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The Limited Scope For Accepting Positive Obligations Under EU Law: The Case of Humanitarian Visas For Refugees

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Abstract

This article discusses the scope for the development of positive obligations to protect fundamental rights under EU law. As a focal point, the judgment of the Court of Justice of the EU in X. and X. v. Belgium is discussed to illustrate this topic. In this case the Court declined to accept the argument that the protection of refugees' fundamental rights imposes a positive obligation for the Member States of the EU to issue a humanitarian visa to ensure legal entry. In arriving at this conclusion the Court expressed the clear limits under EU law for the protection of fundamental rights. This article critically analyses the Court's reasoning in this judgment, and further discusses the scope for the development of positive obligations under EU law.

1. Introduction

The scope for the development of positive obligations within the specific context of EU law is still far from clear. The Court of Justice of the EU (CJEU) has hardly ever explicitly dealt with this issue.[1] Positive obligations require States to take active measures to protect fundamental rights, including legislative measures, organisational and/or practical measures.[2] The scope for recognising such obligations under EU law has been considered to be restricted due to the limited scope of application of fundamental rights and the limited (legislative) competences for the Union's institutions in the relevant areas of EU law.[3] Nonetheless, questions on the scope for the development of positive

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1 Cf. Case C-68/96, 26 November 1996, *T. Port*, para. 38; and Case C-540/03, 27 June 2006, *Parliament v. Council*, paras 52-54.

2 See e.g. ECtHR 13 June 1979, no. 6833/74, *Marckx v. Belgium*, para. 31.

3 See in particular T. Ahmed & I. Butler, 'The European Union and Human Rights Review: An International Law Perspective', 17 *European Journal of International Law* (2006), pp. 771-801. Other aspects to be taken into account are the specific institutional characteristics of the Union institutions (the CJEU in particular) and the particular role which has been assigned by the

obligations under EU law have been raised on different occasions.[4] One reason for this is the clear relevance of the case law of the European Court of Human Rights (ECtHR) to the interpretation of fundamental rights within the context of EU law.[5] Positive obligations have indeed been extensively developed in the case law of the ECtHR.[6] However, the CJEU is to provide for the final interpretation of the rights laid down in the now binding Charter of Fundamental Rights of the EU (Charter) and explain the scope and the limits of fundamental rights protection within the context of EU law.

The CJEU is increasingly being asked to clarify the interpretation of fundamental rights, especially through the preliminary reference procedure which allows national courts to obtain relatively quick interpretations on fundamental rights matters of potentially great importance throughout the Member States.[7] Last year the Court was requested to determine whether a specific positive obligation could be recognised under EU law. In *X. and X.* the Court had to decide whether the EU Member States would need to be more proactive in protecting the fundamental rights of refugees by ensuring that they can travel legally and more safely to the EU by issuing humanitarian visas.[8] It was suggested by the parties and the Advocate General that the effective protection of fundamental rights of refugees would impose a positive obligation on the Member States to do so.[9] However, the Court reached a rather different conclusion. It found that the rights of the Charter do not apply to this situation and that there is no room to accept this suggested positive obligation on the basis of EU law.

This article aims to further analyse and discuss the Court's reasoning for declining to recognise the said positive obligation. It will rely on and refer to a previous study by this author on this topic.[10] Firstly, the facts and the Court's

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EU to ensure protection of fundamental rights vis-à-vis the Member States and other international organisations such as the Council of Europe. See also M. Beijer's dissertation, *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017).

4 See e.g. C. Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights', 19 *Australian Journal of International Law* (2012), pp. 117-142; H. Gersdorf, 'Funktionen der Gemeinschaftsgrundrechte im Lichte des Solanges II-Beschluss des Bundesverfassungsgerichts', 119 *Archiv des öffentlichen Rechts* (1994), pp. 400-426; and B. de Witte, 'The Past and the Future Role of the European Court of Justice in the Protection of Human Rights', in: P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press), p. 882.

5 Cf. Article 6(2)-(3) of the Treaty on European Union (TEU), and Article 52(3) of the Charter.

6 For a recent overview and a critical analysis of this case law, see L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge: Intersentia 2016).

7 For statistics, see European Commission, Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2017, SWD (2018), 304 final, pp. 7-8.

