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R E F L E T S

Special issue

*Charter of Fundamental Rights of the European Union **

Brief information on legal developments of European Union interest

Contents

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** The Charter of Fundamental Rights of the European Union is cited as follows: it is referred to as "Charter of Fundamental Rights" in the keywords and as "the Charter" in the body of the articles and brief summaries.*

A. Case law

I. Application of the Charter by European and international courts

European Court of Human Rights

European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") – Right to respect for private life – Lawyers' obligation to report suspicions in the matter of money laundering – Professional secrecy – Presumption of equivalent protection of fundamental rights – Not applicable to the case in point – No violation of Article 8 of the Convention

On 6 December 2012, the European Court of Human Rights (ECHR) ruled on the consistency with Article 8 of the Convention, which relates to respect for private life, of the obligation to report suspicions placed upon lawyers in application, most recently, of Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for money laundering and terrorist financing. The ECHR concluded unanimously that the article in question had not been violated.

Analysis of this judgment presents us with an opportunity to return to the concept of "presumption of equivalent protection" of fundamental rights, as established by the ECHR with its judgment of 30 June 2005 in the Bosphorus case (Bosphorus [...] v. Ireland, application no. 45036/98 - see *Reflets no. 2/2005* [only available in French]), and study the issue of its application in the case in point.

The appellant, a French national, is a lawyer and a member of the Paris Bar and the Bar Council. On 12 July 2007, the National Bar Council took a decision adopting professional regulations reminding lawyers to report, in certain cases, any suspicions they may have that their clients are laundering money. The regulations also set out internal procedures on the steps to be taken if a transaction may give rise to the reporting of such suspicions. Failure to comply with these regulations can entail disciplinary sanctions and even disbarment.

On 10 October 2007, considering that the aforementioned decision undermined lawyers' freedom to exercise their profession and the essential rules regulating that profession, the appellant appealed to the Conseil d'État to have it set aside, arguing that it represented a misuse of powers. In a judgment of 23 July 2010 (no. 30993), the Conseil d'État dismissed the appellant's appeal and refused to submit a reference for a preliminary ruling to the European Court of Justice concerning the consistency of the obligation to report suspicions with Article 6 TEU and Article 8 of the Convention, as requested by the appellant.

Relying on the latter provision in particular, the appellant argued before the ECHR that the obligation to report suspicions was not consistent with the principles of the protection of lawyer-client privilege and respect for professional secrecy.

Firstly, the ECHR observed that the obligation to report suspicions amounted to a continuing interference with the appellant's right to respect for his correspondence and private life, with this latter concept also covering professional and commercial activities.

Secondly, the ECHR found that this interference was in accordance with French law within the meaning of Article 8 of the Convention and that as it was intended to combat money laundering and associated crimes, it pursued one of the legitimate aims set out in that article, namely the prevention of disorder and crime.

Thirdly, it remained for the ECHR to determine whether the interference was necessary.

In this connection, the ECHR first examined the concept of "presumption of equivalent protection" of fundamental rights, as established in the Bosphorus judgment (cited above).

The court reiterated that the Contracting States remained responsible under the Convention for the measures they took to comply with their international legal obligations, even when those obligations stemmed from their membership of an international organisation to which they had transferred part of their

sovereignty. However, any action taken in compliance with such obligations must be justified where the relevant organisation protects fundamental rights (this concept covering both the substantive guarantees offered and the mechanisms controlling their observance) in a manner that could be considered at least equivalent – not identical, but comparable – to that for which the Convention provides. Any such finding of equivalence could not be considered final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

Consequently, if such equivalent protection were considered to be provided by the organisation, the presumption would be that a State had not departed from the requirements of the Convention when it did no more than implement the legal obligations flowing from its membership of the organisation. However, this presumption was not indisputable; it could be rebutted if, in the circumstances of a particular case, it were considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order.

The ECHR then reiterated that in the Bosphorus judgment, it had found that the protection of fundamental rights afforded by the European Union was, in principle, equivalent to that afforded by the Convention. This was all the more true since 1 December 2009, when the Treaty of Lisbon entered into force, as Article 6 TEU gave the Charter the force of law and made fundamental rights, as guaranteed by the Convention and as they resulted from the constitutional traditions of the Member States, general principles of Community law.

However, the ECHR noted that the case in point differed from the Bosphorus case in two respects. Firstly, unlike an EU regulation, which would be directly applicable, France implemented EU directives, which left a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection.

Secondly, the European Court of Justice had not ruled on the compatibility of the obligation to report suspicions as the Conseil d'État had refused to submit a reference for a preliminary ruling on this matter. In fact, the issue had never been examined before, either in a preliminary ruling delivered in the context of another case or within the framework of one of the various actions open to the European Union's Member States and institutions.

The ECHR observed that the European Court of Justice had already ruled on the compatibility of the obligation to report suspicions in its judgment of 26 June 2007 (Ordre des barreaux francophones et germanophones, C-305/05, ECR p. I-05305), but that this analysis was conducted only in respect of the requirements for a fair trial within the meaning of Article 6 of the Convention and not with regard to respect for private life within the meaning of Article 8.

The ECHR therefore noted that the Conseil d'État had ruled without "the full potential of the relevant international machinery for supervising fundamental rights" – in principle equivalent to that of the Convention – having been deployed, and considered that in the light of that choice and the importance of what was at stake, the presumption of equivalent protection did not apply. As a result, the ECHR had to determine whether the interference was necessary for the purposes of Article 8 of the Convention.

The ECHR began by pointing out that while Article 8 protected the confidentiality of all correspondence between individuals, it afforded strengthened protection to exchanges between lawyers and their clients to enable lawyers to fulfil their fundamental role of defending litigants and, indirectly, to guarantee the right to a fair trial. However, the ECHR held that although lawyers' professional secrecy was one of the fundamental principles on which the administration of justice in a democratic society was based, it was not inviolable and could thus be weighed against imperatives linked to combating money laundering.

In this connection, the ECHR supported the reasoning set out by the Conseil d'État and identified two factors it believed to be decisive

in assessing the proportionality of the interference.

Firstly, lawyers were obliged to report suspicions only in two cases: where they took part for and on behalf of clients in financial or property transactions or acted as trustees, and where they assisted their clients in preparing or carrying out transactions concerning certain defined operations. By contrast, lawyers were not subjected to the obligation where the activity in question related to judicial proceedings or, in principles, where they gave legal advice. The obligation therefore did not go to the very essence of the lawyer's defence role, which formed the very basis of lawyers' professional secrecy.

