

Speakers' Contributions



THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE

SEMINAR FOR JUDGES
FOCUS ON CIVIL AND SOCIAL RIGHTS



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The Charter of Fundamental Rights of the EU in Practice

Seminar for Judges/ Focus on Civil and Social Rights

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Speakers' contributions 415DT103

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The Role of the Charter in the EU Legal Framework and its Relevance for National Legal Orders

Goranka Barać - Ručević

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- Protection in the domestic legal order
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I. Introduction

The historical background and objective

- Charter of Fundamental Rights – basic source of fundamental rights
- Adopted in October 2000
- Reflected the political position of Member States, but did not have any formal legally binding effect
- Binding legal value – after entry into force of the so-called Lisbon Treaty on 1 December 2009
- The main objective – to recognize fundamental rights explicitly and make them more obvious

I. Introduction

Overview of the contents

- Contains 50 guarantees classified in accordance with 6 different value ideals

STRUCTURE:

6 thematic chapters:

- Chapter I – Dignity (Art. 1-5)
- Chapter II – Freedoms (Art. 6-19)
- Chapter III – Equality (Art. 20-26)
- Chapter IV – Solidarity (Art. 27-38)
- Chapter V – Citizens' Rights (Art. 39-46)
- Chapter VI – Justice (Art. 47-50)

General provisions for interpretation and application of the Charter

- Charter VII (Art. 51-54)

II. Legal Value

The Treaty of Lisbon and the Charter

- Founding treaties are at the top of the hierarchy of legal norms and constitute the EU primary legislation
- The Treaty of Lisbon – signed 13 December 2007 in Lisbon (amendment to the Treaty on European Union and the Treaty Establishing the European Community)
 - The Charter of Fundamental Rights signed a day earlier
- Entered into force on 1 December 2009 after having been ratified by all Member States
- The Charter has the same legal value as the founding treaties (TEU, TFEU)
 - Does not constitute an integral part of the Treaty, but Art. 6 of the TEU addresses to the Charter and at the same time restricts its application

II. Legal Value

The Treaty of Lisbon and the Charter

Fundamental rights and the EU legal order:

Article 2 of the TEU also regulates the fundamental values and objectives of the Union:

respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

II. Legal Value

The Treaty of Lisbon and the Charter

Article 6 of the TEU

1. *The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter that set out the sources of those provisions.
2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*
3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

II. Legal Value

The genesis of the Charter

Fundamental rights form an integral **part of the EU legal order** of special significance (Nold, 1974):

- **Human dignity** (Casagrande, 1974);
- **Principle of equality** (Klöckner-Werke AG, 1962);
- **Prohibition of discrimination** (Defrenne v Sabena, 1976);
- **Freedom of association** (Confédération syndicale, Massa, etc., 1974);
- **Freedom of religion and belief** (Prais, 1976);
- **Protection of privacy** (National Panasonic, 1980);
- **Medical secrecy** (Commission v Germany, 1992);
- **Right to property** (Hauer, 1979);
- **Freedom to choose an occupation** (Hauer, 1979);
- **Freedom of trade** (Intern. Handelsgesellschaft, 1970);
- **Freedom to conduct a business** (Usinor, 1984);
- **Freedom of competition** (France, 1985);
- **Respect for family life** (Commission v Germany, 1989);
- **Right to an effective remedy before a tribunal and to a fair trial** (Johnston, 1986; Pecastaing v Belgium, 1980);
- **Inviolability of the home** (Hoechst AG v Commission, 1989);
- **Freedom of thought and expression** (VBVB, VBBA, 1984)

II. Legal Value

The significance in the EU legal order

- The Charter, to a large extent, reflects a list of fundamental rights developed by the CJEU through its case law
 - Prior to 1 December 2009 advocates general and the CJEU referred to the Charter as a legal authority indicating that a specific right has a status of the fundamental principle
- After 1 December 2009 the Charter became an independent source of law
 - It triggered the volume and frequency of application of fundamental rights in the CJEU's case law
 - It does not represent a closed „list“ of fundamental rights of the EU legal order

II. Legal Value

The significance in the EU legal order

The role of fundamental (human) rights in the EU legal order:

- **Legitimacy and limitation of procedures of the EU bodies**
 - Stauder, Nold, Hauer, Kadi
- **Limitation of procedures of Member States when they are implementing EU law**
 - Wachauf, Bosporous
- **Authorising Member States to derogate from guaranteeing basic market freedoms**
 - Familiapress, Schmitberger, Omega

III. The Scope of Application and Legal Effect

The scope of application

Article 51 of the Charter

1. *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*
They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. *The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*
 - The Charter addresses to the institutions of the EU (bodies, offices and agencies)
 - The Charter addresses to all 28 Member States when they are proceeding in the framework of EU law.

III. The Scope of Application and Legal Effect

Application at the national level

The Charter as a means of protection in the domestic legal order

It produces legal effect only within the limits of the powers of the EU:

- The measure whereby the provision of EU law is implemented (it is directly based on EU law)
- The measure that allows derogation from the EU obligations (it is directly based on EU law)
- The measure indirectly affects the situation regulated under EU law (the measure adoption is within the powers of a state, but its effects restrict a right guaranteed under the EU legal order)

III. The Scope of Application and Legal Effect

Legal effect of fundamental rights of the EU

- Principle of supremacy
- Direct applicability
- Functions vertically and (in principle) horizontally

IV. Means of Legal Protection in the EU in the Event of Violation of Fundamental Rights

Possible means of protection

An individual may use the Charter:

- As a ground to review the EU measures
- As a ground to evaluate lawfulness of national measures (in the framework of application of the EU regulations)
- Direct protection – at the institutional level of the EU (seldom)
- Indirect protection – before a national court (more common)
 - Reference to the CJEU for a preliminary ruling

IV. Means of Legal Protection in the EU in the Event of Violation of Fundamental Rights

Possible means of protection

Article 53 of the Charter

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

IV. Means of Legal Protection in the EU in the Event of Violation of Fundamental Rights

The relationship between the Charter and the national Constitution

Article 145 of the Constitution of the Republic of Croatia

*The exercise of the rights ensuing from the European Union **acquis communautaire** shall be made equal to the exercise of the rights under Croatian law.*

*All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia **in accordance with the European Union **acquis communautaire**.***

*The Croatian courts shall protect subjective rights based on the European Union **acquis communautaire**.*

*Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall **apply European Union law directly.***

IV. Means of legal protection in the EU in the Event of Violation of Fundamental Rights

Protection in the domestic legal order

„In accordance with the European Union *acquis communautaire*” means:

- In cases which pertain to **the issue within the powers of the EU**, the courts have an obligation:
 - To evaluate whether a national legal act or practice of governmental agencies represents infringement of a specific guarantee under the Charter
 - That is, in case of doubt, stay the proceedings and submit a reference to the CJEU for a preliminary ruling
- In the event of a „conflict” between the Charter (case law of the CJEU) and the Constitution (case law of the Constitutional Court of the Republic of Croatia):
 - Make an attempt to reconcile disputable provisions by means of interpretation
 - Where reconciliatory interpretation is not possible, apply the Charter directly or **apply the principle of supremacy and the principle of direct applicability**
 - Stay the proceedings and make a reference to the CJEU for a preliminary ruling
 - In cases within the powers of the EU, the Charter is directly applicable and the court infringes EU law where it refuses or postpones direct application of the Charter, even where it stays the proceedings in order to submit a reference to the Constitutional Court for interpretation of a relevant constitutional guarantee

IV. Means of Legal Protection in the EU in the Event of Violation of Fundamental Rights

The relationship between the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 52 of the Charter

3. *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*
4. *In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*

IV. Means of Legal Protection in the EU in the Event of Violation of Fundamental Rights

The relationship between the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms

- In the event that a national court holds that there is a „conflict” between the Charter (case law of the CJEU) and the Convention (case law of the ECtHR or of the Constitutional Court of the Republic of Croatia), it shall stay the proceedings and make a reference to the CJEU for a preliminary ruling.
- The Court shall not stay the proceedings to submit a reference to the Constitutional Court for a preliminary ruling where the court fails to make a prior reference to the CJEU for a preliminary ruling.
- The Court shall not postpone adjudication where it has received a response from the CJEU, even where the court has received a different response from the Constitutional Court or is still waiting for its response.

The scope of application and interpretation of the Charter in domestic legal proceedings

Dr Suzanne Kingston BL
Zagreb, 1 October 2015

Overview

- Title VII of the Charter: General Provisions
 - When does the Charter apply? (Article 51)
 - Who does the Charter bind?
 - Interpreting Charter rights (Article 52(1))
 - Limitations
 - The status of the Explanations
 - Relationship with ECHR, national rights (Article 52)
 - The Charter as a minimum level of protection (Article 53)

When does the Charter apply?

- Article 51(1) EUCFR
- “The provisions of this Charter are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”
- Article 51(2) EUCFR

When does the Charter apply?

- Meaning of “implementing” Union law?
 - C-617/10 *Fransson*: CJEU confirms previous HR caselaw
 - National authorities acting as agents of EU or implementing e.g. Directive (see, e.g., *Wachauf*, *DEB*, *NS*)...
 - AND**
 - National authorities derogating from right granted by EU law, e.g., free movement right (see, e.g., *ERT*, *Carpenter*, *Schmidberger*, *Omega*, *Ruiz-Zambrano*...)

When does the Charter apply?

- NOT if matter has no connection with EU law or fall outside material scope of EU law
 - Eg C-328/04 *Vajnai*; C-40/11 *Iida*; C-206/13 *Siragusa*; C-446/12 *Willems*; C-333/13 *Dano*
- Relevant questions include:
 - Aim of the national law (to implement an EU law? Other aims also?)
 - “Character” of the national law
 - Are there EU rules on the matter or capable of affecting it?
 - Risk of divergence in rights protection so as to undermine unity of EU law?
 - Certain degree of connection with EU law beyond indirect impact?
- *Not always easy to predict outcome on borderline cases*

Who does the Charter bind?

- Article 51(1) EUCFR
 - All national courts and tribunals
 - Any public authority applying EU law
- Does the Charter apply as against private parties? (“horizontal” direct effect)
 - **YES** if the right at issue is judged by the CJEU to represent a general principle of EU law which has “horizontal” direct effect
 - Cases to date: Charter providing evidence of a general principle - Case-by-case basis
 - Eg *Kücüdeveci* C-555/07; *Viking* C-438/05

Implications for status of Charter in national courts

- “**Same legal value**” as the Treaties (Art 6.1 TEU) SO
 - **Interpretative tool** for EU/national law within the scope of EU law
 - Including to justify MS actions that might otherwise infringe EU law (eg *Omega*)
- AND
- **Ground of invalidity** of all EU actions and all MS actions within scope of EU law
 - EU actions: Eg C-236/09 *Test-Achats* (exemption allowing pro-female discrimination in 2004 Insurance Directive invalid); C-293/12 *Digital Rights Ireland* (Data retention Directive invalid)
 - Whether MS is interpreting / applying EU law...
 - Or even restricting EU rights (eg *Carpenter*, *Ruiz Zambrano*)

Interpreting the Charter (1): Limits on Rights

- Article 52(1) EUCFR:
 - “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”
- (1) Legitimate objective (2) Necessity (3) Proportionality
- C-528/13 *Léger* (French ban on blood donations from gay men)

Interpreting the Charter (1): Limits on Rights

- Article 52(2)
- “Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”

Interpreting the Charter (2): Explanations

- What status do the Charter’s “explanations” have?
 - Art 52(7), EUCFR “The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”
 - Art. 6(1) TEU
 - C-129/14 PPU *Spasic*

Interpreting the Charter (2): Rights Vs Principles

- Art. 52(5) EUCFR
 - “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”
- Art. 6(1) TEU; Charter Preamble

Interpreting the Charter (3): Relevance of other HR sources

- Relevance of the ECHR: Article 52(3)
 - “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”
- Eg C-400/10 *McB* (Art 7 Charter = Art 8 ECHR)
- Relevance of Opinion 2/13 CJEU (18 December 2014)

Interpreting the Charter (3): Relevance of other HR sources

- Relevance of national sources of human rights
 - Art 52(4) “In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”
 - Art 52(6) EUCFR “Full account shall be taken of national laws and practices as specified in this Charter”
 - Viz frequent reference to “national law and practices” (e.g., workers’ rights, same-sex marriage debate (Art 9 EUCFR))