8 Case C-638/16, 7 March 2017, *X. and X. v. Belgium*.

9 Opinion of Advocate-General Mengozzi to Case C-638/16, 7 February 2017, para. 3.

10 Beijer 2017 (see note 3).

reasoning in *X. and X.* are presented in section 2. The main parameters for determining the scope for recognising positive obligations under EU law are set out in section 3. Looking at the judgment of *X. and X.*, it is established that the Court only ascertained whether a positive obligation could be recognised on the basis of the limited scope of application of the Charter and the horizontal division of competences between the Court and the political institutions. The Court did not address the question of whether the said positive obligations can be recognised under (international) human rights law. It is argued that the Court thereby overlooked a vital point. Looking at the hard line of criticism that the Court has received for this particular judgment, this article provides recommendations as to how the Court could deal with future cases on positive obligations in a different way at the end in section 4.

2. Case of *X. and X. v. Belgium*: Facts, Preliminary Questions and the Court's Answer

Under the Common European Asylum System, comprehensive procedural standards, as well as material standards, have been established to secure the right of refugees to asylum. However, refugees still must often follow illegal routes and sometimes risk their lives to be able to apply for asylum in one of the EU Member States. This contentious issue lies at the heart of *X. and X.* This case concerns a couple and their three young children, all Syrian nationals who resided in Aleppo. They applied for a visa at the Belgian embassy in Beirut, Lebanon. They asked in particular for a visa with limited territorial validity on humanitarian grounds which can be issued by the Member States on the basis of the Visa Code.[11] The applicants wanted to leave the besieged city of Aleppo and legally enter the territory of Belgium to apply for asylum there. The Belgian authorities refused to issue the visas because of their clear intention to overstay the period for which the visas would be issued. The authorities further stated that diplomatic posts are not the appropriate place to apply for asylum. Under Article 3 of the European Convention on Human Rights (ECHR) there is no obligation for States to admit 'victims of a catastrophic situation' to their territory.[12] The applicants challenged this decision. The Belgian court, which was asked to decide on the lawfulness of that decision, referred questions for a preliminary ruling to the CJEU on the interpretation of the Visa Code. It asked how the specific provisions in the Visa Code were to be interpreted in light of the prohibition of inhuman and degrading treatment and the right to asylum

11 Article 25 of Regulation No. 810/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [*OJ* 2009, L 243/1].

12 Case C-638/16, para. 21.

laid down in Articles 4 and 18 of the Charter. The Belgian court expressed its doubts about whether a positive obligation to grant such visas could be, *inter alia*, deduced from relevant provisions of the ECHR.[13]

The CJEU answered the preliminary questions in a rather brief fashion. In its judgment, it emphasised that the applicants were not simply asking for a temporary humanitarian visa; they were essentially applying for asylum.[14] They wanted to reside for a period longer than ninety days and, according to the Court, such applications fall outside the scope of the Visa Code. Therefore the Charter provisions do not need to be applied.[15] Furthermore, the Court added that the particular issue raised in this case has not yet been regulated by any act of the EU legislature. Thus, if a different conclusion would be reached, the general structure of the system established by the Dublin Regulation would be undermined.[16] It would mean that Member States would have to allow individuals to apply for international protection at the representations of the Member States within the territory of a third country, whereas the competence of the Union to regulate procedures of international protection under Article 78 of the Treaty on the Functioning of the EU (TFEU) does not extend to such situations. In conclusion, the Court held that the Belgian court was wrong to consider the visas as short-term visas which are regulated by the Visa Code.

3. Right or Wrong Considerations?

Many commentators have been disappointed with the outcome that was reached in this case.[17] They had hoped that the Court would have held the Member States accountable for their inactions under EU law.[18] The Court's

13 The Belgian court also asked the CJEU whether the links between the applicants and the Member State, such as family connections, host families, guarantors and sponsors, had to be taken into account.

14 Case C-638/16, para. 42.

15 Case C-638/16, paras 44-45.

16 Under the Dublin Regulation, Member States of first arrival need to deal with the applications of the asylum seekers, and other Member States need to send asylum seekers to such Member States of first arrival. See Regulation 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 first third country national or stateless person [*OJ* 2013, L 180/31).

17 The judgment was quickly discussed on many blogposts. See e.g. 'EU Court leaves the granting of humanitarian visas with Member States' on https://www.ecre.org, 7 March 2017; and M. Zoeteweij-Turhan & S. Progin-Theuerkauf, 'CJEU Case C-638/16, X and X, Dashed Hopes for a Legal Pathway to Europe', 10 March 2017 on europeanlawblog.eu; and H. de Vylder, 'X and X v. Belgium: A Missed Opportunity for the CJEU to Rule on The State's Obligations to Issue Humanitarian Visa for Those in Need of Protection', 14 April 2017 on strasbourgobservers.com.