Secondly, French law had introduced a filter protecting professional secrecy through which, lawyers reported suspicions to the President of the Bar Council of the Conseil d'État and the Cour de Cassation or the chairman of the Bar of which they were members, as appropriate. At this stage, when a lawyer shared information with a fellow professional who was subject to the same rules and had been elected by his or her peers, professional secrecy could not be considered to have been breached.

Consequently, the ECHR concluded that the obligation to report suspicions did not constitute disproportionate interference with the professional secrecy of lawyers and that France had not violated Article 8 of the Convention by providing for this obligation in application of Directive 2005/60/EC of the European Parliament and of the Council.

It should be noted that this is not the first time that the presumption of equivalent protection has been set aside by the ECHR (see the ECHR's judgment of 21 January 2011 in M.S.S. v. Belgium and Greece, application no. 30696/09 - *Reflets no. 1/2011*). However, unlike that judgment, which related to a Member State's discretion in carrying out its international legal obligations, this case gave the ECHR the opportunity to establish a "new ground for non-application" of the presumption of equivalent protection: "a procedural criterion" (C. Picheral, *L'application revisitée de la présomption de protection équivalente*, La semaine juridique, general issue no. 7, 11 February 2013, note 188).

With this judgment, the ECHR emphasised the responsibility, in terms of references for preliminary rulings, of national courts, which are competent in ordinary-law aspects of EU law, for enabling the control mechanism to function fully and thus guarantee complete respect for fundamental rights within the European Union.

European Court of Human Rights, judgment of 6 December 2012, Michaud v. France (application no. 12323/11),
www.echr.coe.int/echr

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[CZUBIAN]

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European Convention on the Protection of Human Rights and Fundamental Freedoms ("the Convention") – Charter of Fundamental Rights – Link between the two texts – Comparison of a selection of provisions

Since its proclamation in Nice on 7 December 2000, the Charter has had a considerable influence on the case law of the European Court of Human Rights (ECHR).

Right to marry (Article 12 of the Convention and Article 9 of the Charter

Since 2002, the ECHR has explicitly based reasoning on the Charter, applying a method of interpretation that takes account of new developments in Convention law (see the judgment of 11 July 2002, Christine Goodwin v. The United Kingdom, application no. 28957/95).

The applicant claimed that there had been a breach of Articles 8, 12, 13 and 14 of the Convention in view of the legal situation of transsexuals in the United Kingdom. The Grand Chamber of the ECHR concluded that Article 8 (right to respect for private and family life), Article 12 (right to marry) and Article 13 (right to an effective remedy) had been violated. With regard to Article 12 of the

Convention and, more specifically, the first part of the sentence, which refers to the right of a man and woman to marry, the court was not persuaded that "these terms must refer to a determination of gender by purely biological criteria". The Grand Chamber highlighted the difference between the wording of Article 12 of the Convention and Article 9 of the Charter (which covers the right to marry and the right to found a family), pointing out that it departed from the wording of Article 12 and removed the reference to men and women.

On 20 June 2010, the ECHR handed down a significant judgment in connection with the right of same-sex couples to marry and their right to obtain an equivalent legal status (judgment of 24 June 2010, Schalk and Kopf v. Austria, application no. 30141/04).

In the case in point, the authorities had refused to issue a marriage licence to an Austrian same-sex couple. This refusal was confirmed by the Verfassungsgerichtshof on the grounds that in Austrian law, the right to marry was reserved to couples made up of a man and a woman.

The question as to the existence of a right to marry for same-sex couples was thus brought before the ECHR for the first time. The ECHR concluded that Article 12 of the Convention had not been violated.

The significance of this judgment goes beyond the mere conclusion that Article 12 had not been violated. In fact, the ECHR interpreted Article 12 in a way that took account of recent developments, through reasoning based on Article 9 of the Charter. More specifically, the ECHR stated that since there was no "European consensus regarding same-sex marriage" (on the date of the judgment, only 6 of the Contracting States to the Convention authorised same-sex marriage), recognition of the right of same-sex couples to marry was left to the discretion of the Contracting States. However, the ECHR stated that on the basis of Article 9 of the Charter, which protects the right to marry and does not refer to the sex of the individuals making up the couple, it would no longer consider the right to marry guaranteed in Article 12 of the Convention to be "limited to marriage between two persons of the opposite sex".

Freedom of assembly and association (Article 11 of the Convention)/Right to collective bargaining and action (Article 28 o the Charter)

The Charter has also become one of the reference points allowing the ECHR to extend the Convention's scope of application and reverse its own case law. The court's judgment of 12 November 2008 in the Demir and Baykara case (Demir and Baykara v. Turkey, application no. 34503/97) is a perfect example of this effect.

The application was lodged by a Turkish civil servants' trade union, which claimed that there had been a breach of Article 11 of the Convention. The trade union had gone to the Turkish courts to make a local government respect the terms of a collective agreement. However, the Yargıtay, ruling in the last instance, found that when the trade union was founded, Turkish regulations did not grant civil servants the right to unionise. The Grand Chamber upheld the solution reached by the Second Section and concluded that Article 11 of the Convention had been violated.

In the judgment in question, the ECHR elucidated its approach to the right to organised and stated that "the right to bargain collectively with the employer ha[d], in principle, become one of the essential elements of the (...) [freedom] set forth in Article 11 of the Convention". In admitting this reversal of its previous case law – particularly its judgment of 6 February 1976 in the Schmidt and Dahlström case (Schmidt and Dahlström v. Sweden, application no. 5589/72) – the ECHR was influenced by external sources, including Article 28 of the Charter, which covers the right to collective bargaining and action.

Legality of criminal offences and penalties (Article 7 of the Convention and Article 49(1) of the Charter)

In the case of Scoppola v. Italy (judgment of 17 September 2009, application no. 10249/03), the ECHR also reversed its case law (European Commission of Human Rights, judgment of 6 March 1978, X v. Federal Republic of Germany) regarding the retroactive application of a more lenient

penalty on the basis of Article 49(1) of the Charter, which concerns the principle of the legality and proportionality of criminal offences and penalties.