Relationship between the Charter & other human rights instruments

- A minimum level of protection (Art 53, Charter)
- BUT
 - Case C-399/11 *Melloni*
 - Case C-168/13 *Jeremy F*

Controversial questions...which are still being answered

- Does the Charter simply re-state pre-existing rights?
 - Preamble
 - Article 51(2) EUCFR, Art 52(2) EUCFR, Art 52(3) EUCFR
- BUT
 - Charter has provided support for expanding scope of EU citizenship law *despite Article 51(2)*
 - Central issue: Is the “genuine enjoyment” of citizenship rights respected? *Ruiz Zambrano, Dereci, McCarthy*
 - Even where “national laws” caveat applies, CJEU has used Charter to strengthen pro-rights interpretation where a Directive applies
 - *ANGED C-78/11*: right to paid annual leave means sick days while on annual leave can be claimed back

Controversial questions...which are still being answered

- Does the Charter (esp Title VII) change the scope of pre-existing rights, as conferred by general principles of EU law (Art. 6(3) TEU)?
 - Viz Art 53, *Melloni*
 - Charter as a **minimum level of protection**
 - **Doesn't prevent CJEU recognising new general principles of fundamental rights in normal way** (Art. 6(3) TEU)

Conclusions

- Charter
 - Adds weight to rights previously recognised by CJEU
 - For some rights: expands substantive scope of EU fundamental rights law
 - Major restriction from national courts' perspective: Art 51 EUCFR
 - NB Use of expedited procedure in a variety of cases (Arts 105, 107 Rules of Procedure CJEU)
 - Eg C-400/10 *McB* (urgent FSJ procedure – 2 months from CJEU receipt of order to judgment)

Case studies on scope and applicability of Charter

Dr Suzanne Kingston BL
ERA, 1 October 2015

Case #1: German Wine Co vs Department of Trade and Trade Practices

- Issue: Is Reg 1924/2006, which prohibits a producer/distributor of wine from claiming that their wine is “easily digestible” – even if this claim is true – compatible with Arts 15(1)/16 of the Charter?

Case #2: Mr Drunk v Head of Traffic Police

- **Issue:** Does EU law preclude national legislation which does not recognize a right of appeal against decision imposing penalties for “minor” breaches of the road traffic regulations, even when those decisions impose a small financial penalty and result in points being added to a driver’s licence?

Case #3: Mr Z v Ministry for Internal Affairs

- **Issue:** Does Article 4 EUCFR preclude Member States, including national courts, from transferring an asylum seeker to the Member State indicated as responsible under EU law where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment pursuant to Art 4 EUCFR?

Case #4: Poor Firm Co v Member State X

- **Issue:** Is a national mechanism for legal aid, intended inter alia to exempt people from paying the administrative charge for legal proceedings and where the grant of such aid is subject to more restrictive conditions in respect of legal as opposed to natural persons, consistent with EU law; especially Article 47 EUCFR?

Overview

- #1: Challenge of national measure enforcing EU legislation (2006 Reg) on basis of EUCFR
- #2: Challenge of national procedural rule on basis of EUCFR
- #3: Challenge of national measure adopted on basis of EU legislation (2003 Reg) for compatibility with EUCFR
- #4: Challenge of national procedural rule in dispute about correct implementation of EU Directive

Case #1: German Wine Co vs Department of Trade and Trade Practices

- Case C-544/10 Deutsche Weintor (2012)
- Claimant challenging national measure enforcing EU legislation on basis EUCFR

Case #1: German Wine Co vs Department of Trade and Trade Practices

- Reference:
- Is it compatible with the first subparagraph of Article 6(1) of the Treaty on European Union, read in conjunction with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of the Charter, for a producer or marketer of wine to be prohibited, without exception, from making in its advertising a health claim of the kind at issue in the main proceedings, even if that claim is correct?

Held

- Charter has same legal value as Treaties
- Relevant provisions: Art 15/16 EUCFR AND also important to take into account Art 35(2) EUCFR (high level of protection of health)
- Legislation designed to protect health – objective recognised by Art 35 EUCFR
- Freedom to choose occupation and conduct business not absolute freedoms
- SO marketing restriction is **compatible** with EUCFR

Mr Drunk v Head of Traffic Police

- Challenge to applicability of national law where issue is compatibility of national procedural rules with EUCFR
- Case C-27/11 Anton Vinkov (2012)

Held

- Requirements flowing from protection of FHR are binding on MS whenever they implement EU law
- Provisions of EUCFR addressed to MS only when implementing EU law
- Where national legislation within scope of EU law, CJEU must provide all criteria needed for national court to determine whether national law is compatible with fundamental rights

Held

- BUT “it is not apparent from the order for reference that the national legislation constitutes a measure implementing EU law or that it is connected in any other way with EU law. Accordingly the jurisdiction of the Court to rule on the reference for a preliminary ruling in so far as it relates to the fundamental right to an effective remedy is not established (para 59)

Mr Z v Ministry for Internal Affairs

- Challenge at national measure adopted on basis of EU Regulation
 - National government: argues that measure does not fall within scope of EU law
- Case C-411/10 NS

Question referred

- Does a decision made by a Member State under Article 3(2) of Regulation 343/2003 on whether to examine a claim for asylum which is not its responsibility under the criteria set out under Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 EUCFR?

Held

- Under Article 51(1) EUCFR, Charter only binds MS when they are implementing EU law
- Nature of power granted here to MS:
 - Art 3(2) grants MS a discretionary power
 - This forms part of the mechanisms for determining the individual MS responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System

Held

- A MS which exercises that discretionary power must be considered as implementing EU law within the meaning of Article 51(1) EUCFR

Poor Firm Co v MS X

- Challenge about breach of EU law by MS where compatibility of national procedural rules law with EUCFR questioned
- Case C-29/09 DEB, 2010

Question referred

- “In view of the fact that Member States may not, through the structuring of conditions under national law governing the award of damages and of the procedure for pursuing a claim seeking to establish State liability under EU law, make the award of compensation in accordance with the principles of State liability in practice impossible or excessively difficult, must there be reservations with regard to a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs, and a legal person, which is unable to make that advance payment, does not qualify for legal aid?”
- (No reference to EUCFR!)

