

The Canada-Czech Republic visa dispute two years on

Implications for the EU's Migration and Asylum Policies

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Abstract

This paper critically examines the policy implications of the ongoing Canada-Czech Republic visa dispute for the founding principles of the EU's immigration and asylum policies, notably those of reciprocity and solidarity. It addresses the main challenges posed by the unilateral reintroduction of visa requirements for nationals of the Czech Republic for the EU's common visa policy, and for the fundamental rights of European citizens who belong to vulnerable and excluded groups, i.e. Roma, in search of international protection. The new Commission proposal on a visa safeguard clause for suspending visa liberalisation will be also critically examined in this context.

The paper argues that the EU-Canada visa controversy reveals several pitfalls for the successful pursuit of EU foreign policy in Justice and Home Affairs, as well as for the legitimacy of Europe's immigration and asylum policies. It concludes with a set of policy recommendations for improving EU-Canada cooperation in the fields of migration and asylum that aim to facilitate the legitimacy, solidarity and fundamental rights compliance of current and future cooperation frameworks.



This work was prepared as part of a project on Migration and Asylum in Europe and EU-Canada Relations, funded by the European Commission, FPI.4 - Public Diplomacy and Election Observation, Service for Foreign Policy Instruments. The project studies EU-Canada cooperation on migration and asylum policies. It aims at providing a better understanding of the conceptual, political, sociological and legal elements and dilemmas characterising the development of common European public responses to these issues, and their implications for the relationship between liberty and security in EU-Canada relations.

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1. Introduction

In July 2009, Canada unilaterally reintroduced a temporary resident visa (TRV) requirement for nationals of the Czech Republic. The Canadian authorities explained this measure as an attempt to limit the increase in the number of asylum applications by Czech nationals of 'Roma origin'. This was not the first time that Canada had lifted and then reintroduced TRV for Czech nationals due to a surge in asylum claims. A similar situation occurred back in the 90s when the Czech Republic became a member of the European Union (EU).¹ What is different this time is that the Czech Republic not only holds full Union membership, but also participates in the emerging EU immigration policy, comprising a common European short-term visa regime founded on the principles of reciprocity and solidarity. So this is the first time that a third country whose nationals enjoy visa-free travel to the EU has reintroduced a visa requirement for the nationals of a member state of the European Union.

The 2009 Canada-Czech Republic visa dispute has in this way exerted wider and still unresolved consequences for the EU-Canada partnership, which go beyond Area of Freedom, Security and Justice (AFJS) matters. Indeed, the issue touches upon other foreign affair (economically-focused) domains, such as trade in goods and services in the proposed Comprehensive Economic and Trade Agreement (CETA),² and the wider (partnership agenda) framework agreement to outline future EU-Canada cooperation.³ The case has also revealed a number of challenges, indeed dilemmas, regarding the premises and principles guiding the EU's immigration and asylum policies.

The first dilemma is that the reintroduction of the TRV obligation to nationals of an EU member state breaches 'the principle of reciprocity', which is a central component of the EU's common

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¹ TRV requirements for Czech nationals were first lifted in April 1996 and then reintroduced in October 1997. The visa obligation was eventually lifted on 31 October 2007, following the Czech Republic's accession to the EU in May 2004. European Commission (2008), Fourth Report from the Commission to the Council and the European Parliament on certain third countries' maintenance of visa requirement in breach of the principle of reciprocity, COM (2008) 486 final/2, Brussels, 9.9.2008, p. 7.

² For more information on CETA, see: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?view=d>. See also the European Commission and the Government of Canada, Joint Study, Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership, (http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EU-Canada_Joint_Study-Introduction_Executive_Summary.pdf).

³ See EU-Canada Partnership Agenda, EU-Canada Summit, Ottawa, 18 March 2004 (http://eeas.europa.eu/canada/docs/partnership_agenda_en.pdf).

visa policy and which means applying to the nationals of third countries the same visa requirements that they apply to EU nationals.⁴ Following Canada's reintroduction of the TRV requirement, the Czech Republic triggered the EU's reciprocity mechanism by notifying the Council and the European Commission of the situation and asking for the adoption of appropriate measures to restore reciprocity in order to "to reassure [people] that all EU citizens on one side and the citizens of Canada on the other side [would] enjoy the same reciprocal regime when crossing the respective borders".⁵ The case also led to debates about making the current reciprocity mechanism 'more efficient' by automatically restoring visa requirements to nationals of the third country in question.⁶

What have the responses been so far at EU level? The reciprocity mechanism has in fact not been applied. The Council delivered a political response by issuing a general expression of solidarity and support from the other member states to the Czech Republic.⁷ The European Commission has so far reacted by favouring a bilateral political arrangement through a series of (closed-door) expert meetings (the Canada-Czech Republic Experts Working Group (EWG) between the two states aimed at the adoption of a set of measures to establish the necessary conditions for lifting the TRV obligation.⁸ The result of these talks has so far been a visit by Canadian experts to the Czech Republic at the end of 2010 to back up the preparation of a country report that will be part of the review of their visa policy towards the Czech Republic. The outcome of these talks is not yet known. The European Parliament has been quite active in the Canada-Czech Republic visa affair. It has raised concerns about the negative repercussions of the unequal treatment given to Czech citizens for the future ratification of the CETA and emphasised the need to apply equivalent retaliatory measures if the case is not resolved soon.⁹

