Speakers' contributions

Applying the Charter of Fundamental Rights of the European Union

Focus on the Right to a Fair Trial

421DT26e

Online, 27-28 September 2021

SEMINAR FOR THE MEMBERS OF THE JUDICIARY

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Relationship between the CFR and ECHR

Mag. Nina Betetto
Supreme Court of Slovenia
President of the CCJE

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Outline

- Relationship between CJEU and ECtHR
- Special focus on the role of both courts in this relationship
- Relationship between Article 47 CFR and 6 ECHR

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CJEU/ECtHR

- EU not a party to the ECHR, but all its MS are
  - 47 parties to ECHR
  - European Court of Human Rights in Strasbourg (ECtHR)
  - Direct access to ECtHR for anyone
- 27 MS of the EU
  - CJEU in Luxembourg
  - Access to CJEU mainly via preliminary reference procedure

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CJEU

- **Institution of the EU**
- Its function is more integrative – to help build **unity**
- CJEU **can refer to the EU principles of supremacy, direct effect and state liability** which ensure that national legislation inconsistent with EU law is actually changed

EU law is binding

- Relationship between CFR and ECHR

ECtHR

- Rising from an **agreement** between European states
  - Aiming at building **community**
- The implementation of its judgments is much **more dependent on national states discretion**

ECtHR judgments are to be taken into account

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CJEU

- **Direct access extremely restricted**: Only where an EU act is addressed to individuals or it is of direct and individual concern to them, Art. 263 TFEU
- Normally access via preliminary reference procedure (part of domestic procedure)

ECtHR

- **Direct access**, but it will only accept applications where all domestic **remedies have been exhausted**, Art. 35 (1) ECHR
- Advisory opinions of the ECtHR under Protocol No. 16 aiming to enhance the judicial dialogue are not binding.

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Is there a remedy to the ECtHR?

No EU law involved:

- Apply to domestic courts, exhaust legal remedies and then go to Strasbourg

EU law involved

1.Where MS authorities have acted

- Application to domestic courts (with possible reference to CJEU by domestic courts)
- If domestic remedies exhausted: Strasbourg

2.Where EU authorities have acted (e.g. competition law)

- Apply to General Court of EU (possibility of appeal to CJEU): no way to go to Strasbourg

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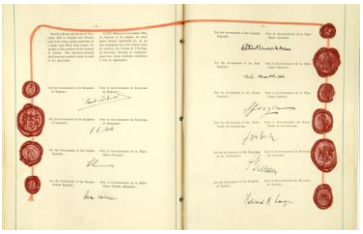
ECHR/CFR

- ECHR: human rights instrument with history and case-law
- CFR: binding since 1 December 2009 - an incorporation of human rights based on gradually developing case law in the initially economic community



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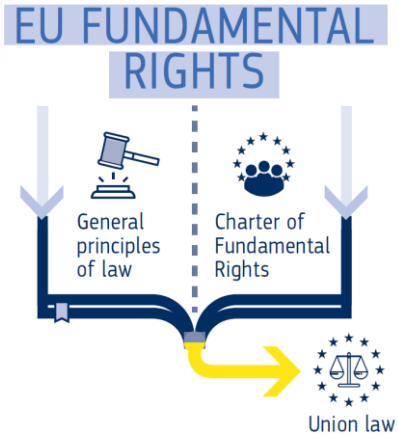
Two sources of human rights protection in EU



- Before the entry into force of the CFR, CJEU relied on **unwritten general principles of EU law**, such as fundamental rights, proportionality, legal certainty, subsidiarity, equality before the law
- ECHR was an important **source of inspiration** for CJEU when defining these principles
- *TEU explicitly states: "Fundamental rights, as guaranteed by the ECHR as they result from the constitutional traditions common to the MS, shall constitute general principles of the Union's law."*

Source: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

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Articles where both the meaning and the scope are the same as corresponding Articles of the ECHR

— Article 2 (right to life) corresponds to Article 2 of the ECHR,

— Article 4 (prohibition of torture and inhuman or degrading treatment or punishment) corresponds to Article 3 of the ECHR,

— Article 5(1) and (2) (prohibition of slavery and forced labour) corresponds to Article 4 of the ECHR,

— Article 6 (right to liberty and security) corresponds to Article 5 of the ECHR,

— Article 7 (respect for private and family life) corresponds to Article 8 of the ECHR,

— Article 10(1) (freedom of thought, conscience and religion) corresponds to Article 9 of the ECHR,

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- Article 11 (freedom of expression) corresponds to Article 10 of the ECHR,
- Article 17 (right to property) corresponds to Article 1 of the Protocol to the ECHR,
- Article 19(1) (protection in the event of removal, expulsion or extradition) corresponds to Article 4 of Protocol No 4,
- Article 19(2) (prohibition of torture and inhuman or degrading treatment or punishment) corresponds to Article 3 of the ECHR as interpreted by the ECtHR,
- Article 48 (presumption of innocence and right of defence) corresponds to Article 6(2) and(3) of the ECHR,
- Article 49(1) (with the exception of the last sentence) and (2) (principle of legality) correspond to Article 7 of the ECHR.

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The same meaning but wider scope

- Article 9 (right to marry and found a family) covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
- Article 12 (1) (freedom of assembly and association) corresponds to Article 11 of the ECHR, but its scope is extended to EU level,
- Article 14(1) (right to education) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
- Article 47(2) and (3) (right to a fair trial) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights or criminal charges does not apply as regards Union law,
- Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to EU level between the Courts of the Member States,

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Example: Art. 9 CFR v Art. 12 ECHR

- Article 9, CFR:

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

- Article 12, ECHR:

Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.

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Minimum standard of protection

CFR, Article 52(3) states the minimum standard of protection: the floor but not the ceiling

"In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, 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."

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Level of protection

- Article 53 (**non-regressive clause**) stipulates that no provision may be interpreted as restricting fundamental rights protected by other mechanisms which the EU or its MS are party to, including the ECHR.

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- This means that case law of ECtHR is of great importance.
- Important for **absolute character of rights**: e.g. Art. 3 ECHR is absolute, hence Art. 4 CFR must be absolute, too

- Case C-400/10 J. *McB.* v L. E., para 53:

"Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the ECtHR."

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Traditional position of the ECtHR: "Strasbourg compromise"

- **EU is not a party to the ECHR and cannot be sued in Strasbourg but MS can be held responsible**
- *Matthews v UK* (1999, EU primary law) According to EU's Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar. Mrs Matthews alleged a breach of her right to vote under Art. 3 Protocol 1 ECHR on account of the fact that the UK has not organised elections.
- ECtHR: "*The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. MS' responsibility therefore continues even after such a transfer*" Breach of Art. 3 Protocol 1 ECHR

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- Bosphorus v Ireland (2005): the application of the doctrine of equivalent protection
- The principle of equivalent protection was no invention of the ECtHR, but had already been introduced by other jurisdictions **facing the challenges resulting from overlapping legal systems**.

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- A piece of EU legislation (secondary EU law) demanded that Yugoslav aircraft be impounded. Bosphorus Airways had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland. Bosphorus argued violation of its right to property under Art. 1 Protocol 1 ECHR

- ECtHR reaffirmed general responsibility of MS under *Matthews*
- But it introduced new rebuttable presumption: **EU offers protection of human rights which is equivalent to the ECHR**
- If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations
- Presumption can be rebutted if in a particular case the protection was **'manifestly deficient'**

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CJEU: Referring to ECtHR while stepping further

- In some cases the CJEU seems to have made use of the right provided by Art. 52(3) CFR, granting more extensive rights than those provided by the ECHR. In these "broadening" cases, the CJEU emphasized that its ruling was meant **not in conflict with the ECtHR precedent**, but beyond it. By widely referring to the ECtHR precedents, in several cases it recalled the importance of taking it **as a starting point, allowing itself to expand the right at stake**, but not to depart from it.
- Case DEB v Bundesrepublik Deutschland involved an expansion of the right of effective judicial protection. After having engaged in a thorough analysis of ECtHR case law, the CJEU eventually relied mainly on Art. 47 CFR to expand the right to legal aid also to legal persons and not only to natural persons, thus reaching an outcome that did not clearly emerge from the ECtHR jurisprudence. Also in this case, however, the court devoted wide attention to ECtHR case law: "the meaning and the scope of the guaranteed rights are to be determined **not only by reference to the text of the ECHR, but also, inter alia, by reference to the case law of the ECtHR**."

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Limitations on the exercise of rights and freedoms

- Article 52 (1) of the CFR says that any limitation on the exercise of the rights and freedoms recognized by CFR 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** recognized by the Union or the need to protect the rights and freedoms of others.
- The legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR (Art.52(3)), which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the CJEU.

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Competing legal orders?

- References to the ECHR diminished since the CFR had gained legal force (the CJEU has said in *Europese Gemeenschap v. Otis NV and Others* (CJEU 2012) that since Article 47 CFR secures protection afforded by Article 6 ECHR, it would henceforth refer only to Article 47)
- The CJEU's priority is uniform application of EU law, facilitation of legal co-operation, establishment of an area of freedom, security and justice

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- In some cases it has deviated from standards set by the ECtHR case law in order to preserve the autonomy and effectiveness of EU legislative measures. Its approach is based on what the CJEU has repeatedly stressed as "the particular characteristics of EU law"
- Sensitive areas: mutual recognition of of judicial decisions, e.g. in child abduction cases (Brussels II bis regulation) and cases concerning asylum seekers

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- In Melloni case the CJEU considered the relationship between the CFR and constitutional guarantees on a domestic level (of which the ECHR can be an integral part). The CJEU refused an interpretation of Art. 53 CFR allowing a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the CFR.

Account needs to be taken of **the primacy of EU law**. CJEU stated (Melloni, C 399/11, para 64):

"Charter must be interpreted as not allowing a MS to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution"

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Opinion 2/13

- **Article 6/2 TEU foresees the accession of the EU to the ECHR**. Following complicated negotiations the negotiators were able to finalise the draft accession agreement in April 2013. The CJEU was asked by the Commission (as per Article 218(11) TFEU) to give its opinion on the competence of the EU to conclude it.
- The CJEU held that the draft Accession Agreement is incompatible with EU law. The central theme: the draft Accession Agreement does not sufficiently take into account the autonomy of EU law, the position of the CJEU itself and certain specific features of Union law as they currently exist.

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Some reactions

- Former President of the ECtHR Dean Spielman: *'For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to* ***a supranational institution****'.*

Or less diplomatic:

- " A legal bombshell"
- "Fundamentally flawed [… and] an unmitigated disaster"

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In the aftermath of the Opinion: the CJEU softening the approach?

- In Aranyosi case (C 404/15) a Hungarian investigating magistrate issued two European arrest warrants with respect to Mr Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed in Hungary. The man having been located in Germany, it was the task of the German authorities to examine the warrants.
- Higher Regional Court of Bremen, which had to decide whether those warrants should be executed, found that the detention conditions to which Mr Aranyosi might be subject were contrary to fundamental rights, in particular the provision of the CFR prohibiting inhuman or degrading treatment or punishment. In judgments of 10 June 2014 and 10 March 2015 the European Court of Human Rights held that Hungary had infringed fundamental rights due to the prison overcrowding which is characteristic of their prisons.
- The German court sought to ascertain from the CJEU whether, in such circumstances, the execution of European arrest warrants can or must be refused

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- The CJEU held that 'in exceptional circumstances' a MS may ignore the principle of mutual trust. In case of information that is 'objective, reliable, specific and properly updated' pointing to the existence of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. That information may be obtained from, inter alia, 'judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing MS, and also decisions, reports and other documents produced by bodies of the CoEurope or under the aegis of the UN'._

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Back to the accession of the EU to ECHR

- Negotiations continue…
- EU will be able to act as respondent in Strasbourg
- fields of application: violations of human rights by EU institutions, e.g. EC in cartel proceedings, staff disputes…
- Where MS acted on basis of EU law (Bosphorus-like cases)
- EU accession will not change the ambit of the Charter rights as ECHR is already the minimum standard

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Art. 47 CFR/Art. 6 and 13 ECHR

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs)[1]	Other corresponding CoE instruments[2]	UN Human rights instruments[3]
47 first paragraph	Right to an effective remedy before a tribunal	Art. 13		Art. 2 (3) ICCPR; Art. 13 CRPD; Art. 40 (2)(b) CRC; Art. 6 ICERD
47 second paragraph	Fair and public hearing	Art. 6 (1)		Art. 14 (3)(d) ICCPR ; Art. 40 (2)(b) CRC
47 third paragraph	Legal aid (needs-based)	Art. 6 (1)		Art. 14 (3)(d) ICCPR; Art. 40 (2)(b) CRC

Source: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdfHandbook

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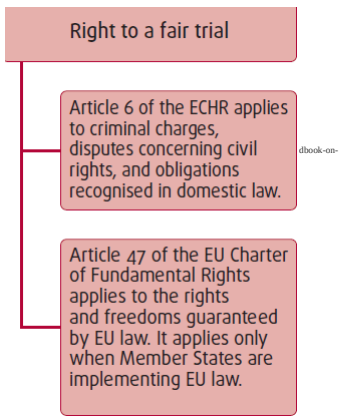
Scope



dbook-on-

- Article 47 applies to all rights and freedoms arising from EU law
- It corresponds to the rights in Article 6 (1) of the ECHR, without Article 6's limitation on civil rights and obligations
- Article 47 therefore secures, as a minimum, the protection offered by Article 6 of the ECHR, in respect to all rights and freedoms arising from EU law.
- This means that the ECtHR case law as a general rule is also relevant in EU law. However, the CFR applies domestically only when MS are implementing (or derogating from) EU law.

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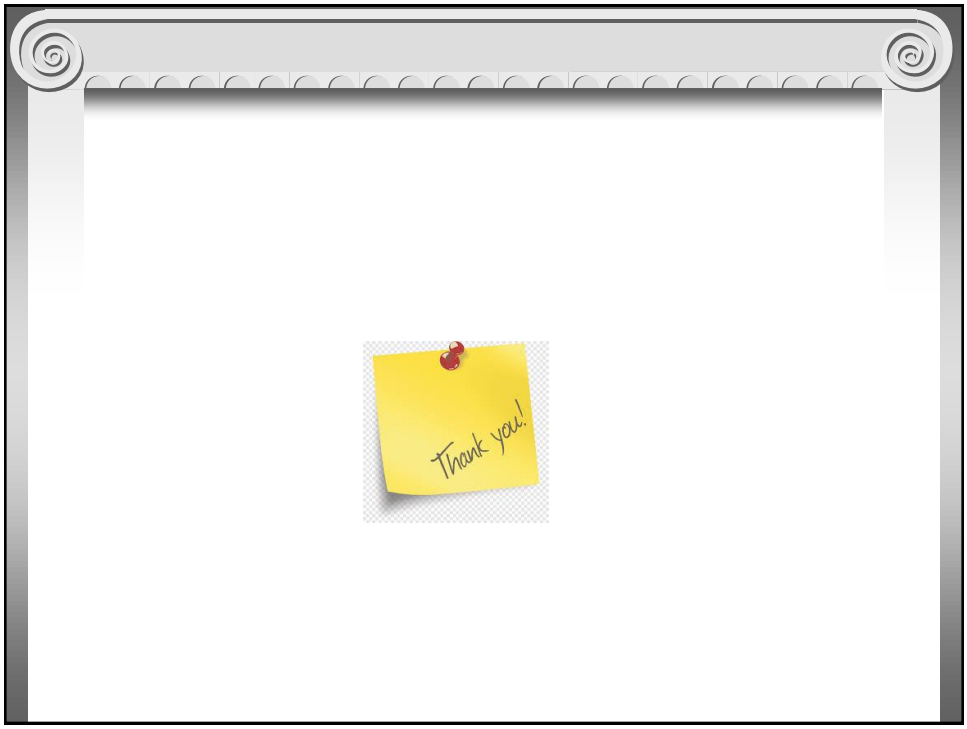

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Slide 1
ECHR: European Convention on Human Rights
CFR: Charter of Fundamental Rights of the European Union

Slide 2
ECtHR: European Court of Human Rights
CJEU: Court of Justice of the European Union

Slide 3
MS: Member States

Slide 5
TFEU:
Art 263 TFEU: Treaty on the Functioning of the European Union
The European Court of Justice has the jurisdiction to review legislative acts of EU institutions. (Art 263 TFEU)
Art 263 TFEU (action for annulment) distinguishes between three types of applicants:
- *Paragraph 2:* Privileged applicants (i.e. Member States, the European Parliament, Council and Commission). They can always bring an action for judicial review.
- *Paragraph 3:* Semi-privileged applicants (Court of Auditors, the European Central Bank and the Committee of the Regions). They are partly privileged because they may solely bring review proceedings 'for the purpose of protecting their prerogatives' (Textbook, 363).
- *Paragraph 4:* Non-privileged applicants (i.e. legal and natural persons) can bring action for judicial review, but they are subject to more stringent conditions in terms of satisfying the legal standing requirement.
Pre-Lisbon, the
In order to be admissible before the CJEU, applicants filing an annulment procedure had to comply with the requirements of direct concern and the strict *Plaumann* formula establishing individual concern. The criticism that this formula triggered led to the adoption of a new article under the Lisbon Treaty, which removed the requirement of individual concern for regulatory acts that are of direct concern and do not entail implementing measures (e. g. Microban International Ltd and Microban (Europe) Ltd v European Commission).
The act in question must be from the EU Institutions, and it does not cover international agreements made by Member States on their own – this is outside the scope of the CJEU's jurisdiction.

Protocol No. 16 allows the ECtHR to provide advisory opinions, at the request of identified courts of the state's parties to the Protocol, on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto".

Slide 8
TEU: Treaty on the European Union

Slide 15
Case C-400/10 J. *McB.* v L. E.: The proceedings related to three children, the first born in England in 2000, the second in Northern Ireland in 2002 and the third in Northern Ireland in 2007. The Irish father and British mother were not married. As well as living in England and Northern Ireland, the family had also lived in Australia, and from November 2008, in the

Republic of Ireland. In July 2009, the mother moved into a refuge with the children. Several days later the father instructed his lawyers to initiate proceedings to obtain custody rights. Ten days later without having been served, the mother left the jurisdiction and moved to England with the children. The father filed a return petition in the Family Division of the High Court in London. The High Court in Dublin ruled that the father had no rights of custody and therefore the mother's removal of the children had not been wrongful.

In his appeal to the Supreme Court, the father sought to avail of the new status accorded to the Charter of Fundamental Rights of the European Union following upon the entry into force of the Treaty of Lisbon. In this he referred to Article 7 and the protection of private and family life. He submitted that rights of custody protected by the Hague Convention included those of an unmarried father where he was living with and by agreement exercising day to day care of the children. He noted he was in the process of asserting his right to apply to be appointed a guardian for the children when they were removed. He further submitted that the court should, in an appropriate case, be prepared to recognise "inchoate rights" of a natural father who had not obtained recognition of his position in the form of a court order, at least where he was carrying out duties and enjoying privileges of a custodial character.

On 30 July the Irish Supreme Court held that neither the provisions of Regulation No 2201/2003 nor Article 7 of the Charter of Fundamental Rights of the EU meant the natural father of a child must necessarily be recognised as having rights of custody, for the purposes of determining whether or not the removal of the child was wrongful, in the absence of a court judgment awarding such rights. However, the Supreme Court accepted that the interpretation of those provisions of European Union law fell within the jurisdiction of the Court of Justice of the EU and therefore sought a preliminary ruling on the matter. It asked the following question:

"Does [Regulation No 2201/2003], whether interpreted pursuant to Article 7 of [the Charter] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having 'custody rights' which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2(11) of that Regulation?"

Ruling: Preliminary ruling issued to the effect that a Member State was not precluded from requiring by its law that an unmarried father must have obtained a court order granting him custody of a child in order to qualify as having "custody rights" which would render the removal of that child from its country of habitual residence as wrongful for the purposes of Article 2(11) of Council Regulation 2201/2003.

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Melloni case: Mr Melloni was an Italian businessman who was prosecuted for bankruptcy fraud and tried to escape the administration of justice in his home country by hiding in Spain. In 1996, Italy requested Spain for his extradition, but Melloni escaped as soon as he was released on bail by the Spanish authorities. Hence, although he was well aware of the time and place of the trial in his home country, he preferred not to attend it personally. Instead, he sent his lawyers, who defended and represented him during the entire criminal process, all the way up to the Italian Supreme Court.

Melloni was found guilty and sentenced to 10 years of imprisonment. As soon as the conviction became final in 2004, Italy issued a European arrest warrant ordering Spain to surrender Melloni. In August 2008, the Spanish police finally managed to arrest him. Not surprisingly, Melloni opposed his surrender. His main argument was that, if he were to be surrendered, he would not be entitled to a retrial in Italy, despite the fact that he had been convicted in his absence. The Audiencia Nacional rejected this argument and held that Melloni's rights of defence had not be violated, even though he was not physically present at his trial. Melloni knew perfectly well that his trial in Italy would be taking place but deliberately chose not to attend it. Besides, he was represented by his lawyers during the entire criminal proceedings. Thereupon, the Court decided to authorise the surrender.

Nevertheless, Melloni was not yet willing to give in and applied to the Spanish Constitutional Court, invoking the right to a fair trial as safeguarded by Art. 24(2) of the Spanish Constitution. According to previous case law of the Constitutional Court, the right to a fair trial in the Spanish Constitution requires that, if a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person's rights of defence, even if he had given power of attorney to a lawyer who effectively represented him at the trial. By contrast, Article 4a(1) of Framework Decision on the European Arrest Warrant 2002/584/JHA ('FD EAW 2002') as amended by Framework Decision 2009/299/JHA ('FD EAW 2009') only allows the Executing State to refuse the surrender or to make it conditional on the right to a retrial in a limited number of situations. If the person convicted in his absence was defended and represented by a lawyer, the Executing State cannot refuse to surrender (Article 4a(1)(b)). In the light of the conflict between its own case law and the EU legal framework, the Constitutional Court decided to ask the CJEU for a preliminary ruling.

Financira program Evropske unije za pravosodje (2014-2020).
Vsebina te publikacije predstavlja izključno stališča avtorice in je njena izključna odgovornost. Evropska komisija ne prevzema nikakršne odgovornosti za morebitno uporabo informacij, ki jih vsebuje.

Listina EU in EKČP

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Predsednica CCJE

1

Pregled vsebine

- Odnos med Sodiščem EU in ESČP
- Kakšna je vloga sodišč v tem razmerju
- Razmerje med 47. čl. Listine in 6. čl. EKČP

2

Sodišče EU/ESČP

- EU ni pogodbenica EKČP, vendar so to vse njene države članice.
  - 47 pogodbenic EKČP
  - Evropsko sodišče za človekove pravice v Strasbourgu (ESČP)
  - Neposreden dostop do ESČP za vsakogar
- 27 držav članic EU
  - Sodišče EU v Luksemburgu
  - Dostop do Sodišča EU predvsem prek postopka predhodnega odločanja

3

SODIŠČE EU

- **Institucija EU**
- Njegova funkcija je bolj integrativna - pomaga graditi **enotnost**
- Sodišče EU **se lahko sklicuje na načela EU o nadrejenosti (primarnosti), neposrednem učinku in odgovornosti države,** ki zagotavljajo, da se nacionalna zakonodaja, ki ni skladna s pravom EU, dejansko spremeni

Pravo EU je zavezujoče

ESČP

- Nastalo na podlagi **sporazuma** med evropskimi državami
- Cilj je graditi **skupnost**
- Izvajanje njegovih sodb je veliko **bolj odvisno od diskrecije nacionalnih držav.**

Upoštevati je treba sodbe ESČP

4

SODIŠČE EU

- **Neposreden dostop je zelo omejen**: Samo kadar je akt EU naslovljen na posameznike ali jih neposredno in individualno zadeva (čl. 263/4 PDEU)
- Običajno dostop prek postopka predhodnega odločanja (del nacionalnega postopka)

ESČP

- **Neposreden dostop,** vendar so dopustne le vloge, če so **bila izčrpana** vsa domača **pravna sredstva (**čl. 35(1) EKČP)
- Svetovalna mnenja ESČP v skladu s Protokolom št. 16, katerih namen je okrepiti dialog med sodišči, niso zavezujoča.

5

Ali je mogoče vložiti pravno sredstvo na ESČP?

Zadeve brez elementov prava EU:

- Vložitev tožbe na domačem sodišču, izčrpanje pravnih sredstev in nato Strasbourg.

Zadeve z elementi prava EU

1.Posamični akti organov DČ

- Nacionalna sodišča morajo uporabiti EU pravo (z možnostjo predhodnega odločanja Sodišča EU)
- Če so domača pravna sredstva izčrpana: Strasbourg

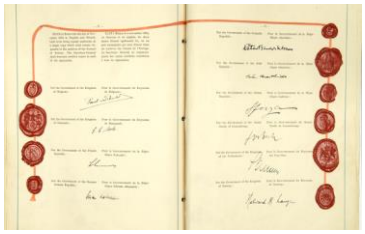
2.Posamični akti organov EU (npr. konkurenčno pravo)

- Pritožba na Splošno sodišče EU (možnost pritožbe na Sodišče EU): ni možnosti pravnega sredstva na ESČP

6

EKČP/CFR

- EKČP: instrument za varstvo človekovih pravic z zgodovino in sodno prakso
- Listina: zavezujoča od 1. decembra 2009 - vključitev človekovih pravic na podlagi postopno razvijajoče se sodne prakse v prvotni gospodarski skupnosti



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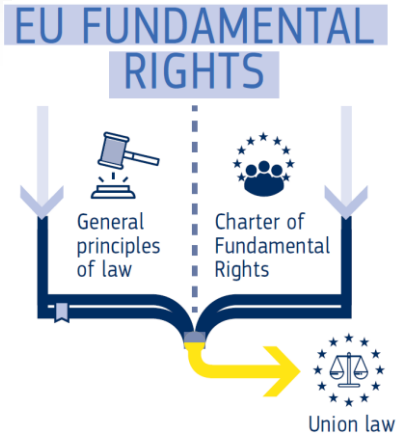
Dva vira varstva človekovih pravic v EU



- Sodišče EU se je pred začetkom veljavnosti Listine opiralo na **nenapisana splošna načela prava EU**, kot so temeljne pravice, sorazmernost, pravna varnost, subsidiarnost, enakost pred zakonom
- EKČP je bila za Sodišče EU pomemben **vir navdiha pri** opredelitvi teh načel
- *V PEU je izrecno navedeno: "Temeljne pravice, ki jih zagotavlja EKČP in izhajajo iz ustavnih tradicij, skupnih državam članicam, so splošna načela prava Unije."*

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8

Določila Listine, katerih pomen in obseg pravice uporabe sta enaka ustreznim določbam EKČP

- Člen 2 (pravica do življenja) ustreza členu 2 EKČP,
- Člen 4 (prepoved mučenja in nečloveškega ali ponižujočega ravnanja ali kaznovanja) ustreza členu 3 EKČP,
- Člen 5(1) in (2) (prepoved suženjstva in prisilnega dela) ustreza členu 4 EKČP,
- Člen 6 (pravica do svobode in varnosti) ustreza členu 5 EKČP,
- Člen 7 (spoštovanje zasebnega in družinskega življenja) ustreza členu 8 EKČP,
- Člen 10(1) (svoboda misli, vesti in veroizpovedi) ustreza členu 9 EKČP,

9

- Člen 11 (svoboda izražanja) ustreza členu 10 EKČP,
- Člen 17 (pravica do lastnine) ustreza členu 1 Protokola k EKČP,
- Člen 19(1) (zaščita v primeru odstranitve, izgona ali izročitve) ustreza členu 4 Protokola št. 4,
- Člen 19(2) (prepoved mučenja in nečloveškega ali ponižujočega ravnanja ali kaznovanja) ustreza členu 3 EKČP, kot ga razlaga ESČP,
- Člen 48 (domneva nedolžnosti in pravica do obrambe) ustreza členu 6(2) in (3) EKČP,
- Člen 49(1) (razen zadnjega stavka) in (2) (načelo zakonitosti) ustrezata členu 7 EKČP.

10

Isti pomen, vendar širši obseg pravic

- Člen 9 (pravica do sklenitve zakonske zveze in ustanovitve družine) pokriva isto področje kot člen 12 EKČP, vendar se njegovo področje uporabe lahko razširi na druge oblike zakonske zveze, če jih določa nacionalna zakonodaja,
- Člen 12(1) (svoboda zbiranja in združevanja) ustreza členu 11 EKČP, vendar je njegovo področje uporabe razširjeno na raven EU,
- Člen 14(1) (pravica do izobraževanja) ustreza členu 2 Protokola k EKČP, vendar je njegovo področje uporabe razširjeno na dostop do poklicnega in nadaljnjega usposabljanja,
- Člen 47(2) in (3) (pravica do poštenega sojenja) ustreza členu 6(1) EKČP, vendar omejitev na odločanje o civilnih pravicah ali kazenskih obtožbah ne velja za pravo EU,
- Člen 50 (pravica do prepovedi dvakratnega sojenja ali kaznovanja v kazenskem postopku za isto kaznivo dejanje) ustreza členu 4 Protokola št. 7 k EKČP, vendar je njegovo področje uporabe med sodišči držav članic razširjeno na raven EU,

11

Primer: Čl. 9 Listine vs. čl. 12 EKČP

- Čl. 9 Listine:

  Pravica do sklenitve zakonske zveze in pravica do ustanovitve družine sta zagotovljeni v skladu z nacionalno zakonodajo, ki ureja uresničevanje teh pravic.

- 12. čl. EKČP:

  Moški in ženske, ki so sposobni za poroko, imajo pravico skleniti zakonsko zvezo in ustanoviti družino v skladu z nacionalnimi zakoni, ki urejajo uresničevanje te pravice.

12

Minimalni standard varstva

Čl. 52(3) Listine določa minimalni standard varstva: spodnja meja, ne pa tudi zgornja meja.

"Če ta listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z EKČP, sta pomen in obseg teh pravic enaka tistima, ki ju določa navedena konvencija. Ta določba ne preprečuje, da bi pravo Unije zagotavljalo širše varstvo."

13

Raven varstva

- Člen 53 (**klavzula o prepovedi poslabšanja položaja)** določa, da se nobena določba ne sme razlagati tako, da omejuje temeljne pravice, ki jih varujejo drugi mehanizmi, katerih pogodbenice so EU ali njene države članice, vključno z EKČP.

14

- To pomeni, da je sodna praksa ESČP zelo pomembna.
- Pomembno v zvezi z **absolutno naravo pravic:** npr. pravica iz čl. 3 EKČP je absolutna, zato enako velja za pravico iz čl. 4 Listine.

- Zadeva C-400/10 J. *McB.* proti L. E., odstavek 53:

"Čl. 7 Listine je treba dati enak pomen in področje uporabe kot členu 8(1) EKČP, kot ga razlaga sodna praksa ESČP."

15

Tradicionalno stališče ESČP: "Strasbourški kompromis"

- **EU ni pogodbenica EKČP in je ni mogoče tožiti v Strasbourgu, a države članice so lahko odgovorne.**
- *Matthews proti Združenemu kraljestvu* (1999, primarno pravo EU) V skladu z aktom EU o neposrednih volitvah (primarno pravo) v Gibraltarju niso potekale volitve v Evropski parlament. Gospa Matthews je trdila, da ji je bila kršena volilna pravica na podlagi čl. 3 Protokola 1 k EKČP, ker Združeno kraljestvo ni organiziralo volitev.
- ESČP: "EKČP *ne izključuje prenosa pristojnosti na mednarodne organizacije, če so pravice iz EKČP še naprej 'varovane'. Odgovornost držav članic se torej nadaljuje tudi po takem prenosu.*" Kršitev čl. 3 Protokola 1 k EKČP

16

- Bosphorus proti Irski (2005): uporaba doktrine enakovrednega varstva pravic
- Načelo enakovrednega varstva ni izum ESČP, saj so ga uvedle že druge jurisdikcije, ki so **se soočale z izzivi, ki so nastali zaradi "prekrivanja" pravnih sistemov**.

17

- Zakonodaja EU (sekundarna zakonodaja EU) je zahtevala zaplembo jugoslovanskih letal. Družba Bosphorus Airways je od družbe Jugoslav National Airways najela letalo, ki je bilo zaseženo na Irskem. Bosphorus je trdil, da je bila kršena njegova pravica do lastnine v skladu s čl. 1 Protokola 1 k EKČP

- ESČP je potrdilo splošno odgovornost držav članic v skladu z doktrino, ki jo je razvilo v zadevi *Matthews*
- Vendar je uvedlo novo izpodbojno domnevo: **EU zagotavlja varstvo človekovih pravic, ki je enakovredno EKČP**
- Če država članica ni imela diskrecijske pravice, se domneva, da ni kršila EKČP, če ni storila ničesar drugega kot le izvajala svoje obveznosti.
- Domnevo je mogoče izpodbiti, če je bilo v določenem primeru varstvo **"očitno pomanjkljivo".**

18

SODIŠČE EU: Sklicevanje na ESČP, a korak naprej

- V nekaterih primerih se zdi, da je Sodišče EU izkoristilo pooblastilo, ki mu jo zagotavlja čl. 52(3) Listine, in široko razlagalo pravice, ki jih določa EKČP. V teh primerih je poudarilo, da njegova odločitev **ni bila** mišljena v **nasprotju s sodno prakso ESČP,** temveč preko nje. Z obširnim sklicevanjem na precedense ESČP je v več zadevah opozorilo na pomen judikature ESČP, ki je **izhodišče, a si je hkrati dovoliti široko razlago, ne pa odstopanje od sodne prakse ESČP.**
- V zadevi DEB proti Zvezni republiki Nemčiji je Sodišče EU široko razlagalo pravico do učinkovitega sodnega varstva. Po temeljiti analizi sodne prakse ESČP se je oprlo predvsem na čl. 47 Listine in pravico do pravne pomoči razširilo tudi na pravne osebe (in ne le na fizične osebe), kar ni jasno izhajalo iz sodne prakse ESČP. Vendar je sodišče tudi v tej zadevi veliko pozornosti namenilo sodni praksi ESČP: "pomen in področje uporabe zajamčenih pravic je treba določiti **ne le s sklicevanjem na besedilo EKČP, temveč, med drugim, tudi s sklicevanjem na sodno prakso ESČP.**"

19

Omejitve pravic in svoboščin

- Čl. 52(1) Listine določa, da mora biti kakršno koli omejevanje uresničevanja pravic in svoboščin, ki jih priznava ta listina, predpisano z zakonom in spoštovati bistveno vsebino teh pravic in svoboščin. Ob upoštevanju načela sorazmernosti so omejitve dovoljene samo, če so potrebne in če dejansko ustrezajo ciljem splošnega interesa, ki jih priznava Unija, ali če so potrebne zaradi zaščite pravic in svoboščin drugih.
- Zakonodajalec mora pri določanju omejitev teh pravic upoštevati enake standarde, kot jih določa podrobna ureditev omejitev iz EKČP (čl. 52(3)), ki se tako uporabljajo, ne da bi bila s tem prizadeta avtonomija prava Unije in Sodišča EU.

20

Konkurenčni pravni redi?

- Sklicevanje na EKČP se je zmanjšalo, odkar je Listina postala pravno veljavna (Sodišče EU je v *zadevi Europese Gemeenschap proti Otis NV in drugi* (Sodišče EU 2012) opozorilo, da "se bo, ker varstvo iz 6. čl. EKČP zagotavlja 47. čl. Listine, odslej sklicevalo le na 47. čl. Listine)."
- Prednostna naloga Sodišča EU je enotna uporaba prava EU, lažje pravosodno sodelovanje, vzpostavitev območja svobode, varnosti in pravice.

21

- V nekaterih primerih je odstopilo od standardov, izoblikovanih v sodni praksi ESČP, da bi ohranilo avtonomijo in učinkovitost zakonodajnih ukrepov EU. Njegov pristop temelji na tem, kar Sodišče EU imenuje "posebne značilnosti prava EU"
- Občutljiva področja: vzajemno priznavanje sodnih odločb, npr. v primerih ugrabitve otrok (Uredba Bruselj II bis) in primeri v zvezi s prosilci za azil.

22

- V zadevi Melloni je SEU obravnavalo razmerje med Listino in ustavnimi jamstvi na nacionalni ravni (katerih sestavni del je lahko EKČP). Sodišče EU je zavrnilo razlago čl. 53 Listine, ki državi članici omogoča, da uporabi standard varstva temeljnih pravic, ki ga zagotavlja njena ustava, če je ta standard višji od tistega, ki izhaja iz Listine.

Upoštevati je treba **primarnost prava EU**. Sodišče EU je navedlo (Melloni, C 399/11, točka 64):

"Čl. 53 Listine je treba razlagati tako, da državi članici ne dopušča, da predajo osebe, ki je bila obsojena v odsotnosti, pogojuje s tem, da je obsodba lahko predmet preizkusa v odreditveni državi članici, zato da bi se izognila zoževanju pravice do poštenega sojenja in pravice do obrambe, ki sta zagotovljeni z njeno ustavo."

23

Mnenje 2/13

- **Člen 6/2 PEU predvideva pristop EU k EKČP**. Po zapletenih pogajanjih je pogajalcem aprila 2013 uspelo dokončati osnutek sporazuma o pristopu. Komisija je Sodišče EU (v skladu s členom 218(11) PDEU) zaprosila za mnenje o pristojnosti EU za njegovo sklenitev.
- Sodišče EU je odločilo, da osnutek pristopnega sporazuma ni združljiv s pravom EU. Osrednja tema: osnutek pristopnega sporazuma ne upošteva v zadostni meri avtonomije prava EU, položaja Sodišča EU in posebnosti prava EU.

24

Nekaj odzivov

- Nekdanji predsednik ESČP Dean Spielman: *"Po mojem mnenju je pomembno zagotoviti, da na ozemlju, kjer velja Konvencija ne bo pravne praznine pri varstvu človekovih pravic, ne glede na to, ali je kršitev mogoče pripisati državi ali* ***nadnacionalni instituciji.***

Ali manj diplomatsko:

- " Pravna bomba"
- "V temelju zgrešen [...] in popolna katastrofa"

25

Po sprejetju mnenja: Sodišče EU mehča pristop?

- V zadevi Aranyosi (C 404/15) je madžarski preiskovalni sodnik izdal dva evropska naloga za prijetje za gospoda Aranyosija, madžarskega državljana, da bi lahko sprožil kazenski pregon zaradi dveh kaznivih dejanj ropa in tatvine, ki naj bi bila storjena na Madžarskem. Ker je bil osumljenec najden v Nemčiji, so bili nemški organi zadolženi za odločanje o nalogu za prijetje.
- Višje deželno sodišče v Bremnu je ugotovilo, da so bili pogoji pridržanja, v katerih bi lahko bil pridržan gospod Aranyosi, v nasprotju s temeljnimi pravicami, zlasti z določbo Listine, ki prepoveduje nečloveško ali ponižujoče ravnanje ali kaznovanje. EKČP je v sodbah z dne 10. junija 2014 in 10. marca 2015 ugotovilo, da je Madžarska kršila temeljne pravice zaradi prenatrpanosti zaporov.
- Nemško sodišče je želelo od Sodišča EU izvedeti, ali je v takih okoliščinah mogoče ali treba zavrniti izvršitev evropskega naloga za prijetje

26

- Sodišče EU je presodilo lahko država članica "v izjemnih okoliščinah" ne upošteva načela vzajemnega zaupanja. V primeru informacij, ki so "objektivne, zanesljive, konkretne in ustrezno posodobljene" in ki kažejo na obstoj "pomanjkljivosti, ki so lahko sistemske ali splošne, ali ki se nanašajo na določene skupine ljudi ali na določene kraje pridržanja". Te informacije se lahko med drugim pridobijo iz "sodb mednarodnih sodišč, kot so sodbe ESČP, sodb sodišč držav članic izdajateljic ter tudi iz odločb, poročil in drugih dokumentov, ki so jih pripravili organi Sveta Evrope ali pod okriljem ZN".

27

Nazaj k pristopu EU k EKČP

- Pogajanja se nadaljujejo...
- EU bo lahko v Strasbourgu nastopala kot respondent.
- področja uporabe: kršitve človekovih pravic s strani institucij EU, npr. EK v kartelnih postopkih, spori uslužbencev...
- Kadar so države članice delovale na podlagi prava EU (primeri, podobni Bosphorus-u)
- Pristop k EU ne bo spremenil obsega pravic iz Listine, saj je EKČP že zdaj minimalni standard.

28

Art. 47 Listine/čl. 6 in 13 EKČP

Charter of Fundamental Rights		Corresponding provisions of ECHR (incl. OPs)[1]	Other corresponding CoE instruments[2]	UN Human rights instruments[3]
47 first paragraph	Right to an effective remedy before a tribunal	Art. 13		Art. 2 (3) ICCPR; Art. 13 CRPD; Art. 40 (2)(b) CRC; Art. 6 ICERD
47 second paragraph	Fair and public hearing	Art. 6 (1)		Art. 14 (3)(d) ICCPR ; Art. 40 (2)(b) CRC
47 third paragraph	Legal aid (needs-based)	Art. 6 (1)		Art. 14 (3)(d) ICCPR; Art. 40 (2)(b) CRC

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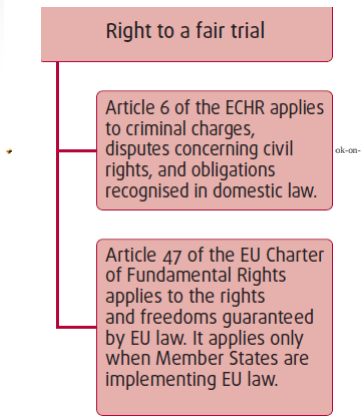
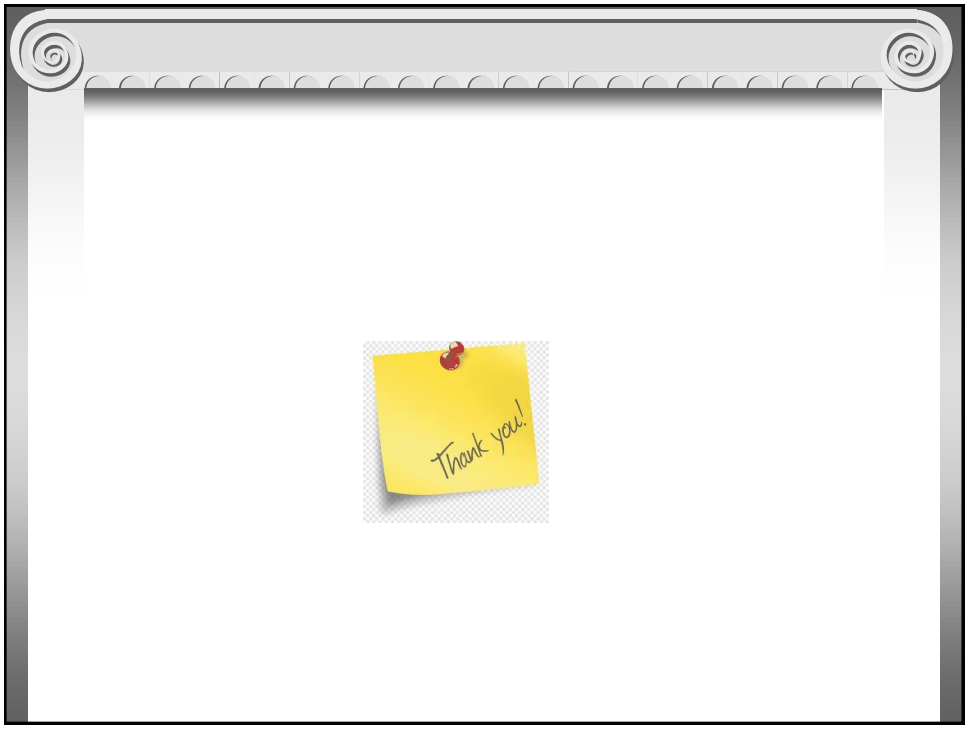
Področje uporabe



- Čl. 47 se uporablja za vse pravice in svoboščine, ki izhajajo iz prava EU.
- Ustreza pravicam iz člena 6(1) EKČP brez omejitve civilnih pravic in obveznosti iz člena 6.
- Člen 47 torej zagotavlja najmanj varstvo, ki jo zagotavlja člen 6 EKČP glede vseh pravic in svoboščin, ki izhajajo iz prava EU.
- To pomeni, da je sodna praksa ESČP kot splošno pravilo pomembna tudi v pravu EU. Vendar se Listina na nacionalni ravni uporablja le, kadar države članice uporabljajo pravo EU (ali odstopajo od njega).

30



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Diapozitiv 1
EKČP: Evropska konvencija o človekovih pravicah
CFR: Listina Evropske unije o temeljnih pravicah

Diapozitiv 2
ESČP: Evropsko sodišče za človekove pravice
SODIŠČE EU: Sodišče Evropske unije: Sodišče Evropske unije

Diapozitiv 3
DČ: države članice

Diapozitiv 5
PDEU:
263. člen PDEU: Pogodba o delovanju Evropske unije
Sodišče Evropske unije je pristojno za presojo zakonodajnih aktov EU.
institucije. (263. člen PDEU)
Člen 263 PDEU (ničnostna tožba) razlikuje med tremi vrstami tožečih strank:
- *Odstavek 2:* Privilegirani prosilci (tj. Member StatesMember StatesEvropski parlament, Svet in Komisija). Vedno lahko vložijo tožbo za sodno presojo.
- *Odstavek 3:* Polprivilegirani prosilci (Računsko sodišče, Evropska centralna banka in Odbor regij). Deloma so privilegirani, ker lahko izključno vložiti revizijski postopek "za zaščito svojih pravic" (učbenik, 363).
- *Odstavek 4:* Neprivilegirani prosilci (tj. pravne in fizične osebe) lahko vložijo tožbo za sodno presojo, vendar zanje veljajo strožji pogoji glede izpolnjevanje pogoja pravne sposobnosti.
Pred Lizbonsko pogodbo je
Da bi bila tožba pred Sodiščem EU dopustna, so morale tožeče stranke, ki so vložile ničnostni postopek, izpolnjevati zahteve neposredne prizadetosti in stroge *Plaumannove* formule za ugotavljanje individualne prizadetosti. Zaradi kritik, ki jih je sprožila ta formula, je bil sprejet nov člen Lizbonske pogodbe, ki je odpravil zahtevo po individualni zadevnosti za regulativne akte, ki zadevajo neposredno in ne vključujejo izvedbenih ukrepov (npr. zadevi Microban International Ltd in Microban (Europe) Ltd proti Evropski komisiji).
Zadevni akt mora izhajati iz institucij EU in ne zajema mednarodne sporazume, ki jih države članice sklenejo same - to je zunaj obseg pristojnosti Sodišča EU.

Protokol št. 16 ESČP omogoča, da na zahtevo določenih sodišč držav pogodbenic Protokola daje svetovalna mnenja o "načelnih vprašanjih v zvezi z razlago ali uporabo pravic in svoboščin, opredeljenih v Konvenciji ali njenih protokolih".

Diapozitiv 8
TEU: Pogodba o Evropski uniji

Diapozitiv 15
Zadeva C-400/10 J. *McB.* proti L. E.: Postopek se je nanašal na tri otroke, prvega rojenega v Angliji leta 2000, drugega na Severnem Irskem leta 2002 in tretjega na Severnem Irskem leta 2007. Irski oče in britanska mati nista bila poročena. Družina je poleg Englandin Northern Irelandživela tudi v Australiaod novembra2008, in2008, in 2008, in pa tudi v Republic of IrelandRepublic of Ireland. Julija 2009 se je mati z otroki preselila v zavetišče. Nekaj dni

pozneje je oče naročil svojim odvetnikom, naj sprožijo postopek za pridobitev pravice do skrbništva. Deset dni pozneje je mati, ne da bi ji bila vročena pisanja, zapustila jurisdikcijo in se preselila v England z otroki. Oče je na družinskem oddelku višjega sodišča vložil zahtevek za vrnitev London. Višje sodišče v Dublin odločilo, da oče ni imel pravice do varstva in vzgoje otrok, zato materina premestitev otrok ni bila nezakonita.

V pritožbi na vrhovno sodišče je oče želel izkoristiti nov status, ki ga je po začetku veljavnosti Lizbonske pogodbe dobila Listina Evropske unije o temeljnih pravicah. Pri tem se je skliceval na člen 7 ter varstvo zasebnega in družinskega življenja. Trdil je, da pravice do varstva in vzgoje, ki jih varuje Haaška konvencija, vključujejo pravice neporočenega očeta, če živi z otroki in po dogovoru z njimi izvaja vsakodnevno varstvo in vzgojo. Opozoril je, da je v postopku uveljavljanja pravice, da zaprosi za imenovanje za skrbnika otrok, ko bodo ti odpeljani. Poleg tega je trdil, da bi moralo biti sodišče v ustreznem primeru pripravljeno priznati "začetne pravice" naravnega očeta, ki svojega položaja ni priznal s sodno odločbo, vsaj kadar je opravljal naloge in užival privilegije skrbniške narave.

Irsko vrhovno sodišče je 30. julija odločilo, da niti določbe Uredbe št. 2201/2003 niti člen 7 Listine EU o temeljnih pravicah ne pomenijo, da je treba naravnemu očetu otroka nujno priznati pravico do varstva in vzgoje za namene ugotavljanja, ali je bil odvzem otroka nezakonit ali ne, če ni sodne odločbe, s katero bi mu bile take pravice dodeljene. Vendar je vrhovno sodišče priznalo, da je razlaga teh določb prava Unije v pristojnosti Sodišča EU, zato je v zvezi s tem vložilo predlog za sprejetje predhodne odločbe. Zastavilo je naslednje vprašanje:

"Ali [Uredba št. 2201/2003], razlagana na podlagi člena 7 [Listine] ali kako drugače, nasprotuje temu, da država članica s svojim zakonom zahteva, da oče otroka, ki ni poročen z materjo, pridobi odločbo pristojnega sodišča, s katero mu je dodeljeno skrbništvo, da bi se lahko štel za osebo, ki ima 'pravice do skrbništva', zaradi katerih je odstranitev tega otroka iz države običajnega prebivališča nezakonita v smislu člena 2(11) te uredbe?"

Sodba: Predhodno odločanje: državi članici ni bilo prepovedano, da bi v svojem pravu zahtevala, da mora neporočen oče pridobiti sodno odločbo, s katero mu je dodeljeno skrbništvo nad otrokom, da bi se lahko opredelil kot oseba, ki ima "pravico do skrbništva", zaradi česar bi bila odstranitev tega otroka iz države njegovega običajnega prebivališča nezakonita v smislu člena 2(11) Uredbe Sveta št. 2201/2003.

Diapozitiv 23

Primer Melloni: Melloni je bil italijanski poslovnež, ki so ga preganjali zaradi goljufije pri stečaju in se je skušal izogniti sodstvu v svoji domovini, tako da se je skril v Spain. Leta 1996 je Italyzahtevala Spain za njegovo izročitev, vendar je Melloni pobegnil takoj, ko so ga španski organi izpustili pod varščino. Čeprav je bil dobro seznanjen s časom in krajem sojenja v svoji domovini, se ga ni želel osebno udeležiti. Namesto tega je poslal svoje odvetnike, ki so ga branili in zastopali med celotnim kazenskim postopkom vse do italijanskega vrhovnega sodišča.