A man who had committed a number of criminal offences in Italy was tried under the summary procedure provided for in Italian law and was sentenced to life imprisonment. He had chosen to be tried under that procedure because it entailed a reduction of sentence under the Italian legal system. However, legislation in the area changed and the penalty was altered in that the reduced penalty provided for in the event of trial under the summary procedure consisted simply of life imprisonment rather than life imprisonment with daytime isolation. The ECHR found that Italy had violated Article 7 of the Convention because the appellant had been given the heaviest sentence of those provided for by "all the laws in force during the period between the commission of the offence and delivery of the final judgment".

According to the ECHR, "a consensus ha[d] gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, ha[d] become a fundamental principle of criminal law". Consequently, the court stated that Article 7(1) of the Convention "guarantee[d] not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law".

Freedom of thought, conscience and religion (Article 9 of the Convention and Article 10 of the Charter)

In 2011, the ECHR ruled that Armenia had violated Article 9 of the Convention, which concerns freedom of thought, conscience and religion, and recognised the existence of a right to conscientious objection (judgment of 7 July 2011, Bayatyan v. Armenia, application no. 23459/03).

In the case in point, an Armenian citizen who was a Jehovah's Witness had been sentenced to two and a half years' imprisonment for refusing to perform military service because of his religious beliefs. He had requested the status of conscientious objector (but at the time of the events, Armenian law did not provide for this status) and had asked to perform an alternative service.

The ECHR reversed its case law (European Commission of Human Rights, judgment of 7 March 1977, Conscientious objectors v. Denmark, application no. 7565), describing the Convention as "a living instrument" and referring to Article 10 of the Charter, which deals with freedom of thought, conscience and religion, and the general consensus in Europe and beyond, and decided that Article 9 of the Convention included the right to conscientious objection.

Principle of non-discrimination (Article 14 of the Convention and Article 21 of the Charter)

The ECHR has also used the Charter in cases where the articles of the Convention are insufficiently precise. In this connection, it is worth mentioning the ECHR's judgment of 1 December 2009 in the G.N. case (G.N. v. Italy, application no. 43134/05), which related to the prohibition of discrimination based on state of health, disability or genetic features.

The appellants, who were suffering from thalassemia and were infected with HIV or hepatitis C as a result of blood transfusions, claimed, among other things, that they had received discriminatory treatment compared to haemophiliacs because they had not been able to benefit from certain out-of-court settlements.

The ECHR, referring to Article 21 of the Charter, which concerns the principle of non-discrimination, stated that Article 14 of the Convention (prohibition of discrimination) prohibited discrimination based on state of health, disability or genetic features. However, as it pointed out in this judgment, the ECHR had already declared that the list of grounds for discrimination outlined in Article 14 of the Convention was not exhaustive.

Based on this reasoning, the ECHR found that there had been different treatment with no objective or reasonable justification and concluded that Italy had violated Article 14 of the Convention, in conjunction with Article 2.

Prohibition of torture (Article 3 of the Convention)/Protection in the event of removal, expulsion or extradition (Article 19 of the Charter)

Finally, two judgments on the extradition of terrorists should be mentioned (judgment of 10 April 2012, Babar Ahmad and Others v. The United Kingdom, applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09; judgment of 17 January 2012, Harkins and Edwards v. The United Kingdom, applications nos. 9146/07 and 32650/07). In the cases in point, several individuals accused of international terrorism had been placed in detention in the United Kingdom while awaiting extradition to the United States. The ECHR concluded that Article 3 of the Convention (prohibition of torture) had not been violated because extradition to the United States would not expose them to any treatment that contravened that provision.

In these cases, the ECHR clarified its case law on Article 3 of the Convention. More specifically, by referring to Article 19 of the Charter, which concerns protection in the event of removal, expulsion or extradition, the ECHR affirmed that protection against the risk of treatment contravening Article 3 of the Convention remained absolute, even in cases linked to the fight against terrorism. Nonetheless, the ECHR stipulated that "the absolute nature of Article 3 [did] not mean that any form of ill-treatment [would] act as a bar to removal".

European Court of Human Rights, judgment of 11 July 2002, Christine Goodwin v. The United Kingdom (application no. 28957/95); judgment of 24 June 2010, Schalk and Kopf v. Austria (application no. 30141/04); judgment of 12 November 2008, Demir and Baykara v. Turkey (application no. 34503/97); judgment of 17 September 2009, Scoppola v. Italy (no. 2) (application no. 10249/03); judgment of 7 July 2011, Bayatyan v. Armenia (application no. 23459/03); judgment of 1 December 2009, G.N. v. Italy (application no. 43134/05); judgment of 10 April 2012, , Babar Ahmad and Others v. The United Kingdom (applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09); judgment of 17 January 2012, Harkins and Edwards v. The United Kingdom (applications nos. 9146/07 and 32650/07), www.echr.coe.int/echr

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[GLA]

II. Application of the Charter by national courts

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

Italy

Asylum policy – Border controls, asylum and immigration – Criteria and mechanisms for determining the Member State responsible for examining an asylum application – Risk of fundamental rights

The Administrative Court of Rome's judgment of 6 June 2012 related to the sensitive issue of asylum policy. It recalls the case law of the European Court of Justice (judgment of 21 December 2011, N. S. and M. E. And Others, C-411/10 and C-493/10, not yet published) on the obligation of a Member State to assume responsibility for examining an asylum application on the basis of Article 3(2) of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national in the event of a risk that the applicant's fundamental rights will be violated.

With regard to the application of the Charter, the Administrative Court of Rome cited the section of the ECJ's judgment in which it determined that "Article 4 of the Charter (...) must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot

be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision".

With this judgment, the Administrative Court of Rome adopted the case law of the ECJ and annulled the police authority's decision to transfer the appellant to Greece. That decision had been adopted on the basis of indications from the Dublin unit, which had determined that Greece was the Member State responsible for examining the asylum application submitted to the Italian State by the appellant.

In the view of the administrative court, the police authority did not correctly check the applicability of Article 3(2) of Council Regulation (EC) No. 343/2003, which allows Member States to derogate from the normal procedure for determining the Member State responsible for examining an asylum application.

Regional Administrative Court, judgment of 6 June 2012, no. 5128

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[VBAR]

Article 9

Right to marry and right to found a family

Spain

Charter of Fundamental Rights – Right to marry and right to found a family – Amendment to the conditions for contracting marriage in order to include same-sex unions – Compatibility with constitutional protection of the institution of marriage – Procedure for adoption of minor children by couples in a same-sex union – Compatibility of national adoption procedures with the constitutional duty to ensure full protection of children

The Tribunal Constitucional (Spanish Constitutional Court) ruled on the constitutionality of law 13/2005 of 1 July 2005, which amended the Civil Code with regard to marriage. This law modified Article 44 of the Civil Code by adding a second paragraph permitting marriage between persons of the same sex and, consequently, giving such marriages the same legal effects as marriages between persons of different sexes.