In the meantime, in May 2011, the European Commission presented a new legislative initiative, currently under negotiation within the Council, amending the Regulation listing the countries whose nationals are required to be in possession of visas to enter the EU.¹⁰ This proposal suggests that the efficiency of the reciprocity mechanism could be improved by a visa safeguard clause for the EU to suspend visa liberalisation in the event of 'urgent' circumstances, such as an increase of asylum applications from nationals of a third country. The initiative appears to be

⁴ Recital 1 of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement (OJ L/1 81 of 21.3.2001).

⁵ M. Vicenová (2009), Notification by the Czech Republic concerning visa reciprocity, Ambassador, Permanent Representative of the Czech Republic to the European Union, 14 July 2009 (OJ C 184/2, 6.8.2009).

⁶ "In this context, it should be mentioned that a suggestion has been made by a Member State to modify the current reciprocity mechanism in order to make it more efficient. According to the suggestion, the Commission could be obliged to present a proposal, within a very short period of time, for a temporary restoration of a visa requirement for nationals of a third country, which does not lift the visa obligation within a period of no longer than 12 months of its introduction for a Member State". Page 5 of the European Commission, Proposal for a Regulation amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final, Brussels, 24.5.2011.

⁷ Press Release, 3008th Council Meeting, Justice and Home Affairs, 8920/10 (Presse 88), Brussels, 23 April 2010, p. 7.

⁸ European Commission, Sixth Report on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity, COM(2010) 620 final, Brussels, 5.11.2010.

⁹ European Parliament, Written Declaration, on the implementation of the principle of reciprocity on visa exemptions in relation to Canada and the United States of America, 0008/2011, 7.3.2011.

¹⁰ European Commission, Proposal for a Regulation amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final, Brussels, 24.5.2011.

surprisingly close to the Canadian visa policy approach of putting obstacles in the path of people who genuinely have a fear of persecution in their country of origin.

The second issue of concern stemming from the visa controversy has indeed been indeed that the linking of visa obligations as a means of creating barriers for asylum seekers (who may be refugees) stands at odds with the United Nations 1951 Convention relating to the status of refugees (the Geneva Convention) and its 1967 Protocol.¹¹ The Canada-Czech Republic affair has raised important concerns about asylum and the fundamental rights of European citizens belonging to particularly vulnerable and excluded groups, i.e. Roma.

While the visa question has been at the forefront of official policy discussions, the grounds of the dispute have much wider implications for the rights and treatment of Czech nationals of Roma ethnicity in the EU and the overall legitimacy of the EU's asylum system. The fact that the Canadian Immigration and Refugee Board (IRB) recognised Czech Roma as refugees,¹² even if the absolute number has been relatively small, poses sensitive questions about the practical delivery of fundamental rights to minorities in Europe. It also undermines one of the foundations of the EU asylum regime. The so-called '1999 Aznar Protocol'¹³ is based on the assumption that each member state shall be regarded as a 'safe country of origin' by the others with regard to asylum applications made by their nationals. Indeed, the vulnerability pertaining to the situation of Roma in Europe has attracted much attention among academia, civil society, international and European human rights organisations and some EU institutional actors. The census and evictions of Roma people carried out in Italy following the entry into force of the so-called "security package" and the French expulsions of Roma people (including Romanian citizens) in the summer 2010 are other (not isolated) illustrations that fundamental rights cannot be taken for granted in the European Union.¹⁴

This Policy Brief is based on the research conducted within the project "Migration and Asylum in Europe and EU-Canada Relations".¹⁵ It synthesises and updates the main findings originally reached in the paper published in 2010 by the Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS) entitled "The Canada-Czech Republic Visa Affair: Assessing visa reciprocity and fundamental rights in the European Union."¹⁶ Section 1 of Brief outlines the treatment of Roma Czech nationals in the 2009 Canada-Czech Republic affair. Section 2 and 3 outline the shortcomings of the common European asylum system and common visa policy. The new Commission proposal on a visa safeguard clause for suspending visa liberalisation will be also critically examined. The paper concludes with a set of policy

¹¹ Refer to Articles 31-33 of the Geneva Convention.

¹² Canada also receives and recognises asylum to Hungarian citizens of Roma origin. Refer to http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12393.htm#P183_26798.

¹³ Protocol (24) on asylum for nationals of member states of the EU, OJ C 83/305, 30.3.2010. The Protocol was originally introduced by the Treaty of Amsterdam in 1999.