18 See on this topic U.I. Jensen, 'Humanitarian Visa: Option or obligation?', October 2014, CEPS Paper in Liberty and Security in Europe No. 68.

conclusions are inconsistent with the Opinion of the Advocate General's reasoning on this case as well. The Advocate General had concluded that the family's situation did fall within the scope of the Charter and the prohibition of torture and inhuman and degrading treatment, as laid down in the Charter, imposed a positive obligation on the Member States to issue visas with limited territorial validity to the family.[19] The Court did not, however, pay attention to any of the fundamental rights arguments which were provided for in the Opinion of the Advocate General on this case.

The following section aims to analyse the Court's approach to *X. and X.*, and thereby discusses whether the Court used the right or wrong considerations in reaching what some consider a disappointing outcome of this case. The Court specifically addressed the issue of the limited scope of application of fundamental rights under EU law and the limited competences of the Union to act, as well as the specific horizontal division of competences between the Court and the Union institutions. These points, as well as the point overlooked by the Court – whether the claimed positive obligation can be established on the basis of (EU) fundamental rights law – are discussed hereafter.

3.1. The Limited Scope of Application and the Limited Competences of the Union to Act to Protect Fundamental Rights Under EU Law

In its judgment on *X. and X.*, the Court mainly focused on answering the preliminary question of whether the claimed protection falls within the scope of application of EU law. In this particular case, another directly relevant question is whether there is a competence for the Union to take any actions in this field. This is explained further below.[20] Both questions are fundamental for determining whether a positive obligation can be recognised under EU law.[21]

At first sight, the Court seems to provide some convincing reasons for its decision to exclude the situation of the case from the scope of application of the Charter.[22] The applicants were not really seeking to obtain visas with a limited duration of ninety days. They wanted to apply for asylum in Belgium and obtain a more permanent right of residence. The Visa Code only establishes

19 Opinion of Advocate-General Mengozzi to Case C-638/16, para. 3.

20 Essentially, since positive obligations require *actions* to be taken by public authorities, the question of whether the EU has a competence to take such actions becomes relevant. After all, Article 5(2) of the TFEU determines that the EU can only act within the limits of the competences which have been conferred to it by the Member States to achieve its objectives.

21 See further Beijer 2017 (note 3), Chapters 8 and 9.

22 The provisions of the Charter are addressed to the Member States when they are 'implementing Union law', according to Article 51(1) of the Charter.

uniform rules for a visa with a short duration (with a maximum of three months) and therefore does not apply to this situation.[23]

In its judgment, the Court did not first set out or refer to the main principles in order to determine when the fundamental rights laid down in the Charter are applicable. The Court has previously established that the fundamental rights of the Charter must be complied with when 'national legislation falls within the scope of European Union law'.[24] This encompasses a quite broad scope of application of the Charter's rights.[25] Taking this into account, it could be convincingly argued that the situation in *X. and X.* does fall within the scope of application of the Charter. The Belgian authorities had directly based their decision to refuse the visas on one of the grounds for refusal listed exhaustively under the Visa Code.[26] The Visa Code indeed contains a clear obligation on the Member States to refuse a visa if there are reasonable doubts as to, *inter alia*, the intention of the applicant to leave the territory of the Member States before the expiry of the visa for which they applied.[27] The Belgian authorities had used this particular ground for its refusal and also notified the applicants thereof by using the standard form that is expressly to be used on the basis of the Visa Code.[28] Judging by these actions, the Belgian authorities clearly seemed to be acting as the so-called 'agents of EU law', which would mean that they were bound to protect the rights laid down in the Charter. The Advocate General and many commentators on this judgment have similarly argued that the Court should have established that the situation of *X. and X.* falls within the scope of application of the Charter.[29]

In accommodating any positive obligation under EU law, it is also relevant, however, to determine what kind of competence a Member State exercises under EU law when it acts within the scope of application of the Charter. For the most part, the Visa Code exhaustively regulates the procedures which Member States must follow regarding the applications for short-term visas. It specifically

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23 See Article 1(1) of the Visa Code.