Held

- Settled case law that national procedural rules governing actions for safeguarding individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law
- Here: question referred concerns right of a legal person to effective access to justice – in EU law, the principle of effective judicial, a general principle of EU law and a Charter right
- Charter does not exclude grant of legal aid to legal persons

Held

- Legal persons may rely on Art 47 EUCFR
- Legal aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of costs of proceedings and/or assistance of lawyer
- For national court to ascertain whether conditions for granting legal aid breach Art 47 EUCFR (must review legitimacy of aim pursued and proportionality of national rules)

Case #1: German Wine Co vs Department of Trade and Trade Practices

Issue: Is Reg 1924/2006, which prohibits a producer/distributor of wine from claiming that their wine is “easily digestible” – even if this claim is true – compatible with Arts 15(1)/16 of the Charter?

Relevant law: The preamble to Reg 1924/2006 states that an increasing number of foods labeled and advertised in the EU include claims as to nutrition and health benefits. The aim of the Regulation is inter alia to ensure that the substances in relation to which a claim as to nutrition/health benefits has been made in fact have been shown scientifically to have such effects.

Article 1 of the Regulation states that the Regulation harmonises the provisions laid down by law, regulation or administrative action in Member States relating to nutrition and health claims, in order to ensure the effective functioning of the internal market while providing a high level of consumer protection.

Article 3 of the Regulation provides that the use of nutrition/health claims shall not (a) be false, ambiguous or misleading; (b) give rise to doubt about the safety and/or the nutritional adequacy of other foods; (c) encourage or condone excess consumption of a food...

Article 5 of the Regulation provides that the use of nutrition/health claims shall only be permitted if (a) the presence, absence or reduced content in a food or category of food of a nutrient or other substance in respect of which the claim is made has been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific evidence.

Facts: P is a wine-growers’ cooperative. The labels on the necks of the bottles it sells state “mild edition, easily digestible.”

D objects to the use of the description “easily digestible” on the ground that it is a health claim pursuant to the Regulation and, therefore, is not permitted for alcoholic drinks.

P brings an action before the national court, which decides to stay the proceedings to refer the following question to the CJEU, on the basis that producers or distributors of wine are prohibited from referring to their product as being easily digestible owing to its low acidity, even if that claim is correct:

Is it compatible with the first subparagraph of Article 6(1) of the Treaty on European Union, read in conjunction with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of the Charter, for a producer or marketer of wine to be prohibited, without exception, from making in its advertising a health claim of the kind at issue in the main proceedings, even if that claim is correct?

Task:

1. Can the CJEU review the compatibility of the Reg with the Charter?
2. If so, do Arts 15/16 preclude the EU legislator from prohibiting advertising in the circumstances set out above?

Case #2: Mr Drunk v Head of the Traffic Police

Issue: Does EU law preclude national legislation which does not recognize a right of appeal against decision imposing penalties for “minor” breaches of the road traffic regulations, even when those decisions impose a small financial penalty and result in points being added to a driver’s licence?

Law: Article 2 of the Convention on Driving Disqualifications (OJ 1998 C 216, p. 2) provides that “The Member States hereby undertake to cooperate, in accordance with the provisions of this Convention, with the objective that drivers who are disqualified from driving in a Member State other than that in which they normally reside should not escape the effects of their disqualification when they leave the State of the offence.”

Article 2(1) of the Agreement on cooperation in proceedings for road traffic offences and the enforcement of financial penalties imposed in respect thereof (OJ 2000 L 239, p. 428) provides, “The Contracting Parties undertake to accord each other the widest possible cooperation in proceedings for road traffic offences and the enforcement of decisions in respect thereof in accordance with the provisions of this Agreement.”

Article 5(1) of the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties OJ 2005 L 76 p. 16 states that decisions concerning breaches of road traffic regulations “if they are punishable in the issuing State and as they are defined by the law of the issuing State [are], under the terms of this Framework Decision and without verification of the double criminality of the act, [to] give rise to recognition and enforcement...” Article 20(3) of the Framework Decision provides, “Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the [EU] Treaty may have been infringed, oppose the recognition and the execution of decisions...”

The national law on road traffic provides that coercive administrative measures applicable for the purpose of maintaining the safety of road traffic include the “withdrawal of a driving licence” and that “Decisions imposing an administrative penalty of up to €50 may not be challenged in court.” It also provides that points shall be added to a licence on the basis of a decision imposing an administrative penalty which has become final.

Facts: P collided with another vehicle in the car park of the capital city, which other vehicle was owned by another resident of that city. Following the incident, an administrative decision was taken in relation to P holding him liable for a “minor traffic accident”, for which he was fined 20, and 4 points were added to his licence.

P appealed against his decision before the District Court, which dismissed the appeal by order declaring it inadmissible, as the Law on road traffic precludes judicial review of any decision imposing a financial penalty of under €50, including where this entails adding points to a licence.

P challenged the order before the appeal court, arguing that EU law in the field of freedom, security and justice, requiring mutual recognition of judgements, preclude the non-recognition under national law of a right of appeal against such decisions on adding points to licences. P also argued that the relevant provisions of national law infringe Articles 47 and 48 of the EUCFR and Article 6 of the European Convention on Human Rights.

Task: Can P, in the context of this dispute, rely upon Arts 47 and 48 EUCFR before the appeal court?

Case #3: Mr Z v Ministry for Internal Affairs

Issue: Does Article 4 EUCFR preclude Member States, including national courts, from transferring an asylum seeker to the Member State indicated as responsible under EU law where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment pursuant to Art 4 EUCFR?

Law: EU asylum policy forms part of the EU's aim of establishing an area of freedom, security and justice, extending to those who, forced by circumstances, legitimately seek protection in the EU.

The Dublin II Regulation (Reg 343/2003) establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national. In principle, the system of the Dublin II Regulation is that a single Member State is responsible for doing so. Article 3(1) of the Regulation provides,

“Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State which shall be the one which the criteria set out in Chapter III indicate is responsible.”

Where a third country national has applied for asylum in a Member State which the Regulation does not indicate as the State responsible, the Regulation provides for a procedure for transferring the asylum seeker to the responsible Member State. However, Article 3(2) provides, “By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility...”

In order to determine which is the Member State responsible for the purposes of Article 3(1), Chapter III of that Regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State, and applications made in an international transit area of an airport.

Facts: P is an Afghan national who came to Ireland after travelling through inter alia Greece, where he was arrested in 2008. He was released by the Greek authorities four days later and ordered to leave Greece within 30 days. P did not make an asylum application. He says that when he tried to leave Greece he was arrested by the police and expelled to Turkey, where he was detained in appalling conditions for two months. He says that he escaped from his place of detention in Turkey and travelled to Ireland, where he arrived and lodged an asylum application.