¹⁴ T. Hammarberg (2011), *Human Rights in Europe: No grounds for complacency*, Council of Europe: Strasbourg. M. Merlino (2009), *The Italian (In)Security Package – Security vs. Rule of Law and Fundamental Rights in the EU*, Challenge Research Paper No. 14, CEPS, March (<http://www.ceps.eu/files/book/1809.pdf>).

¹⁵ The project, which is funded by the Foreign Policy Instruments Service (FPIS) of the European Commission, studies EU-Canada cooperation on migration and asylum policies. It aims at providing a better understanding of the conceptual, political, sociological and legal elements and dilemmas characterising the development of common European public responses to these issues, and their implications for the relationship between liberty and security in EU-Canada relations. For more information, see: <http://www.ceps.eu/content/eu-canada-project-migration-and-asylum-europe-and-eu-canada-relations>

¹⁶ See A. Eggenschwiler, *The Canada- Czech Republic Visa Affair: Assessing visa reciprocity and fundamental rights in the European Union*, CEPS Paper on Liberty and Security in Europe, CEPS, November 2010.

recommendations for improving EU-Canada cooperation in the fields of migration and asylum to facilitate the legitimacy, solidarity and fundamental rights compliance of current and future frameworks of cooperation.

2. The treatment of Roma and the Canada-Czech Republic visa affair

One of the central questions in the 2009 Canada-Czech Republic visa affair continues to be ‘who’ are the main target groups of the public policy measures applied by the Canadian authorities. The legal category under which these people fall is of central importance for two main reasons: first, it determines the actual degree of legal protection and rights that these individuals are entitled to in light of European and international (human rights) law and EU law. Second, it sets the level of autonomy and margin of appreciation enjoyed by state authorities (both Canada and the Czech Republic) and the EU in the affair. The definition of who is addressed by the law has therefore been a fundamental component in the high-level official debates that have taken place since the beginning of the visa dispute in 2009 in attempts by authorities to justify the division of rights, benefits and entitlements of the individual travellers involved. The controversy dealt with people of ‘Roma’ origin holding Czech Republic nationality, and therefore benefiting from the status of European citizens.

One of the few common points of understanding between the Canadian and the Czech governments since the emergence of the case has been the constant questioning of the genuineness of the asylum applications submitted by Czech nationals of Roma ethnic origin. According to the Canadian Minister Kinney, the number of refugees claims abandoned or withdrawn by Czech nationals proves that many of these claims were submitted by ‘economic immigrants’ who wanted to bypass the Canadian immigration system.¹⁷ Moreover, as the Czech Republic is a “stable democracy and has robust protection for human rights”, the *prima facie* of any asylum claim was to be questioned.¹⁸ The Czech Republic authorities even argued that the main cause for the increase of refugee claims of Czech nationals should not be assessed from the perspective of human rights of Roma in the Czech Republic but in light of the *attractiveness* of the Canadian asylum system for economically motivated migrants.¹⁹ The Czech authorities also pointed to unemployment and the sense of insecurity among the Roma (due to the rise in right-wing extremism) as additional reasons for their exodus.

The Canadian government’s framing of the situation, reinforced by the Czech Republic, was in direct conflict with the assessment of the Canadian Immigration and Refugee Board (IRB), which recognised – as the two tables below demonstrate – Czech Roma claiming asylum in Canada as refugees.²⁰ Drawing on the data of the Office of the United Nations High Commissioner for Refugees (UNHCR), in 2008, the IRB accepted 84 asylum claims by Czech nationals, out of the 195 cases finalised, with a recognition rate of 43%. Similarly, in 2009, the

¹⁷ CBC News, Citizenship and Immigration Canada (CIC), News Release, “Canada imposes a visa on the Czech Republic”, 13 July 2009, (<http://www.cic.gc.ca/english/departement/media/releases/2009/2009-07-13a.asp>).

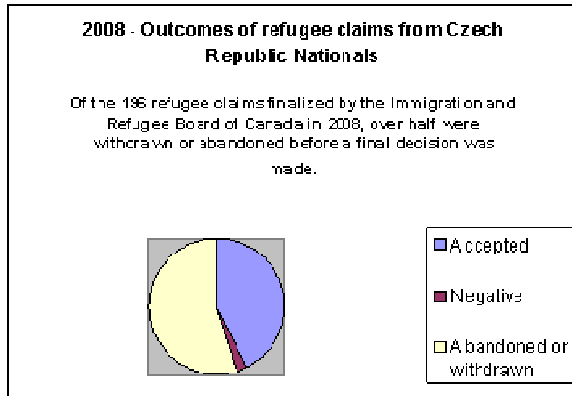
¹⁸ Opening remarks for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism *Balanced Refugee Reform*”, Citizenship and Immigration Canada, 8 April 2010 (<http://www.cic.gc.ca/english/departement/media/speeches/2010/2010-04-08.asp>).

¹⁹ European Commission (2009a), Report from the Commission to the Council on the re-introduction of the visa requirement by Canada for citizens of the Czech Republic, COM (2009) 562 final, Brussels, 19.10.2009, p. 7.