The first argument presented by the appellants, a group of 72 members of the Congress of Deputies belonging to the People's Party (Partido Popular, PP), claimed that the law infringed on Article 32 of the Spanish constitution, which guarantees the right to marry. Based on a literal interpretation of the article and drawing on historical, constitutional and legislative grounds and the doctrine of the Tribunal Constitucional itself, they argued that the institution of marriage, as guaranteed by the article, could only refer to a union between a man and a woman. In their view, an amendment such as that made by the law would distort an institution that should be guaranteed and protected by the constitution.

They then argued that as per Article 10(2) of the constitution, Article 32 must be read in the light of Article 9 of the Charter (concerning the right to marry and the right to found a family), which would not allow marriage between persons of the same sex. Although it may seem that the wording of the Charter article leaves rooms for such amendments, the appellants argued that this was not the case. They reasoned that the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and the constitutional traditions of the Member States set limits to the interpretation of the Charter.

The Tribunal Constitucional dismissed their appeal. It began by stating that the law in question did not represent a restriction on the right to marry, but rather an amendment to the conditions for exercising it with a view to harmonising the legal statuses of homosexuals and heterosexuals. It considered that a certain 'widening' of the concept of marriage could be perceived within international law, comparative law and European law. The court based its observation on the section of the *Explanations relating to the Charter of Fundamental Rights* dealing with Article 9, in

particular. The Explanations state that while Article 9 is based on Article 12 of the Convention, it was modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the Convention, but its scope may be wider when national legislation so provides.

Law 13/2005 also amends Article 175(4) of the Spanish constitution by making it possible for married same-sex couples to adopt minor children. Although the court's previous statements do not prevent analysis of the compatibility of this amendment with Article 39(2) of the constitution, namely the duty to fully protect children, these statements doubtless conditioned the court's response. Thus the Tribunal Constitucional declared that this legal reform was guided by this duty to protect, and that the duty appeared to have been duly respected. Although the Spanish legal system does not recognise a fundamental right to adoption, the Tribunal Constitucional observed that the procedures established for that purpose guaranteed the protection of the child's interests, which they consider to be essential.

Tribunal Constitucional, judgment of 6 November 2012, no. 198/2012,

www.tribunalconstitucional.es

IA/33346-A

[NUNEZMA] [MAGAZJU]

Italy

Fundamental rights – Right to respect for private and family life – Right to marry – Transcription in Italy of a marriage contracted abroad between two members of the same sex – Inadmissibility – Inapplicability of Article 9 of the Charter of Fundamental Rights

With its judgment of 15 March 2012, the Corte di Cassazione confirmed that a marriage contracted between two Italian nationals of the same sex in the Netherlands could not be transcribed into the Italian civil status register.

This judgment has already been discussed in an article in *Reflets no. 2/2012*.

The Corte di Cassazione upheld judgment no. 138/2010 of the Corte Costituzionale (see *Reflets no. 3/2010*), which ruled that in the light of the Italian constitution, same-sex couples' right to marry could not be recognised.

However, for the first time in its history, the Corte di Cassazione recognised that same-sex couples had a "right to family life" in accordance with the case law of the European Court of Human Rights (ECHR). In the Corte di Cassazione's view, the members of a same-sex couple could claim the same treatment as that given to married couples.

The Corte di Cassazione and the Corte Costituzionale both based their reasoning on Article 12 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Article 9 of the Charter, among others.

According to the two Italian courts, the provisions in question give the Contracting States to the Convention and/or Member States of the European Union discretion to legislate on the right to marry and the right to found a family.

The Corte di Cassazione first pointed towards the case law of the ECHR to show that Article 12 of the Convention does not impose an obligation for the Contracting States to grant same-sex couples access to marriage (see its judgment of 24 June 2010, Schalk and Kopf v. Austria, application no. 30141/04).

It then considered whether Article 9 of the Charter applied to the case in point.

Basing its reasoning on the principle that the Charter only applies if the matter brought before the national court is governed by European Union law, the Corte di Cassazione found that the transcription of a marriage contracted abroad between two Italian nationals was outside the scope of the

European Union's powers. Moreover, the Corte di Cassazione found that the issue was not at all connected – not even indirectly – to EU law.

Consequently, it declared that Article 9 did not apply to the case in point.

Corte di Cassazione, Sez. I, judgment of 15 March 2012, no. 4184, www.italgiure.giustizia. it

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[VBAR] [BITTOGI]

Article 18

Right to asylum

Slovenia

Border controls, asylum and immigration – Asylum policy – Procedure for granting and withdrawing refugee status in the Member States – Council Directive 2005/85/EC – Non-attendance of the personal interview by the applicant – Presumed withdrawal of the application – Suspension of the procedure – Articles 18 and 47 of the Charter of Fundamental Rights – Violation

In a judgment handed down on 21 April 2011, the Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia) ruled on the effects of an applicant's non-attendance of the personal interview regarding his application for international protection.

The case concerned an Afghan national (hereinafter referred to as "the applicant") who filed an application for international protection on 17 August 2010. He was placed in an asylum centre and there received notification from the Slovenian Ministry of Foreign Affairs that he should attend a personal interview on 7 April 2011. Although he received regular reminders of the interview date and was at the asylum centre on the interview date, the applicant did not attend the interview. It later emerged that he had wrongly believed the interview was scheduled for 8 April 2011. Consequently, in application of Articles 50(2)(1) and 50(3) of the Slovenian law on international protection (hereinafter referred to as "the law") and the Slovenian law on administrative procedure, the Ministry of Foreign Affairs adopted an order stating that the procedure had been suspended and requiring the applicant to leave Slovenian territory immediately (hereinafter referred to as "the order").

The applicant brought the case before the Upravno sodišče, which ruled that applying Article 50 of the law in this way breached Articles 18 and 47 of the Charter, among other provisions.

