarian-visa-discovering-un-chartered-waters-of-eu-law> (7 April 2017).

4 Charter of Fundamental Rights of the European Union, OJ C 326 of 26 October 2012.

5 The issue in any case featured high on the agenda during the negotiations. See Gráinne de Búrca, The Drafting of the European Union Charter of Fundamental Rights, *European Law Review* 26 (2001) 2, 126-138, 137.

debated, in particular, whether the so-called “derogation situation” known from *ERT*,⁶ whereby fundamental rights as general principles applied to member states restricting market freedoms, was to be covered also by the Charter.⁷ The second possibility was rejecting the notion that Article 51 (1) CFR entails a distinction between the scope of applicability of the Charter and of fundamental rights as general principles of law.

Today – and at least since the *Åkerberg Fransson* judgment – it seems clear that the CJEU opted for the latter solution.⁸ In that judgment, the CJEU could probably not state the general rule regarding the application of the Charter to member states’ action in any clearer terms:

“Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”.⁹

Despite the clarity of the general rule – where EU law applies, so does the Charter – the legal uncertainty surrounding the applicability of the Charter to member states has not been entirely removed. Rather, the Court has shifted the fault line from “does the Charter apply?” to “does EU law apply?” which is a question often no less difficult to answer. Having said that, it is worth appreciating that a schism between the applicability of the Charter and of fundamental rights as general principles was avoided in view of the already complex, inter-connected and multi-level system of human rights protection in Europe.

An important consequence of “hitching” the Charter onto EU law in a general manner is that almost every case before the CJEU now has the potential to harbour a fundamental rights dimension. Therefore, due to the status of the Charter as primary law, the stakes involved in delimiting the scope of EU law are higher, with potential for constitutional conflict frequently around the corner. In other words, judges have to be mindful of the fundamental rights consequences following from the Charter when determining that EU law applies to member states’ conduct in a given case. Such

6 CJEU, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Judgment of 18 June 1991, ECLI:EU:C:1991:254.

7 Koen Lenaerts, Exploring the Limits of the EU Charter of Fundamental Rights, *European Constitutional Law Review* 8 (2012) 3, 375-403, 385.

8 Elise Muir, Fundamental Rights: An Unsettling EU Competence, *Human Rights Review* 15 (2014) 1, 25-37, at 31. See also a later explicit recognition of the fact by the Court in CJEU, *Julian Hernández and Others*, Judgment of 10 July 2014, ECLI:EU:C:2014:2055, at 33.

9 CJEU, *Åklagaren v Hans Åkerberg Fransson*, Judgment of 26 February 2013, ECLI:EU:C:2013:105.

consequences can be of particular significance where national sensibilities are involved.

Although in theory the situation is similar with respect to fundamental rights as general principles, the enactment of the Charter has raised the stakes in at least three respects. First, the catalogue of rights is “out there” for everyone to see (and invoke) which makes rights protection in the EU more transparent and places increased demands on the Court to apply the written law consistently, as well as develop the Charter as its “own” human rights instrument now that it has one, with one eye on becoming more independent from the ECHR and the interpretations of the Strasbourg Court.¹⁰ Second, the binding and constitutional nature of the Charter has demonstrably emboldened the CJEU to rely more on fundamental rights, including for the purpose of annulling acts of EU institutions.¹¹ Third, the material scope of the Charter is larger than that of fundamental rights as general principles recognised hitherto by the Court.¹²

In a development familiar to EU law scholars, following the expansive and precedent-setting approach in *Fransson* came a series of cases in which the CJEU found the Charter inapplicable. That was partly because, in addition to laying down the general rule of applicability of the Charter for the purposes of Article 51 (1) thereof, the Court in *Fransson* interpreted the scope of EU law rather broadly, which among others elicited the criticism of the German Constitutional Court.¹³

In *Siragusa*, *Torralbo Marcos* and *Julian Hernández* – all decided in 2014, the year subsequent to *Fransson* (and *Melloni*) – the CJEU found the Charter inapplicable, as the situations were considered to fall outside the scope of EU law.¹⁴

10 For indications that the Charter competes at least partially with the ECHR and that the CJEU vies for more independence from the Strasbourg case law see CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454 on the rejection of the draft accession agreement of the EU to the ECHR; Gráinne de Búrca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, *Journal of European and Comparative Law* 20 (2013) 2, 168-184, 174-176; and Michal Ovádek, External Judicial Review and Fundamental Rights in the EU: A Place in the Sun for the Court of Justice, *EU Diplomacy Papers* (2016) 2, 13-15 on the growing number of Charter references in the CJEU's case law which are, at least in part, substituting references to the ECHR. See also CJEU, *J.N.*, Judgment of 15 February 2016, ECLI:EU:C:2016:84 for a new feature of the CJEU's case law – a reference to a part of the Explanations which conditions the applicability of the convergence clause of Art. 52 para. 3 of the Charter.

