

Speakers' Contributions



MINISTRY OF JUSTICE
FINLAND



THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE



415DT104 Helsinki, 11-12 June 2015



This series of seminars is organised with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission.

The Charter of Fundamental Rights of the EU in Practice

Seminar for Judges / Focus on Rights Related to Administrative Law

Helsinki, 11-12 June 2015

Speakers' contributions 415DT104

Sionaidh Douglas-Scott

- The role of the Charter within the EU legal framework and its relevance for national legal orders
- Case studies on application of the EU Charter
- Case studies outline

Filippo Fontanelli

- The scope of application and interpretation of the Charter in domestic legal proceedings
- Overview of key rights and principles in Titles I, II and III of the Charter
- The EU Charter and the European Convention

Kari Kuusiniemi

- Selection of provisions guaranteed under "Solidarity"
Title of the Charter: special focus on environmental protection (Art.37)

Luis María Díez-Picazo Giménez

- Justice and good administration in the Charter of Fundamental Rights of the European Union
- Seminar Material

Mika Seppälä

- Introduction to the workshop: Environmental protection, background presentation

Matti Haapaniemi

- Workshop notes

Patrick Sahlstöm

- Workshop notes



This publication has been produced with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission. The contents of this publication are the sole responsibility of ERA and can in no way be taken to reflect the views of the European Commission.

**THE ROLE OF THE CHARTER WITHIN THE EU LEGAL FRAMEWORK AND ITS
RELEVANCE FOR THE NATIONAL LEGAL ORDER**



**PROFESSOR SIONAIDH DOUGLAS-SCOTT
UNIVERSITY OF OXFORD**

A. INTRODUCTION

Fundamental rights were not a pressing concern in the early EEC
BUT growth in EU competence

From free trade and
agriculture

To the European arrest
warrant



SPECIFIC REFERENCES TO FUNDAMENTAL RIGHTS IN EU TREATY

- *Article 6 TEU* is especially significant,
 - Art 6(1) stipulates that the EU's Charter of Fundamental Rights shall have the same legal force as the treaties themselves.
 - Article 6(2) requires the EU to accede to the ECHR – a task of great legal complexity.
 - Article 6(3) also confirms that the ECHR and the protection of fundamental rights under the constitutional traditions of the member states shall continue to constitute general principles of EU law.
- *Article 2 TEU* tells us that
 - The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights . . .

SPECIFIC REFERENCES

- Additionally there are specific treaty items that qualify as fundamental rights namely:
- Article 18 TFEU: non-discrimination on grounds of nationality
- Article 19 TFEU non-discrimination: 'the Council . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'
- Article 157 TFEU: equal pay
- Some fundamental rights exist as secondary legislation rather than treaty provisions - the equal treatment directives are good examples

AD HOC PROTECTION OF FUNDAMENTAL RIGHTS UNTIL CHARTER COMES INTO EXISTENCE

- *Role of ECJ:* However, given the absence of any EU Bill of Rights until 2000, protection of fundamental rights for the first 40 years of European integration developed through the case law of the European Court of Justice (ECJ), which has undoubtedly played a very important role.

*11/70 Internationale Handelsgesellschaft [1970]
ECR 1125 CJEU:*

- 2 . RESPECT FOR FUNDAMENTAL RIGHTS FORMS AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW PROTECTED BY THE COURT OF JUSTICE . THE PROTECTION OF SUCH RIGHTS, WHILST INSPIRED BY THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES, MUST BE ENSURED WITHIN THE FRAMEWORK OF THE STRUCTURE AND OBJECTIVES OF THE COMMUNITY .



Declaration of Charter of Fundamental Rights

B. Charter of Fundamental Rights

- *50 rights*
- *These rights are divided into six sections:*
- Dignity
- Freedoms
- Equality
- Solidarity
- Citizens' rights
- Justice

Explanations

- **Explanations**
- A 52(7). *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.*

When must policy-makers/Institutions take the Charter into account?

- a). *At the negotiating stage*
- *[Joined cases C-293/12 Digital Rights Ireland and C-594/12 Kärntner Landesregierung [2014] ECR 000]*

- b). *After legislation or policies have been adopted*
 - i) In the EU courts in Luxembourg*
 - ii) When does the Charter come into play at national level?*
- *Art 51(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.*

Preliminary references

- **Article 267 TFEU**
- *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
- *(a) the interpretation of the Treaties;*
- *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
- *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
- *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
- *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*
- Eg *Association Belge des Consommateurs Tests-Achats*, 2011

C. ASSESSMENT OF CHARTER

- The CJEU has applied the Charter frequently since it became binding. In a *Joint Communication from Presidents Costa and Skouris* of the ECJ and ECtHR in early 2011, it was observed that the Charter has rapidly become of primary importance in the recent case-law of the CJEU.
- Decisions in EU Courts quoting the Charter (COMMISSION Annual Report on Charter 2014):
 - 2014 - 210
 - 2013 - 114
 - 2012 - 87
 - 2011 – 43

Problems/issues with Charter

- 1. opaque language
- 2. Some rights highly qualified
- 3. Limitations
- 4. Problem of horizontal effect
- 5. Distinctions between rights and principles
- 6. Scope
- 7. the Charter and the ECHR
- 8. The Charter and national constitutional rights
- 9. Opt-outs?

The Charter and national constitutional 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.***
- **Article 53**
- **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 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.**'*

National identity

- **Art 4(2) TEU:** The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

The CFR and supremacy of EU law over national law

- **Case 6/64 Costa v ENEL [1964] ECR 585**
- *It follows from all these observations that the law stemming from the Treaty, an independent source of law, **could not, because of its special and original nature, be overridden by domestic legal provisions, however framed**, without ... the legal basis of the Community itself being called into question.'*
- **Internationale Handelsgesellschaft[1970] ECR 1125:**
- IN FACT, THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, CANNOT BECAUSE OF ITS VERY NATURE BE OVERRIDDEN BY RULES OF NATIONAL LAW, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED IN QUESTION .
- **THEREFORE THE VALIDITY OF A COMMUNITY MEASURE OR ITS EFFECT WITHIN A MEMBER STATE CANNOT BE AFFECTED BY ALLEGATIONS THAT IT RUNS COUNTER TO EITHER FUNDAMENTAL RIGHTS AS FORMULATED BY THE CONSTITUTION OF THAT STATE OR THE PRINCIPLES OF A NATIONAL CONSTITUTIONAL STRUCTURE ."**
- ECJ proclaimed that fundamental rights, as general principles of Community law, are
- *'INSPIRED BY THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES', SIMULTANEOUSLY UNDERLINING THAT THEIR PROTECTION 'MUST BE ENSURED WITHIN THE FRAMEWORK OF THE STRUCTURE AND OBJECTIVES OF THE COMMUNITY.'*

BUT . . .Threats to supremacy especially from the German courts



- **Solange I** [1974] 2 CMLR 549 the protection of fundamental rights as ‘an inalienable, essential feature’ of Germany’s Basic Law.
- **Solange II** [1987] 2 CMLR 225
- **Ratification of the Maastricht Treaty: Brunner** [1994] 1 CMLR 57:
- ... in future the interpretation of enabling provisions by institutions and agencies of the Community will have to consider **that the Union Treaty basically distinguishes between the exercise of a conferred limited sovereign power and the amendment of the Treaty**, thus the interpretation will not result in an extension of the Treaty: such an interpretation of enabling provisions would not have a binding effect for Germany . . .
-
- **Ratification of the Lisbon Treaty, judgment of 30 June 2009**, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 Available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html
- **European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life.** This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.

Co-existence: each the final judge?

- For over 40 years, the ECJ and the national constitutional courts co-existed in a creative ambiguity; each one considering itself to be the final judge
- The ECJ has developed various techniques to deal with such instances of potential constitutional conflict:
 - The controversial issue may be brought outside the scope of EU law ([Grogan](#)),
 - EU law may be recognised to protect the same constitutional right and to the same far-reaching extent ([Omega Spielhallen](#) 2003 Charter not mentioned). The court allowed German authorities to ban the game, but insisted that this outcome did not depend upon 'a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.
 - the principle of respect for national identity in **Article 4(2) TEU** may be used to allow national norms to remain applicable even when they undermine effectiveness of an EU norm.

Case C-399/11 Melloni [2013] ECR I-0000

59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order [..], rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State [..]

60. It is true that Article 53 CFR confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, **provided that the level of protection provided for by the CFR, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.**

61. However ... Article 4a(1) of [the EAW] FD does not allow MS to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

Analysis of Melloni

- a) *Charter as maximum standard?*
- b) *Possibility of narrow construction of Melloni?*
- c) *But how to justify the ruling from national constitutional viewpoint?*
- d) *worrying message:*

UK & Poland 'opt-out'?

- **Protocol 30 to the Lisbon Treaty on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom**
- *Article 1*
- *1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
- *2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*
- *Article 2*
- *To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.*

Pagani Detention centre, Greece
see *R (Saedi) v Secretary of State for the Home Department* [2010] EWHC 705 (re status of UK 'opt out') – becomes Joined Cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR 000.



Article 1(2) Protocol

- - *Nonetheless, it would appear that Article 1(2) of the Protocol, which provides that nothing in Title IV of the Charter creates justiciable rights, is distinguishable from the rest of the document, and was specifically intended to function as an opt-out – although it remains doubtful whether it is capable of so doing.*
- Title IV concerns solidarity rights, such as the right of collective action and the right to health care, and the Protocol is intended to ensure that these rights are not directly enforceable in these member states. However, most of the rights in Title IV are already recognised as general principles of EU law under Article 6(3) TEU, which means that they can be enforced in national courts without invoking the Charter. As a result, it is doubtful to what extent Article 1(2) is able to function as a substantive opt-out.

But general principles of law still apply

- But also one other very important thing to bear in mind – the Charter is not the only source of Fundamental Rights in EU, as we know. Under Art 6(3) EU the case law of ECJ on Fundamental Rights as General Principles will continue to nourish the EU. To these Fundamental Rights the Protocols do not apply in any case.

D. USING AND LITIGATING THE CHARTER

- **1. What does CJEU case law reveal about the ways in which the Charter may be applied?**
- **a) Hierarchical primacy:** status of primary law. See also *Kadi* case.
- **b) Charter may be used as grounds of annulment of EU act:**
- Notably, there are the cases in which the ECJ has declared EU provisions to be invalid: *Test-Achats* and *Volker* (*Case C-236/09 Association belge des Consommateurs Test-Achats and Others [2011] ECR 000; Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert*)
- **c) Charter as interpretive tool:**

D. USING AND LITIGATING THE CHARTER (cont)

- **d) Charter ignored** eg In citizenship and free movement cases, such as *Ruiz Zambrano*, *Gaydarov* and *Aldazhov*, the ECJ failed to give an interpretation of the Charter, although the referring courts had explicitly asked for it.
- Furthermore, even though one of the main novelties of the Charter was the incorporation of specific provisions referred to the right to the integrity of the person in the fields of medicine and biology (Article 3(2) Charter), the Charter was not mentioned in *Brüstle*, about the interpretation of the concept of 'human embryo'

D. USING AND LITIGATING THE CHARTER (cont

- **e) General Principles of law rather than Charter:**
And unsurprisingly, perhaps, given the Court's continuing history of 'discovering' fundamental rights as unwritten general principle of EU law (see for example Case C-114/04 *Mangold* [2005] ECR I-9981; and Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG*, [2010] ECR I-nyr on age discrimination as an unwritten general principle), the express provisions of the Charter are not seen as *confining* the Court of Justice.

D. USING AND LITIGATING THE CHARTER (cont)

- **2. Fundamental rights cases tend to have a different nature depending on the European fora they are decided in.**
- *Eg General Court, or CJEU*

D. USING AND LITIGATING THE CHARTER (cont)

- **3. Difficulties with individual standing before CJEU:**
- using the Charter before the CJEU directly is relatively difficult because the CJEU is not primarily designed as a human rights court to deal with individual complaints.
- a) *Preliminary references*. (Article 267 TFEU).
- b) *Direct access*: Beyond the preliminary reference procedure, it is very difficult to get access to the CJEU.
- 'action for annulment' under article 263 TFEU): an individual or organisation can usually only do this if he/she/it is specifically named by a piece of legislation. An example of this is the case of *Kadi and Al Barakaat International Foundation v. Council and Commission* (Case C-402/05 P and C-415/05, P. *Kadi* [2008] ECR I-6351) where an individual complained about legislation that placed him on a list of people suspected of involvement with terrorism.
-

D. USING AND LITIGATING THE CHARTER (cont)

- c) *Infringement procedure*: The European Commission can make a complaint against an EU member state (through the 'infringement procedure' Art 258 TFEU) before the CJEU. Although an individual or organisation can bring the government to the attention of the Commission, it is entirely within the Commission's discretion on how to proceed.

D. USING AND LITIGATING THE CHARTER (cont)

- d) *Other routes*: it is easier, however, for an individual to make a complaint to one of several bodies set up by the EU to investigate certain kinds of wrongdoing.
- *European Data Protection Supervisor*: Individuals who believe that there has been a failure to safeguard their personal data by an EU institution or body can make a complaint.
- *The European Parliament's Committee on Petitions* can act on a complaint about national authorities failing to implement EU law properly, including failure to respect the rights in the Charter.
- *The European Ombudsman* also hears complaints that may have human rights implications.
- What these procedures have in common is that they do not deliver a legally binding outcome – rather, they are similar to mediation.

CONCLUSION

- In February 2015, a Eurobarometer Survey showed that awareness of the Charter has only slightly improved over the years: only 14 % of respondents actually knew what the Charter is about (11 % in 2012 and 8 % in 2007). Some 51 % of respondents had heard about the Charter, but did not know exactly what it is (53 % in 2012 and 48 % in 2007).
-
- The best argument for the Charter is the simplest: the need for robust and accessible judicial protection for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law.