²⁰ The IRB is an administrative tribunal, independent from CIC and Canada Border Services Agency (CBSA), responsible for the decisions on immigration and refugee matters in Canada.

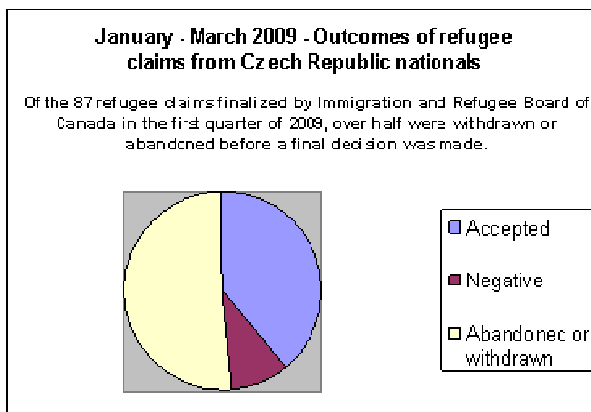
IRB accepted 90 asylum claims by Czech nationals, out of the 166 cases finalised, with a recognition rate of 54%.²¹

Figure 1. Outcome of refugee claims from Czech Republic nationals (2008)



Source: Citizenship and Immigration Canada (CIC).

Figure 2. Outcome of refugee claims from Czech Republic nationals (January-March 2009)



Source: Citizenship and Immigration Canada (CIC).

The reintroduction of visas for Czech nationals is not just an obstacle for individuals in need of international protection to enter Canadian territory lawfully. There is a rich body of evidence and research on the contentious issue of the treatment of Roma more generally in Europe.²² Since the fall of the Berlin Wall in 1989 and the opening up of borders between East and West Europe, the situation of Roma both in their countries of origin and in other European countries has been politically divisive and practically intractable. Even in their countries of origin, the

²¹ UNHCR (2009), *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally-displaced and Stateless Persons*, Annex, Table 12, 16 June 2009, and UNHCR (2010b), *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally-displaced and Stateless Persons*, Annex, Table 12, 15 June 2010, (<http://www.unhcr.org/4a375c426.html>).

²² Refer to C. Cahn and E. Guild (2008), *Recent Migration of Roma in Europe*, Council of Europe Commissioner for Human Rights and OSCE High Commissioner on National Minorities, 10 December (http://www.osce.org/documents/hcnm/2008/12/37164_en.pdf).

Roma are often castigated as foreigners and immigrants. In the Canada-Czech Republic visa dispute the main discussion has been the extent to which these people are refugees. Many human rights actors at various levels have documented concerns about Roma minorities as victims of violence, racist attitudes and discrimination in key areas of social life.²³ In particular, and following the French expulsion of (Bulgarian and Romanian Roma in the summer of 2010,²⁴ the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stressed that prejudice against Roma is widespread in Europe and that “[...] sweeping and generalised statements about Roma from high level personalities tend to cement and deepen these prejudices”.²⁵ The numbers of judgements pronounced by the European Court of Human Rights in Strasbourg that condemn EU member states for permitting racial discrimination against Roma (Article 14 of the European Convention of Human Rights) have also been extensive.²⁶

Roma rights violations are taking place within a context of increased populist nationalism and anti-immigrant sentiment in many EU member states. Shocking examples of anti-Romani violence have occurred in countries such as the Czech Republic, Hungary and Slovakia in the last two years.²⁷ During 2007 – 2009 eight Roma were killed in those countries through racist violence.²⁸ The fears generated by this wave of violence have forced some Roma to seek protection in other countries inside and outside Europe. The fact that the EU asylum system does not accommodate EU nationals seeking asylum in other EU member states may be a factor pushing these people to apply for asylum elsewhere, for instance in Canada. This has not only included Czech Roma; 1,000 Hungarian Roma also sought protection in Canada during 2008 and 2009.²⁹ Since the late 90s, after having become an EU candidate, Czech Republic has been subject to increasing pressure to protect Roma rights and to improve their socio-economic conditions in society. However, despite some positive legislative and political initiatives the human rights situation of Roma in Czech Republic remains particularly fragile.³⁰

²³ For instance, according to a survey conducted by the EU Agency for Fundamental Rights in 2009, covering Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia, on average, 47% of all the Roma respondents indicated that they were victims of discrimination based on their ethnicity in the previous 12 months. See European Union Agency for Fundamental Rights (2009), Data in Focus Report – The Roma, EU-Midis, European Union Minorities and Discrimination Survey, 2009, p. 4.

²⁴ For more details on the Roma Affair in France refer to S. Carrera and A. Faure Atger (2010), *L'affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Paper on Liberty and Security in Europe, Centre for European Policy Studies, Brussels.