Some months later, P was told he would be transferred to Greece the next month under the Dublin II Regulation. He challenged this decision, arguing that there was a risk his fundamental rights could be infringed if he were to be sent back to Greece.

D argued, inter alia, that the discretion pursuant to Article 3(2) of the Regulation does not fall within the scope of EU law, and therefore the EUCFR did not apply.

Task: Does a decision pursuant to Article 3(2) of the Regulation fall within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 EUCFR?

Case #4: Poor Firm Co vs Member State X

Issue: Is a national mechanism for legal aid, intended inter alia to exempt people from paying the administrative charge for legal proceedings and where the grant of such aid is subject to more restrictive conditions in respect of legal as opposed to natural persons, consistent with EU law; especially Article 47 EUCFR?

Law: Recitals 5 and 11, preamble to Directive 2003/8 on improving access to justice in cross-border disputes by establishing minimum common rules on legal aid for such disputes, state (5) “This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognized right to access to justice is also reaffirmed by [Article 47 EUCFR]...”

(11) “Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.”

The scope *ratione personae* of the right to legal aid is defined in Article 3(1) of the Directive: “Natural persons involved in a dispute covered by this Directive shall be entitled to received appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.”

Article 6(3) states, “When taking a decision on the merits of an application...Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his/her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant’s trade or self-employed profession.

Member State X’s law on Court Costs sets out the principle requiring advance payment for the administrative costs of proceedings in civil litigation, stating that “The originating application may, in general, be served after payment of the administrative charge for the proceedings. Should the grounds of the action be extended, no judicial action may in general be undertaken before payment of the administrative charge for the proceedings has been made; this also applies to appellate proceedings.”

The Code of Civil Procedure, para 116, provides, “Upon application, legal aid shall be received by...a legal person or an entity capable of being party to legal proceedings...if the costs can be paid neither by that party nor by any parties having an economic involvement in the subject matter of the proceedings, and where the failure to pursue or defend the action would run counter to the public interest.”

Facts: P applied for legal aid to bring an action to establish that D has incurred State liability under EU law. P is seeking damages for the delay in transposition of two EU directives, causing it considerable financial loss. P is, however, unable to make the necessary advance payment of court costs, amounting to €274,368, and has no financial means to pay for representation by a lawyer, despite the fact that this is compulsory in the main proceedings. The national court refuses to grant legal aid on the ground that para 116 of the Code of Civil Procedure is not satisfied.

Task: 1. Can P rely on Art 47 EUCFR to challenge the compatibility of para 116 of the Code of Civil Procedure with EU law?

2. Does Art 47 preclude a national rule making pursuit of a claim subject to advance payment of costs, where a legal person is not eligible for legal aid even where it cannot make such payment?



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EU Charter of Fundamental Rights:
“Dignity”, “Freedoms” and “Equality”

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE

Zagreb, 1-2 October 2015

Dr. A.P. van der Mei

Chapter I Dignity	Chapter II Freedom		Chapter III Equality
Human dignity	Right to liberty and security	Freedom of the arts and sciences	Equality before the law
Right to Life	Respect for private and family life	Right to education	Non-discrimination
Rght to integrity	Protection of personal data	Freedom to choose an occupation and to work	Cultural, religious and linguistic diversity
Prohibition of inhuman or degrading treatment	Right to marry and found a family	Freedom to conduct a business	Equality between men and women
Prohibition of slavery and forced labour	Freedom of thought and religion	Right to property	Rights of the child
	Freedom of expression	Right to asylum	Rights of the elderly
		Protection against expulsion	Integration of persons with disabilities

Human dignity

Explanations

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights

It results that none of the rights laid down in this Charter may be used to harm the dignity of another person

Case C-36/02 *Omega Spielhallen*

‘Playing at killing’

Joined cases C-148-150/13 *A, B and C*

Evidence of sexual orientation

Prohibition of inhuman or degrading treatment

Case C-411/10 <i>N.S.</i>	Asylum – Country of first application	Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.
Case C-562/13 <i>Abdida</i>	Article 19 Charter: No expulsion to state where risk of such treatment exists	The seriously ill asylum seeker

Right to family life

<i>C-256/11 Dereci</i>	Residence rights for third country family members of 'immobile' Union citizens
	Can immobile EU citizens invoke Article 7 on the right to family life?
	Does the right to family life imply a right to a residence permit?
<i>Case C-483/09 Sanchez</i>	Victims in criminal procedure

Right to private life and data protection

Cases C-293/12
and C-594/12
*Digital Rights
Ireland Ltd*

Directive requires data to be retained for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism.

Directives makes it possible to know a user, when and with whom has contact

By requiring the retention of data and by allowing the competent national authorities to access those data, the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data.

Freedom to choose an occupation and to work, to conduct a business

Explanations	‘[R]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’
Case C-390/12 <i>Pfeiffer</i>	Gambling
	Violation of the TFEU freedoms for (self-)employed persons implies violation of Articles 15-17

Equality and Non-discrimination

Reconfirmation of existing non-discrimination law	Gender and nationality		
	Religion		
	Age	<i>Mangold</i> case law	C-236/09 <i>Test-Achats</i>
	Sexual orientation	Case C-528/13 <i>Léger</i>	Blood donation by MSMs
	Disability	UN Convention	C-354/13 <i>Kaltoft</i> - obesity
	Ethnic origin	Case C-83/14 <i>CHEZ</i>	Roma & discrimination by association
New	Cultural, religious and linguistic diversity	Case C-391/09 <i>Runevic-Vardyn</i>	
		Case C-202/11 <i>Las</i>	
	Elderly		

Social rights and principles in the EU Charter of Fundamental Rights

JEFF KENNER

PROFESSOR OF EUROPEAN LAW

UNIVERSITY OF NOTTINGHAM



Structure of presentation

- 1. Sources of social rights and principles in EU law**
- 2. The continuing significance of the Community Social Charter (CSC) 1989**
- 3. Social rights and principles in the Solidarity Chapter of the Charter of Fundamental Rights (CFR) – contents and case studies**