CASE STUDIES ON APPLICATION OF THE EU CHARTER
Professor Sionaidh Douglas-Scott, University of Oxford
Helsinki 2015

1. Garden Centres

1. *Sunshine Garden Centre*, a Belgian garden centre operator, objected to its competitors' (*Happy Plants Garden Centre*) refusal to comply with national legislation requiring retailers to observe one day of closure per week. They brought legal proceedings in the Belgian courts requesting that they be ordered to cease the practice and comply with the requirement to observe one day of rest per week. *Happy Plants Garden Centre* argued in their defence that the Belgian obligation was contrary to EU law. They persuaded the Belgian Constitutional Court to make a preliminary reference to the Court of Justice on that point.

a) First, the CJEU was requested to determine whether the contested Belgian legislation was contrary to the principles of equality and non-discrimination set out in Articles 20 and 21 of the Charter, read in the light of Articles 15 and 16 of the Charter.

b) Secondly, the CJEU was asked to consider the Belgian measure's compatibility with the Treaty provisions on the free movement of goods and services (Articles 34, 35 and 56 TFEU).

Please advise whether the Charter may apply in this case.

Further questions:

1. How do we know if the Charter applies? What is the field of its application?
2. What relevant caselaw would you cite here?
3. What might be the consequences in this case if the Court were to find that the Charter were applicable?

2. Fingerprint retention

Council Regulation No 2252/2004/EC requires EU member states to collect and store biometric data, including fingerprints, in the storage medium of passports and other travel documents, and requires that such data be used for verifying the authenticity of the document or the identity of the holder.

The Netherlands introduced such measures. However, Netherlands law also provides that such data obtained through these measures can be kept in a central register, and used for other purposes (such as national security, prevention of crime and identification of disaster victims).

The applicants made passport applications, but refused to provide the fingerprint data. They argued, inter alia, that the storage and further use of this data breached their fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights of the EU.

The national court referred (inter alia) this question for a preliminary ruling:

Does Article 4(3) of the Regulation 2252/2004/EC, read with Articles 7 and 8 Charter, require Member States to guarantee that the biometric data collected and stored pursuant to that Regulation will not be collected, processed and used for purposes other than the issue of passports or other travel documents?

[NB: The ECJ had already held (in [C-291/12 Schwarz](#)) that the collection of data for the purposes stipulated in the regulation (to verify the authenticity of the passport or the identity of the holder) was compatible with the Charter. The question was whether further processing of those data by Member States would similarly be compatible.]

Please advise whether you think that further use by the Netherlands of this data breaches Arts 7 and 8 Charter.

3. Sacked Embassy employees

Ms B and Ms J are both Moroccan nationals. They were employed as members of the domestic staff respectively at the Sudanese and Libyan Embassies in London. They were both dismissed and brought claims against the respective Embassies for unfair dismissal, failure to pay the national minimum wage and breach of the Working Time Regulations 1998. Ms J also claims arrears of pay, racial discrimination and harassment.

Two of their claims derive from EU law, namely:

- the UK Working Time Regulations (1998) implement the European Working Time Directive 2003/88/EC into UK law, and
- the EU Directive 2000/43/EC (The Race Directive) is implemented in the UK by The Race Relations Act 1976 (Amendment) Regulations 2003, SI No 1626 amending the Race Relations Act of 1976.

The Embassies claimed state immunity in reliance on sections 16(1)(a) and 4(2)(b) of the UK State Immunity Act 1961 which transposes a Council of Europe Convention on that issue. The effect of section 16(1)(a) is that states enjoy a blanket immunity from UK courts' jurisdiction in respect of proceedings concerning employment of the members of an Embassy. They also claim that Ms J's action is barred by section 4(2)(b) because she was not habitually resident in the UK at the time her contract of employment was made.

NB: Under the UK doctrine of Parliamentary sovereignty, UK courts do not have jurisdiction to disapply Acts of the UK Parliament, except in the specific instance that they violate EU law.

Questions

1. Did invoking state immunity for these employment claims amount to a breach of human rights law, given that Article 6 ECHR (the right to a fair trial) guarantees access to the courts, according to the case law of the European Court of Human Rights (ECtHR).
2. Is the EU Charter also applicable given that Article 47 EU Charter of Fundamental Rights also guarantees the right to a fair trial.
3. If the EU Charter is applicable, may it be applied *horizontally*, given that Foreign Embassies are not treated as emanations of the state, but as private parties in employment disputes such as these.

4. Wearing the red star

Lazlo was the vice-president of the left-wing Workers' Party in Hungary. He has been convicted in the Hungarian courts - under a criminal law prohibiting the displaying of totalitarian symbols in public - for wearing a red star, 5 cm in diameter, as a symbol of the international workers' movement, on his jacket during a demonstration. Under that provision - Art. 269/B, paragraph 1(b) of the Hungarian Criminal Code, a person who makes public use of the swastika, the SS insignia, the "arrow cross", the hammer and sickle, the five-pointed red star, or any other sign representing one of these symbols has committed a minor offence punishable by a fine. [Hungary's Constitutional Court stated in 2000 that the law prohibiting the displaying of totalitarian symbols in public is in compliance with the Constitution, referring also to Hungary's historical experience.]

Lazlo appealed to the Budapest Regional Court. That court decided to stay the proceedings and to refer the case to the CJEU for a preliminary ruling under Article 267 TFEU.

In its order for reference, the Budapest Court observed that in several EU member States, such as the Italian Republic, the symbol of left-wing parties is the red star or the hammer and sickle, and is not prohibited.

By the reference the national court asks whether the principle of non-discrimination, [Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22)] or Articles 10, 11 and 12 of the Charter preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings.

Questions

1. Will Lazlo be successful in his claim that the EU Charter and general principles of law apply?
2. Would your answer be any different had a worker from another member State been penalized for wearing the red star symbol in Hungary?

1 **CASE STUDIES ON THE APPLICATION OF THE EU CHARTER IN NATIONAL LAW**

PROFESSOR SIONAIDH DOUGLAS-SCOTT
UNIVERSITY OF OXFORD

2

1. Garden Centres

- *Sunshine Garden Centre*, a Belgian garden centre operator, objected to its competitors' (*Happy Plants Garden Centre*) refusal to comply with national legislation requiring retailers to observe one day of closure per week. They brought legal proceedings in the Belgian courts requesting that they be ordered to cease the practice and comply with the requirement to observe one day of rest per week. *Happy Plants Garden Centre* argued in their defence that the Belgian obligation was contrary to EU law. They persuaded the Belgian Constitutional Court to make a preliminary reference to the Court of Justice on that point.
- a) First, the CJEU was requested to determine whether the contested Belgian legislation was contrary to the principles of equality and non-discrimination set out in Articles 20 and 21 of the Charter, read in the light of Articles 15 and 16 of the Charter.
- b) Secondly, the CJEU was asked to consider the Belgian measure's compatibility with the Treaty provisions on the free movement of goods and services (Articles 34, 35 and 56 TFEU).
-
- *Please advise whether the Charter may apply in this case.*
- *Further questions:*
 - 1. How do we know if the Charter applies? What is the field of its application?
 - 2. What relevant caselaw would you cite here?
 - 3. What might be the consequences in this case if the Court were to find that the Charter were applicable?

3  **Case C–483/12 Pelckmans Turnhout NV v Walter Van Gastel Balen NV, Judgment Of The Court (First Chamber) 8 May 2014**

- 20 It follows that, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to that effect . . . *Åkerberg Fransson* EU:C:2013:105, paragraph 22).
- 21 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties . . .
- 22 There is nothing specific in the order for reference demonstrating that the legal situation at issue in the main proceedings comes within the scope of EU law. . .
- 24 In any event, as regards the application of Articles 34 TFEU to 36 TFEU governing the free movement of goods, referred to by that court, it must be borne in mind, as this Court has observed on a number of occasions, that those provisions do not apply to national rules concerning the closure of shops that are enforceable against all economic operators pursuing activities within the national territory and that affect, in the same way, in law and in fact, the sale of domestic products and of products from other Member States (see, inter alia, Joined Cases C–69/93 and C–258/93 *Punto Casa and PPV* EU:C:1994:226, paragraph 15, and Joined Cases C–418/93 etc. *Semeraro Casa Uno and Others* EU:C:1996:242, paragraph 28)...

- 26 It follows from all the foregoing that it has not been established that the Court has jurisdiction to interpret the provisions of the Charter referred to by the referring court.
- 27 In those circumstances, the Court has no jurisdiction to answer the question referred by the Grondwettelijk Hof.

4 2. Fingerprint retention

- Council Regulation No 2252/2004/EC requires EU member states to collect and store biometric data, including fingerprints, in the storage medium of passports and other travel documents, and requires that such data be used for verifying the authenticity of the document or the identity of the holder.
- The Netherlands introduced such measures. However, Netherlands law also provides that such data obtained through these measures can be kept in a central register, and used for other purposes (such as national security, prevention of crime and identification of disaster victims).
- The applicants made passport applications, but refused to provide the fingerprint data. They argued, inter alia, that the storage and further use of those data breached their fundamental rights under Article 7 and 8 of the Charter of Fundamental Rights of the EU.
- The national court referred (inter alia) this question for a preliminary ruling:
 - *Does Article 4(3) of the Regulation 2252/2004/EC, read with Articles 7 and 8 Charter, require Member States to guarantee that the biometric data collected and stored pursuant to that Regulation will not be collected, processed and used for purposes other than the issue of passports or other travel documents?*
- [The ECJ had already held (in [C-291/12 Schwarz](#)) that the collection of data for the purposes stipulated in the regulation (to verify the authenticity of the passport or the identity of the holder) was compatible with the Charter. The question was whether further processing of those data by Member States would similarly be compatible.]

- *Please advise whether you think that further use by the Netherlands of this data breaches Arts 7 and 8 Charter.*

5 **JOINED CASES C-446/12 – 449/12 WILLEMS**
Judgment Of The Court (Fourth Chamber) 16 April 2015

- 46 The Court has already held, in its judgment in *Schwarz* (C-291/12,), that the use and storage of biometric data for the purposes specified in Article 4(3) of that regulation are compatible with the requirements of Articles 7 and 8 of the Charter.
- 47 As regards all other uses and storage of that data, it is clear from Article 4(3) of Regulation No 2252/2004, which deals with the use of such data '[f]or the purpose of this Regulation', . . . that the use and storage of that data are not governed by the latter regulation. . . . Regulation No 2252/2004 is without prejudice to any other use or storage of these data in accordance with national legislation of Member States and . . . does not provide a legal base for setting up or maintaining databases for storage of those data in Member States, that matter being within the exclusive competence of the Member States.
- 48 It follows, in particular, that Regulation No 2252/2004 does not require a Member State to guarantee in its legislation that biometric data will not be used or stored by that State for purposes other than those mentioned in Article 4(3) of that regulation . . .
- 49 Next, as regards Articles 7 and 8 of the Charter, it is clear from the case-law of the Court that the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (judgments in *Åkerberg Fransson*, C-617/10, paragraphs 20 and 22 . . .)
- 50 Given that, in the present case, Regulation

No 2252/2004 is not applicable, there is no need to determine whether the storage and use of biometric data for purposes other than those referred to in Article 4(3) thereof are compatible with those articles of the Charter . . .

- 53 Therefore, the answer to the questions referred is that Article 4(3) of Regulation No 2252/2004 must be interpreted as meaning that it does not require the Member States to guarantee, in their legislation, that biometric data collected and stored in accordance with that regulation will not be collected, processed and used for purposes other than the issue of the passport or travel document, since that is not a matter which falls within the scope of that regulation.

6 3. Sacked Embassy employees

- Ms B and Ms J are both Moroccan nationals. They were employed as members of the domestic staff respectively at the Sudanese and Libyan Embassies in London. They were both dismissed and brought claims against the respective Embassies for unfair dismissal, failure to pay the national minimum wage and breach of the Working Time Regulations 1998. Ms J also claims arrears of pay, racial discrimination and harassment.
- Two of their claims specific derive from EU law: namely, the Working Time Regulations (1998) implement the European Working Time Directive 2003/88/EC into UK law, and the EU Directive 2000/43/EC (The Race Directive) is implemented in the UK by The Race Relations Act 1976 (Amendment) Regulations 2003, SI No 1626 amending the Race Relations Act of 1976.
-
- The Embassies claimed state immunity in reliance on sections 16(1)(a) and 4(2)(b) of the UK State Immunity Act 1961 which transposes a Council of Europe Convention on that issue. The effect of section 16(1)(a) is that states enjoy a blanket immunity from UK courts' jurisdiction in respect of proceedings concerning employment of the members of an

Embassy. Ms J's claim is also barred by section 4(2)(b) because she was not habitually resident in the UK at the time her contract of employment was made.

-
- Main Issues:
- 1. Did invoking state immunity for these employment claims amount to a breach of human rights law, given that Article 6 ECHR (the right to a fair trial) guarantees access to the courts, according to the case law of the European Court of Human Rights (ECtHR).
-
- 2. Is the EU Charter also applicable given that Article 47 EU Charter of Fundamental Rights also guarantees the right to a fair trial.
-
- 3. If the EU Charter is applicable, may it be applied *horizontally*, given that Foreign Embassies are not treated as emanations of the state, but as private parties in employment disputes such as these.

7  ***Benkharbouche v Embassy of the Republic of Sudan, Libya [2015] EWCA Civ 33***

- The appellants cannot of course claim a remedy under the EU Charter unless they can also show that they are entitled to rely on a violation of it to seek a remedy in proceedings before a national court. For this there must be claims which fall “within the scope of” EU law. As to this, Article 51 EU Charter confirms that the EU Charter is addressed to the EU institutions and like bodies and that it does not extend the field of application of the EU Treaties. Article 52(5) of the EU Charter states that the EU Charter only applies to these entities when they are implementing Union law, in the exercise of their respective powers. The EU Charter does not, therefore, apply to claims based on national law.