²⁵ T. Hammarberg (2010), “Recent rise in security discourse in Europe: The case of Roma”, Council of Europe Commissioner for Human Rights, Speech to the Parliamentary Assembly, Session 4 to 8 October (<http://www.statewatch.org/news/2010/oct/coe-roma-security.pdf>) and S. Carrera and A. Faure Atger (2010), *L'affaire des Roms – A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Paper on Liberty and Security in Europe, Centre for European Policy Studies, Brussels, September.

²⁶ See among others *Connors v. United Kingdom*, application 66746/01, 27.05.2004. See also *Stoica v. Romania*, application n. 42722/02, 04.03.08. *Moldovan and Others v. Romania*, Applications nos. 41138/98 and 64320/01, 30.11.2005. *D.H. and Others v. the Czech Republic*, Application no. 57325/00, 07.02.2006.

²⁷ See European Roma Rights Centre <http://www.errc.org>

²⁸ Parliamentary Assembly Council of Europe, Motion for a recommendation, “Roma asylum seekers in Council of Europe member states”, 15 October 2009 (<http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC12073.pdf>).

²⁹ For a study on Hungarian Roma asylum applications to Canada refer to J. Tóth (2010), *The Incomprehensible flow of Roma Asylum Seekers from the Czech Republic and Hungary to Canada*, CEPS Paper on Liberty and Security in Europe.

³⁰ M. Caparini (2010), *State Protection of the Czech Roma and the Canadian Refugee System*, CEPS Paper on Liberty and Security in Europe, Centre for European Policy Studies, Brussels, November, pp. 5-9.

The plausibility of persecution claims by Czech Roma cannot therefore be dismissed easily. The Canadian and Czech Republic governments' restrictive framings of the personal scope are rather unsatisfactory. The two possible solutions that Czech Republic proposed to Canada – to tighten the asylum system or to mutually recognise each other as 'safe countries of origin'³¹ – are based on false and inadequate assumptions. The unilateral re-imposition of the visa requirement on Czech nationals is not a suitable policy response to the issues at stake here.

3. The Common European Asylum System: Premises and shortcomings

The foundational principles and working arrangements characterising the Common European Asylum System (CEAS) might constitute another decisive factor in understanding the driving forces behind the departure of Czech Roma to Canada. The CEAS is based on the assumption that fundamental rights are always protected in the Union and that all EU member states shall be considered 'safe countries of origin' in asylum matters. The exclusion of the possibility for EU nationals to seek protection in any member state finds legal grounds in the Qualification Directive 2004/83/EC³² as well as the above-mentioned Protocol (24) on asylum for nationals of member states of the EU (the Aznar Protocol),³³ attached to the Treaty on the functioning of the European Union (TFEU).

The 'Qualification Directive', which establishes minimum common standards for the qualification and status of persons in need of international protection, limits its personal scope of application to third country nationals and stateless persons.³⁴ This limitation is highly questionable in light of Article 42 of the 1951 Convention Relating to the Status of Refugees (the Geneva Convention)³⁵ that excludes the possibility to apply any limitations as to who is to be regarded as a refugee to Article 1, which provides for the definition of refugee. Further, it appears to be in conflict with Article 3 of the Geneva Convention – which requires that the Convention is applied in non-discriminatory bases – and with Article 18 of the EU Charter of Fundamental Rights establishing 'the right to asylum'.

Similarly, the above-mentioned Protocol (known as the Aznar Protocol) provides that each EU member state shall be considered a safe country of origin by other member states. With the exception of Belgium, which has made a formal declaration of its intention to continue to examine each request for asylum by nationals of member states,³⁶ EU citizens who apply for asylum in another EU member state generally have their application classified as 'manifestly unfounded'. The Protocol is based on the assumption that all EU member states protect fundamental rights and freedoms. The fact that in several EU member states Roma still face violence and racial discrimination in key areas of social life such as education, employment, housing and health care shows that the presumption upon which the Protocol is based is wrong.

³¹ European Commission (2009a), op. cit., p. 7.

³² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12, 30.9.2004).

³³ OJ C 83/305, 30.3.2010. The 'Aznar protocol' came as a result of the pressures of the former Spanish government (during the negotiations of the Amsterdam Treaty) to impede Basques of Spanish nationality to apply for asylum in other EU member states.

³⁴ Recital 6 and Article 1.

³⁵ See (<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>).

³⁶ Declaration by Belgium to the Protocol to the Treaty of Amsterdam on asylum for nationals of member states of the European Union.

4. EU visa policy: A test for the principles of reciprocity and solidarity

The Canadian-Czech Republic affair is not only impacting on the bilateral relations of the two countries, but also on external relations of the EU and its visa policy. The Commission has tried to act as Canada's main counterpart in this policy domain. Short-term visa policy is an EU competence and is part of its broader strategy on the management of EU external borders. Since the transference of competences in this field to the EU important steps towards a common visa policy have been taken: the adoption of a Schengen Visa Code, setting out common procedures for issuing visas;³⁷ the establishment of a 'black' or 'white' list to subject or exempt nationals of third countries to a short-stay visa when crossing the EU's external borders;³⁸ and the requirements to set up a EU reciprocity mechanism to react to countries whose nationals enjoy visa-free travel to the EU, which have made the nationals of one or more member states subject to the visa obligation.