11 For an example see CJEU, *Digital Rights Ireland*, Judgment of 8 April 2014, ECLI:EU:C:2014:238. Prior to the enactment of the Charter, the CJEU has been reluctant to annul EU acts on the basis of fundamental rights as general principles of EU law.

12 Sybe A. de Vries, Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, *Utrecht Law Review* 9 (2013) 1, 169-192, 186; Lenaerts (2012), 386.

13 See BVerfG, Judgment of the First Senate of 24 April 2013 – 1 BvR 1215/07 and the accompanying press release.

14 CJEU, *Siragusa*, Judgment of 6 of March 2014, ECLI:EU:C:2014:126; CJEU, *Emiliano Torralbo Marcos*, Judgment of 27 March 2014, ECLI:EU:C:2014:187; and CJEU, *Julian Hernandez* (2014).

The Court also identified certain criteria, while drawing on its past case law on fundamental rights as general principles,¹⁵ which were to aid the process of determining whether a given national measure implements EU law for the purposes of Article 51 (1) CFR. What matters, according to the Court, is the intention to implement EU law; the nature of the national implementing legislation, irrespectively of whether EU law is indirectly affected; the objectives pursued, especially insofar as they are distinct from those covered by EU law; and the existence (or otherwise) of specific EU rules on the subject matter or of EU rules capable of affecting it.¹⁶ Where EU law does not impose any obligation on the member states, the Charter does not apply.¹⁷ The same holds true in situations where member states do not act on the basis of powers derived from EU law.¹⁸

These criteria help the CJEU establish whether in the relationship between EU law and the implementing national measure there is a "degree of connection [...]" which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other".¹⁹ It should be noted that the criteria listed in *Siragusa* and later referred to in a number of other cases have not yet received endorsement (citation) in a Grand Chamber judgment. Nevertheless, in the practice of the chambers, the CJEU has effectively transformed the question "does EU law apply?" to "does EU law apply to a sufficient degree?", even though the ultimate answer remains a binary yes or no.

C *X and X* or Welcome to "Un-Chartered" Territory

There is one hitherto undiscussed feature underlying the CJEU's case law on the applicability of the Charter to member states' actions: most of the cases concern the relationship between national legislative acts and EU Directives or Treaty articles in a particular issue area. The examined connection between EU law and national measures in *X and X*, however, concerns an EU Regulation the application of which gives rise to a national administrative decision (the refusal to grant visa). The case law on the "degree of connection" to EU law would appear to suggest that it should be close to impossible for a legal situation explicitly founded in an EU Regulation (the Visa Code) to fall outside the scope of EU law (and therefore the Charter), not least on account of the direct legal effects produced by an EU Regulation as opposed to an EU Directive.²⁰ It should also be noted that recital 29 of the Visa Code explicitly states that the Regulation respects fundamental rights recognised in the Charter.

15 Chiefly CJEU, *Annibaldi*, Judgment of 18 December 1997, ECLI:EU:C:1997:631.

16 CJEU, *Siragusa* (2014), at 25.

17 *Ibid.*, at 26.

18 CJEU, *Julian Hernández* (2014), at 44. For a more straightforward restatement see CJEU, *Safe Interenvíos SA*, Judgment of 10 March 2016, ECLI:EU:C:2016:154, at 79.