- In fact, it is common ground that both claimants have claims that fall within the scope of EU law. As the judge explained, Ms. Benkharbouche's claims under the Working Time Regulations and Ms. Janah's claims under the Working Time Regulations and for racial discrimination and harassment are derived from EU measures. They have other claims which they accept are not within EU law, such as claims for unfair dismissal. The question of what falls within the scope of EU law is controversial in some contexts but no one has taken issue with the point that in part Ms. Benkharbouche's claims and Ms. Janah's claims are within the scope of EU law . . .

8 **BENKHARBOUCHE: HORIZONTAL EFFECT**

- *Horizontal Direct Effect*
- In our judgment, for the reasons given below, an EU Charter right can be relied on "horizontally" in certain circumstances.
- The CJEU gave general principles of EU law horizontal direct effect before the EU Charter came into effect. In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set

aside in order to give effect to the general principle.

- It is therefore perhaps not surprising to find that the CJEU has applied *Mangold* to the equivalent Charter provision after the Lisbon Treaty came into effect. Case C-555/07 *Kucukdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination. The CJEU also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically Article 6, TFEU) provided that the EU Charter had the same status as the Treaties. This was significant because, as Lord Kerr pointed out in *Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 at [26]:
- “[I]n its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, the *Promusicae* case [2008] All ER (EC) 809.”

9 **BENKHARBOUCHE: HORIZONTAL EFFECT**

- A question which remained after *Kucukdeveci* was whether the CJEU’s statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to *Mangold* general principles. The CJEU to an extent addressed this question in Case C-176/12 *Association de Mediation Sociale (AMS)* [2014] ECR I-000 (“AMS”) which was decided after Langstaff J. gave his judgment. In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers’ right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it

required specific expression in Union or national law, but expressly distinguished *Kucukdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.

- The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in *Kucukdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so. The Explanations prepared under the authority of the Praesidium of the Convention which drafted the EU Charter, which Article 52(7) EU Charter requires the court to take into account when interpreting the EU Charter, state that the CJEU has “enshrined” the right to an effective remedy “as a general principle of Union law”. The Explanations cite Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097 and Case C-97/91 *Borelli* [1992] ECR I-6313. In *Borelli*, for instance, the CJEU held:
 - “14. As the Court observed in particular in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”
 - We therefore conclude that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect. It remains, of course, subject to the exceptions to be found in the jurisprudence of the Strasbourg court (subject to any contrary provision in EU law). Our conclusion accords

with the analysis of the case law made by Mr. Eicke, which Mr. Landau adopted and on which Mr. Otty relied.

10 4. WEARING A RED STAR

- Lazlo was the vice-president of the left-wing Workers' Party in Hungary. He has been convicted - under a criminal law prohibiting the displaying of totalitarian symbols in public - for wearing a red star, 5 cm in diameter, as a symbol of the international workers' movement, on his jacket during a demonstration. Under that provision - Art. 269/B, paragraph 1(b) of the Hungarian Criminal Code, a person who makes public use of the swastika, the SS insignia, the "arrow cross", the hammer and sickle, the five-pointed red star, or any other sign representing one of these symbols has committed a minor offence punishable by a fine. [Hungary's Constitutional Court stated in 2000 that the law prohibiting the displaying of totalitarian symbols in public is in compliance with the Constitution, referring also Hungary's historical experience.]
- Lazlo appealed to the Budapest Regional Court. That court decided to stay the proceedings and to refer the case to the CJEU for a preliminary ruling under Article 267 TFEU.
- In its order for reference, the Budapest Court observed that in several EU member States, such as the Italian Republic, the symbol of left-wing parties is the red star or the hammer and sickle. Therefore, the question arose whether a provision in one EU member State prohibiting the use of the symbols of the international labour movement on pain of criminal prosecution was discriminatory, when such a display in another member State did not give rise to any sanction.
- By the reference the national court asks whether the principle of non-discrimination, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22) or Articles 10, 11 and 12 of the Charter preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the

symbol in question in the main proceedings.

-
- 1. Will Lazlo be successful in his claim that the EU Charter and general principles of law apply?
- 2. Would your answer be any different had a worker from one of those other Member States been penalized for wearing the star symbol in Hungary?

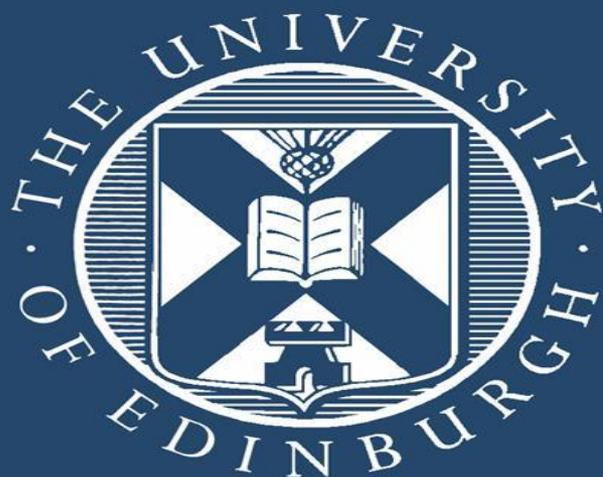
11  **Case C-328/04: Criminal proceedings against Attila Vajnai [Order of the Court (Fourth Chamber), ECR I 8577]**

- On 6 October 2005 the CJEU declared that it had no jurisdiction to answer the question referred by the Regional Court. The relevant part of the reasoning reads as follows:
- “11. By its question, the national court asks, essentially, whether the principle of non-discrimination, Article 6 EU, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22) or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ C 364, p. 1), preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings.
- ...
- 13. By contrast, the Court has no such jurisdiction with regard to national provisions outside the scope of Community law and when the subject matter of the dispute is not connected in any way with any of the situations contemplated by the treaties (see *Kremzow*, paragraphs 15 and 16).
- 14. It is clear that Mr Vajnai’s situation is not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings are outside the scope of Community law.

- 15. In those circumstances, it must be held, on the basis of Article 92 § 1 of the Rules of Procedure, that the Court clearly has no jurisdiction to answer the question referred by the *Fővárosi Bíróság.*”

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

Dr Filippo Fontanelli
Session A – 11 June 2015



The University of Edinburgh
Edinburgh Law School

Outline

- Limits and scope of Charter's rights (with specific reference to Art. 41)
- The riddle of the "implementation of EU law"
- The horizontal effect of Charter's rights
- The function of the explanations

Title VII of the Charter

Field of Application – Art. 51

- *Ratione materiae, ratione personae*

Interpretation of rights and principles – Art. 52

- What is the normative content of a Charter right?

Level of protection – Art. 53

- Coordination with ECHR and domestic rules

Prohibition of abuse of rights (circular) – Art. 54

The scope of application of the CFR

Art. 51

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. **[i.e., limited subjective application]** They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties. **[conferral]**

Implementation of EU law?

Important: when the Charter applies to State measures, it can prevail over them and cause their disapplication (by virtue of the primacy of EU law, since *Costa v Enel*).

When is the MS “implementing” EU law?
Same doctrines used for the application of general principles (*ERT*, *Wachauf*): when the State measures falls “within the scope” of EU law, by way of *application* or *derogation*.

***Fransson (2013)* – zoom in**

Swedish law provides for the applicability of (both) fiscal and criminal sanctions to tax crimes.

This duplication might breach the principle of *ne bis in idem* (Article 50 of the Charter).

The question is: **are the Swedish measures implementing EU law?**

Otherwise, the Charter cannot apply.

(continued)

24 ... tax penalties and criminal proceedings ... are connected in part to breaches of ... obligations to declare VAT

26 ... Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU [NB: VAT finances the EU's budget]

27 ... It follows that tax penalties and criminal proceedings for tax evasion ... **constitute implementation ... of EU law**, for the purposes of Article 51(1) of the Charter

Too wide? Art. 51(1) CFR

Generic checklist (see *Siragusa* 2014):

24: the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a **certain degree of connection** above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

Is the measures intended to implement EU law? What is its nature? Does it have other goals than those supported by EU law? Does EU law regulate specifically the subject-matter of the measure?

***Delvigne* – Opinion 4 June 2015**

French law provides that conviction for certain crimes entails the loss of the right to vote. This causes a restriction on convicted people's right to vote at European elections.

Does this mean that the French measures fall within the scope of EU law, under Art. 51(1) of the Charter?

AG Cruz Villalon's Opinion

91. The situation of the loss of the right to vote in elections to the European Parliament ... as a result of the French law which, as we shall see, pursuant to EU law, governs elections to the European Parliament — by reference to the national general electoral law ..., which refers in turn to the relevant criminal law ... — is the consequence of a law adopted **in order to implement EU law.**

Which EU law?

Art. 223(1) TFEU - The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. [**not acted upon**]

Doesn't matter: French law implements EU law even if the matter is not 'entirely determined by EU law' [**stretching *Melloni***]

Article 41

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time **by the institutions and bodies of the Union.**

This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions.

Liability and right to obtain answers.

Coordination with Art. 51(1)?

Express reference to EU institutions, are MS authorities cannot be bound, not **even when they implement EU law?** (cfr. Art. 296 TFEU)

No, see C-277/11 *M*: “the right...of the applicant for asylum to be heard must apply fully to the procedure in which **the competent national authority** examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System.”

(continued)

It seems to me neither consistent nor in accordance with the case-law of the Court for the wording of Article 41 of the Charter to allow the introduction of an exception to the rule laid down in Article 51... (C-249/13 ***Boudjlida* opinion**)

Accordingly, where... a Member State implements EU law, the requirements pertaining to the right to good administration... are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities. (C-604/12 ***H.N.* judgment**)

(continued)

it is clear from the wording of Article 41 of the Charter that it is addressed not to the MS but solely to the institutions, bodies, offices and agencies of the EU

... Consequently, an applicant for a resident permit cannot derive from Article 41(2)(a) of the Charter a right to be heard in all proceedings relating to his application.

(Judgment in case C-249/13 *Boudjlida*)

Cases of derogation

No direct obligations flowing from EU law, but national measures entail a derogation → the Charter binds them.

Example: *Pfleger* (C-390/12):

Austrian law sanctioning the use of unauthorised gaming machine **derogates** from the free circulation rules in the Treaty → Artt. 15-17 of the Charter must be respected.

Article 52: guidelines on interpretation

- Proportionality (par. 1)
- Duty to defer to the interpretation of equivalence principles deriving from ECtHR and common constitutional traditions (par. 3 and 4)
- Principles can only be used to interpret and review the legality of implementing acts (par. 5) → **[no direct effect?]**
- Explanations are authoritative (par. 7)

Article 41 and ECHR/constitutional traditions

A non-obvious link: The usual sources of law for the general principles of EU law do not offer any assistance in ascertaining whether [there is] a right to be heard for the taxpayer. ...Article 6 of the ECHR guarantees a right to be heard only in judicial or quasi-judicial proceedings, but not in administrative proceedings. The constitutional traditions common to the Member States also have included a right to be heard in the context of administrative proceedings only in isolated cases and only recently. **(Opinion in Case C-276/12, Jiří Sabou)**

Article 52(3) and 53 CFR

Express link to the case law of the ECtHR. However, increasingly the CJEU is relying on its own case law rather than going back to the interpretation of the Convention.

Issue with Art. 53: the level of protection is not capped, in theory, but see *Melloni* (normally it is less likely that the ECtHR advocates a higher standard, but it has occurred, e.g. right to strike)

Direct effect?

The question of direct effect goes back to ***Van Gend en Loos***: not just a matter of source, but also of content of the norm.

Hence, Treaty norms and general principles have been considered to have direct effect, insofar as they are clear and bestow unequivocally a right on the individual without need for implementing measures (*Mangold, Defrenne*)

Charter's rights?

Source of primary law. The test of direct effect should apply normally. BUT, remember Art. 52(5) CFR: **no direct effect for principles.** **Controversial distinction**

“[principles] do not...give rise to direct claims for positive action by the Union's institutions or Member States authorities.”

However, right to good administration seems to fall squarely in the “rights” camp.

Horizontal direct effect?

Whereas it's customarily denied to unimplemented Directives, primary law norms *can* have it (*Bosman, Mangold, Laval*).

[unlikely to arise with respect to Article 41, which concerns primarily vertical disputes]

Charter's rights? Why not? But see *Association de Mediation Sociale*, Case C-176/12. The requisites of direct effect must be met.

AMS (zoom in)

...Art. 27 of the Charter...provides that workers must...be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices.

...for this article to be fully effective, it must be given more specific expression in EU or national law.

...the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age ... is sufficient in itself to confer on individuals an individual right which they may invoke as such.

... Art. 27 CFR cannot, as such, be invoked in a dispute ... in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

...since [Art. 27] by itself **does not suffice to confer on individuals a right which they may invoke as such**, it could not be otherwise if it is considered in conjunction with that directive.

Praesidium's explanations

Referred to in Art. 52(7) CFR and Art. 6(1) TEU. Authoritative guidelines. Useful to identify sources of inspiration and relevant precedents. Increasingly superseded by new case law.

Also useful to draw the distinction between rights and principles, at least tentatively.

Thanks for listening!

Overview of key rights and principles in Titles I, II and III of the Charter

Dr Filippo Fontanelli
Session II – 11 June 2015



The University of Edinburgh
Edinburgh Law School

Outline

- Introduction: Structure of the Charter
- Overview of the rights guaranteed in Titles I, II, III
 - Title I: dignity
 - Title II: freedoms
 - Title III: equality
- Interpretation of the rights in light of the ECHR, Art. 52 (3)
- Limits to these rights: Art. 52 (1)

Application in the case law of the CJEU

The Charter of Fundamental Rights

Adopted as a political declaration (not binding: soft law) with the Treaty of Nice in 2000.

Purpose: give **visibility** to the unwritten principles of fundamental rights protection endorsed and enforced by the ECJ. Largely inspired by the ECHR and the European Social Charter (1961).