Melloni je bil spoznan za krivega in obsojen na 10 let zapora. Takoj po pravnomočnosti obsodbe leta 2004 je Italyizdala evropski nalog za prijetje, ki je odrejal Spain predajo Mellonija. Avgusta 2008 je španski policiji končno uspelo prijeti Mellonija. Ni presenetljivo, da je Melloni nasprotoval predaji. Njegov glavni argument je bil, da v primeru predaje ne bi bil upravičen do ponovnega sojenja v Italy, čeprav je bil obsojen v odsotnosti. Audiencia Nacional je ta argument

zavrnila in odločila, da Mellonijeva pravica do obrambe ni bila kršena, čeprav fizično ni bil prisoten na sojenju. Melloni je dobro vedel, da je njegovo sojenje v Italy bo potekalo, vendar se je namerno odločil, da se ga ne bo udeležil. Poleg tega so ga med celotnim kazenskim postopkom zastopali njegovi odvetniki. Zato je Sodišče odločilo, da dovoli predajo.

Kljub temu se Melloni še ni bil pripravljen vdati in se je obrnil na Spanish Constitutional Court, sklicujoč se na pravico do poštenega sojenja, ki jo varuje člen 13(1) in (2). 24(2) španske ustave. V skladu s prejšnjo sodno prakso ustavnega sodišča pravica do poštenega sojenja iz španske ustave zahteva, da se v primeru, ko je bila oseba obsojena v odsotnosti, predaja za izvršitev te obsodbe pogojuje s pravico do izpodbijanja obsodbe, da se zavaruje pravica te osebe do obrambe, tudi če je dala pooblastilo odvetniku, ki jo je učinkovito zastopal na sojenju. Nasprotno pa člen 4a(1) Okvirnega sklepa o evropskem nalogu za prijetje 2002/584/PNZ (v nadaljevanju: OS ENZ 2002'spremenjen z Okvirnim sklepom 2009/299/PNZ (v nadaljevanju: OS ENZ 2009'državi izvršiteljici omogoča, da v omejenem številu primerov samo zavrne predajo ali jo pogojuje s pravico do ponovnega sojenja. Če je osebo, ki je bila obsojena v odsotnosti, zagovarjal in zastopal odvetnik, Executing StateExecuting StateExecuting Statene more zavrniti predaje (člen 4a(1)(b)). Zaradi nasprotja med lastno sodno prakso in pravnim okvirom EU je Sodišče prve stopnje Constitutional Court odločilo, da bo Sodišču EU predložilo predlog za sprejetje predhodne odločbe.

Independence and impartiality of tribunals in the CJEU case law

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President of the CCJE

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1

The impact of international law on national law - UK

- National law ⇔ international law
- Concept of judicial independence originates from England (1701):

- it impacted the thinking of political leaders in the transnational level
- the international community embodied the principle of judicial independence into international treaties

- The international law of judicial independence has impacted the domestic law: UK introduced ECHR into the British domestic law (1998; British Constitutional Reform Act, 2005)

2

Article 47(2), CFR

- Everyone is entitled to a fair and public hearing within a reasonable time by **an independent and impartial tribunal** previously established by law. /…/

3

Tribunal/court

- **CoE** and **EU law** use the term tribunal rather than court. The word ‘tribunal’ is given an **autonomous meaning**, and the CJEU has applied consistent principles in determining whether a body qualifies as a tribunal.
- Not necessarily a court of classic kind

4

What defines "tribunal" in the ECtHR case law?

- established by law
- the power to issue binding decisions
- independence and impartiality
- the ability to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner
- having full jurisdiction over the case
- the duration of its members' terms of office

5

Guðmundur Andri Ástráðsson v. Iceland

- The judgment added that the very notion of a "tribunal" implied that it **should be composed of judges selected on the basis of merit** – that is, judges who fulfil the **requirements of technical competence and moral integrity** to perform the judicial functions required of it in a State governed by the rule of law (§§ 220-221). A rigorous process for the appointment of ordinary judges is of paramount importance to ensure that the most qualified candidates in both these respects are appointed to judicial posts. The higher a "tribunal" is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. /…/ Such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges (§ 222).

6

What defines "tribunal" in the CJEU case law?

The CJEU has addressed the meaning of 'tribunal' in the context of deciding whether a particular entity is permitted to refer a case to the CJEU for a preliminary ruling

The body must:

- be permanent
- be established by law
- be independent and impartial
- have compulsory iurisdiction
- include an *inter-partes* procedure
- apply rules of law

7

CJEU: Examples

- Does Court of Auditors qualify as s tribunal? (CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 19 December 2012, paras. 19-31)
- Does a Commission for Protection against Discrimination qualify as a tribunal? (CJEU, C-394/11 *Valeri Hariev Belov v. CHEZ Elektro Balgaria AD and others)*
- Does an arbitral body qualify as a tribunal? (CJEU, C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, 13 February 2014, paras. 18–25)

8

Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou

- **The CJEU ruled that the Court of Auditors did not constitute a tribunal** because: (i) it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake; (ii) its jurisdiction was limited to *a priori* auditing of the state's expenditure, and did not include making a determination; (iii) its decision did not acquire the force of *res judicata* and its proceedings were not intended to lead to a decision of a judicial nature; and (iv) the beneficiary of the expenditure at issue was not a party to the proceedings before the Court of Auditors.

9

Merck Canada Inc. v Accord Healthcare Ltd and Others

- "**The jurisdiction** of the *Tribunal Arbitral necessário* does **not stem from the will of the parties, but from Law** No 62/2011 of 12 December 2011. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before the competent appellate court, it becomes **definitive and has the same effects as a judgment handed down by an ordinary court."**

10

Why is independence important?

- The **purpose** of independence is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence
- Judicial independence is therefore a **pre-requisite to the rule of law**

11

Impartiality/independence

- CCJE (Opinion No. 1, 1994): "The judicial independence serves as the guarantee of impartiality."
- CCJE (Opinion No. 3): "The judicial independence is a pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society."
- They are tightly **intertwined and functional in character**: they are means protecting the ability of the judge to perform the relevant judicial function
- **Independence**: no outside source, which would prevent the judge from performing his function
- **Impartiality**: individual quality of a decision-maker who is free from irrelevant pressures with regard to the decision to be taken (towards himself, parties, lawyers, public opinion)

12

Independence

- **Legal** elements: institutional framework establishing legislative provisions and constitutional safeguards of judiciary and judges
- **Ethical** elements: incorporates the qualities necessary to achieve the end - the protection of the rights of citizens
- Independence:
- of the **judiciary as a body**
- **individual**

- G. Guillaume: "The judge who wants to be independent is independent."
- Irmgard Gris: "To be a good judge is a matter of character."

13

Is there a potential threat to judicial independence if there is decrease of salaries of judges???

14

Example

Facts:

The Portuguese legislature temporarily **reduced the remuneration** of a series of office holders in the public sector, including the **judges** of the Court of Auditors. The Trade Union of Portuguese Judges, acting on behalf of those judges, brought an action before the Supreme Administrative Court of Portugal seeking the annulment of those budgetary measures. The ASJP contended that the **salary-reduction measures infringed 'the principle of judicial independence'** enshrined not only in the Portuguese Constitution but also in EU law.

15

Is the organisation of the judiciary in MS the EU's business?

- CJEU: "To the extent that the Court of Audits may, as a 'court or tribunal', rule on questions concerning the application or interpretation of EU law Portugal must ensure that the court meets the requirements essential to effective judicial protection. Maintaining such a court's independence is essential and inherent in the task of adjudication. It is required not only at EU level, but also at the level of the MS and, therefore, as regards national courts. **It is essential to the proper working of the judicial cooperation system between national courts and the CJEU.**

16

- **The external aspect** of judicial independence presupposes that the court concerned exercises its functions wholly autonomously, **without being subject to any hierarchical constraint or subordinated** to any other body and **without taking orders or instructions** from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

17

- That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such **as guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out** also constitutes a guarantee essential to judicial independence (*Asociação Sindical dos Juízes Portugueses*, C-64/16, paras. 44-45). "

18

Epilogue

- However, **the CJEU holds that the salary-reduction measures at issue cannot be considered to impair the independence of the members of the Court of Audits.** Those measures were applied not only to the judges, but, more widely, to various public office holders performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary. **They are, therefore, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit.** In addition, **the measures at issue were temporary in nature.**

19

National courts are to ensure "the full application of European Union law (…) and (…) judicial protection of an individual's rights under that law" (*Opinion 1/09*, § 68). If politicians can influence courts' decisions, they can use this leverage to pursue sheer protectionism, instead of advancing the interests linked to the EU internal market. In addition, deficiencies of judicial independence in one MS entail problems for the courts in other MS, as the latter are obliged to recognize and enforce judicial decisions coming from other EU MS. Should the courts trust the judgments from the State in which the division of powers is blurred?

MS and their legal orders differ as to the substance and procedures, ways and level of protection of fundamental rights, court organisation and the expediency of proceedings. These differences are treated as diversity and have not prevented the EU from establishing the European area of justice based on mutual trust and mutual recognition of judgments. **How to find the limits of States' freedom to organise their judiciary? How to differentiate between a "reorganisation" and a breach of the rule of law?** Is the EU (and if yes, who exactly – Council, CJEU?) legitimized to make such a decision? And what consequences should be drawn if a breach of the rule of law is established?

These issues can be important for all 24 EU acts introducing mutual recognition of judgments (more than 20 instruments with regard to cooperation in civil and criminal matters). The *LM* case arose in the context of one of them – the European Arrest Warrant (EAW) Framework Decision.

20

Example: LM case (C-216/18 PPU)

- The CJEU was asked by an Irish court to address one of the most serious current legal challenges of the EU: the consequences of restrictions imposed upon judicial independence in one MS for other MS. The sequence of laws adopted in 2015-2018 in Poland has been assessed commonly by various external and internal institutions as "enable(ing) the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice and thereby pos(ing) a grave threat to the judicial independence as a key element of the rule of law"

21

- According to the judgment, national courts should apply **both steps of the *Aranyosi* test** when judicial independence in the issuing country is endangered. If the executing court possesses a strong evidence of systemic or generalised deficiencies in this respect, it should proceed to the second step – of individual case assessment: "the executing judicial authority must refrain from giving effect to the European arrest warrant" only if there are substantial grounds for believing that that person will run a real risk of a breach of the fundamental right to a fair trial (§ 78 and 59).

22

Example: Commission v Poland

(C 192/18)

Facts:

In 2017, a Polish law lowered the retirement age of judges and public prosecutors, and the age for early retirement of judges of the Supreme Court to 60 years for women and 65 years for men, whereas those ages were previously set at 67 years for both sexes. In addition, that law conferred on the MoJ the power to extend the period of active service of judges of the ordinary courts beyond the new retirement ages thus set. Since the Commission took the view that those rules were contrary to EU law, it brought an action (Article 258 TFEU) for failure to fulfil obligations before the CJEU.

23

Infringement of Article 19 (2/2) TEU

Judicial independence requires that the court concerned exercise its functions wholly autonomously and in an impartial manner. The fact that an organ, such as the MoJ, is entrusted with the power to decide whether or not to grant an extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of independence has been undermined. However, it finds that the substantive conditions and detailed procedural rules governing that decision-making power are, in the case in point, such as to give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality. First, **the criteria on the basis of which the minister is called upon to adopt his decision are too vague and that decision does not need to state reasons and cannot be challenged in court proceedings. Second, the length of the period for which the judges are liable to continue to wait for the decision of the minister falls within the latter's discretion.**

24

The necessary imperviousness of judges to all external intervention or pressure requires guarantees against removal from office. **The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate**, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. In the case in point, the combination of the measure lowering the normal retirement age of judges and of the measure consisting in conferring upon the MoJ the discretion to authorise them to continue to carry out their duties beyond the new retirement age thus set, for 10 years in the case of female and 5 years in the case of male judges, fails to comply with the principle of irremovability. That combination of measures is such as to create reasonable doubts regarding the fact that the new system might actually have been intended to enable the minister to remove certain groups of judges while retaining other judges in post.

25

Impartiality

"I'm recusing myself from this case."

- **EU law** has consistently followed the principles established by the ECtHR's case law regarding the two required aspects of impartiality: subjective and objective impartiality.

26

Impartiality – subjective/objective test

- The **subjective** impartiality (relating to an individual judge's personal prejudices or bias) is presumed as long as the contrary has not been proved
- **Objective** test: account must be taken of considerations relating to the functions exercised and to internal organisation.

"Justice must not only be done; it must also be seen to be done".

27

ECtHR: Impartiality – objective test

- Piersack v. Belgium: "What is at stake is the confidence which the courts in a democratic society must inspire in the public."
- Hauschildt v. Denmark: "The fear that the judge or tribunal lacks impartiality must be such that it can be held to be objectively justified; the standpoint of the accused on this matter, although important, is not decisive."
- De Cubber v. Belgium: One of the three judges of the criminal court who had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question. (….) "Even appearances may be important …"
- How about this?

28

CJEU: Example

- Case *Chronopost SA and La Poste v. Union française de l'express* concerned a claim that infrastructural assistance constituted state aid. The case had twice been before the Court of First Instance, with a different judicial composition but the same Judge-Rapporteur. At the second hearing, the court affirmed its first ruling, namely that there was state aid. The appellants claimed that the second court was not an impartial tribunal because it included the same Judge-Rapporteur and the decision was tainted with bias.
- The CJEU set out the **test for impartiality** as follows: (i) the members of the tribunal must be subjectively impartial, that is, none must show bias or personal prejudice (there is a presumption of personal impartiality in the absence of evidence to the contrary); and (ii) the tribunal must be objectively impartial by offering guarantees sufficient to exclude any legitimate doubt in this respect. The CJEU dismissed the allegation of bias. The facts did not establish that the Chamber's composition was unlawful.

29

30

Independence and impartiality of tribunals in the CJEU case law

Slide1
CJEU: Court of Justice of the European Union

Slide 2:
ECHR: Europan Convention on Human Rights

Slide 3
CFR: Charter of Fundamental Rights of the European Union

Slide 4
CoE: Council of Europe
ECtHR: European Court of Human Rights
"Not necessarily a court of classic kind": Examples of bodies recognised as having the status of a "tribunal" within the meaning of Article 6 § 1 of the ECHR include:
▪ a regional real-property transactions authority (*Sramek v. Austria*, § 36)
▪ a criminal damage compensation board (*Rolf Gustafson v. Sweden*, § 48)
▪ a forestry disputes resolution committee (*Argyrou and Others v. Greece*, § 27)
▪ the Court of Arbitration for Sport (*Mutu and Pechstein v. Switzerland*, § 149), and a football arbitration committee (*Ali Rıza and Others v. Turkey*, §§ 202-204)

Slide 7
Inter-partes procedure: having or involving adverse parties

Slide 8
In *Valeri Hariev Belov v. CHEZ Elektro Balgaria AD and others* (Bulgaria and the European Commission intervening),72 the Bulgarian Commission for Protection against Discrimination (KZD) requested a preliminary ruling on various provisions of EU law relating to discrimination and consumer protection. The CJEU confirmed that a national body might be classified as a court or tribunal within the meaning of Article 267 of the TFEU when performing judicial functions, but could not be recognised as such when exercising other functions, such as those of an administrative nature. Accordingly, it was necessary to determine in what specific capacity a body was acting when it sought a ruling from the CJEU. In this case, various factors led the court to reject the contention that the proceedings before the body were intended to lead to a decision of a judicial nature; these included: that KZD could proceed on its own motion, and had extensive investigative powers; KZD's power to join persons to the proceedings on its own initiative; that KZD would be a defendant in court proceedings if its decision were appealed; and that KZD could revoke its decisions.

Slide 12
CCJE: Consultative Council of European Judges (an advisory body of the CoE)
Opinion No. 1: Opinion No. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges
Opinion No. 3 (2002): Opinion No. 3 on ethics and liability of judges
As for opinions of the CCJE see https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta

Slide 20

Opinion 1/09: Opinion of the CJEU delivered pursuant to Article 218(11) TFEU. The Opinion was sought regarding the international court envisaged in the draft agreement creating a unified patent litigation system.
Pursuant to Article 218(11) TFEU, the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the CJEU as to whether an agreement envisaged is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU.
MS: Member States

Slide 23
TFEU: Treaty on the Functioning of the EU

Slide 24
TEU: Treaty on European Union
MoJ: Ministry of Justice

Financira program Evropske unije za pravosodje (2014-2020).
Vsebina te publikacije predstavlja izključno stališča avtorice in je njena izključna odgovornost. Evropska komisija ne prevzema nikakršne odgovornosti za morebitno uporabo informacij, ki jih vsebuje.

Neodvisnost in nepristranskost sodišč v sodni praksi Sodišča EU

Mag. Nina Betetto
Vrhovno sodišče Republike Slovenije
Predsednica CCJE

1

Vpliv mednarodnega prava na nacionalno pravo - UK

- Nacionalno pravo ⟺ mednarodno pravo

- Koncept neodvisnosti sodstva izvira iz Anglije (1701):

- vplival je na razmišljanje političnih voditeljev na nadnacionalni ravni.
- mednarodna skupnost je nato načelo neodvisnosti sodstva vključila v mednarodne pogodbe.

- Mednarodno pravo je povratno vplivalo na domače pravo: Združeno kraljestvo je EKČP v britansko notranje pravo integriralo (1998; British Constitutional Reform Act, 2005).

2

Člen 47(2) Listine

- Vsakdo ima pravico do poštene in javne obravnave v razumnem roku pred **neodvisnim in nepristranskim sodiščem, ki je** bilo predhodno ustanovljeno z zakonom. /…/

3

Sodišče za uslužbence/sodišče

- V **pravu SE** in **EU** se namesto izraza sodišče uporablja izraz tribunal. Beseda "sodišče" ima **avtonomen pomen.** V zvezi s pojmom je Sodišče EU izoblikovalo ustaljeno in konsistentno sodno prakso.
- Ni nujno, da gre za sodišče klasične vrste

4

Kaj opredeljuje pojem "sodišče" v sodni praksi ESČP?

- ustanovljeno z zakonom
- pooblastilo za izdajanje zavezujočih odločb.
- neodvisnost in nepristranskost
- možnost odločanja o zadevah iz svoje pristojnosti na podlagi pravnih pravil in po predpisanem postopku.
- ima polno pristojnost za odločanje o zadevi
- trajanje mandata njegovih članov.

5

Guðmundur Andri Ástráðsson proti Islandiji

- Sodba je navedenemu dodala, da že sam pojem "sodišča" pomeni, da ga **morajo sestavljati objektivno izbrani sodniki,** torej sodniki, ki izpolnjujejo **zahteve glede strokovne usposobljenosti in moralne integritete za** opravljanje sodnih nalog, ki se od njih zahtevajo v pravni državi (tč. 220-221). Strog postopek imenovanja rednih sodnikov je izrednega pomena za to, da so na sodniška mesta imenovani kandidati, ki so najbolj usposobljeni. Višje ko je "sodišče" v sodni hierarhiji, zahtevnejša morajo biti veljavna merila za izbiro. /.../ Takšna selekcija, ki temelji objektivnh merilih, ne zagotavlja le tehnične zmogljivosti sodnega organa, da zagotavlja pravico kot "tribunala", temveč je ključna tudi z vidika zagotavljanja zaupanja javnosti v sodstvo in služi kot dodatno jamstvo osebne neodvisnosti sodnikov (tč. 222).

6

Kaj opredeljuje pojem "sodišče" v sodni praksi Sodišča EU?

Sodišče EU je obravnavalo pomen pojma "sodišče" v okviru odločanja o tem, ali lahko določen subjekt predloži zadevo Sodišču EU v predhodno odločanje

Elementi "sodišča":

- trajno
- ustanovljeno z zakonom.
- neodvisno in nepristransko.
- imeti mora obvezno sodno pristojnost
- postopek med strankami *(inter-partes)*
- uporaba pravnih pravil

7

Sodišče EU: Primeri

- Ali Računsko sodišče izpolnjuje pogoje za sodišče? (Sodba Sodišča EU z dne 19. decembra 2012 v *zadevi Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou proti Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou,* C-363/11, točka 1. 19-31)
- Ali komisija za varstvo pred diskriminacijo izpolnjuje pogoje za sodišče? (Zadeva C-394/11, SEU, *Valeri Hariev Belov proti CHEZ Elektro Balgaria AD in drugi)*
- Ali se arbitražni organ šteje za sodišče? (Zadeva C-555/13, *Merck Canada Inc. proti Accord Healthcare Ltd in drugi,* Sodišče EU, 13. februar 2014, točki 1 in 2. 18–25)

8

Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou

- **Sodišče EU je odločilo, da Računsko sodišče ni sodišče,** ker: (i) imelo je povezave z ministrstvom, kar pomeni, da ni moglo delovati kot tretji v razmerju do strank; (ii) njegova pristojnost je bila omejena na predhodno revizijo državnih izdatkov in ni vključevala odločanja; (iii) njegova odločba ni postala *res iudicata* in njegov postopek ni bil namenjen sprejetju sodne odločbe; (iv) upravičenec do izdatkov, ki so bi predmet preizkusa, ni bil stranka v postopku pred Računskim sodiščem.

9

Merck Canada Inc. proti Accord Healthcare Ltd in drugi

- "**Pristojnost** *arbitražnega sodišča necessário* **ne izhaja iz volje strank, temveč iz zakona** št. 62/2011 z dne 12. decembra 2011. Ta zakon temu sodišču podeljuje obvezno pristojnost, da na prvi stopnji odloča o sporih v zvezi s pravicami industrijske lastnine, ki se nanašajo na referenčna zdravila in generična zdravila. Poleg tega, če zoper arbitražno odločbo, ki jo izda tak organ, ni pritožbe pri pristojnem pritožbenem sodišču, postane **dokončna in ima enake učinke kot sodba, ki jo izda redno sodišče."**

10

Zakaj je neodvisnost pomembna?

- **Namen** neodvisnosti je vsakomur zagotoviti temeljno pravico, da se o njegovi zadevi odloča v poštenem sodnem postopku, izključno na podlagi pravnih pravil in brez kakršnih koli neprimernih vplivov.
- Neodvisnost sodstva je zato **predpogoj za pravno državo.**

11

Nepristranskost/neodvisnost

- CCJE (Mnenje št. 1, 1994): "Neodvisnost sodstva je jamstvo za nepristranskost."
- CCJE (mnenje št. 3): "Neodvisnost sodnikov je predpogoj za nepristranskost sodnika, ki je bistvena za verodostojnost sodnega sistema in zaupanje, ki bi ga moral vzbujati v demokratični družbi."
- Sta tesno **prepleteni in funkcionalne narave –** pomenita sredstvo, ki varuje sposobnost sodnika, da opravlja ustrezno sodniško funkcijo.
- **neodvisnost**: ni zunanjega vira, ki bi sodniku preprečeval opravljanje njegove funkcije
- **Nepristranskost**: individualna lastnost tistega, ki odloča in ki ni pod pritiskom glede odločitve, ki jo je treba sprejeti (v razmerju do sebe, strank, odvetnikov, javnega mnenja).

12

Neodvisnost

- **Pravni** elementi: institucionalni okvir, ki ga določajo zakon ter ustavna jamstva sodstva in sodnikov
- **Etični** elementi: se nanašajo na kvalitete, ki jih mora imeti sodnik in so potrebne za dosego cilja - varstvo pravic državljanov.
- Neodvisnost:
  - **sodstva kot organa oblasti**
  - **individualna**

- G. Guillaume: G. Guillaume: "Sodnik, ki želi biti neodvisen, je neodvisen."
- Irmgard Gris: "Biti dober sodnik je stvar značaja."

13

Ali lahko znižanje plač sodnikov ogrozi neodvisnost sodstva???

14

Primer

Dejstva:

Portugalski zakonodajalec je začasno **znižal prejemke** številnih uradnikov v javnem sektorju, med drugim tudi **sodnikov** Računskega sodišča. Sindikat portugalskih sodnikov je v imenu teh sodnikov pri portugalskem vrhovnem upravnem sodišču vložil tožbo za razglasitev ničnosti teh proračunskih ukrepov. ASJP je trdil, da **so ukrepi za znižanje plač kršili "načelo neodvisnosti sodstva", ki** je zapisano ne le v portugalski ustavi, temveč tudi v pravu Unije.

15

Ali je organizacija sodstva v državah članicah stvar EU?

- Sodišče EU: "Če lahko Računsko sodišče kot tribunal odloča o vprašanjih v zvezi z uporabo ali razlago prava EU, mora Portugalska zagotoviti, da sodišče izpolnjuje zahteve, ki so nujne za učinkovito sodno varstvo. Ohranjanje neodvisnosti takega sodišča je bistveno in neločljivo povezano z nalogo sojenja. Neodvisnost se ne zahteva le na ravni EU, temveč tudi na ravni držav članic, torej tudi v zvezi z nacionalnimi sodišči, in je **bistvena za pravilno delovanje sistema pravosodnega sodelovanja med nacionalnimi sodišči in Sodiščem EU.**

16

- **Zunanji vidik** neodvisnosti sodstva predpostavlja, da sodišče opravlja svoje naloge popolnoma samostojno, **ne da bi bilo podvrženo kakršnim koli hierarhičnim omejitvam ali podrejeno kateremu** koli drugemu organu in **ne da bi sprejemalo ukaze ali navodila iz** kakršnega koli vira. To ga varuje pred zunanjimi posegi ali pritiski, ki bi lahko ogrozili neodvisno presojo njegovih članov in vplivali na njihove odločitve.

17

- Ta zahteva po svobodi zahteva določena jamstva, nujna za varstvo osebnosti tistih, ki razsojajo v sporu, npr. jamstvo pred razrešitvijo s položaja. **To, da prejemajo plačilo, ki ustreza pomembnosti nalog, ki jih opravljajo,** je prav **tako jamstvo, ki je bistveno za neodvisnost sodnikov** (*Asociação Sindical dos Juízes Portugueses*, C-64/16, prim. točke 44-45). “

18

Epilog

- Vendar pa **je Sodišče EU menilo, da za konkrtene ukrepe za znižanje plač ni mogoče šteti, da posegajo v neodvisnost članov Računskega sodišča.** Ti ukrepi se namreč niso uporabljali le za sodnike, temveč širše, za javne uslužbence, ki opravljajo naloge v javnem sektorju, vključno s predstavniki zakonodajne, izvršilne in sodne oblasti. **Gre torej za splošne ukrepe, katerih cilj je bil, da tudi javni uslužbenci prispevajo k varčevalnim ukrepom, ki so bili pogojeni z zahtevo po zmanjšanju proračunskega primanjkljaja portugalske države.** Poleg tega so **bili ukrepi začasne narave.**

19

Nacionalna sodišča morajo zagotoviti "polno uporabo prava Evropske unije (...) in (...) sodno varstvo pravic posameznika, ki izhajajo iz tega prava" (*Mnenje 1/09*, § 68). Če lahko politiki vplivajo na odločitve sodišč, lahko to uporabijo za izvajanje čistega protekcionizma, namesto da bi spodbujali interese, povezane z notranjim trgom EU. Poleg tega pomanjkanje neodvisnosti sodišč v eni državi članici povzroča težave sodiščem v drugih državah članicah, kadar morajo priznavati in izvrševati sodne odločbe iz drugih držav članic EU. Ali naj sodišča zaupajo sodbam države, v kateri ni jasno, ali je spoštovano načelo delitve?

Države članice in njihovi pravni redi se razlikujejo glede vsebine in postopkov, načinov in ravni varstva temeljnih pravic, organizacije sodišč in hitrosti postopkov. Te razlike se obravnavajo kot raznolikost in EU niso preprečile vzpostavitve evropskega območja pravice, ki temelji na medsebojnem zaupanju in vzajemnem priznavanju sodnih odločb. **Kako najti meje svobode držav pri organizaciji njihovega sodstva? Kako razlikovati med "reorganizacijo" in kršitvijo načela pravne države?** Ali je EU (in če da, kdo točno - Svet, Sodišče EU?) legitimna za sprejetje takšne odločitve? In kakšne posledice naj bodo, če se ugotovi kršitev načela pravne države?

Ta vprašanja so lahko pomembna za vseh aktov EU, ki so podlaga za vzajemno priznavanje sodnih odločb (več kot 20 instrumentov v zvezi s pravosodnim sodelovanjem v civilnih in kazenskih zadevah). Zadeva *LM* je nastala v okviru enega od njih - Okvirnega sklepa o evropskem nalogu za prijetje.

20

Primer: Primer LM (C-216/18 PPU)

- Irsko sodišče je Sodišče EU zaprosilo, naj obravnava enega najresnejših pravnih izzivov EU: kakšna je posledica omejitve neodvisnosti sodstva v eni državi članici za druge države članice. Zaporedje zakonov, sprejetih v letih 2015-2018 na Poljskem, so različne zunanje in notranje institucije ocenile kot "omogočanje zakonodajni in izvršilni oblasti, da se resno in obsežno vmešavata v pravosodje, s čimer resno ogrožata neodvisnost sodstva kot ključnega elementa pravne države"

21

- V skladu s sodbo morajo nacionalna sodišča uporabiti **obe stopnji testa *Aranyosi,*** kadar je ogrožena neodvisnost sodstva v državi izdajateljici. Če ima izvršitveno sodišče trdne **dokaze o sistemskih ali splošnih pomanjkljivostih** v zvezi s tem, bi moralo preiti na **drugi** korak - **presojo okoliščin konkretnega primera**: "Izvršitveni pravosodni organ se mora vzdržati izvršitve evropskega naloga za prijetje" le, če obstajajo tehtni razlogi za prepričanje, da bo za to osebo obstajala realna nevarnost kršitve temeljne pravice do poštenega sojenja (tč. 78 in 59).

22

Primer: Komisija proti Poljski (C 192/18)

Dejstva:

Leta 2017 je poljski zakon znižal upokojitveno starost sodnikov in državnih tožilcev ter starost za predčasno upokojitev sodnikov vrhovnega sodišča na 60 let za ženske in 65 let za moške, medtem ko je bila prej ta starost za oba spola določena na 67 let. Poleg tega je ta zakon podelil pristojnost ministrstvu za pravosodje, da podaljša delovno dobo sodnikov rednih sodišč po tako določeni novi upokojitveni starosti. Ker je Komisija menila, da je ta ureditev v nasprotju s pravom Unije, je pri Sodišču EU vložila tožbo zaradi neizpolnitve obveznosti (člen 258 PDEU).

23

Kršitev člena 19(2/2) PEU

Neodvisnost sodstva zahteva, da sodišče opravlja svoje naloge popolnoma samostojno in nepristransko. Dejstvo, da je organu, kot je ministrstvo za pravosodje, zaupana pristojnost, da odloča o tem, ali naj se odobri podaljšanje opravljanja sodniške funkcije po običajni upokojitveni starosti ali ne, samo po sebi ne zadostuje za sklep, da je bilo načelo neodvisnosti ogroženo. Vendar pa so vsebinski pogoji in podrobna postopkovna pravila, ki urejajo to pristojnost odločanja, v obravnavanem primeru takšni, da vzbujajo utemeljen dvom o neobčutljivosti zadevnih sodnikov na zunanje dejavnike, in o njihovi nevtralnosti. Prvič, **merila, na podlagi katerih naj bi minister sprejel svojo odločitev, so bila preveč nejasna in te odločitve ni bilo treba obrazložiti in je ni bilo mogoče izpodbijati v sodnem postopku. Drugič, dolžina obdobja, ko so morali sodniki naprej čakati na odločitev ministra, je bila v njegovi diskreciji.**

24

Nujna odpornost sodnikov na vse zunanje posege ali pritiske zahteva, da obstajajo jamstva proti razrešitvi s položaja. **Načelo nepremakljivosti zahteva, da lahko sodniki ostanejo na položaju, dokler niso dosegli obvezne upokojitvene starosti, ali do izteka mandata,** če je ta določen za določen čas. Čeprav to načelo ni povsem absolutno, pa od njega ni mogoče odstopati, razen če je utemeljeno z legitimnimi in nujnimi razlogi in ob upoštevanju načela sorazmernosti. V obravnavanem primeru kombinacija ukrepa, ki znižuje običajno upokojitveno starost sodnikov, in ukrepa, ki pomeni, da je MNZ podeljena diskrecijska pravica, da sodnikom dovoli, da nadaljujejo z opravljanjem sodniške funkcije po tako določeni novi upokojitveni starosti, in sicer za deset let za sodnice in za pet let za sodnike, ni v skladu z načelom nepremakljivosti. Ta kombinacija ukrepov vzbuja utemeljen pomislek, da je bil namen nove ureditve v resnici omogočiti ministru, da razreši določene sodnike, medtem ko druge ohrani na položaju.

25

Nepristranskost

"I'm recusing myself from this case."

- **Pravo EU** dosledno sledi načelom, ki jih je v zvezi z dvema zahtevanima vidikoma nepristranskosti - subjektivno in objektivno nepristranskostjo - določilo ESČP v svoji sodni praksi.

26

Nepristranskost - subjektivni/objektivni test

- **Subjektivna** nepristranskost (povezana z osebnimi predsodki ali pristranskostjo posameznega sodnika) se domneva, dokler ni dokazano nasprotno.
- **Objektivni** test: upoštevati je treba vidike, ki se nanašajo na opravljanje funkcije in na notranjo organizacijo.
- "Pravici mora biti ne le zadoščeno, javnost mora tudi videti, da ji je bilo zadoščeno."

27

ESČP: Nepristranskost - objektivni preizkus

- Piersack proti Belgiji: "Gre za zaupanje, ki ga morajo sodišča v demokratični družbi vzbujati v javnosti."
- Hauschildt proti Danski: "Strah, da sodnik ali sodišče ni nepristranski, mora biti takšen, da ga je mogoče šteti za objektivno upravičenega; stališče obtoženca v zvezi s tem, čeprav je pomembno, ni odločilno."
- De Cubber proti Belgiji: Eden od treh sodnikov kazenskega sodišča, ki je odločal o obtožbah zoper pritožnika, je bil pred tem preiskovalni sodnik v dveh zadevnih zadevah. (....) "Tudi videz je lahko pomemben ..."
- Kaj pa to?

28

SODIŠČE EU: Primer

- Zadeva *Chronopost SA in La Poste proti Union française de l'express* se je nanašala na trditev, da infrastrukturna pomoč pomeni državno pomoč. Zadeva je bila dvakrat predložena Sodišču prve stopnje v drugačni sodni sestavi, vendar z istim sodnikom poročevalcem. Na drugi obravnavi je sodišče potrdilo svojo prvo sodbo, in sicer da je šlo za državno pomoč. Pritožniki so trdili, da sodišče, ko je odločalo drugič, ni bilo nepristransko, ker je v njem sodeloval isti sodnik poročevalec, in da je bila odločitev pristranska.
- Sodišče EU je opravilo **preizkus nepristranskosti**: (i) člani sodišča morajo biti subjektivno nepristranski, kar pomeni, da nihče od njih ne sme biti pristranski ali imeti osebnih predsodkov (če ni nasprotnih dokazov, velja domneva subjektivne nepristranskosti); in (ii) sodišče mora biti objektivno nepristransko, tako da obstajajo zadostna jamstva, ki izključujejo dvom o nepristranskosti. Sodišče EU je očitek o pristranskosti zavrnilo.

29

30

Independence in nepristranskost sodišč v sodni praksi Sodišča EU

Slide1
SODIŠČE EU: Sodišče Evropske unije: Sodišče Evropske unije

Diapozitiv 2:
EKČP: Evropska konvencija o človekovih pravicah

Diapozitiv 3
CFR: Listina Evropske unije o temeljnih pravicah

Diapozitiv 4
CoE: Svet Europe
ESČP: Evropsko sodišče za človekove pravice
"Ni nujno, da gre za sodišče klasične vrste": Primeri organov, ki jim je priznan status "sodišča" v smislu člena 6(1) EKČP, vključujejo:
▪ regionalni organ za transakcije z nepremičninami (*Sramek proti Avstriji,* § 36).
▪ odbor za nadomestilo škode, povzročene s kaznivim dejanjem (*Rolf Gustafson proti Švedski,* § 48)
▪ odbor za reševanje sporov v gozdarstvu (*Argyrou in drugi proti Grčiji,* § 27)
▪ arbitražno sodišče za šport (*Mutu in Pechstein proti Švici,* § 149) in nogometni arbitražni odbor (*Ali Rıza in drugi proti Turčiji,* §§ 202-204)

Slide 7
Interpartesni postopek: z nasprotnimi strankami ali v katerega so vključene nasprotne stranke

Diapozitiv 8
V zadevi *Valeri Hariev Belov proti družbi CHEZ Elektro Balgaria AD in drugim* (Bulgaria in Evropska komisija kot intervenient),72 je bolgarska komisija za varstvo pred diskriminacijo (KZD) zahtevala predhodno odločanje o različnih določbah prava EU v zvezi z diskriminacijo in varstvom potrošnikov. Sodišče EU je potrdilo, da je nacionalni organ lahko opredeljen kot sodišče v smislu člena 267 PDEU, kadar opravlja sodne funkcije, vendar ga ni mogoče priznati kot takega, kadar opravlja druge funkcije, kot so tiste upravne narave. Zato je bilo treba ugotoviti, v kakšni posebni vlogi deluje organ, ko zahteva odločitev Sodišča EU. V tem primeru je sodišče na podlagi različnih dejavnikov zavrnilo trditev, da naj bi postopek pred organom vodil do odločitve sodne narave; med njimi so bili: da je KZD lahko postopal na lastno pobudo in da je imel obsežna preiskovalna pooblastila; da je KZD lahko na lastno pobudo v postopek vključil osebe; da je bil KZD tožena stranka v sodnem postopku, če je bila zoper njegovo odločbo vložena pritožba; in da je KZD lahko preklical svoje odločbe.

Diapozitiv 12
CCJE: Posvetovalni svet evropskih sodnikov (svetovalno telo SE)
Mnenje št. 1: Mnenje št. 1 (2001) CCJE o standardih glede neodvisnosti sodstva in nespremenljivosti sodnikov
Mnenje št. 3 (2002): Mnenje št. 3 o etiki in odgovornosti sodnikov
Glede mnenj CCJE glej https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta.

Diapozitiv 20

Mnenje 1/09: Mnenje Sodišča Evropske unije v skladu s členom 218(11) PDEU. Mnenje je bilo zahtevano v zvezi z mednarodnim sodiščem, predvidenim v osnutku sporazuma o vzpostavitvi enotnega sistema reševanja patentnih sporov.
V skladu s členom 218(11) PDEU lahko Evropski parlament, Svet, Komisija ali Member StateMember Statepridobijo mnenje Sodišča EU o tem, ali je predvideni sporazum združljiv z določbami Pogodb. Namen te določbe je preprečiti zaplete, ki bi nastali zaradi pravnih sporov glede združljivosti mednarodnih sporazumov, ki zavezujejo EU, s Pogodbama.
DČ: države članice

Diapozitiv 23
PDEU: Pogodba o delovanju EU

Slide 24
TEU: Pogodba o Evropski uniji
MoJ: Ministrstvo za pravosodje

Convention and Charter - 2 systems in comparison:
fair trial, efficient remedy, field of application

ERA, 27 September 2021

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1

Points of discussion / learning objectives

1. The 2 systems: Comparing **CFREU and ECHR**
2. Intro to the right to a **fair trial**
3. Intro to the right to **efficient remedy**
4. The CFREU's **field of application**, including the available FRA tools in that regard (prepares for the case study - group work in the second presentation)

2

2

A little quiz: Question 1

- How often does the CJEU use the Charter in a year?

A) In around 90 cases

B) In around 35 cases

C) In over 300 cases

3

3

A little quiz: Question 2

- How many of the provisions in the CFREU are NOT also reflected in the text of the ECHR?

A) 40 per cent of the CFREU provisions

B) 10 per cent of the CFREU provisions

C) 0 per cent because all Charter provisions are available either in ECHR or in its many protocols

4

4

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

A little quiz: Question 3

- In some EU MS national judges may request the ECtHR to give advisory opinions for instance on Art. 6 ECHR. In how many MS is that the case?

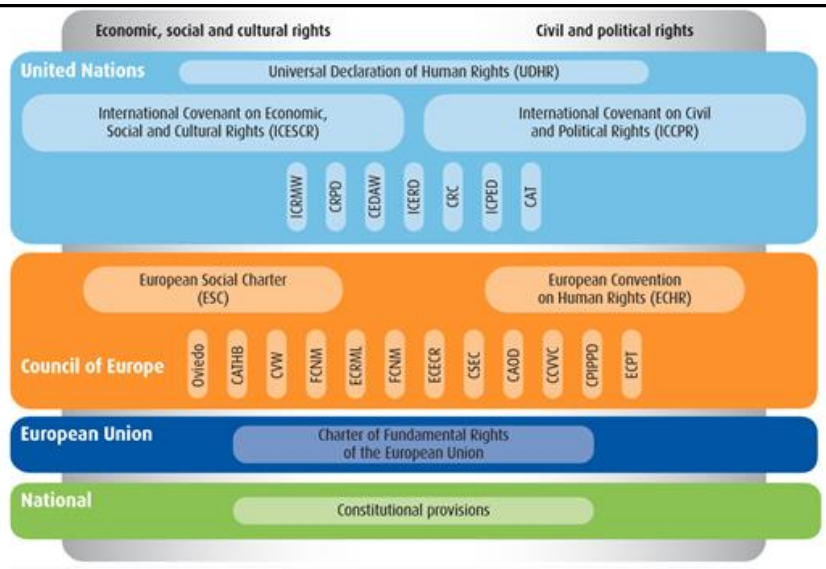
A) 3

B) 13

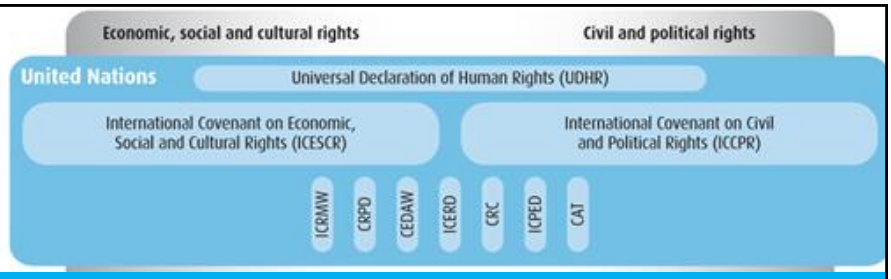
C) 9

5

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



6



Article 8 UDHR:
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights

on Access to justice:
es shall ensure effective access to justice for persons with on an equal basis with others, including through the provision of

Art 2(3) ICCPR:
(a) … any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…;
(b) …any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) … competent authorities shall enforce such remedies when granted.

7

Art. 6(1) TEU: the relevance of the Charter

EU "recognises the rights, freedoms and principles" set out in the Charter . The latter:

- "shall have the **same legal value as the Treaties**"
- "shall not extend in any way" the **EU competences**.
- shall be interpreted in accordance with the general provisions in Title VII and with "due regard" to the "**explanations**".

8

8

Art. 6 (2) and (3) TEU: the relevance of the ECHR

- The Union **shall accede** to the ECHR without this affecting its competences.
- Fundamental rights, as guaranteed by ECHR "and as they result from the constitutional traditions common to the Member States, shall **constitute general principles of the Union's law**"

9

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Article 52 CFREU and the Explanations

- Art 52 (3) CFREU: *In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, 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.*
- Explanations: around 90 references to the ECHR

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CoE	EU
• **Human Rights Organisation**	• Not a specialised Human Rights Organisation, **BUT**: ○ Specific legislative competences ○ Increasingly developing HR-strategies ○ Increasing investment in HR
• **47 MS**	• **27 MS**
• **Intergovernmental (Conventions)**	• **Supranational (full-fledged governance system), BUT:** ○ Principle of enumerated powers

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ECtHR - Strasbourg	CJEU - Luxembourg
• **Specialised** human rights court	• **All fields of law** covered
• **47 judges**	• **76** (27 at CJEU plus 49 at GC) plus 11 GAs
• **Staff: over 640**	• **Staff: 2.235**
• **Budget for 2021: 74 million** EUR	• **Budget for 2021: 444 million** Eur
• **Languages: EN/FR**	• **24 official EU languages**, 45% of staff, 552 language combinations, over 1 mio pages per year

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ECtHR - Strassbourg	CJEU - Luxembourg
• Mainly **individual applications;** • requests for advisory opinions so far limited to EST, FI, FR, EL, LITH, LUX, NL, SK, SI	• Individual access restricted • Mainly **preliminary rulings via national courts**
• **New applications in 2020**: **41.700**	• **New cases in 2020**: **1.582**
• Seperate opinions and dissent; • **Public** deliberations, votes disclosed • Clerks are professional staff of the Court, independent from judges, work on rotating basis for different judges – **preparatory work is centralised** • **Open** approach to external legal sources	• One voice • **Secret** deliberations, votes not disclosed • Clerks recruited by the judges (GAs) themselves – **preparatory work carried out in personal cabinets** under supervision of judges • Rather **reserved** (different for GA opinions)

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CFREU and ECHR

LEGEND: No ECHR equivalent; More extensive than ECHR; EU context-specific; Equivalent protection to ECHR

I Dignity (Articles 1–5)	1 Human dignity	2 Life	3 Integrity of the person	4 Torture; inhuman, degrading treatment	5 Slavery and forced labour		
II Freedoms (Articles 6–19)	6 Liberty and security	7 Private and family life	8 Personal data	9 Marry and found family	10 Thought conscience and religion		
	11 Expression and information	12 Assembly and association	13 Arts and sciences	14 Education	15 Choose occupation and engage in work		
	16 Conduct a business	17 Property	18 Asylum	19 Removal, expulsion or extradition			
III Equality (Articles 20–26)	20 Equality before the law	21 Non-discrimination	22 Cultural, religious and linguistic diversity	23 Equality: men and women	24 The child	25 Elderly	26 Integration of persons with disabilities
IV Solidarity (Articles 27–38)	27 Workers right to info. and consultation	28 collective bargaining and action	29 Access to placement services	30 Unjustified dismissal	31 Fair and just working conditions		
	32 Prohibition of child labour; prot. at work	33 Family and professional life	34 Social security and assistance	35 Health care	36 Access to services of economic interest	37 Environmental protection	38 Consumer protection
V Citizens' rights (Articles 39–46)	39 Vote and stand as candidate to EP	40 Vote and candidate at municipal elections	41 Good administration	42 Access to documents	43 European ombudsman	44 Petition (EP)	45 Movement and residence
	46 Diplomatic and consular protection						
VI Justice (Articles 47–50)	47 Effective remedy and fair trial	48 Presump. innocence; right of defence	49 Legality and prop. of offences and penalties	50 *Ne bis in idem*			
VII General provisions (Articles 51–54)	51 Application	52 Scope and interpretation	53 Level of protection	54 Prohibition of abuse of rights			

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The CFREU being more "narrow" than the ECHR: scope of application MS

ECHR: MS are always bound by ECHR

Art. 51 CFREU: MS are only bound by CFREU"when implementing Union law"

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The CFREU being "wider" than the ECHR: scope of application MS

Art 6 (1) ECHR : "civil rights and obligations or of any criminal charge"

Art. 47 CFREU: all procedures covered, including administrative, tax, asylum procedures

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Rights vs Principles

- The explanations are of limited value
  - Principles: Artt. 25 (elderly people), 26 (PWD, confirmed in C-356/12) and 37 (env. protection).
  - Example of hybrid provisions: Artt. 23 (gender equ.), 33 family and prof. life), 34 (social security).
- Relevant factors for the determination:
  - Individual right or political aim?
  - Dependent on national or EU legislation?
  - Large margin of appreciation?
  - Reference to national law?

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Rights v. Principles: Art. 52(5)

LEGEND: Rights; Undefined; Principles

NB: this only refers to the language used in the Charter text
Ellipses: qualification in Explanations

I Dignity (Articles 1–5)	1 Human dignity	2 Life	3 Integrity of the person	4 Torture; inhuman, degrading treatment	5 Slavery and forced labour		
II Freedoms (Articles 6–19)	6 Liberty and security	7 Private and family life	8 Personal data	9 Marry and found family	10 Thought conscience and religion		
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Direct horizontal effect?

- Not the rule, but "*the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals*"
- Conditions:
  - Mandatory nature and
  - "*sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such*"
- So far recognised for:
  - Art. 21: prohibition to discriminate,
  - Art. 47: right to an effective remedy and a fair trial
  - Art. 31 (2): right to annual period of paid leave

See Egenberger, C-414/16, EU:C:2018:257; IR, C-68/17, EU:C:2018:696; Bauer und Willmeroth, C-569/16 and C-570/16, EU:C:2018:871; Max-Planck-Gesellschaft, C-684/16, EU:C:2018:874; Cresco, C-193/17, EU:C:2019:43

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Order of the General Court in Case T-600/15

- "47 In that regard, in so far as the applicants rely on Article 37 of the Charter of Fundamental Rights, it suffices to observe that that article only **contains a principle providing for a general obligation on the European Union in respect of the objectives to be pursued in the framework of its policies, and not a right to bring actions** in environmental matters before the Courts of the European Union.
- 48 …The Explanations …. provide moreover …. Accordingly, those **principles become significant for the courts only when such acts are interpreted or reviewed but, on the other hand, do not give rise to direct claims for positive action by the European Union's institutions or Member States' authorities.** This is consistent both with the case-law of the Court of Justice and with the approach of the Member States' constitutional systems to 'principles'. In that regard, those Explanations cite, inter alia, by way of illustration, Article 37 of the Charter of Fundamental Rights."

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Fair trial elements:

The right to a fair trial relates to the administration of justice in civil and criminal contexts. It has two aspects:

- institutional (e.g. independence and impartiality of the tribunal; definition of a tribunal); and
- procedural – a fair and public hearing (includes a series of individual rights ensuring the proper administration of justice – e.g. rights of defendants, incl. right to legal assistance and victims' rights in criminal proceedings)

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Fair trial and effective remedy

ECHR	CFREU
Fair trial: Article 6 ○ Para 1: key entitlements re tribunal, hearing, timing ○ Para 2: presumption of innocence ○ Para 3: procedural rights	**Fair trial: Article 47** ○ Para 2: key entitlements re tribunal, hearing, timing; right to be defended ○ Para 3: Legal aid **Presumption of innocence: Article 48**
Effective Remedy: Article 13 Everyone whose Convention rights are violated shall have an effective remedy before a national authority	**Effective Remedy: Art. 47 Para 1** Everyone whose rights guaranteed by EU law has the right to an effective remedy before a tribunal

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Right to a fair trial: Art. 6 ECHR

CFREU (also civ+admin l):
-**Art. 47 (plus r.e.r.)**
-**Art. 48 (1)**
-**Art. 48 (2): general ref. to "rights of defense"**
-**Art. 47 (2): right to defended, represented**

- Para 1: Key entitlement in civil and criminal procedures:
  - **a fair and public hearing**
  - **within a reasonable time**
  - by an **independent** and **impartial** tribunal **established by law**
  - judgment shall be **pronounced publicly** but the press and public may be excluded from all or part of the trial
- Para 2: **Presumption of innocence**.
- Para 3: **5 minimum rights in criminal procedure**

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Art. 6 (3) ECHR: 5 minimum rights in criminal procedure

CFREU (also civ+admin law):
-Art. 47 (2): right to be adv., def., represented
-Art 47 (3): free legal aid

- (a) **informed promptly, in a language he understands** and in detail, of the nature and cause of the accusation;
- (b) adequate **time and facilities for the preparation of defence**;
- (c) **defend himself in person or through legal assistance** of his own choosing or, if he has not sufficient means to pay for **legal assistance, to be given it free** when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the **same conditions as witnesses against him**;
- (e) free assistance of an **interpreter**

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Right to an effective remedy:

- No overall definition
- According to ECtHR effective remedy must
  - Be accessible
  - Be capable of providing redress (re applicants complaints)
  - Offer reasonable prospects of success
- EU law: principles of effectiveness and equivalence:
  - requires national law not to make it impossible or excessively difficult to enforce EU rights
  - conditions are not less favourable than those for similar claims of domestic nature
  - Explanations: EU law provides more extensive protection since it guarantees the right to an effective remedy before a court (established by CJEU as a cpl in case 222/84 Johnston)

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What is a “tribunal”?