24 Case C-617/10, 26 February 2013, *Åkerberg Fransson*, para. 21. See also Case C-206/13, 6 March 2014, *Siragusa*, para. 20.

25 See further on this issue D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 50 *Common Market Law Review* (2013), pp. 1267-1304.

26 This was noted in the Opinion of Advocate General Mengozzi to Case C-638/16, para. 49.

27 Article 32(1)(b) of the Visa Code.

28 See Article 32(3) and Annex VI of the Visa Code.

29 See the Opinion of Advocate General Mengozzi to Case C-638/16, paras 43-70; and see J. de Coninck and M. Chamon, 'Geen recht op tijdelijke visums voor Syrische vluchtelingen' [No right to temporary visas for Syrian refugees], *SEW* 2017, pp. 382-387. A different issue not discussed in this article is whether the Charter would territorially apply in this case since applications were lodged outside the territory of the Union. The Advocate General had argued that unlike the applicability of the ECHR, the applicability of the Charter is not conditional on a territorial criterion. See paras 89-99.

provides that Member States shall exceptionally issue a visa with limited territorial validity on the basis of humanitarian grounds because of reasons of national interest or international obligations.[30] By referring to 'reasons of national interest or of international obligations', the EU legislature expresses that this matter is not exhaustively regulated under EU law. The Visa Code does not specifically harmonise the substantive matters of humanitarian situations. The Court has accepted in other cases that Member States may still enjoy sovereign powers under EU law, even when there are clear substantive connections to certain EU Directives or Regulations.[31] In its case law on the applicability of the Charter, the Court has also held that Member States may still apply national fundamental rights standards as long as the primacy, unity and effectiveness of EU law are thereby not compromised.[32]

By expressing those or similar considerations in its judgment on *X. and X.*, the Court could have thus decided differently and stress the discretionary powers of the Member States in the exercise of EU law. A clear substantive obligation with which Member States would need to comply is not provided for in the Visa Code. Whether a specific obligation can be deduced from provisions of the Charter or from international law instruments is a different question that remains to be answered (see section 3.3).

3.2. The Division of Competences Between the Court and the Union Institutions

In its judgment on *X. and X.*, the Court further focused on the legislative prerogative of the Union's institutions. It did so by pointing out that the EU legislature has not yet adopted any measure on the basis of Article 79(2)(a) of the TFEU regarding residence and visas on humanitarian grounds. This provision contains the legal basis for acts to be adopted regarding the conditions governing the issuing of long-term visas and residence permits to third country nationals. As with any potential extensive interpretation of EU law by the Court, tension will arise in relation to the political institutions of the EU. Recognising a positive obligation under EU law might indeed lead to that.[33] The horizontal division of power between the Court and political institutions forms a legitimate consideration to take into account for the Court in determining whether it can recognise a positive obligation. In this case, the issue at stake has clear political, economic and social implications and may be addressed

30 Article 25(1)(a) of the Visa Code.

31 See Case C-333/13, 11 November 2014, *Dano*, paras 87-91; and Joined Cases C-446/12 and C-449/12, 16 April 2015, *Willems and Others*, para. 47.

32 Joined Cases C-411/10 and C-493/10, 21 December 2011, *N.S. and Others*, paras 65 and 68; and Case C-399/11, 26 February 2013, *Melloni*, para. 60.

33 See Beijer 2017 (note 3), pp. 151-156.

better by political institutions. The Court has expressed on various occasions the discretionary powers of the political institutions on political, economic, social and technical questions in its case law as well.[34]

That said, the Court has also on various occasions decided to fill certain gaps left by the EU legislature. For example, the Court has been willing to establish several procedural standards on the basis of fundamental rights considerations.[35] Specifically in the area of asylum law, the Court has further recognised in *Abdida* that Member States have to make provision for the basic needs of a third country national who suffers from a particularly serious illness while awaiting the appeal of a transfer decision.[36] The effective protection of the principle of non-refoulement and the right to effective judicial protection required that such basic needs must be provided. The EU legislature had not addressed that very specific matter.