Structure of the Charter

Preamble

Title I: Dignity

Title II: Freedoms

Title III: Equality

Title IV: Solidarity

Title V: Citizens' Rights

Title VI: Justice

Title VII: General Provisions Governing the Interpretation and Application of the Charter

Structure of the Charter

Preamble

Title I: Dignity

Title II: Freedoms

Title III: Equality

Title IV: Solidarity

Title V: Citizens' Rights

Title VI: Justice

Title VII: General Provisions Governing the Interpretation and Application of the Charter

Title I: Dignity

Article 1: Human dignity

Article 2: Right to life

Article 3: Right to the integrity of the person

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

Article 5: Prohibition of slavery and forced labour

Title II: Freedoms

Article 6: Right to liberty and security

Article 7: Respect for private and family life

Article 8: Protection of personal data

Article 9: Right to marry and right to found a family

Article 10: Freedom of thought, conscience and religion

Article 11: Freedom of expression and information

Article 12: Freedom of assembly and of association

Title II: Freedoms

Article 13: Freedom of the arts and sciences

Article 14: Right to education

Article 15: Freedom to choose an occupation and right to engage in work

Article 16: Freedom to conduct a business

Article 17: Right to property

Article 18: Right to asylum

Article 19: Protection in the event of removal, expulsion or extradition

Title III: Equality

Article 20 Equality before the law

Article 21 Non-discrimination

Article 22 Cultural, religious and linguistic diversity

Article 23 Equality between women and men

Article 24 The rights of the child

Article 25 The rights of the elderly

Article 26 Integration of persons with disabilities

Proportionality codified

Art. 52(1) of the Charter

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.

Same limitation provision for all rights

The test

A restrictive measure is justified if:

- Provided for by law
- Genuinely meets objective of a general interest
- Necessary
- Proportionate
- Respects essence of the right

Human dignity (Title I)

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

NS v Home Dept (2011) – zoom in

Afghan asylum seeker entered EU through Greece, then applied for asylum in the UK
Article 3 of Regulation 343/2003 (Dublin Regulation):

A Member State (MS) **may** transfer asylum seekers back to the MS through which they first entered the EU (here: Greece)

But MS **may** examine asylum application if they so choose, instead of transferring the applicant.

(continued)

Is a MS **required** to process an asylum application where the transfer to the responsible State would expose the asylum claimant to a risk of violation of his fundamental rights?

Background: Vast majority of asylum seekers enter EU via Greece or Italy, where they have to live in terrible conditions.

(continued)

94: ...in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the 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 Article 4 of the Charter**.

Legislative amendment

Follow-up cases: *EM (Eritrea) & Others v Secretary of State for the Home Department* [2012] EWCA Civ 1336; *R (Medhanye) v SSHD* [2012] EWHC 1799 (Admin) and [2011] EWHC 3012 (Admin)
Dublin III (Reg. 604/2013): Art. 3(2) → systematic deficiencies in responsible State: obligation to suspend the transfer.

Right to Liberty (Title II)

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Example: *Radu* (C-396/11)

- Can a State which executes a European Arrest Warrant (EAW) breach the right under Article 6 CFR?
- If yes: must this interference satisfy the proportionality test?
- CJEU dodged this question, but clearly EAWs pose serious questions in this respect, see *Melloni* (C-399/11) (again subsumed under Articles 47 and 48 CFR)

Right to Privacy and Data Protection (Title II)

Article 7 of the Charter:

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Right to private and family life

Relevance of Article 7:

1. Child custody/abduction cases: *McB v L.E.* (C-400/10 PPU)

- Should an unmarried father's right to custody be automatic?
- Court: Art 7 **right of father** to be balanced with **right of child** under Art 24 and **right of mother** to free movement under the Treaties

2. Search of business premises

- Are they protected as 'home'? Probably, see C-94/00 (*Roquette-Frères*)

Protection of personal data

Challenges to EU legislation:

- Data Retention Directive 2006/24/EC: *Digital Rights Ireland* joined cases C-293 and 594/12. Directive annulled under Art. 7 and 8 of the Charter (better: under Art. 52(1) CFR)

- Access to passenger name records?

- Case *Scarlet* (C-70/10): Art. 8 used as a competing interest in intellectual property case (peer to peer online exchange of copyrighted material)

Similar in UK: *Rugby Football Union v Viagogo* [2012] UKSC 55

Google Spain (2014)

Interpretation of secondary law (Directive 95/46) in light of the Charter. Interests and rights involved:

- the **individual's** right "to oblivion" (Art. 7-8)
- **Google's** economic interest (Art. 15-17)
- the right to information of **internet users** (Art. 11)
- "particular reasons" of **public** interest.

How is it possible to **balance** them all?

Google Spain (2014) – zoom in

97: ... the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available ... those rights override as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information ... However, that would not be the case if it appeared, for particular reasons ... that the interference with his fundamental rights is justified by the preponderant interest of the general public in having ... access to the information in question.

Title II

Article 13: Freedom of the arts and sciences

Article 14: Right to education

Article 15: Freedom to choose an occupation and right to engage in work

Article 16: Freedom to conduct a business

Article 17: Right to property

Article 18: Right to asylum

Article 19: Protection in the event of removal, expulsion or extradition

Freedom to conduct a business

Article 16

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

McDonagh v RyanAir (2013)

Attempt to construe Regulation 261/2004 (the “charter” of passengers’ rights) in light of Article 16 of the Charter.

Ryanair invoked the release of carriers’ liabilities in the case of ‘super-extraordinary circumstances’ (Icelandic volcanic ash cloud in 2010), an option not contemplated in the Regulation.

McDonagh v RyanAir – zoom in

63 ... the referring court mentions Articles 16 and 17 of the Charter. However, it is also necessary to take account of **Article 38** thereof which, like Article 169 TFEU, seeks to ensure a high level of **protection for consumers**, including air passengers, in European Union policies.

64 It follows [that the applicable provision of EU law], must be considered to comply with the requirement intended **to reconcile the various fundamental rights involved and strike a fair balance between them.**

Right to Property

Article 17

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

(continued)

Potentially far-reaching, whenever property is at stake (e.g. payment of a fine, etc) – contrast with ECHR (Protocol 1)

- Cf. *Ryanair* case: was invoked alongside Art 16

Right to intellectual property: *Scarlet v SABAM* C-70/10

Facts: Application for injunction by company representing authors, composers, etc. (SABAM) that Scarlet (internet service provider) should block activities of its users which infringe copyright (in particular peer-to-peer sharing of music, etc.)

Question: Does EU law (five Directives) interpreted in light of CFR preclude the court from making such an injunction?

***Scarlet v SABAM* – zoom in**

Rights: **Art. 17(2)** (IP holders) and **Art. 16** (*Scarlet*) and **Art. 8,11** (users)

47 The ... filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rightholders. ... that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced.

49 ... the contested filtering system is to be regarded as not respecting **the requirement that a fair balance be struck** between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.

Title III: Equality

Article 20 Equality before the law

Article 21 Non-discrimination

Article 22 Cultural, religious and linguistic diversity

Article 23 Equality between women and men

Article 24 The rights of the child

Article 25 The rights of the elderly

Article 26 Integration of persons with disabilities

Title III: Equality

Article 20 Equality before the law

Everyone is equal before the law.

Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Relevance: Link with Equality Directives based on Art. 19 TFEU – secondary legislation construed in light of Art 21 CFR → Case C-236/09 *Test-Achats*

Title III: Equality

Article 23 Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Relevance:

- Similar to Art. 157 TFEU
- Cases *Elbal Moreno* (C-385/11) and *Roca Alvarez* (C-104/09)

Case C-236/09 *Test-Achats*

Facts: Directive 2004/113 (on equal treatment of men and women in the access to and supply of goods and services) provided exception in Art. 5(2) for insurance contracts without time limit.

Question: is the exception compatible with Art. 21 and 23 CFR?

Analysis: **Direct** discrimination between men and women

Reasoning:

- Equal treatment: comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified
- Purpose of Directive was application of unisex rules on insurance premiums and benefits

***Test-Achats* – zoom in**

32. [The] provision, which enables ... to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women ... and is incompatible with Articles 21 and 23 of the Charter.

- Court confirmed its stance on what constitutes equal treatment
- Notable that Court put emphasis on an argument relating to an inconsistency within the Directive rather than striking out the provision based on Art. 21/23 alone.
- Clearer: AG Kokott: If EU takes 'action' under Art 19(1) TFEU to combat discrimination then it has to do so in accordance with the requirements of the principle of equal treatment.

The rights of the child (Title III)

1. Children shall have the right to such protection and care as is necessary for their well-being.

They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Relevance: custody cases

- *McB* (C-400/10 PPU): Court took child's best interest into account

Thank you for listening.

The EU Charter and the European Convention

Dr Filippo Fontanelli
Session II – 12 June 2015



The University of Edinburgh
Edinburgh Law School

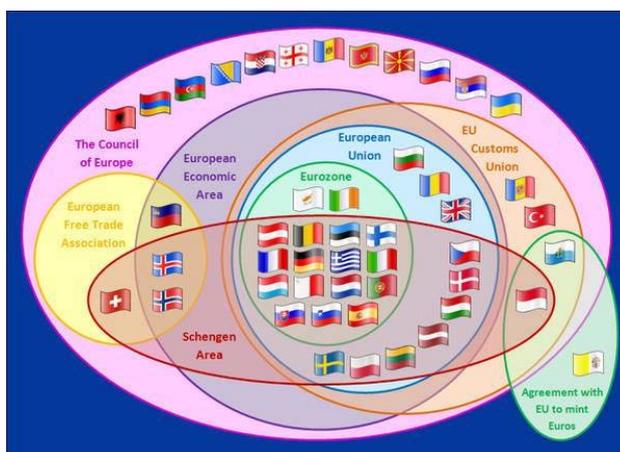
Outline

- Interpretation linkage Charter – ECtHR
- Review of EU acts
- Equivalent protection
- Different models of access to justice
- Accession
- Opinion 2/13

The EU and the ECHR

EU not a party to the ECHR, but all of its Member States are

- 47 parties to ECHR
- European Court of Human Rights in Strasbourg (ECtHR)
- Direct access to ECtHR
- 28 MS of the EU
- CJEU in Luxembourg
- Access to CJEU mainly via preliminary reference procedure



<http://boingboing.net/2011/03/12/venn-diagram-illustr.html>

The EU and the ECHR

ECHR was an important 'source of inspiration' for CJEU when defining the general principles of fundamental rights protection. The CJEU has scrupulously followed the case law of the ECtHR, see e.g. case *DEB* (C-279/09) on legal aid.

This is reflected in Art. 6(3) TEU, which refers to ECHR:

Fundamental rights, **as guaranteed by the ECHR** and as they result from the constitutional traditions common to the Member States, shall constitute **general principles of the Union's law**.

The Charter and the ECHR

Interpretation of the rights in light of the ECHR, Art. 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.

For corresponding rights: see explanations to the Charter Art. 52(7).

The explanations ... shall be **given due regard** by the courts of the Union and of the Member States.

Article 52(3) CFR: corresponding rights

Article 2: Right to life = **Article 2 ECHR**

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment = **Article 3 ECHR**

Article 5: Prohibition of slavery and forced labour = **Article 4 ECHR**

Article 6: Right to liberty and security = **Article 5 ECHR**

Article 7: Respect for private and family life = **Article 8 ECHR**

Article 9: Right to marry and right to found a family = **Article 12 ECHR, but wider scope**

(continued)

Article 10: Freedom of thought, conscience and religion
= Article 9 ECHR

Article 11: Freedom of expression and information =
Article 10 ECHR

Article 12: Freedom of assembly and of association =
Article 11 ECHR, but wider scope

Article 14: Right to education = Article 2 Protocol 1
ECHR, but wider scope

Article 17: Right to property = Article 1 Protocol 1
ECHR

Article 19: Protection in the event of removal, expulsion
or extradition = Article 3 ECHR

The Charter and the ECHR

Implications of Art. 52 CFR and Art. 6 TEU

ECHR is a *minimum* standard, i.e., Charter's Articles to be interpreted **at least** like corresponding ECHR Articles → case law of European Court of Human Rights is of great importance.

Can a MS increase the protection from the level required by the ECHR? Yes, but:

- Fundamental rights can **interfere with each other**, and
- If the protection deviates from the Charter's standard, the MS **cannot breach EU law** as a result (*Melloni* 2013)

Kadi II – zoom in

In the *Kadi* cases, the CJEU made extensive reference to the standards used by the ECtHR. See an example on lack of review of individual sanctions for blacklisted individuals:

133. Such a review is all the more essential since ... the procedure for delisting and ex officio re-examination ... **do not provide to the person whose name is listed ... the guarantee of effective judicial protection, as the ECtHR ... has recently stated** in paragraph 211 of its judgment of 12 September 2012, *Nada v. Switzerland*

Review of EU acts: current situation under the ECHR

EU is not a party and cannot be sued in Strasbourg, *but* EU Member States can be held responsible instead for breaches of the ECHR.

Matthews v UK (1999), before the European Court of Human Rights (ECtHR)

- According to EU's Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar.
- Applicant complained to ECtHR arguing there had been a violation of her right to vote under Art. 3 Protocol 1 ECHR.

***Matthews v UK* – zoom in**

The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. **Member States’ responsibility therefore continues** even after such a transfer.

Does this entail indirect review of EU measures by the ECtHR?

Bosphorus v Ireland

Bosphorus v Ireland (2005): EU legislation (Regulation) demanded that Yugoslavian aircraft be impounded to comply with UN sanctions.

Bosphorus airlines had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland. *Bosphorus* argued that Ireland violated its right to property under Art. 1 Protocol 1 ECHR.

If the ECtHR had upheld the claim, it would have **indirectly reviewed the EU Regulation for compliance with the ECHR.**

***Bosphorus* – zoom in**

155 ... State action taken in compliance with [EU law] is justified **as long as** the [EU] is considered to protect fundamental rights ... **in a manner which can be considered at least equivalent to that for which the Convention provides.** ...

156. ... 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 [EU] membership ... 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**.

Michaud: distinguishing Bosphorous

France's implementation of EU Directive requires lawyers to report suspicious activities, restricting the right to professional confidentiality.