- established by law
- permanent
- compulsory jurisdiction
- inter-partes procedure
- applies rules of law
- independent and impartial

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When is a tribunal independent?

- Factors impacting on independence:
  - manner of appointment of judges,
  - duration of terms of office,
  - guarantees against outside pressure
- stable terms of office
- protection against removal during term

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When is a tribunal impartial?

- subjective impartiality:
  - free of prejudices/bias
- objective impartiality:
  - no appearance of bias (family links, professional relations of the judges to the case)

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Fair hearing

- Adversarial character (both civil and criminal):
  - Right to have knowledge of and comment on all evidence
  - Right to have sufficient time to familiarise oneself with evidence
  - Right to produce evidence
- EU law: right to information, including 'letter of rights' harmonised (Dir 2012/13/EU)
- Right to reasoned decision
- whole procedure needs to be considered
- Right to an appeal only in criminal cases (AP7). However Art. 6 ECHR applies to all appeal procedures

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Public hearing

- includes oral hearing with presence of defendant
- But oral hearing not necessary where: no issues of credibility and no contested facts; limited nature or of exclusively technical nature
- Art 6(1) ECHR explicitly allows for exclusion of public:
  - in the interest of morals, public order, national security
  - Required by interest of juveniles or protection of private life of parties
  - Where publicity would prejudice the interest of justice

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EU Directives on criminal procedural rights

- interpretation and translation (2010/64/EU),
- information (2012/13/EU),
- access to a lawyer (2013/48/EU),
- legal aid (2016/1919/EU),
- presumption of innocence (2016/343/EU),
- procedural safeguards for children suspected or accused in criminal proceedings (2016/800/EU).

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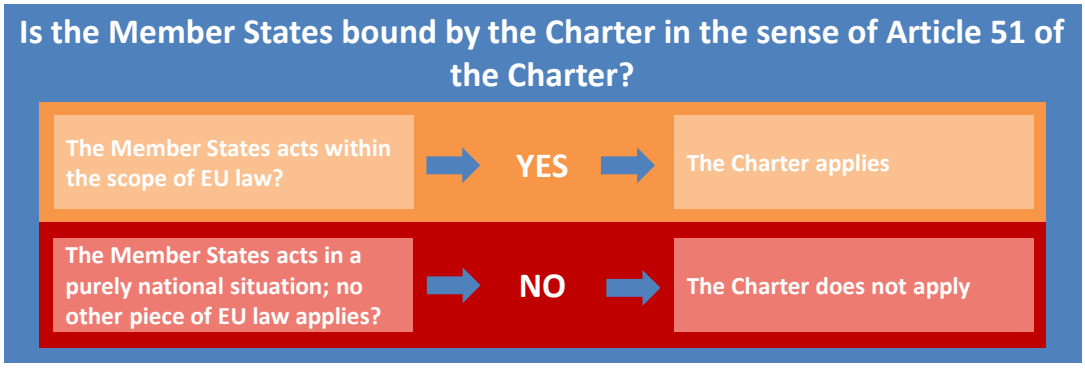
The Charter's field of application



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Article 51: The Charter's "field of application"

- "1. The provisions of this Charter are addressed to the… Union … and to the Member States **only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the **limits of the powers of the Union** as conferred on it in the Treaties.
- 2. The **Charter does not extend the field of application of Union law** beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. "

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What does "implementing EU law mean"?

- the same as 'acting within the scope of EU law' and covers a wide range of situations
- minimum requirement: there must be **some connection with Union law (other than the Charter)**
- this connection is sufficiently concrete if Member States act **as agents** for the EU or in situations in which they need to **rely on some kind of authorization** of EU law

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National acts meant to transpose EU law

- Covers **all kind of** legislative or regulatory measures
- **All levels** of national measures qualify as implementation
- Also, national measures using the **margin of appreciation** granted by EU law (directives) qualify as "implementing Union law" in the sense of Art. 51: in exercising the discretion granted by the EU legislator, MS have to respect the Charter

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Pre-existing national legislation

- Where pre-existing national provisions can ensure that EU law is implemented there is **no need for new** legislation transposing e.g. an EU directive
- Such national provisions **qualify** as 'implementing Union law'
- Once such norms change form purely internal measures to measures implementing EU law, they **have to conform** with the Charter

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Concepts of national law referred to in EU law

- National concepts/terms can imply 'implementation' in the sense of Article 51 if used in the context of the EU provisions at issue (see e.g. CJEU, Rodriguez Caballero, Case C-442/00)
- An EU directive refers to national law; it is for national law to specify these terms and to define them. **If these national legal concepts are used in context of that directive, the EU fundamental rights apply, regardless whether** it concerns new national legislation specifically made to transpose the directive or whether it are existing national legal concepts (e.g. by virtue of employment law).

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National law using discretionary powers granted by the EU

- Qualifies as 'implementing EU law', regardless of whether it concerns **mandatory or optional exercise of discretionary powers** (CJEU, Sabou, Case C-276/12 or Milkova, Case C-406/15)
- This does **not apply** if EU law simply recognises existing MS powers to take more favourable provisions (**gold plating**). Gold plating falls in the scope of EU law if the EU law act makes this explicit: see Art 4(1) AMSD

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National provision concerning remedies, sanctioning and enforcement

- If such provisions are **used to guarantee the application of EU law** they qualify as implementation in the sense of Art. 51
- This applies **also if EU law does not establish a respective obligation** (as in Art 9 Dir 2000/78). Principle of sincere cooperation (Art. 4(3) TEU).
- Such acts qualify as implementation **irrespective** of whether they are adopted in order to transpose EU law (e.g. Case C-218/15, *Paoletti; Case C-405/10, Garenfeld*)

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National measures falling under a prohibition and needing EU law authorisation

- Where Member States risk to discriminate based on nationality, to **restrict fundamental freedoms or deprive Union citizens of the genuine enjoyment of their citizens rights** they may invoke exceptions: but then they have to respect EU fundamental rights
- Case C-98/14, *Berlington*; Case C-368/95, *Familiapress*; Case C-165//14, *Rendon Marin*;

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Voluntary references in national law to (concepts of) EU law

- Per se such references do not bring national law within the scope of EU law (Case C-482/10, Teresa Cicala)
- However **CJEU might have jurisdiction** to interpret these terms (and hence the Charter may play a role) if the national law makes them applicable directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in same way

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National measures falls in an area in which the EU has legislative powers

- **Not** sufficient to trigger application of Charter
- Two additional criteria need to be fulfilled:
  - the **EU has exercised** these powers
  - the **national measure falls in the exact scope of application of these** legislative measures

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Criteria to determine field of application

24 "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".

25 "…some of the points to be determined are 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; and also whether there are **specific rules of EU law on the matter or capable of affecting it** …".

26 "In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not **impose any obligation on Member States with regard to the situation at issue** in the main proceedings"

CJEU, Case C-206/13, *Cruciano Siragusa*

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Within and beyond the Charter's scope

STATE AS EU AGENT	EU AUTHORISATION	OTHERWISE WITHIN SCOPE	OUTSIDE SCOPE
New legislation formally transposing	Exceptions granted by EU primary law	Legislation falling within scope of EU legislation	
Old legislation substantially transposing			National legislation voluntarily using EU law concepts
Discretion granted by EU secondary law			"Goldplating"
Remedies, sanctions, enforcement			National legislation uses national legal concepts referred to by EU legislation

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Thank you!

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FRA Charter tools for legal practitioners

ERA, 27 September 2021

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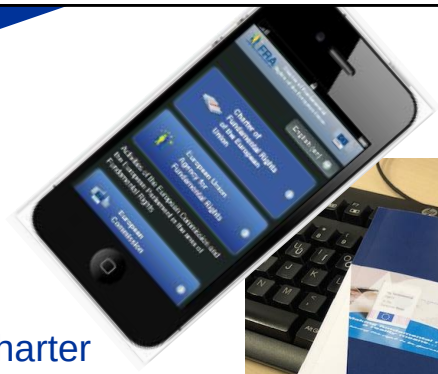
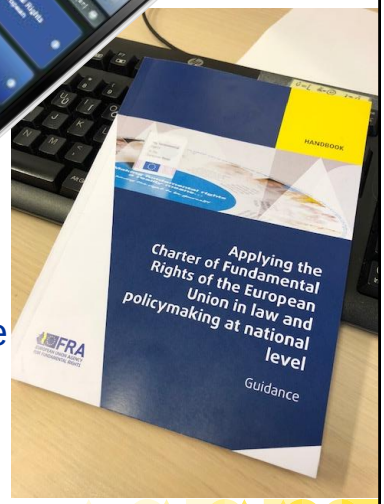
How can FRA assist?

- Charterpedia:
  case law & other info
- Checklist for applicability of Charter
- Checklist for Charter compliance
- Annual FRR Charter chapter on national use
- Charter training





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FRA and ECtHR: Analysis of case law – handbooks

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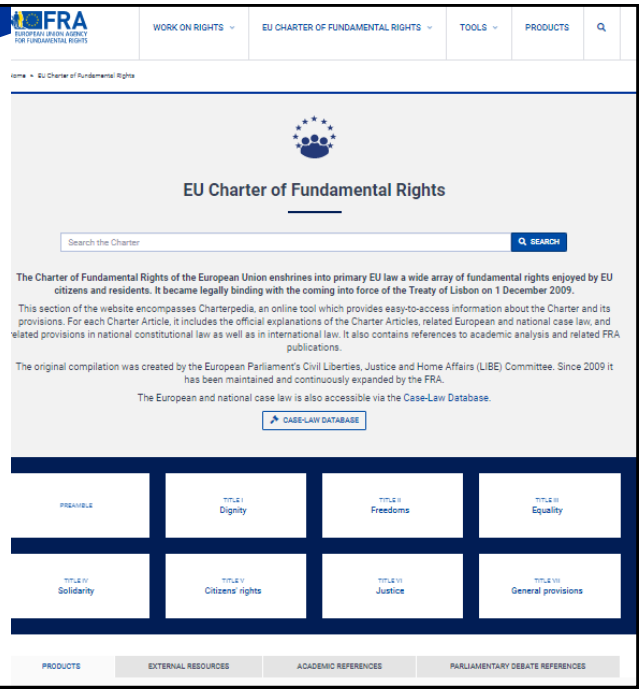
Charterpedia

- National and European case law
- Relevant national constitutional provisions, EU law, international law
- Parliamentary debates
- Academic references

and more to come …



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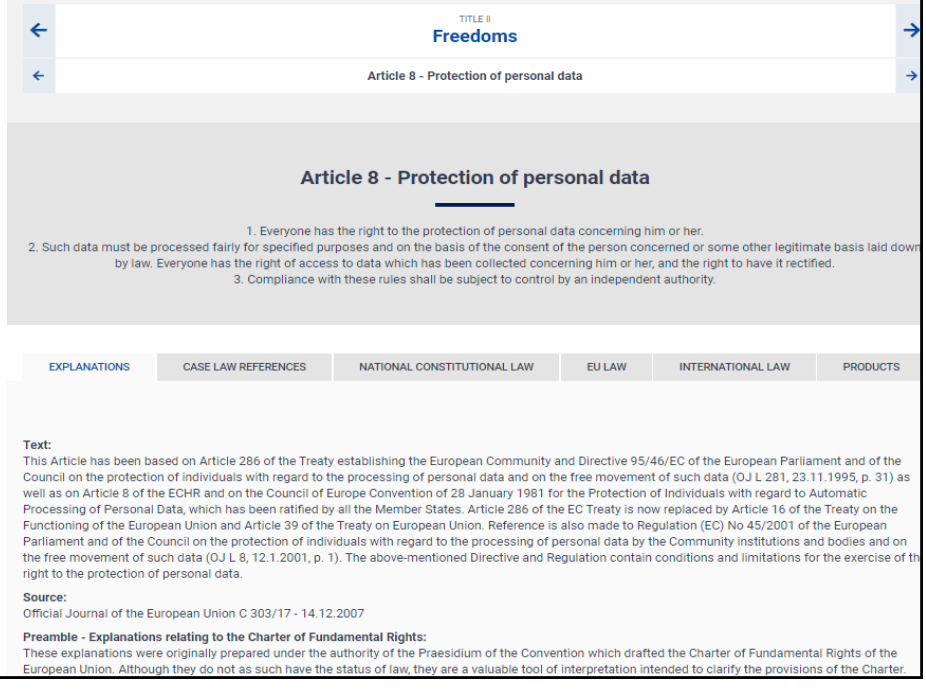

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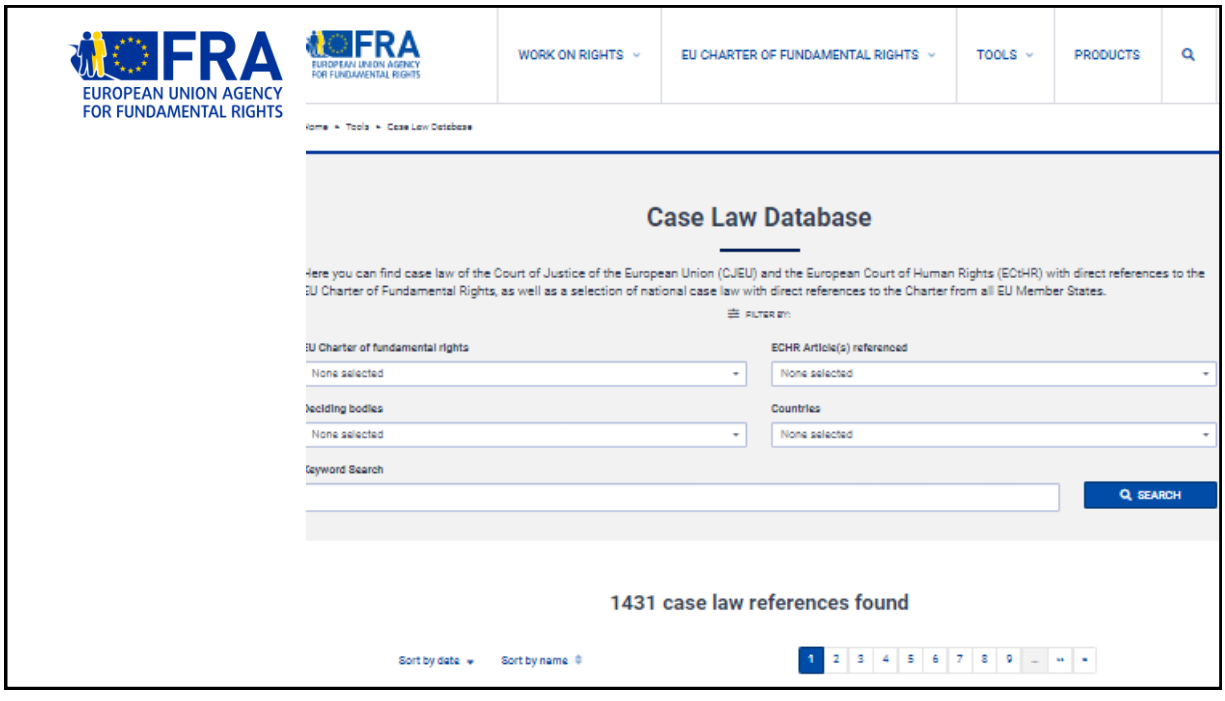
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WORK ON RIGHTS
EU CHARTER OF FUNDAMENTAL RIGHTS
TOOLS
PRODUCTS
Case Law Database
Here you can find case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) with direct references to the EU Charter of Fundamental Rights, as well as a selection of national case law with direct references to the Charter from all EU Member States.
FILTER BY:
EU Charter of fundamental rights
None selected
ECHR Article(s) referenced
None selected
Deciding bodies
None selected
Countries
None selected
Keyword Search
SEARCH
1431 case law references found
Sort by date
Sort by name
1 2 3 4 5 6 7 8 9

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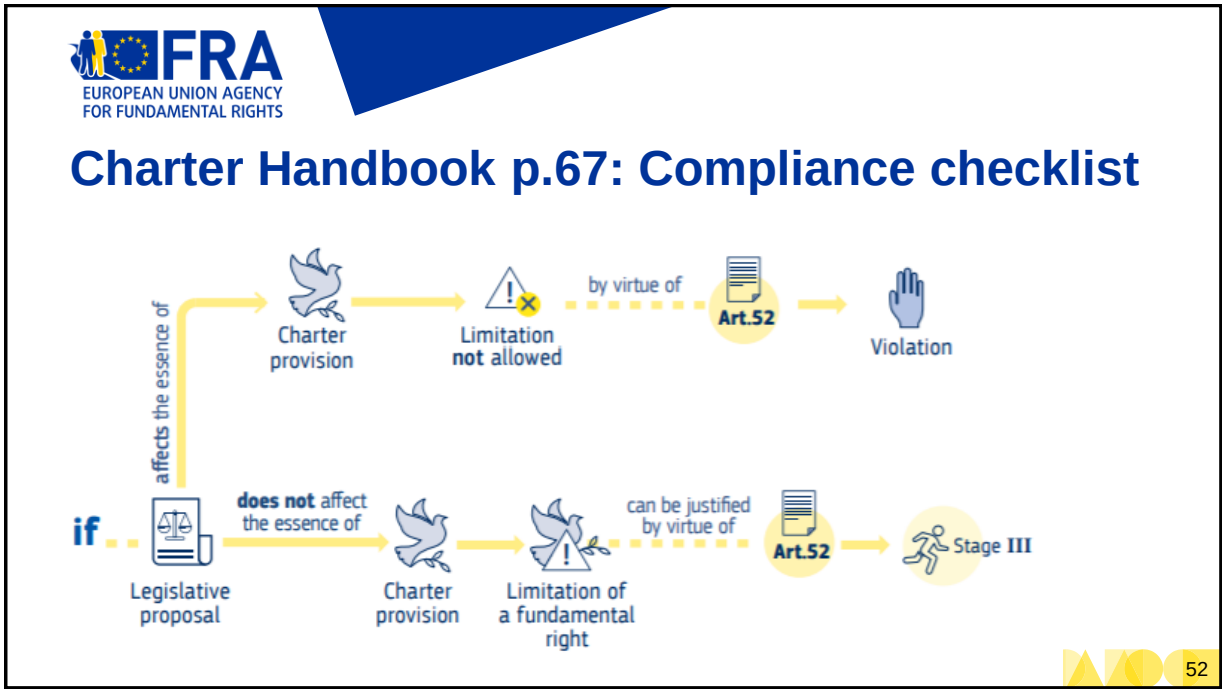
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Charter Handbook p.67: Compliance checklist
affects the essence of
Charter provision
Limitation not allowed
by virtue of
Art.52
Violation
if
Legislative proposal
does not affect the essence of
Charter provision
Limitation of a fundamental right
can be justified by virtue of
Art.52
Stage III
52

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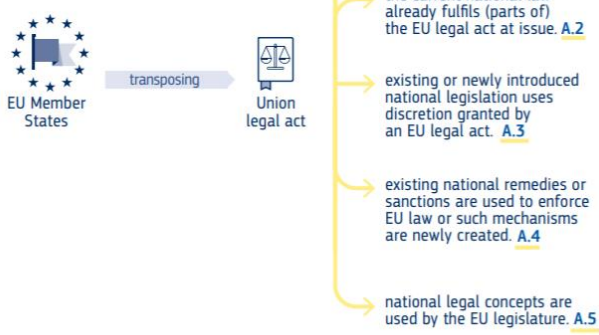
Charter Handbook p.47: Applicability checklist



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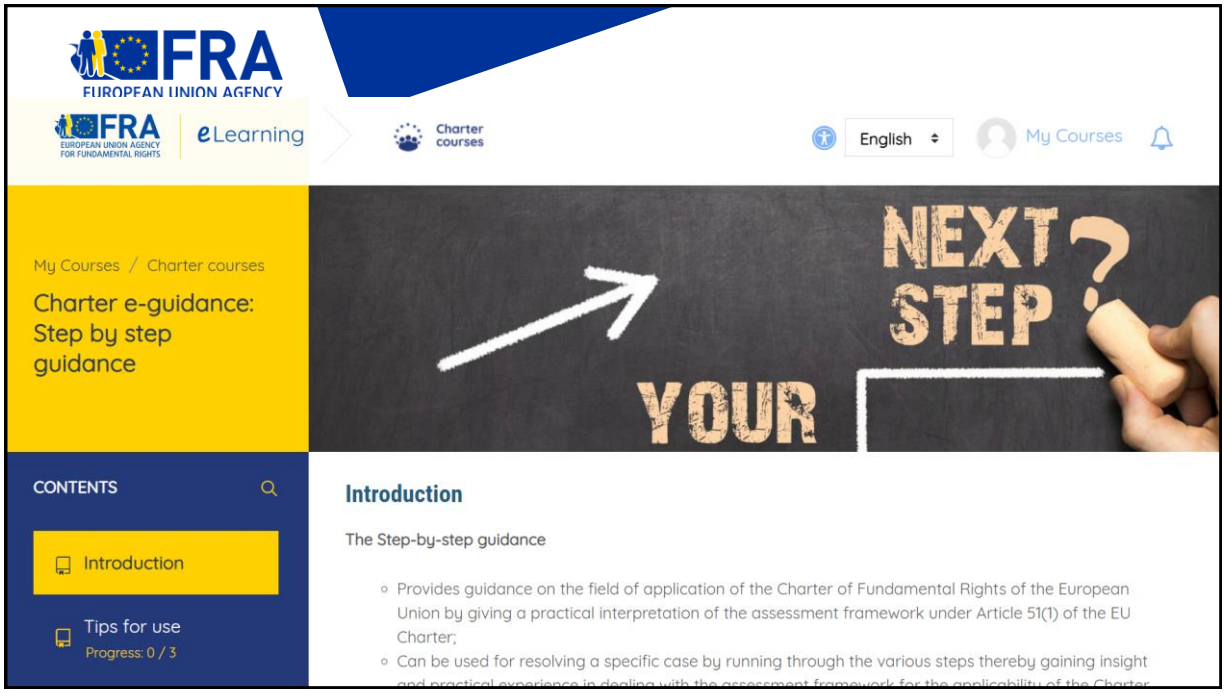

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Charter courses

English

My Courses

Charter e-guidance: Concrete examples

This course provides 10 concrete examples to demonstrate the field of application of the Charter of Fundamental Rights of the European Union in the sense of its Article 51(1). This course should be used together with the Step-by-step examples as the explanations in the examples refer to different steps in the guidance.

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Charter courses

English

My Courses

Charter case studies

This course can be used as a support for a face-to-face course or as a standalone course. It aims to help legal practitioners, law students and legal experts assess how the EU Charter of Fundamental Rights is applied in a range of policy areas. Eight concrete cases as decided by the CJEU are presented together with questions about the applicability of the Charter in each one.

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Charter courses

English

My Courses

Charter case studies: Trainers' area

This course provides information for trainers who intend to run workshops using the eight case studies. It introduces the trainer to the methodology that is advised for the use of these case studies and contains a manual and worksheets which can be used in workshops.

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Case Studies and Trainer's manual

Charter courses

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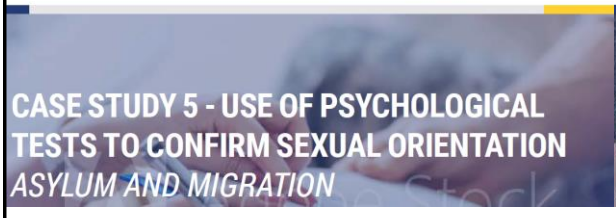
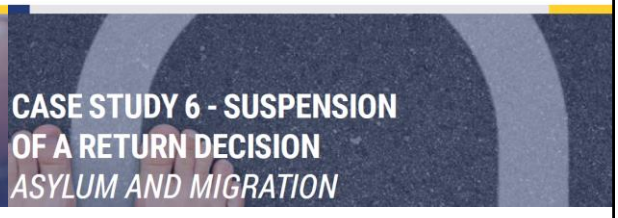
Work on 2 case studies in 4 groups

Charter courses



Charter courses



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Thank you!

Gabriel.Toggebburg@fra.europa.eu

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Konvencija in Listina - primerjava sistemov:

pošteno sojenje, učinkovito pravno sredstvo, področje uporabe

ERA, 27. september 2021

Gabriel N. Toggenburg
Agencija EU za temeljne pravice

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Financira program Evropske unije za pravosodje (2014-2020).
Vsebina te publikacije predstavlja izključno stališča avtorja in je njegova izključna odgovornost. Evropska komisija ne prevzema nikakršne odgovornosti za morebitno uporabo informacij, ki jih vsebuje.

1

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Točke razprave / učni cilji

1. Sistema: Primerjava **Listine z EKČP**
2. Uvod v pravico do **poštenega sojenja**
3. Uvod v pravico do **učinkovitega pravnega sredstva**
4. **Področje uporabe** Listine, vključno z razpoložljivimi orodji FRA v zvezi s tem (priprava na študijo primera - skupinsko delo v drugi predstavitvi)

2

2

Majhen kviz: 1. vprašanje

- Kolikokrat na leto Sodišče EU uporabi Listino?

A) V približno 90 zadevah

B) V približno 35 zadevah

C) V več kot 300 zadevah

3

3

Majhen kviz: 2. vprašanje

- Koliko določb Listine NI zajetih tudi v besedilu EKČP?

A) 40 odstotkov določb Listine

B) 10 odstotkov določb Listine

C) 0 odstotkov, ker so vse določbe Listine na voljo v EKČP ali v njenih številnih protokolih.

4

4

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Majhen kviz: 3. vprašanje

- V nekaterih državah članicah EU lahko nacionalni sodniki zaprosijo ESČP za svetovalno mnenje, na primer o 6. členu EKČP. V koliko državah članicah je tako?

A) 3

B) 13

C) 9

5

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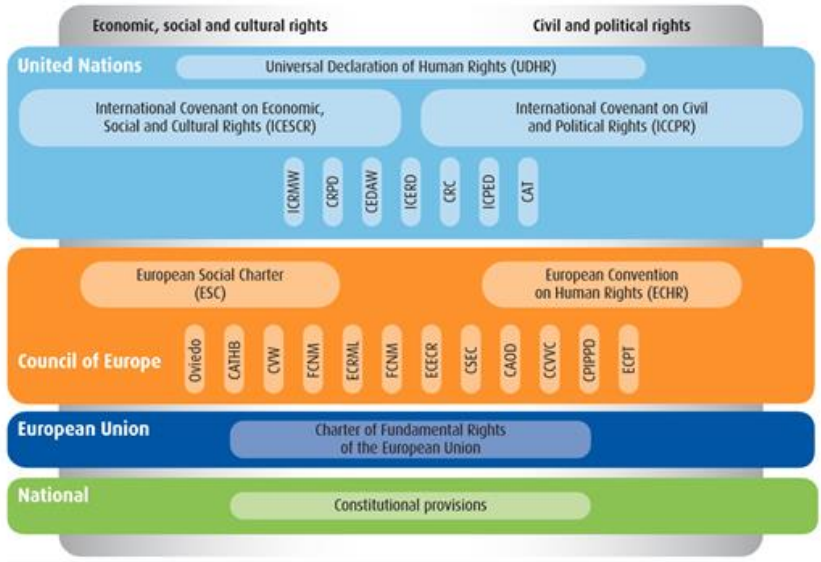

6

8. člen Splošne deklaracije človekovih pravic:
Vsakdo ima pravico do učinkovitega pravnega sredstva pred pristojnimi državnimi sodišči

člen 2(3) MPDPP:
(a) [...] vsakomur, ki so mu bile kršene v tem Paktu priznane pravice in svoboščine, učinkovito pravno sredstvo [...];
(b) [...] da bodo pristojne sodne, upravne ali zakonodajne oblasti in katerikoli drugi pristojni organi odločali o pravicah osebe, ki vloži pritožbo, in razvili možnosti za sodno varstvo;
(c) [...] pristojni organi uveljavljali tako zagotovljena pravna sredstva.

dostopu do pravnega varstva:
odbenice invalidom zagotovijo učinkovit dostop do pravnega
ko kot drugim, tudi z zagotavljanjem postopkovnih in starosti

7

Člen 6(1) PEU: pomen Listine

EU „priznava pravice, svoboščine in načela“ iz Listine. Slednje:

- „imajo **enako pravno veljavnost kot Pogodbi“**.
- „na nikakršen način ne širijo **pristojnosti Unije“**.
- „se razlagajo v skladu s splošnimi določbami naslova VII Listine o njeni razlagi in uporabi ter ob ustreznem upoštevanju **pojasnil**“.

8

8

Člen 6(2) in (3) PEU: pomen EKČP

- Unija **pristopi k** EKČP, ne da bi to vplivalo na njene pristojnosti.
- Temeljne pravice, kakor jih zagotavlja EKČP „in kakor izhajajo iz ustavnega izročila, skupnega državam članicam, **so kot splošna načela del prava Unije“**.

9

9

Člen 52 Listine in pojasnila

- 52. člen (3) Listine: *Kolikor ta listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z Evropsko konvencijo o varstvu človekovih pravic in temeljnih svoboščin, sta vsebina in obseg teh pravic enaka kot vsebina in obseg pravic, ki ju določa navedena konvencija. Ta določba ne preprečuje širšega varstva po pravu Unije.*
- Pojasnila: približno 90 sklicevanj na EKČP

10

10

CoE	EU
• **Organizacija za človekove pravice**	• Ni specializirana organizacija za človekove pravice, **VENDAR**: ○ Posebne zakonodajne pristojnosti ○ Vedno bolj razvijajoče se strategije na področju človekovih pravic ○ Povečanje naložb v človekove pravice
• **47 DČ**	• **27 DČ**
• **Medvladne (konvencije)**	• **Nadnacionalni (polnopravni sistem upravljanja), VENDAR:** ○ Načelo naštetih pristojnosti

11

ESČP - Strasbourg	Sodišče EU - Luksemburg
• **Specializirano** sodišče za človekove pravice	• Vsa **področja prava**
• **47 sodnikov** • **Število zaposlenih: več kot 640** • **Proračun za leto 2021: 74 milijonov** evrov	• **76** (27 na Sodišču EU in 49 na Splošnem sodišču) ter 11 generalnih pravobranilcev • **Število zaposlenih: 2.235** • **Proračun za leto 2021: 444 milijonov** evrov
• **Jezika: EN/FR**	• **24 uradnih jezikov EU**, 45 %

12

ESČP - Strasbourg	Sodišče EU - Luksemburg
• Predvsem **pritožbe posameznikov;** • prošnje za svetovalna mnenja so bile doslej omejene na EST, FI, FR, EL, LITH, LUX, NL, SK, SI	• Omejen individualni dostop • Predvsem **predhodna odločanja prek nacionalnih sodišč**
• **Nove vloge v letu 2020**: **41.700**	• **Nove zadeve v letu 2020**: **1.582**
• Ločena mnenja in odklonilna mnenja; • Razkritje **javnih** razprav in glasovanj • Sodni uradniki so strokovno osebje sodišča, neodvisno od sodnikov, delajo izmenično za različne sodnike - **pripravljalno delo je centralizirano** • **Odprt** pristop k zunanjim pravnim virom	• En glas • **Tajno** posvetovanje, glasovanje ni razkrito • Uradniki, ki jih zaposlijo sodniki (GA) sami - **pripravljalno delo se opravlja v osebnih kabinetih pod** nadzorom sodnikov • Precej **zadržan (**različno za mnenja GA)
• **Šibko izvrševanje**	• **strogo izvrševanje**, denarne kazni, lahko

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Listina in EKČP

LEGENDA: Ni enakovrednega EKČP; Obsežnejše od EKČP; Specifični kontekst EU; Enakovredna zaščita z EKČP

I Dostojanstvo (členi 1-5)	1 Človekovo dostojanstvo	2 Življenje	3 Integriteta osebe	4 Mučenje; nečloveško, ponižujoče ravnanje	5 Suženjstvo in prisilno delo		
II Svoboščine (členi 6-19)	6 Svoboda in varnost	7 Zasebno in družinsko življenje	8 Osebni podatki	9 sklepanje zakonske zveze in ustvarjanje družine	10 Svoboda misli, vesti in vere		
	11 Izražanje in obveščanje	12 Zbiranje in združevanje	13 Umetnost in znanost	14 Izobraževanje	15 Izbira poklica in pravica do dela		
	16 Gospodarska pobuda	17 Lastninska pravica	18 Azil	19 Odstranitev, izgon ali izročitev			
III Enakost (členi 20-26)	20 Enakost pred zakonom	21 Prepoved diskriminacije	22 Kulturna, verska in jezikovna raznolikost	23 Enakost žensk in moških	24 Otrok	25 Starejši	26 Vključenost invalidov
IV Solidarnost (členi 27-38)	27 Pravica delavcev do obveščenosti in posvetovanja	28 kolektivna pogajanja in ukrepi	29 Dostop do služb za posredovanje zaposlitev	30 Neupravičene odpustitve	31 Pošteni in pravični delovni pogoji		
	32 Prepoved dela otrok; varstvo mladih pri delu	33 Družinsko in poklicno življenje	34 Socialna varnost in socialna pomoč	35 Varovanje zdravja	36 Dostop do storitev splošnega gospodarskega pomena	37 Varstvo okolja	38 Varstvo potrošnikov
V Pravice državljanov (členi 39-46)	39 Pravica voliti in biti voljen v EP	40 Pravica voliti in biti voljen na občinskih volitvah	41 Dobro upravljanje	42 Dostop do dokumentov	43 Evropski varuh človekovih pravic	44 Peticija (EP)	45 Gibanje in prebivanje
	46 Diplomatska in konzularna zaščita						
VI Pravosodje (členi 47-50)	47 Učinkovito pravno sredstvo in pošteno sojenje	48 Domneva nedolžnosti; pravica do obrambe	49 Zakonitost in sorazmernost kaznivih dejanj in kazni	50 *Ne bis in idem*			
VII Splošne določbe (členi 51-54)	51 Področje uporabe	52 Obseg pravic in načel ter njihova razlaga	53 Raven varstva	54 Prepoved zlorabe pravic			

Listina je "ožja" od EKČP: področje uporabe države članice

Člen 51 Listine: Listina je za države članice zavezujoča le „pri izvajanju prava Unije“.

EKČP: EKČP vedno zavezuje države članice

15

15

Širša veljavnost Listine od EKČP: področje uporabe države članice

Člen 6(1) EKČP: „civilnih pravicah in obveznostih ali kakršnikoli kazenski obtožbi“.

Člen 47 Listine: vsi postopki, vključno z upravnimi, davčnimi in azilnimi postopki.

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Pravice proti načelom

- Pojasnila imajo omejeno vrednost
  - Načela: členi 25 (starejši), 26 (invalidi, potrjeno v zadevi C-356/12) in 37 (varstvo okolja).
  - Primer hibridnih določb: členi 23 (enakost spolov), 33 (družinsko in poklicno življenje), 34 (socialna varnost).
- Pomembni dejavniki za določitev:
  - Pravica posameznika ali politični cilj?
  - Odvisno od nacionalne zakonodaje ali zakonodaje EU?
  - Široko področje proste presoje?
  - Sklicevanje na nacionalno pravo?

17

17

Pravice proti načelom: člen 52(5)

LEGENDA: Pravice; Nedoločen; Načela

Opomba: to se nanaša samo na jezik, ki je uporabljen v besedilu Listine.
Elipse: kvalifikacija v razlagah

I Dostojanstvo (členi 1-5)	1 Človekovo dostojanstvo	2 Življenje	3 Integriteta osebe	4 Mučenje; nečloveško ali ponižujoče ravnanje	5 Suženjstvo in prisilno delo		
II Svoboščine (členi 6-19)	6 Svoboda in varnost	7 Zasebno in družinsko življenje	8 Osebni podatki	9 Sklepanje zakonske zveze in si ustvarjanje družine	10 Svoboda misli, vesti in vere		
	11 Izražanje in obveščanje	12 Zbiranje in združevanje	13 Umetnost in znanost	14 Izobraževanje	15 Izbira poklica in pravica do dela		
	16 Gospodarska pobuda	17 Lastninska pravica	18 Azil	19 Odstranitev, izgon ali izročitev			
III Enakost (členi 20-26)	20 Enakost pred zakonom	21 Prepoved diskriminacije	22 Kulturna, verska in jezikovna raznolikost	23 Enakost žensk in moških	24 Otrok	25 Starejši	26 Vključevanje invalidov
IV Solidarnost (členi 27-38)	27 Pravica delavcev do obveščanja in posvetovanja	28 kolektivna pogajanja in ukrepi	29 Dostop do storitev posredovanja dela	30 Neupravičene odpustitve	31 Pošteni in pravični delovni pogoji		
	32 Prepoved dela otrok; varstvo mladine pri delu	33 Družinsko in poklicno življenje	34 Socialna varnost in socialna pomoč	35 Varovanje zdravja	36 Dostop do storitev splošnega gospodarskega pomena	37 Varstvo okolja	38 Varstvo potrošnikov
V Pravice državljanov (členi 39-46)	39 Voliti in biti voljen v EP	40 Voliti in biti voljen na občinskih volitvah	41 Dobro upravljanje	42 Dostop do dokumentov	43 Evropski varuh človekovih pravic	44 Peticija (EP)	45 Gibanje in prebivanje
	46 Diplomatska in konzularna zaščita						
VI Pravosodje (členi 47-50)	47 Učinkovito pravno sredstvo in pošteno sojenje	48 Domneva nedolžnosti; pravica do obrambe	49 Zakonitost in sorazmernost kaznivih dejanj in kazni	50 *Ne bis in idem*			
VII Splošne določbe (členi 51-54)	51 Uporaba	52 Obseg pravic in načel ter njihova razlaga	53 Raven zaščite	54 Prepoved zlorabe pravic			

18

Neposredni horizontalni učinek?

- Ni pravilo, vendar „*dejstvo, da so nekatere določbe primarnega prava naslovljene predvsem na države članice, ne izključuje njihove uporabe v razmerjih med posamezniki*“.
- Pogoji:
  - Obvezna narava in
  - „sama po sebi *zadostuje in je ni treba konkretizirati z določbami prava EU ali nacionalnega prava, da bi posameznikom podelila pravico, na katero se lahko sklicujejo kot na tako*“.
- Doslej je bilo priznano za:
  - Člen 21: prepoved diskriminacije,
  - Člen 47: pravica do učinkovitega pravnega sredstva in poštenega sojenja
  - Člen 31(2): pravica do plačanega letnega dopusta

Glej Egenberger, C-414/16, EU:C:2018:257; IR, C-68/17, EU:C:2018:696; Bauer und Willmeroth, C-569/16 in C-570/16, EU:C:2018:871; Max-Planck-Gesellschaft, C-684/16, EU:C:2018:874; Cresco, C-193/17, EU:C:2019:43

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Sklep Splošnega sodišča v zadevi T-600/15

- „47. Kolikor se tožeče stranke sklicujejo na člen 37 Listine o temeljnih pravicah, v zvezi s tem zadostuje ugotovitev, da ta člen **vsebuje le načelo, ki določa splošno obveznost Unije v zvezi s cilji, zastavljenimi v okviru njenih politik, ne pa pravice do vložitve tožbe** v zvezi z okoljskimi zadevami pri sodiščih Unije.
- 48. [...] V Pojasnilih [...] je poleg tega [...] pojasnjeno, da se načela lahko izvajajo z zakonodajnimi ali izvedbenimi akti, ki jih Unija sprejme v okviru svojih pristojnosti, države članice pa samo pri izvajanju prava Unije, tako da **za sodišča postanejo pomembna šele pri razlagi ali reviziji teh aktov, niso pa razlog za neposredne zahteve po pozitivnem ukrepanju institucij Unije ali organov držav članic**, kar je v skladu s sodno prakso Sodišča in s pristopom v ustavnih sistemih držav članic do „načel“. V zvezi s tem je v navedenih pojasnilih kot primer med drugim naveden člen 37 Listine o temeljnih pravicah.“

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Elementi poštenega sojenja:

Pravica do poštenega sojenja se nanaša na pravosodje v civilnem in kazenskem kontekstu. Ima dva vidika:

- institucionalni (npr. neodvisnost in nepristranskost sodišča, opredelitev sodišča) in
- procesna - poštena in javna obravnava (vključuje vrsto individualnih pravic, ki zagotavljajo pravilno izvajanje pravosodja - npr. pravice obdolžencev, vključno s pravico do pravne pomoči in pravicami žrtev v kazenskih postopkih).

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Pravično sojenje in učinkovito pravno sredstvo

ESČP	Listina
Pravično sojenje: člen 6 ○ Odstavek 1: ključne pravice v zvezi s sodiščem, zaslišanjem, časom ○ Odstavek 2: domneva nedolžnosti ○ Odstavek 3: postopkovne pravice	**Pravično sojenje: člen 47** ○ Odstavek 2: ključne pravice v zvezi s sodiščem, zaslišanjem, časom; pravica do obrambe ○ Odstavek 3: Pravna pomoč **Domneva nedolžnosti: Člen 48**
Učinkovito sredstvo: Člen 13 Vsakdo, čigar pravice iz Konvencije so kršene, ima pravico do učinkovitih pravnih sredstev pred domačimi oblastmi	**Učinkovito sredstvo: člen. 47(1)** Vsakdo, čigar pravice zagotavlja pravo EU, ima pravico do učinkovitega pravnega sredstva pred sodiščem

22

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Pravica do poštenega sojenja: člen 6 EKČP

Listina (tudi civ.+upr. p):
- čl. 47 (plus r.e.r.)
- čl. 48 (1)
- čl. 48(2): splošni sklic na „pravico do obrambe“
- čl. 47(2): pravica do obrambe, zastopanja

- Odstavek 1: Ključna pravica v civilnih in kazenskih postopkih:
  - **poštena in javna obravnava**
  - **v razumnem roku**
  - **neodvisno** in **nepristransko** sodišče, **ustanovljeno z zakonom**
  - sodba se **razglasi javno,** vendar se lahko mediji in javnost izključijo iz celotnega sojenja ali njegovega dela
- Odstavek 2: **domneva nedolžnosti**
- Odstavek 3: **5 minimalnih pravic v kazenskem postopku**

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Čl. 6(3) EKČP: 5 minimalnih pravic v kazenskem postopku

Listina (tudi civilno in upravno pravo):
- čl. 47(2): pravica do sve., obr., zastopanja
-člen 47(3): brezplačna pravna pomoč

a. da ga **takoj in podrobno seznanijo v jeziku, ki ga razume**, o bistvu in vzrokih obtožbe, ki ga bremeni;

b. da ima primeren **čas in možnosti za pripravo svoje obrambe**;

c. da se **brani sam ali z zagovornikom** po lastni izbiri ali, če nima dovolj sredstev za plačilo **zagovornika**, da ga dobi **brezplačno**, če to zahtevajo interesi pravičnosti;

d. da zaslišuje oziroma zahteva zaslišanje obremenilnih prič, in da doseže navzočnost in zaslišanje razbremenilnih prič **ob enakih pogojih, kot veljajo za obremenilne priče**;

e. da ima brezplačno pomoč **tolmača**.

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24

Pravica do učinkovitega pravnega sredstva:

- Ni splošne opredelitve
- Po mnenju ESČP mora učinkovito pravno sredstvo
  - biti dostopno
  - biti sposobno zagotoviti odškodnino (glede pritožbe vložnikov).
  - imajo razumne možnosti za uspeh
- Pravo EU: načeli učinkovitosti in enakovrednosti:
  - zahtevata, da nacionalna zakonodaja ne onemogoča ali pretirano otežuje uveljavljanja pravic EU,
  - pogoji niso manj ugodni od tistih za podobne zahtevke domače narave
  - Razlaga: Pravo EU zagotavlja obsežnejše varstvo, saj zagotavlja pravico do učinkovitega pravnega sredstva pred sodiščem (ki jo je Sodišče EU določilo kot cpl v zadevi 222/84 Johnston)

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Kaj je „sodišče“?

- določeno z zakonom
- trajno
- obvezna pristojnost
- postopek *inter partes*
- uporablja pravna pravila
- neodvisno in nepristransko

26

26

Kdaj je sodišče neodvisno?

- Dejavniki, ki vplivajo na neodvisnost:
  - način imenovanja sodnikov,
  - trajanje mandata,
  - jamstva pred zunanjim pritiskom
- stabilni mandati
- zaščita pred odstranitvijo med trajanjem mandata

27

27

Kdaj je sodišče nepristransko?

- subjektivna nepristranskost:
  - brez predsodkov
- objektivna nepristranskost:
  - ni videza pristranskosti (družinske vezi, poklicna povezanost sodnika z zadevo).

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Pravično zaslišanje

- kontradiktornost (civilna in kazenska):
  - Pravica do seznanitve z vsemi dokazi in podajanja pripomb v zvezi z njimi
  - Pravica do zadostnega časa za seznanitev z dokazi
  - Pravica do predložitve dokazov
- Pravo EU: pravica do informacij, vključno z usklajenim „pisnim obvestilom o pravicah“ (Direktiva 2012/13/EU)
- Pravica do utemeljene odločitve
- Upoštevati je treba celoten postopek
- Pravica do pritožbe samo v kazenskih zadevah (AP7). Vendar člen. 6 EKČP velja za vse pritožbene postopke.

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Javna obravnava

- vključuje ustno obravnavo ob navzočnosti tožene stranke
- Vendar ustna obravnava ni potrebna, če: ni vprašanj verodostojnosti in spornih dejstev; je omejena ali izključno tehnične narave
- Člen 6(1) EKČP izrecno dovoljuje izključitev javnosti:
  - v interesu morale, javnega reda, nacionalne varnosti
  - interes mladoletnikov ali varstvo zasebnega življenja strank
  - če bi javnost škodovala interesom pravičnosti.

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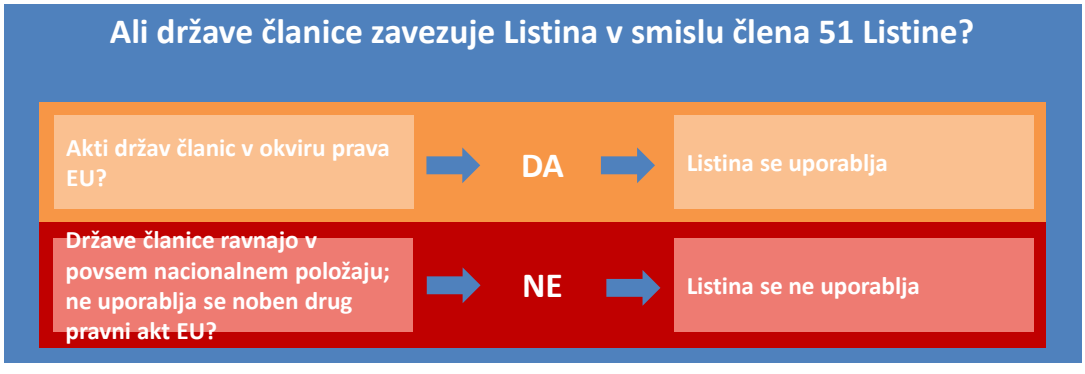
Direktive EU o kazenskih procesnih pravicah

- tolmačenje in prevajanje (2010/64/EU),
- obveščenost (2012/13/EU),
- dostop do odvetnika (2013/48/EU),
- pravna pomoč (2016/1919/EU),
- domneva nedolžnosti (2016/343/EU),
- procesna jamstva za otroke, ki so osumljene ali obdolžene osebe v kazenskem postopku (2016/800/EU).

Področje uporabe Listine



Člen 51: Področje uporabe Listine

- „1. Določbe te listine se uporabljajo za institucije, organe, urade in agencije Unije [...,] za države članice pa samo, **ko izvajajo pravo Unije**. Zato spoštujejo pravice, upoštevajo načela in spodbujajo njihovo uporabo v skladu s svojimi pristojnostmi in ob spoštovanju **meja pristojnosti Unije**, ki so ji dodeljene v Pogodbah
- 2. Ta listina **ne razširja področja uporabe prava Unije** preko pristojnosti Unije niti **ne ustvarja** nikakršnih novih pristojnosti ali nalog Unije in **ne spreminja** pristojnosti in nalog, opredeljenih v Pogodbah.“

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Kaj pomeni „izvajanje prava EU“?

- enako kot „delovanje na področju uporabe prava EU“ in zajema širok spekter situacij.
- minimalna zahteva: obstajati mora **določena povezava s pravom Unije (razen Listine).**
- ta povezava je dovolj konkretna, če države članice delujejo **kot zastopniki** EU ali v primerih, ko **se** morajo **zanašati na določeno vrsto pooblastila** prava EU.

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Nacionalni akti za prenos prava EU

- Zajema **vse vrste** zakonskih in podzakonskih ukrepov.
- **Vse ravni** nacionalnih ukrepov se štejejo za izvajanje
- Tudi nacionalni ukrepi, pri katerih je **polje proste presoje, ki ga** zagotavlja pravo EU (direktive), se štejejo za „izvajanje prava Unije“ v smislu člena 51: države članice morajo pri izvajanju diskrecijske pravice, ki jim jo je dodelil zakonodajalec EU, spoštovati Listino

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Predhodno obstoječa nacionalna zakonodaja

- Če je mogoče z že obstoječimi nacionalnimi določbami zagotoviti izvajanje prava EU, **ni potrebe po novi** zakonodaji, ki bi prenesla npr. direktivo EU.
- Takšne nacionalne določbe **se štejejo za** „izvajanje prava Unije“.
- Ko se takšne norme spremenijo iz povsem notranjih ukrepov v ukrepe za izvajanje prava EU, morajo biti v **skladu z** Listino.

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Pojmi nacionalnega prava, na katere se sklicuje pravo EU

- Nacionalni pojmi/termini lahko pomenijo „izvajanje“ v smislu člena 51, če se uporabljajo v okviru zadevnih določb EU (glej npr. sodbo Sodišča EU, Rodriguez Caballero, zadeva C-442/00).
- Direktiva EU se sklicuje na nacionalno zakonodajo, zato mora nacionalna zakonodaja te izraze natančno opredeliti in opredeliti. **Če se ti nacionalni pravni pojmi uporabljajo v okviru te direktive, se uporabljajo temeljne pravice EU, ne glede na to, ali** gre za novo nacionalno zakonodajo, sprejeto posebej za prenos direktive, ali za obstoječe nacionalne pravne pojme (npr. na podlagi delovnega prava).