It may thus be expected, in some cases, that the Court would be willing to formulate certain positive obligations. However, most probably, such obligations would have to bear significantly less political implications than the one at issue in *X. and X.* The Visa Code is far from clear on which obligations the Member States must fulfil with respect to humanitarian situations, as has already been explained above.[37] The Court was asked to formulate a positive obligation which did not find a strong basis in secondary EU legislation. The positive obligation would therefore acquire an 'autonomous nature', while most positive obligations in its case law are of a procedural and either a supportive nature or intrinsic nature, meaning that such positive obligations have a relatively clear basis in the obligations already laid down in EU secondary legislation or in the relevant provision of the Charter itself.[38] Autonomous positive obligations are, however, much more difficult for the Court to define due to the division of competences between the Union's political institutions.

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34 Cf. e.g. Case C-356/12, 22 May 2014, *Glatzel*, paras 52 and 64; and Case C-491/01, 10 December 2002, *British American Tobacco Investments and Imperial Tobacco*, para. 123.

35 For various examples see Beijer 2017 (note 3), pp. 270-271.

36 Case C-562/13, 18 December 2014, *Abdida*, paras 59-62. See more on this case and for other examples M. Beijer, 'Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine', 2 *Review of European Administrative Law* (2015), pp. 127-150.

37 See Article 13 of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals [*OJ* 2008, L 348/98].

38 A typology of autonomous and intrinsic and supportive, as well as other types of positive obligations has been developed by Van Kempen, see P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten: over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten* [Repression by human rights: on positive obligations to apply criminal law to ensure fundamental rights] (Nijmegen: Wolf Legal Publishers 2008).

3.3. Further Reflections: The Establishment of the Existence of a Positive Obligation

In its judgment, the Court did not examine whether (international) human rights law recognises a positive obligation of States to take further actions in order to protect the rights of refugees. It is argued here, that the Court overlooked an important argument in its judgment. To determine whether there is scope for recognising certain positive obligations under EU law, it is also necessary to have clarity over the actual content of the obligation at stake and the type of measures that would be required to fulfil such an obligation.

In *X. and X.*, the applicants asked of, as phrased by the Advocate General, '(...) a legal access route to the right to international protection on the territory of the Member States (...)'.[39] The positive obligation would thus entail measures to regulate the entry of refugees into the territory of the Member State. It would include a specific remedy, accessible in the third country, that has the potential for refugees to secure legal access to one of the Member States in the EU. Such remedies are not yet available in the Member States in the sense that the positive obligation would warrant changes to the Member States' policies and organisational structures in order to allow refugees in third countries to lodge applications for asylum there. It would clearly require the Member States to take further measures to ensure the protection of the fundamental rights of refugees.[40]

The Advocate General finds a basis for this kind of positive obligation in Article 4 of the Charter under certain conditions, namely '(...) when there are substantial grounds to believe that the refusal to issue the visa will have the direct consequence of exposing persons seeking international protection to torture or inhuman and degrading treatment (...)'.[41] The conditions seemed to be fulfilled in *X. and X.*, as the applicants were residing in war-torn Syria. The Advocate General pointed out the particularly grave circumstances faced by residents of that country, which seem to justify the conclusion that a positive obligation for the Member States to ensure legal entry in this case would exist.

The prohibition of torture and inhuman and degrading treatment, along with the right to life, may provide a strong basis to recognise positive obligations, arguably because of their absolute nature.[42] States cannot justify the limitations

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39 Opinion of Advocate-General Mengozzi to Case C-638/16, para. 6 and, continuing in para. 9 'that legal access route already exists, namely that of Article 25(1)(a) of the Visa Code'.

40 This positive obligation is thus also closely linked to the negative obligation for the protection of fundamental rights. Distinguishing between a negative and positive obligation may not be very easy. The case law of the ECtHR has indeed been criticised for that reason, see D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London: Routledge 2012), pp. 69 ff.

41 Opinion of Advocate-General Mengozzi to Case C-638/16, para. 3.

42 The absolute nature of this fundamental right has also been recognised by the Court, see e.g. Case C-578/16, 16 February 2017, *C.K. and Others*, para. 59. Further fundamental rights provisions that were relevant to this case were Article 1 (human dignity), Article 2 (the right to life), Article 18 (the right to asylum), and Article 24(2) (the child's best interests) of the Charter.