Firstly, the Upravno sodišče observed that the right to asylum was a fundamental right guaranteed by Article 18 of the Charter and could only be restricted by the principle of proportionality. By contrast, in the view of the Upravno sodišče, the ministry's application of Article 50(3) of the law did not allow the applicant access to the right to asylum or to effective judicial protection, which is guaranteed by Article 47 of the Charter. Although the applicant had cited a number of circumstances in his application that would, at first glance, justify an in-depth examination, such as court proceedings on the grounds on his political beliefs, the ministry's suspension of the application procedure did not allow the procedure to be continued and thus prevented an in-depth examination.

Secondly, the Upravno sodišče found that the application of the law was not consistent with Article 18 of the Charter because it was not necessary for purposes of protecting the public interest within the meaning of European Union law, such as the efficiency of proceedings or protection of other people's rights.

Furthermore, the Upravno sodišče noted that suspending the application procedure for international protection on the basis of Article 50(3) of the law was not consistent with Article 20(2) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. Any applicant who has not withdrawn his or her application and whose application has not been dismissed by a binding administrative decision cannot re-submit the same application

or request that a procedure suspended within the meaning of Article 50(3) be reopened, yet under Article 20(2) of the directive, a procedure closed because the applicant did not attend a personal interview may be reopened.

Consequently, the Upravno sodišče annulled the order adopted by the ministry and referred the case back to it.

Upravno sodišče Republike Slovenije, judgment of 21 April 2011, Sodba I U 677/2011, www.sodisce.si/usrs/odlocitve/

IA/33338-A

[SAS]

Article 21

Non-discrimination

Poland

Charter of Fundamental Rights – Right to property – Principle of non-discrimination – National provision granting a right to compensation for real estate located outside the current borders of Poland – Requirement that the owner and heirs have Polish nationality, to the exclusion of legal persons – No deprivation of possessions – No violation of Article 17 of the Charter – Differentiation between two different groups of persons – No violation of Article 21 of the Charter

With its judgment of 26 April 2012, the Naczelny Sąd Administracyjny (Supreme Administrative Court, hereinafter referred to as "the NSA") ruled on Articles 21 and 17 of the Charter, which deal with the principle of non-discrimination and the right to property respectively.

This judgment relates to the right to compensation for real estate that is located outside the current borders of Poland and was abandoned due to the Second World War. The right to compensation stems from the provisions of the law of 8 July 2005. Compensation may be sought by the real estate's owner or by that person's heirs.

In the case in point, an application for compensation had been filed by two foundations headquartered outside of Poland. They claimed that they were entitled to receive compensation as the heirs of natural persons who had owned real estate located outside the current borders of Poland on 1 September 1939, but the prefect dismissed their application. The foundations then appealed to the Minister for the Treasury against this decision. The minister also dismissed their application on the grounds that they did not meet the condition of nationality.

A provision of the national law granting the right to compensation specified that the owner of the real estate in question must have had Polish nationality on 1 September 1939, with this requirement also applying to that person's heirs, as in the case in point (Articles 2(2) and 3(2) of the law of 8 July 2005). When dismissing the appeal brought by the two foundations, the minister considered that a legal person could not meet this requirement as it could not have Polish nationality. The foundations lodged an appeal against the Minister for the Treasury's decision with the Wojewódzki Sąd Administracyjny w Warszawie (Administrative Court of Warsaw Voivodeship, hereinafter referred to as "the WSA").

After the WSA dismissed their appeal, the foundations brought an appeal on points of law before the NSA. Among other things, they argued that Articles 17 and 21 of the Charter had been violated. The NSA briefly examined this argument.

The appellants asserted that he WSA had infringed the right to property guaranteed by Article 17 of the Charter and Article 1 of Protocol No. 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention". The NSA considered that Article 17 had not been breached in the case in point because the appellants had not been deprived of property they already possessed, nor had their right to use, dispose of or bequeath such possessions been restricted.

The foundations also argued that the principle of non-discrimination set down in Article 21 of the Charter and Article 14 of the Convention had been violated. They also asked the NSA to consider the possibility of

submitting a reference for a preliminary ruling to the European Court of Justice concerning the compatibility of the national provision in question, which required claimants to have Polish nationality, with the principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU and Article 4 of the Agreement on the European Economic Area.

Nevertheless, the NSA found that Article 21 of the Charter had not been violated. It stressed that the refusal to pay compensation was not based on the fact that the appellants' were headquartered abroad, but rather on the fact that the appellants did not have Polish nationality. The NSA held that by setting a condition of nationality, the national law draws a distinction between the situation of legal persons and the situation of natural persons. These two groups are different, whereas the concept of discrimination applies to treatment of similar entities. Consequently, the NSA concluded that there had been no discrimination and it did not submit a reference for a preliminary ruling to the European Court of Justice as the appellants had requested.

Naczelny Sąd Administracyjny, judgment of 26 April 2012, I OSK 606/11,
www.nsa.gov.pl

IA/33345-A

[BOZEKKA]

Article 24

The rights of the child

Ireland

Border controls, asylum and immigration – Asylum policy – Granting of refugee status – Refusal – Expulsion order – Claimed violation of the Charter of Fundamental Rights – Implementation of European Union law – Purely internal situation

The appellant, a Nigerian national, filed an application to be granted refugee status, which was refused by the Irish competent authority. Following this decision, an expulsion order was issued with regard to the appellant. The appellant is the father of an Irish citizen child, born to an Irish mother from whom the appellant had separated with no possibility of reconciliation. The appellant appealed against the expulsion order using a number of arguments, notably the claim that there had been a breach of Article 24(3) on the rights of the child, which recognises the right of the child to maintain on a regular basis a personal relationship with both of his or her parents. The appellant argued that if he were deported, his child would not be able to exercise her right to maintain on a regular basis a personal relationship and direct contact with both her parents.

The High Court reiterated that Article 51(1) of the Charter states that its provisions only apply to Member States "when they are implementing Union law". Although this concept has not yet been defined completely and exhaustively, the High Court observed that there was a spectrum of possibilities. On the one hand, there were cases in which Member States exercised a discretionary power conferred upon them by Union legislation (see, for instance, the ECJ's judgment of 21 December 2011, N. S., C-411/10 and C-493/10). On the other hand, there were cases relating to purely internal situations and only concerning domestic law. The High Court noted that the difference between implementation of Union law and purely internal situations was not always clear, such as in cases where a Member State exercises its discretionary powers in connection with a European arrest warrant.