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Nacionalna zakonodaja, ki uporablja diskrecijska pooblastila, ki jih je podelila EU

- se šteje za „izvajanje prava EU“, ne glede na to, ali gre za **obvezno ali neobvezno izvrševanje diskrecijskih pooblastil** (sodba Sodišča EU, Sabou, C-276/12, ali Milkova, C-406/15).
- To **ne velja,** če pravo EU preprosto priznava obstoječa pooblastila držav članic za sprejemanje ugodnejših določb (***gold plating***). *Gold plating* spada na področje uporabe prava EU, če je v pravnem aktu EU to izrecno navedeno: glej člen 4(1) AMSD

38

38

Nacionalne določbe o pravnih sredstvih, sankcijah in izvrševanju

- Če se takšne določbe **uporabljajo za zagotavljanje uporabe prava EU,** se štejejo za izvajanje v smislu člena 51.
- To velja **tudi, če pravo EU ne določa ustrezne obveznosti** (kot v členu 9 Direktive 2000/78). Načelo lojalnega sodelovanja (člen 4(3) PEU).
- Takšni akti se štejejo za izvajanje **ne glede na to,** ali so sprejeti za prenos prava EU (npr. zadeva C-218/15, *Paoletti;* zadeva C-405/10*, Garenfeld)*.

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Nacionalni ukrepi, za katere velja prepoved in za katere je potrebna odobritev po pravu EU

- Kadar države članice tvegajo diskriminacijo na podlagi državljanstva, **omejevanje temeljnih svoboščin ali prikrajšanje državljanov Unije za resnično uživanje njihovih državljanskih pravic,** se lahko sklicujejo na izjeme: vendar morajo v tem primeru spoštovati temeljne pravice EU.
- Zadeva C-98/14, *Berlington*; zadeva C-368/95, *Familiapress*; zadeva C-165/14, *Rendon Marin;*

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40

Prostovoljno sklicevanje na (pojme) prava EU v nacionalnem pravu

- Takšna sklicevanja sama po sebi ne vključujejo nacionalnega prava v področje uporabe prava EU (zadeva C-482/10, Teresa Cicala).
- Vendar **bi bilo Sodišče EU lahko pristojno za** razlago teh izrazov (in s tem za razlago Listine), če jih nacionalna zakonodaja neposredno in brezpogojno uporablja, da se zagotovi enaka obravnava notranjih razmer in razmer, ki jih ureja pravo EU.

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Nacionalni ukrepi spadajo na področje, na katerem ima EU zakonodajne pristojnosti.

- **Ne** zadostuje za začetek uporabe Listine
- Izpolniti je treba dve dodatni merili:
  - **EU je** te pristojnosti **izvajala.**
  - **nacionalni ukrep sodi v natančno področje uporabe teh** zakonodajnih ukrepov.

42

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Merila za določitev področja uporabe

24 „zahteva obstoj **navezne okoliščine določene stopnje, ki presega sorodnost zadevnih področij ali posredne učinke** enega od področij na drugega “.

25 „[...] je treba poleg drugih elementov preveriti, ali je cilj zadevne nacionalne ureditve izvajanje določbe prava Unije, kakšna je **narava te ureditve**, in ali sledi **ciljem**, ki jih pravo Unije **ne zajema**, tudi če lahko nanj vpliva posredno, ter ali obstaja **posebna ureditev prava Unije na tem področju ali pa taka, ki lahko nanj vpliva** [...]“.

26 „Sodišče je med drugim sklenilo, da se temeljne pravice Unije v zvezi z nacionalno ureditvijo ne uporabljajo, ker določbe prava Unije na zadevnem področju **državam članicam ne nalagajo nikakršne obveznosti v zvezi s položajem v postopku v glavni stvari**.“

Sodišče EU, zadeva C-206/13, *Cruciano Siragusa*

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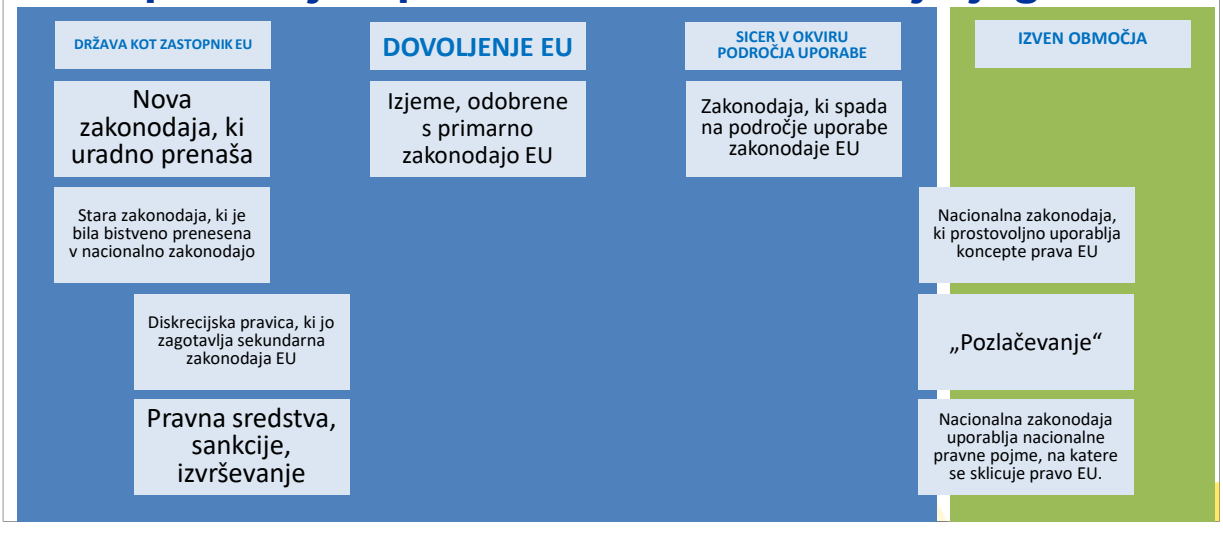
Na področju uporabe Listine in zunaj njega



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Hvala!

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Orodja Listine FRA za pravne strokovnjake

ERA, 27. september 2021

Gabriel N. Toggenburg
Agencija EU za temeljne pravice

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Financira ga program Evropske unije za pravosodje (2014-2020).
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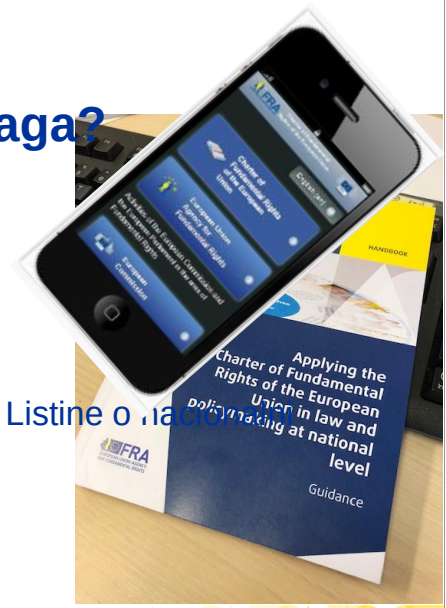
Kako lahko agencija FRA pomaga?

- Charterpedia:
  sodna praksa in druge informacije
- Kontrolni seznam za uporabo Listine
- Kontrolni seznam za skladnost z Listino
- Letno poročilo o temeljnih pravicah poglavje Listine o nacionalni uporabi
- Usposabljanje o Listini



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FRA in ESČP: analiza sodr prakse - priročniki

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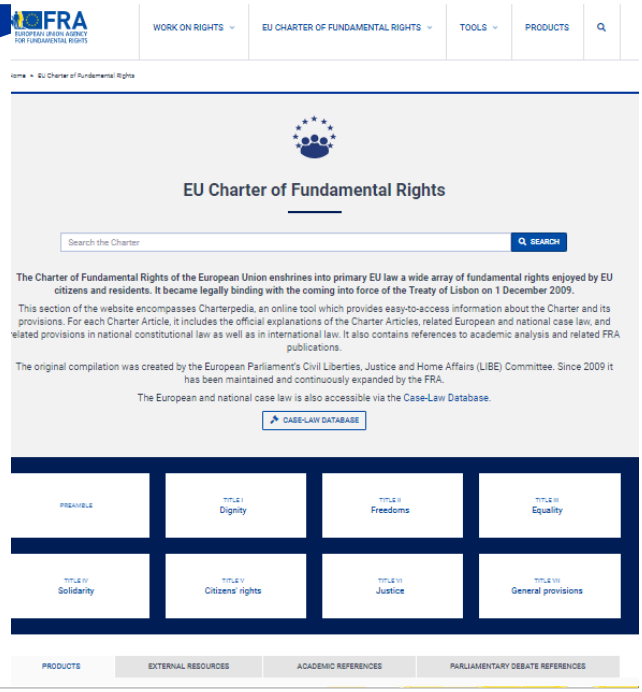
Charterpedia

- Nacionalna in evropska sodna praksa
- Ustrezne nacionalne ustavne določbe, pravo EU, mednarodno pravo
- Parlamentarne razprave
- Akademske reference

in še več...



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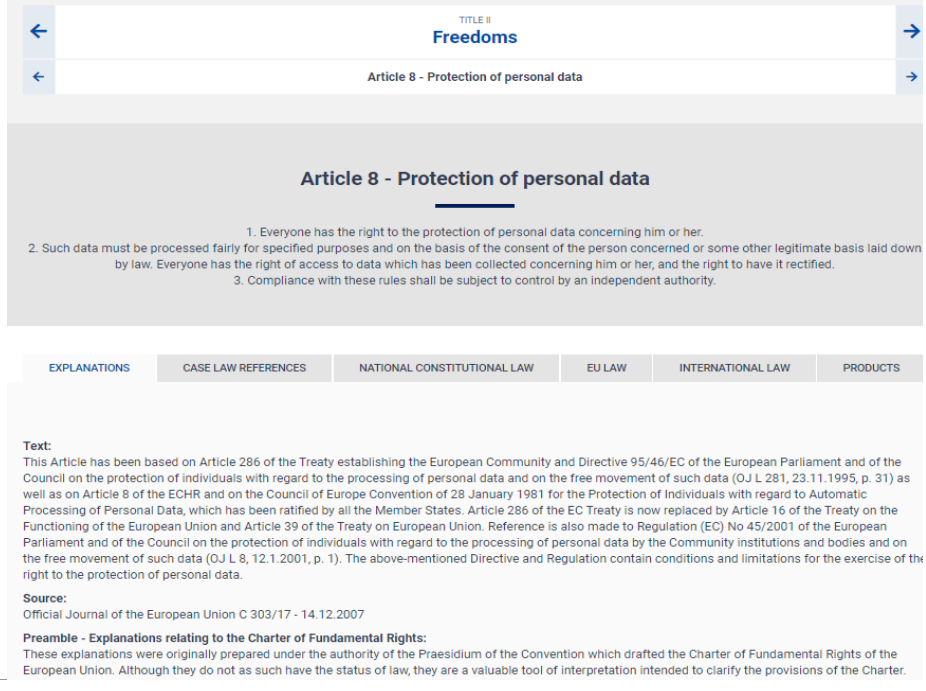

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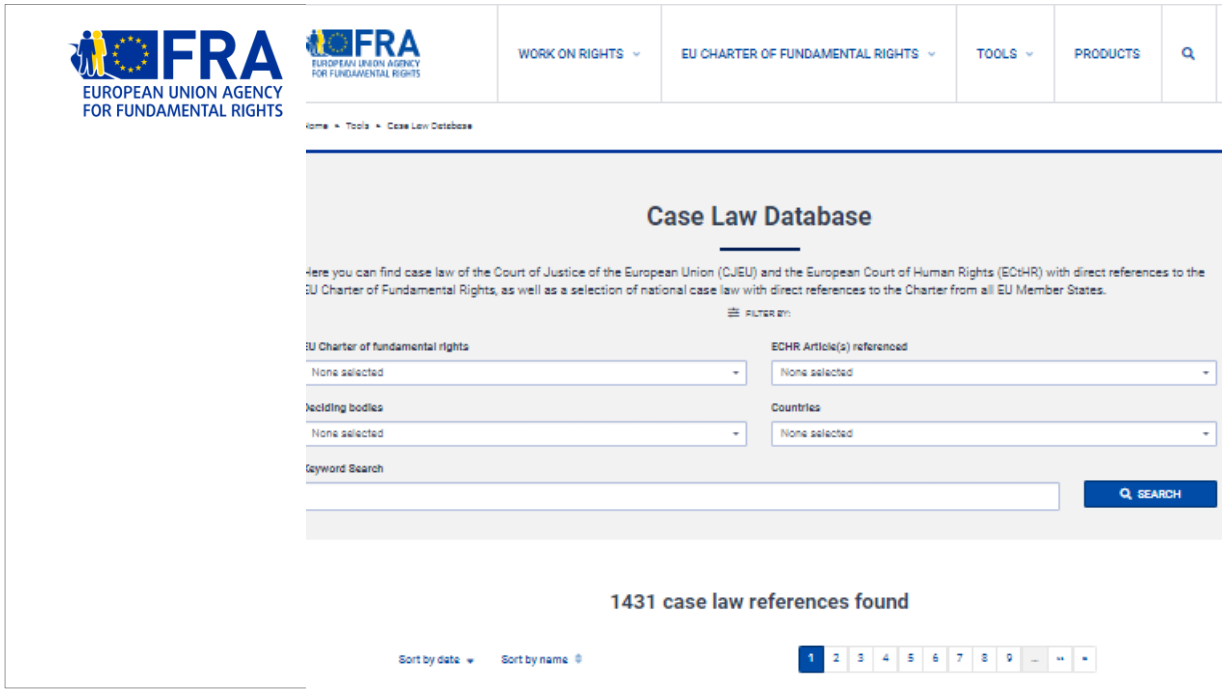

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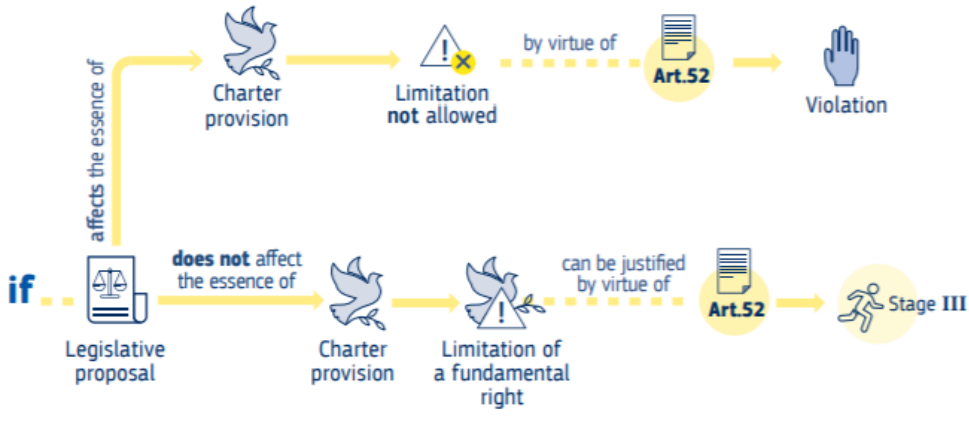
Priročnik Listine, str. 67: Kontrolni seznam skladnosti



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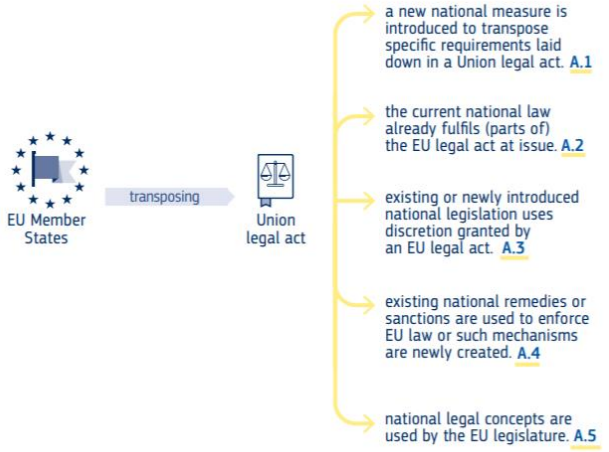
Priročnik Listine, str. 47: Kontrolni seznam za uporabo



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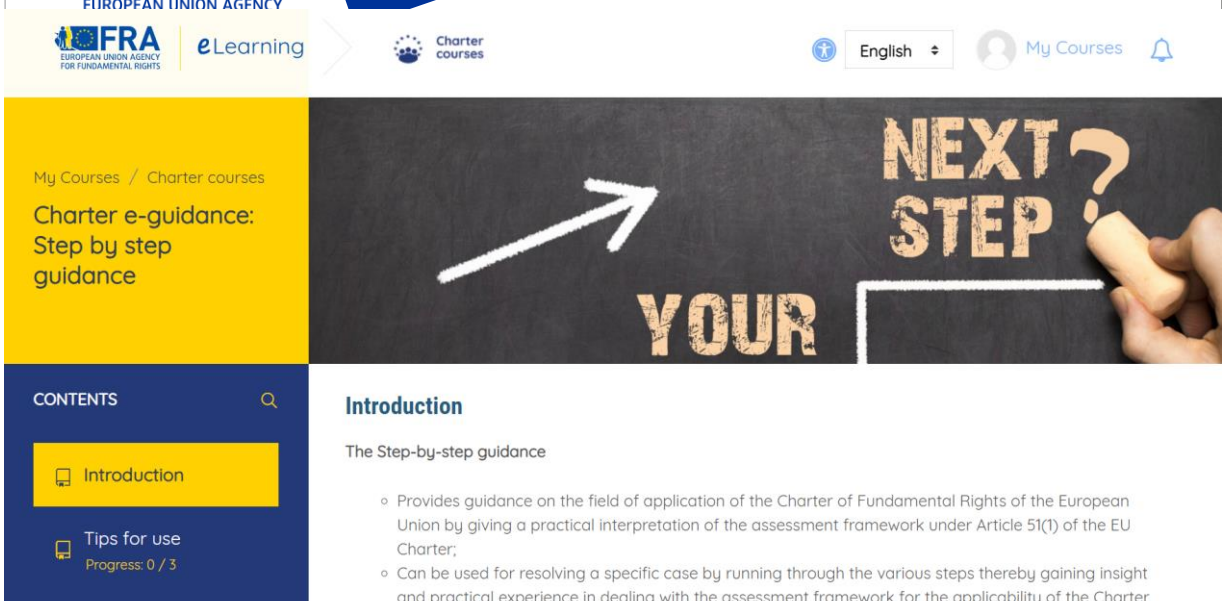

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Charter courses

English

My Courses

Charter e-guidance: Concrete examples

This course provides 10 concrete examples to demonstrate the field of application of the Charter of Fundamental Rights of the European Union in the sense of its Article 51(1). This course should be used together with the Step-by-step examples as the explanations in the examples refer to different steps in the guidance.

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Charter courses

English

My Courses

Charter case studies

This course can be used as a support for a face-to-face course or as a standalone course. It aims to help legal practitioners, law students and legal experts assess how the EU Charter of Fundamental Rights is applied in a range of policy areas. Eight concrete cases as decided by the CJEU are presented together with questions about the applicability of the Charter in each one.

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Charter courses

English

My Courses

Charter case studies: Trainers' area

This course provides information for trainers who intend to run workshops using the eight case studies. It introduces the trainer to the methodology that is advised for the use of these case studies and contains a manual and worksheets which can be used in workshops.

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Študije primerov in priročnik za trenerie

Charter courses

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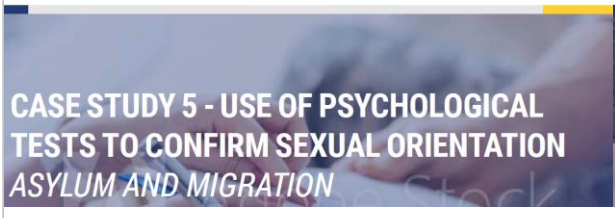
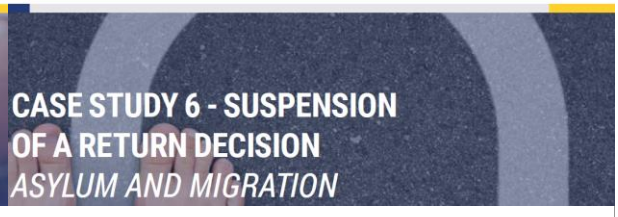
Delo na 2 študijah primerov v 4 skupinah

Charter courses



Charter courses



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1. Case Study 5 - Use of psychological tests to confirm sexual orientation

Field - Asylum and migration

Handout for participants

The facts of the case

In April 2015, Mr Okorie, a Nigerian national, submitted an application for asylum in an EU Member State. In support of that application, he claimed that he had a well-founded fear of being persecuted in his country of origin on account of his homosexuality. As a result of a decision made on 1 October 2015, the national immigration authorities rejected Okorie's application for asylum. Although they considered that his statements were not fundamentally contradictory, they concluded that he lacked credibility on the basis of a psychologist's expert report. That expert's report entailed an exploratory examination, an examination of his personality and several personality tests, and concluded that it was not possible to confirm Okorie's assertion relating to his sexual orientation.

Okorie brought an action before the national administrative court, contending in particular that the psychological tests he had undergone seriously prejudiced his fundamental rights under Article 1 (human dignity) and Article 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union (the Charter) and did not make it possible to assess the plausibility of his sexual orientation. The national immigration authority contested the violation of fundamental rights, stating that the tests are necessary to confirm sexual orientation and do not involve any physical examination or an obligation to view pornographic photographs or videos. In addition, Okorie consented to the test.

Which pieces of EU Law are relevant here?

Charter

Article 1 – Human dignity

> "Human dignity is inviolable. It must be respected and protected."

Article 7 – Respect for private and family life

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

Article 47 – Right to an effective remedy and to a fair trial

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

“Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Qualification Directive 2011/95/EU[1]

Article 4 provides that:

> "1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.
>
> "2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.
>
> "3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> > "(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
> >
> > "(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
> >
> > "(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
> >
> > "(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;
> >
> > "(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship."

It follows from the case law of the Court of Justice of the European Union (CJEU) that Article 4 of Directive 2011/95/EU does not preclude national immigration authorities from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant.

Questions

[1] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337, p. 9.

Please answer question 1 before moving on to the next questions.

Question 1: Mr Okorie claims that certain aspects of the procedure before the national court violate Article 47 of the Charter (effective judicial protection). Does Article 47 of the Charter apply to the proceedings before the national administrative court?

a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).

b. Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.

c. No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.

d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Notes

Assuming the Charter applies:

Question 2: Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 1 and 7 of the Charter must comply with the same standards as those laid down by the ECHR and the case law of the European Court of Human Rights (ECtHR).

Notes

Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation? Specify the Charter provisions that are relevant to this question and the relevant factors to be taken into account.

Notes

Background information for trainers

Introductory Notes

This case study is based on CJEU, C-473/16, *F.*, ECLI:EU:C:2018:36, 25 January 2018.

The case study only concerns the first question (see *F.,* paragraphs 47–71) on the *psychologist's* expert report. The fact that the French and Dutch governments as well as the Commission had vigorously contested the reliability of the expert's report at issue is left outside the case study (see *F.*, paragraph 58).

Questions and Answers

Question 1. Does Article 47 of the Charter apply to the proceedings before the national administrative court?

a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
b. Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.
c. No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.
d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *F.*, and Article 47 of the Charter does not play a role in that case.

Correct answer

Option b is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, "implementing Union law" has a broad meaning covering all types of execution and application of Union law by the Member States. It means the same as "acting within the scope of EU law" and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 4 of Directive 2011/95/EU, which concerns the duty of Member States to assess the relevant elements of the application for international protection.

Option c is not correct. The exercise by Member States of such discretion qualifies, in principle, as "implementing Union law", regardless of whether it concerns a mandatory or optional exercise of discretionary powers (see situation A.3 in the FRA handbook). That is why *option c* is not correct. In addition, it is possible to refer to situation A.4 in Chapter 7 of the FRA handbook: measures falling within the procedural autonomy of Member States qualify as implementation in the sense of Article 51 (1) of the Charter.

Option a is not correct (see introductory remarks).

Option d is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the explanations on Article 47 and Article 52 (3) of the Charter).

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant to the interpretation of Articles 1 and 7 of the Charter.

Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 7 of the Charter. In this case, however, the CJEU does not refer to case law of the ECtHR. This is probably because the use of a psychologist's expert report on the basis of projective personality tests does not pass the proportionality test of Article 52 (1) of the Charter.

Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR ("corresponding rights"). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see the last sentence of Article 52 (3) of the Charter, and Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

> Article 52 of the Charter – Scope and interpretation of rights and principles
>
> "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."

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and in the explanation on the specific Charter provision at issue in 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

> Explanation on Article 7 – Respect for private and family life
>
> "The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology, the word 'correspondence' has been replaced by 'communications'.
>
> "In accordance with Article 52 (3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:
>
> "'1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "'2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'"
>
> Explanation on Article 52 – Scope and interpretation of rights and principles
>
> "Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR: […] Article 7 corresponds to Article 8 of the ECHR,".

Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation?

Introductory remarks

Chapter 8 of the FRA handbook gives a structured framework for the examination of whether or not a national provision is compatible with the Charter. To make sure all necessary steps are taken, it is advisable to use this checklist. In this case, the assessment should involve Article 52 (1) of the Charter (the general clause for limitations).

The conditions laid down in Article 52 (1) of the Charter are as follows.

- Are the limitations provided for by law?
- Is respect for the essence of the fundamental right at issue guaranteed?
- Do the limitations serve a legitimate objective?
- Is the limitation appropriate to address the problem identified?
- Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?
- Are the limitations proportionate to the aim pursued?

In this case, the focus is on the *proportionality test*.

Correct answer

No. It is incompatible with Article 7 of the Charter (see *F.*, paragraphs 50–70). The CJEU does not deal with Article 1 of the Charter.

Explanation

The use of a psychologist's expert report such as that at issue in the main proceedings constitutes an interference with that person's right to respect for their private life (see *F.*, paragraph 54). The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is, in view of its nature and subject matter, *particularly serious* (see *F.*, paragraph 60).

In this regard, it is relevant that consent is not necessarily given freely; it is de facto imposed under the pressure of the circumstances in which applicants seeking international protection find themselves (see *F.*, paragraph 53).

As this case concerns an interference, the conditions laid down in Article 52 (1) should be checked (see introductory remarks).

The CJEU goes directly to the proportionality test. What is decisive is that the impact of such an expert's report on the applicant's private life seems disproportionate to the aim pursued. In the light of the seriousness of the interference with the right to privacy, the test cannot be regarded as proportionate to the benefit that it may represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95/EU. The following elements viewed together are relevant in this regard.

- The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is particularly serious.
- Such an expert's report is based, in particular, on the fact that the person concerned undergoes a series of psychological tests intended to establish an essential element of their identity that concerns their personal sphere in that it relates to intimate aspects of their life.
- Principle 18 of the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation and gender identity states that no person may be forced to undergo any form of psychological test on account of their sexual orientation or gender identity.

In addition, such an expert's report cannot be considered essential for the purpose of confirming the statements of an applicant for international protection relating to their sexual orientation to adjudicate on an application for international protection based on a fear of persecution on the grounds of that orientation.

Further Reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4, 7 and 8 of the FRA handbook.

Ferreira, N. and Venturi, D. (2018), 'Testing the untestable: The CJEU's decision in Case C-473/16, F V Bevándorlási És Állampolgársági Hivatal (28 June 2018)', *EDAL – European Database of Asylum Law*, available at https://ssrn.com/abstract=3204321.

2. Case Study 6 - Suspension of a return decision

Field - Asylum and migration

Handout for participants

The facts of the case

On 15 April 2009, Mr Madagi submitted an application pursuant to national law for a residence permit on medical grounds, on the basis that he was suffering from a particularly serious illness. That application was considered admissible on 4 December 2009. As a result of a decision made on 6 June 2011, Mr Madagi's application for leave to reside was rejected on the ground that his country of origin (Nigeria) has adequate medical infrastructure to care for persons suffering from his illness. On 29 June 2011, Mr Madagi was notified of that decision and was ordered to leave France. This decision must be classified as a "return decision" within the meaning of Article 3 (4) of Return Directive 2008/115/EC. On 7 July 2011, Mr Madagi appealed against this return decision, stating that no appropriate treatment for his illness is available in Nigeria. Under the relevant national rules, no judicial remedy is available to Mr Madagi to suspend the enforcement of a return decision.

Which pieces of EU Law are relevant here?

Charter of Fundamental Rights of the European Union (the Charter)

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

> "*2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*[…]"

Article 47 – Right to an effective remedy and to a fair trial

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Return Directive 2008/115/EC[2]

Article 3 (4) provides the following:

[2] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, p. 98.

"For the purpose of this Directive the following definitions shall apply:
[…]

"(4) 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return".

Article 5 is worded as follows:

"When implementing this Directive, Member States shall take due account of:
[…]

"(c) the state of health of the third-country national concerned and respect the principle of non-refoulement."

Article 9, entitled 'Postponement of removal', provides in paragraph 1:

"Member States shall postpone removal:

"(a) when it would violate the principle of non-refoulement, or

"(b) for as long as a suspensory effect is granted in accordance with Article 13 (2)."

Article 12 states:

"Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.
[…]"

Article 13 (1) and (2) provide the following:

"1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12 (1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

"2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12 (1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation."

Article 14 (1) states the following:

"Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:
[…]

"(b) emergency health care and essential treatment of illness are provided".

Which provisions of national law apply?

Article 3 (i) of the law on entry, residence, establishment and removal of foreign nationals provides in paragraph 1:

> "A foreign national residing in France who can prove his identity in accordance with paragraph 2 and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in France".

Questions

Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).

Yes, because these rules qualify as the implementation of Directive 2008/115/EC.

No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have suspensive effect.

No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Notes

Assuming that the Charter applies:

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 47 and 19 of the Charter must comply with the same standards as those fixed by the ECHR and the case law of the European Court of Human Rights (ECtHR).

Notes

Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health?

Notes

Background information for trainers

Introductory Notes

This case study is based on the Court of Justice of the European Union (CJEU), C-562/13, *Abdida*, ECLI:EU:C:2014:2453, 18 December 2014.

The case study concerns only the suspensive effect of an appeal against a return decision, dealt with by the CJEU in paragraphs 39–53. It does not cover the question of whether there is a duty to provide for their basic needs. The facts of the case study have been simplified, and this aspect has been left aside.

Questions and Answers

Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
b. Yes, because these rules qualify as the implementation of Directive 2008/115/EC.
c. No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have a suspensive effect.
d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *Abdida*. The CJEU uses the Charter to interpret Articles 5 and 13 of Directive 2008/115/EC.

Correct answer

Option b is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, "implementing Union law" has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as "acting within the scope of EU law" and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 13 (2) of Directive 2008/115/EC, which gives discretion to Member States to grant temporary suspension of return decisions. The exercise by Member States of such discretion qualifies, in principle, as "implementing Union law", regardless of whether it concerns a mandatory or optional exercise of discretionary powers. It may even be the case that respect for the Charter leads to the mandatory exercise of discretion on the basis of Union law. This is exactly what happens in this case (other examples in which a discretion turns out to be a duty are CJEU, C-411/10 and C-493/10, *N.S.*, 21 December 2011, paragraphs 55, 68–69 and 106–108; and CJEU, C-329/13, *Stefan*, 8 May 2014, paragraph 35). This is why *option c* is not correct.

Option a is not correct (see introductory remarks).

Option d is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the underlined parts of the explanation for question 2).

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant.

Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 47 and Article 19 (2) of the Charter. The CJEU also refers to case law of the ECtHR (see *Abdida*, paragraphs 47 and 51).

Explanation
The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR ("corresponding rights"). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

> Article 52 of the Charter – Scope and interpretation of rights and principles
>
> "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."

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and the explanation on the specific Charter provision at issue in 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

Explanation on Article 19 – Protection in the event of removal, expulsion or extradition

> "[…]
> Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see Ahmed v. Austria, judgment of 17 December 1996, 1996-VI, p. 2206, and Soering, judgment of 7 July 1989)."

Explanation on Article 47 – Right to an effective remedy and to a fair trial

> "The first paragraph is based on Article 13 of the ECHR:
>
> "'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'
> "However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.
> […]
>
> "The second paragraph corresponds to Article 6 (1) of the ECHR which reads as follows:
>
> "'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

"In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law, as stated by the Court in Case 294/83, 'Les Verts' v. European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

> "With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union."

Explanation on Article 52 – Scope and interpretation of rights and principles

> "Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:
> […]
> "Article 19 (2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,
> […]

> "Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:
> […]
> "Article 47 (2) and (3) corresponds to Article 6 (1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, […]".

Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health?

Correct answer

Yes (see *Abdida*, paragraphs 46–53).

According to the CJEU, Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, must be interpreted as precluding national legislation that does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health.

Explanation

The directive does not require that the remedy provided for in Article 13 (1) has suspensive effect. Nonetheless, the characteristics of such a remedy must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.

In this regard, it should be noted that Article 19 (2) of the Charter states that no one may be removed to a state where there is a serious risk that they would be subjected to inhuman or degrading treatment. By referring to the case law of the ECtHR, the CJEU considers that, in the *very exceptional cases* in which the removal of a third-country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-*refoulement*, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter, proceed with such a removal.

Those very exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national to a country in which there is a serious risk that they will be subjected to inhuman or degrading treatment.

For the appeal to be effective in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health, that third country national must be able to avail themselves, in such circumstances, of a remedy with suspensive effect, to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter.

Further Reading

Chapter 1 ‘Field of application’ and ‘What is the rationale of Article 51?’ and Chapters 3, 4, 7 and 8 of the FRA handbook.

Financira program Evropske unije za pravosodje (2014-2020).
Vsebina te publikacije predstavlja izključno stališča avtorija in je njegova izključna odgovornost. Evropska komisija ne prevzema nikakršne odgovornosti za morebitno uporabo informacij, ki jih vsebuje.

1. Študija primera 5 - Uporaba psiholoških testov za potrditev spolne usmerjenosti

Azil in migracije

Gradivo za udeležence

Dejstva

Aprila 2015 je nigerijski državljan Okorie vložil prošnjo za azil v eni od držav članic EU. V utemeljitev te prošnje je navedel, da ima utemeljen strah pred preganjanjem v izvorni državi zaradi svoje homoseksualnosti. Nacionalni organi za priseljevanje so 1. oktobra 2015 z odločbo zavrnili Okoriejevo prošnjo za azil. Čeprav so menili, da njegove izjave niso bile bistveno protislovne, so na podlagi izvedenskega mnenja psihologa sklenili, da ni verodostojen. To izvedensko mnenje je vključevalo raziskovalni pregled, pregled njegove osebnosti in več osebnostnih testov ter je zaključilo, da Okoriejevih trditev glede njegove spolne usmerjenosti ni mogoče potrditi.

Okorie je pri nacionalnem upravnem sodišču vložil tožbo, v kateri je zlasti trdil, da so psihološki testi, ki jih je opravil, resno posegali v njegove temeljne pravice iz členov 1 (človekovo dostojanstvo) in 7 (spoštovanje zasebnega in družinskega življenja) Listine Evropske unije o temeljnih pravicah (Listina) in da niso omogočili ocene verjetnosti njegove spolne usmerjenosti. Nacionalni organ za priseljevanje je kršitvi temeljnih pravic ugovarjal in navedel, da so testi potrebni za potrditev spolne usmerjenosti in ne vključujejo nobenega fizičnega pregleda ali obveznosti ogleda pornografskih fotografij ali videoposnetkov. Poleg tega je Okorie privolil v testiranje.

Katere določbe prava EU so pomembne v tej zadevi?

Listina

Člen 1 - Človekovo dostojanstvo

> „Človekovo dostojanstvo je nedotakljivo. Treba ga je spoštovati in varovati.“

Člen 7 - Spoštovanje zasebnega in družinskega življenja

> „Vsakdo ima pravico do spoštovanja svojega zasebnega in družinskega življenja, stanovanja ter komunikacij.“

47. člen - Pravica do učinkovitega pravnega sredstva in poštenega sojenja

> „Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu.

Vsakdo ima pravico, da o njegovi zadevi pravično, javno in v razumnem roku odloča neodvisno, nepristransko in z zakonom predhodno ustanovljeno sodišče. Vsakdo ima možnost svetovanja, obrambe in zastopanja.

Osebam, ki nimajo zadostnih sredstev, se odobri pravna pomoč, kolikor je ta potrebna za učinkovito zagotovitev dostopa do sodnega varstva.“

Kvalifikacijska direktiva 2011/95/EU [1]

Člen 4 določa:

„1. Države članice lahko menijo, da je dolžnost prosilca, da čim prej predloži vse elemente, potrebne za utemeljitev prošnje za mednarodno zaščito. Dolžnost države članice je, da v sodelovanju s prosilcem oceni ustrezne elemente prošnje.

2. Elementi iz odstavka 1 so prosilčeve izjave in vsa dokumentacija, ki jo ima prosilec na voljo, v zvezi s prosilčevo starostjo, izvorom, vključno z izvorom ustreznih sorodnikov, identiteto, državljanstvom(-i), državo(-ami) in krajem(-i) prejšnjega prebivališča, predhodnimi prošnjami za azil, potovalnimi potmi, potnimi dokumenti in razlogi za prošnjo za mednarodno zaščito.

3. Ocena prošnje za mednarodno zaščito se opravi individualno in vključuje upoštevanje:

1. Države članice lahko naložijo prosilcu dolžnost, da čim prej predloži vse potrebne elemente za utemeljitev prošnje za mednarodno zaščito. Dolžnost države članice je, da v sodelovanju s prosilcem obravnava ustrezne elemente prošnje.

2. Elementi iz odstavka 1 so izjave prosilca in vsa dokumentacija, s katero razpolaga prosilec, glede svoje starosti, porekla, vključno s poreklom ustreznih sorodnikov, identitete, državljanstva(-ev), držav(-e) in kraja(-ev) prejšnjega prebivališča, prejšnjih prošenj za azil, prepotovanih poti, potovalnih dokumentov ter razlogov za prošnjo za mednarodno zaščito.

3. Obravnavanje prošnje za mednarodno zaščito se izvede v vsakem posameznem primeru posebej in vključuje upoštevanje naslednjega:

(a) vsa ustrezna dejstva, ki se nanašajo na izvorno državo v času, ko se sprejme odločitev o prošnji, vključno z zakoni in predpisi izvorne države in načinom njihove uporabe;

(b) ustrezne izjave in dokumentacijo, ki jih predloži prosilec, vključno z informacijami o tem, ali je bil ali bi lahko bil prosilec podvržen preganjanju oziroma mu je bila ali bi mu lahko bila povzročena resna škoda;

(c) individualni položaj in osebne okoliščine prosilca, vključno z dejavniki, kot so poreklo, spol in starost, za oceno dejstva, ali bi na podlagi prosilčevih osebnih okoliščin dejanja, ki jim je bil prosilec izpostavljen ali bi jim bil lahko izpostavljen, pomenila preganjanje ali resno škodo;

(d) ali so imele dejavnosti prosilca od odhoda iz izvorne države izključni ali poglavitni namen ustvarjanja potrebnih pogojev za prošnjo za mednarodno zaščito, z namenom ocene, ali bi bil prosilec ob vrnitvi v to državo zaradi teh dejavnosti izpostavljen preganjanju ali resni škodi;

[1] Direktiva 2011/95/EU Evropskega parlamenta in Sveta z dne 13. decembra 2011 o standardih glede pogojev, ki jih morajo izpolnjevati državljani tretjih držav ali osebe brez državljanstva, da so upravičeni do mednarodne zaščite, glede enotnega statusa beguncev ali oseb, upravičenih do subsidiarne zaščite, in glede vsebine te zaščite, UL L 337, str. 9.

(e) ali se od prosilca lahko utemeljeno pričakuje, da bo izkoristil zaščito druge države, kjer lahko uveljavlja državljanstvo.“

Iz sodne prakse Sodišča Evropske unije (SEU) izhaja, da člen 4 Direktive 2011/95/EU ne nasprotuje temu, da nacionalni organi za priseljevanje odredijo pridobitev izvedenskega mnenja v okviru presoje dejstev in okoliščin v zvezi z zatrjevano spolno usmerjenostjo prosilca.

Vprašanja

Preden preidete na naslednja vprašanja, odgovorite na vprašanje 1.

Vprašanje 1: G. Okorie trdi, da nekateri vidiki postopka pred nacionalnim sodiščem kršijo člen 47 Listine (učinkovito sodno varstvo). Ali se člen 47 Listine uporablja za postopek pred nacionalnim upravnim sodiščem?

a. Da, Listina je katalog temeljnih pravic, ki se načeloma vedno uporablja, tako kot Evropska konvencija o človekovih pravicah (EKČP).

b. Da, ker se postopek pred nacionalnim sodiščem nanaša na uporabo Direktive 2011/95/EU.

c. Ne, metode ocenjevanja, ki jih izvajajo organi za priseljevanje, ne spadajo na področje uporabe prava EU, saj Direktiva 2011/95/EU ne usklajuje nacionalnih pravil o dokazih.

d. Ne, ta zadeva se nanaša na azil, člen 47 Listine pa zagotavlja pravico do učinkovitega sodnega varstva samo za civilne zahtevke in v okviru kazenskega pregona.

Opombe

Ob predpostavki, da se Listina uporablja:

Vprašanje 2: Na podlagi ustreznih določb Listine razpravljajte o tem, ali je treba pri razlagi členov 1 in 7 Listine upoštevati enake standarde, kot jih določata EKČP in sodna praksa Evropskega sodišča za človekove pravice (ESČP).

Opombe

Vprašanje 3: Ali je uporaba izvedenskega mnenja psihologa na podlagi projektivnih osebnostnih testov za oceno resničnosti trditve prosilca za mednarodno zaščito glede njegove spolne usmerjenosti v skladu z Listino? Navedite določbe Listine, ki se nanašajo na to vprašanje, in ustrezne dejavnike, ki jih je treba upoštevati.

Opombe

Osnovne informacije za vodje usposabljanja

Uvodne opombe

Ta študija primera temelji na sodbi Sodišča EU, C-473/16, *F.* , ECLI:EU:C:2018:36, 25. januar 2018.

Študija primera se nanaša samo na prvo vprašanje (glej *F.,* odstavki 47-71) v izvedenskem mnenju *psihologa.* Dejstvo, da sta francoska in nizozemska vlada ter Komisija odločno izpodbijali zanesljivost zadevnega izvedenskega mnenja, je ostalo zunaj študije primera (glej *F.,* točka 58).

Vprašanja in odgovori

Vprašanje 1. Ali se za postopek pred nacionalnim upravnim sodiščem uporablja člen 47 Listine?

a. Da, Listina je katalog temeljnih pravic, ki se načeloma vedno uporablja, tako kot EKČP.
b. Da, ker se postopek pred nacionalnim sodiščem nanaša na uporabo Direktive 2011/95/EU.
c. Ne, metode ocenjevanja, ki jih izvajajo organi za priseljevanje, ne spadajo na področje uporabe prava EU, saj Direktiva 2011/95/EU ne usklajuje nacionalnih pravil o dokazih.
d. Ne, ta zadeva se nanaša na azil, člen 47 Listine pa zagotavlja pravico do učinkovitega sodnega varstva samo za civilne zahtevke in v okviru kazenskega pregona.

Uvodne opombe

Analizo zadeve v zvezi z Listino je treba začeti tako, da se na podlagi člena 51(1) Listine preveri, ali se Listina uporablja. Povratne informacije kot odgovor na to vprašanje se lahko osredotočijo na razloge za dosledno izvedbo tega pomembnega predhodnega koraka (glej poglavje 3 priročnika FRA). Poleg tega bi se lahko sklicevali tudi na poglavje 7 tega priročnika, v katerem je naveden kontrolni seznam za uporabo člena 51(1) Listine.

Zelo pomembno je vedeti, da se temeljne pravice EU uporabljajo le v primerih, ki spadajo na področje uporabe prava EU. To je velika razlika v primerjavi z EKČP, ki se načeloma uporablja v vseh primerih. Pri uporabi Listine je treba na podlagi člena 51(1) Listine preveriti: ali gre v zadevnem primeru za povsem nacionalno situacijo, v kateri Listina nima vloge, ali pa zadeva spada na področje uporabe prava Unije, v katerem se Listina uporablja? Sistem iz člena 51(1) je v bistvu takšen: uporaba temeljnih pravic Unije je povezana z uporabo drugih določb prava Unije. Prav tako je pomembno upoštevati, da je uporaba Listine vedno povezana z uporabo drugih določb prava Unije.

To vprašanje kot tako v zadevi *F.* ni izrecno izraženo, zato člen 47 Listine v tej zadevi ne igra vloge.

Pravilni odgovor

Možnost b je pravilen odgovor (glejte situacijo A.3 v poglavju 7 priročnika agencije FRA).

Razlaga:

V skladu s členom 51(1) Listine se Listina uporablja za vse nacionalne ukrepe za izvajanje prava Unije. V skladu s sodno prakso Sodišča EU ima „izvajanje prava Unije“ širok pomen, ki zajema vse vrste izvajanja in uporabe prava Unije s strani držav članic. Pomeni enako kot „delovanje v okviru prava EU“ in zajema vse situacije, ki jih ureja pravo EU.

V tem primeru je uporaba Listine povezana s členom 4 Direktive 2011/95/EU, ki se nanaša na dolžnost držav članic, da ocenijo ustrezne elemente prošnje za mednarodno zaščito.

Možnost c ni pravilna. Izvajanje take diskrecijske pravice s strani držav članic se načeloma šteje za „izvajanje prava Unije“, ne glede na to, ali gre za obvezno ali neobvezno izvajanje diskrecijske pravice (glej situacijo A.3 v priročniku FRA). Zato *možnost c* ni pravilna. Poleg tega se je mogoče sklicevati na situacijo A.4 v poglavju 7 priročnika FRA: ukrepi, ki spadajo v procesno avtonomijo držav članic, se štejejo za izvajanje v smislu člena 51(1) Listine.

Možnost a ni pravilna (glej uvodne opombe).

Možnost d ni pravilna. Pomembna dodana vrednost člena 47 Listine v primerjavi s členom 6 EKČP je, da njegovo področje uporabe ni omejeno na civilne tožbe in kazenski pregon. Zato se uporablja tudi na drugih področjih sodnih postopkov, kot so azil in migracije ter obdavčenje (glej podčrtane dele pojasnila k vprašanju 2).

Vprašanje 2. Na podlagi ustreznih določb Listine razpravljajte o tem, ali sta EKČP in sodna praksa ESČP pomembna za razlago členov 1 in 7 Listine.

Pravilni odgovor:

Da. EKČP in sodna praksa ESČP sta načeloma pomembni za uporabo člena 47 in člena 19(2) Listine. Tudi Sodišče EU se sklicuje na sodno prakso ESČP (glej *Abdida*, točki 47 in 51).

Razlaga:

EKČP ni pravni instrument, ki bi bil formalno vključen v pravo Unije. Vendar Listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z EKČP („ustrezne pravice“). Na podlagi člena 52(3) Listine morata biti pomen in področje uporabe teh ustreznih pravic iz Listine enaka tistima, ki ju določa EKČP (vključno s sodno prakso ESČP). EKČP določa najnižji prag varstva. Pravo Unije lahko določa širše varstvo (glej zadnji stavek člena 52(3) Listine ter poglavje 2 ter korake 9 in 10 v poglavju 8 priročnika FRA).

> Člen 52 Listine - Obseg in razlaga pravic in načel
>
> „3. Kolikor ta listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z Evropsko konvencijo o varstvu človekovih pravic in temeljnih svoboščin, sta vsebina in obseg teh pravic enaka kot vsebina in obseg pravic, ki ju določa navedena konvencija. Ta določba ne preprečuje širšega varstva po pravu Unije.“

Kako vem, ali gre za ustrezne pravice?

Odgovor je na voljo v pojasnilu člena 52(3) Listine in v pojasnilu konkretne sporne določbe Listine v „Pojasnilih v zvezi z Listino o temeljnih pravicah“ (na voljo na portalu EUR-LEX, v razdelku „Pogodbe/Druge pogodbe in protokoli“; UL C 303, 14.12.2007).

> Pojasnilo o členu 7 - Spoštovanje zasebnega in družinskega življenja
>
> „Pravice, zagotovljene v členu 7, ustrezajo pravicam, zagotovljenim v členu 8 EKČP. Zaradi upoštevanja razvoja tehnologije je bila beseda ‚dopisovanje‘ nadomeščena z besedo ‚komunikacije‘.“

„V skladu s členom 52(3) sta pomen in obseg te pravice enaka kot v ustreznem členu EKČP. Posledično so omejitve, ki se lahko zakonito uvedejo za to pravico, enake tistim, ki jih dovoljuje člen 8 EKČP:

1. Vsakdo ima pravico do spoštovanja svojega zasebnega in družinskega življenja, doma in dopisovanja.

2. Javna oblast se ne sme vmešavati v izvrševanje te pravice, razen, če je to določeno z zakonom in nujno v demokratični družbi zaradi državne varnosti, javne varnosti ali ekonomske blaginje države, zato, da se prepreči nered ali kaznivo dejanje, da se zavaruje zdravje ali morala, ali da se zavarujejo pravice in svoboščine drugih ljudi.“

Pojasnilo k 52. členu - Obseg pravic in načel ter njihova razlaga

„členi Listine, katerih pomen in področje uporabe sta enaka ustreznim členom EKČP: [...] člen 7 ustreza členu 8 EKČP,“.

Vprašanje 3: Ali je uporaba izvedenskega mnenja psihologa na podlagi projekcijskih testov osebnosti za oceno resničnosti trditve prosilca za mednarodno zaščito glede njegove spolne usmerjenosti v skladu z Listino?

Uvodne opombe

Poglavje 8 priročnika FRA vsebuje strukturiran okvir za preverjanje, ali je nacionalna določba skladna z Listino ali ne. Da bi se prepričali, da so bili sprejeti vsi potrebni ukrepi, je priporočljivo uporabiti ta kontrolni seznam. V tem primeru bi morala ocena vključevati člen 52(1) Listine (splošna klavzula o omejitvah).

Pogoji iz člena 52(1) Listine so naslednji.

- Ali so omejitve določene z zakonom?
- Ali je zagotovljeno spoštovanje bistva zadevne temeljne pravice?
- Ali omejitve služijo legitimnemu cilju?
- Ali je omejitev primerna za reševanje ugotovljenega problema?
- Ali omejitev presega tisto, kar je potrebno za dosego zastavljenega cilja? Ali so na voljo ukrepi, ki bi manj posegali v temeljne pravice?
- Ali so omejitve sorazmerne z zastavljenim ciljem?

V tem primeru je poudarek na *testu sorazmernosti*.

Pravilni odgovor

Ne. To ni združljivo s členom 7 Listine (glej *F.* , točke 50-70). Sodišče EU se ne ukvarja s členom 1 Listine.

Razlaga:

Uporaba izvedenskega mnenja psihologa, kot je to v postopku v glavni stvari, pomeni poseg v pravico te osebe do spoštovanja njenega zasebnega življenja (glej *F.*, točka 54). Poseg v zasebno življenje prosilca za mednarodno zaščito, ki izhaja iz priprave in uporabe takega izvedenskega mnenja, je glede na njegovo naravo in vsebino *še posebej resen* (glej *F.*, točka 60).

V zvezi s tem je pomembno, da privolitev ni nujno dana prostovoljno; dejansko je vsiljena pod pritiskom okoliščin, v katerih se znajdejo prosilci, ki zaprosijo za mednarodno zaščito (glej *F.*, točka 53).

Ker gre v tem primeru za poseg, je treba preveriti pogoje iz člena 52(1) (glej uvodne opombe).