Visa policy has been an important dimension of the broader EU-Canada cooperation in Justice and Home Affairs (JHA). Since the revisions of the reciprocity mechanism³⁹ in 2005, the achievement of visa-free travel for nationals of all member states has been one of the EU's main priorities in all EU-Canada summits. On the other side, Canada has argued that decisions on visa requirements are based on an assessment of the risks and benefits associated with the movement of a country's citizens, according to established criteria.⁴⁰

Despite the fact that TRV obligations for Bulgarians and Romanians are still maintained by Canada, it should be emphasised that significant progress has been made since the entry into force of the reciprocity mechanisms. After the 2004 enlargement, Canada lifted TRV for six member states: Estonia, Latvia, Hungary, Lithuania, Poland and Slovakia. The reintroduction of a visa requirement for Czech Republic's nationals represents a major setback, not only in the process of visa liberalisation, but also in the results of the broader EU-Canada cooperation on Justice and Home Affairs issues.

4.1 The reciprocity mechanism

Following the initiation of the EU reciprocity mechanism – starting with the Czech notification to the Council and the Commission of the new situation – the Commission reacted promptly to Canada's measure by facilitating a dialogue between the parties. In an ad hoc report presented to the Council on 19 October 2009, the Commission set out – under the threat of proposing the introduction of visas for holders of Canadian diplomatic and services passports – two conditions for Canada to implement by the end of 2009: first, the reinstatement of visa issuing facilities in Prague; second, the establishment of clear measures aimed at lifting the TRV obligation.

³⁷ Regulation (EC) No. 810/2009.

³⁸ Council Regulation (EC) No 539/2001 as amended by Council Regulation (EC) No 2414/2001 (OJ L 327/1, 12.12.2001), Council Regulation (EC) No 453/2003 (OJ L 69/10, 13.3.2003), *Act of Accession of 2003* (OJ L 236/718, 23.9.2003), Council Regulation (EC) No 851/2005 (OJ L 141/3, 4.6.2005), Council Regulation (EC) No 1791/2006 (OJ L 363/1, 20.12.2006), Council Regulation (EC) No 1932/2006 (OJ L 405/23, 30.12.2006) and Council Regulation (EC) No 1244/2009 (OJ L 336/1, 18.12.2009).

³⁹ Article 1(4)(a) of Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism (OJ L 141/3, 4.6.2005).

⁴⁰ Criteria: socio-economic profile; immigration violation rates; asylum claims; the integrity of travel documents; safety and security issues; border management; human rights; and bilateral relations.

The first condition was fulfilled by Canada on 21 December 2009; the second has been dealt with by the Canada-Czech Republic Experts Working Group (EWG),⁴¹ which includes representatives of the Commission (DG Home Affairs) and of the EU delegation to Canada. The EWG, which so far has met twice in Ottawa and twice in Prague, serves to create a regular venue for dialogue addressing the causes of Canada's reintroduction of TRV for Czech nationals and identifying the solutions to re-establish reciprocity. The parties agreed on the adoption of long-term measures (including better implementation of 'Roma integration policies' in the Czech Republic) and short-term measures aimed at addressing the current situation.

The entry into force of the Lisbon Treaty in December 2009 has extended the decision-making powers of the European Parliament in this area. It has taken a clear position in visa quarrels with Canada. First, it adopted a Resolution at the EU-Canada summit of 5 May 2010 in which it expressed its concerns regarding Canada's maintenance of TRV for three EU member states (Bulgaria, Czech Republic and Romania) and then called Canadian authorities to waive the requirement as soon as possible. Afterwards, on 8 March 2011, the Parliament adopted a declaration which "calls on the Commission and the Council to increase the political pressure on Canada ... for abolishing the visa regime for Czech citizens as well as ending other breaches of visa reciprocity towards citizens of Bulgaria and Romania".⁴² Furthermore, the Parliament linked the visa issue to the ongoing Canada-EU trade talks. The declaration expressly notes that "delay in the termination of the unequal status of Czech citizens could threaten the ratification of the Comprehensive Economic and Trade Agreement between the EU and Canada".

Even though the Commission activated the reciprocity mechanism promptly, the TRV obligation for Czechs has now been in place for two years and Canada has still not given any date for its lifting. However, it seems improbable that the Commission will go further by proposing to the Council the adoption of retaliatory measures against Canada. The risk of a rejection by the Council (acting by qualified majority) is too high for the EU executive. It is therefore more likely that the EU will manage to link the reestablishment of visa reciprocity with the ratification of the CETA, which is very important for Canada.