113. ... Directives ... leave it to [States] to choose the means [of implementation]. ... France ... had a **margin of manoeuvre** capable of obstructing the application of the presumption of equivalent protection...

114. ...in *Bosphorus* the control mechanism provided for in EU law was fully brought into play. The Irish Supreme Court applied ... for a preliminary ruling ... [I]n the present case the *Conseil d'Etat* **refused to submit the applicant's request** to the CJEU for a preliminary ruling

***Al Dhabhi*: no equivalent protection**

Italy's implementation of the Euro-Mediterranean association agreement resulted in a refusal to grant family allowance to the applicant.

33. ... the Court of Cassation [did not provide] the reasons why ... the question raised did not warrant referral to the CJEU. It is therefore not clear ... whether **that question was considered not to be relevant ... or whether it was simply ignored**. ...the reasoning of the Court of Cassation contains no reference to the case-law of the CJEU.

34. That finding is sufficient for the Court to conclude that there has been **a violation of Article 6 ECHR**.

Traditional relationship

There is **a gap** in the jurisdiction of the ECtHR over acts that can affect individuals' rights, when no State is involved, and the measure is attributable only to the EU.

Connolly v 15 Member States of the EU (2008):

EU staff dispute: EU employee official had been fired. Differently from *Matthews* and *Bosphorus*, no Member State was involved. Hence, the ECtHR held the complaint inadmissible, because the act was not attributable to any MS.

Competing or complementing legal orders?

There are fundamental procedural and structural differences:

- ECtHR admits applications only if all domestic remedies have been exhausted, Art. 35(1) ECHR

- Direct access of individuals to the CJEU is very restricted, Art. 263 TFEU:

Only where an EU act is addressed to an individual (or it is of direct and individual concern to them): e.g. fine issued by EU

- Typically the CJEU operates via the preliminary reference procedure, Art. 267 TFEU → critical role of domestic courts.

Relevance of different procedures

A) challenging measures under the Charter v

B) challenging measures under the ECHR.

A) Only EU acts (preliminary ruling, annulment) or State measures falling under the scope of EU law → disapplication, preliminary ruling. Limited direct access.

B) Exhaustion → application to Strasbourg.

Opinion 2/94

27 No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.

34 ... Accession to the Convention would ... entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into **a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.**

35. Such a modification of the system ... would be of constitutional significance and ... could be brought about **only by way of Treaty amendment.**

The treaty amendment

The Lisbon Treaty includes Article 6(2) of the TEU, which reads:

The Union **shall accede** to the ECHR. Such accession shall not affect the Union's competences as defined in the Treaties.

The language suggests **an obligation**, but is misleading: accession to a multilateral treaty cannot be achieved unilaterally.

A negotiation process must start.

Protocol no. 8

The accession agreement “shall make provision for **preserving the specific characteristics** of EU and EU law”, in particular to address proceedings against MS/the Union;

The **competences** of the EU and **Art. 344 TFEU** shall not be affected [inter-state dispute on the Treaties **are only** for the CJEU]

The negotiation process

Firstly, the ECHR itself needed changing, to allow accession of a non-State member.

→ Protocol 14 to the ECHR (2004) entered into force in 2010.

Art. 14 of the Protocol modifies Art. 59 of the Convention, to permit accession of the EU.

The rules concerning the negotiation of the accession are found in Art. 218 of the Treaty on the Functioning of the EU (TFEU)

Draft Accession Agreement

April 2013: agreement between the negotiating parties (47 members of the CoE and the EU) on the draft accession instrument (the **Draft Accession Agreement – “DAA”**).

- Co-respondent mechanism (Article 3)
- Prior involvement (Article 3)
- Inter-State cases (Article 4)
- Other issues

The co-respondent mechanism

Acts of MS will be **primarily** attributed to the States, even when they implement EU law (Art. 1(4) DAA).

However, it is unfair to invoke the responsibility of the MS for acts that are implementing EU obligations, and for which the State had **no discretion**.

Therefore, the responsibility of the MS is without prejudice to the possibility of the EU to act **as co-respondent**.

(continued)

Article 3 DAA, paras. 1 to 5.

When an application against a MS calls into question a EU act (especially when the MS had **no margin of choice**); or

When an application against the EU calls into question a State implementing measure (especially when **there was discretion** as to the choice of implementation methods),

The EU or the MS (respectively) can serve as co-respondents.

(continued)

A MS or the EU will become co-respondent either accepting the invitation of the ECtHR or if the ECtHR accepts its application.

The ECtHR shall consult the parties to the proceedings before inviting/accepting, and shall review **the plausibility** of the applications.

(continued)

Attribution of responsibility when a violation of the ECHR is established by the ECtHR in a case when the EU and a MS act as co-respondents.

Default rule: **joint (full) liability**, but the co-respondents can ask the ECtHR to allocate the responsibility differently.

This is to prevent the ECtHR from ruling on the **allocation of competences** between Union and MS, which is a precondition to attribute responsibility for specific acts.

Prior involvement

If the ECtHR acquires jurisdiction to review the compatibility between EU acts and the ECHR, it will necessarily interpret EU law.

This is normally a task for domestic and EU courts, and the CJEU can rule authoritatively on the correct interpretation of EU law through the preliminary ruling mechanism.

The EU wants to avoid that a EU provision is interpreted for the first time by the ECtHR → prior involvement.

(continued)

Article 3(6) DAA: If the CJEU has not yet assessed the compliance with human rights of the challenged EU measure, it shall be asked first.

The CJEU is given an opportunity to flag the illegality of an EU law measure (in a process similar to annulment under Art. 263 TFEU, like in *Kadi*, or declaration of illegality under Art. 267 TFEU, like in *Digital Rights Ireland*); or to provide reasons in support of its legality.

Intra-State disputes

Article 29 ECHR allows the parties of the CoE to bring applications **against each other** (as opposed to applications brought **by individuals**). Very rarely used (three judgments, three pending).

Problem with Article 344 TFEU: matters of EU law in inter-State disputes cannot be assigned to the jurisdiction of bodies other than the CJEU.

***Bosphorus* presumption?**

It is unclear whether the presumption of legality of EU acts (*Bosphorus*) will survive after the accession.

The possibility to address a claim directly against the EU (as a Convention member) makes this presumption unnecessary → probably it will be dropped.

Opinion 2/13 – an overview

Under Article 218(11) TFEU, the CJEU is competent to pronounce on the compatibility of an international agreement (**the DAA**) with the EU Treaties (**TEU, TFEU and Protocol 8**).

The Court concluded that **the DAA is not compatible with the Treaties**, thus the accession is not possible under the terms proposed therein.

The reasoning refers mainly to two points: the **autonomy** of the EU legal order and the **exclusive jurisdiction** of the CJEU.

Co-respondent mechanism

The CJEU considered that the ECtHR's power to assess the **plausibility** of the requests to serve as co-respondent are illegal (paras. 215-235)

This assessment would result in a determination regarding the **division of competences** between EU and MS, which is only for the CJEU to determine.

Co-respondent – zoom in

224. the ECtHR is to ascertain whether...it is **plausible** that the conditions set out in [the DAA for triggering the co-respondent system] are met...[T]he fact remains that, in carrying out that review, the ECtHR would be required to **assess the rules of EU law governing the division of powers between the EU and its Member States** as well as the criteria for the attribution of their acts or omissions.

Prior involvement

Double function: implement the subsidiarity principle within the Convention and ensure proper functioning of EU judicial system.

Triggered when the CJEU **has not yet interpreted** EU law. Circular paradox: in order to verify this precondition, the ECtHR must interpret EU law and the case law of the CJEU.

Prior involvement – zoom in

238. [I]t is necessary, in the first place, for the question whether the CJEU has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR **to be resolved only by the competent EU institution**, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to **interpret the case-law of the CJEU**.

Prior involvement and consistent interpretation

Under Art. 3(6) DAA, the prior involvement is designed to allow the CJEU to rule on the **question of compatibility** between the EU measure and the ECHR → a **question of validity**.

Art. 3(6) DAA does not contemplate the possibility to ask the CJEU, more simply, about the **interpretation of EU secondary law**.

Interpretation of secondary legislation – zoom in

246 If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

The CFSP issue

Under Art. 24(1) TFEU, the CJEU has limited jurisdiction over CFSP measures (for instance, EU military operations).

Only restrictive measures addressed to individuals can be reviewed (Art. 275 TFEU, think of the *Kadi* cases).

Yet, there is no exception for these measures in the DAA → they would be challengeable before the ECtHR.

External review of CFSP acts – zoom in

254. the ECtHR would...rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the CJEU cannot, for want of jurisdiction, review in the light of fundamental rights.

255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.

256. ...jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU...cannot be conferred **exclusively** on an international court which is outside the institutional and judicial framework of the EU.

Inter-State disputes

Simple problem: the possibility of inter-State actions under Art. 33 ECHR is not in conformity with Art. 344 TFEU.

Submission of EU law-based disputes to external authorities breaches the duty of loyal cooperation between the MS and the EU (Art. 4(3) TEU).

Exclusive jurisdiction of the CJEU

With the accession the ECHR would become a source of EU law. The CJEU would then claim **exclusive jurisdiction** in any dispute **between the MS**, or between MS and the EU which relate to the respect of the Convention. [very rare, unlike individual applications]

Other problem: inter-State disputes would breach the **mutual trust** between MS (*NS*; *Melloni*): each MS must presume that the other MS respect EU law.

Mutual trust – zoom in

194. In so far as the **ECHR would...require a MS to check that another MS 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.

Is there a real requirement?

Protocol no. 16

Protocol no. 16 (not yet into force) allows high courts of the MS to request an advisory opinion to the ECtHR.

According to the CJEU this mechanism would trigger the prior involvement system, but would end up bypassing the system of preliminary references under Art. 267 TFEU.

The tension between Articles 53

Art. 53 of the EU Charter **allows** MS to elevate the protection required by the Charter.

Art. 53 of the ECHR considers the Convention as a minimum standard (so MS **can** increase it).

However, *Melloni* clarified that the Charter **does not allow MS to breach EU law** to set higher standards of protection.

The CJEU held that Art. 53 ECHR can create an issue in this respect. Real conflict of obligations?

An effort of *inconsistent* interpretation

Given the trouble that the CJEU went through to identify problems in the DAA, even remote or hypothetical ones, one wonders whether the assessment is objective or strategic.

Way forward?

Re-negotiation (with all CoE members,
and with the traps set by the CJEU)

Amendment or Protocol to the Treaties
(to follow or bypass the Opinion)

Doing nothing

Thanks for listening!



 **KORKEIN HALLINTO-OIKEUS**
HÖGSTA FÖRVALTNINGSDOMSTOLEN

The Charter of Fundamental Rights in
Practice

Kari Kuusiniemi
Supreme Administrative Court
11.6.2015

Orientation: Provisions under Solidarity Title, emphasis on Environmental Protection

- Title IV: Solidarity (Art. 27-38)
- Fundamental Rights Doctrine: 2nd and 3rd generation, cf. The ECHR (and Titles 1-2 of the Charter) → political and freedom rights (1st generation)
- Point of view of the judiciary, applying administrative law
- Articles 27-32: workers' rights
- Article 33(1): protection of family life (cf. ECHR Art. 8, see also Art. 7, 9)
 - Same-sex marriage, rights of transsexuals, cases unde aliens law (expulsion, refugees, residence permits etc.)
- Articles 34-36: social security and health care
- Art. 37-38: Environmental and consumer protection

3



KUNNEN HALLINTO-OIKEUS
HÖGSTA FÖRVALTNINGSDOMSTOLEN

Environmental Protection Clause

- Art. 37: A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development
 - Principle of high level of protection
 - Principle of integration
 - Principle of sustainable development
- TFEU Art. 11
 - Environmental protection requirements must be **integrated** into the definition and implementation of the Union's policies and activities, in particular with a view to promoting **sustainable development**

4

28.5.2015



KUNNEN HALLINTO-OIKEUS
HÖGSTA FÖRVALTNINGSDOMSTOLEN

Environmental Articles of the TFEU

- TFEU Art. 191
 - Union policy on the environment shall contribute to pursuit of the following **objectives**:
 - — preserving, protecting and improving the quality of the environment,
 - — protecting human health,
 - — prudent and rational utilisation of natural resources,
 - — promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change

5 28.5.2015



KUUKSEN HALLINTO-OIKEUS
HÖGSTA FÖRVALTNINGSDOMSTOLEN

Environmental Articles of the TFEU (ctd.)

- Union policy on the environment shall **aim at a high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay
- TFEU Art. 192-193
 - Legislative competence and environmental safeguard clause

6 28.5.2015



KUUKSEN HALLINTO-OIKEUS
HÖGSTA FÖRVALTNINGSDOMSTOLEN

Excursion: the Finnish Constitution

- Environmental clause since 1995
- At present, the Constitution of 2000, Art. 20: Responsibility for the Environment (cf. Rights-based point of departure)
 - Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone (para 1) → substantive proclamation
 - The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment (para 2) → constitutional task to improve environmental legislation, especially with a view to improving citizens' and organisations' possibilities to influence environmental decision-making (cf. The Århus Convention and right case-law of the CJEU)

7 28.5.2015



Impact of Constitutional Provisions on Courts?