Sodišče EU se je neposredno lotilo preizkusa sorazmernosti. Odločilno je, da se zdi vpliv takega izvedenskega mnenja na zasebno življenje tožeče stranke nesorazmeren z zastavljenim ciljem. Glede na resnost posega v pravico do zasebnosti tega preizkusa ni mogoče šteti za sorazmernega s koristjo, ki jo lahko predstavlja za presojo dejstev in okoliščin iz člena 4 Direktive 2011/95/EU. V zvezi s tem so pomembni naslednji elementi, obravnavani skupaj.

- Poseg v zasebno življenje prosilca za mednarodno zaščito, ki je posledica priprave in uporabe takšnega izvedenskega mnenja, je še posebej resen.
- Takšno izvedensko mnenje temelji zlasti na dejstvu, da zadevna oseba opravi vrsto psiholoških testov, katerih namen je ugotoviti bistveni element njene identitete, ki zadeva njeno osebno sfero, saj se nanaša na intimne vidike njenega življenja.
- Načelo 18 *Yogyakartskih načel o* uporabi mednarodnega prava človekovih pravic v zvezi s spolno usmerjenostjo in spolno identiteto določa, da nihče ne sme biti prisiljen v kakršno koli obliko psihološkega testa zaradi svoje spolne usmerjenosti ali spolne identitete.

Poleg tega se takšno izvedensko mnenje ne more šteti za bistveno za potrditev izjav prosilca za mednarodno zaščito v zvezi z njegovo spolno usmerjenostjo za odločanje o prošnji za mednarodno zaščito, ki temelji na strahu pred preganjanjem zaradi te usmerjenosti.

Nadaljnje branje

Poglavje 1 „Področje uporabe“ in „Kakšna je utemeljitev člena 51?“ ter poglavja 3, 4, 7 in 8 priročnika FRA.

Ferreira, N. in Venturi, D. (2018), „Testing the untestable: F V Bevándorlási És Állampolgársági Hivatal (28. junij 2018) “, *EDAL - European Database of Asylum Law,* dostopno na https://ssrn.com/abstract=3204321.

2. Študija primera 6 - Odložitev odločbe o vrnitvi

Azil in migracije

Gradivo za udeležence

Dejstva

Madagi je 15. aprila 2009 v skladu z nacionalno zakonodajo vložil prošnjo za dovoljenje za prebivanje iz zdravstvenih razlogov, ker je trpel za posebno hudo boleznijo. Ta prošnja je bila 4. decembra 2009 obravnavana kot dopustna. Z odločbo z dne 6. junija 2011 je bila prošnja g. Madagija za dovoljenje za prebivanje zavrnjena, ker da ima njegova izvorna država (Nigerija) ustrezno zdravstveno infrastrukturo za oskrbo oseb z njegovo boleznijo. O tej odločitvi je bil 29. junija 2011 obveščen in mu je bilo odrejeno, da zapusti Francijo. To odločbo je treba opredeliti kot „odločbo o vrnitvi" v smislu člena 3(4) Direktive 2008/115/ES o vračanju. Dne 7. julija 2011 se je gospod Madagi pritožil zoper to odločbo o vrnitvi in navedel, da v Nigeriji ni na voljo ustreznega zdravljenja njegove bolezni. V skladu z ustreznimi nacionalnimi predpisi g. Madagi nima na voljo nobenega pravnega sredstva za odložitev izvršitve odločbe o vrnitvi.

Katere določbe prava EU so pomembne v tej zadevi?

Listina Evropske unije o temeljnih pravicah (Listina)

Člen 19 - Varstvo v primeru odstranitve, izgona ali izročitve

> *„2. Nihče se ne sme odstraniti, izgnati ali izročiti državi, v kateri obstaja zanj resna nevarnost, da bo podvržen smrtni kazni, mučenju ali drugemu nečloveškemu ali ponižujočemu ravnanju ali kaznovanju.* […]"

47. člen - Pravica do učinkovitega pravnega sredstva in nepristranskega sodišča

> „Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu.
>
> Vsakdo ima pravico, da o njegovi zadevi pravično, javno in v razumnem roku odloča neodvisno, nepristransko in z zakonom predhodno ustanovljeno sodišče. Vsakdo ima možnost svetovanja, obrambe in zastopanja.
>
> Osebam, ki nimajo zadostnih sredstev, se odobri pravna pomoč, kolikor je ta potrebna za učinkovito zagotovitev dostopa do sodnega varstva."

Direktiva o vrnitvi 2008/115/ES [2]

Člen 3(4) določa naslednje:

> „Za namene te direktive se uporabljajo naslednje opredelitve pojmov:
> […]

[2] Direktiva 2008/115/ES Evropskega parlamenta in Sveta z dne 16. decembra 2008 o skupnih standardih in postopkih v državah članicah za vračanje nezakonito prebivajočih državljanov tretjih držav, UL L 348, str. 98.

‚odločba o vrnitvi' pomeni upravno ali sodno odločbo ali akt, ki navaja ali opredeljuje, da je prebivanje državljana tretje države nezakonito, ter nalaga ali navaja obveznost vrnitve."

Člen 5 se glasi:

„Države članice pri izvajanju te direktive ustrezno upoštevajo:
[…]

(c) zdravstveno stanje zadevnega državljana tretje države."

Člen 9 z naslovom „Odlog odstranitve" v 1. odstavku določa:

„Države članice odložijo odstranitev:

(a) če bi odstranitev kršila načelo nevračanja, ali

(b) toliko časa, za kolikor se v skladu s členom 13(2) zagotovi suspenzivni učinek)."

12. člen določa:

„Odločbe o vrnitvi in, če so bile izdane, odločbe o prepovedi vstopa in odločbe o odstranitvi se izdajo v pisni obliki ter navajajo dejanske in pravne razloge ter informacije o razpoložljivih pravnih sredstvih. […]"

Člen 13(1) in (2) določa naslednje:

„1. Zadevnemu državljanu tretje države se zagotovi učinkovito pravno sredstvo, da se pritoži zoper odločbo v zvezi z vrnitvijo iz člena 12(1) ali zagotovi njen ponovni pregled pred pristojnim sodnim ali upravnim organom ali pred pristojnim telesom, katerega člani so nepristranski in neodvisni.

2. Organ ali telo iz odstavka 1 je pristojno za pregled odločb v zvezi z vrnitvijo iz člena 12(1), vključno z možnostjo začasne odložitve njihove izvršitve, razen če se začasna odložitev že uporablja po nacionalni zakonodaji."

Člen 14(1) določa naslednje:

„1. Razen v primerih iz členov 16 in 17, države članice zagotovijo, da se za državljane tretjih držav v obdobju za prostovoljni odhod, odobrenem v skladu s členom 7, in v obdobjih, za katera je bila odstranitev odložena v skladu s členom 9, po možnosti upoštevajo naslednja načela:
[…]

(b) zagotovi se nujna zdravstvena oskrba in osnovno zdravljenje."

Katere določbe nacionalnega prava se uporabljajo?

Člen 3(i) zakona o vstopu, prebivanju, nastanitvi in odstranitvi tujcev v prvem odstavku določa:

„Tujec, ki prebiva v Franciji, ki lahko dokaže svojo identiteto v skladu z 2. odstavkom in trpi za boleznijo, ki povzroča resnično tveganje za njegovo življenje ali telesno integriteto ali resnično

tveganje za njegovo nečloveško ali ponižujoče ravnanje, če v njegovi izvorni državi ali v državi, v kateri prebiva, ni ustreznega zdravljenja, lahko zaprosi ministra ali njegovega zastopnika za dovoljenje za prebivanje v Franciji.“

Vprašanja

Vprašanje 1. Ali se člen 47 Listine uporablja za nacionalna postopkovna pravila v zvezi z (ne)odlogom?

Da, Listina je katalog temeljnih pravic, ki se načeloma vedno uporablja, tako kot Evropska konvencija o človekovih pravicah (EKČP).

Da, ker ta pravila veljajo za izvajanje Direktive 2008/115/ES.

Ne, ker člen 13(2) Direktive 2008/115/ES ne zahteva, da ima pravno sredstvo iz člena 13(1) nujno odložilni učinek.

Ne, ta zadeva se nanaša na azil, člen 47 Listine pa zagotavlja pravico do učinkovitega sodnega varstva samo za civilne zahtevke in v okviru kazenskega pregona.

Opombe

Ob predpostavki, da se Listina uporablja:

Vprašanje 2. Na podlagi ustreznih določb Listine razpravljajte o tem, ali je treba pri razlagi členov 47 in 19 Listine upoštevati enake standarde, kot jih določata EKČP in sodna praksa Evropskega sodišča za človekove pravice (ESČP).

Opombe

Vprašanje 3. Ali člena 5 in 13 Direktive 2008/115/ES v povezavi s členom 19(2) in členom 47 Listine pomenita, da mora obstajati pravno sredstvo z odložilnim učinkom v zvezi z odločbo o vrnitvi, katere izvršitev lahko zadevnega državljana tretje države izpostavi resni nevarnosti hudega in nepopravljivega poslabšanja njegovega zdravstvenega stanja?

Opombe

Osnovne informacije za vodje usposabljanja

Uvodne opombe

Ta študija primera temelji na sodbi Sodišča Evropske unije (SEU), C-562/13, *Abdida,* ECLI:EU:C:2014:2453, 18. december 2014.

Študija primera zadeva le odložilni učinek pritožbe zoper odločbo o vrnitvi, ki ga je Sodišče EU obravnavalo v točkah 39-53. Ne obravnava vprašanja, ali obstaja dolžnost zagotavljanja njihovih osnovnih potreb. Dejstva v študiji primera so bila poenostavljena in ta vidik je bil opuščen.

Vprašanja in odgovori

Vprašanje 1. Ali se člen 47 Listine uporablja za nacionalna postopkovna pravila v zvezi z (ne)odlogom?

a. Da, Listina je katalog temeljnih pravic, ki se načeloma vedno uporablja, tako kot EKČP.
b. Da, ker se ta pravila štejejo za izvajanje Direktive 2008/115/ES.
c. Ne, ker člen 13(2) Direktive 2008/115/ES ne zahteva, da ima pravno sredstvo iz člena 13(1) nujno odložilni učinek.
d. Ne, ta zadeva se nanaša na azil, člen 47 Listine pa zagotavlja pravico do učinkovitega sodnega varstva samo za civilne zahtevke in v okviru kazenskega pregona.

Uvodne opombe

Analizo zadeve v zvezi z Listino je treba začeti tako, da se na podlagi člena 51(1) Listine preveri, ali se Listina uporablja. Povratne informacije kot odgovor na to vprašanje se lahko osredotočijo na razloge za dosledno izvedbo tega pomembnega predhodnega koraka (glej poglavje 3 priročnika FRA). Poleg tega bi se lahko sklicevali tudi na poglavje 7 tega priročnika, v katerem je naveden kontrolni seznam za uporabo člena 51(1) Listine.

Zelo pomembno je vedeti, da se temeljne pravice EU uporabljajo le v primerih, ki spadajo na področje uporabe prava EU. To je velika razlika v primerjavi z EKČP, ki se načeloma uporablja v vseh primerih. Pri uporabi Listine je treba na podlagi člena 51(1) Listine preveriti: ali gre v zadevnem primeru za povsem nacionalno situacijo, v kateri Listina nima vloge, ali pa zadeva spada na področje uporabe prava Unije, v katerem se Listina uporablja? Sistem iz člena 51(1) je v bistvu takšen: uporaba temeljnih pravic Unije je povezana z uporabo drugih določb prava Unije. Prav tako je pomembno upoštevati, da je uporaba Listine vedno povezana z uporabo drugih določb prava Unije.

To vprašanje kot tako v *Abdidi* ni izrecno. Sodišče EU uporablja Listino za razlago členov 5 in 13 Direktive 2008/115/ES.

Pravilni odgovor

Možnost b je pravilen odgovor (glejte situacijo A.3 v poglavju 7 priročnika agencije FRA).

Razlaga:

V skladu s členom 51(1) Listine se Listina uporablja za vse nacionalne ukrepe za izvajanje prava Unije. V skladu s sodno prakso Sodišča EU ima „izvajanje prava Unije“ širok pomen, ki zajema vse vrste izvajanja in

uporabe prava Unije s strani držav članic. Pomeni enako kot „delovanje v okviru prava EU“ in zajema vse situacije, ki jih ureja pravo EU.

V tem primeru je uporaba Listine povezana s členom 13(2) Direktive 2008/115/ES, ki državam članicam daje diskrecijsko pravico, da odobrijo začasno odložitev odločb o vrnitvi. Izvajanje take diskrecijske pravice s strani držav članic se načeloma šteje za „izvajanje prava Unije“, ne glede na to, ali gre za obvezno ali neobvezno izvajanje diskrecijske pravice. Lahko se celo zgodi, da spoštovanje Listine privede do obveznega izvajanja diskrecijske pravice na podlagi prava Unije. Prav to se zgodi v tej zadevi (drugi primeri, v katerih se diskrecijska pravica izkaže za dolžnost, so sodbi SEU, C-411/10 in C-493/10, *N.S.* , 21. december 2011, točke 55, 68-69 in 106-108; ter sodba SEU, C-329/13, *Stefan,* 8. maj 2014, 35. točka). Zato *možnost c* ni pravilna.

Možnost a ni pravilna (glej uvodne opombe).

Možnost d ni pravilna. Pomembna dodana vrednost člena 47 Listine v primerjavi s členom 6 EKČP je, da njegovo področje uporabe ni omejeno na civilne tožbe in kazenski pregon. Zato se uporablja tudi na drugih področjih sodnih postopkov, kot so azil in migracije ter obdavčenje (glej podčrtane dele razlage k vprašanju 2).

Vprašanje 2. Na podlagi ustreznih določb Listine razpravljajte, ali sta EKČP in sodna praksa ESČP ustrezni.

Pravilni odgovor:

Da. EKČP in sodna praksa ESČP sta načeloma pomembni za uporabo člena 47 in člena 19(2) Listine. Tudi SEU se sklicuje na sodno prakso ESČP (glej *Abdida*, točki 47 in 51).

Razlaga:
EKČP ni pravni instrument, ki bi bil formalno vključen v pravo Unije. Vendar Listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z EKČP („ustrezne pravice“). Na podlagi člena 52(3) Listine morata biti pomen in področje uporabe teh ustreznih pravic iz Listine enaka tistima, ki ju določa EKČP (vključno s sodno prakso ESČP). EKČP določa najnižji prag varstva. Pravo Unije lahko določa širše varstvo (glej poglavje 2 ter korake 9 in 10 v poglavju 8 priročnika FRA).

> Člen 52 Listine - Obseg in razlaga pravic in načel
>
> „3. Kolikor ta listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z Evropsko konvencijo o varstvu človekovih pravic in temeljnih svoboščin, sta vsebina in obseg teh pravic enaka kot vsebina in obseg pravic, ki ju določa navedena konvencija. Ta določba ne preprečuje širšega varstva po pravu Unije.“

Kako vem, ali gre za ustrezne pravice?

Odgovor je na voljo v pojasnilu člena 52(3) Listine in pojasnilu konkretne sporne določbe Listine v „Pojasnilih v zvezi z Listino o temeljnih pravicah“ (na voljo na portalu EUR-LEX, v razdelku „Pogodbe/Druge pogodbe in protokoli“; UL C 303, 14.12.2007).

Pojasnilo k členu 19 - Zaščita v primeru odstranitve, izgona ali izročitve

> „[…]

2. Odstavek 2 vključuje ustrezno sodno prakso Evropskega sodišča za človekove pravice v zvezi s členom 3 EKČP (glej Ahmed proti Avstriji, sodba z dne 17. decembra 1996, 1996-VI, str. 2206, in Soering, sodba z dne 7. julija 1989).“

Pojasnilo k 47. členu - Pravica do učinkovitega pravnega sredstva in poštenega sojenja

„Prvi odstavek temelji na 13. členu EKČP:

Vsakdo, čigar pravice in svoboščine, ki jih priznava ta Konvencijo, so kršene, ima pravico do učinkovitih pravnih sredstev pred domačimi oblastmi, in to tudi če je kršitev storila uradna oseba pri opravljanju uradne dolžnosti.

Vendar je v pravu Unije varstvo obsežnejše, saj zagotavlja pravico do učinkovitega pravnega sredstva pred sodiščem.
[…]

Drugi odstavek ustreza členu 6(1) EKČP, ki se glasi:

Vsakdo ima pravico, da o njegovih civilnih pravicah in obveznostih ali o kakršnikoli kazenski obtožbi zoper njega pravično in javno ter v razumnem roku odloča neodvisno in nepristransko z zakonom ustanovljeno sodišče. Sodba mora biti izrečena javno, toda tisk in javnost sta lahko izločena s sojenja deloma ali v celoti v interesu morale, javnega reda ali državne varnosti, če to v demokratični družbi zahtevajo koristi mladoletnikov ali varovanje zasebnega življenja strank, ali pa v nujno potrebnem obsegu, kadar je to po mnenju sodišča nujno potrebno zaradi posebnih okoliščin, če bi javnost sojenja škodovala interesom pravičnosti.

V pravu Unije pravica do poštenega sojenja ni omejena na spore v zvezi s civilnopravnimi pravicami in obveznostmi. To je ena od posledic dejstva, da je Unija skupnost, ki temelji na pravni državi, kot je Sodišče navedlo v zadevi 294/83, Les Verts proti Evropskemu parlamentu (sodba z dne 23. aprila 1986, Recueil, str. 1339). Kljub temu se jamstva, ki jih zagotavlja EKČP, v vseh pogledih, razen glede njihovega področja uporabe, podobno uporabljajo za Unijo.

V zvezi s tretjim odstavkom je treba opozoriti, da je treba v skladu s sodno prakso Evropskega sodišča za človekove pravice zagotoviti pravno pomoč, kadar bi bilo zaradi odsotnosti take pomoči nemogoče zagotoviti učinkovito pravno sredstvo (sodba ESČP z dne 9. oktobra 1979, Airey, serija A, zvezek 32, str. 11). Obstaja tudi sistem pravne pomoči za zadeve pred Sodiščem Evropske unije.“

Pojasnilo k členu 52 - Področje uporabe in razlaga pravic in načel

„členi Listine, katerih pomen in področje uporabe sta enaka kot pri ustreznih členih EKČP:
[…]
Člen 19(2) ustreza členu 3 EKČP, kot ga razlaga Evropsko sodišče za človekove pravice,
[…]
členi, katerih pomen je enak kot pri ustreznih členih EKČP, vendar je področje uporabe širše:
[…]
Člen 47(2) in (3) ustreza členu 6(1) EKČP, vendar omejitev na določanje civilnih pravic in obveznosti ali kazenskih obtožb ne velja za pravo Unije in njegovo izvajanje, [...]“.

Vprašanje 3. Ali člena 5 in 13 Direktive 2008/115/ES v povezavi s členom 19(2) in členom 47 Listine pomenita, da mora obstajati pravno sredstvo z odložilnim učinkom v zvezi z odločbo o vrnitvi, katere

izvršitev lahko zadevnega državljana tretje države izpostavi resni nevarnosti resnega in nepopravljivega poslabšanja njegovega zdravstvenega stanja?

Pravilen odgovor

Da (glej *Abdida*, točke 46-53).

Po mnenju Sodišča EU je treba člena 5 in 13 Direktive 2008/115/ES v povezavi s členom 19(2) in členom 47 Listine razlagati tako, da nasprotujeta nacionalni ureditvi, ki ne predvideva pravnega sredstva z odložilnim učinkom v zvezi z odločbo o vrnitvi, katere izvršitev lahko zadevnega državljana tretje države izpostavi resnemu tveganju resnega in nepopravljivega poslabšanja njegovega zdravstvenega stanja.

Razlaga:

Direktiva ne zahteva, da ima pravno sredstvo iz člena 13(1) odložilni učinek. Kljub temu je treba značilnosti takega pravnega sredstva določiti na način, ki je skladen s členom 47 Listine, ki pomeni ponovno potrditev načela učinkovitega sodnega varstva.

V zvezi s tem je treba opozoriti, da člen 19(2) Listine določa, da nihče ne sme biti odstranjen v državo, v kateri obstaja resna nevarnost, da bi bil izpostavljen nečloveškemu ali ponižujočemu ravnanju. S sklicevanjem na sodno prakso ESČP Sodišče EU meni, da v *zelo izjemnih primerih, v katerih* bi odstranitev državljana tretje države, ki trpi za hudo boleznijo, v državo, kjer ni na voljo ustreznega zdravljenja, kršila načelo nevračanja, države članice zato ne morejo, kot je določeno v členu 5 Direktive 2008/115/ES v povezavi s členom 19(2) Listine, izvesti take odstranitve.

Za te zelo izjemne primere sta značilni resnost in nepopravljiva narava škode, ki jo lahko povzroči odstranitev državljana tretje države v državo, v kateri obstaja resna nevarnost, da bo izpostavljen nečloveškemu ali ponižujočemu ravnanju.

Da bi bila pritožba učinkovita v zvezi z odločbo o vrnitvi, katere izvršitev lahko zadevnega državljana tretje države izpostavi resnemu tveganju resnega in nepopravljivega poslabšanja njegovega zdravstvenega stanja, mora imeti ta državljan tretje države v takih okoliščinah možnost uporabiti pravno sredstvo z odložilnim učinkom, da se zagotovi, da se odločba o vrnitvi ne izvrši, preden pristojni organ nima možnosti preučiti ugovora, ki se nanaša na kršitev člena 5 Direktive 2008/115/ES v povezavi s členom 19(2) Listine.

Nadaljnje branje

Poglavje 1 „Področje uporabe“ in „Kakšna je utemeljitev člena 51?“ ter poglavja 3, 4, 7 in 8 priročnika FRA.

The Right to an Effective Remedy and to a Fair Trial in EU Law:

the doctrine of effective judicial protection

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Funded by the European Union's Justice Programme (2014-2020).
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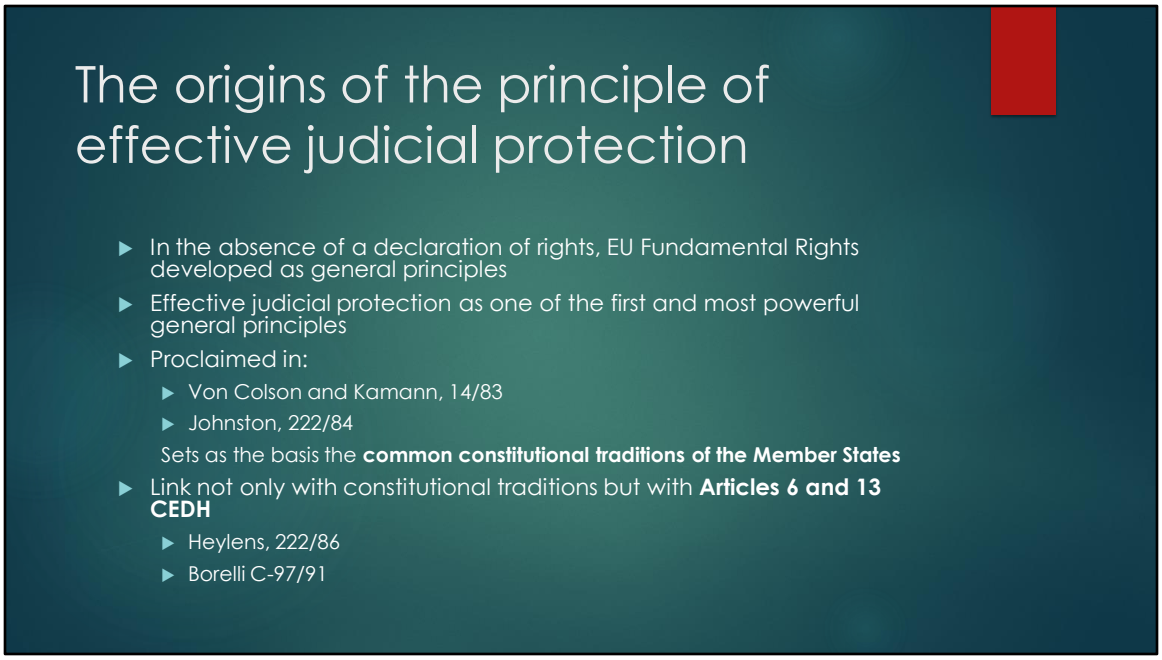
* All the views are purely personal to the speaker

Outline of presentation

- Development and evolution of the principle of effective judicial protection as a general principle
- Consolidation of the principle of effective judicial protection in the Charter of Fundamental Rights (the Charter)
- The principle of national procedural autonomy and the 'principles' of equivalence and effectiveness

Please, note that this presentation will be focused exclusively in the application of the principle of effective judicial protection to the Member States (and by the courts of the Member States).

The issue of effective judicial protection against acts of the EU institutions before EU Courts will therefore not be the object of this presentation.



- The principle of effective judicial protection was one of the most developed general principles under the "pre-Charter" fundamental rights case-law of the Court.

- For a more general and complete account of the case-law on the principle of effective judicial protection before the entry into force of the Charter, you can consult the "répertoire de jurisprudence" in the following link:

https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_ordrejur/data/index_A-01_02_11.htm

Early development of the principle of effective judicial protection

- Pre-Charter Case-law : focus on the principle of effectiveness

Effectiveness - Impossible or excessively difficult

- 222/84- Johnston (effective judicial remedy)
- C-213/89 Factortame (interim relief)
- 199/82 San Giorgio (remedies >repayment of illegal tax levies)
- C-6/90 and 9/90 Francovich- (Damages)
- C-312/93 Peterbroeck and C-430/93 Van Schijndel
- C-208/90 Emmot // C-338/91 Steenhorst-Neerings; C- 349/08 Sopropé (time limitations)
- C-432/05 Unibet – availability of legal remedies

The relationship between the principle of effective judicial protection and the principle of effectiveness as a limit to the principle of procedural autonomy is very close. I will come back to the principle of effectiveness at the end of the presentation to explain its autonomous functioning in the present legal context, but both principles cannot really be regarded separately, as the latter is a concrete expresion of the former.

Early development of the principle of effective judicial protection

- Intense development in the application of the principle to the Member States
- Often fueling the principle of "effectiveness" as a limitation to the principle of national procedural autonomy
- Interrelation with other far-reaching developments in the constitutional principles of EU law:
  - Relevance of effective judicial protection after the acknowledgement of the principle of direct effect
  - Close interrelation with the principle of sincere cooperation
  - Proclamation of the principle of state liability for breaches of EU law (Francovich damages) on the basis (inter alia) of considerations of effective judicial protection

The Charter: Consolidation of the principle of effective judicial protection

- First paragraph of Article 47 of the Charter (right to an effective remedy and to a fair trial)

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article"

- Explanatory notes:
  - confirm that this article is based on article 13 ECHR but that it goes beyond
  - Emphasize the limited impact on the EU system of remedies

- **Correlative obligation for Member States**: Article 19(1) TUE … "Member States shall provide remedies sufficient to ensure effective legal protection in the fields of EU law"

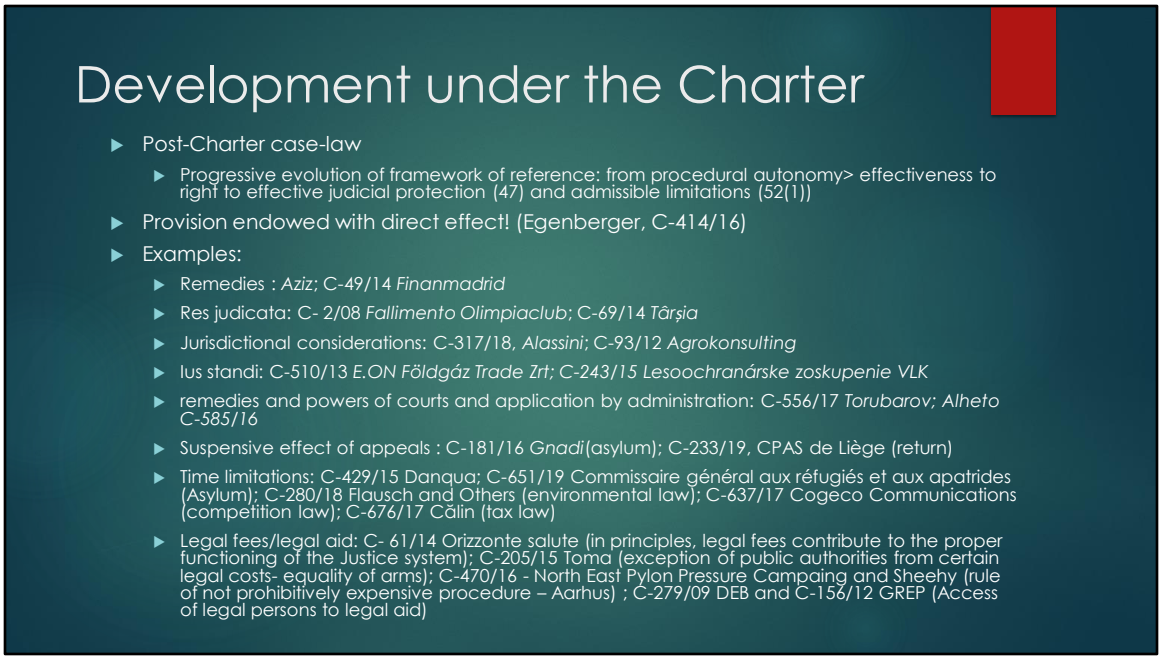
Article 19 has revealed itself a powerful source of law to be directly enforced in the Member State beyond the scope of application of the Charter with regard to some of the elements of Article 47 of the Charter (those related with judicial Independence). It remains to be seen whether those developments are also applicable with regard to other components of Article 47.

The Charter: Consolidation of the principle of effective judicial protection

- Ongoing discussion about scope of application of Article 47 of the Charter:
- …. "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right…"

Does this mean a different personal scope tan the one defined by Article 51(1) of the Charter?

- for discussion see Opinion of AG Bobek in Asociația "Forumul Judecătorilor din România" C-83/19 , points 196 et ff.



The list of cases is huge, as Article 47 of the Charter is the most widely interpreted provision of the Charter.

For a more complete account of the case law on Article 47, you can consult the digest of the Case law in the following link:

https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_1/data/index_1_04_03_47.htm

The principle of procedural autonomy and its limits

- Point of departure: principle of institutional and procedural autonomy of the Member States (33/76, *Rewe*)
  - "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law "
- The limits :
  - Equivalence: procedural rules governing actions for safeguarding an individual's rights under EU law must be **no less favorable** than those governing similar domestic actions
  - Effectiveness: procedural rules governing actions for safeguarding an individual's rights under EU law must not make it **in practice impossible** or **excessively difficult** to exercise rights conferred by EU law

The principle of procedural autonomy and its limits

- Post Charter:
  - Discussion about the relationship between the "principle" of effectiveness and the principle of effective judicial protection
    - See, e.g. Alassini C-317/08
  - Critical stance towards the limitation of procedural autonomy on the basis of the "effectiveness" rule

If you are interested in this topic, the discusion has been developed extensively by the doctrine.

See, for example:

S. PRECHAL and R. WIDDERSHOVEN: "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection", Review of European Administrative Law, 2011, Vol. 4, n° 2.

KROMMENDIJK, J., Is there Light on the Horizon? The Distinction between "Rewe-effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte, CMLR, 2016, Vol. 53.

SAFJAN, M. and DÜSTERHAUS, D., A Union of Effective Judicial Protection : Addressing a Multi-level Challenge through the Lens of Article 47 CFREU, Yearbook of European Law, 2014, Vol. 33, n° 1

The limits of effectiveness / effective judicial protection

- Limitations / Balancing
  - With other legal principles:
    - Legal certainty (see above, case law on res judicata, or below, case law on time limitations)
    - Good administration of Justice; judicial economy; procedural considerations: *Trade Agency* C-619/10; C-73/16 *Puškár ; C-685/15 Online Games*
  - With other fundamental rights
    - Liberty and security: C-752/18 *Deutsche Umwelthilfe*
  - Other interests, values
    - Public safety: C-300/11 – ZZ
    - Financial interests of the Union – (See saga *Taricco; M.A.S; Kolev; Dzivev*)

Thanks for your attention !

Pravica do učinkovitega pravnega sredstva in poštenega sojenja v pravu EU:

doktrina učinkovitega sodnega varstva

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Funded by the European Union's Justice Programme (2014-2020).
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* Vsa stališča so izključno osebna mnenja govorca.

Osnutek predstavitve

- Razvoj in razvoj načela učinkovitega sodnega varstva kot splošnega načela
- Utrditev načela učinkovitega sodnega varstva v Listini o temeljnih pravicah (Listina)
- Načelo nacionalne procesne avtonomije ter „načeli“ enakovrednosti in učinkovitosti

Upoštevajte, da bo ta predstavitev osredotočena izključno na uporabo načela učinkovitega sodnega varstva v državah članicah (in s strani sodišč držav članic).

Vprašanje učinkovitega sodnega varstva zoper akte institucij EU pred sodišči EU zato ne bo predmet te predstavitve.

Izvor načela učinkovitega sodnega varstva

- Ker ni deklaracije o pravicah, so se temeljne pravice EU razvile kot splošna načela
- Učinkovito sodno varstvo kot eno od prvih in najmočnejših splošnih načel
- Razglašeno v:
  - Von Colson in Kamann, 14/83
  - Johnston, 222/84

  kot osnovo določa **skupne ustavne tradicije držav članic**
- Povezava ne le z ustavnimi tradicijami, temveč tudi s **členoma 6 in 13 ESČP**
  - Heylens, 222/86
  - Borelli C-97/91

- Načelo učinkovitega sodnega varstva je bilo eno od najbolj razvitih splošnih načel v sodni praksi Sodišča o temeljnih pravicah iz obdobja pred Listino.

- Za splošnejši in popolnejši pregled sodne prakse o načelu učinkovitega sodnega varstva pred začetkom veljavnosti Listine si lahko ogledate "répertoire de jurisprudence" na naslednji povezavi:

https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_ordrejur/data/index_A-01_02_11.htm

Zgodnji razvoj načela učinkovitega sodnega varstva

- Sodna praksa pred Listino: poudarek na načelu učinkovitosti

Učinkovitost - Nemogoče ali pretirano težko

- 222/84- Johnston (učinkovito pravno sredstvo)
- C-213/89 Factortame (začasna odredba)
- 199/82 San Giorgio (pravna sredstva >povračilo nezakonitih davčnih dajatev)
- C-6/90 in 9/90 Francovich- (odškodnina)
- C-312/93 Peterbroeck in C-430/93 Van Schijndel
- C-208/90 Emmot // C-338/91 Steenhorst-Neerings; C-349/08 Sopropé (zastaranje)
- C-432/05 Unibet - razpoložljivost pravnih sredstev

Načeli učinkovitega sodnega varstva in učinkovitosti kot omejitev načela procesne avtonomije sta tesno povezani. K načelu učinkovitosti se bom vrnila na koncu predstavitve, da pojasnim njegovo avtonomno delovanje v sedanjem pravnem okviru, vendar obeh načel v resnici ni mogoče obravnavati ločeno, saj je slednje konkretno izražanje prvega.

Zgodnji razvoj načela učinkovitega sodnega varstva

- Intenziven razvoj uporabe načela v državah članicah
- Pogosto podpiranje načelo „učinkovitosti“ kot omejitev načela nacionalne procesne avtonomije.
- Povezava z drugimi daljnosežnimi spremembami ustavnih načel prava EU:
  - Pomen učinkovitega sodnega varstva po priznanju načela neposrednega učinka
  - Tesna povezanost z načelom iskrenega sodelovanja
  - Razglasitev načela odgovornosti države za kršitve prava EU (Francovicheva odškodnina) na podlagi (med drugim) vidikov učinkovitega sodnega varstva

Listina: utrditev načela učinkovitega sodnega varstva

- Prvi odstavek 47. člena Listine (pravica do učinkovitega pravnega sredstva in poštenega sojenja)

„Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu."

- Pojasnjevalne opombe:
  - potrjujejo, da ta člen temelji na 13. členu EKČP, vendar ga presega
  - poudarjajo omejen vpliv na sistem pravnih sredstev EU.

- **Povezana obveznost držav članic**: Člen 19(1) PEU ... „Države članice vzpostavijo pravna sredstva potrebna za zagotovitev učinkovitega pravnega varstva na področjih, ki jih ureja pravo Unije".

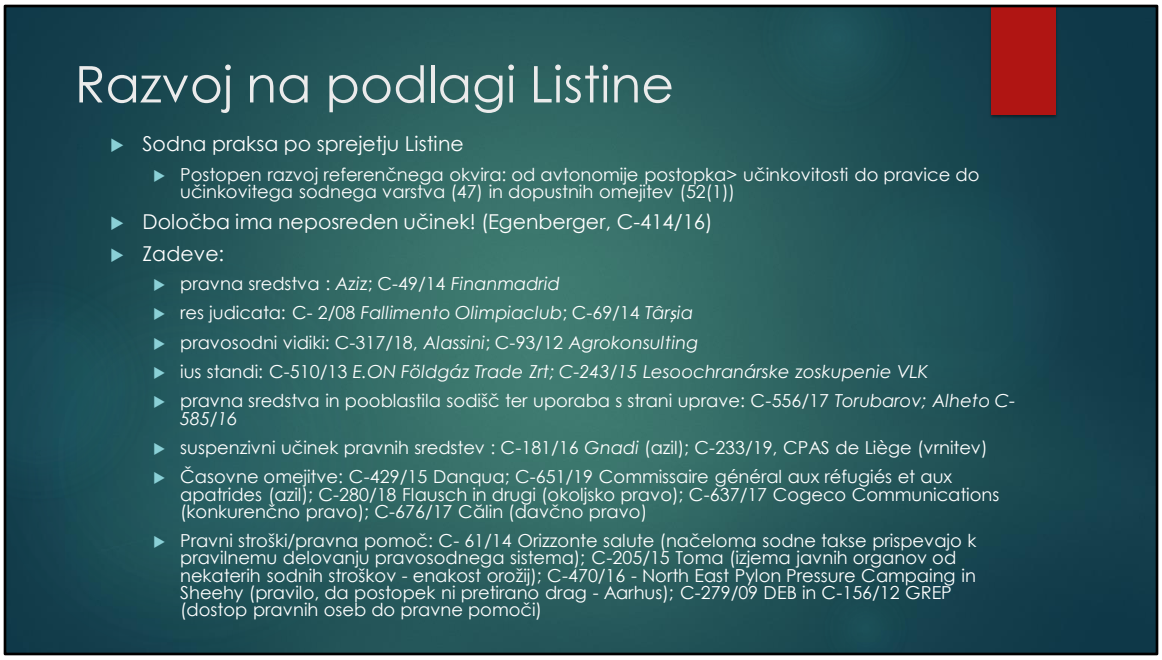
Člen 19 se je pokazal kot močan pravni vir, ki se neposredno izvaja v državi članici zunaj področja uporabe Listine v zvezi z nekaterimi sestavnimi deli člena 47 Listine (elementi, povezani z neodvisnostjo sodstva). Treba je še ugotoviti, ali se ta razvoj uporablja tudi za druge sestavne dele člena 47.

Listina: utrditev načela učinkovitega sodnega varstva

- Stalna razprava o področju uporabe člena 47 Listine:
- …. „Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico …“

Ali to pomeni drugačno osebno področje uporabe, kot je določeno v členu 51(1) Listine?

- za razpravo glej sklepne predloge generalnega pravobranilca Bobeka v zadevi Asociația „Forumul Judecătorilor din România“ C-83/19 , odstavek 196 in naslednji.



Seznam primerov je obsežen, saj je 47. člen Listine najširše razlagana določba Listine.

Za popolnejši opis sodne prakse v zvezi s členom 47 si lahko ogledate zbirnik sodne prakse na naslednji povezavi:

https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_1/data/index_1_04_03_47.htm

Načelo procesne avtonomije in njegove omejitve

- Izhodišče: načelo institucionalne in postopkovne avtonomije držav članic (33/76, *Rewe*)
  - "domači pravni sistem vsake države članice mora določiti pristojna sodišča in procesne pogoje za tožbe, katerih namen je zagotoviti varstvo pravic državljanov pred neposrednim učinkom prava [EU]".

- Omejitve :
  - Enakovrednost: postopkovna pravila, ki urejajo ukrepe za zaščito pravic posameznika v skladu s pravom EU, **ne smejo biti manj ugodna od** tistih, ki urejajo podobne nacionalne ukrepe.
  - Učinkovitost: postopkovna pravila, ki urejajo ukrepe za zaščito pravic posameznika v skladu s pravom EU, ne smejo v **praksi onemogočati** ali **pretirano oteževati** uveljavljanja pravic, ki jih podeljuje pravo EU.

Načelo procesne avtonomije in njegove omejitve

- Po Listini:
  - Razprava o razmerju med "načelom" učinkovitosti in načelom učinkovitega sodnega varstva
    - Glej npr. Alassini C-317/08
  - Kritično stališče do omejevanja avtonomije postopka na podlagi pravila „učinkovitosti“

Če vas ta tema zanima, je bila razprava obsežno razvita v okviru doktrine.

Glej na primer:

S. PRECHAL in R. WIDDERSHOVEN: „Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection“, Review of European Administrative Law, 2011, Vol. 4, n° 2.

KROMMENDIJK, J., „Is there Light on the Horizon? The Distinction between "Rewe-effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte“, CMLR, 2016, Vol. 53.

SAFJAN, M. in DÜSTERHAUS, D., „A Union of Effective Judicial Protection : Addressing a Multi-level Challenge through the Lens of Article 47 CFREU“, Yearbook of European Law, 2014, Vol. 33, n° 1

Meje učinkovitosti / učinkovito sodno varstvo

- Omejitve / tehtanje
  - Z drugimi pravnimi načeli:
    - Pravna varnost (glej zgoraj sodno prakso o pravnomočnosti ali spodaj sodno prakso o zastaranju).
    - Učinkovito izvajanje sodne oblasti; ekonomičnost postopka; postopkovni vidiki: C-619/10; C-73/16 *Puškár;* C-685/15 *Online Games*
  - Z drugimi temeljnimi pravicami
    - Svoboda in varnost: C-752/18 *Deutsche Umwelthilfe*
  - Drugi interesi, vrednote
    - Javna varnost: C-300/11 - ZZ
    - Finančni interesi Unije - (glej sago *Taricco; M.A.S; Kolev; Dzivev*)

Hvala za vašo pozornost!

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The content of this publication represents the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Practical exercise and group work:

Application of EU secondary law in light of the Charter procedural provisions in CJEU preliminary ruling proceedings

Case-study

A Facts:

Mr. XY comes from Strangia a third State which is not a member of the EU. In August 2018, after violent attacks were perpetrated in Strangia against the ethnic minority to which Mr. XY is a member, he fled the country and presented himself at the border of the Kingdom of Fingrelia, an EU country. When he was checked at the border, he did not have any documents, and he immediately submitted an application for international protection on account of the alleged risks to his life in his country of origin.

In January 2019, Fingrelian administrative authorities, after having found the application of Mr. XY for international protection admissible, rejected it on the grounds that, due to recent developments in Strangia, it was unlikely that he would be the subject of persecution in the future. The administrative authorities included in the decision a return decision ordering the applicant to return to his country of origin and banning him from coming back to and from residing in the Kingdom of Fingrelia during the next two years (the first administrative decision).

In February 2019, Mr. XY lodged an appeal against the first administrative decision with the Fingrelian first instance administrative court. That court annulled the administrative decision by judgement of 15 June 2019 and ordered the administrative authorities to conduct a new procedure and take a new decision (the first judgement). That judgement was based on procedural defects, lack of motivation, as well as on a different material assessment of the developments in Strangia.

Following the first judgement, the administrative authorities adopted again an almost identical administrative decision in December 2019 (the second administrative decision). The applicant lodged an appeal against the second administrative decision. Due to the COVID pandemic, the examination of his case was put on hold until September 2020. Then, once more, the applicant won the case, having the second administrative decision annulled by the first instance administrative court by judgement of 3 October 2020. Following that second judgement, the administrative authorities adopted on 15 March 2021, for the third time, an administrative decision with a content materially identical to the first administrative decision, and included an order to remove the applicant from the Fingrelian territory (the third administrative decision).

Mr. XY has lodged an appeal against the third administrative decision which is now pending before the Fingrelian first instance administrative court (the referring court).

The referring court is examining, for the third time, the appeal lodged by the applicant. There are new procedural provisions that apply to the proceedings, due to newly applicable procedural provisions. First, the national legislation mandates the referring court to take a decision in 20 days. Second, the national legislation allows the national court only to review manifest errors of formal character in the administrative decision. Third, the appeal of the applicant now does not have suspensive effect, and he may be removed from Fingrelian territory even when court proceedings are still pending. Fourth, there is only the possibility to appeal against the decision of the referring court during a period of 8 days after the decision has been taken.

In those circumstances, the referring court is considering the possibility to ask for a preliminary ruling to the Court of Justice. However, the referring court has doubt as to the practical effects that that preliminary ruling could have, given that, under national law, administrative courts do not have the power to vary the decisions of administrative authorities, but can only order them to reexamine the issue and make a new decision. In the present case, the referring court has already referred back the case to administrative authorities twice, and they always come back with an almost identical decision.

B EU secondary law:

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60)

- Recitals :

"(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(50) It reflects a basic principle of Union law that the decisions taken on an application for international protection … are subject to an effective remedy before a court or tribunal.

…

(60) This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly.'

- Article 46: The right to an effective remedy

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:
(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
(ii) considering an application to be inadmissible pursuant to Article 33(2);

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

…

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

…

8. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

10. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

…"

C Questions for discussion:

1. <u>Identification of problems and applicable rules:</u>

   a) Which are the different aspects that may be problematic in terms of "effective judicial protection"?
   b) Why may those aspects pose problems with regard to the standards of the Charter?

2. <u>Justification and balancing:</u>

a) Which are the different interests/principles at issue, to be taken into account in the assessment of the potential limitations of Charter rights and the balancing exercise?
b) How could the national authorities try justify the national procedural rules at issue?
c) Would any of those justifications be admissible and what would be your normative framework for assessing those justifications?

3. <u>Articulating the legal problems:</u>

   Which questions could the Administrative Court pose to the Court of Justice? (Each group to propose at least 3 questions)

4. Remedies and practical solution to the case:

a) How would you resolve the case?
b) Which role would the Charter have regarding the interpretation of the provisions of secondary law?
c) Would you leave any of the national provisions disapplied, and on the basis of which rule of EU law?

Financira ga program Evropske unije za pravosodje (2014-2020).

Vsebina te publikacije izraža le stališča avtorja in je njegova izključna odgovornost. Evropska komisija ne prevzema nikakršne odgovornosti za morebitno uporabo informacij, ki jih vsebuje.

Praktične vaje in skupinsko delo:

Uporaba sekundarnega prava EU ob upoštevanju postopkovnih določb Listine v postopkih predhodnega odločanja Sodišča EU

Študija primera

Dejstva:

Gospod XY prihaja iz Strangije, tretje države, ki ni članica EU. Avgusta 2018 je po nasilnih napadih na etnično manjšino, katere je pripadnik, pobegnil iz države in se zglasil na meji Kraljevine Fingrelie, države EU. Ko so ga preverili na meji, ni imel nobenih dokumentov, zato je takoj vložil prošnjo za mednarodno zaščito zaradi domnevne nevarnosti za svoje življenje v izvorni državi.

Upravni organi Fingrelije so januarja 2019, potem ko so ugotovili, da je prošnja gospoda XY za mednarodno zaščito dopustna, prošnjo zavrnili, ker zaradi nedavnih dogodkov v Strangiji ni verjetno, da bi bil v prihodnosti predmet preganjanja. Upravni organi so v odločbo vključili odločbo o vrnitvi, s katero so prosilcu odredili vrnitev v izvorno državo ter mu prepovedali vrnitev in bivanje v Kraljevini Fingreliji v naslednjih dveh letih (prva upravna odločba).

Gospod XY je februarja 2019 vložil pritožbo zoper prvo upravno odločbo pri upravnem sodišču prve stopnje v Fingreliji. To sodišče je s sodbo z dne 15. junija 2019 upravno odločbo razveljavilo in upravnim organom naložilo, naj izvedejo nov postopek in sprejmejo novo odločbo (prva sodba). Ta sodba je temeljila na procesnih pomanjkljivostih, pomanjkanju obrazložitve in tudi na drugačni materialni presoji dogajanja v Strangiji.

Upravni organi so decembra 2019 po prvi sodbi ponovno sprejeli skoraj enako upravno odločbo (druga upravna odločba). XY je zoper drugo upravno odločbo vložil pritožbo. Zaradi pandemije COVID je bila obravnava njegove zadeve odložena do septembra 2020. Nato je XY ponovno zmagal v zadevi, saj je upravno sodišče prve stopnje s sodbo z dne 3. oktobra 2020 razveljavilo drugo upravno odločbo. Upravni organi so po tej drugi sodbi 15. marca 2021 tretjič sprejeli upravno odločbo, ki je bila vsebinsko enaka prvi upravni odločbi in je vključevala odredbo o odstranitvi pritožnika z ozemlja Fingrelije (tretja upravna odločba).

Gospod XY je zoper tretjo upravno odločbo vložil pritožbo, ki je v postopku pred upravnim sodiščem prve stopnje v Fingreliji (v nadaljnjem besedilu: predložitveno sodišče).

Predložitveno sodišče tretjič obravnava pritožbo, ki jo je vložil XY. V postopku se uporabljajo nove procesne določbe, in sicer zaradi na novo veljavnih procesnih določb. Prvič, nacionalna zakonodaja predložitvenemu sodišču nalaga, da mora odločiti v 20 dneh. Drugič, nacionalna zakonodaja

nacionalnemu sodišču dovoljuje le pregled očitnih napak formalne narave v upravni odločbi. Tretjič, pritožba XY sedaj nima odložilnega učinka in je lahko odstranjen z ozemlja Fingrelije, tudi če sodni postopek še poteka. Četrtič, zoper odločbo predložitvenega sodišča je mogoče vložiti pritožbo le v roku osmih dni po sprejetju odločbe.

V teh okoliščinah predložitveno sodišče preučuje možnost, da bi Sodišču Evropske unije predlagalo sprejetje predhodne odločbe. Vendar predložitveno sodišče dvomi o praktičnih učinkih, ki bi jih lahko imela ta predhodna odločba, glede na to, da v skladu z nacionalnim pravom upravna sodišča niso pristojna za spremembo odločb upravnih organov, temveč jim lahko le naložijo, naj ponovno preučijo zadevo in sprejmejo novo odločitev. V obravnavani zadevi je predložitveno sodišče že dvakrat vrnilo zadevo v ponovno odločanje upravnim organom, ki so vedno izdali skoraj enako odločbo.

B Sekundarno pravo EU:

Direktiva 2013/32/EU Evropskega parlamenta in Sveta z dne 26. junija 2013 o skupnih postopkih za priznanje ali odvzem mednarodne zaščite (UL L 180, str. 60).

- Uvodne izjave:

„(18) V interesu držav članic in prosilcev za mednarodno zaščito je, da se odločitev o prošnjah za mednarodno zaščito sprejme čim prej, brez poseganja v ustrezno in celovito obravnavo.

…

(50) V skladu s temeljnim načelom prava Unije je, da je zoper odločbe v zvezi s prošnjami za mednarodno zaščito, [...] na razpolago učinkovito pravno sredstvo pred sodiščem

[…]

(60) Ta direktiva spoštuje temeljne pravice in upošteva načela, ki so priznana z Listino. Namen te direktive je zlasti zagotoviti dosledno spoštovanje človeškega dostojanstva in spodbujati uporabo členov 1, 4, 18, 19, 21, 23, 24 in 47 Listine ter jo je treba temu ustrezno izvajati.