4.2 The transfer of ideas in international relations: The new Commission proposal on a visa safeguard clause for suspending visa liberalisation

The Canada-Czech Republic dispute has unexpectedly coincided with proposals in the EU itself to develop a similarly restrictive policy in its common visa regime. At the end of December 2010, France and the Netherlands submitted a joint document in which they called for the introduction of a safeguard clause into the Regulation 539/2001 (on visas) that would confer to the European Commission the possibility to rapidly suspend the visa waiver in specific circumstances.⁴³ What motivated this initiative was anxiety about the visa waiver regime offered to Albania and Bosnia-Herzegovina since November 2010 and the alleged increase of asylum applications to certain EU member states. The Commission presented an initiative in May 2011.⁴⁴ Article 1a, titled 'Safeguard Clause', stipulates that the safeguard (suspension)

⁴¹ European Commission (2009a), *op. cit.*, p. 8.

⁴² Restoration of reciprocity in the visa regime – solidarity with the unequal status of Czech citizens following the unilateral introduction of visas by Canada (<http://www.europarl.europa.eu/sides/getDoc.do?type=WDECL&reference=P7-DCL-2010-0089&language=EN>).

⁴³ Doc. 18212/10 VISA 311 COMIX 842.

⁴⁴ European Commission, Proposal for a Regulation amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final, Brussels, 24.5.2011.

clause will apply, as a temporary measure, in the event that one or more member states are confronted by “an emergency situation” which includes the following:

- (a) A sudden increase of at least 50%, over a six-month period, in the number of nationals of a third country listed in Annex II found to be illegally staying on the member states’ territory, in comparison with the previous six-month period;
- (b) A sudden increase of at least 50%, over a six-month period, in comparison with the previous six-month period, in the number of asylum applications from nationals of the third country listed in Annex II, for which the recognition rate of asylum applications was less than 3% over the previous six-month period;
- (c) A sudden increase of at least 50%, over a six-month period, in the number of rejected readmission applications submitted by a member state to a third country listed in Annex II for its own nationals, in comparison with the previous six-month period.

A member state that claims it is facing any of these situations will need to notify the European Commission and duly justify its claim by providing relevant data and statistics. The initiative leaves the final say to the European Commission, which will examine the notification delivered by the member state in light of the situation at national level and on the basis of reports carried out by Frontex (the EU external borders agency) and EASO (the European Asylum Support Office) and

within three months following receipt thereof, the Commission may adopt an implementing decision suspending the exemption of visa requirement for nationals of the third country concerned for a period of six months.

As stated by the Explanatory Memorandum,

the Commission shall take into account the number of Member States affected by the sudden occurrence of any of the situations listed in this proposal and the overall impact of them on the migration situation of the EU.

Moreover, before the end of the period of validity of the implementing decision the Commission and the Member State(s) concerned will submit a report to the European Parliament and the Council.

On the asylum issue, EUROSTAT’s statistics indicate that the top four countries of origin of asylum-seekers in the EU in 2009 are Afghanistan, Russia, Somalia and Iraq.⁴⁵ Asylum-seekers from these states cannot be sent back to their country of origin. Taking the example of Somalis, the European Court of Human Rights has held that return to Mogadishu would currently constitute a breach of the prohibition on torture, inhuman or degrading treatment.⁴⁶ If member state authorities do not grant Somalis certain documents (which is the case for a number of member states), then they remain irregularly on the territory. Thus for the first emergency situation regarding visas is problematic. Should the police target irregular migrants they will pick up Somalis in this situation, but the fact that there may be an increase in the number of Somalis counted as ‘irregularly present’ in no way changes the fact that they cannot be return to Somalia as they are in danger of torture, inhuman or degrading treatment.

Regarding the second emergency situation, as recognition rates for asylum seekers from the same country of origin in different member states remains highly uneven, punishing people from a country on the basis of recognition rates is suspect. Where there is a rise in asylum

⁴⁵ http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=Asylum_statistics&printable=yes

⁴⁶ CASE OF SUFI and ELMI v. THE UNITED KINGDOM (*Applications nos. 8319/07 and 11449/07*) 28 June 2011.

applications, great care must be taken to ensure that the protection needs of individuals are met. The Arab Spring has resulted in very significant refugee movements on the southern shores of the Mediterranean. The EU response has been weak to say the least.⁴⁷ The differential recognition rates of refugees from the same countries in different EU member states makes recognition rates by definition suspect as a ground for policy making in any field. The principle, however, is critical. Flight to seek protection must not be instrumentalised as an excuse to reinforce visa obligations on countries of origin. Instead the two subjects need to be treated separately and in the separate policy spheres of visa and asylum to which they belong.

The third emergency situation put forward by the Commission's proposal also causes problems. There is still a paucity of information about the operation of readmission agreements.⁴⁸ From what information is available it would appear that member states do not always respect the terms of readmission agreements and in fact seek to send people to countries with which they have signed agreements on terms outside those contained in the agreement. Thus, to punish a third state for insisting on the respect for an international agreement by subjecting its nationals to a visa requirement, which the third emergency situation suggests, does not indicate a proper application of public international law.