In the case in point, the High Court stressed that the rights of the appellant's child and former partner, both of whom were Irish citizens, derived entirely from Article 9 of the Irish constitution. Moreover, the Irish State's power to deport the appellant pursuant to the Immigration Act 1999 did not derive from European Union law, but was rather a legislative expression of the inherent right of all States under international law to regulate and control their own borders. While European Union law lays down the minimum substantive and procedural rules for asylum applications, the Immigration Act 1999 remains a purely internal law and thus the exercise by the Irish State of a discretionary power granted by that law cannot be

considered implementation of Union law within the meaning of Article 51(1) of the Charter.

The High Court ruled that since the Irish State was not implementing European Union law when it issued an expulsion order with regard to the appellant, the substantive provisions of the Charter, including Article 24(3), did not apply to the case in point. The High Court therefore dismissed the appellant's request for authorisation to submit an application for judicial review on the basis of Article 24(3) of the Charter.

High Court, judgment of 3 April 2012, AO v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No.3), 2012, IEHC 104

IA/33185-A

[TCR] [DUNNEPE]

Netherlands

Fundamental rights – Charter of Fundamental Rights – The rights of the child – Decision to refuse an asylum application – Certain documents mentioned by the asylum seeker not taken into consideration – Violation of Article 24 of the Charter

In a judgment handed down on 18 July 2012, the Raad van State found, in the light of Article 24 of the Charter in particular, that the Dutch authorities competent in the matter of immigration and asylum had not duly taken into account the interests of the asylum seeker, a minor, in their decision to refuse his application for asylum.

The case concerned the transfer of a minor asylum seeker from the Netherlands to Italy. It had come to light that the asylum seeker had already submitted an application for asylum in Italy before filing an application in the Netherlands. While it was not contested that Italy was the Member State responsible for examining the asylum application by virtue of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, the asylum seeker argued that the asylum procedure in Italy was not consistent with European Union law and that transferring him there would contravene Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention").

After confirming, with reference to the European Court of Justice's judgment in the joined cases N.S. and M.E. (judgment of 21 December 2011, C-411/10 and C-493/10), that the case fell within the scope of application of the Charter and could thus be examined in the light of Article 24 thereof, the Raad van State observed that the article, which was based on Article 3 of the Convention on the Rights of the Child, gave national authorities a certain margin of discretion and that consequently, national courts had to restrict themselves to assessing whether this margin had been overstepped.

The Raad van State then observed that in the case of M.S.S. v. Belgium and Greece (judgment of 21 January 2011, application no. 30696/03) concerning the transfer of an asylum seeker to Greece by the Belgian authorities, the European Court of Human Rights had found that a number of factors had to be taken into account in order to determine whether transferring an asylum seeker to another Member State would breach Article 3 of the Convention. These factors included the quality of the asylum procedure in the other Member State and the living and detention conditions in that State. In the Raad van State's view, it followed from this judgment that an in-depth examination was also required when the asylum seeker had based his or her argument that a transfer would breach Article 3 of the Convention solely on general documents containing information on one or more of the factors mentioned above.

Finally, the Raad van State found that in the case in point, the asylum seeker had based his argument solely on general documents on the situation of asylum seekers – and more specifically, minors – in Italy. It could not be ruled out that these documents may be relevant in determining whether the factors mentioned above (that is, the asylum procedure and living and detention conditions in Italy) would indicate that the asylum seeker should not be

transferred. Given that the competent national authorities had not taken these documents into consideration when deciding to transfer the asylum seeker, the Raad van State concluded that the authorities had not duly taken into account the interests of the minor asylum seeker, especially in the light of Article 24 of the Charter.

Raad van State, 18 July 2012, Vreemdeling v. Minister voor Immigratie en Asiel, 201101617/1/V4, www.rechtspraak.nl LJN BX2089

IA/33181-A

[SJN]

Article 27

Workers' right to information and consultation within the undertaking

Belgium

Charter of Fundamental Rights – Workers' right to information and consultation within the undertaking – Protection in the event of unjustified dismissal – Application to the European Commission

The European Commission, acting on its own behalf and on behalf of the European Communities, appealed to the Cour du Travail de Bruxelles (Brussels Labour Court) against a judgment of the Tribunal du Travail de Bruxelles (Brussels Labour Tribunal).

In the contested judgment, the European Commission and Communities had been ordered to pay severance pay and compensation for unfair dismissal to 39 language teachers who had been hired by these institutions on open-ended contracts established under Belgian law. The Commission and the Communities contested the court's description of this dismissal as "unfair": they argued that "they were under no obligation to inform and consult employees and that their behaviour following the dismissal [had been] without fault and [did] not make the dismissal unfair".

The Cour du Travail first highlighted that neither the applicable Belgian legislation nor Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees, nor even Article 21 of the European Social Charter required the European Commission to have a procedure for prior information and consultation.

Nevertheless, it observed that "in the specific circumstances of this dispute, the complete lack of any prior information or consultation, even informal and outside of the framework of any regulations, [made] this dismissal unfair.

According to the Cour du Travail, the European Commission signed the Charter on 7 December 2000, and Article 27 thereof provided for a procedure of prior information and consultation while Article 30 set down the principle of the right to protection against unjustified dismissal. The Cour du Travail therefore noted that "when assessing whether the right to dismissal has been exercised abnormally, the clear imbalance between the legitimate expectations arising from the European Commission's signature of the Charter and the brutal nature of the dismissals it performed should also be borne in mind". Consequently, the Cour du Travail confirmed that the dismissals in question had been unfair, basing its reasoning on Articles 27 and 30 of the Charter.

Cour du Travail de Bruxelles, judgment of 24 April 2012, RG No. 2010/AB/913, www ://jure.juridat.just.fgov.be/

IA/33187-A

[FLUMIBA]

France

European Union law – Principles – Fundamental rights – Article 27 of the Charter of Fundamental Rights – Directive 2002/14/EC of the European Parliament and of the Council – Workers' right to information and consultation – Ability to invoke this provision in a dispute between individuals with a view to assessing the compliance of a national implementing measure – National provision excluding employees with certain types of employment contract from a calculation of the number of

workers employed by a company, specifically that used to determine the statutory threshold for establishing staff representative bodies

Two judgments handed down by the Social Chamber of the Cour de Cassation raised the issue of the horizontal direct effect of the Charter, and more specifically Article 27 on workers' right to information and consultation within the undertaking. By virtue of that article, workers must, at the appropriate level, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

In its judgment of 17 May 2011, which is briefly discussed in *Reflets no. 2/2011,* the Cour de Cassation, by applying Article 27 of the Charter to a dispute between individuals, seemed to accord that provision horizontal direct effect. The Cour de Cassation had found that an employee, acting as an individual, could invoke his employer's civil liability on the grounds that the employer had not established staff representative bodies and had thus deprived him of a means of representation.