- Člen 46: Pravica do učinkovitega pravnega sredstva

1.Države članice zagotovijo, da imajo prosilci pravico do učinkovitega pravnega sredstva pred sodiščem zoper:

(a) odločbo, izdano v zvezi z njegovo prošnjo za mednarodno zaščito, vključno z odločbo:

(i) o neutemeljenosti prošnje v zvezi s statusom begunca in/ali subsidiarne zaščite,

(ii) o nedopustnosti prošnje v skladu s členom 33(2),

(iii) sprejeto na meji ali v tranzitnih območjih države članice, kot je opisano v členu 43(1); […]

3. Države članice zaradi spoštovanja odstavka 1 zagotovijo, da učinkovito pravno sredstvo vsaj v pritožbenih postopkih pred sodiščem prve stopnje zagotavlja podrobno in ex nunc presojo dejstev in pravnih vprašanj, po potrebi vključno s presojo potreb po mednarodni zaščiti v skladu z Direktivo 2011/95/EU.

4. Države članice določijo razumne roke in druga potrebna pravila za uveljavljanje pravice prosilca do učinkovitega pravnega sredstva v skladu z odstavkom 1. Roki prosilcem ne smejo onemogočiti ali pretirano otežiti takega uveljavljanja.

[…]

5. Brez poseganja v odstavek 6 države članice prosilcem dovolijo, da ostanejo na njihovem ozemlju do izteka roka, v katerem lahko uveljavljajo svojo pravico do učinkovitega pravnega sredstva in, če so tako pravico v tem roku uveljavljali, pa do zaključka postopka s pravnim sredstvom.

[…]

8. Države članice prosilcu dovolijo, da ostane na njihovem ozemlju do zaključka postopka iz odstavkov 6 in 7, v katerem se odloča, ali lahko ostane na njihovem ozemlju.

10. Države članice lahko določijo roke, v katerih mora sodišče v skladu z odstavkom 1 preučiti odločbe organa za presojo.

[…]“

C Vprašanja za razpravo:

1. <u>Opredelitev težav in veljavnih pravil:</u>

   a) Kateri so različni vidiki, ki so lahko problematični z vidika učinkovitega sodnega varstva?
   b) Zakaj lahko ti vidiki povzročajo težave v zvezi s standardi Listine?

2. <u>Utemeljitev in tehtanje:</u>

   a) Katere različne sporne interese/načela je treba upoštevati pri presoji morebitnih omejitev pravic iz Listine in tehtanju?
   b) Kako bi lahko nacionalni organi poskušali utemeljiti zadevna nacionalna postopkovna pravila?
   c) Ali bi bila katera od teh utemeljitev dopustna in kakšen bi bil vaš normativni okvir za presojo teh utemeljitev?

3. <u>Utemeljitev pravnih težav:</u>

   Katera vprašanja bi lahko upravno sodišče postavilo Sodišču EU? (Vsaka skupina naj predlaga vsaj 3 vprašanja)

4. <u>Pravna sredstva in praktična rešitev primera:</u>

   a) Kako bi rešili zadevo?
   b) Katero vlogo bi imela Listina pri razlagi določb sekundarnega prava?
   c) Ali bi dopustili, da se katera od nacionalnih določb ne uporablja in, če ja, na podlagi katerega pravila prava EU?

Applying the Charter of Fundamental Rights of the EU
Focus on the right to a fair trial, Ljubljana, 27-28 September 2021

The use of Article 47(2) of the Charter on the Right to an Oral (Public) Hearing: Five-Steps Methodological Approach

Boštjan Zalar

(extracts from oral presentation with references)

1.Right to an effective remedy and to a fair trial (Article 47(1) and (2) Charter):

„Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

„Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

2.The first (methodological) step: Does national court implement EU law in a particular case (51(1) Charter)?

Examples of "implementation" of EU law or when the national legislation falls within the scope of EU law:

- The tax penalties and criminal proceedings to which Mr Åkerberg Fransson is subject "*are connected in part"* to breaches of his obligations to declare VAT; there is *a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources; any lacuna in the collection of the first potentially causes a reduction in the second.*[1]
- Member State which exercises discretionary power conferred by Dublin Regulation 343/2003 must be considered as implementing EU law.[2]

3.The second (methodological) step: taking into account the text of (secondary) EU law on the right to effective legal remedy

Examples of secondary EU legal texts on the right to legal remedy:

[1] Åklagaren, C-617/10, paras. 19-26.

[2] N.S. and M.E.,C-411/10 and C-493/10, paras. 66-68.

- **Protection of personal data (Regulation 2016/679):** Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have "*the right to an effective judicial remedy"* where he or she considers that his or her rights under this Regulation have been infringed (Article 79(1)).
- **Consumer Protection Article 7(1) of the Directive 93/13/ES on unfair terms in consumer contracts:** Member States shall ensure that, in the interests of consumers and of competitors, "*adequate and effective means"* exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The means referred to in paragraph 1 shall include provisions whereby persons */.../ "may take action according to the national law concerned before the courts"* or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms. *"*
- **Protection of environment (Article 9(2) and (4) Aarhus Convention; C-243/15, paras. 55, 62):** Each Party shall, within the framework of its national legislation, ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a party requires this as a precondition, *"have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission" /.../.* The procedures shall provide *"adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts /.../ shall be publicly accessible."*
- **Criminal law (Directive 2016/343 on presumption of innocence and the right to be present at the trial in criminal proceedings):** Member States shall ensure that suspects and accused persons „*have the right to be present"* at their trial (Article 8(1); see also Recital 41).[3] Exceptions are regulated in Articles 7(6) and 8(2). Member States shall ensure that suspects and accused persons *„have an effective remedy*" if their rights under this Directive are breached (Article 10(1)).
- **Asylum (Procedures Directive 2013/32/EU):** Member States shall ensure that an effective remedy (against the decision of administrative authority) provides for *„a full and ex nunc examination of both facts and points of law"* (Article 46(3)).

[3]Recital 41 says that the right to be present at the trial can be exercised only if one or more hearings are held and that national rules should comply with the Charter and with the ECHR, as interpreted by the CJEU and by the ECtHR, in particular with regard to the right to a fair trial (see also recitals 34, 35 and 44).

4.The third (methodological) step: checking the text of secondary EU law on the right to effective legal remedy from the perspective of Article 47 Charter

- */.../ characteristics of the effective legal remedy from the secondary EU law must be determined in a manner that is consistent with Article 47 of the Charter",*[4]
- there cannot be situations which are covered by EU law without fundamental rights from the Charter being applicable.[5]
- article on effective legal remedy in EU directive in conjunction with Article 47 Charter have a direct effect;[6] Article 47 Charter „*is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such;"*[7]
- Article 47 Charter is applicable also in (horizontal) disputes between private parties.[8]

5.The continuation of the third step and towards the fourth (methodological) step:

- checking whether the CJEU has already interpreted a particular provision in secondary EU law on the right to effective legal remedy, including oral (public) hearing

or (in case of procedural autonomy)

- using of equivalence and effectiveness as general principles of EU law[9] in conjunction with case law of the ECtHR on the right to an oral (public) hearing based on Article 6 ECHR.

6.The fourth (methodological) step: the use of case law of the ECtHR:

- According to Article 6(3) TEU fundamental rights recognised by the ECHR constitute general principles of the European Union's law.
- According to Article 52(3) Charter rights contained in the Charter which correspond to rights guaranteed by the ECHR are to be given the same meaning and scope as those laid down by the ECHR[10] in order to ensure the „*necessary consistency between the Charter and the ECHR,*

[4] C-924/19 PPU, C-925/19 PPU, FMS and others, 14. 5. 2020, paras. 126-128; see also: J.N., C-601/15 PPU, paras. 48, 60; Torubarov, C-556/17, para. 55.

[5] Åklagaren, C-617/10, paras. 19-26; see also: Berlioz, C-682/15, paras. 43-52.

[6] See, for example: Torubarov, C-556/17, para. 73.

[7] Egenberger, C-414/16, para. 78; Torubarov, C-556/17, para. 56; A.K. and others, C-585/18, C-624/18 and C-625/18, para. 162.

[8] See: Egenberger, C-414/16.

[9] See, for example: LH, C-564/18, paras. 62-77.

[10] Åklagaren, C-617/10, para. 44; J.N., C-601/15 PPU, para. 45.

without thereby adversely affecting the autonomy of Union law and that of the CJEU;[11]

- CJEU already decided that Article 47(1) Charter is based on Article 13 ECHR[12] and that Article 47(2) Charter corresponds to Article 6(1) ECHR.[13]

7.The case of Moussa Sacko (C-348/16) as an example of the interplay between case law of the CJEU and ECtHR on the right to an oral hearing:

a.) Art. 46(3) of the Procedures Directive 2013/32/EU: Member State shall ensure that an effective remedy provides for *„a full and ex nunc examination of both facts and points of law including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance."*

b.) The principle of effective judicial protection of the rights which individuals derive from EU law „*comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented".*[14]

c.) With regard to the proceedings at administrative authority the applicant has the rights of defence,[15] in particular, the right to be heard, which guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely;[16] the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.[17]

d.) Failure to give the applicant the opportunity to be heard in court proceedings constitutes a restriction of the rights of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter.[18]

e.) Fundamental rights, such as respect for the rights of the defence, which includes the right to be heard, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they

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[11] J.N., C-601/15 PPU, para. 47.

[12] Tall, C-239/14, para. 52.

[13] DEB, C-279/09, para. 32. See also: Berlioz, C-682/15, para. 54; Otis, and others, C-199/11, paras. 46-47; C-205/15, para. 40.

[14] Moussa Sacko, C-348/16, para. 32.
[15] Ibid. para. 33.
[16] Ibid. para. 34.
[17] Ibid. para. 35.
[18] Ibid. para. 37.

do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. An interpretation of the right to be heard, /.../ to the effect that it is not an absolute right is confirmed by the case-law of the ECtHR in the light of which Article 47 of the Charter must be interpreted, as the first and second paragraphs of that article correspond to Article 6(1) and Article 13 of the ECHR.[19]

f.) Article 6(1) ECHR does not impose an absolute obligation to hold a public hearing and does not necessarily require that a hearing be held in all proceedings. Neither the second paragraph of Article 47 of the Charter nor any other provision thereof imposes such an obligation.[20]

g.) The question whether there is an infringement of the rights of the defence and the right to effective judicial protection „*must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question.*"[21]

h.) The obligation imposed in Article 46(3) of Directive 2013/32 on the court with jurisdiction to ensure that a full and *ex nunc* examination of both facts and points of law must be interpreted in the context of the procedure for the examination of applications for international protection as a whole, as governed by that directive, "*taking into account the close link the between appeal proceedings before a court or tribunal and the proceedings at first instance preceding during which the applicant must be given the opportunity of a personal interview"* on his or her application for international protection, as required by Article 14 of the directive.[22]

i.) It is only if that court or tribunal considers that it is in a position to carry out such an examination solely on the basis of the information in the case-file, including, where applicable, the report or transcript of the personal interview with the applicant in the procedure at first instance, that it may decide not to hear the applicant in the appeal before it. In such circumstances, the possibility of not holding a hearing is in the interest of both the Member States and applicants /.../ to have a decision made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.[23]

j.) This is supported by the case-law of the ECtHR to the effect that „*there is no need for a hearing where the case does not raise any questions of fact or law that cannot be adequately resolved by referring to the file and the written submissions of the parties (judgment of 4 June 2015, Andechser Molkerei Scheitz v Commission, C-682/13 P, not published, EU:C:2015:356, paragraph 46, which refers to the judgment of the ECtHR of 12 November 2002, Döry v.Sweden,*

[19]Ibid. para. 38-39.
[20]Ibid. para. 40; see also: Andechser Molkerei Scheitz v . Commission, C-682/13 P, para. 44.
[21]Moussa Sacko, C-348/16, para. 41.
[22]Ibid. para. 42. See also: Alheto, C-585/16, paras. 127, 130.
[23]Moussa Sacko, C-348/16, para. 44; see also para. 45.

CE:ECHR:2002:1112JUD002839495, § 37).“[24]

k.) The court may dismiss the appeal without hearing the applicant “*where the factual circumstances leave no doubt”* as to whether that decision was well founded.[25]

Compare the example of Moussa Sacko with the interplay between case law of the CJEU and ECtHR in the field of criminal law in the case of TX, UW, C-688/18, 13 February 2020, paras. 29-49.

8.Continuation of the fourth (methodological) step: selection of concrete criteria/standards for oral hearing from the relevant case law of the ECtHR:

- criminal law: Article 6(3)(c) and (d) ECHR and Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb), Council of Europe, 30 April 2021, pp. 54-60;
- civil law: Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), Council of Europe, Updated to 31 December 2020, pp. 46-60;
- administrative law: *Ramos Nunes de Carvalho E Sá v Portugal* [GC], 6 Nov. 2018.

9.Example of concrete set of criteria/standards for oral hearing (Ramos Nunes de Carvalho E Sá v Portugal, [GC], App. nos. 55391/13, 57728/13 and 74041/13, 6. Nov. 2018):

Exceptional circumstances may justify dispensing with a (public) hearing, where:

- there are no issues of credibility or contested facts and the court may fairly and reasonably decide the case on the basis of the case file,
- in cases raising purely legal issues of limited scope,
- if the case concerns highly technical issues /.../ which may be better dealt with in writing than in oral argument; for example, in the sphere of social-security national authorities are entitled, having regards to the demands of efficiency and economy, dispensing with a hearing, as systematically holding hearings may be an obstacle to the particular diligence required.

By contrast a hearing is necessary, where:

- there is a need to assess whether the facts were correctly established,
- the circumstances require the court to form its own impression of litigants by affording

[24]Ibid. para. 47.
[25]Ibid. para. 49.

then a right to explain their personal situation on their own behalf or through a representative,

- the court needs to obtain clarification on certain points.[26]

10.Further criteria/standards for having or not having an oral hearing:

- **Article 53 ECHR:** For eventual violation of Article 6 on the right to oral (public) hearing it is relevant that national courts respect rules of national law on oral public hearing, because nothing in the ECHR shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.
- **Standard of „sufficient review" in administrative disputes:**[27] As regards the method of review, the ECtHR has consistently acknowledged that the domestic courts cannot be required under Article 6 to be able to substitute their own assessment or findings for those of the competent administrative authority. Consequently, judicial scrutiny may be confined to a review of the administrative acts and proceedings, without fresh decisions having to be taken, especially on the facts of the case. Accordingly, the judicial body conducting the review has been recognised as having "full jurisdiction", within the autonomous meaning of Article 6(1) ECHR, even if it does not conduct a re-examination and reassessment of the evidence, including a rehearing of witnesses, but confines itself to verifying – particularly from the standpoint of relevance, sufficiency and coherence – the facts and evidence on which the administrative decision under review was based.[28] This holds even in the context of proceedings concerning administrative sanctions falling under the criminal limb.[29]
- **Oral (public) hearing at one judicial instance:** The right to a public hearing under Article 6 (1) ECHR implies a right to an oral hearing before at least one instance. The absence of a hearing at second or third instance may be justified by the special features of the proceedings concerned, provided a hearing has been held at first instance. The lack of a public hearing at first instance may be remedied if a public hearing is held at the appeal stage, provided that the scope of the appellate proceedings extends to matters of law and fact.[30]

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[26] Ramos Nunes de Carvalho E Sá v Portugal, paras. 190-191.

[27]See: Sigma Radio Television Ltd. v. Cyprus, App. nos. 32181/04 and 35122/05, para. 152; Ramos Nunes de Carvalho E Sá v Portugal, para. 177

[28]Ramos Nunes de Carvalho E Sá v Portugal, Joint concurring opinion of Judges Raimondi, Nussberger, Jäderblom, Møse, Poláčková and Koskelo v zadevi Ramos Nunes Carvalho E Sa v. Portugal, para. 11

[29]Ibid. para. 18.

[30] Ramos Nunes de Carvalho E Sá v Portugal, para. 192; Xhoxaj v Albania, App. no. 15227/19, para. 339. In criminal law at the second instance court proceedings, the case law of the ECtHR distinguishes between the situation whether the appeal court simply gives a different legal interpretation, this includes if it merely made another application of the law to the facts already established at the first instance court, or the appeal court carries out a fresh evaluation

- **Decision on inadmissibility of evidence:** A national court is under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant. Article 6 ECHR requires the domestic courts to adequately state the reasons on which their decisions are based, this includes decision for not accepting new evidence which the applicant had submitted. This obligation presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question.[31] Even in criminal law, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial.[32]
- **Necessary argumentation for not having an oral hearing:** The national court must provide explanation in the judgment why new evidence and facts were not relevant for the decision in question. In the absence of any explanation as to which facts and evidence the national court considered new, and why it found them irrelevant, it is difficult for the ECtHR to ascertain how that court's reasons for dismissing the applicant's request for a hearing were interpreted against the factual background of the case.[33]

11.The fifth (methodological) step: Interpretation of national law in conformity with EU law (sincere cooperation - Article 4(3) TEU)

- Member States must interpret their national law in a manner consistent with EU law.[34]
- National courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not thereby compromised.[35]
- In case of a conflict between provisions of domestic law and rights guaranteed by the Charter a national court is under a duty to give full effect to the provisions of the Charter, if necessary

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of facts beyond purely legal considerations which are decisive for the determination of the applicant's guilt (Igual Coll v. Spain, para. 36, Spînu v. Romania, para. 55-59).

[31] Xhoxaj v Albania, App. no. 15227/19, paras. 326-327, 335, 344; Perez v. France, App. no. 47287/99, para. 80; Ramos Nunes de carvalho E Sá v Portugal, para. 185.

[32] See: Poletan and Azirovik v. The former Yugoslav Republic of Macedonia, App. nos. 26711/07, 32786710 and 34278/10, para. 95.

[33] Cimperšek v. Slovenia, App. no. 58512/16, para. 45; see also: Mirovni Institute v. Slovenia, App. no. 32303/13, para. 44.

[34] N.S. and M.E.,C-411/10 and C-493/10, para. 77.

[35] Åklagaren, C-617/10, para. 29.

refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.[36] In addition, any administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules which have direct effect, from having full force and effect are incompatible with those requirements, which are the very essence of EU law.[37]

[36] Åklagaren, C-617/10, para. 45.

[37] Torubarov, C-556/17, para. 73.

Uporaba Listine EU o temeljnih pravicah
Poudarek na pravici do poštenega sojenja, Ljubljana, 27. in 28. september 2021

Uporaba člena 47(2) Listine o pravici do ustne (javne) obravnave: Metodološki pristop petih korakov

Boštjan Zalar

(izvlečki iz ustne predstavitve z referencami)

1. Pravica do učinkovitega pravnega sredstva in poštenega sojenja (prvi in drugi odstavek 47. člena Listine):

„Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu.

Vsakdo ima pravico, da o njegovi zadevi pravično, javno in v razumnem roku odloča neodvisno, nepristransko in z zakonom predhodno ustanovljeno sodišče. Vsakdo ima možnost svetovanja, obrambe in zastopanja.“

2. Prvi (metodološki) korak: Ali nacionalno sodišče v konkretnem primeru izvaja pravo EU (51(1) Listine)?

Primeri „izvajanja“ prava EU ali ko nacionalna zakonodaja spada na področje uporabe prava EU:

- Davčne globe, ki so bile naložene H. Åkerbergu Franssonu, in kazenski pregon, ki je bil sprožen zoper njega, so *„deloma povezani z njegovim neizpolnjevanjem obveznosti prijavljanja podatkov v zvezi z DDV /.../ obstaja neposredna zveza med pobiranjem prihodkov od DDV ob spoštovanju prava Unije, ki se uporabi, in dajanjem ustreznih virov iz naslova DDV na razpolago proračunu Unije, saj lahko vsaka vrzel pri pobiranju prvih povzroči zmanjšanje drugih*.“[1]
- Za državo članico, ki izvaja diskrecijsko pravico, podeljeno z Dublinsko uredbo 343/2003, je treba šteti, da izvaja pravo EU.[2]

3. Drugi (metodološki) korak: upoštevanje besedila (sekundarnega) prava EU o pravici do učinkovitega pravnega sredstva

Primeri sekundarnih pravnih besedil EU o pravici do pravnega sredstva:

- **Varstvo osebnih podatkov (Uredba 2016/679):** *„Brez poseganja v katero koli razpoložljivo upravno ali izvensodno sredstvo, vključno s pravico do vložitve pritožbe pri*

[1] Åklagaren, C-617/10, točke 24, 26.
[2] N.S. in M.E., C-411/10 in C-493/10, točke 66-68.

nadzornem organu na podlagi člena 77, ima vsak posameznik, na katerega se nanašajo osebni podatki, pravico do učinkovitega pravnega sredstva, kadar meni, da so bile njegove pravice iz te uredbe kršene (člen 79(1))."

- **Varstvo potrošnikov (Direktiva 93/13/ES o nedovoljenih pogojih v potrošniških pogodbah):** *„Države članice zagotovijo, da v interesu potrošnikov in konkurentov obstajajo ustrezna in učinkovita sredstva za preprečevanje nadaljnje uporabe nedovoljenih pogojev v pogodbah, ki jih s potrošniki sklenejo prodajalci ali ponudniki. Sredstva, navedena v odstavku 1, vključujejo predpise, na podlagi katerih lahko osebe [...] ukrepajo v skladu z zadevnim nacionalnim pravom na sodiščih ali pri pristojnih upravnih organih, da odločijo, ali so pogodbeni pogoji, sestavljeni za splošno rabo, nedovoljeni, tako da lahko uporabijo* ustrezna in učinkovita sredstva *za preprečevanje nadaljnje uporabe takih pogojev"* (člen 7(1)).
- **Varstvo okolja (člen 9(2) in (4) Aarhuške konvencije; C-243/15, točki 55 in 62):** Pogodbenica v okviru svoje notranje zakonodaje zagotavalja, da imajo člani vključene javnosti, ki imajo zadosten interes, ali ki trdijo, da je bila kršena njihova pravica, če se to zahteva kot pogoj po upravnem postopkovnem pravu pogodbenice, *„dostop do revizijskega postopka pred sodiščem in/ali drugim neodvisnim in nepristranskim telesom, določenim z zakonom, da izpodbijajo stvarno in postopkovno zakonitost katere koli odločitve, dejanja ali opustitve*" [...]. Postopki morajo zagotavljati *„ustrezna in učinkovita pravna sredstva, vključno s sodno prepovedjo, če je ta primerna, in biti morajo pošteni, pravični, pravočasni in ne pretirano dragi. Odločitve po tem členu morajo biti izdane ali evidentirane v pisni obliki. Odločitve sodišč [...] morajo biti javno dostopne.*"
- **Kazensko pravo (Direktiva (EU) 2016/343 o domnevi nedolžnosti in pravici biti navzoč na sojenju v kazenskem postopku):** Države članice zagotovijo, da imajo osumljene in obdolžene osebe *„pravico biti navzoče*" na svojem sojenju (člen 8(1); glej tudi uvodno izjavo 41).[3] Izjeme so urejene v členih 7(6) in 8(2). Države članice zagotovijo, da imajo osumljene in obdolžene osebe *„učinkovito pravno sredstvo*", če so kršene njihove pravice iz te direktive (člen 10(1)).
- **Azil (Direktiva 2013/32/EU o postopkih):** Države članice zagotovijo, da učinkovito pravno sredstvo (zoper odločitev upravnega organa) zagotavlja *„podrobno in ex nunc presojo dejstev in pravnih vprašanj*" *(*člen 46(3)).

[3]V uvodni izjavi 41 je navedeno, da se pravica biti navzoč na sojenju lahko uveljavlja le, če sojenje vključuje enega ali več narokov, ter da morajo biti nacionalna pravila skladna z Listino in EKČP, kakor jih razlagata Sodišče EU in ESČP, zlasti v zvezi s pravico do poštenega sojenja (glej tudi uvodne izjave 34, 35 in 44).

4. **Tretji (metodološki) korak: preverjanje besedila sekundarne zakonodaje EU o pravici do učinkovitega pravnega sredstva z vidika člena 47 Listine**

- *„[...] značilnosti učinkovitega pravnega sredstva [je treba] določiti v skladu s členom 47 Listine*“, [4]
- Ne morejo obstajati situacije, ki jih ureja pravo EU, ne da bi se pri tem uporabljale temeljne pravice iz Listine.[5]
- Člen o učinkovitem pravnem sredstvu v direktivi EU v povezavi s členom 47 Listine učinkuje neposredno; [6] člen 47 Listine je dovolj *„sam po sebi in ga ni treba pojasnjevati z določbami prava Unije ali nacionalnega prava, da bi se posameznikom podelila pravica, na katero se kot tako lahko sklicujejo;*“ [7]
- Člen 47 Listine se uporablja tudi v (horizontalnih) sporih med zasebnimi strankami.[8]

5. **Nadaljevanje tretjega koraka v smeri četrtega (metodološkega) koraka:**

- Preverjanje, ali je Sodišče EU že razlagalo določeno določbo sekundarnega prava EU o pravici do učinkovitega pravnega sredstva, vključno z ustno (javno) obravnavo

ali (v primeru procesne avtonomije)

- uporaba enakovrednosti in učinkovitosti kot splošnih načel prava EU[9] v povezavi s sodno prakso ESČP o pravici do ustne (javne) obravnave na podlagi člena 6 EKČP.

6. **Četrti (metodološki) korak: uporaba sodne prakse ESČP:**

- V skladu s členom 6(3) PEU so temeljne pravice, ki jih priznava EKČP, splošna načela prava Evropske unije.
- V skladu s členom 52(3) imajo pravice iz Listine, ki ustrezajo pravicam, zagotovljenim z EKČP, enako vsebino in obseg kot tiste, ki jih določa EKČP.[10] S slednjim se zagotovi *„potrebno usklajenost med Listino in EKČP, ne da bi to škodilo avtonomiji prava Unije in Sodišča Evropske unije*“.[11]

[4] C-924/19 PPU, C-925/19 PPU, FMS in drugi, 14. 5. 2020, točke 126-128; glej tudi: J.N., C-601/15 PPU, točki 48 in 60; Torubarov, C-556/17 PPU, točka 55.
[5] Åklagaren, C-617/10, točke 19-26; glej tudi: Berlioz, C-682/15, točke 43-52.
[6] Glej na primer: Torubarov, C-556/17, točka 73.
[7] Egenberger, C-414/16, točka 78; Torubarov, C-556/17, točka 56; A.K. in drugi, C-585/18, C-624/18 in C-625/18, točka 162.
[8] Glej: Egenberger, C-414/16.
[9] Glej na primer: LH, C-564/18, točke 62-77.
[10] Åklagaren, C617/10, točka 44; J.N., C-601/15 PPU, točka 45.
[11] J.N., C-601/15 PPU, točka 47.

- Sodišče EU je že odločilo, da člen 47(1) Listine temelji na členu 13 EKČP[12] in da člen 47(2) Listine ustreza členu 6(1) EKČP.[13]

7. Zadeva Moussa Sacko (C-348/16) kot primer medsebojnega vplivanja in dopolnjevanja sodne prakse ESČP in Sodišča EU glede pravice do ustne obravnave:

a.) Člen 46(3) Direktive 2013/32/EU o postopkih: Države članice zagotovijo, da učinkovito pravno sredstvo *„vsaj v pritožbenih postopkih pred sodiščem prve stopnje zagotavlja podrobno in ex nunc presojo dejstev in pravnih vprašanj, po potrebi vključno s presojo potreb po mednarodni zaščiti v skladu z Direktivo [2011/95]*."

b.) Navedeno načelo učinkovitega sodnega varstva pravic, ki jih imajo posamezniki na podlagi prava Unije, *„je sestavljeno iz različnih elementov, ki zajemajo zlasti pravico do obrambe, načelo enakosti orožij, pravico do dostopa do sodišč ter pravico do svetovanja, obrambe in zastopanja*".[14]

c.) V zvezi s postopkom pred upravnim organom ima prosilec pravico do obrambe,[15] zlasti pravico do izjave, ki vsakomur zagotavlja možnost, da učinkovito izrazi svoja stališča med upravnim postopkom in pred sprejetjem odločitve, ki bi lahko negativno vplivala na njegove interese;[16] pravilo, v skladu s katerim mora biti naslovniku odločbe, ki posega v položaj, omogočeno, da predstavi svoje pripombe, preden bo ta odločba sprejeta, je namenjeno zlasti temu, da lahko ta oseba popravi napako ali navaja elemente v zvezi s svojim osebnim položajem, ki govorijo v prid temu, da naj bo odločba sprejeta, naj ne bo sprejeta ali naj ima določeno vsebino.[17]

d.) To, da prosilec ni bil zaslišan v postopku s pravnim sredstvom pomeni omejitev pravice do obrambe, ki je del načela učinkovitega sodnega varstva, določenega v členu 47 Listine.[18]

e.) Temeljne pravice, kot je spoštovanje pravice do obrambe, vključno s pravico do izjave, ne pomenijo absolutnih upravičenj, ampak so lahko omejene, če te omejitve dejansko ustrezajo ciljem splošnega interesa, ki se uresničujejo z zadevnim ukrepom, in če glede na želeni cilj ne pomenijo pretiranega in nesprejemljivega posega, ki bi ogrožal samo bistvo tako zagotovljenih pravic. Takšna razlaga pravice do izjave […], v skladu s katero ta pravica ni absolutna, je podprta s sodno prakso ESČP, ob upoštevanju katere je treba razlagati navedeni člen 47 Listine, ker prvi in drugi odstavek tega člena ustrezata členu 6(1) in členu 13 EKČP.[19]

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[12]Tall, C-239/14, točka 52.
[13]DEB, C-279/09, točka 32. Glej tudi: Berlioz, C-682/15, točka 54; Otis in drugi, C-199/11, točki 46-47; C-205/15, točka 40.
[14]Moussa Sacko, C-348/16, točka 32.
[15]Ibid. točka 33.
[16]Ibid. točka 34.
[17]Ibid. točka 35.
[18]Ibid. točka 37.
[19]Ibid. točki 38-39.

f.) Člen 6(1) ESČP ne nalaga absolutne obveznosti, da se opravi javna obravnava, in ne zahteva, da se nujno opravi zaslišanje v vseh postopkih. Tudi člen 47(2) Listine ali katera druga njena določba ne določa te obveznosti.[20]

g.) Obstoj kršitve pravice do obrambe in pravice do učinkovitega sodnega varstva je treba *„presojati glede na posebne okoliščine posameznega primera, zlasti glede na vrsto zadevnega akta, okvir, v katerem je bil sprejet, in pravna pravila, ki urejajo zadevno področje.*“[21]

h.) Obveznost pristojnega sodišča iz člena 46(3) Direktive 2013/32, da zagotovi je treba zahtevo glede podrobne in *ex nunc* presoje dejstev in pravnih vprašanj razlagati v okviru celotnega postopka obravnavanja prošenj za mednarodno zaščito, kot ga ureja navedena direktiva, *„pri čemer se upošteva tesna povezava med pritožbenim postopkom pred sodiščem in postopkom na prvi stopnji, ki se opravi predhodno, med katerim mora biti v skladu s členom 14 navedene direktive prosilcu dana možnost osebnega razgovora o njegovi prošnji za mednarodno zaščito*“.[22]

i.) Samo v primeru, da navedeno sodišče oceni, da lahko to presojo opravi zgolj na podlagi podatkov iz spisa, glede na okoliščine primera vključno z zapisnikom ali dobesednim prepisom osebnega razgovora s prosilcem v postopku na prvi stopnji, lahko odloči, da ne bo zaslišalo prosilca v okviru postopka s pravnim sredstvom, ki je bilo vloženo pri njem. V teh okoliščinah se namreč z možnostjo, da se ne opravi zaslišanje, upošteva interes držav članic in prosilcev [...], da se o prošnjah za mednarodno zaščito odloči, kakor hitro je to mogoče, brez poseganja v ustreznost in celovitost obravnave.[23]

j.) Ta ugotovitev je podprta s sodno prakso ESČP, v skladu s katero *„zaslišanje ni potrebno, če se v zadevi ne pojavljajo dejanska ali pravna vprašanja, ki jih ni mogoče ustrezno rešiti na podlagi spisa in pisnih stališč strank (sodba z dne 4. junija 2015, Andechser Molkerei Scheitz/Komisija, C-682/13 P, neobjavljena, EU:C:2015:356, točka 46, ki se sklicuje na sodbo ESČP z dne 12. novembra 2002, Döry proti Švedski, CE:ECHR:2002:1112JUD002839495, točka 37)*“.[24]

k.) Sodišče, tožbo zavrne, ne da bi zaslišalo prosilca, zlasti če *„dejanske okoliščine ne dopuščajo nikakršnega dvoma*“ glede utemeljenosti te zavrnilne odločbe.[25]

Primer Moussa Sacko velja primerjati z medsebojnim vplivom sodne prakse Sodišča EU in ESČP na področju kazenskega prava v zadevi TX, UW, C-688/18, 13. februar 2020, točke 29-49.

[20]Ibid. točka 40; glej tudi: Andechser Molkerei Scheitz proti Komisija, C-682/13 P, točka 44.
[21]Moussa Sacko, C-348/16, točka 41.
[22]Ibid. točka 42. Glej tudi: Alheto, C-585/16, točki 127 in 130.
[23]Moussa Sacko, C-348/16, točka 44; glej tudi točko 45.
[24]Ibid. točka 47.
[25]Ibid. točka 49.

8. **Nadaljevanje četrtega (metodološkega) koraka: izbira konkretnih meril/standardov za ustno obravnavo iz ustrezne sodne prakse ESČP:**

- Kazensko pravo: Člen 6(3)(c) in (d) EKČP in Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb), Council of Europe, 30 April 2021, str. 54-60;
- Civilno pravo: Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), Council of Europe, Updated to 31 December 2020, str. 46-60;
- Upravno pravo: Ramos Nunes de Carvalho E Sá proti Portugalski [Veliki senat], 6. november 2018.

9. **Primer konkretnega sklopa meril/standardov za ustno obravnavo (Ramos Nunes de Carvalho E Sá proti Portugalski, (Veliki senat), pritožbe št. 55391/13, 57728/13 in 74041/13, 6. november 2018):**

Izjemne okoliščine lahko upravičijo opustitev (javne) obravnave, če:

- ni odprtih vprašanj glede verodostojnosti ali o prerekanih dejstvih, sodišče pa lahko o zadevi pravično in razumno odloči na podlagi spisa,
- v zadevah, v katerih se pojavljajo izključno pravna vprašanja omejenega obsega,
- če spora zadeva zelo strokovna vprašanja [...], ki jih je bolje obravnavati pisno kot ustno; na primer na področju socialne varnosti lahko nacionalni organi glede na zahteve učinkovitosti in ekonomičnosti opustijo obravnavo, saj bi sistematično izvajanje obravnav lahko oviralo posebno skrbnost, ki se zahteva pri vodenju postopka.

Nasprotno pa je zaslišanje potrebno, kadar:

- je treba oceniti, ali so bila dejstva pravilno ugotovljena,
- okoliščine zahtevajo, da si sodišče ustvari lastno predstavo o strankah v postopku, tako da jim omogoči, da v svojem imenu ali prek zastopnika pojasnijo svoj osebni položaj,
- sodišče mora pridobiti pojasnila o nekaterih točkah.[26]

10. **Nadaljnja merila/standardi za sojenje na ustni (javni) obravnavi ali brez nje:**

- **Člen 53 EKČP:** Za morebitno kršitev člena 6 o pravici do ustne (javne) obravnave je pomembno, da nacionalna sodišča spoštujejo pravila nacionalne zakonodaje o ustni javni obravnavi, saj se nobena določba EKČP ne sme razlagati tako, da omejuje ali odstopa od katere koli človekove pravice in temeljne svoboščine, ki so lahko zagotovljene na podlagi zakonov katere koli visoke pogodbenice ali na podlagi katerega koli drugega sporazuma, katerega pogodbenica je.

[26]Ramos Nunes de Carvalho E Sá proti Portugalski, točki 190-191.

- **Standard „zadostne presoje“ v upravnih sporih**[27]**:** ESČP je v zvezi z metodo presoje dosledno priznavalo, da na podlagi člena 6 od domačih sodišč ni mogoče zahtevati, da bi lahko s svojo presojo ali ugotovitvami nadomestila presojo ali ugotovitve pristojnega upravnega organa. Zato je lahko sodni nadzor omejen na pregled upravnih aktov in postopkov, ne da bi bilo treba sprejeti nove odločitve, zlasti glede dejstev v zadevi. V skladu s tem je bilo priznano, da ima sodni organ, ki izvaja presojo, „polno pristojnost“ v avtonomnem smislu člena 6(1) EKČP, tudi če ne izvaja ponovnega pregleda in ponovne ocene dokazov, vključno s ponovnim zaslišanjem prič, ampak se omeji na preverjanje - zlasti z vidika ustreznosti, zadostnosti in doslednosti - dejstev in dokazov, na katerih temelji upravna odločba.[28] To velja tudi v okviru postopkov v zvezi z upravnimi sankcijami, ki spadajo v kazenski del določbe 6. člena EKČP.[29]
- **Ustna (javna) obravnava na eni sodni stopnji:** Pravica do javne obravnave v skladu s členom 6(1) EKČP pomeni pravico do ustne obravnave na vsaj eni sodni stopnji. Odsotnost obravnave na drugi ali tretji stopnji se lahko upraviči s posebnostmi zadevnega postopka, če je bila izvedena obravnava na prvi stopnji. Problem odsotnosti ustne (javne) obravnave na prvi stopnji se lahko odpravi, če se ustna (javna) obravnava opravi na pritožbeni stopnji, pod pogojem, da obseg pritožbenega postopka zajema pravna in dejanska vprašanja.[30]
- **Dokazni sklep o nedopustnosti/nepotrebnosti dokazov:** Nacionalno sodišče je dolžno ustrezno preučiti navedbe, argumente in dokaze, ki jih predložijo stranke, brez da bi ob tem prejudiciralo oceno relevantnosti dokazov. Člen 6 EKČP zahteva, da nacionalna sodišča ustrezno navedejo razloge, na katerih temeljijo njihove odločitve, kar vključuje odločitev o nesprejemu novih dokazov, ki jih je predložil pritožnik. Ta obveznost predpostavlja, da lahko stranka v sodnem postopku pričakuje konkreten in izrecen odgovor na tiste navedbe, ki so odločilne za izid zadevnega postopka.[31] Tudi v kazenskem pravu zahteva po poštenem sojenju sodišču ne nalaga obveznosti odreditve izvedenskega mnenja ali drugega ali izvedbe drugega dokaza samo zato, ker je stranka to zahtevala. Kadar obramba vztraja, da sodišče zasliši pričo ali izvede druge dokaze (kot je na primer izvedensko mnenje), mora domače

[27]Glej: Sigma Radio Television Ltd. proti Cipru, pritožbi št. 32181/04 in 35122/05, točka 152; Ramos Nunes de Carvalho E Sá proti Portugalski, točka 177

[28]Ramos Nunes de Carvalho E Sá proti Portugalski, Skupno pritrdilno mnenje sodnikov Raimondi, Nussberger, Jäderblom, Møs, Poláčková in Koskelo v zadevi Ramos Nunes Carvalho E Sá proti Portugalski, točka 11

[29]Ibid. točka 18.

[30]Ramos Nunes de Carvalho E Sá proti Portugalski, točka 192; Xhoxaj proti Albaniji, pritožba št. 15227/19, točka 339. V kazenskem pravu v sodnem postopku na drugi stopnji sodna praksa ESČP razlikuje med položajem, ali pritožbeno sodišče zgolj poda drugačno pravno razlago, to vključuje, če je zgolj drugače uporabilo pravo na dejstva, ki jih je že ugotovilo sodišče prve stopnje, ali pa pritožbeno sodišče opravi novo oceno dejstev, ki presega zgolj pravne pomisleke, ki so odločilni za določitev pritožnikove krivde (Igual Coll proti Španiji, točka 36, Spînu proti Romuniji, točke 55-59).

[31]Xhoxaj proti Albaniji, pritožba št. 15227/19, točke 326-327, 335, 344; Perez proti Franciji, pritožba št. 47287/99, točka 80; Ramos Nunes de Carvalho E Sá proti Portugalski, točka 185.

sodišče odločiti, ali je potrebno oziroma priporočljivo sprejeti te dokaze v obravnavo na sojenju.[32]

- **Nujna argumentacija za opustitev ustne obravnave:** Nacionalno sodišče mora v sodbi pojasniti, zakaj novi dokazi in dejstva niso bili pomembni za zadevno odločitev. Kadar nacionalno sodišče ne pojasni, katera dejstva in dokazi so se nacionalnemu sodišču zdeli novi in zakaj so se mu zdeli nepomembni, ESČP težko ugotovi, kako so bili razlogi tega sodišča za zavrnitev pritožnikove zahteve za zaslišanje uporabljeni (interpretirani) glede na dejansko stanje zadeve.[33]

11. Peti (metodološki) korak: Razlaga nacionalnega prava v skladu s pravom EU (lojalno sodelovanje - člen 4(3) PEU)

- Države članice morajo svoje nacionalno pravo razlagati v skladu s pravom EU.[34]
- Nacionalna sodišča uporabijo nacionalne standarde glede varstva temeljnih pravic, če ta uporaba ne ogrozi ravni varstva iz Listine, kot jo razlaga Sodišče, niti ne posega v primarnost, enotnost in učinkovitost prava Unije.[35]
- Kadar so določbe njegovega nacionalnega prava v nasprotju s pravicami, ki jih zagotavlja Listina, ima nacionalno sodišče, ki v okviru svojih pristojnosti uporablja določbe prava Unije, dolžnost zagotoviti polni učinek teh določb, pri čemer lahko po potrebi odloči, da ne bo uporabilo neskladne določbe nacionalne zakonodaje – tudi naknadne – ne da bi mu bilo treba zahtevati ali čakati predhodno odpravo te določbe po zakonodajni poti ali kakšnem drugem ustavnem postopku.[36] Poleg tega je vsaka upravna ali sodna praksa, katere učinek bi bil zmanjšanje učinkovitosti prava Unije s tem, da bi se nacionalnemu sodišču odrekla možnost, da ob tej uporabi stori vse potrebno, da se ne uporabijo nacionalne zakonske določbe, ki morda ovirajo polni učinek predpisov Unije, ki imajo neposredni učinek, nezdružljiva z zahtevami same narave prava Unije.[37]

[32]Glej: Poletan in Azirovik proti Nekdanji jugoslovanski republiki Makedoniji, pritožbe št. 26711/07, 32786/10 in 34278/10, točka 95.
[33]Cimperšek proti Sloveniji, pritožba št. 58512/16, točka 45; glej tudi: Mirovni inštitut proti Sloveniji, pritožba št. 32303/13, točka 44.
[34]N.S. in M.E., C-411/10 in C-493/10, točka 77.
[35]Åklagaren, C-617/10, točka 29.
[36]Åklagaren, C-617/10, točka 45.
[37]Torubarov, C-556/17, točka 73.

Uporaba Listine EU o temeljnih pravicah
Poudarek na pravici do poštenega sojenja, Ljubljana, 27. in 28. september 2021

PRIVILEGIJ ZOPER SAMOOBTOŽBO

(študija primera)

Pripravil Boštjan Zalar

Okoliščine primera

Ministrstvo za notranje zadeve države članice EU se je odločilo, da prosilcu, ki je prišel iz Sirije, ne podeli statusa begunca (niti subsidiarne zaščite). Razlog za zavrnilno odločbo je bil, da je Ministrstvo za notranje zadeve kot organ odločanja (v nadaljevanju: ministrstvo) v zadevah mednarodne zaščite uporabilo izključitveno klavzulo iz člena 12(2)(b) Direktive EU o pogojih 2011/95. Ministrstvo je na podlagi informacij, ki jih je nosilec odločitve zbral med osebnim razgovorom s prosilcem, ugotovilo, da obstajajo resni razlogi za domnevo, da je prosilec med vojno v Siriji, preden je bil sprejet kot prosilec za azil v tej državi članici, storil hudo nepolitično kaznivo dejanje. Med osebnim razgovorom je bil prisoten predstavnik nevladne organizacije (NVO), ki je prosilcu pomagal, vendar prosilcu ni postavil nobenega vprašanja in je bil med razgovorom neaktiven. Prisotnost predstavnika nevladne organizacije na razgovorih s prosilci je urejena na podlagi pogodbe, podpisane med nevladno organizacijo in ministrstvom, ki se delno financira iz virov EU. Po izdaji zavrnilne prvostopenjske odločbe je prosilcu na podlagi nacionalnih določb o brezplačni pravni pomoči nudil strokovno pravno pomoč svetovalec za begunce. V tožbi zoper zavrnilno odločbo ministrstva svetovalec za begunce trdi, da je bil osebni razgovor s prosilcem v postopku na prvi stopnji opravljen tako, da sta bili kršeni pravici prosilca do privilegija zoper samoobtožbo in do domneve nedolžnosti. Trdi, da je nosilec odločitve s kombinacijo zelo konkretnih, sugestivnih in napadalnih vprašanj, z namero, da bi potrdil prosilčevo krivdo, prosilca prisilil, da je praktično priznal, da je v Siriji storil nepolitično kaznivo dejanje. Poleg tega je oseba, ki je sprejela odločitev, skoraj prisilila prosilca, da je položil prst na telefon, da bi aktiviral geslo, in tako pridobila dodatne informacije za ugotovitev prosilčeve vpletenosti v domnevno kaznivo dejanje. Nosilec odločitve med osebnim razgovorom prosilca ni obvestil niti o pravici do molka glede njegove morebitne vpletenosti v domnevno kaznivo dejanje. Zato svetovalec za begunce trdi, da je treba odločbo

ministrstva razveljaviti in jo vrniti ministrstvu, da opravi ponovno preverjanje dejstev in okoliščin z ustreznimi postopkovnimi jamstvi glede privilegija zoper samoobtožbo, ali, kot je predlagal, da Upravno sodišče vsebinsko preuči potrebe prosilca po mednarodni zaščiti.

Vprašanja za razpravo v skupinah

1. Ali se pravica do privilegija zoper samoobtožbo kot sestavni del pravice do poštenega sojenja in domneve nedolžnosti uporablja v tem primeru?
2. Zakaj (ne)? Na podlagi katerega zaporedja argumentov?
3. Če se privilegij zoper samoobtožbo uporablja v tem primeru, kakšne bi lahko bile konkretne pravne posledice pravice do privilegija zoper samoobtožbo v sodnem ali upravnem postopku o prošnji za mednarodno zaščito v tem konkretnem primeru?

Osnovni pravni viri EU

Člen 78(1) PDEU: *„Unija oblikuje skupno politiko o azilu, subsidiarni zaščiti in začasni zaščiti z namenom ponuditi ustrezen status vsem državljanom tretjih držav, ki potrebujejo mednarodno zaščito, in zagotoviti skladnost z načelom nevračanja. [...]“*

Člen 78(2) PDEU: *„Za namene odstavka 1 Evropski parlament in Svet po rednem zakonodajnem postopku sprejmeta ukrepe za skupni evropski azilni sistem, ki zajema:*

a) enoten status azila za državljane tretjih držav, ki velja v celotni Uniji;

d) skupne postopke za dodelitev ali odvzem enotnega statusa azila ali subsidiarne zaščite.“

Člen 12(2)(b) direktive o pogojih 2011/95:

„Državljan tretje države ali oseba brez državljanstva ne more biti begunec, če obstajajo tehtni razlogi za domnevo, da [...], je storil(-a) hudo nepolitično kaznivo dejanje izven države sprejemnice, preden ga/jo je ta sprejela kot begunca [...]“.

Člen 4(1) direktive o pogojih 2011/95:

„Države članice lahko naložijo prosilcu dolžnost, da čim prej predloži vse potrebne elemente za utemeljitev prošnje za mednarodno zaščito. Dolžnost države članice je, da v sodelovanju s prosilcem obravnava ustrezne elemente prošnje.“

Člen 4(2) direktive o pogojih 2011/95:

„Elementi iz odstavka 1 so izjave prosilca in vsa dokumentacija, s katero razpolaga prosilec, glede svoje starosti, porekla, vključno s poreklom ustreznih sorodnikov, identitete, državljanstva(-ev), držav(-e) in kraja(-ev) prejšnjega prebivališča, prejšnjih prošenj za azil, prepotovanih poti, potovalnih dokumentov ter razlogov za prošnjo za mednarodno zaščito.“

Člen 4(3)(b) direktive o pogojih 2011/95:

„Obravnavanje prošnje za mednarodno zaščito se izvede v vsakem posameznem primeru posebej in vključuje upoštevanje naslednjega:

a) *vsa ustrezna dejstva, ki se nanašajo na izvorno državo v času, ko se sprejme odločitev o prošnji, vključno z zakoni in predpisi izvorne države in načinom njihove uporabe;*
b) *ustrezne izjave in dokumentacijo, ki jih predloži prosilec, vključno z informacijami o tem, ali je bil ali bi lahko bil prosilec podvržen preganjanju oziroma mu je bila ali bi mu lahko bila povzročena resna škoda; [...].“*

Uvodna izjava 16 direktive o pogojih 2011/95:

„Ta direktiva upošteva temeljne pravice in spoštuje načela, priznana zlasti z Listino Evropske unije o temeljnih pravicah. Ta direktiva si prizadeva zlasti zagotoviti polno spoštovanje človekovega dostojanstva in pravice do azila prosilcev za azil in družinskih članov, ki jih spremljajo, ter spodbujati uporabo členov 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 in 35 navedene listine in bi jo bilo zato treba temu ustrezno izvajati.“

Člena 15(3) in 16 Direktive 2013/32/EU o postopkih:

„Države članice sprejmejo ustrezne ukrepe, s katerimi zagotovijo, da osebni razgovori potekajo v razmerah, ki prosilcem omogočajo, da razloge za svojo prošnjo celovito predstavijo.“

„Organ za presojo med osebnim razgovorom o vsebini prošnje za mednarodno zaščito zagotovi, da se da prosilcu ustrezna možnost predstavitve elementov, potrebnih za čim popolnejšo utemeljitev prošnje v skladu s členom 4 Direktive 2011/95/EU. To vključuje možnost podati pojasnilo glede elementov, ki morda manjkajo, in/ali morebitne neskladnosti ali nasprotja v izjavah prosilca.“

Uvodna izjava 60 Direktive 2013/32 o postopkih:

„Ta direktiva spoštuje temeljne pravice in upošteva načela, ki so priznana z Listino. Namen te direktive je zlasti zagotoviti dosledno spoštovanje človeškega dostojanstva in spodbujati uporabo členov 1, 4, 18, 19, 21, 23, 24 in 47 Listine ter jo je treba temu ustrezno izvajati.“

Člen 48 Listine (domneva nedolžnosti in pravica do obrambe):

1. *„Obdolženec velja za nedolžnega, dokler njegova krivda ni dokazana v skladu z zakonom.*
2. *Vsakemu obdolžencu je zagotovljena pravica do obrambe.“*

Direktiva (EU) 2016/343 Evropskega parlamenta in Sveta z dne 9. marca 2016 o krepitvi nekaterih vidikov domneve nedolžnosti in krepitvi pravice biti navzoč na sojenju v kazenskem postopku:

Člen 1 (a) (predmet urejanja): Ta direktiva določa skupna minimalna pravila o nekaterih vidikih domneve nedolžnosti v kazenskem postopku.