Sources of social rights and principles in the EU legal order

- ▶ **Art 151 TFEU – refers to ESC and CSC as sources of EU social policy**
- ▶ **EU legislation – e.g. Working Time Directive; Decision authorising ratification by Member States of the Maritime Labour Convention**
- ▶ **case law of the CJEU – general principles and “particularly important” social rights**
- ▶ **social rights in the CFR sourced from, inter alia, from ESC, Revised ESC, CSC**
- ▶ **ILO Declaration on Fundamental Rights and Principles – no direct reference in the CFR**

The continuing significance of the Community Social Charter

- ▶ **non-binding but referenced in the TFEU, EU legislation, the CFR and case law**
- ▶ **inspired by ILO and ESC – social rights focus**
- ▶ **aim to strengthen social policy in the Member States not simply reflect social rights**
- ▶ **includes decent work - fair remuneration, social protection, decency in retirement**
- ▶ **legislative impulse on EU institutions; implementation obligation on Member States; non-retrogression**

CFR – points of contrast with the CSC

- ▶ CFR has ‘same legal value’ as the treaties – EU primary law – reaffirms rights
- ▶ broader focus - civil, political, economic and social rights, freedoms and principles
- ▶ no reference to ILO in the Explanations (sources)
- ▶ selected social rights – missing ESC rights, dilution of social protection
- ▶ no legislative impulse on EU institutions but addressed to them
- ▶ no direct implementation obligation on the part of the Member States

UN and CoE sources of social rights and principles in the CFR explanations - examples

- ▶ freedom of association Art 12 – Art 11 ECHR
- ▶ right to engage in work Art 15 – Art 1(2) ESC
- ▶ rights of the child Art 24 – UN CRC
- ▶ integration of disabled people Art 26 – Art 15 ESC
- ▶ collective barg & action Art 28 – Art 6 ESC
- ▶ unjust dismissal protection Art 30 – Art 24 RESC
- ▶ family and professional life – Art 33 - Art 16 ESC
- ▶ social security and assistance – Art 34 - Arts 12-13 ESC

EU sources of social rights and principles in the CFR - examples

- ▶ **non-discrimination, Art 21 – Art 19 TFEU**
- ▶ **gender equality, Art 23 – Arts 3 and 8 TEU, Art 157 TFEU**
- ▶ **workers' right to information and consultation, Art 27 – points 17, 18 CSC, Art 6 ESC**
- ▶ **fair and just working conditions, Art 31 – Dirs 89/391/EEC and 2003/88/EC**
- ▶ **prohibition of child labour and protection of young workers, Art 32 - Dir 94/33/EC, Art 7 ESC**

Explaining the CFR – problem areas for social rights and principles

- ▶ **scope, Art 51, limited obligations on Member States, no extension of field of application**
- ▶ **‘national laws and practices’ Art 52(6)**
- ▶ **corresponding rights from ECHR, Art 52(3), but not ESC**
- ▶ **hierarchy of rights and principles – some social rights are horizontal but others are not**
- ▶ **‘principles’ not judicially cognisable rights Art 52(5)**
- ▶ **balancing economic freedoms and social rights**

Hierarchy of social rights and principles – Solidarity Chapter

- ▶ **strong rights** – working time, rest, paid annual leave, Art 31 (2), prohibition of child labour, protection of young workers, Art 32, maternity and paternity rights, Art 33
- ▶ **weak rights / principles** – workers' right to information, Art 27, collective bargaining/action, Art 28, unjust dismissal protection, Art 30, health care, Art 35
- ▶ **mere principles** – levels of social security, Art 34(1) and Arts 36-38 – environment and consumer protection

Case study 1 – scope of the Charter – Art 30, Nagy

“Every worker has a right to protection against unjustified dismissal, in accordance with Union law and national practice”

- ▶ **no Commission proposal for a directive despite legal basis in Art 153 TFEU – unanimity requirement**
- ▶ **Art 24 RESC – 20/28 EU MS have ratified – not Hungary**
- ▶ **ILO Conv No 158 – 10/28 EU MS have ratified**
- ▶ **ECtHR, dismissal without giving reason violates Art 6 ECHR – *K.M.C. v Hungary*, 2012 – ECtHR cited CFR commitment**
- ▶ **Cases C-488-491/12 & 562/12 Nagy – CJEU has no jurisdiction – no implementation obligation on Hungary under Art 51 CFR – national practice can prevail**

Case study 2 – scope of the Charter – Art 31(2), *Strack*

- ▶ “Every worker has the right ... to an annual period of paid leave” – source Art 7 of Dir 2003/88 – rights of EU staff?
- ▶ Art 288 TFEU – directives addressed to MS
- ▶ CFR addressed to EU institutions, Art 51
- ▶ CST & GC – EU Staff Regs autonomous. Limited carry over period for long-term sickness
- ▶ CJ, Case C-579/12 RX-II – Staff Regs must be interpreted consistently with CFR and in conformity with case law. CFR yardstick for measurement of the lawfulness of all EU acts

Case Study 3 – horizontal application of CFR Art 21, *Kücükdeveci*

- ▶ Case C-555/07, national provisions falling within the scope of EU law must conform with principle of non-discrimination on grounds of age, Dir 2000/78/EC, Art 21 CFR
- ▶ national courts have a duty to disapply any contrary provision of national legislation falling within the scope of EU law irrespective of whether the case is referred to the CJEU – similar to the principle of ‘direct effect’
- ▶ compare with AMS case on Art 27 CFR - workshop

Case study 4, Art 34(3) right or principle? *Kamberaj*

- ▶ “the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources” – in accordance with national law and practices
- ▶ Case C-571/10 – lower rate of housing benefit for non-EU nationals. Long-term Residents (LTR) Dir 2003/109 grants right to equal treatment for LTRs but limited to “core benefits”
- ▶ CJEU – ambiguous on right/principle but was part of implementation of Art 34(3) therefore justiciable - left to national court to determine whether this amounted to a right to equal treatment to housing benefit

Case Study 4 – AMS compare with *Kücükdeveci*

- ▶ Art 27, workers' guarantee of information and consultation in accordance with national law and practice – Dir 2002/14/EC
- ▶ French law excluded some staff from calculation of threshold for worker involvement. Could they rely on Art 27 to enforce 'rights' under Directive?
- ▶ Case C-176/12 AMS, no. Art 27 is collective not individual right - not possible to infer that Art 3(1) of Dir is directly applicable rule of law - no link with a 'general principle of law' recognised by CJEU
- ▶ source of Art 27 from RESC and CSC not discussed
- ▶ CJEU criticised for reducing a right sourced from a Directive to a mere principle