In the view of the Cour de Cassation, an employer who failed to take the necessary steps to establish a staff representative body, despite being legally required to do so, and without a statement of deficiency having been drawn up, was committing a fault that would inevitably harm the employees as it deprived them of a means to represent and defend their interests. The Cour de Cassation derived this principle from the combined application of the relevant provisions of domestic legislation on staff representation, namely Article 8 of the preamble to the 1948 constitution, Articles L2323-1 and L2324-5 of the Labour Code and Article 1382 of the Civil Code, and the relevant provisions of European Union law, including Article 27 of the Charter and Article 8(1) of Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community.

Furthermore, in a judgment handed down on 11 April 2012, the Social Chamber of the Cour de Cassation submitted a reference for a preliminary ruling to the European Court of Justice with a view to determining whether the right recognised by Article 27 of the Charter, as set down in the provisions of a directive, could be relied upon in a dispute between individuals.

The appointment of a trade union representative and the creation of staff representative bodies (staff representatives and a works council) are subject to a condition regarding the number of workers employed at the company or establishment in question. In application of Article 111-3 of the Labour Code, workers employed under certain contracts (apprenticeship contracts, employment-initiative contracts, employment support contracts and professional training contracts) are excluded from the calculation of workforce numbers. As a result, an employer with over 100 employees may have fewer than 11 employees who are taken into account in the calculation. This provision of the Labour Code transposes Directive 2002/14/EC of the European Parliament and of the Council.

The Cour de Cassation found that Article 3(1) of Directive 2002/14/EC of the European Parliament and of the Council, as interpreted by the European Court of Justice in the CGT case (judgment of 18 January 2007, C-385/05, ECR 2007, p. I-00611), precludes national legislation that excludes a specific category of workers from the calculation of staff numbers. Furthermore, the Cour de Cassation pointed out that it was settled case law that the fundamental rights of the European Union could be relied upon in disputes between individuals with a view to assessing whether Member States had respected them when implementing European Union law and that Articles 51 and 52 did not represent a restriction on the ability to invoke provisions of the Charter in horizontal disputes. In view of these elements, the Cour de Cassation asked the European Court of Justice, in essence, whether the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter of Fundamental Rights of the European Union, and as specified in the provisions of Directive 2002/14/EC of the European Parliament and of the Council, could be invoked in a dispute between private individuals in order to assess the compliance of a national measure

implementing the directive. If so, the Cour de Cassation wanted to know whether those same provisions could be interpreted as precluding a national legislative provision that excluded from the calculation of staff numbers in the company, in particular to determine the legal thresholds for establishing staff representative bodies, workers with certain types of employment contract (pending case C-176/12).

Cour de Cassation, Social Chamber, judgment of 17 May 2011, no. 10-12.852, and Social Chamber, judgment of 11 April 2011, no. 11-21.609, www.legifrance.gouv.fr

IA/32945-A
QP/07508-A9

[SIMONFL] [MESSIFR]

Article 30

Protection in the event of unjustified dismissal

Germany

Charter of Fundamental Rights – Protection in the event of unjustified dismissal – National legislation on protection in the event of dismissal not applicable to the first six months of the employment contract (*Wartezeit*) – Protection during this period provided by the courts – Examination of a possible violation of the principle of good faith and accepted principles of morality – No need to refer the case to the European Court of Justice

In a judgment handed down on 8 December 2011, the Bundesarbeitsgericht (Federal Labour Court) ruled on the issue of whether German labour law contravened Article 30 of the Charter, which guarantees protection in the event of unjustified dismissal. Under Article 1 of the law on protection in the event of dismissal (*Kündigungsschutzgesetz*), an employment contract must have run for at least six months uninterrupted for an employee to receive the protection guaranteed by the law.

In the case in point, the employee was dismissed on the grounds because he was unfit to work.

According to the Bundesarbeitsgericht, for the first six months of an employment contract, protection in the event of unjustified dismissal within the meaning of Article 30 of the Charter is, in German law, provided by the labour courts, which assess whether the dismissal violates the principle of good faith or the accepted principles of morality enshrined in Articles 242 and 138(1) of the Bürgerliches Gesetzbuch (civil code, hereinafter referred to as "the BGB").

In the case in point, the Bundesarbeitsgericht found that the principle of good faith and the accepted principles of morality had not been violated to the extent that the dismissal was due to the incapacity (illness) of the employee, a situation that could not be ascribed to the employer. Moreover, in this specific case, it was not possible to determine whether and, if applicable, when the employee would be able to resume work.

The employee claimed that the issue of whether the principle of good faith and the accepted principles of morality had been violated should have been referred to the European Court of Justice.

The Bundesarbeitsgericht considered that these general provisions (Articles 242 and 138(1) of the BGB) could only be interpreted in the light of the fundamental rights enshrined in the Basic Law, which offers extensive protection, and not in the light of the Charter. In the light of the fundamental rights enshrined in the Basic Law, the courts would be justified in restricting themselves to evaluating the fairness of the dismissal in the event of a dismissal within the first six months of the employment contract. Employees' trust was inevitably limited because they could expect that their contracts may be terminated within the first six months.

In the Bundesarbeitsgericht's view, questions relating to a potential violation of Articles 138 and 124 of the BGB were not connected to European Union law. The European directives on collective redundancy and relocation of undertakings were not applicable. With reference to Article 51(1) of the Charter, according to which the Charter's provisions only apply to Member States when they are implementing Union law, the

Bundesarbeitsgericht found that there were no connecting factors between European Union law and the general provisions on the principle of good faith and the accepted principles of morality.
l'Union.

The Bundesarbeitsgericht's judgment has been criticised by a number of authors (see, for instance, Ritter, *Europarechtsneutralität mitgliedstaatlicher Generalklauseln?*, NJW 2012, 1549 et s.)