More generally, two questions need to be raised with regard to this Commission proposal: the initiative has been named 'visa safeguard clause', but 'what' and 'who' would be 'safeguarded' by this measure? Further, it could be argued that the proposal has negative implications for the EU's 'good faith' in international relations. It implies punishing everyone where state failure affects a few individuals. On the term 'emergency situations': is this not a dubious concept? The proposed system diminishes legal certainty as it would permit the EU to promptly re-introduce visa requirements on the basis of circumstances beyond travellers and asylum seekers' control.

5. Conclusions and policy recommendations

The 2009 Canada-Czech Republic visa dispute does not reflect well on any of the actors involved but demonstrates a narrowness of perspective that is regrettable. In particular, it reveals several pitfalls for the successful pursuit of EU foreign policy in Justice and Home Affairs, not least for the legitimacy of Europe's immigration and asylum policies. While some actors have been most commendable in their approaches, such as the European Parliament, others, i.e. certain member states, have shown a lack of vision. The EU-level responses to the case have remained at the political level, with the European Commission fostering bilateral political arrangements that have so far not been conducive to achieving an internationally acceptable solution to the case. The Commission's new initiative on a 'visa safeguard clause for suspending visa liberalisation' demonstrates that the Union does not cavil at putting forward dubious policy options while criticising other countries for the very same options.

On the basis of our research, the following policy recommendations are pertinent:

Regarding the Roma:

- A. The EU needs to recognise that EU nationals of Roma ethnicity are suffering discrimination and persecution in some EU countries of such seriousness as to qualify them for refugee status outside their home state. There is no point denying or seeking to

⁴⁷ S. Carrera (2011), *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration*, CEPS Paper on Liberty and Security in Europe.

⁴⁸ J-P. Cassarino (2010), *Readmission Policy in the European Union*, Study, European Parliament, DG Internal Policies, Brussels (<http://www.europarl.europa.eu/activities/committees/studies/searchPerform.do;jsessionid=41B1D7DB4DFE1C2C0C27EEE0D4AA798F.node2>).

ignore the evidence of the Canadian IRB: our close allies are providing international protection to EU citizens because EU states are unable or unwilling to protect them. Only once this reality has been recognised can the EU seek solutions.

- B. In light of the above, if the EU does not want to recognise nationals of the member states as refugees within the EU (the principle of the Aznar Protocol) then fuller solidarity needs to be extended to EU nationals leaving their state of origin to reside in another member state. If EU citizenship is supposed to compensate individuals for their removal from the possibility of being refugees, then full social solidarity (and social benefits) and protection from expulsion must be available to all citizens in all member states. If persecuted Roma who are also EU citizens flee their state of nationality, they need to be able to enjoy protection as citizens with full social rights in other member states.
- C. If the EU is unwilling to give real social solidarity rights to EU citizens when they move, including protection against expulsion, the only other option is to abolish the limitations of the personal scope of the *Qualification Directive* (currently applicable only to TCNs and stateless persons) and allow EU nationals to seek asylum in any other member state. This may be an unwelcome recommendation but it is the only option if the EU does not grant citizenship rights as an alternative to refugee status for those fleeing persecution.
- D. Within the EU, the plight of many Roma must be taken seriously. Only once member states take action to provide protection to Roma against racial violence and to ensure equal treatment will Roma no longer need to flee persecution in their home countries.

Regarding the EU as an international actor:

- E. The European Commission should continue its active role in the negotiations with Canada aimed at restoring the principle of reciprocity. An active European Commission is central for the EU to be perceived externally as a 'single actor' in this policy domain. In light of the fact that TRV obligations for Czech Republic have been in place for two years now and that Canada has not yet given any indications as to the date of its lifting, the Commission should consider increasing pressure on Canada. There are two main instruments that could be used: first, the proposal to the Council of the adoption of temporary measures against Canada; and second, linking more closely the 'visa affair' to dossiers in other wider policy agendas where Canada has particular interests, such as the Comprehensive Economic Trade Agreement (CETA).

The suitability of the first option would depend on the answers that Canada will be able to give in the coming months and on the political climate in the Council (a rejection would be seen as a lack the solidarity of other EU member states and would have serious implications for the EU both internally and externally). The second option, already called for by the European Parliament, may give the Czech Republic and the EU leverage in the negotiations without deeply undermining member states' bilateral relations with Canada.

- F. The Commission proposal on a visa safeguard clause for suspending visa liberalisation should be seriously reconsidered. The 'connecting factor' related to the increase in asylum applications should be deleted from the initiative as it constitutes an effective obstacle for asylum seekers to have access to protection and justice in Europe. Such (politically-driven) initiatives put EU visa policy in a more difficult relationship with the EU's basic commitments on the fundamental rights of particularly vulnerable groups. They also send a confused message abroad to partner countries such as Canada in a context where the EU is expressing concerns about the adequacy of their immigration policy approaches and at the same time proposing them as a legitimate policy option of their own.