19 CJEU, *Siragusa* (2014), at 24; and CJEU, *Julian Hernández* (2014), at 34.

20 See Art. 288 TFEU.

Such a conclusion finds further support in the precedent most relevant to *X and X* – one which was cited by AG Mengozzi in his Opinion but conspicuously avoided by the CJEU. In *N. S. and Others*, the Court clearly stated that the Charter is applicable where member states exercise discretion derived from another EU Regulation in the area of migration:

“[...] the discretionary power conferred on the Member states by Article 3 (2) of Regulation No. 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51 (1) of the Charter.”²¹

N. S. is a case which dealt with a legal situation – at least insofar as the application of the Charter is concerned – most analogous to *X and X*, which makes the CJEU's omission of the precedent all the more glaring. Both judgments concerned discretionary power emanating from an EU Regulation in the area of migration and both have been decided by the Court's Grand Chamber. The latter fact underlines that neither judgment can be ascribed to a “blip” of any particular Chamber; rather, these decisions embody the Court's doctrine.

The deduction that the Charter is applicable in *X and X* was also reached by AG Mengozzi. In addition to citing the *N. S.* case, the Advocate General recalled that the Belgian authorities seized of the visa request themselves processed it as an application based on the Visa Code and issued their refusal on the basis of Article 32 (1)(b) thereof.²² He continued by pointing out that the intention of the applicants to apply for asylum once in Belgium could not

“alter the nature or purpose of their applications [...] such an intention could at the very most constitute a ground for refusal of the applications of the applicants in the main proceedings, pursuant to the rules of that code, but certainly not a ground for not applying that code.”²³

On the contrary, the CJEU adopted a teleological approach the goal of which can only be identified as distancing EU law as far as possible from the politically toxic issue at hand. This approach requires some suspension of commonly held beliefs about the legal effects produced by statutes of positive law (the Visa Code), especially when also recognised by the relevant authorities (the Belgian Immigration Office) as binding and applicable.

The CJEU ruled that because the ultimate purpose of the short-term visa application was the filing of an asylum request in Belgium, the whole short-term visa proceeding that everyone concerned treated as being governed by the Visa Code

21 CJEU, *N. S. and Others*, Judgment of 21 December 2011, ECLI:EU:C:2011:865, at 68.

22 CJEU, *X and X v Etat belge*, Opinion of AG Mengozzi of 7 February 2017, ECLI:EU:C:2017:93, at 49.

23 Ibid., at 50-51.

(including the refusal of visa) was in fact not meant to be based on the Visa Code at all.²⁴ In so doing, the CJEU downplayed the formal link between the application and the Visa Code as insufficient for establishing that the case at hand falls within the scope of EU law.²⁵ What is implicit in the Court's assessment is that the connection between EU law and the application under review is *merely* formal.

Such a view echoes familiar complaints about formalistic interpretations of law as something generally undesirable. Formal connections, however, form the very fabric of modern legal systems based on the rule of law – they are self-evidently the essence of how sources of law relate to each other and how valid laws can be distinguished in a given legal system. A minimal degree of formalism which constrains decision-making is necessary to sustain systems of rules, even if that means accepting sometimes sub-optimal (from the perspective of the CJEU, not normatively) outcomes of cases.²⁶

It would have been controversial but still comparatively legitimate for the Court to say that the intention of the applicants to stay in Belgium long-term justifies the refusal of the short-term visa request in line with Article 32 (1)(b).²⁷ The approach chosen by the Court, however, is a denial of the ordinary meaning of the Visa Code accepted by both parties during the visa proceedings, the formal correctness of which was equally conceded by the Court.²⁸ It fails to give effect to, against all odds, the applicable statutory law in the circumstances of the case and disempowers the legitimate legal claim of the applicants by refusing to treat it within the framework of applicable law of the Visa Code on which it was overtly based. Instead, the CJEU disqualified the application of the Syrians on the ground that the purpose of the Visa Code is not such as to even allow the refusal of visa applications in accordance with the written law of Article 32 thereof. In this way, the Court ensured that the matter falls outside the scope of EU law and the Charter does not apply.