- References to the Charter in the case-law of the CJEU
 - Ne bis in idem: criminal proceedings against Zoran Spasic (C-129/14 PPU, Grand Chamber); Åkerberg Fransson (C-617/10, Grand Chamber) → field of application of the Charter
 - Art. 27: Association de meadiation sociale (C-176/12, Grand Chamber)
 - European arrest warrant, Melloni (C-399/11, Grand Chamber)
- References to the Charter in the case-law of the Finnish Supreme Court and the Supreme Administrative Court
 - Google hits Supreme Court 12 cases (10 criminal cases, many of them ne bis in idem, 2 cases concerning labour law, equal treatment)
 - Supreme Administrative Court 38 cases of different kinds

8 28.5.2015



Case law of SAC: Environment and Fundamental Rights

- References to the Charter

- Environmental permit of Helsinki-Vantaa Airport (SAC 2015:12)
- Spring hunting of birds (SAC 2013:185)
- Old telecommunication poles treated with CCA solutions were used as underlay of duckboard in a wilderness area included in the Natura 2000 network (SAC 2013:102)

Impact of the national Constitution

- Substantive impact on interpretation (SAC 2002:86, Vuotos artificial lake, water management permit)
- Impact on interpretation of organisations' right to appeal (bird protection and wolf shooting under the Hunting Act, SAC 2004:76 and SAC 2007:74; cf inhabitants' association's right to appeal an expropriation permit, SAC 2011:49, Århus Convention, EIA Directive, no reference to the Constitution)

9 28.5.2015



KORKEIN HALLINTO-OIKEUS
HÖCHSTE VERWALTUNGSGERICHTSHOF

Impact of the Environmental Protection Clause

- The Charter has primacy over national law (within field of application of EU law)
- Explanations → Art 37 → reference to Art 11 and 191 of TFEU and national Constitutions
- Directly applicable >< vague → some interpretative effect, highlighting of environmental principles and objectives

10 28.5.2015



KORKEIN HALLINTO-OIKEUS
HÖCHSTE VERWALTUNGSGERICHTSHOF



JUSTICE AND GOOD ADMINISTRATION IN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Luis María Díez-Picazo
Judge at the Spanish Supreme Court



ARTICLE 47 OF THE CHARTER

Contents:

- Access to justice for the protection of any right recognised by EU law.
- Fair and public hearing by an independent tribunal.
- Legal aid.



ARTICLE 47 OF THE CHARTER

1. Access to justice

Art. 47 (1) takes inspiration from Art. 13 of the Convention. But it covers all rights recognised by EU law; not only fundamental rights, like Art. 13 f of the Convention.

There are no rights excluded from judicial protection (*ubi ius, ibi remedium*). Art. 47 (1) as a constitutional ban on denial of justice.

Particularly important for administrative law. Art. 47 (1) requires full judicial control of all types of administrative action. Art. 47 (1) as a complement of Art. 41.



ARTICLE 47 OF THE CHARTER

Cases:

KME Germany AG (C-272/09) 8 December 2011.

Kadi II (C-584/10 P) 18 July 2013.

Mahdi (C-146/14 PPU) 5 June 2014.

Otis and others (C-199/11) 6 November 2012.

Sánchez Morcillo (C- 169/14) 17 July 2014.

ET Agroconsulting (C-93/12) 27 June 2013.



ARTICLE 47 OF THE CHARTER

2. Fair and public hearing

Art. 47 (2) takes inspiration from Art. 6 (1) of the Convention. But there are some differences:

A) Art. 47 (2) does not mention “civil and criminal matters”.

B) Art. 47 (2) explicitly refers to a tribunal “previously established by law”.

Idea of natural judge.

C) Art. 47 (2) does not regulate the exceptions to publicity.

D) Art. 47 (2) includes a right to be advised, that the Convention envisions only for criminal cases.

ARTICLE 47 OF THE CHARTER

Cases:

Wintersteiger AG (C-523/10) 19 April 2012.

Csipai (C-472/11) 21 February 2013.

Trade Agency (C-619/10) 6 September 2012.



ARTICLE 47 OF THE CHARTER

3. Counsel and legal aid

Cases:

Akzo Nobel Chemicals Ltd (C-550/07) 14 September 2010.

DEB (C-279/09) 9 November 2010.



ARTICLE 47 OF THE CHARTER

4. Standard of protection

Cases:

Melloni (C-399/11) 26 February 2013.

Servet Kamberaj (C-571/10) 24 April 2012.



ARTICLE 48 TO 50 OF THE CHARTER

Contents:

- Presumption of innocence and right of defence.
- Principles of legality and proportionality.
- *Non bis in idem*.



ARTICLE 48 TO 50 OF THE CHARTER

1. Rights of the defence

Art. 48 takes inspiration from Art. 6 (2 and 3) of the Convention. Art. 48 speaks about the “rights of the defence” in general terms, without any specification. However, the Explanation says that such rights are those enumerated by Art. 6 (3) of the Convention.

Note: Art. 6 (3) does not mention explicitly the right against self-incrimination, but it has been recognised by the Strasbourg Court in *John Murray v. United Kingdom* 8 February 1996.

Art. 48 does not fix a test (e.g. beyond any reasonable doubt) for the destruction of the presumption of innocence. Is there any national margin of appreciation?

To what extent is Art. 48 applicable to non-criminal sanctions?



ARTICLE 48 TO 50 OF THE CHARTER

Cases:

Gueye and Sánchez (C-483/09 and 1/10) 21 December 2011.

Radu (C-396/11) 29 January 2013.

Schindler Holding Ltd (C-501/11 P) 18 July 2013.

Elf Aquitaine (C- 521/09 P) 29 September 2011.

Melloni (C-399/11) 26 February 2013.



ARTICLE 48 TO 50 OF THE CHARTER

2. Principles of legality and proportionality

Art. 49 takes inspiration from Art. 7 of the Convention. But there are some differences:

- A) Art. 49 includes the retroactivity of favourable penal laws. Sense of such provision.
- B) It eliminates any reference to “civilised” nations.
- C) It introduces a requirement of proportionality in sanctions.

Is “law” in Art. 49 to be understood as statute or legislative act?



ARTICLE 48 TO 50 OF THE CHARTER

3. *Non bis in idem*

Art. 50 takes inspiration from Art. 4 of Protocol no. 7 of the Convention. But there are some differences:

A) Art. 50 refers to the “Union”, not to the “State”. It thus expands the sphere of application of *non bis in idem* to judicial decisions adopted in any place within the European Union.

B) It speaks of “criminal” proceedings, which is not mentioned by Art. 4 of Protocol no. 7.

C) Contrary to Art. 4 of Protocol no. 7, Art. 50 does not envision (at least explicitly) the possibility of reopening a criminal case for a serious violation of procedural guarantees or the discovery of new facts.

ARTICLE 48 TO 50 OF THE CHARTER

Cases:

Mantello (C-261/09) 16 November 2010.

Bonda (C-489/10) 5 June 2012.

Fransson (C-617/10) 26 February 2013.

Spasic (C- 129/14 PPU) 27 May 2014.



ARTICLE 41 OF THE CHARTER

Contents:

- Impartiality
- Right to be heard
- Access to the dossier
- Statement of reasons in administrative decisions
- Non-contractual liability of EU institutions and agents
- Official languages in communications with EU institutions



ARTICLE 41 OF THE CHARTER

Art. 41 codifies the basic guarantees vis-à-vis public administration. Such guarantees already existed either as explicit provisions in the Constitutive Treaties, or as general principles of law declared by the ECJ.

Art. 41 is applicable only to EU institutions, organs and bodies; not to national administrations. See the clear wording of Art. 41 (1), as well as the ECJ judgement in *YS and MS* (joint cases C-141/12 and 372/12) 17 July 2014.



JUSTICE AND GOOD ADMINISTRATION IN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Luis María Díez-Picazo
Judge at the Spanish Supreme Court

ARTICLE 47 OF THE CHARTER

Contents:

- Access to justice for the protection of any right recognised by EU law.
- Fair and public hearing by an independent tribunal.
- Legal aid.

1. Access to justice

Art. 47 (1) takes inspiration from Art. 13 of the Convention. But it covers all rights recognised by EU law; not only fundamental rights, like Art. 13 of the Convention.

There are no rights excluded from judicial protection (*ubi ius, ibi remedium*). Art. 47 (1) as a constitutional ban on denial of justice.

Particularly important for administrative law. Art. 47 (1) requires full judicial control of all types of administrative action. Art. 47 (1) as a complement of Art. 41.

Cases:

KME Germany AG (C-272/09) 8 December 2011.

Kadi II (C-584/10 P) 18 July 2013.

Mahdi (C-146/14 PPU) 5 June 2014.

Otis and others (C-199/11) 6 November 2012.

Sánchez Morcillo (C- 169/14) 17 July 2014.

ET Agroconsulting (C-93/12) 27 June 2013.

2. Fair and public hearing

Art. 47 (2) takes inspiration from Art. 6 (1) of the Convention. But there are some differences:

A) Art. 47 (2) does not mention “civil and criminal matters”.

B) Art. 47 (2) explicitly refers to a tribunal “previously established by law”. Idea of natural judge.

C) Art. 47 (2) does not regulate the exceptions to publicity.

D) Art. 47 (2) includes a right to be advised, that the Convention envisions only for criminal cases.

Cases:

Wintersteiger AG (C-523/10) 19 April 2012.

Csipai (C-472/11) 21 February 2013.

Trade Agency (C-619/10) 6 September 2012.

3. Counsel and legal aid

Cases:

Akzo Nobel Chemicals Ltd (C-550/07) 14 September 2010.

DEB (C-279/09) 9 November 2010.

4. Standard of protection

Cases:

Melloni (C-399/11) 26 February 2013.

Servet Kamberaj (C-571/10) 24 April 2012.

ARTICLES 48 TO 50 OF THE CHARTER

Contents:

- Presumption of innocence and right of defence.
- Principles of legality and proportionality.
- *Non bis in idem*.

1. Rights of the defence

Art. 48 takes inspiration from Art. 6 (2 and 3) of the Convention. Art. 48 speaks about the “rights of the defence” in general terms, without any specification. However, the Explanation says that such rights are those enumerated by Art. 6 (3) of the Convention.

Note: Art. 6 (3) does not mention explicitly the right against self-incrimination, but it has been recognised by the Strasbourg Court in *John Murray v. United Kingdom* 8 February 1996.

Art. 48 does not fix a test (e.g. beyond any reasonable doubt) for the destruction of the presumption of innocence. Is there any national margin of appreciation?

To what extent is Art. 48 applicable to non-criminal sanctions?

Cases:

Gueye and Sánchez (C-483/09 and 1/10) 21 December 2011.

Radu (C-396/11) 29 January 2013.

Schindler Holding Ltd (C-501/11 P) 18 July 2013.

Elf Aquitaine (C- 521/09 P) 29 September 2011.

Melloni (C-399/11) 26 February 2013.

2. Principles of legality and proportionality

Art. 49 takes inspiration from Art. 7 of the Convention. But there are some differences:

A) Art. 49 includes the retroactivity of favourable penal laws. Sense of such provision.

B) It eliminates any reference to “civilised” nations.

C) It introduces a requirement of proportionality in sanctions.

Is “law” in Art. 49 to be understood as statute or legislative act?

3. *Non bis in idem*

Art. 50 takes inspiration from Art. 4 of Protocol no. 7 of the Convention. But there are some differences:

A) Art. 50 refers to the “Union”, not to the “State”. It thus expands the sphere of application of *non bis in idem* to judicial decisions adopted in any place within the European Union.

B) It speaks of “criminal” proceedings, which is not mentioned by Art. 4 of Protocol no. 7.

C) Contrary to Art. 4 of Protocol no. 7, Art. 50 does not envision (at least explicitly) the possibility of reopening a criminal case for a serious violation of procedural guarantees or the discovery of new facts.

Cases:

Mantello (C-261/09) 16 November 2010.

Bonda (C-489/10) 5 June 2012.

Fransson (C-617/10) 26 February 2013.

Spasic (C- 129/14 PPU) 27 May 2014.

ARTICLE 41 OF THE CHARTER

Contents:

- Impartiality
- Right to be heard
- Access to the dossier
- Statement of reasons in administrative decisions
- Non-contractual liability of EU institutions and agents
- Official languages in communications with EU institutions

Art. 41 codifies the basic guarantees vis-à-vis public administration. Such guarantees already existed either as explicit provisions in the Constitutive Treaties, or as general principles of law declared by the ECJ.

Art. 41 is applicable only to EU institutions, organs and bodies; not to national administrations. See the clear wording of Art. 41 (1), as well as the ECJ judgement in *YS and MS* (joint cases C-141/12 and 372/12) 17 July 2014.