Člen 7: Pravica do molka in pravica posameznika, da ne izpove zoper sebe:

1. Države članice zagotovijo, da imajo osumljene in obdolžene osebe pravico do molka v zvezi s kaznivim dejanjem, katerega storitve so osumljene ali obdolžene.

2. Države članice zagotovijo, da imajo osumljene in obdolžene osebe pravico, da ne izpovedo zoper sebe.

3. Uveljavljanje pravice posameznika, da ne izpove zoper sebe, pristojnim organom ne preprečuje zbiranja dokazov, ki se lahko pridobijo zakonito z uporabo zakonitih prisilnih ukrepov in ki obstajajo neodvisno od volje osumljenih ali obdolženih oseb.[1]

4. Države članice lahko sodnim organom dovolijo, da pri izrekanju sankcij upoštevajo sodelovanje osumljenih in obdolženih oseb.[2]

5. Če osumljene ali obdolžene osebe uveljavljajo pravico do molka ali pravico, da ne izpovedo zoper sebe, se to ne uporabi proti njim in se ne šteje kot dokaz, da so storile zadevno kaznivo dejanje.

Uvodna izjava 11: Ta direktiva bi se morala uporabljati le v kazenskem postopku, kakor ga razlaga Sodišče Evropske unije (v nadaljnjem besedilu: Sodišče), brez poseganja v sodno prakso Evropskega sodišča za človekove pravice. Ta direktiva se ne bi smela uporabljati za civilne ali upravne postopke, vključno kadar se lahko v slednjih izrečejo sankcije, kot so

[1] Glej tudi uvodno izjavo 29.
[2] Glej tudi uvodno izjavo 28.

postopki v zvezi z varstvom konkurence, trgovino, finančnimi storitvami, cestnim prometom, davki ali davčnimi pribitki, in preiskave, ki jih upravni organi vodijo v zvezi s takimi postopki.
Uvodna izjava 24: Pravica do molka je pomemben vidik domneve nedolžnosti in bi morala služiti kot varstvo pred samoobtožbo.
Uvodna izjava 25: Pravica posameznika, da ne izpove zoper sebe, je prav tako pomemben vidik domneve nedolžnosti. Osumljene in obdolžene osebe, ki so pozvane, da podajo izjavo ali odgovorijo na vprašanja, ne bi smele biti prisiljene predložiti dokaze ali dokumente ali posredovati informacije, ki lahko privedejo do samoobtožbe.
Uvodna izjava 27: Pravica do molka in pravica posameznika, da ne izpove zoper sebe, pomenita, da pristojni organi osumljenih ali obdolženih oseb ne bi smeli prisiliti, da navajajo informacije, če te osebe tega ne želijo. Za ugotavljanje kršitve pravice do molka ali pravice posameznika, da ne izpove zoper sebe, bi bilo treba upoštevati razlago Evropskega sodišča za človekove pravice glede pravice do poštenega sojenja v okviru EKČP.

Orodja za uporabo Listine in EKČP o privilegiju zoper samoobtožbo:

- BAILLI (iskanje sodne prakse / ESČP ali SEU / točno določene besede)
- *EU Charter of Fundamental Rights*; *Practitioners' tools on EU Law,* Fair Trials, september 2020, Pravice obrambe (člen 48(2)), str. 35-37.
- *Presumption of innocence, right to remain silent and not to incriminate oneself right to be present at the trial; Practitioners' tools on EU Law*, Fair Trials, oktober 2020.
- *Guide on Article 6 of the Convention - right to a fair trial (criminal limb),*, 31. 8. 2021, str. 40-42.

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Limitations of Art 47 CFREU

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Justice of the Constitutional Court
Croatia

Due Process

- Article 47 of the Charter of Fundamental Rights of the European Union lays down the **'right to an effective remedy and to a fair trial**'

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an ***effective remedy*** before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a ***fair and public hearing*** within a reasonable time by an ***independent and impartial tribunal*** previously established by law. Everyone shall have ***the possibility of being advised, defended and represented***.
>
> ***Legal aid*** shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure ***effective access to justice***.

XIV Amandmant to the Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Historically, due process ordinarily entailed a jury trial. The jury determined the facts and the judge enforced the law. In past two centuries, however, states have developed a variety of institutions and procedures for adjudicating disputes. Making room for these innovations, the Court has determined that due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. Mullane v. Central Hanover Bank (1950).

Article III of the U.S. Constitution provides that 'the judicial Power shall extend to all Cases' as well as to 'Controversies.' The U.S. Supreme Court put it this way: 'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies'

Normative Roots of Art 47

- Joined Cases C-317/08 to C-320/08 *Alassini*

> Secondly, it should be borne in mind that **the principle of effective judicial protection is a general principle of EU law** stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also **been reaffirmed by Article 47** of the Charter of Fundamental Rights of the European Union (see *Mono Car Styling*, paragraph 47 and the case-law cited).

In the same reasoning the CJEU found

"Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty* v *United Kingdom,* no. 37112/97, §33, ECHR 2001-XI (extracts)).

Such "relaxed" use of constitutional terms – fundamental right and fundamental principle – opens complex discussion about their nature, relations and distinguishing features.

For example, some have argued that fundamental principles are of 'limited justiciability' and in the context of limitation provided by Article 52(5) CFREU cannot be invoked with direct effect before a national judge because Art 47 guarantees fundamental right – higher level of ruleness-like precession – of effective remedy and

fair trial. Consequently, when applying Art 47 CFREU to a dispute at hand national courts could not accept arguments entailed by the principle of effective judicial protection as being of “direct effect”. Whether the principle applies and with what ”effect” is thus a completely separated legal question from the application of Art 47.

Effective Judicial Protection

- Case 222/84 *Johnston*

  „…it must be borne in mind first of all that article 6 of the Directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination ' to pursue their claims by judicial process'. It follows from that provision that the ***Member States must take measures which are sufficiently effective to achieve the aim*** *of the Directive and that* ***they must ensure that the rights thus conferred may be effectively relied upon before the national courts*** *by the persons concerned .*

  The requirement of judicial control stipulated by that article ***reflects a general principle of law which underlies the constitutional traditions common to the member states****. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as the European Parliament , Council and Commission recognized in their joint declaration of 5 April 1977 (Official Journal c 103 , p . 1) and as the Court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in Community law.*

  By virtue of article 6 of Directive 76/207 , interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of community law and of national legislation intended to give effect to the rights for which the directive provides .

  The answer to this part of the sixth question put by the Industrial tribunal must therefore be that ***the principle of effective judicial control*** *laid down in article 6 of council Directive no 76/207 of 9 February 1976 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts ."*

Already in the **Case 14/83 *von Colson*** the Court held that „*national remedies had to guarantee real and effective judicial protection*" to ensure the protection of the EU right to equal treatment of men and women.

22 ***IT IS IMPOSSIBLE TO ESTABLISH REAL EQUALITY OF OPPORTUNITY WITHOUT AN APPROPRIATE SYSTEM OF SANCTIONS*** *. THAT FOLLOWS NOT ONLY FROM THE ACTUAL PURPOSE OF THE DIRECTIVE BUT MORE SPECIFICALLY FROM ARTICLE 6 THEREOF WHICH , BY GRANTING APPLICANTS FOR A POST WHO HAVE BEEN DISCRIMINATED AGAINST* ***RECOURSE TO THE COURTS , ACKNOWLEDGES THAT THOSE CANDIDATES HAVE RIGHTS OF WHICH THEY MAY AVAIL THEMSELVES BEFORE THE COURTS .***

23 ALTHOUGH , AS HAS BEEN STATED IN THE REPLY TO QUESTION 1 , FULL IMPLEMENTATION OF ***THE DIRECTIVE DOES NOT REQUIRE ANY SPECIFIC FORM OF SANCTION FOR UNLAWFUL DISCRIMINATION , IT DOES ENTAIL THAT THAT SANCTION BE SUCH AS TO GUARANTEE REAL AND EFFECTIVE JUDICIAL PROTECTION . MOREOVER IT MUST ALSO HAVE A REAL DETERRENT EFFECT*** *ON THE EMPLOYER . IT FOLLOWS THAT WHERE A MEMBER STATE CHOOSES TO PENALIZE THE BREACH OF THE PROHIBITION OF DISCRIMINATION BY THE AWARD OF COMPENSATION , THAT*

COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED .

Case 222/86 Heylens (1987)

4 SINCE FREE ACCESS TO EMPLOYMENT IS A FUNDAMENTAL RIGHT WHICH THE TREATY CONFERS INDIVIDUALLY ON EACH WORKER IN THE COMMUNITY, ***THE EXISTENCE OF A REMEDY OF A JUDICIAL NATURE AGAINST ANY DECISION OF A NATIONAL AUTHORITY REFUSING THE BENEFIT OF THAT RIGHT IS ESSENTIAL IN ORDER TO SECURE FOR THE INDIVIDUAL EFFECTIVE PROTECTION FOR HIS RIGHT*** . AS THE COURT HELD IN ITS JUDGMENT OF 15 MAY 1986 IN CASE 222/84 JOHNSTON V CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY ((1986)) ECR 1651, AT P . 1663, THAT REQUIREMENT REFLECTS A GENERAL PRINCIPLE OF COMMUNITY LAW WHICH UNDERLIES 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 .

15 **EFFECTIVE JUDICIAL REVIEW**, WHICH **MUST BE ABLE TO COVER THE LEGALITY OF THE REASONS FOR THE CONTESTED DECISION**, **PRESUPPOSES** IN GENERAL THAT THE COURT TO WHICH THE MATTER IS REFERRED MAY REQUIRE THE COMPETENT AUTHORITY **TO NOTIFY ITS REASONS** . BUT WHERE, AS IN THIS CASE, IT IS MORE PARTICULARLY A QUESTION OF SECURING **THE EFFECTIVE PROTECTION OF A FUNDAMENTAL RIGHT** CONFERRED BY THE TREATY ON COMMUNITY WORKERS, THE LATTER **MUST ALSO BE ABLE TO DEFEND THAT RIGHT UNDER THE BEST POSSIBLE CONDITIONS** AND HAVE THE POSSIBILITY OF DECIDING, WITH A FULL KNOWLEDGE OF THE RELEVANT FACTS, WHETHER THERE IS ANY POINT IN THEIR APPLYING TO THE COURTS . CONSEQUENTLY, IN SUCH CIRCUMSTANCES THE COMPETENT NATIONAL AUTHORITY IS UNDER A DUTY TO INFORM THEM OF THE REASONS ON WHICH ITS REFUSAL IS BASED, EITHER IN THE DECISION ITSELF OR IN A SUBSEQUENT COMMUNICATION MADE AT THEIR REQUEST .

In the context of the judical power clause (Art III) of the US Constitution the 'cases or controversies' clause requires plaintiffs **to have 'standing' to bring a suit in court**. This requirement applies equally to citizens and non-citizens alike. As the Supreme Court held in *Clapper v. Amnesty International*, '[t]o establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and ***redressable by a favorable ruling***."' Speculation is not enough; the injury (actual or imminent) must exist 'in fact' (p. 10).

Courts as one of equally valuable branches of state power i.e. the Government.

Normative strength of the gender equality principle as the facilitator of jurisprudential integration of the EU legal order.

EU Requirment of Minimal Effectivness of Procedural Instrumnets

- 33/76 REWE-ZENTRAL

  „The prohibition laid down in Article 13 of the Treaty …have a **direct effect and confer on citizens rights** which the national courts are required to protect .

  Applying ***the principle of cooperation*** laid down in article 5 of the Treaty, **it is the national courts** which are **entrusted with ensuring the legal protection** which citizens derive from the direct effect of the provisions of Community law.

  Accordingly, in the absence of Community rules on this subject, **it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions** governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions **cannot be less favourable** than those relating to similar actions of a domestic nature…

  In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

  The position would be different only if the conditions and time-limits ***made it impossible in practice to exercise the rights*** which the national courts are obliged to protect .

  This is not the case ***where reasonable*** periods of limitation of actions are fixed .

  The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned ."

The key rational beyond the minimal effectiveness doctrine was very much functional and „integration driven". If individuals were to have any benefit from EU granted rights and privileges then effective enforcement of those rights was a functional precondition. In a legal system based on rights enforced through disputes in judicial proceeding this functional „logic" entailed that it was upon (national) courts to ensure minimal effectiveness of EU granted rights and privileges. If minimal effectiveness required removal of existing national procedural rules bad for national rules. If minimal effectiveness required „invention" of procedural rules so be it. Citizens had to have at least minimal use of EU provided rights and privileges. Otherwise the EU legal order was just another international-law construct.

The minimal effectiveness doctrine did not fit perfectly into the Treaty architecture of the EU. To accommodate the doctrine that was not explicitly spelled out in the funding Treaties something had to give. The doctrine does not fit comfortably with the (fundamental) principle of separation of competences between the supranational EU level and the national MS level of governance. First, the area of procedural law (civil, administrative and criminal) falls within the regulatory scope of national legislators. Moreover, so does the issue of fundamental rights as the cornerstone of constitutional law in constitutional democracies. Second, rules of procedural law are

primarily enacted by legislative branch, not „invented" by judiciary.

This conflict still revibrates today. It is clearly reflected in Art 51 and Art 52 of the Charter.

General Limitations on Art 47

- Art 51

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for **the principle of subsidiarity** and to the Member States ***only when they are implementing Union law***. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and *respecting the limits of the powers of the Union* as conferred on it in the Treaties.

The Charter ***does not extend the field of application of Union law*** beyond the powers of the Union ***or establish any new power or task*** for the Union, or modify powers and tasks as defined in the Treaties.

- Art 52

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.

Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

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.

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.

Application of the Principle

- ***effective judicial protection*** to be provided
  - when national courts interpret national law, so as to provide effective remedies and procedures when dealing with rights under Union
    - Art 267 TFEU mechanism
  - when the CJEU interprets Treaty provisions as applied by EU bodies;
  - when the CJEU reviews the validity of secondary law as implemented by Member States, eventually entailing also disapplication;
- the principle of effective judicial protection has functioned as an „umbrella principle"
  - it comprises various elements, which themselves constitute rights or principles of their own that have been often applied in a somewhat flexible manner (sometimes as self-standing principles, sometimes in connection with the principle of effective judicial protection or as a part of it)
  - those elements are reflected in Art 41, Art 47and Art 48 CFREU

Article 47 of the Charter houses several rights and general principles of EU law. It is linked to other fundamental rights recognized in the Charter, such as Article 41 on the right to good administration and Article 48(2) regarding the rights of the defence. The principle of effective judicial protection, itself entails the rights of defence (which in turn embodies the right to be heard), the principle of equality of arms, the right of access to a court, and the right to be advised, defended, and represented.

Impossible or Excessively Difficult

- C-312/93 *Peterbroeck*

  For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law ***impossible or excessively difficult*** must be ***analysed*** by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.

  In the light of that analysis the basic principles of the domestic judicial system, such as protection of the *rights of the defence*, the principle of *legal certainty* and the *proper conduct of procedure*, must, where appropriate, be taken into consideration.

Procedural rules related to the right to access to a court, time limits, compensation ceilings, etc. were scrutinized under the Rewe/Peterbroeck **'procedural rule of reason'.**

This **balancing mechanism** allows the EU principle of effectiveness be overridden by number of competing interests and values: 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure' may ultimately justify the application of the rule at issue. This was already seen in C-33/76 Rewe where the Court found that the setting of reasonable time-limits for bringing proceedings was needed in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned and as such were reasonable.

With the enactment of the CFREU such „well-established" doctrinal positions started „migrating" from the Rewe/Peterbroec type of scrutiny to **new type of scrutiny developing under Art 47.** For example, in C-19/13 Fastweb Rewe position on time-limits have been „reaffirmed" proportional limitation of the right to effective judicial protection provided by Art 47.

Example of Early Migration

- C-93/12 Agrokonsulting

  As regards, next, the principle of effectiveness, it must be recalled that, from the point of view of the analysis required by the case-law cited at paragraph 38 above, the question whether a national procedural provision renders the exercise of an individual's rights under the European Union legal order *impossible in practice or excessively difficult* must be assessed taking into consideration, as appropriate, the principles which lie at the basis of the national legal system concerned, such as the *protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings* (see inter alia, to that effect, *Peterbroeck*, paragraph 14, and *Pontin*, paragraph 47).

  the case in the main proceedings, the referring court must, as regards the concerns set out at paragraphs 30 and 31 above, take account of the following factors.

  …

  So far as concerns, lastly, **Article 47** of the Charter, it is apparent from the Court's case-law that that provision **constitutes a reaffirmation of the principle of effective judicial protection**, a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention … (see to that effect, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Case C-334/12 RX-II *Arango Jaramillo and Others* v *EIB* [2013] ECR, paragraph 40).

  In the present case, it is sufficient to observe in this connection that, taking account, inter alia, of the considerations expressed in paragraphs 50 to 58 of this judgment and in the light of the information available to the Court in these proceedings, it does not appear that an individual in a position such as that of Agrokonsulting is deprived of an effective remedy before a court with a view to defending rights derived from European Union law.

  In the light of the foregoing, the answer to the questions referred is that European Union law, in particular **the principles of equivalence and effectiveness and Article 47 of the Charter, does not preclude a national rule** of jurisdiction such as that in Article 133(1) of the APK, which results in conferring on a single court all disputes relating to decisions of a national authority responsible for the payment of agricultural aid under the European Union common agricultural policy, provided that actions intended to ensure the safeguarding of the rights which individuals derive from European Union law are not conducted in less advantageous conditions than those provided for in respect of actions intended to protect the rights derived from any aid schemes for farmers established under national law, and that jurisdiction **rule does not cause individuals procedural problems in terms, inter alia, of the duration of the proceedings**, such as to render the exercise of the rights derived from European Union law excessively difficult, which it is for the referring court to ascertain.

Case C-432/05 Unibet (London) Ltd

It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61) and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

38 Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 12; Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph

12).

39 It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, inter alia, *Rewe*, paragraph 5; *Comet*, paragraph 13; *Peterbroeck*, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49).

40 Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44).

41 It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraph 16; and *Factortame*, paragraphs 19 to 23).

42 Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, inter alia, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24, and *Safalero*, paragraph 50). It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Unión de Pequeños Agricultores* v *Council*, paragraph 41).

43 In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).

44 Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law.

Doctrinal Changes:
From Principle to Right; From Resonablness to Proprotionality

- **C-320/08 Alassini**

60 In those circumstances, it must be held that the national legislation at issue in the present case ***complies with the principle of effectiveness*** in so far as electronic means is not the only means by which the settlement procedure may be accessed and in so far as interim measures are possible in exceptional cases where the urgency of the situation so requires.

61 ***Secondly, it should be borne in mind that the principle of effective judicial protection is a general principle of EU law*** stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and ***which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights*** of the European Union (see *Mono Car Styling*, paragraph 47 and the case-law cited).

62 In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. ***That condition might prejudice implementation of the principle of effective judicial protection***.

63 Nevertheless, it is settled case-law that **fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed** (see, to that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty* v *United Kingdom,* no. 37112/97, §33, ECHR 2001-XI (extracts)).

64 However, as the Italian Government observed at the hearing, it must first be noted that the aim of the national provisions at issue is the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, and they thus ***pursue legitimate objectives*** **in the general interest**.

65 Secondly, the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, **does not seem** – in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment – ***disproportionate in relation to the objectives pursued***. In the first place, as the Advocate General stated in point 47 of her Opinion, **no less restrictive alternative to the implementation of a mandatory procedure exists**, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is ***not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives***.

66 In the light of the foregoing, it must be held that the national procedure at issue in the main proceedings also complies with the principle of effective judicial protection, subject to the conditions referred to in paragraphs 58 and 59 of this judgment.

With the introduction of Art 47 the scrutiny of effective judicial protection evolved into two „prongs". The first prong was the „established" effectiveness prong. The second was the additional „proportionality" prong characteristic of the Court's scrutiny of restrictions of fundamental rights.

Fundamental Right and/or Fundamnetal Principle

- The Principle aspect of the scrutiny facilitates exploration of practical implications/scope of the right

  At paragraph 59 of the DEB judgment, the Court of Justice decided, taking into account the case law of the European Court of Human Rights, ***that the principle of effective judicial protection enshrined in Article 47*** of the Charter ***is to be interpreted*** as meaning that its assertion by legal persons is not excluded and that the application aid granted to this principle, among others may include exemption from payment of advance court costs and / or fees for the assistance of a lawyer.

Two Lines of Restrictions

- Restrictions (for analytical purposes) related to
  - Art 47 guaranteeing fundamental right
  - Art 47 reaffirming fundamental principle of EU law

Restriction of Art 47 as Fundamental Right

- C-156/12 GREP

  However, the Court found that fundamental rights, such as respect for the rights of the defense, ***are not absolute rights but may be subject to restrictions. However, these must actually correspond to objectives of the general interest pursued by the measure in question and, in view of the purpose pursued, must not constitute an obvious and disproportionate impairment of the rights guaranteed in this way*** (judgment of April 2, 2009, Gambazzi, C. -394/07, ECR 2009 ECR I - 2563, paragraph 29).

- See also C-317-320/08 *Alassini*, C-28/05 *Dokter*, C-619/10 *Trade Agency*, C-418/11 *Texdata*

The CJEU further elaborated:

"As regards legal aid, the Court of Justice stated that it is for the national judge to examine whether the conditions for granting legal aid constitute a restriction on the right of access to the courts which undermines the very essence of that right or whether it serves a legitimate purpose serve and whether the means employed are proportionate to the objective pursued (DEB, paragraph 60).
In making that assessment, the national judge may take into account the subject-matter of the dispute, the applicant's reasonable prospects of success, the importance of the dispute for him, the complexity of the law and the applicable procedure and the applicant's ability to defend his case effectively. When assessing proportionality, the national judge may also take into account the amount of the court costs to be advanced and whether or not they constitute an insurmountable obstacle to access to justice (DEB, paragraph 61).

What about Art 52(1)

- Art 52 (1) provides general definition of acceptable restrictions of fundamental rights and as such comprises a number of elements:
  - the limitation must be provided **by law**;
  - it must respect **the essence** of the right or freedom at stake
    - is restriction violating the essence of the right of such character that it can be considered "obvious"?;
  - it must be justified by (**legitimate aim**)
    - an objective of general interest recognized by the Union
    - the need to protect the rights and freedoms of others;
  - the principle of **proportionality** has to be respected
    - Is this different level of scrutiny from "*an obvious and disproportionate impairment*"**?**

Element 1: Provided by Law

- C-562/12 **Eesti-Läti programmi 2007-2013 Seirekomitee,**

67 The first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

68 To ensure that the right to an effective remedy within the EU is upheld, the second subparagraph of Article 19(1) TEU requires the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

69 In a case such as that in the main proceedings, the rejection of an application for aid by the Seirekomitee means that the applicant is definitively excluded from the procedure allocating the aid cofinanced by the EU, without any decision being communicated to it subsequently.

70 Furthermore, it is apparent from the second sentence of the first subparagraph of Chapter 6.6 of the programme manual that the decisions of the Seirekomitee are not appealable. It is therefore not possible for an applicant whose application for aid has been rejected to contest that rejection decision.

71 In those circumstances, the lack of any remedy against such a rejection decision deprives the applicant of its right to an effective remedy, in breach of Article 47 of the Charter.

72 It must be added that Article 52(1) of the Charter accepts that limitations may be made on the exercise of the rights and freedoms recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

73 ***In any event, the lack of remedy against a decision rejecting an application for aid, such as that at issue in the main proceedings, was provided for by the Seirekomitee and not by law.***

74 Consequently, it must be found that, ***in so far as it provides that a decision of the Seirekomitee rejecting an application to aid cannot be subject to an appeal, the programme manual does not comply with the principle of effective judicial protection*** laid down in the first paragraph of Article 47 of the Charter.

75 Furthermore, it must be borne in mind that the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law. Pursuant to that principle, it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case (see, to that effect, judgment in *Oleificio Borelli* v *Commission*, EU:C:1992:491, paragraphs 13 and 14).

Element 2: Essence of Effective Judicial Protection

- C-279/09 DEB

  In the light of all of the foregoing, the answer to the question referred must be that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

  In that connection, **it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right**; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

  In making that assessment, the national court ***must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively***. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.

- C-314/13 Peftiev

  As regards the Lithuanian Government's argument that the respondents in the main proceedings could obtain legal aid as provided for under national law in order to obtain legal representation, suffice it to note that, ***through Article 3(1)(b) of Regulation No 765/2006, the European Union legislature introduced a coherent system in order to ensure observance of the rights guaranteed by Article 47 of the Charter***, irrespective of any freezing of funds. ***When a person included in the list in Annex I to that regulation must have recourse to necessary legal services, it cannot be that that person must be regarded as destitute due to that freezing of funds; rather, that person must be able to apply to have certain funds or economic resources released***, provided that the conditions set out in that provision are satisfied.

  The very essence of Article 3(1)(b) precludes the competent national authority from refusing to authorise a release of funds on the ground that such a person may have recourse to legal aid.

  As regards the criteria to be taken into consideration by the competent national authority when deciding on a request for a derogation, Article 3(1)(b) of Regulation No 765/2006 sets out limitations on the use of funds: they must be intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services.

The CJEU uses also expressions such as the "actual substance", "the very substance" and "the very principle"; see, for example, CJEU, Joined cases C-379/08 and C-380/08, Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v. Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v. Ministero Ambiente e Tutela del Territorio e del Mare and Others (C-380/08) [GC], 9 March 2010, para. 88

Element 2: The Essence (often implicit)

- C-300/11 ZZ

„As regards judicial proceedings, the Court has already held that, having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them (Case C-450/06 *Varec* [2008] ECR I-581, paragraph 45; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 52; and Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 30; see also, as regards Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the judgment of the European Court of Human Rights in *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262).

The fundamental right to an effective legal remedy would be infringed ***if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views*** (*Commission* v *Ireland and Others*, paragraph 52 and the case-law cited).

57 However, if, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38, by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle (see, by analogy, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 344).

58 To that end, the Member States are required, first, to ***provide for effective judicial review both of the existence and validity of the reasons invoked by the national authority*** with regard to State security and of the legality of the decision taken under Article 27 of Directive 2004/38 and, second, to prescribe techniques and rules relating to that review, as referred to in the preceding paragraph of the present judgment…

In this connection, the national court with jurisdiction must carry out an independent examination of all the matters of law and fact relied upon by the competent national authority and it must determine, in accordance with the national procedural rules, whether State security stands in the way of such disclosure…

On the other hand, *if it turns out that State security does stand in the way of disclosure* of the grounds to the person concerned, judicial review, as provided for in Article 31(1) of Directive 2004/38, of the legality of a decision taken under Article 27 thereof must, having regard to what has been stated in paragraphs 51, 52 and 57 of the present judgment, be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary.

In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, ***the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.***"

See also C-595/10 P Kadi II EU:C:2013:518; C-280/12 P Fulmen; C-584/10 P, C-593/10 P

Element 2: The Essence (sometimes explicit)

- Case C-216/18 PPU Minister for Justice and Equality (Deficiencies in the system of justice)

  „…the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded."

- In C-362/14 *Schrems*, the CJEU considered that legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, did not respect the essence of the right to an effective remedy and to a fair trial, as enshrined in Article 47 of the Charter.

If the court finds the breach of the essence of a fundamental right the measure in question is automatically incompatible with the Charter. No need to proceed with the proportionality test. On the other hand, a mere finding that a measure respects the essence of a fundamental right does not automatically mean that it complies with the principle of proportionality, (Digital Rights Ireland; Tele2 Sverige).

In C-362/14 *Schrems*, the CJEU considered that legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, did not respect the essence of the right to an effective remedy and to a fair trial, as enshrined in Article 47 of the Charter.

Element 3: Grounds of General Interest

- Examples from the caselaw:
  - established Rewe/Peterbroock principles still prevail – „the rights of the defence, the principle of legal certainty and the proper conduct of procedure”
    - time-limits: C-470/99, Universale-Bau AG; C-500/16, Carterpillar Financial Services; C-637/17, Cogeo Communications; C-676/17, Călin; C-280/18, Alain Flausch
    - res-judicata/duble jeopardy: C-119/05, Lucchini; C-2/08, Fallimento Olimpiclub; C-213/13, Pizzarotti; C-64/14, Târsia
    - ius standi rules: C-510/13, E.ON FoldgazTrade
  - considerations pertaining to the security of the EU or of its Member States
    - Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II; C-300/11 ZZ;
  - the existence of swift, effective and less costly dispute settlement
    - Joined Cases C-317-320/08 Alassini; C-619/10 Trade Agency
  - protection of health and life
    - procedural limitations due to COVID-19
  - autonomy of religious organisations („organization’s ethos”)
    - C-414/16 Egenberger

Element 4: Proportionality

- Different Aims – Different Types of Scrutiny
  - difference in the review of a limitation of a fundamental right for reasons of
    - an objective of general interest
      - the test would seem a traditional one, i.e. in particular a strict test of proportionality
    - to protect the rights and freedoms of others
      - the need to reconcile the requirements of the protection of the different rights
      - C-450/06 Varec

        "On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

        The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.

        To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets (see, by analogy, Mobistar, paragraph 40)."
        "

Element 4: (de facto) Balancing

- C-752/18 Deutsche Umwelthilfe eV

  „…where it is unable to interpret national law in compliance with the requirements of EU law, the national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraph 21, and of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 58 and 61). Nevertheless, that ***case-law of the Court cannot be understood as meaning that the principle of effectiveness of EU law and observance of the right, guaranteed by the first paragraph of Article 47 of the Charter, to effective judicial protection oblige the national court to disapply a provision of national law*** or not to follow the only interpretation of that provision which seems to it to accord with the national constitution ***if, in so doing, it infringes another fundamental right guaranteed by EU law***.

  It is accordingly necessary, in the third place, to weigh against one another the fundamental rights at issue in the light of the requirements laid down in the first sentence of Article 52(1) of the Charter. Need for provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure."

Omejitve v zvezi s členom 47 Listine o temeljnih pravicah

Goran Selanec, S.J.D.

Sodnik ustavnega sodišča

Hrvaška

Financira program Evropske unije za pravosodje (2014-2020).
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Dolžno pravno postopanje

- Člen 47 Listine Evropske unije o temeljnih pravicah določa **„pravico do učinkovitega pravnega sredstva in nepristranskega sodišča“.**

  Vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, ima pravico do ***učinkovitega pravnega sredstva*** pred sodiščem v skladu s pogoji, določenimi v tem členu.

  Vsakdo ima pravico, da o njegovi zadevi ***pravično, javno in v razumnem roku*** odloča ***neodvisno, nepristransko in z zakonom predhodno ustanovljeno sodišče***. Vsakdo ima možnost svetovanja, obrambe in zastopanja.

  Osebam, ki nimajo zadostnih sredstev, se odobri ***pravna pomoč***, kolikor je ta potrebna za ***učinkovito zagotovitev dostopa do sodnega varstva.***

Normativne korenine člena 47

- Združene zadeve od C-317/08 do C-320/08 *Alassini*

  V zvezi s tem je treba najprej opozoriti, da je na podlagi ustaljene sodne prakse **načelo učinkovitega sodnega varstva splošno načelo prava Unije**, ki izhaja iz skupnih ustavnih tradicij držav članic ter je potrjeno v členih 6 in 13 EKČP **ter prav tako v členu 47** Listine o temeljnih pravicah (glej sodbo *Mono Car Styling,* 47. odstavek in navedeno sodno prakso).

Učinkovito sodno varstvo

- Zadeva 222/84 *Johnston*

  „/…/ je treba najprej opozoriti, da člen 6 Direktive državam članicam nalaga obveznost, da v nacionalni pravni red uvedejo ukrepe, potrebne, da se vsem osebam, ki se čutijo prizadete zaradi diskriminacije, omogoči „vlaganje zahtevkov v sodnih postopkih“. Iz te določbe izhaja, da morajo ***države članice sprejeti ukrepe, ki bodo dovolj učinkoviti za dosego cilja*** *direktive in ki bodo* ***poskrbeli, da se bodo lahko zadevne osebe dejansko sklicevale pred nacionalnimi sodišči na tako podeljene pravice****.*

  Sodni nadzor, ki ga zahteva ta člen, ***je odraz splošnega pravnega načela, ki je podlaga ustavnih tradicij, ki so skupne vsem državam članicam****. To načelo je bilo prav tako priznano s členoma 6 in 13 Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin z dne 4. novembra 1950. Kot je bilo priznano v skupni izjavi Skupščine, Sveta in Komisije z dne 5. aprila 1977 (UL C 103, str. 1) ter s sodno prakso Sodišča, je treba v okviru prava Skupnosti upoštevati načela, na katerih temelji ta konvencija.*

  Na podlagi člena 6 Direktive 76/207, ki se razlaga ob upoštevanju zgoraj navedenega splošnega načela, imajo vse osebe pravico do učinkovitega pravnega sredstva na pristojnem sodišču zoper ukrepe, za katere menijo, da so v nasprotju z načelom enakega obravnavanja moških in žensk iz te direktive. Države članice morajo zagotoviti učinkovit sodni nadzor nad spoštovanjem veljavnih določb prava Skupnosti in nacionalne zakonodaje, namenjene uresničevanju pravic, ki jih določa direktiva.

  Na ta del šestega vprašanja, ki ga je postavilo delovno sodišče, je torej treba odgovoriti, da ***načelo učinkovitega sodnega nadzora*** *iz člena 6 Direktive Sveta št. 76/207 z dne 9. februarja 1976 ne dopušča, da bi se potrdilo, ki ga izda nacionalni organ, da so izpolnjeni pogoji za odstopanje od načela enakega obravnavanja moških in žensk zaradi varovanja javne varnosti, obravnavalo kot neizpodbiten dokaz in tako izključilo izvajanje kakršne koli sodne kontrole*.“

Zahteva EU po minimalni učinkovitosti procesnih instrumentov

- 33/76 REWE-ZENTRAL

  „Prepoved iz člena 13 Pogodbe ... ima **neposreden učinek in državljanom podeljuje pravice**, ki jih morajo varovati nacionalna sodišča.

  V skladu z **načelom sodelovanja** iz člena 5 Pogodbe so **nacionalna sodišča tista, ki so zadolžena za zagotavljanje pravnega varstva**, ki ga imajo državljani zaradi neposrednega učinka določb prava Skupnosti.

  Zato je v odsotnosti pravil Skupnosti na tem področju **naloga notranjega pravnega sistema vsake države članice, da določi pristojna sodišča in procesne pogoje** za tožbe, katerih namen je zagotoviti varstvo pravic državljanov pred neposrednim učinkom prava Skupnosti, pri čemer se razume, da ti pogoji **ne smejo biti manj ugodni** od tistih, ki se nanašajo na podobne tožbe domače narave …

  Če takšnih usklajevalnih ukrepov ni, je treba pravico, ki jo podeljuje pravo Skupnosti, uveljavljati pred nacionalnimi sodišči v skladu s pogoji, ki jih določajo nacionalni predpisi.

  Položaj bi bil drugačen le, če bi pogoji in roki v praksi **onemogočali uveljavljanje pravic**, ki jih morajo varovati nacionalna sodišča.

  To ne velja, kadar so **določeni razumni roki** za zastaranje tožb.

  Določitev takšnih rokov za ukrepe davčne narave je uporaba temeljnega načela pravne varnosti, ki varuje tako davčnega zavezanca kot zadevno upravo.“

Splošne omejitve v zvezi s členom 47

- Člen 51

Določbe te listine se uporabljajo za institucije, organe, urade in agencije Unije ob spoštovanju ***načela subsidiarnosti***, za države članice pa ***samo, ko izvajajo pravo Unije***. Zato spoštujejo pravice, upoštevajo načela in spodbujajo njihovo uporabo v skladu s svojimi pristojnostmi in ob spoštovanju meja pristojnosti Unije, ki so ji dodeljene v Pogodbah.

Ta listina ***ne razširja področja uporabe prava Unije*** preko pristojnosti Unije niti ne ustvarja nikakršnih novih pristojnosti ali nalog Unije in ***ne spreminja pristojnosti in nalog***, opredeljenih v Pogodbah.

- Člen 52

Kakršno koli omejevanje uresničevanja pravic in svoboščin, ki jih priznava ta listina, mora biti predpisano z zakonom in spoštovati bistveno vsebino teh pravic in svoboščin. Ob upoštevanju načela sorazmernosti so omejitve dovoljene samo, če so potrebne in če dejansko ustrezajo ciljem splošnega interesa, ki jih priznava Unija, ali če so potrebne zaradi zaščite pravic in svoboščin drugih.

Pravice, ki jih priznava ta listina in jih urejajo določbe Pogodb, se uresničujejo v skladu s pogoji in v mejah, opredeljenih v teh pogodbah. Kolikor ta listina vsebuje pravice, ki ustrezajo pravicam, zagotovljenim z Evropsko konvencijo o varstvu človekovih pravic in temeljnih svoboščin, sta vsebina in obseg teh pravic enaka kot vsebina in obseg pravic, ki ju določa navedena konvencija. Ta določba ne preprečuje širšega varstva po pravu Unije.

Kolikor so v tej listini priznane temeljne pravice, kot izhajajo iz skupnih ustavnih tradicij držav članic, je treba te pravice razlagati skladno s temi tradicijami.

Uporaba načela

- ***Učinkovito sodno varstvo,*** ki ga je treba zagotoviti:
  - ko nacionalna sodišča razlagajo nacionalno zakonodajo tako, da zagotovijo učinkovita pravna sredstva in postopke pri obravnavi pravic iz Unije,
    - mehanizem iz člena 267 PDEU;
  - ko Sodišče EU razlaga določbe Pogodbe, ki jih uporabljajo organi EU;
  - ko Sodišče EU preverja veljavnost sekundarnega prava, kot ga izvajajo države članice, kar na koncu povzroči tudi prenehanje uporabe.
- Načelo učinkovitega sodnega varstva je delovalo kot „krovno načelo“:
  - vsebuje različne elemente, ki sami po sebi pomenijo pravice ali načela, ki se pogosto uporabljajo nekoliko prožno (včasih kot samostojna načela, včasih v povezavi z načelom učinkovitega sodnega varstva ali kot njegov del);
  - ti elementi se odražajo v členih 41, 47 in 48 Listine.

Nemogoče ali pretirano oteženo

- C-312/93 *Peterbroeck*

  Za uporabo teh načel je treba vsako zadevo, v kateri se pojavi vprašanje, ali nacionalna procesna določba ***onemogoča ali pretirano otežuje*** uporabo zakonodaje Skupnosti, ***analizirati*** glede na vlogo te določbe v postopku, njen potek in njene posebnosti, gledano v celoti, pred različnimi nacionalnimi sodišči.

  Na podlagi te analize je treba po potrebi upoštevati temeljna načela nacionalnega pravosodnega sistema, kot so *varstvo pravice do obrambe*, načelo *pravne varnosti* in *pravilen potek postopka*.

Primer zgodnje selitve

- C-93/12 Agrokonsulting

  Dalje, glede načela učinkovitosti je treba spomniti, da se mora z vidika presoje, ki se zahteva s sodno prakso, navedeno v točki 38 te sodbe, vprašanje, ali nacionalna postopkovna določba praktično onemogoča ali pretirano otežuje uresničevanje pravic, ki jih posameznikom daje pravni red Unije, presoditi po potrebi ob upoštevanju temeljnih načel zadevnega nacionalnega pravnega sistema, kot so varstvo pravice do obrambe, pravna varnost in učinkovit potek postopka (glej v tem smislu zlasti zgoraj navedeni sodbi Peterbroeck, točka 14, in Pontin, točka 47).

  Glede pomislekov, povzetih v točkah 30 in 31 te sodbe, mora predložitveno sodišče v postopku v glavni stvari upoštevati te elemente.

  ….

  Nazadnje, glede **člena 47** Listine je iz sodne prakse Sodišča razvidno, da ta določba pomeni **potrditev načela učinkovitega sodnega varstva**, splošnega načela prava Unije, ki izhaja iz skupnih ustavnih tradicij držav članic ter je potrjeno v členih 6 in 13 Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin, podpisane v Rimu 4. novembra 1950 (glej v tem smislu zlasti sodbe z dne 15. maja 1986 v zadevi Johnston, 222/84, Recueil, str. 1651, točka 18; z dne 13. marca 2007 v zadevi Unibet, C-432/05, ZOdl., str. I-2271, točka 37, in z dne 28. februarja 2013 v zadevi Arango Jaramillo in drugi proti EIB, C-334/12 RX-II, točka 40).

  V obravnavanem primeru v zvezi s tem zadostuje poudariti, da se zlasti ob upoštevanju preudarkov, izraženih v točkah od 50 do 58 te sodbe, in podatkov, ki jih ima Sodišče v tem postopku, ne zdi, da je upravičenec, ki je v položaju, v kakršnem je Agrokonsulting, prikrajšan za učinkovito pravno sredstvo pred sodiščem za uveljavljanje pravic, ki jih ima na podlagi prava Unije.

  Na podlagi vsega navedenega je na postavljeni vprašanji treba odgovoriti, da je pravo Unije, zlasti **načeli enakovrednosti in učinkovitosti ter člen 47 Listine, treba razlagati tako, da ne nasprotuje nacionalnemu pravilu** o sodni pristojnosti, kakršno je navedeno v členu 133(1) APK, katerega posledica je, da se vsi spori v zvezi z odločbami nacionalnega organa, pristojnega za izplačilo kmetijskih pomoči v okviru skupne kmetijske politike Unije, dodelijo enemu samemu sodišču, če se pravna sredstva, katerih namen je zagotovitev varstva pravic, ki jih imajo upravičenci na podlagi prava Unije, ne izvajajo pod manj ugodnimi pogoji, kot so določeni za pravna sredstva, katerih namen je varstvo pravic na podlagi morebitnih shem pomoči za kmete, določenih v notranjem pravu, in če tako pravilo o pristojnosti upravičencem **ne povzroča postopkovnih nevšečnosti, predvsem z vidika trajanja postopka**, ki čezmerno otežuje uresničevanje pravic na podlagi prava Unije, kar mora preveriti predložitveno sodišče.

Doktrinarne spremembe: Od načela k pravici; od upravičenosti k sorazmernosti

- **C-320/08 Alassini**

60 V teh okoliščinah je treba ugotoviti, da so z zadevnim nacionalnim predpisom, ki je sporen v postopkih v glavni stvari, ***spoštovana načela učinkovitosti***, če sredstva elektronskega komuniciranja ne pomenijo edinega načina dostopa do postopka poravnave in so v izjemnih primerih možni začasni ukrepi, ko je to potrebno zaradi nujnosti situacije.

61 ***Drugič, v zvezi s tem je treba najprej opozoriti, da je na podlagi ustaljene sodne prakse načelo učinkovitega sodnega varstva splošno načelo prava Unije***, ki izhaja iz skupnih ustavnih tradicij držav članic in je ***potrjeno*** v členih 6 in 13 EKČP ter ***prav tako v členu 47 Listine Unije o temeljnih pravicah*** (glej zgoraj navedeno sodbo Mono Car Styling, točka 47 in navedena sodna praksa).

62 V postopkih v glavni stvari ni sporno, da zadevni nacionalni predpis s tem, da dopustnost tožbe na področju storitev elektronskih komunikacij pogojuje z obveznim poskusom izvensodne poravnave, uvaja dodatno fazo za dostop do sodišča. ***Ta pogoj bi lahko vplival na načelo učinkovitega sodnega varstva.***

63 Vendar pa iz ustaljene sodne prakse izhaja, da **temeljne pravice niso absolutne pravice, ampak lahko vsebujejo omejitve pod pogojem, da te omejitve dejansko ustrezajo ciljem v splošnem interesu, ki jim sledijo zadevni ukrepi, in da glede na zastavljeni cilj ne pomenijo pretiranega in nesprejemljivega posega, ki bi omejeval samo bistvo tako zagotovljenih pravic** (glej v tem smislu sodbo z dne 15. junija 2006 v zadevi Dokter in drugi, C-28/05, ZOdl., str. I-5431, točka 75 in navedena sodna praksa, in sodbo Evropskega sodišča za človekove pravice z dne 21. novembra 2001 v zadevi Fogarty proti Združenemu kraljestvu, Recueil des arrêts et décisions 2001-XI, točka 33).

64 Kot je na obravnavi navedla italijanska vlada, je najprej treba ugotoviti, da sta namena zadevnih nacionalnih določb hitrejša in cenejša poravnava spora s področja elektronskih komunikacij ter razbremenitev sodišč, s čimer te določbe ***sledijo legitimnim ciljem v splošnem interesu.***

65 ***Dalje se zdi***, da uvedba postopka obvezne izvensodne poravnave, kakor ga določa zadevni nacionalni predpis iz postopka v glavni stvari, z vidika natančnih modalitet njegovega delovanja, navedenih v točkah od 54 do 57 te sodbe, ***ni nesorazmerna s cilji, ki jim sledi***. Po eni strani namreč, kot je navedla generalna pravobranilka v točki 47 sklepnih predlogov, ***ni milejšega sredstva od uvedbe obveznega postopka***, ker uvedba zgolj fakultativnega postopka izvensodne poravnave ne pomeni enako učinkovitega sredstva za doseganje teh ciljev. Po drugi strani ***ne obstaja očitno nesorazmerje med temi cilji in morebitnimi pomanjkljivostmi zaradi obvezne narave postopka izvensodne poravnave.***

66 Glede na vse navedeno je treba ugotoviti, da zadevni nacionalni postopek, ki je sporen v postopku v glavni stvari, upošteva načelo učinkovitega sodnega varstva ob pridržku pogojev, navedenih v točkah 58 in 59 te sodbe.

Temeljna pravica in/ali temeljno načelo

- Načelo olajšuje raziskovanje praktičnih posledic/obsega pravice

  V točki 59 sodbe DEB je Sodišče ob upoštevanju sodne prakse Evropskega sodišča za človekove pravice odločilo, da je treba ***načelo učinkovitega sodnega varstva iz člena 47*** Listine ***razlagati*** tako, da njegovo uveljavljanje s strani pravnih oseb ni izključeno in da pomoč pri uporabi tega načela med drugim lahko vključuje oprostitev predplačila sodnih stroškov oziroma stroškov pomoči odvetnika.

Dve vrsti omejitev

- Omejitve (za analitične namene), povezane s:
  - členom 47, ki zagotavlja temeljno pravico;
  - členom 47, ki potrjuje temeljno načelo prava EU.

Omejitev člena 47 kot temeljne pravice

- C-156/12 GREP

  Vendar je Sodišče ugotovilo, da temeljne pravice, kot je spoštovanje pravice do obrambe, ***niso absolutne pravice, ampak lahko zanjo veljajo omejitve. Vendar morajo te dejansko ustrezati ciljem splošnega interesa, ki jih zasleduje zadevni ukrep, in glede na zasledovani cilj ne smejo pomeniti očitnega in nesorazmernega posega v tako zagotovljene pravice*** (sodba z dne 2. aprila 2009, Gambazzi, C-394/07, Recueil, str. 2009, str. I-2563, točka 29).

- Glej tudi C-317-320/08 *Alassini*, C-28/05 *Dokter*, C-619/10 *Trade Agency*, C-418/11 *Texdata*

Kaj pa člen 52(1)

- Člen 52(1) vsebuje splošno opredelitev sprejemljivih omejitev temeljnih pravic in je sestavljen iz več elementov:
  - omejitev mora biti določena **z zakonom**;
  - spoštovati mora **bistveno vsebino** zadevne pravice ali svoboščine;
    - ali je omejitev, ki krši bistvo pravice, takšne narave, da jo je mogoče šteti za „očitno”?
  - mora biti upravičena (**legitimni cilj**);
    - cilj splošnega interesa, ki ga priznava Unija;
    - potreba po zaščiti pravic in svoboščin drugih;
  - upoštevati mora načelo **sorazmernosti**;
    - ali je to drugačna raven nadzora kot *„očitna in nesorazmerna prizadetost"?*

Element 1: Zagotovljeno z zakonom

- C-562/12 **Eesti-Läti programmi 2007-2013 Seirekomitee,**

67 V zvezi s tem glede načela učinkovitega pravnega varstva člen 47, prvi odstavek, Listine določa, da ima vsakdo, čigar pravice in svoboščine, zagotovljene s pravom Unije, so kršene, pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu.

68 Za zagotovitev tega, da bo v Uniji spoštovana navedena pravica do učinkovitega pravnega sredstva, je s členom 19(1), drugi pododstavek, PEU državam članicam naloženo, naj vzpostavijo pravna sredstva, potrebna za zagotovitev učinkovitega pravnega varstva na področjih, ki jih ureja pravo Unije.

69 V zadevi, kakršna je ta v postopku v glavni stvari, je posledica tega, da Seirekomitee zavrne vlogo za subvencijo, dokončna odstranitev vlagatelja iz postopka dodelitve subvencij, ki jih sofinancira Unija, ne da bi mu bila naknadno poslana kakršna koli odločba.

70 Poleg tega iz točke 6.6, prvi odstavek, drugi stavek, programskega navodila izhaja, da odločitev Seirekomitee ni mogoče izpodbijati pred sodiščem. Vlagatelj, čigar vloga za subvencijo je bila zavrnjena, torej nima nobene možnosti za izpodbijanje te odločitve o zavrnitvi.

71 V teh okoliščinah je vlagatelju, ker ni mogoče vložiti tožbe zoper tako odločitev o zavrnitvi, odvzeta njegova pravica do učinkovitega pravnega sredstva, kar pomeni kršitev člena 47 Listine.

72 Dodati je treba, da mora biti v skladu s členom 52(1) Listine kakršno koli omejevanje uresničevanja pravic in svoboščin, ki jih priznava Listina, predpisano z zakonom in mora spoštovati bistveno vsebino teh pravic in svoboščin, ob upoštevanju načela sorazmernosti pa so omejitve dovoljene samo, če so potrebne in če dejansko ustrezajo ciljem splošnega interesa, ki jih priznava Unija, ali če so potrebne zaradi zaščite pravic in svoboščin drugih.

73 ***V vsakem primeru je to, da ni mogoče vložiti tožbe zoper odločitev o zavrnitvi vloge za subvencijo, kakršna je ta v postopku v glavni stvari, določil Seirekomitee in ne zakon.***

74 Zato je treba ugotoviti, ***da programsko navodilo s tem, da je v njem določeno, da odločitve Seirekomitee o zavrnitvi vloge za subvencijo ni mogoče izpodbijati pred sodiščem, ne spoštuje načela učinkovitega pravnega varstva*** iz člena 47, prvi odstavek, Listine.

75 Poleg tega je treba spomniti, da je zahteva po sodnem nadzoru vsake odločbe nacionalnega organa temeljno načelo prava Unije. Na podlagi tega načela morajo nacionalna sodišča odločiti o zakonitosti akta, ki ima negativne posledice, in tožbo, vloženo v ta namen, šteti za dopustno, čeprav notranja postopkovna pravila v podobnem primeru ne določajo take tožbe (glej v tem smislu sodbo Oleificio Borelli/Komisija, EU:C:1992:491, točki 13 in 14).

Element 2: Bistvo učinkovitega sodnega varstva

- C-279/09 DEB

  Glede na vse zgoraj navedeno je na zastavljeno vprašanje treba odgovoriti, da je treba načelo učinkovitega sodnega varstva, kot je določeno v členu 47 Listine, razlagati tako, da ni izključeno, da bi se nanj sklicevale pravne osebe, in da lahko pomoč, odobrena na podlagi tega načela, med drugim pokriva oprostitev plačila predujma stroškov postopka in/ali pomoč odvetnika.