What is also puzzling about the CJEU's conclusion is that it was held on the ground that if the Visa Code were to allow applicants to obtain short-term visa in a chosen member state in order to subsequently apply for asylum, the "general structure of the system established by Regulation No. 604/2013 [Dublin Regulation]" would be undermined. This is objectionable on two levels which apply also to the CJEU's interpretation more generally. First, it must be reiterated that the applicability of the Visa Code need not have entailed the granting of the short-term visa. On the contrary, the CJEU could have still ruled that a refusal to grant visa in a case such as the one in the main proceedings was in compliance with the Visa Code. Such an interpretation could be still criticised for failing to offer a higher level of fundamental rights protection and therefore also live up to the EU's commitment to the latter in the Treaties, but at least it would have been honest and consistent as far as the

24 CJEU, *X and X* (2017), at 50.

25 Ibid., at 43.

26 Frederick Schauer, Formalism, *The Yale Law Journal* 97 (1988) 4, 509-548.

27 Art. 32 of the Visa Code provides an *exhaustive* list of grounds for refusal of a visa.

28 CJEU, *X and X* (2017), at 43.

applicability of EU law and the Charter is concerned. Second, there is no obvious reason why the CJEU should be more concerned about the undermining of the Dublin Regulation than of the Visa Code. They are both EU Regulations which means that one does not take legally precedence over the other. Surely, if the CJEU intended to offer an EU law conforming interpretation to the objectives of the Dublin Regulation, the more sensible – in light of the established case law on the applicability of the Charter – and less militant option – in light of established precepts of the rule of law – would have been (repeating the first point) to concede the applicability of the Visa Code and rather uphold the administrative decision of the Belgian Immigration Office as being in accordance with Article 32 of the Visa Code.

It is, moreover, notable that the Court was not worried in *X and X* about the unity, primacy and effectiveness of EU law, namely the Visa Code. Letting national courts and authorities in the member states to determine, in particular, the level of fundamental rights protection applicable to visa requests, even if “only” formally based on the Visa Code, appears to run entirely counter to the *raison d’être* for fundamental rights protection at EU level, as articulated by the CJEU itself:

“It is also important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the member states. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.”²⁹

It is difficult to see how the CJEU’s teleological approach that sets aside an ordinary meaning interpretation of the Visa Code, the formal correctness of which was acknowledged by the Court and which was, moreover, accepted by the relevant actors of the proceedings, is anything else than *contra legem*. On this view, what seems to be at play is a situation of emergency during which “the *Rechtsstaat* is effectively suspended, as the normative steadying factors of legal reasoning cease to function as effective constraints”.³⁰ The current state of the migration discourse Europe-wide requires no close examination to affirm the extreme sensitivity of the subject. Indeed, the Court was pressured by no fewer than 14 submissions of national governments and even the Commission, all of which were calling for the Court to either stay away or reject humanitarian visa.

Purposive interpretation has received ample attention in the past in relation to the Court’s pro-integration stance.³¹ It has been suggested, among others, that teleological interpretation is at least partially validated by the “value-based and

29 CJEU, *Siragusa* (2014), at 31-32.

30 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012), 446-450.

31 See, for example, Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012).

purpose-oriented" nature of the Treaties.³² But in that light the CJEU's interpretation is equally contradictory: the preference given to the Regulation instituting the common asylum system is less in line with the stated values of the Union in Article 2 TEU than would be the case if the CJEU adopted the more ordinary interpretation of the applicability of the Visa Code and gave at least some weight to fundamental rights considerations. The paradox is of course compounded also by the fact that unlike in the past, when the CJEU tended to be accused of overly expansionist interpretations, the present charge against the Court is that it has been overly restrictive – indeed to the point of *contra legem* – in its interpretation of the EU's statutory law.

Finally, it is worth appraising *X and X* in light of the established case law on Article 51 (1) of the Charter. For one, the judgment sits uncomfortably with the standard set in *Fransson* where the CJEU worked very creatively to establish a connection between EU law and a national measure *not* adopted with the explicit intention to transpose EU legislation into domestic law. In other words, the absence of a formal link between EU and national law did not stop the Court from making the Charter applicable in *Fransson*, while the existence of a formal link between a directly applicable and directly effective EU law (the Regulation on the Visa Code) and a national administrative decision explicitly based on a provision of the Visa Code was not found to be sufficient for the Charter to apply in *X and X*.

For some it might be tempting to reject *Fransson* and instead look to *Siragusa* for a more lenient evaluation of the Court's decision in the case at hand. Two preliminary points must be made in this respect, however. First, *X and X* does not refer to *Siragusa* or the interpretive criteria listed therein; the Court mentions once *Torralbo Marcos* (which does not contain the criteria) but also *Fransson*.³³ Thus, given that the CJEU itself was unwilling to endorse the *Siragusa* criteria, it is somewhat generous to treat the Court's decision in that light. Second, unlike *Fransson*, a Grand Chamber decision which together with *Melloni* (handed down on the same day) marked the dawn of the Charter era, *Siragusa*, *Torralbo Marcos* and *Julian Hernández* are "merely" chamber judgments. *Fransson* is simply the more authoritative case on Charter applicability.