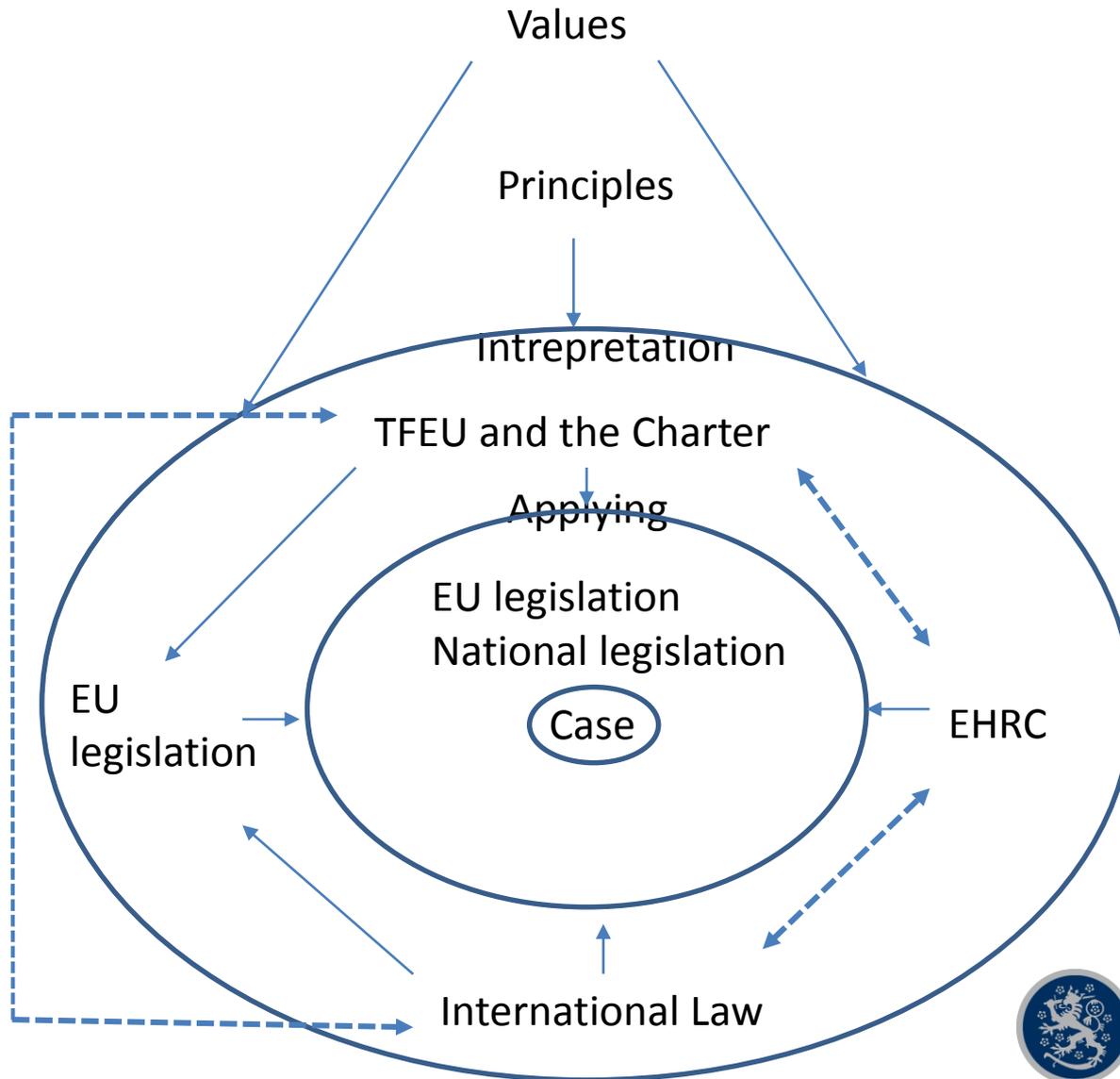
**Workshop A: Environmental
protection,
background presentation**

Mika Seppälä

Supreme Administrative Court

ERA 11.-12.6.2015

Decision-making background



- EHRC:
 - Focus on protection of individuals
 - Smaltini v Italy (24.3.2015)
 - The Court declared the application Inadmissible as being manifestly ill-founded. Examining the first applicant's complaint under the procedural aspect of Article 2 of the Convention, the Court held in particular that she had had the benefit of adversarial proceedings in the course of which investigations had been carried out at her request. In the Court's view, the first applicant had not demonstrated that, in the light of the scientific data available at the time of the events, there had been a breach of the procedural aspect of her right to life.
 - Compare to Öneryildiz v Turkey (Dangerous industrial activities)



– Lopez Ostra v. Spain (9.12.1994)

- The Court held that there had been a violation of Article 8 of the Convention, finding that the Spanish State had not succeeded in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant –and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The Court noted in particular that the applicant and her family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. They moved only when it became apparent that the situation could continue indefinitely and when the applicant's daughter's paediatrician recommended that they do so. Under these circumstances, the municipality's offer could not afford complete redress for the nuisance and inconveniences to which they had been subjected. The Court further held that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that the conditions in which the applicant and her family had lived for a number of years were certainly very difficult but did not amount to degrading treatment.



– Powell and Rayner v. the UK (21.2.1990)

- The Court observed that in each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home had been adversely affected by the noise generated by aircraft using Heathrow Airport. However, it also pointed out that the existence of large international airports, even in densely populated urban areas, and the increasing use of jet aircraft had become necessary in the interests of a country's economic well-being. A number of measures had further been introduced by the responsible authorities to control, abate and compensate for aircraft noise at and around Heathrow Airport. In the applicants' case, the Court found that that the United Kingdom Government could not arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8 of the Convention. It therefore held that there had been no violation of Article 13 (right to an effective remedy) of the Convention in respect of the claims of either applicant under Article 8 since no arguable claim of violation of Article 8 and no entitlement to a remedy under Article 13 had been made out in relation to either applicant.



– Hatton and Others v. the UK (8.7.2003)

- In this case the Court observed that the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. However, departing from the Chamber's approach, the Grand Chamber held that there had been no violation of Article 8 of the Convention, finding in particular that the United Kingdom had not overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole. While the Court could not reach a conclusion about whether the 1993 policy on night flights at Heathrow airport had actually led to an increase in night noise, it found that there was an economic interest in maintaining a full service of night flights, that only a small percentage of people had suffered by the noise, that the housing prices had not dropped, and that the applicants could move elsewhere without financial loss. As further regards the question whether the applicants had had a remedy at national level to enforce their Convention rights, the Court held that there had been a violation of Article 13(right to an effective remedy) of the Convention. It was indeed clear that the scope of review by the domestic courts had been limited at the material time to examining whether the authorities had acted irrationally, unlawfully or manifestly unreasonably (classic English public-law concepts) and, prior to the entry into force of the Human Rights Act 1998, the courts had not been able to consider whether the claimed increase in night flights represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who lived near Heathrow Airport



– Flamenbaum and Others v. France (13.12.2012)

- The Court noted in particular that the domestic courts had recognised the public-interest nature of the project and that the French Government had established a legitimate aim – the region’s economic well-being. In the applicants’ case, it held that there had been no violation of Article 8 of the Convention. Having regard to the measures taken by the authorities to limit the impact of the noise disturbance on local residents, it found that they had struck a fair balance between the competing interests. It further saw no flaw in the decision-making process. The Court also held that there had been no violation of Article 1 (protection of property) of Protocol No. 1 to the Convention, as the applicants had failed to establish the existence of an infringement of their right to peaceful enjoyment of their possessions.



– Deés v. Hungary (9.10.2010)

- In the applicant's case, the Hungarian authorities had been called on to strike a balance between the interests of the road-users and of local inhabitants. While recognising the complexity of the authorities' tasks in handling infrastructure issues potentially involving considerable time and resources, the Court considered that the measures taken by the authorities had consistently proved insufficient, so exposing the applicant to excessive noise disturbance over a substantial period and imposing a disproportionate individual burden on him. Although the vibration or noise caused by the traffic had not been substantial enough to cause damage to the applicant's house, the noise had, according to the expert measurements, exceeded the statutory level by between 12% and 15%. There had thus existed a direct and serious nuisance which affected the street in which the applicant lived and had prevented him from enjoying his home. The Court therefore held that there had been a violation of Article 8 of the Convention, finding that Hungary had failed to discharge its positive obligation to guarantee the applicant's right to respect for his home and private life. The Court also held that there had been a violation of Article 6 § 1 (right to a fair trial within a reasonable time) of the Convention on account of the length of the proceedings.



– Fägerskiöld v. Sweden (26.2.2008)

- The Court declared the application inadmissible. As regards their complaint under Article 8 of the Convention, the applicants had in particular not furnished the Court, or the national authorities, with any medical certificates to substantiate that their health had been adversely affected by the noise or the light reflections. Hence, the noise levels and light reflections in the present case were not so serious as to reach the high threshold established in cases dealing with environmental issues. It followed that this complaint was manifestly ill-founded.



- EUCJ:
 - Focus on implementation and enforcement of EU secondary legislation
 - The Charter is applied only if EU legislation is concern
 - C-206/13 (Cruciano Siragusa)
 - The landscape is mentioned in various pice of legislation (E.g. Article 2(1)(a) of Directive 2003/4/EC, Articles 1 and 3 of Directive 2011/92/EU) and reffering to art. 17 of the Charter (right to property)
 - the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other
 - whether that legislation is intended to implement a provision of EU law;
 - the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law;
 - whether there are specific rules of EU law on the matter or capable of affecting it
 - the Court has no jurisdiction to answer the question



- C-416/10 (Jozef Križan and Others)
 - Construction of landfill and right to appeal against the decision
 - Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006, must be interpreted as meaning that it
 - requires that the public concerned have access to an urban planning decision, such as that at issue in the main proceedings, from the beginning of the authorisation procedure for the installation concerned,
 - does not allow the competent national authorities to refuse the public concerned access to such a decision by relying on the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, and
 - does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned an urban planning decision, such as that at issue in the main proceedings, during the administrative procedure at first instance, provided that all options and solutions remain possible and that regularisation at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine
 - A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61, as amended by Regulation No 166/2006, and from Article 9(2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.



– C-240/09 (Lesoochranárske zoskupenie VLK)

- Slovak Brown Bear and access to remedy if applicant is not party concern
- Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.



– C-120/10 (European Air Transport SA)

- Brussels Airport and how to interpret the directive 2002/30/EC (Supplemented by Regulation (EU) N:o 598/2014) “Operating restrictions”, and must Article 6(2) be interpreted as precluding rules which impose limits on noise levels, as measured on the ground, to be complied with by aircraft overflying territories located near the airport, and which provide that any person exceeding those limits may incur a penalty, where those rules are capable of being infringed by aircraft which comply with the standards in Volume 1, Part II, Chapter 4 of Annex 16 of the Convention on International Civil Aviation
- Article 2(e) must be interpreted as meaning that an ‘operating restriction’ is a prohibition, absolute or temporary, that prevents the access of a civil subsonic jet aeroplane to a European Union airport. Consequently, national environmental legislation imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, does not itself constitute an ‘operating restriction’ within the meaning of that provision, unless, in view of the relevant economic, technical and legal contexts, it can have the same effect as prohibitions of access to the airport in question.



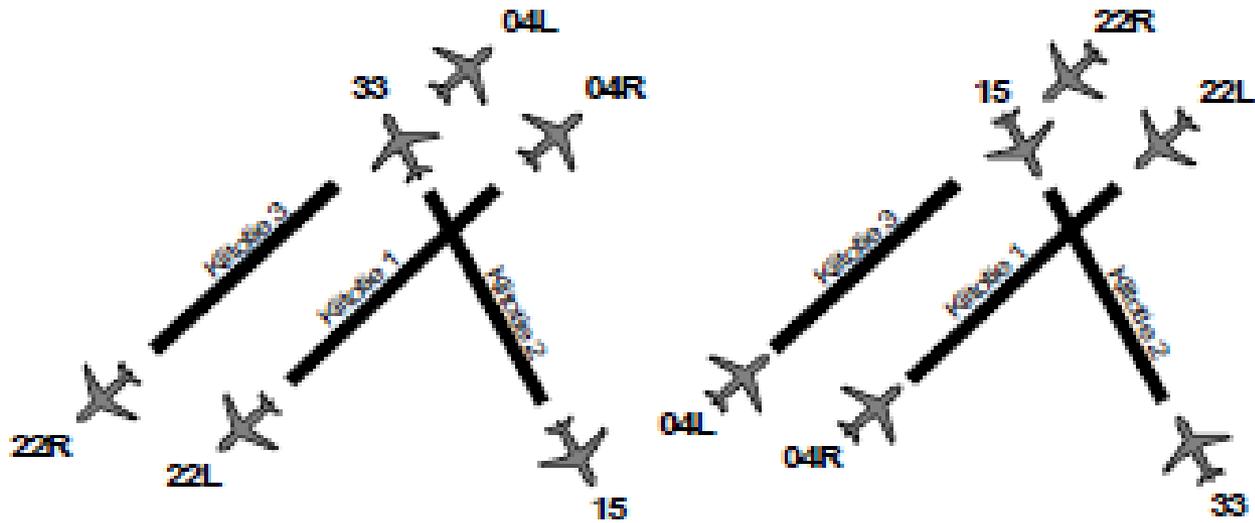
- Relevant international Law
 - Aarhus Convention
 - Three pillars: Access to the Environmental Information, Participation and Access to Justice
 - Articles on participation and access to justice are in mainly in scope when activities mentioned in annex 1:
 - Equals the list of projects of EIA directive/ IE directive
 - Aarhus convention has relevance how to interpret EU legislation (and the Charter too?)
 - Access to justice of art. 9 covers
 - Para. 1 relates to the environmental information
 - Para. 2 covers specific activities
 - Para. 3:
 - All other kind of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.
 - Members of the public have access to administrative or judicial procedure



- Air Transport Agreement the U.S. – EU (25.5.2007, L 134/4)
 - Open skies –agreement allows any airline of the European Union and any airline of the United States to fly between any point in the European Union and any point in the United States. Airlines of the United States are also allowed to fly between points in the European Union.
 - Article 15 Environment
 - 1. The Parties recognize the importance of protecting the environment when developing and implementing international aviation policy. The Parties recognize that the costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy.
 - 2. When a Party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects.
 - 3. When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organization in Annexes to the Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement.
 - 4. If one Party believes that a matter involving aviation environmental protection raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.
 - Article 19 Arbitration
 - Disputes to the Joint Committee and the Arbitration