of such absolute rights. The ECtHR has also developed quite detailed types of positive obligations on the basis of the corresponding rights laid down in the ECHR.[43] So far, however, the specific positive obligation that was claimed in *X. and X.* has not been recognised by other international courts on the basis of fundamental rights law. This may be due to the issuing of a humanitarian visa being considered as only one of the options that States may choose to effectively protect the fundamental rights of refugees. Other options, which are currently often put forward, include providing for protection close to the region of the country of origin of refugees. Positive obligations have a so-called alternative structure, which means that they can always be fulfilled by different means, even if related to the protection of absolute fundamental rights.[44] According to the Advocate General, there were no real alternatives for the applicants other than seeking refuge in one of the EU Member States.[45] According to some human rights observers, the situation in the countries neighbouring Syria had become untenable and did not provide for any real alternative for the applicants to be settled. Whether there are indeed alternatives for such refugees, other than to apply for asylum in one of the Member States, is an important question which is often not specifically addressed by the political institutions of the Member States. Answering this question requires very careful consideration of the alternatives available. It may be debatable whether the Court would have had sufficient information to be able to provide the answer. In the case law of the ECtHR, it has further been recognised that the development of positive obligations is especially limited in cases involving social and economic obligations which could impose a disproportionate and impossible burden on States.[46] Considering the possible implications of the recognition of the suggested positive obligation, it would be quite a bold step for the Court to accept that there is a positive obligation for States to issue a humanitarian visa to refugees to ensure respect for their fundamental rights.[47]

On the basis of the foregoing, it is argued that the prohibition of torture or inhuman and degrading treatment did not provide a sufficient basis as yet for the establishment of the specific positive obligation of which the applicants in *X. and X.* claimed. This might have indeed informed the Court when reaching

43 See e.g. ECtHR 28 October 1998, *Osman v. the United Kingdom*, no. 23452/94, paras 115-116.

44 See Klatt, pp. 695-696. Positive obligations can be fulfilled by several means. The ECtHR has also held that positive obligations are not the same as negative obligations, which are of results to be achieved, see ECtHR 21 June 1988, *Plattform 'Ärtze für das leben' v. Austria*, no. 10126/82, para. 34. In relation to absolute fundamental rights, see ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, para. 96.

45 Opinion of Advocate General Mengozzi to Case C-638/16, para. 157.

46 See e.g. ECtHR 28 October 1998, *Osman v. the United Kingdom*, no. 23452/94, para. 116; and ECtHR 18 January 2001, *Chapman v. the United Kingdom*, no. 27238/95, para. 92.

47 For a more detailed analysis on the establishment of positive obligations under the ECHR, see Beijer 2017 (note 3), pp. 52-54 and 63-69.

its judgment. After all, fundamental rights arguments were put forward in the opinion of the Advocate General in this case. If the Court would have included its own fundamental rights arguments in its judgment, it could have provided a more realistic picture of the arguments made by the applicant in this case, and it could have still emphasised the broad discretion that Member States enjoy to ensure protection of the said fundamental rights in terms of the actions they may take (see also section 3.1). The Court would then have at least paid some attention to the dire situation of the applicants, while showing that there are still limited grounds for imposing such a clear positive obligation on the Member States under international fundamental rights law. It is unfortunate for that reason that the Court decided not to develop this discussion on the scope for the protection of fundamental rights in this case. Instead, the Court used quite formal arguments in its judgment for which it has been heavily criticised.[48] By doing so, the Court has not provided sufficiently convincing answers to the important questions that were at issue in the case of *X. and X.*

4. Conclusions

The scope for developing positive obligations under EU law has often been regarded as very limited. The Court's judgment in *X. and X.* confirmed it. When recognising positive obligations within the scope of EU law, the specific characteristics of EU law need to be taken into account, including the limited scope of application of fundamental rights, the limited competences of the EU and the division of power between the Court and the political institutions of the EU. This article has argued that the Court's reasoning for rejecting the positive obligation at issue in this case is not fully convincing. The Court's decision to exclude the situation from the scope of application of the Charter's rights is somewhat hard to reconcile with its case law on the broad scope of application of the Charter. Moreover, while this article concurs with the outcome reached by the Court, that is, the refusal to recognise the positive obligation in the case discussed, it criticises the Court for using only very formal arguments for this decision. The Court hardly paid attention to fundamental rights arguments and the dire situation of the applicants. Taking into account the general principles which have been developed in the case law of the ECtHR, it would be difficult to accept the specific positive obligation that was claimed in *X. and X.* By engaging in this human rights debate, the Court could have made its

48 See G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht Journal of European and Comparative Law* (2013), pp. 168-184.

judgment much more convincing. The Court's very formal and quite rigid reasoning in its judgment on this case has made the outcome a greater disappointment than needed.