Balancing economic freedoms and social rights

- ▶ **EXAMPLE 1 – freedoms v social rights: freedom to conduct a business, Art 16, based on case law of CJEU trumps fundamental social rights, Arts 28, right of collective bargaining, Case C-426/11 *Alemo-Herron***

Balancing economic freedoms and social rights

- ▶ **EXAMPLE 2 – C-438/05 *Viking* & C-341/05 *Laval* – where is the centre of gravity between market freedoms and social rights?
National law and practices?
Compare with *Demir* ECtHR 2008 -
relevance of *Opinion 2/13* on EU
Accession to the ECHR**

Cases for the workshop

- ▶ **C-176/12 *AMS* – p. 65 – also read the Advocate General’s Opinion**
- ▶ **C-426/11 *Alemo-Herron* – p. 137**
- ▶ **C-571/10 *Kamberaj* – p.166**

Workshop questions

- 1. Who were the parties and what were the questions of law referred to the Court of Justice?**
- 2. What were the relevant provisions of EU legislation and the Charter?**
- 3. Outline the main points of law in the Judgment of the Court of Justice**
- 4. Critically analyse the Judgment of the Court in the light of the relevant provisions in the Charter and the scope of its application**



ADDITIONAL SUBSTANTIVE RIGHTS OF PARTICULAR RELEVANCE FOR JUDICIAL OFFICIALS AND EMPLOYEES – ACCESS TO JUSTICE

Lara Barberić

**Senior Adviser at the State Attorney's Office of
the Republic of Croatia**

TITLE VI OF THE CHARTER- JUSTICE

- ❑ Right to an effective remedy and to a fair trial:
Article 47
 - ❑ Presumption of innocence and right of defence:
Article 48
 - ❑ Principles of legality and proportionality of
criminal offences and penalties: Article 49
 - ❑ Right not to be tried or punished twice in
criminal proceedings for the same criminal
offence: Article 50
- 

ARTICLE 47

- ❑ Anyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to:
 - An effective remedy before a tribunal;
 - A fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law;
 - The possibility of being advised, defended and represented.



ARTICLE 47, paragraph 1

1. Right to an effective remedy
 - ❑ It is based on Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.)
 - ❑ More extensive protection – guarantees a right to an effective legal remedy before a tribunal
 - ❑ Case Johnston, C-222/84, Judgement 15 May 1986, right to an effective legal remedy as a general principle of EU law



ARTICLE 47, paragraph 1, contd.

- Valid for all rights guaranteed by the law of the Union

- „According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law.”

ARTICLE 47, paragraph 2

2. Right to a fair and public hearing

- Within a reasonable time;
- By an independent and impartial tribunal previously established by law;
- Everyone shall have the possibility of being advised, defended and represented.

ARTICLE 47, paragraph 2, contd.

- Corresponds to the right to a fair trial under Article 6, paragraph 1 of the ECHR:
- „In the determination of his **civil** rights and obligations or of any **criminal charge** against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and **public may be excluded** from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”



ARTICLE 47, paragraph 2, contd.

- Differences in comparison with Article 6, paragraph 1 of the ECHR:
 - Scope of application: is not limited to disputes pertaining to civil rights and obligations or any criminal charge;
 - Case ECtHR Micallef v Malta [GC], No. 17056/06
 - Does not contain exceptions from the principle of publicity
 - Everyone's right of being advised, defended and represented is not limited to criminal proceedings (ECHR, Article 6, paragraph 3 (c))



ARTICLE 47, paragraph 3

3. Right to legal aid

- „In accordance with case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.” (Judgement of the ECtHR, *Airey v Ireland*, 6289/73, of 9 October 1979)
- „There is also a system of legal aid for cases before the Court of Justice of the European Union.”



Legal aid and ECtHR

- Is providing legal aid essential?
- It depends on:
 - The facts and circumstances of every case
 - The significance of the matter for the claimant
 - Complexity of the relevant law and proceedings
 - Capability of the claimant to represent him/herself on his/her own
 - Financial status of the claimant
 - Likelihood of success in the dispute
- Cases of the ECtHR: *Steel and Morris v UK*, 68416/01, § 61, 62, *Airey v Ireland*, 6289/73, §26



ARTICLE 47, CASES

- Kadi II (C-584/10 P), 18 July 2013
- ZZ (C-300/11), 4 June 2013
- Centre public d'action sociale d'Ottignies-Louvain-la-Neuve (C-562/13), 18 December 2014
- Sanchez Morcillo (C-169/14), 17 July 2014
- Csipai (C-472/11), 21 February 2013
- Mahadi (C-146/14 PPU), 5 June 2014

KADI II (C-584/10)

- „...fundamental right, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to

ARTICLE 48

- Presumption of innocence and right of defence
 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
 2. Respect for the rights of defence of anyone who has been charged shall be guaranteed.



ARTICLE 48, contd.

- Corresponds to Article 6, paragraphs 2 and 3 of the ECHR
- Same meaning and scope of application as the right guaranteed by the ECHR (Article 52, paragraph 3 of the Charter)
- The rights under Article 6 (paragraph 3) of the ECHR + interpretation of the ECtHR: minimum rights to be respected
 - What are these rights?
 - Article 6 (paragraph 3) of the ECHR contains no explicit guarantee of the right to protection against self-incrimination, but that right has been established through case law of the ECtHR (Funke v France, No. 10828/84, §44)



ARTICLE 48, CASES

- ❑ Radu (C-396/11), 29 January 2013
- ❑ Melloni (C-399/11), 26 February 2013
- ❑ Ahmed Abdelaziz Ezz (T-256/11), 27 February 2014



„...the two systems, the ECHR and the EU, mutually and for the mutual benefit have had a positive impact on each other through their courts, which throughout the years have shown their openness to the development of human rights. Through mutual respect, they have established a genuinely harmonious relationship indispensable to achieve coherence in the protection of human rights.” (Advocate General Francis G. Jacobs).



**THANK YOU FOR YOUR
ATTENTION!**



The Charter of Fundamental Rights and the European Convention of Human Rights: complementing or competing systems of fundamental rights protection in Europe?