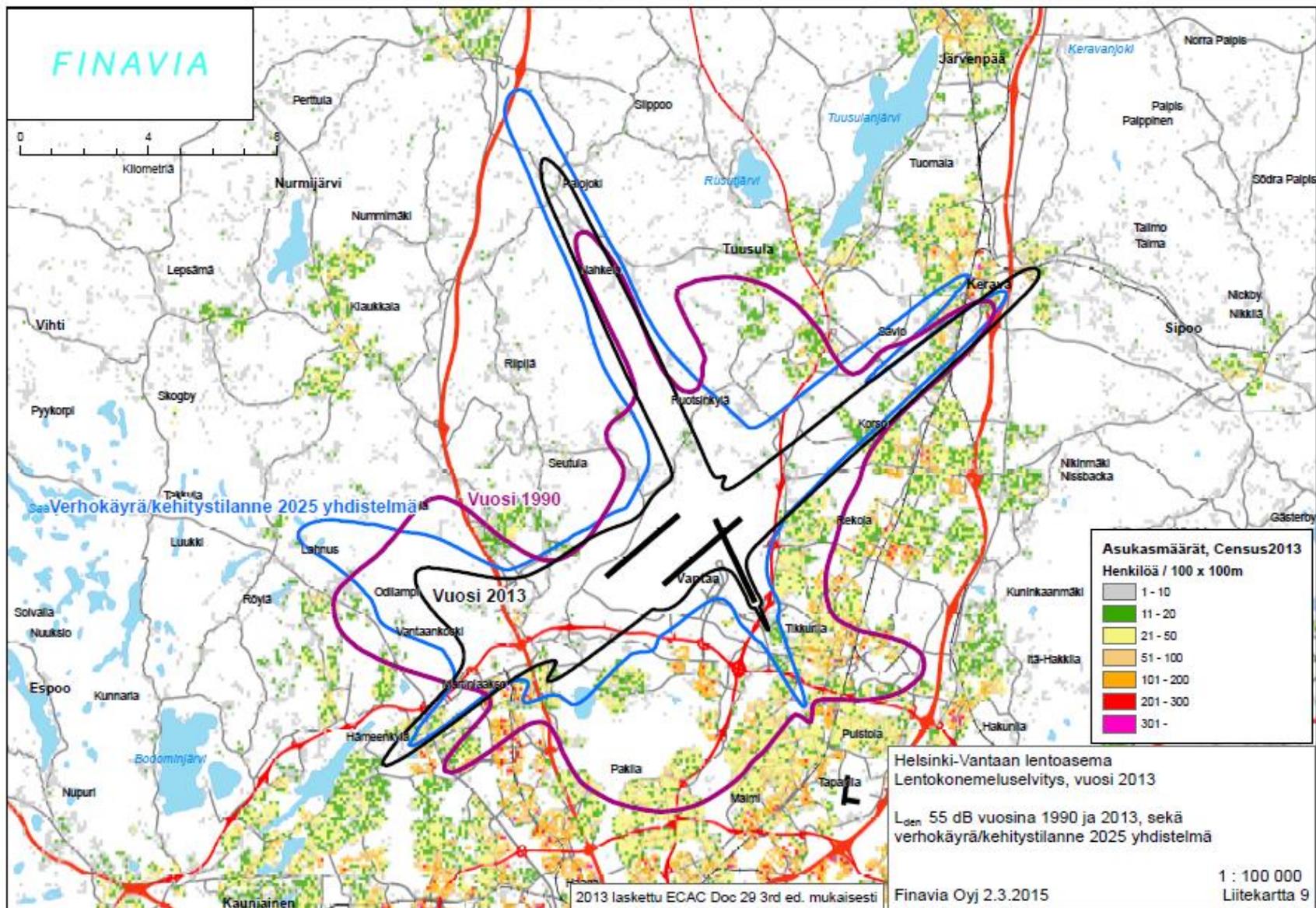


Case Helsinki Airport

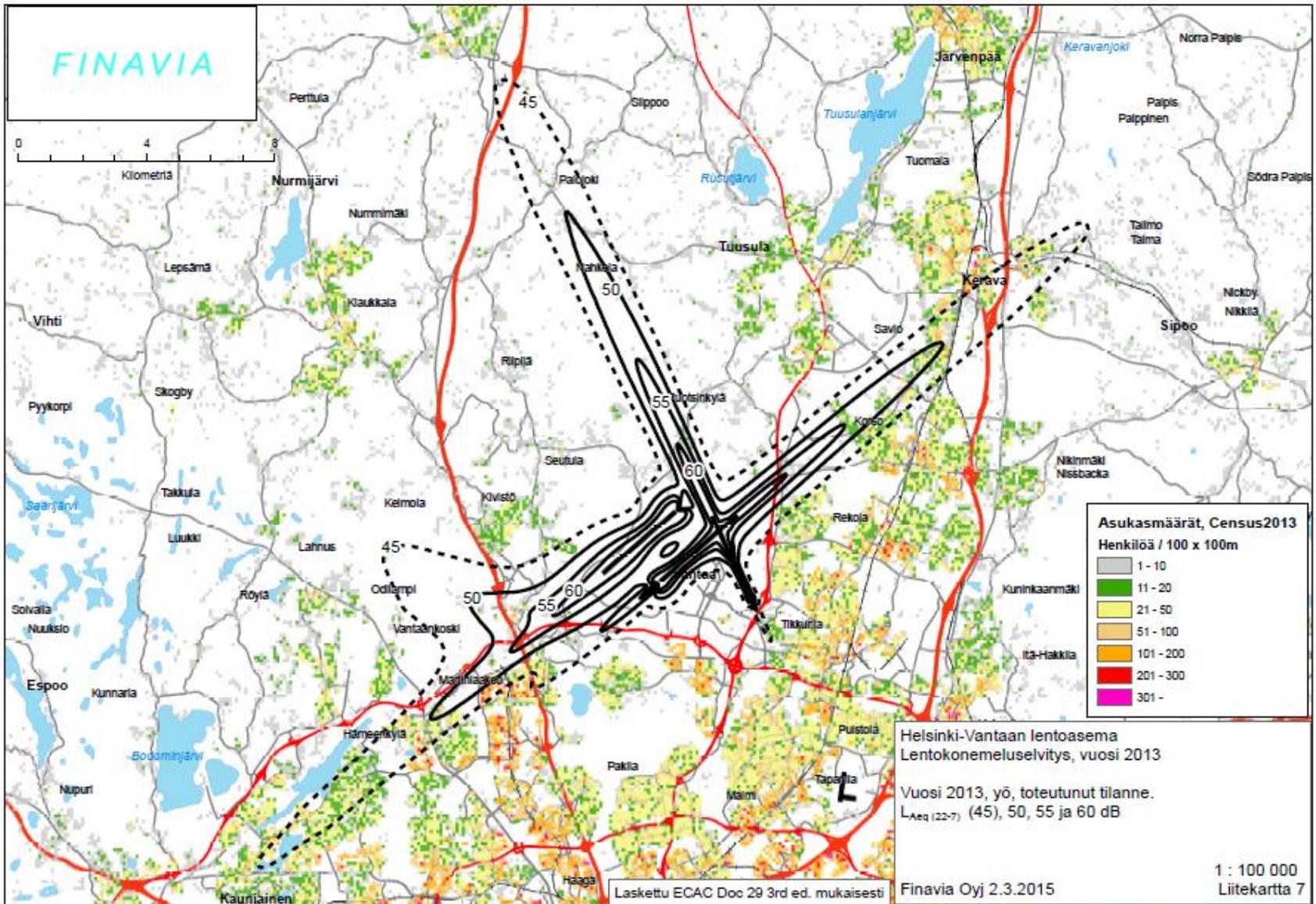


Kuva 5. Helsinki-Vantaan lentoaseman kiihtoraiden numerointi.

LDEN 55 dB noise level



Night noise levels (Laeq)



J/Matti/ERA

Case 1

Question 1

EU law is not normally applicable in purely internal situations. EU-law is applicable if the provisions of EU-law have been rendered applicable by domestic law due to a renvoi made by the law to the content of those provisions. But the renvoi to EU law as a means of regulating purely internal situations must be unconditional and precise enough. In this case the renvoi has not the consequence of setting aside the national rules relating to the duty to state reasons.

Question 2

In theory the national rules could be replaced with the second paragraph of article 296 TFEU and Article 41 (2) of the Charter. There is in principle a clear violation of Article 41 (2) of the Charter.

Question 3

The Council of state has held in a judgment that "principles of EU law apply directly to the internal legal order and must govern actions of the administration". The national law relating to the right of access to administrative documents states "Administrative activity ... shall be governed as well by principles derived from the community legal order". The national authorities should follow principles derived from the community legal order but the Court of Justice does not have jurisdiction in this case.

Case 2

Question 1

The national legislation does not constitute a measure implementing EU law and it is not connected in another way with EU law. The Charter is not applicable in this case.

Question 2

Article 2 of the Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is applicable in relation to the right of appeal in criminal matters. In this case there has been no access to justice (tribunal) at all. Article 2 of the Protocol No 7 is not applicable. It is question of a minor offence/crime. Article 6 of the European Convention on Human Rights is applicable.

Question 3

The national court should declare the request for the preliminary reference as inadmissible.

Case 3

Question 1

Council directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers must be applied in this case. In the preamble (5) of this Directive is regulated that this Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter. The Charter is applicable in this situation.

Question 2

According to Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not be deprived, even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by the directive.

Case 4

Question 1

According to article 47 of the Charter everybody is entitled to a fair hearing. If somebody is charged with a criminal offence he/she has a right to interpretation. This right covers also pre-trial questioning by the police at the police station. Ahmet's right to interpretation depends on the fact whether he is able to comprehend the questions put to him and to make himself understood in his replies.

Question 2

An interpreter is brought in from a neighbouring town. The interpreter is not a professional one. It is not necessary that the interpreter is a professional one. But the interpretation as provided must not lead to results compromising Ahmet's entitlement to a fair trial or his ability to defend himself. Ahmet has recently passed a language exam. This may not be enough to guarantee him a fair trial. The interpreter often provides interpretation services for the police. I am not satisfied that despite the lack of a professional interpreter the interpretation as provided would compromise Ahmet's entitlement to a fair trial.

Question 3

According to article 48 of the Charter respect for the rights of the defence of anyone who has been charged shall be guaranteed. Ahmet must have adequate facilities for the preparation of his defence. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. The prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused. Ahmet asks to see the relevant form to refresh his memory, but is told he cannot see it at this moment. Ahmet does not have adequate facilities for the preparation of his defence. Ahmet should have seen a copy of the form prior to being interviewed about it. The police should disclose to Ahmet also all other material in their possession. His partner contacted the authorities by letter. His partner says that Ahmet was intimidating. This might be an acceptable reason not to disclose the letter. The Charter does not contain such a provision that all the documents should be translated. Ahmet has a right to interpretation. The interpreter is not a professional one but he may be able to translate the documents to Ahmet.

ERA Workshop 12.6.2015

Introduction / discussion

- No experience with the charter, fundamental rights in general yes (mainly right to fair trial).
- Never applied. Most relevant would probably be art 47 (right to effective remedy and fair trial), but since most cases concern solely internal matters, the charter rarely comes into play.
- The Convention. The Charter is little known (initial reaction to this seminar: "Oh, right, the EU does have a charter of rights"), and by its nature only comes into play in matters relevant to EU law, which is frequently not the case.

Case 1

- The Charter applies to member states only when implementing union law. Thus, it does not apply to matters which are purely internal to a member state.
- However, it is possible for a member state to incorporate union law into its internal law (renvoi)
- In this case, the matter is purely internal, but a) the Council of State has held that principles of EU law apply directly and b) the national law states that the same principles shall govern administrative activity.
- The applicable part of the Charter would be Art 41.2 (c) (Obligation to give reasons for decisions).
- In this case, no specific rule of EU law has been incorporated into national law. Thus, the Charter does not apply.
- That said, the national law does require that the principles of EU law be taken into account; presumably, this also applies to the principles enshrined in Art 41.2 (c).
- Therefore, the national court cannot apply the charter in itself, but it should take the principles enshrined in art 41 2 (c) into account in whatever manner the national legal system allows/requires when deciding whether the Region has violated national law.

Case 2

- Problem: B has been sentenced to a fine, but cannot challenge it in court due to it being less than 50 €.
- B wants the EU court to rule on whether Protocol 7 Art 2 ECHR is applicable.
- As in case 1, this is a purely internal matter; there is no EU aspect, nor is there renvoi; therefore, the Charter is not applicable.
- Art 2 Protocol 7 ECHR is not applicable either, because it concerns the right to appeal a conviction by a tribunal (court), and the problem here is that it isn't possible to bring the matter before a court in the first place.
- That said, it does seem to be a case regarding a criminal matter, which falls within the ambit of Art 6 ECHR; that article may therefore be applicable.
- The national court should reject the request for a preliminary ruling, since the EU court is not competent to answer the question.

Case 3

- Member State Z has adopted an administrative circular, which i.a. includes a tide over allowance for asylum seekers.
- This allowance is not granted to asylum seekers who are the responsibility of another member state, even if the asylum seeker is not physically present in that state.
- Therefore, if Z calls upon another Member State to take responsibility for the asylum seeker (regulation 343/2003) and the asylum seeker stays i Z, the asylum seeker will not receive an allowance.
- ADR seeks annulment of the circular, because it violates the Charter and directive 2003/09, which amongst other thing concerns the allowance.
- The matter concerns the proper implementation and application of EU law. Therefore, the Charter applies.
- The Circular as written effectively prevents certain asylum seekers (those who Z considers the responsibility of another Member State) from receiving an allowance, which means they get no money.
- Keeping asylum seekers destitute in such a manner arguably violates Art 1 (respect for human dignity) and in effect Art 18 (right to asylum, by making asylum seeking under those condition untenable), possibly also Art 21 (non-discrimination). Furthermore, it is not clear whether the circular meets the definition of "law" in Art 52.
- Given the multiple problems with circular and the Charter, the most appropriate interpretation is that the circular cannot be applied in so far as it would prevent asylum seekers from receiving an allowance.

Case 4

- The Charter does not contain an explicit right to an interpreter. However, such a right can be derived from Art 47 (fair trial) and Art 48.2 (rights of the defence).
- The question then is, were Ahmet's rights under those articles jeopardized?
- Given that Ahmet's Fraustrinian is broken and he is being charged with an offense in a language which is not his native tongue, there is sufficient reason to consider an interpreter necessary for realizing Ahmet's rights.
- In particular, it should be borne in mind that expressing oneself in a foreign language can be harder than understanding it and that passing the language test does not necessarily indicate sufficient language skills to handle a legal case.
- Thus, the procedure was not compatible with the Charter or at least was not applied correctly.
- It is impossible to determine if the interpretation was of sufficient quality on the basis of the information provided. As a general rule, an interpreter in a legal case should be a professional, but a sufficiently skilled non-professional should be enough.
- The form should have been provided since it is central to the case and there is no acceptable reason for not showing it.
- The former partner's letter should also be provided, since it is important to the case and the former partner will in any case likely be called as a witness. If concealing the former partner's current address is important for some reason, that can be done.
- Given that Ahmet and the former partner may well have different ideas about the relationship, and Ahmet must be heard about this, the letter should be translated.