As for the *Siragusa* criteria themselves, all but one criterion would appear to support the applicability of EU law and of the Charter. In fact, the connection between the Visa Code and the national decision is so obviously close that it hardly makes sense to be applying the criteria of *Siragusa*, which were developed in the context of relationships between EU Directives and national legislative measures, to *X and X*. The criterion that could be potentially read as bolstering the CJEU's judgment is the distinctiveness of the objectives pursued by the visa application. This argument, however, still comes up against the same problem expounded above: the Syrians have not applied for asylum in their application but for short-term visa in Belgium on the basis of the Visa Code. Their application was, furthermore, handled as such by

32 Beck (2012), 215.

33 CJEU, *X and X* (2017), at 45.

the authorities. The second-step humanitarian objective of their visa request was immaterial from the perspective of whether the Visa Code was the applicable law because it evidently was: without the Visa Code, there could have been no application for short-term visa. Again, the distinct ultimate objective of the visa request could have been accounted for in the grounds for refusal which, however, form still part of the legal framework of the Visa Code.

D Conclusion

The CJEU's judgment in *X and X* brought relief to member states – they remain free to reject applications for visa with a humanitarian motive under the terms set by their national laws. AG Mengozzi's ambitious legal proposal to grant humanitarian visa under the Visa Code will remain a bold and interesting footnote in the legal history of the EU. In more propitious times, the case could have perhaps become a venerated landmark of both EU and human rights law.

This article has argued that it will become neither. On the contrary, *X and X* is more likely to be remembered for the great receptiveness of the CJEU to the political demands of the member states. The Court was indeed so willing in this case as to put on the proverbial altar one of its most prized assets: the authority of EU law. However, a European supreme court more attuned to the political sensibilities of the member states is perhaps exactly what is suited to the age of new intergovernmentalism.³⁴

Be that as it may, the CJEU's ruling in *X and X* carries a number of features which make up the overall negative appraisal without even delving into the question of the moral defensibility of using humanitarian intent as a disqualifying factor from EU fundamental rights protection. The CJEU's judgment is sufficiently unconvincing from the perspective of law in general and EU law in particular.

First, *X and X* contributes to legal uncertainty as regards the applicability of the Charter to member states for the purposes of Article 51 (1) CFR. The judgment does not conform to the expansive and creative interpretation of *Fransson*; it contradicts the specific precedent regarding powers derived from EU Regulations established in *N. S. and Others*; and it does not fit satisfactorily within the *Siragusa* criteria which the CJEU in any case entirely omitted. Second, the Court, instead of giving an appropriate degree of weight to the formal connection of the visa application to EU law, which was confirmed by the legal practice of the parties to the dispute at national level, the CJEU engaged in a counter-intuitive teleological interpretation that disregarded the textual reading of the statute. Such *contra legem* failure to give effect to an applicable statute – which merely required the acknowledgement of the applicability of EU law, not the reversal of the visa refusal – is inimical to a conventional functioning of legal systems based on the rule of law, such as the legal

34 Christopher J. Bickerton, Dermot Hodson and Uwe Puetter (eds.), *The New Intergovernmentalism. States and Supranational Actors in the Post-Maastricht Era* (2015).

order of the EU.³⁵ Moreover, the teleological interpretation cannot be validated by reference to any of the values that the EU is based upon; nor can it be legitimized by requirements of the Dublin Regulation establishing the common EU asylum system, as there is no legal hierarchy between that Regulation and the Regulation on the Visa Code. Third and last, the CJEU paid little attention to the potential effects on the unity, primacy and effectiveness of EU law when divergent national standards with respect to visa applications “formally” based on the Visa Code are developed. By going to such great lengths to negate the Visa Code, the EU has effectively created “un-Chartered” territory in EU law.

35 CJEU, *Parti écologiste “Les Verts” v European Parliament*, Judgment of 23 April 1986, ECLI:EU:C:1986:166, at 23.