Prof. Johan Callewaert
Deputy Grand Chamber Registrar



Bosphorus v. Ireland (45036/98)

If ... equivalent protection is considered to be provided by [an international] organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. (§ 156)



Bosphorus v. Ireland (II)

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights. (§ 156)



Bosphorus v. Ireland (III)

By “equivalent” the Court means “comparable”: any requirement that the organisation's protection be “identical” could run counter to the interest of international co-operation pursued. (§ 155)



Bosphorus v. Ireland (IV)

It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. (§ 157)



Michaud v. France (12323/11)

The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply. (§ 115)



To sum up the requirements of the Bosphorus presumption:

- No exercise of discretion by the domestic courts
- Relevant case-law of the CJEU
- No manifest deficiency



Art. 52 § 3 EU-Charter

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



Art. 6 EU-Charter

Everyone has the right to liberty and security of person.



Art. 5 ECHR

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Art. 52 § 3 EU-Charter

- Is the link between EU law and the Convention
- Establishes the Convention standards as minimum protection standards under EU law
- Was necessary, especially in view of the fact that the EU-Charter borrowed a large number of Convention provisions while giving them a different, simplified wording.



Trend towards autonomy from the ECHR

- Formal autonomy: risk for legal certainty
- Substantial autonomy: affecting standards of protection



Formal autonomy

“Three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR, paragraph 37).” (Akerberg Fransson, C-617/10, § 35)

See also, e. g., Otis and Others (6.11.2012, C-199/11) and Y and Z (5.9.2012, C-71/11 and C-99/11)

Substantial autonomy

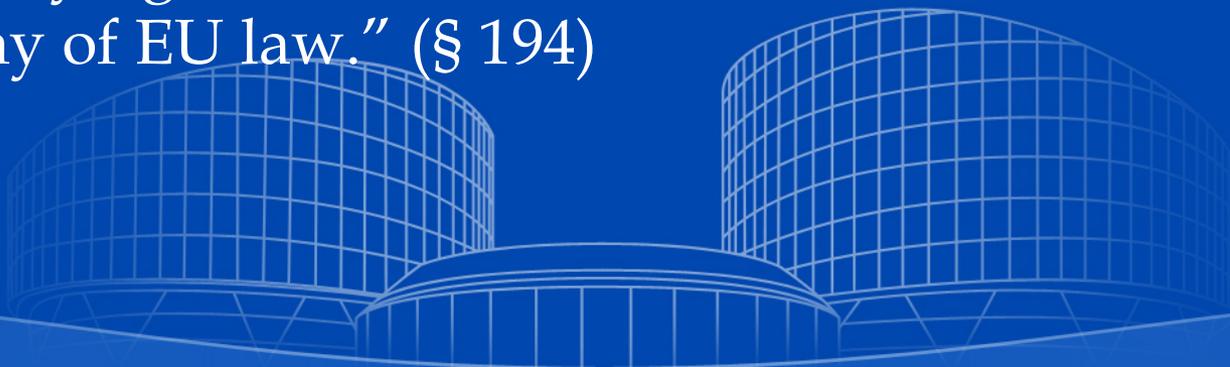
Two key questions relating to the methodology of mutual recognition:

- 1) Does an executing judge have the competence to assess respect for the fundamental rights of the person concerned in the requesting State, at least if he has reasons to fear a breach of those rights?
- 2) If so, should he assess those rights on a case-by-case basis?



Opinion 2/13

“In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.” (§ 194)



Opinion 2/13

It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. (§ 191)



N. S. & M. E. (C-411/10 & C-493/10)

It cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights. (§§ 82-83)

M.S.S. v. Belgium and Greece (30696/09)

Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

(§ 367)



Tarakhel v. Switzerland (29217/12)

Were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention, (§ 122)



Art. 6 § 2 TUE

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.



“EU accession to the Convention, in the terms defined today by the CJEU, could only appeal to those who don't like human rights very much.”
(Steve Peers)



Thank you!



Fundamental Rights and their judges in Europe

Strasbourg or Luxembourg?

Litigation by an individual

EU law
NOT
applicable

EU law
applicable

EU law
NOT
applicable



Appeal to the DOMESTIC COURTS which apply :

- Their own domestic law
- The ECHR



**Application to the STRASBOURG COURT
(after exhaustion of domestic remedies) which applies :**

- Only the ECHR

Strasbourg or Luxembourg?

Litigation by an individual

EU law
NOT
applicable

EU law
applicable

EU law
applicable

ACTS BY EU INSTITUTIONS

Direct appeal to EU COURTS
(e. g. 263 § 4 TFEU) which apply :

- The EU-Charter
- Other relevant EU legislation
- But also, indirectly, the ECHR:
 - ✓ 52 § 3 EU-Charter
 - ✓ as part of the “general principles of the Union’s law” (6§3 TEU)

ACTS BY MEMBER STATES

Appeal to the DOMESTIC COURTS
(acting as “Union Courts of
ordinary jurisdiction”) which apply:

- EU law, including the Charter
- The ECHR (directly)
- Their own domestic (substantial and/or procedural) law



Preliminary ruling by the ECJ (267 TFEU) which applies :

- **The EU-Charter**
- **Other relevant EU legislation**
- **But also, indirectly, the ECHR:**
 - ✓ **52 § 3 EU-Charter**
 - ✓ **as part of the “general principles of the Union’s law” (6§3 TEU)**



DOMESTIC COURTS acting as “Union Courts of ordinary jurisdiction”



The STRASBOURG COURT (under the terms of the Bosphorus – jurisprudence¹)

¹*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Application no. [45036/98](#)), ECtHR, 30 June 2005

SUMMARY

EU Law not applicable	EU law applicable	
<p>DOMESTIC COURTS</p> <ul style="list-style-type: none"> • Domestic law • ECHR 	<p>EU COURTS</p> <ul style="list-style-type: none"> • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation 	<p>DOMESTIC COURTS (“ordinary jurisdiction”)</p> <ul style="list-style-type: none"> • EU law, including the Charter • ECHR • Domestic law
<p>STRASBOURG COURT</p> <ul style="list-style-type: none"> • ECHR 	<p>ECJ</p> <ul style="list-style-type: none"> • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation 	
<p>DOMESTIC COURTS (“ordinary jurisdiction”)</p>		
<p>STRASBOURG COURT Bosphorus - jurisprudence</p>		