  Nacionalno sodišče mora v zvezi s tem preveriti, ali predpostavke za odobritev pravne pomoči pomenijo omejitev pravice do dostopa do sodišč, s katero bi bila ta pravica kršena v svojem bistvu, ali se je z navedenimi predpostavkami uresničeval legitimni cilj in ali med uporabljenimi sredstvi in uresničevanim ciljem obstaja razumno razmerje sorazmernosti.

  V okviru te presoje lahko ***nacionalno sodišče upošteva predmet spora***, ***razumno možnost za uspeh prosilca, pomen zadeve zanj, zapletenost prava in postopka***, ***ki ju je treba uporabiti, ter sposobnost tega prosilca, da učinkovito zastopa svoje stališče***. Pri presoji sorazmernosti lahko nacionalno sodišče upošteva tudi, kolikšni so stroški postopka, ki jih je treba plačati kot predujem, in ali je ovira, ki jo ti stroški morebiti pomenijo za dostop do sodnega varstva, nepremagljiva.

- C-314/13 Peftiev

  Kar zadeva ugovor litovske vlade, da bi lahko tožene stranke v postopku v glavni stvari zaprosile za brezplačno pravno pomoč, določeno z nacionalnim pravom, da bi prejele pomoč odvetnika, je treba ugotoviti, da je zakonodajalec Unije s ***členom 3(1)(b) Uredbe št. 765/2006 vzpostavil dosleden sistem, ki omogoča zagotovitev spoštovanja pravic, zagotovljenih s členom 47 Listine***, ne glede na zamrznitev sredstev. ***Kadar mora oseba, navedena na seznamu iz Priloge I k tej uredbi, uporabiti pravne storitve, ki jih potrebuje, zaradi te zamrznitve sredstev ne sme veljati kot oseba brez sredstev, temveč mora, nasprotno, v ta namen zahtevati sprostitev nekaterih zamrznjenih sredstev ali virov***, če so izpolnjeni vsi pogoji iz te določbe.

  Tako člen 3(1)(b) sam po sebi nasprotuje temu, da pristojni nacionalni organ zavrne odobritev sprostitve sredstev, ker bi takšna oseba lahko pridobila brezplačno pravno pomoč.

  V zvezi z merili, ki jih mora pristojni nacionalni organ upoštevati pri odločitvi o prošnji za odstopanje, je treba ugotoviti, da člen 3(1)(b) Uredbe št. 765/2006 določa omejitve za uporabo sredstev, saj morajo biti ta namenjena izključno za plačilo zmernih honorarjev in povračilo nastalih stroškov, povezanih z zagotavljanjem pravnih storitev.

Element 2: Bistvo (največkrat implicitno)

- C-300/11 ZZ

  V zvezi s sodnim postopkom je treba poudariti, da je Sodišče že razsodilo, da morajo imeti stranke postopka glede načela kontradiktornosti, ki je del pravice do obrambe iz člena 47 Listine, pravico seznaniti se z vsemi dokumenti ali stališči, predloženimi sodišču, zato da vplivajo na njegovo odločitev ali da o dokumentih in stališčih razpravljajo (sodbe z dne 14. februarja 2008 v zadevi Varec, C-450/06, ZOdl., str. I-581, točka 45; z dne 2. decembra 2009 v zadevi Komisija proti Irski in drugim, C-89/08 P, ZOdl., str. I-11245, točka 52, in z dne 21. februarja 2013 v zadevi Banif Plus Bank, C-472/11, točka 30; kar zadeva člen 6(1) Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin, podpisane v Rimu 4. novembra 1950, glej tudi sodbo Evropskega sodišča za človekove pravice z dne 23. junija 1993 v zadevi Ruiz-Mateos proti Španiji, série A, št. 262, točka 63).

  Če bi sodna odločba temeljila na dejstvih ali dokumentih, s katerimi se stranke – ali ena od njih – niso mogle seznaniti in glede katerih zato niso mogle podati stališč, bi bila s tem kršena temeljna pravica do učinkovitega pravnega sredstva (zgoraj navedena sodba Komisija proti Irski in drugim, točka 52 in navedena sodna praksa).

  Če pa v izjemnih primerih nacionalni organ temu, da zainteresirano stranko natančno in v celotni obvesti o razlogih, na katerih temelji odločba, sprejeta v skladu s členom 27 Direktive 2004/38, nasprotuje s tem, da se sklicuje na razloge v zvezi z državno varnostjo, mora pristojno sodišče države članice imeti na voljo in uporabiti tehnike in pravila postopkovnega prava, ki omogočajo uskladitev legitimnih preudarkov državne varnosti glede narave in virov podatkov, ki so se upoštevali pri sprejetju take določbe, in nujnosti, da se zadevni osebi zagotovi ustrezno spoštovanje njenih procesnih pravic, kot sta pravica do izjave in načelo kontradiktornosti (glej po analogiji zgoraj navedeno sodbo Kadi in Al Barakaat International Foundation proti Svetu in Komisiji, točka 344).

  Za to morajo države članice ***vzpostaviti, prvič, učinkovit sodni nadzor nad obstojem in utemeljenostjo razlogov, ki jih v zvezi z državno varnostjo uveljavlja nacionalni organ***, ter nad zakonitostjo odločbe, sprejete v skladu s členom 27 Direktive 2004/38, in drugič, tehnike in pravila zvezi z nadzorom, kot so navedene v prejšnji točki.

  V zvezi s tem mora pristojno nacionalno sodišče neodvisno preučiti vse pravne in dejanske elemente, ki jih uveljavlja pristojni nacionalni organ, in v skladu z nacionalnimi postopkovnimi pravili presoditi, ali državna varnost takemu obvestilu nasprotuje.

  Če pa se izkaže, da državna varnost dejansko nasprotuje temu, da se zainteresirana oseba obvesti o navedenih razlogih, je treba sodni nadzor nad zakonitostjo odločbe, sprejete v skladu s členom 27 Direktive 2004/38, kot je predviden v njenem členu 31(1), glede na navedeno v točkah 51, 52 in 57 te sodbe, opraviti po postopku, v katerem se ustrezno pretehtajo zahteve, ki izhajajo iz državne varnosti, in zahteve, ki izhajajo iz pravice do učinkovitega sodnega varstva, pri čemer je treba morebitne posege v izvajanje te pravice omejiti na nujno potrebne.

  V zvezi s tem mora po eni strani navedeni postopek ob upoštevanju zahteve po spoštovanju člena 47 Listine zagotoviti, da se čim bolj spoštuje načelo kontradiktornosti, zato da se zainteresirani osebi omogoči izpodbijanje razlogov, na katerih temelji zadevna odločba, in predložitev stališč glede dokazov v zvezi z njo ter tako učinkovito uveljavljanje razlogov obrambe. Predvsem je pomembno, da se ***zainteresirana oseba vsekakor obvesti o bistvu razlogov, na katerih temelji odločba o zavrnitvi vstopa, ki je bila sprejeta na podlagi člena 27 Direktive 2004/38, saj potrebna zaščita državne varnosti ne more povzročiti, da se zainteresirani osebi odreče pravica do izjave, zaradi česar bi njena pravica do pritožbe, kot je predvidena v členu 31 te direktive, postala neučinkovita.***”

Element 2: Bistvo (včasih eksplicitno)

- Zadeva C-216/18 PPU Minister za pravosodje in enakost (Pomanjkljivosti v pravosodju)

  „Glede tega je treba poudariti, da je zahteva po neodvisnosti sodišč bistvena vsebina temeljne pravice do poštenega sojenja, ki ima poglaviten pomen kot garant varstva vseh pravic, ki jih imajo pravni subjekti na podlagi prava Unije, in ohranitve skupnih vrednot držav članic, ki so navedene v členu 2 PEU, zlasti vrednote pravne države.”

- V C-362/14 *Schrems*, je Sodišče EU menilo, da ureditev, ki ne določa nobene možnosti, da bi posameznik lahko uporabil pravna sredstva za pridobitev dostopa do osebnih podatkov, ki se nanj nanašajo, ali dosegel popravo ali izbris takih podatkov, posega v bistvo temeljne pravice do učinkovitega sodnega varstva, določene v členu 47 Listine.

Element 3: Razlogi splošnega interesa

- Primeri iz sodne prakse:
  - še vedno prevladujejo uveljavljena načela Rewe/Peterbroock – „pravica do obrambe, načelo pravne varnosti in pravilen potek postopka”;
    - časovni roki: C-470/99, Universale-Bau AG; C-500/16, Carterpillar Financial Services; C-637/17, Cogeo Communications; C-676/17, Călin; C-280/18, Alain Flausch;
    - pravnomočnost/nevarnost pred dvakratno obsodbo: C-119/05, Lucchini; C-2/08, Fallimento Olimpiclub; C-213/13, Pizzarotti; C-64/14, Târsia;
    - pravila ius standi: C-510/13, E.ON FoldgazTrade;
  - vidiki, ki se nanašajo na varnost EU ali njenih držav članic;
    - Združene zadeve C-584/10 P, C-593/10 P in C-595/10 P Kadi II; C-300/11 ZZ;
  - obstoj hitrega, učinkovitega in cenejšega reševanja sporov;
    - Združene zadeve C-317-320/08 Alassini; C-619/10 Trade Agency;
  - varovanje zdravja in življenja;
    - postopkovne omejitve zaradi covida-19;
  - avtonomnost verskih organizacij („etos organizacije”);
    - C-414/16 Egenberger.

Element 4: Sorazmernost

- Različni cilji - različne vrste nadzora:
  - razlika v presoji omejitve temeljne pravice iz naslednjih razlogov:
    - cilj splošnega interesa;
      - preizkus bi bil tradicionalen, zlasti strog preizkus sorazmernosti;
    - za zaščito pravic in svoboščin drugih;
      - potreba po uskladitvi zahtev glede varstva različnih pravic;
      - C-450/06 Varec:

        „Nasprotno, pravico dostopa je treba pretehtati glede na pravico drugih gospodarskih subjektov do varstva njihovih zaupnih podatkov in poslovnih skrivnosti.

        Načelo varstva zaupnih podatkov in poslovnih skrivnosti mora biti zagotovljeno tako, da je usklajeno z zahtevami učinkovitega pravnega varstva in varstva pravic obrambe, ki jih imajo stranke v sporu (glej po analogiji sodbo z dne 13. julija 2006 v zadevi Mobistar, C-438/04, ZOdl., str. I-6675, točka 40), v primeru pravnega sredstva oziroma sredstva, o katerem odloča organ, ki je sodišče v smislu člena 234 ES, pa tako, da je v celotnem postopku zagotovljeno pravično sojenje.

        Zato mora imeti pristojni revizijski organ vsekakor možnost pridobiti podatke, na podlagi katerih se popolnoma seznani z zadevo, o kateri odloča, to pa vključuje tudi zaupne podatke in poslovne skrivnosti (glej po analogiji zgoraj navedeno sodbo Mobistar, točka 40).“

Element 4: (Dejansko) uravnoteženje

- C-752/18 Deutsche Umwelthilfe eV

  „/…/ da če nacionalno sodišče ne more razlagati nacionalne ureditve v skladu z zahtevami prava Unije, je to sodišče, ki odloča v okviru svoje pristojnosti, kot organ države članice dolžno, da v sporu, ki mu je predložen, ne uporabi nobene nacionalne določbe, ki je v nasprotju z določbo prava Unije z neposrednim učinkom (sodbi z dne 9. marca 1978, Simmenthal, 106/77, EU:C:1978:49, točka 21, in z dne 24. junija 2019, Popławski, C-573/17, EU:C:2019:530, točki 58 in 61).

  Vendar te sodne prakse ***Sodišča ni mogoče razumeti tako, da načelo učinkovitosti prava Unije in spoštovanje pravice do učinkovitega sodnega varstva, ki je zagotovljena s členom 47, prvi odstavek, Listine, nacionalno sodišče zavezujeta, da ne uporabi določbe nacionalnega prava*** ali edine razlage te določbe, ki se mu zdi v skladu z nacionalno ustavo, ***če bi s tem kršilo drugo temeljno pravico, ki jo zagotavlja pravo Unije.***

  Da bi se odgovorilo na vprašanje za predhodno odločanje, **je torej treba, na tretjem mestu, tehtati zadevne temeljne pravice** glede na zahteve iz člena 52(1), prvi stavek, Listine. Če v določbah nacionalnega prava obstaja pravna podlaga za sprejetje takega zapora, ki je pri svoji uporabi dovolj dostopna, natančna in predvidljiva, in če omejitev pravice do svobode, zajamčene s členom 6 Listine, do katere bi prišlo zaradi izreka take sankcije, spoštuje druge pogoje, ki jih v zvezi s tem določa člen 52(1) Listine. Po drugi strani pa pravo Unije tega sodišča ne pooblašča, da uporabi tak ukrep, če v nacionalnem pravu ni take pravne podlage.“

The Right to Legal Aid in the EU Legal Order

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The Principle of "equality of arms"

- The procedural notion of maintaining a "fair balance" between the parties
  - each party must be afforded a reasonable opportunity to present her case – including her evidence – under conditions that do not place her at a substantial disadvantage in comparison the other party (Regner v. the Czech Republic [GC], ECHR § 146; Dombo Beheer B.V. v. the Netherlands, ECHR § 33).
  - inherent in the broader concept of a fair trial and is closely linked to the adversarial principle
- equilibrium of procedural rights and privileges
  - requires that there be a fair balance between the opportunities afforded the parties involved in litigation (for example, each party should be able to call witnesses and cross-examine the witnesses called by the other party).

A concept that has been developed by the European Court of Human Rights in the context of the right to a fair trial (Article 6). It applies in principle to civil as well as to criminal cases (Feldbrugge v. the Netherlands, ECHR § 44). However, it has evolved primarily through criminal caselaw.

It continues to evolve both through the ECHR as well as the CJEU caselaw.

Relational and Substantial Equality

- The CJEU repeatedly held the principle of equality of arms is an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law
  - Art 47 Charter

- C-169/14 *Sanchez Mocillo and Abril García*:

  "It is settled case-law that the principle of equality of arms, together with, among others, the principle audi alteram partem, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a ***clearly less advantageous*** position ***compared with*** its opponent."

Since the concept is relational - depends on the comparator – it does not inhere substantive minimum of rights. The minimum of rights – the substantive trashold – is provided by the tightly related principle of effective judicial protection. The right to adversarial proceedings provides that the parties should be able to participate effectively by knowing and understanding the case and by being able to comment on it.
The CJEU held in *ZZ v Secretary of State for the Home Department* that:

"Having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them."

Part of the Fair Trail "Package"

- claim of violation of equality of arms "*will be considered in the light of the whole of Article 6 (1) because the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial*". (ECtHR, Ruiz-Mateos v. Spain, No. 12952/87, 23 June 1993, para. 63;)

- CJEU, C-199/11, *Europese Gemeenschap v. Otis NV and Others*

  "***The principle of equality of arms, which is a corollary of the very concept of a fair hearing*** (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden and Others v API and Commission [2010] ECR I-8533, paragraph 88), implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

  As the Advocate General has observed in point 58 of his Opinion, the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Conversely, the harm which a lack of balance will be likely to cause must, as a rule, be proved by the person who has suffered it."

- If there is a "equality of arms" issue related to a particular (national) court proceeding the CJEU will not limit it scrutiny to the question of procedural equivalence but can engage in examining any aspect of the fair trail guarantee as provided by Art 47 of the Charter
  - breach of some narrow aspect regulated by fair trail Directives opens a door to wider Art 47 scrutiny

Legal Aid
Requirment of Equality of Arms

- In some circumstances the principle of equality of arms may require the provision of financial support to allow a person of limited means to pay for legal representation
  - the right of effective judicial protection with its precondition in the form of the right of access to judicial protection should be ***accessible to all*** individuals
    - material/financial status can be hindrance
    - states to take steps to ensure minimal substantive equality in terms of opportunity to access to proceedings;
      - indirect discrimination logic
    - setting up appropriate legal aid systems is the condition of the equality before the law (justice for all)
      - legal aid includes both assistance by a lawyer and dispensation from payment of the costs of proceedings
- *Airey v Ireland* (ECHR, App no 6289/73, [1981])

Indirect discrimination focuses on the practical implication of a challnged practice/standard of tretment. In this case the standard that could turn into discriminatory practice due to its exclussionary implications related to access to effective protection before courts is “pay-for-legal- service” or “contribute-to-execution-of justice” practices. Obviously, they will inevitably place those without sufficent financial means in unfavorable position; exclude them from the protection of justice system.

Airey v. Ireland,
the applicant sought judicial separation from her husband but was unable to obtain a judicial order because she could not afford to retain a lawyer without legal aid. Article 6 (1) ECHR requires from MS to provide legal aid when legal assistance is indispensable for securing effective access to a court. Testing self-sufficiency is allowed. Hence, particular circumstances of each case are the key. In the present case, the relevant factors in favour of granting legal aid were: the complexity of the procedure and of the issues of law; the need to establish facts through expert evidence and the examination of witnesses; and that this was a marital dispute entailing emotional involvement.

See also ECHR caselaw:

P., C. and S. v. The United Kingdom, No. 56547/00, 16 October 2002, paras. 88-91.

Aerts v. Belgium, No. 25357/94, 30 July 1998.

Ruling on legal aid in the form of assistance by a lawyer, the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (Eur. Court H.R., judgments in *Airey v. Ireland*, § 26; *McVicar v. the United Kingdom*, §§ 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, ECHR 2002-VI, § 91, and *Steel and Morris v. the United Kingdom*, § 61). Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings (Eur. Court H.R., judgment in *Steel and Morris v. the United Kingdom*, § 62).

As regards legal aid in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought, the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see, to that effect, Eur. Court H.R., judgments in *Tolstoy-Miloslavsky v. the United Kingdom* of 13 July 1995, Series A No 316-B, §§ 59 to 67, and *Kreuz v. Poland* of 19 June 2001, ECHR 2001-VI, §§ 54 and 55)

Legal Aid under the EU Charter

- Article 47 of the Charter provides a right to legal aid to those who lack sufficient resources ***so far as this is necessary to ensure effective access to justice***.
  - "*where the absence of such aid would make it impossible to ensure an effective remedy*" (Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17)
  - applies to proceedings relating to all rights and freedoms arising from EU law
    - Council ***Directive 2003/8/EC*** to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41, and corrigendum OJ 2003 L 32, p. 15)

      '(5) This Directive seeks to promote the application of legal aid ***in cross-border disputes*** for persons who lack sufficient resources where aid is ***necessary to secure effective access to justice***. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union ['the Charter'].

      …

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

The scope *ratione personae* of the right to legal aid is defined in Article 3(1) of Directive 2003/8:
'Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.'

Article 6(3) of that directive states:
'When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession.'
6 Article 94(2) and (3)

The third Paragraph of Art 47

- C-279/09 **DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH** v **Bundesrepublik Deutschland**

> "In that connection, the first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.
>
> Under the second paragraph of Article 47, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented.
>
> The third paragraph of Article 47 of the Charter provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is ***necessary to ensure effective access to justice***.
>
> According to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR."

The extension of the "impossible or excessively difficult" doctrine:

C-279/09 DEB

> "As is apparent from well-established case-law on the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (see, inter alia, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43; and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 46).
>
> The referring court essentially asks whether the fact that a legal person is unable to qualify for legal aid renders the exercise of its rights impossible in practice in the sense that that legal person would not be able to gain access to a court because it would be impossible for it to make the advance payment in respect of the costs of proceedings and to obtain the assistance of a lawyer.
>
> The question referred thus concerns ***the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection***. That principle is a general principle of EU law stemming from the constitutional traditions common to the

Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') (Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61; and *Unibet*, paragraph 37)."

The Level of Scrutiny

- C-279/09 DEB

  "In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which ***undermines the very core of that right***; whether they pursue ***a legitimate aim***; and whether there is ***a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve***.

  In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts."

The "personal" scope of the legal aid doctrine

- Legal aid to Legal persons – ***not impossible***

  C-279/09 **DEB**

  "It is apparent from the examination of the case-law of the European Court of Human Rights that the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned…

  In the light of all of the foregoing, the answer to the question referred must be that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning ***that it is not impossible*** for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer…

  With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

"Not impossible" criteria suggests that compared to natural persons the level of scrutiny afforded to legal persons could be considerably lower. The case law suggests that in order to be successful with their "right to legal aid" claim legal persons will have to demonstrate interest that goes beyond their self-interest. There ought to be some "public" benefit from granting them legal aid.

C-279/09 **DEB:**

"That court had occasion to examine the situation of a commercial company which had applied for legal aid in the context of French legislation, which provides for such aid only in the case of natural persons and, exceptionally, in the case of non-profit-making legal persons having their seat in France and lacking sufficient resources. The European Court of Human Rights held that the difference in treatment between profit-making companies, on the one hand, and natural persons and non-profit-making legal persons, on the other, is based on an objective and reasonable justification which relates to the tax arrangements governing legal aid, since those arrangements provide for the possibility of deducting all costs of proceedings from taxable profits and of carrying over losses to a subsequent tax year (Eur. Court H.R., decision in *VP Diffusion Sarl v. France* of 26 August 2008, pp. 4, 5 and 7).

51 Similarly, in the case of a community of users of communal rural property

applying for legal aid in order to challenge an action for restitution of title to land, the European Court of Human Rights considered that account should be taken of the fact that funds approved by private associations and companies for their legal representation come from funds accepted, approved and paid by their members and noted that the application was made in order to intervene in civil litigation relating to the ownership of land, the outcome of which would affect only the members of the communities in question (Eur. Court H.R., decision in *CMVMC O´Limov. Spain* of 24 November 2009, paragraph 26). That court concluded from this that the refusal to grant free legal aid to the applicant community had not undermined the very core of its right of access to a court.

The subject-matter of the litigation may be taken into consideration, in particular its ***economic importance***.

For the purposes of taking account of the financial capacity of an applicant, where that applicant is a legal person, consideration may be given inter alia to the form of the company (whether it is a capital company or a partnership, whether it is a limited liability company or otherwise); the financial capacity of its shareholders; the objects of the company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity.

In its observations, the EFTA Surveillance Authority submits that, according to German law, a company will never fulfil the conditions for obtaining legal aid in a situation where it has not succeeded in becoming genuinely established, with employees and other infrastructure. That condition can ***specifically affect applicants for such aid who rely on rights conferred by EU law, in particular freedom of establishment*** or access to a particular market in a Member State.
It should be observed that ***such a factor must undoubtedly be taken into account*** by the national courts. However, it is for those courts to strike a fair balance in order to ensure that applicants relying on EU law have access to the courts, but without favouring such applicants over others. In this respect, the referring court and the German Government have stated that, according to the case-law of the Bundesgerichtshof, the legal concept of ‘public interest’ can cover all conceivable general interests for the benefit of the legal person.”

Legal Aid in Criminal Proceedings

- Criminal proceedings are inherently unequal in terms of powers and resources available to the prosecution versus the individual.
  - the underlying rationale for defence rights is to balance that inequality by giving rights to suspects and accused persons throughout the whole criminal procedure
  - legal aid is part of that equilibrium equation
  - due to inherent inequality of power the level of scrutiny will be higher
    - practical benefits following from the right to legal aid under Art 47 will be wider in scope
    - judicial inquiry will be more demanding

Stockholm Roadmap

- Resolution of the Council of 30 November 2009 on a ***Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*** (OJ 2009 C 295, p.1).
  - Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on ***the right to interpretation and translation*** in criminal proceedings
  - Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on ***the right to information*** in criminal proceedings
  - Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 ***on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings***, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, 6.11.2013, p. 1).
  - Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on **procedural safeguards for children** who are suspects or accused persons in criminal proceedings
  - Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of **the presumption of innocence and of the right to be present at the trial** in criminal proceedings (OJ 2016 L 65, 11.3.2016, p. 1)
  - Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on **legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings** (OJ 2016 L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

The normative justification for these measures is ***ensuring mutual trust.*** The means is a wide set of minimum standards/rights provided by binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element.

The Aim of the Legal Aid Directive

- directive is the sixth and last of a package of legal instruments adopted in line with Roadmap 2009
  - complements EU rules on access to a lawyer and on procedural safeguards for children who are suspected or accused of crimes and does not affect the rights they define
- ensure that the right to legal aid is provided and is offered in a uniform way across the EU
- common minimum rules concerning ***the right to legal aid*** in criminal proceedings across the EU
  - clear criteria for granting legal aid
    - funding by an EU country to provide a lawyer, allowing those individuals who do not have the resources to cover the costs of proceedings, access to one
  - quality standards and
  - remedies in case of breach

The purpose of the right to legal aid is to guarantee the right to a lawyer, as defined under Directive 2013/48/EU on the right of access to a lawyer (the 'Access to a Lawyer Directive'):

"(1) The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU of the European Parliament and of the Council (3) by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA (4) (requested persons)."

Also, the Right to Information Directive provides that suspects must be informed of their right to be assisted by a lawyer as well as "any entitlement to free legal advice and the conditions for obtaining such advice".

Scope of Application Ratione Persona

- All EU citizens will enjoy the rights set out by the Directive, if they are faced with criminal justice –
  - ***suspects and accused*** persons in criminal proceedings ***who have a right of access to a lawyer*** pursuant to Directive 2013/48/EU and who are:
    - deprived of liberty
    - or required to be assisted by a lawyer
    - required or permitted to attend an investigative or evidence-gathering act
  - persons who were not initially suspects or accused persons but ***become suspects or accused*** persons in the course of questioning by the police or by another law enforcement authority
  - persons who are the subject of European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (***requested persons***)

- applies to suspects, accused persons and requested persons regardless of
  - their legal status, citizenship or nationality
  - without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth

The Legal Aid Directive does not apply: (a) where the Access to a Lawyer Directive does not provide for a right to a lawyer; (b) where the person waived their right to a lawyer and has not revoked such waiver, in accordance with the Access to a Lawyer Directive; 41 (c) where a Member State has temporarily and exceptionally applied derogations to the right to a lawyer, in accordance with the Access to a Lawyer Directive.

The right to legal aid automatically applies in situations where legal assistance is mandatory, i.e. when the right to legal assistance cannot be waived under EU or national law.

Deprivation of liberty

- Provided that this complies with the right to a fair trial, the following situations ***do not constitute***:
  - identifying the suspect or accused person;
  - determining whether an investigation should be started;
  - verifying the possession of weapons or other similar safety issues;
  - carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints;
  - bringing the suspect or accused person to appear before a competent authority

Scope of Application Ratione Materia

- Criminal proceedings allowing a right of access to a lawyer pursuant to Directive 2013/48/EU
- European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA

- Directive always applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings
  - Accordingly, in respect of ***minor offences*** the Directive applies ***only to the proceedings before a court*** having jurisdiction in criminal matters ***if and only*** where:
    - the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court;
    - deprivation of liberty cannot be imposed as a sanction;

Criminal proceedings - three criteria for the criminal nature of a sanction

C-617/10 *Aklagaren v. Hans Akerberg Fransson*:

"'The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur."

The criteria reflect those developed by the ECHR in the Engel and Others v. Netherlands, App. nos. 5100/71; 5101/71; 51102/71; 5354/72; 537072, Judgment of 8 June 1976, paras. 82-83.

Where the law of a Member State provides for the imposition of a sanction regarding ***minor offences*** (e.g. traffic offences) by an authority ***other than a court*** having jurisdiction in criminal matters competent to impose ***sanctions other than deprivation of liberty*** and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, the Directive can be applied only to the proceedings before that court following such an

appeal or referral.

Where the law of a Member State provides in respect of minor offences that ***deprivation of liberty cannot be imposed as a sanction***, the Directive applies only to the proceedings before a court having jurisdiction in criminal matters.

The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial, including obtaining the assistance of a lawyer.

Falling Within the Scope

- Ratione materie & ratione persone = the Charter applies
  - The authorities of EU countries are bound to comply with the Charter of fundamental rights only when implementing EU law.
  - If a national authority violates the Charter when implementing EU law, national judges (under the guidance of the European Court of Justice) have the power to ensure that the Charter is respected.

When implementing this Directive, Member States should ensure respect for the fundamental right to legal aid as provided for by the Charter and by the ECHR. In doing so, they should respect the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

Right to legal aid in criminal proceedings

- suspects and accused persons ***who lack sufficient resources*** to pay for the assistance of a lawyer have the right to legal aid ***when the interests of justice so require***;
  - may apply different test to determine whether legal aid is to be granted:
    - a means test (based on the resources of the person concerned, including income and fortune) and/or;
    - a merits test (based on the need to ensure effective access to justice in the circumstances of the case);
  - must respect the criteria set out to establish these tests,
    - in particular that the merit is deemed to exist where the person is brought before a court for a decision on detention and during detention;
- must grant legal aid without undue delay and — at the latest — before the person concerned is questioned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts are carried out.

Right to legal aid in EAW proceedings

Requested persons have a right to legal aid:

- from the executing EU country,
  - upon arrest until they are handed over to the issuing EU country,
  - or until the decision not to surrender them becomes final;
- from the issuing country,
  - when they exercise their right to appoint a lawyer in the issuing country to assist the lawyer in the executing country in accordance with EU rules on the right of access to a lawyer,
  - in so far as legal aid is necessary to ensure effective access to justice

- This right may be subject to a means test under the same criteria as for criminal proceedings.

The Interests of Justice Test

Means test

- to determine whether a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer MS must take into account all relevant and objective factors,
  - such as the income, capital and family situation of the person concerned,
  - as well as the costs of the assistance of a lawyer
  - and the standard of living in that Member State,.

Merits test

- in order to determine whether the interests of justice require legal aid to be granted MS must take into account
  - the seriousness of the criminal offence,
  - the complexity of the case and
  - the severity of the sanction at stake
- The Presumption of Fulfilment
  - where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings
  - during detention

Competent Authority

- Should be an
  - **independent** authority
  - a **court**, including a judge sitting alone
  - in so far as this is necessary *in urgent situations* the temporary involvement of the police and the prosecution should also be possible for legal aid to be granted in a timely manner
- Have capacity to decide whether or not to grant legal aid and on the assignment of lawyers
  - without undue delay
  - diligently, respecting the rights of the defence
    - adequate training must be provided to staff involved in the decision-making on legal aid

Adequate training should be provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings. Training ought to be provided to courts and judges that take decisions regarding the granting of legal aid.

Effectivness of the Right to Legal Aid

- Suspects, accused persons and requested persons
  - will be informed in writing if their request for legal aid is refused in full or in part
  - provided with legal aid services of a quality adequate to safeguard the fairness of the proceedings
    - MS shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services
  - upon their request have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify

Where legal aid has been granted to a suspect, an accused person or a requested person, one way of ensuring its effectiveness and quality is to facilitate continuity in his or her legal representation. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings, as well as — where relevant — in European arrest warrant proceedings.

Effective Remedy

- Member States must ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Pravica do pravne pomoči v pravnem redu EU

Goran Selanec, S.J.D.

Sodnik ustavnega sodišča

Hrvaška

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Načelo „enakosti orožij“

- Postopkovni pojem ohranjanja „pravičnega ravnotežja“ med strankami
  - Vsaki stranki mora biti zagotovljena razumna možnost, da predstavi svoje trditve – vključno z dokazi – pod pogoji, ki je ne postavljajo v bistveno slabši položaj v primerjavi z nasprotno stranko (Regner proti Češki republiki [VS], 146. odstavek EKČP; Dombo Beheer B.V. proti Nizozemski, 33. odstavek EKČP).
  - Vključeno je v širši pojem poštenega sojenja in tesno povezano z načelom kontradiktornosti.
- Ravnovesje med procesnimi pravicami in privilegiji
  - Zahteva pravično ravnovesje med možnostmi, ki jih imajo stranke, udeležene v sodnem postopku (vsaka stranka mora na primer imeti možnost, da pokliče priče in navzkrižno zasliši tiste, ki jih pokliče nasprotna stranka).

Relacijska in dejanska enakost

- Sodišče EU je večkrat odločilo, da je načelo enakosti orožij sestavni del načela učinkovitega sodnega varstva pravic, ki jih posameznikom daje pravni red Unije.
  - Člen 47 Listine

- C-169/14 *Sanchez Morcillo in Abril García*:

  „Iz ustaljene sodne prakse Sodišča je namreč razvidno, da načelo enakosti orožij in med drugim načelo kontradiktornosti izhajata iz pojma poštenega sojenja, ki vključuje obveznost dati vsaki stranki razumno možnost, da predstavi svoje trditve pod pogoji, ki ene stranke v primerjavi z nasprotno stranko ne postavljajo v bistveno slabši položaj.“

Del „svežnja“ o poštenem sojenju

- Trditev o kršitvi enakosti orožij „*bo obravnavana v luči celotnega člena 6(1), saj je načelo enakosti orožij le ena od značilnosti širšega koncepta poštenega sojenja, ki vključuje tudi temeljno pravico, da je postopek kontradiktoren*” (ESČP, Ruiz-Mateos proti Španiji, št. 12952/87, 23. junij 1993, 63. odstavek).

- SEU, C-199/11, *Europese Gemeenschap proti Otis NV in drugi*

  „**Načelo enakosti orožij, ki izhaja iz pojma poštenega sojenja** (sodba z dne 21. septembra 2010 v združenih zadevah Švedska in drugi proti API in Komisiji, C-514/07 P, C-528/07 P in C-532/07 P, ZOdl., str. I-8533, točka 88), vključuje obveznost dati vsaki stranki razumno možnost, da predstavi svoje trditve, vključno z dokazi, pod pogoji, ki ene stranke v primerjavi z nasprotno stranko ne postavljajo v bistveno slabši položaj.

  Kot je poudaril generalni pravobranilec v točki 58 sklepnih predlogov, je cilj enakosti orožij zagotoviti ravnotežje med strankami postopka in tako zajamčiti, da lahko katera koli stranka v postopku preveri in izpodbija vsak dokument, predložen sodišču. Škodo, ki jo lahko povzroči to neravnotežje, mora načeloma dokazati tisti, ki mu je nastala.“

- Če obstaja vprašanje „enakosti orožij“, povezano z določenim (nacionalnim) sodnim postopkom, sodišče EU ne bo omejilo preverjanja na vprašanje enakovrednosti postopkov, temveč lahko preuči katerikoli vidik jamstva poštenega postopka, kot ga določa člen 47 Listine.
  - Kršitev ozkega področja, ki ga urejajo direktive o poštenem sojenju, odpira vrata širšemu preverjanju na podlagi člena 47.

Pravna pomoč
Zahteva po enakosti orožij

- V nekaterih okoliščinah lahko načelo enakosti orožij zahteva zagotovitev finančne podpore, da je osebi z omejenimi sredstvi omogočeno plačilo pravnega zastopanja.
  - Pravica do učinkovitega sodnega varstva, ki jo pogojuje pravica do dostopa do sodnega varstva, bi morala biti ***dostopna vsem*** posameznikom:
    - materialni/finančni status je lahko ovira;
    - države sprejmejo ukrepe za zagotovitev minimalne dejanske enakosti v smislu možnosti dostopa do postopkov;
      - logika posredne diskriminacije;
    - vzpostavljanje ustreznih sistemov pravne pomoči je pogoj za enakost pred zakonom (pravica za vse);
      - pravna pomoč zajema tako pomoč odvetnika kot tudi oprostitev plačila stroškov postopka.
- *Airey proti Irski* (EKČP, pritožba št. 6289/73, [1981])

Pravna pomoč v skladu z Listino EU

- Člen 47 Listine zagotavlja pravico do pravne pomoči tistim, ki nimajo dovolj sredstev, ***če je to potrebno za zagotovitev učinkovitega dostopa do sodnega varstva***.
  - „/…/, *če bi bilo v primeru, da takšne pomoči ni, nemogoče zagotoviti učinkovito pravno sredstvo*“ (Pojasnila v zvezi z Listino EU o temeljnih pravicah, UL 2007 C303/17).
  - Uporablja se pri postopkih v zvezi z vsemi pravicami in svoboščinami, ki izhajajo iz prava EU.
    - **Direktiva Sveta 2003/8/ES** – izboljšanje dostopa do pravnega varstva v čezmejnih sporih z uvedbo minimalnih skupnih pravil glede pravne pomoči v takih sporih (UL 2003 L 26, str. 41 in popravek UL 2003 L 32, str. 15).

      „(5) Ta direktiva si prizadeva za pospeševanje uporabe pravne pomoči v čezmejnih sporih za osebe, ki nimajo dovolj sredstev, kadar je pomoč potrebna, da se zagotovi dejanski dostop do pravnega varstva. Splošno priznano pravico do dostopa do pravnega varstva potrjuje tudi člen 47 Listine o temeljnih pravicah Evropske unije [Listina].

      …

      (11) Pravna pomoč bi morala kriti predpravdne nasvete z namenom doseči poravnavo, preden se sproži sodni postopek, pravno pomoč pri vložitvi zadeve na sodišče ter zastopanje na sodišču in pomoč pri kritju ali oprostitvi plačila stroškov postopka.“

Tretji odstavek člena 47

- C-279/09 **DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH** proti **Zvezni republiki Nemčiji**

  „V zvezi s tem člen 47, prvi odstavek, Listine določa, da ima vsakdo, ki so mu kršene pravice in svoboščine, zagotovljene s pravom Unije, pravico do učinkovitega pravnega sredstva pred sodiščem v skladu s pogoji, določenimi v tem členu.
  V skladu z drugim odstavkom tega člena ima vsakdo pravico, da o njegovi zadevi pravično, javno in v razumnem roku odloča neodvisno, nepristransko in z zakonom predhodno ustanovljeno sodišče. Vsakdo ima možnost svetovanja, obrambe in zastopanja.
  Člen 47, tretji odstavek, Listine posebej določa, da se osebam, ki nimajo zadostnih sredstev, odobri pravna pomoč, če je ta ***potrebna za učinkovito zagotovitev dostopa do sodišča***.

  V skladu s pojasnili k temu členu, ki jih je v skladu s členom 6(1), tretji pododstavek, PEU in členom 52(7) Listine treba upoštevati kot vodilo pri njeni razlagi, ustreza člen 47, drugi odstavek, Listine členu 6(1) EKČP.“

Stopnja nadzora

- C-279/09 DEB

  „Nacionalno sodišče mora v zvezi s tem preveriti, ali predpostavke za odobritev pravne pomoči pomenijo omejitev pravice do dostopa do sodišč, ***s katero bi bila ta pravica kršena*** v svojem bistvu, ali se je z navedenimi predpostavkami uresničeval ***legitimni cilj*** in ali ***med uporabljenimi sredstvi in uresničevanim ciljem obstaja razumno razmerje sorazmernosti***.

  V okviru te presoje lahko nacionalno sodišče upošteva predmet spora, razumno možnost za uspeh prosilca, pomen zadeve zanj, zapletenost prava in postopka, ki ju je treba uporabiti, ter sposobnost tega prosilca, da učinkovito zastopa svoje stališče. Pri presoji sorazmernosti lahko nacionalno sodišče upošteva tudi, kolikšni so stroški postopka, ki jih je treba plačati kot predujem, in ali je ovira, ki jo ti stroški morebiti pomenijo za dostop do sodnega varstva, nepremagljiva.”

„Osebno“ področje uporabe doktrine o pravni pomoči

- Pravna pomoč pravnim osebam – ***ni izključena***

  C-279/09 **DEB**

  „Iz sodne prakse Evropskega sodišča za človekove pravice izhaja, da odobritev pravne pomoči pravnim osebam načeloma ni izključena, ampak da je treba o tem odločati glede na veljavne predpise in položaj zadevne družbe …

  Glede na vse zgoraj navedeno je na zastavljeno vprašanje treba odgovoriti, da je treba načelo učinkovitega sodnega varstva, kot je določeno v členu 47 Listine, razlagati tako, ***da ni izključeno***, da bi se nanj sklicevale pravne osebe, in da lahko pomoč, odobrena na podlagi tega načela, med drugim pokriva oprostitev plačila predujma stroškov postopka in/ali pomoč odvetnika …

  Kar zadeva posebej pravne osebe, lahko nacionalno sodišče upošteva njihov položaj. Tako lahko upošteva zlasti obliko družbe in to, ali je zadevna pravna oseba pridobitna, ter finančno sposobnost njenih družbenikov oziroma delničarjev in možnost, da si priskrbijo denarna sredstva, potrebna za vložitev tožbe pri sodišču.“

Pravna pomoč v kazenskih postopkih

- Kazenski postopki so že po naravi neenaki glede pristojnosti in sredstev, ki jih ima na voljo tožilstvo v primerjavi s posameznikom.
  - Temeljni razlog za pravico do obrambe je uravnoteženje te neenakosti z zagotavljanjem pravic osumljencem in obdolžencem v celotnem kazenskem postopku.
  - Pravna pomoč je del te ravnotežne enačbe.
  - Zaradi neenakosti moči bo stopnja nadzora višja.
    - Praktične koristi, ki izhajajo iz pravice do pravne pomoči v skladu s členom 47, bodo večje.
    - Sodna preiskava bo zahtevnejša.

Stockholmski načrt

- Resolucija Sveta z dne 30. novembra 2009 o ***načrtu za krepitev procesnih pravic osumljenih ali obtoženih oseb v kazenskih postopkih*** (UL 2009 C 295, str. 1).
  - Direktiva 2010/64/EU Evropskega parlamenta in Sveta z dne 20. oktobra 2010 o ***pravici do tolmačenja in prevajanja*** v kazenskih postopkih.
  - Direktiva 2012/13/EU Evropskega parlamenta in Sveta z dne 22. maja 2012 o ***pravici do obveščenosti*** v kazenskih postopkih.
  - Direktiva 2013/48/EU Evropskega parlamenta in Sveta z dne 22. oktobra 2013 o ***pravici do dostopa do odvetnika v kazenskih postopkih in v postopkih na podlagi evropskega naloga za prijetje*** ter o pravici do obveščanja tretje osebe ob odvzemu prostosti in o pravici do komunikacije s tretjimi osebami in konzularnimi organi med odvzemom prostosti (UL 2013 L 294, 6. 11. 2013, str. 1).
  - Direktiva (EU) 2016/800 Evropskega parlamenta in Sveta z dne 11. maja 2016 o ***procesnih jamstvih za otroke*****,** ki so osumljenci ali obdolženci v kazenskem postopku.
  - Direktiva (EU) 2016/343 Evropskega parlamenta in Sveta z dne 9. marca 2016 o krepitvi nekaterih vidikov ***domnevne nedolžnosti in pravice do navzočnosti*** na sojenju v kazenskem postopku (UL 2016 L 65, 11. 3. 2016, str. 1).
  - Direktiva 2016/1919 Evropskega parlamenta in Sveta z dne 26. oktobra 2016 o ***pravni pomoči za osumljence in obdolžence v kazenskem postopku ter za zahtevane osebe v postopkih na podlagi evropskega naloga za prijetje*** (UL 2016 L 297, 4. 11. 2016, str. 1.; popravek UL L91 5. 4. 2017, str. 40).

Cilj direktive o pravni pomoči

- Direktiva je šesta in zadnja v svežnju pravnih instrumentov, sprejetih v skladu s načrtom 2009.
  - Dopolnjuje pravila EU o dostopu do odvetnika in procesnih jamstvih za otroke, ki so osumljeni ali obtoženi kaznivih dejanj, ter ne vpliva na pravice, ki jih opredeljujejo.
- Zagotoviti pravico do pomoči in njeno enotno izvajanje po vsej EU.
- Skupna minimalna pravila glede pravice do ***pravne pomoči v kazenskih postopkih*** v EU.
  - Jasna merila za odobritev pravne pomoči.
    - Finančna pomoč s strani države članice EU, ki posameznikom brez sredstev za kritje postopka omogoči dostop do odvetnika.
  - Standardi kakovosti.
  - Pravna sredstva v primeru kršitve.

Področje uporabe
Ratione Personae

- Vsi državljani EU bodo imeli pravice, določene v direktivi, če se soočajo s kazenskim pravosodjem.
  - ***Osumljenci in obdolženci*** v kazenskem postopku, ***ki imajo pravico do dostopa do odvetnika,*** v skladu z direktivo 2013/48/EU, in ki jim je:
    - odvzeta prostost ali
    - morajo imeti pomoč odvetnika, ali
    - se morajo udeležiti ali se lahko udeležijo preiskovalnega dejanja ali dejanja zbiranja dokazov.
  - Osebe, ki prvotno niso bile osumljene ali obdolžene, vendar **to postanejo** med zaslišanjem, ki ga opravi policija ali drug organ preprečevanja, odkrivanja in preiskovanja kaznivih dejanj.
  - Osebe, za katere se v skladu z Okvirnim sklepom 2002/584/PNZ vodi postopek za evropski nalog za prijetje (***zahtevane osebe***).

- Uporablja se za osumljence, obdolžence in zahtevane osebe ne glede na
  - njihov pravni status, državljanstvo ali narodnost ter
  - brez kakršnekoli diskriminacije na podlagi rase, barve kože, spola, spolne usmerjenosti, jezika, veroizpovedi, politične ali druge opredelitve, narodnosti, etničnega ali družbenega porekla, premoženja, invalidnosti ali rojstva.

Odvzem prostosti

- Če je to v skladu s pravico do poštenega sojenja, naslednji primeri ***ne pomenijo***:
  - identifikacije osumljenca ali obdolženca;
  - ugotavljanja, ali je treba začeti preiskavo;
  - preverjanja posedovanja orožja ali drugih podobnih varnostnih vprašanj;
  - izvajanja preiskovalnih dejanj ali zbiranja dokazov, ki niso izrecno navedena v tej direktivi, kot na primer telesni pregledi, fizično preverjanje, odvzem krvi, alkoholni ali podobni testi ter fotografiranje oziroma jemanje prstnih odtisov;
  - privedbe osumljenca ali obdolženca pred pristojni organ.

Področje uporabe
Ratione Materiae

- Kazenski postopki, ki omogočajo pravico do dostopa do odvetnika v skladu z Direktivo 2013/48/EU.
- Postopek za izdajo evropskega naloga za prijetje na podlagi Okvirnega sklepa 2002/584/PNZ.
- Direktiva se vedno uporablja, ko se sprejme odločitev o priporu in med priporom v katerikoli fazi postopka do zaključka postopka.
  - V skladu s tem se direktiva v zvezi z ***lažjimi kaznivimi dejanji*** uporablja ***le za postopek pred sodiščem***, pristojnim za kazenske zadeve, ***samo v primeru, če***:
    - zakonodaja države članice določa, da sankcijo naloži organ, ki ni sodišče, pristojno za kazenske zadeve, in je zoper naložitev te sankcije mogoča pritožba na takšno sodišče ali pa jo je takšnemu sodišču mogoče predložiti;
    - kot sankcija ne more biti naložen odvzem prostosti;

Uvrščanje na področje uporabe

- Ratione Materiae & Ratione Personae = velja Listina
  - Organi držav članic EU morajo Listino o temeljnih pravicah spoštovati le pri izvajanju prava Unije.
  - Če nacionalni organ pri izvajanju prava Unije krši Listino, so nacionalni sodniki (v skladu z usmeritvijo Sodišča EU) pooblaščeni, da zagotovijo spoštovanje Listine.

Pravica do pravne pomoči v kazenskih postopkih

- Osumljenci in obdolženci, ***ki nimajo dovolj sredstev*** za plačilo odvetnika, imajo pravico do pravne pomoči, ***kadar to zahtevajo interesi pravosodja.***
  - Uporabijo lahko drugačen preizkus za določanje, ali bo pravna pomoč dodeljena:
    - preizkus premoženja (temelji na sredstvih zadevne osebe, vključno z dohodki in premoženjem) in/ali;
    - preizkus utemeljenosti (temelji na potrebi po zagotovitvi učinkovitega dostopa do pravnega varstva v okoliščinah zadeve).
  - Upoštevati morajo merila za določanje preizkusov:
    - zlasti, da se šteje, da zaslužek obstaja, ko je oseba privedena pred sodišče, ki odloča o priporu, in med priporom.
- Pravna pomoč se mora odobriti brez nepotrebnega odlašanja in najpozneje pred zaslišanjem zadevne osebe s strani policije, drugega organa kazenskega pregona ali sodnega organa oziroma pred izvedbo posebnih preiskovalnih dejanj ali zbiranjem dokazov.

Pravica do pravne pomoči v postopkih ENP

Zahtevane osebe imajo pravico do pravne pomoči:

- iz države EU izvršiteljice,
  - ob prijetju do izročitve državi EU izdajateljici,
  - ali do pravnomočnosti odločitve, da se jih ne preda;
- iz države izdajateljice,
  - kadar uveljavljajo svojo pravico do imenovanja odvetnika v državi izdajateljici za pomoč odvetniku v državi izvršiteljici v skladu s pravili EU o pravici do dostopa do odvetnika,
  - če je pravna pomoč potrebna za zagotovitev učinkovitega dostopa do sodnega varstva.
- Za to pravico se lahko opravi preizkus premoženjskega stanja po enakih merilih kot pri kazenskih postopkih.

Preizkus interesa pravičnosti

Preizkus premoženja

- Pri ugotavljanju, ali osumljenec ali obdolženec nima dovolj sredstev za plačilo pomoči odvetnika, mora država članica upoštevati vse ustrezne in objektivne dejavnike:
  - dohodek, kapital in družinski položaj zadevne osebe,
  - stroške odvetniške pomoči,
  - življenjski standard v tej državi članici.

Preizkus utemeljenosti

- Pri ugotavljanju, ali interesi pravosodja zahtevajo dodelitev pravne pomoči, mora država članica upoštevati:
  - resnost kaznivega dejanja,
  - zapletenost primera in
  - resnost možnih sankcij.
- Domneva o izpolnjevanju pogojev:
  - kadar je osumljenec ali obdolženec priveden pred pristojno sodišče ali sodnika, da bi odločil o priporu v katerikoli fazi postopka,
  - med pridržanjem.

Pristojni organ

- Pristojni organi so:
  - **neodvisni** organi,
  - **sodišče**, vključno s sodnikom posameznikom,
  - če je to potrebno v *nujnih primerih*, je treba omogočiti tudi začasno sodelovanje policije in tožilstva, da se pravočasno dodeli pravna pomoč.

- Imajo pristojnost odločanja o dodelitvi pravne pomoči in o dodelitvi odvetnikov:
  - brez nepotrebnega odlašanja,
  - vestno in ob spoštovanju pravic do obrambe,
    - osebje, ki sodeluje pri odločanju o pravni pomoči, mora biti ustrezno usposobljeno.

Učinkovitost pravice do pravne pomoči

- Osumljenci, obdolženci in zahtevane osebe:
  - bodo pisno obveščeni, če bo njihova prošnja za pravno pomoč v celoti ali delno zavrnjena;
  - jim bodo zagotovljene storitve pravne pomoči ustrezne kakovosti, da se zagotovi poštenost postopka;
    - države članice sprejmejo ustrezne ukrepe za spodbujanje ustreznega usposabljanja odvetnikov, ki zagotavljajo storitve pravne pomoči;
  - bodo na zahtevo dobili drugega odvetnika, ki jim zagotavlja storitve pravne pomoči, če to upravičujejo posebne okoliščine.

Učinkovito pravno sredstvo

- Države članice morajo zagotoviti, da imajo osumljenci, obdolženci in zahtevane osebe v primeru kršitve njihovih pravic iz te direktive na voljo učinkovito pravno sredstvo v skladu z nacionalno zakonodajo.