Bundesarbeitsgericht, order of 8 December 2011, 6 AZN1371/11, www.bundesarbeitsgericht.de

IA/33258-A

[AGT]

Article 41

Right to good administration

Ireland

European Union citizenship – Application to be granted a certificate of naturalisation – Refusal – Lack of reasons – Article 41(2) of the Charter – Implementation of Union law – Article 51(1) of the Charter – Obligation to give reasons

The appellant, a Syrian national, had obtained refugee status in Ireland. He later submitted an application to be granted a certificate of naturalisation with a view to applying for naturalisation. The Irish authority handling his application refused it without giving reasons. The appellant then appealed against this refusal.

When the case came before the High Court, the appellant argued that the refusal of the government, which was the defendant in the case, to grant him Irish nationality inevitably denied him access to Union citizenship. European Union law, particularly the obligation to give reasons mentioned in Article 41(2) of the Charter, thus applied to the case in point. The appellant referred to the ECJ's judgment in the Rottmann case (judgment of 2 March 2010, C-135/08, ECR 2010, p. I-01449) in support of his argument that the granting of Union citizenship was a matter of Union law.

The High Court observed that European Union law applied to actions by the Member States that encroached upon the rights and protections afforded to individuals as citizens of the European Union. The principle of proportionality was applicable in the Rottmann case because it concerned the withdrawal of the naturalisation of a person who was already a Union citizen. However, in the case in point, the appellant was still a Syrian national and had never held Union citizenship. The case therefore only concerned the granting, and not the withdrawal, of naturalisation, which remained the sovereign prerogative of each Member State under international law. The High Court found that Article 41(2) of the Charter had not been violated since, with regard to Article 51(1) of the same text, the refusal to grant a certificate of naturalisation did not have the effect of implementing Union law. The appeal was dismissed and the appellant lodged an appeal against the High Court's judgment.

The Supreme Court found that it was not necessary to assess whether the competent Irish authority had been implementing Union law when refusing an application for a certificate of naturalisation and, consequently, there was no need to determine whether the competent authority's failure to give reasons constituted a violation of Article 41(2) of the Charter. The Supreme Court noted that there were several sources of law demonstrating an emerging consensus that the authorities must give reasons for their decisions. Over the last 30 years, Irish case law had recognised a significant range of circumstances in which a failure to give reasons had led to the quashing of an administrative decision. In the same vein, Article 296 TFEU provides that "legal acts shall state the reasons on which they are based" and Article 41 of the Charter recognises the right to "good administration". The Supreme Court also referred to the Council v. Bamba judgment (judgment of 15 November 2012, C-417/11), in which the ECJ ruled that the purpose of the obligation to give reasons was to provide the person concerned with sufficient information to ascertain whether the act was well founded or whether it was vitiated by a defect and to make

it possible to review the lawfulness of the act. The Supreme Court drew on Article 41 of the Charter but primarily took Irish constitutional law as the basis for its conclusion that the competent authority was obliged to give reasons for its refusal to grant a naturalisation certificate, and thus quashed the decision.

High Court, judgment of 22 July 2011, and Supreme Court, judgment of 6 December 2012, Mallack v. Minister for Justice, Equality and Law Reform, 2011 IEHC 306 (HC) and 2012 IESC 59 (SC),

IA/33185-A

[TCR] [DUNNEPE]

Article 47

Right to an effective remedy and to a fair trial

Germany

Right to an effective remedy – Association Council created by the EEC-Turkey Association Agreement – Decision No. 1/80 – Judicial protection against expulsion – Expulsion of a Turkish national – Limitation of appeals before the third-level court to issues of law – Compatibility with Article 47 of the Charter

In its judgment of 10 July 2012, the Bundesverwaltungsgericht (Federal Administrative Court) found, among other things, that the limitation of the *Revision* (appeal) before the third-level court to questions of law did not breach the right to an effective remedy guaranteed by Article 47 of the Charter.

A *Revision* had been submitted to the Bundesverwaltungsgericht by a Turkish national who was contesting his expulsion from Germany. The competent authority had ordered his expulsion after he received a number of criminal convictions, in particular for the rape of his wife and the repeated sexual abuse of his daughter. The Bundesverwaltungsgericht determined that expulsion of the appellant was legally justified because his criminal behaviour constituted a sufficiently serious threat affecting a fundamental interest of society.

In August 2009, the Bundesverwaltungsgericht stayed proceedings and submitted a reference for a preliminary ruling to the European Court of Justice with regard to the protection against expulsion afforded by Article 14(1) of Decision No. 1/80 of the Association Council created by the EEC-Turkey Association Agreement (case C-436/09, Belkiran). However, in the light of the ECJ's judgment of 8 December 2011 in the Ziebell case (C-371/08), it withdrew its request for a preliminary ruling.

The appellant felt that the amount of time that had passed between the lower court's judgment and the hearing before the Bundesverwaltungsgericht (a result of the staying of proceedings and the reference for a preliminary ruling) would justify new elements – in his favour – being taken into account in the *Revision* procedure, or at least when the case was referred back to the lower court. In this connection, the appellant indicated that since being released in September 2009, he had undergone psychotherapy and had not committed any more crimes.

However, the Bundesverwaltungsgericht stressed that it was, in principle, bound by the lower court's assessment of the facts due to its position as a court hearing on points of law. It therefore would not take account of the new developments and elements of evidence that had only been submitted during the *Revision* procedure.

While Article 14(1) of Decision No. 1/80 of the Association Council makes expulsion conditional upon the existence of a "present" threat (Ziebell judgment, cited above, paragraph 84), the Bundesverwaltungsgericht considered that this could not alter the distinction in national procedural law between courts that heard on both the facts and points of law and courts that only heard on points of law.

In that context, the Bundesverwaltungsgericht reiterated the case law of the European Court of Justice (*inter alia* its judgment of 12 February 2008, Kempter, C-2/06,

paragraph 57, ECR 2008, p. I-00411), according to which it is for the domestic legal system of each Member State to lay down the procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided that these rules are compatible with the principle of equivalence and the principle of effectiveness. In the view of the Bundesverwaltungsgericht, the rules governing *Revision* respect these principles.

In the court's view, the limitation of the *Revision* to questions of law also does not violate the right to an effective remedy guaranteed by Article 47 of the Charter. Citing the ECJ's judgment of 28 July 2011 in the Samba Diouf case (C-69/10, paragraph 69), the Bundesverwaltungsgericht found that the principle of effective judicial protection afforded an individual a right of access to a court or tribunal, but not to a number of levels of jurisdiction, thus this principle did not require the *Revision* to allow examination of the current state of facts.

Furthermore, the Bundesverwaltungsgericht observed that in the event of the emergence after the lower court's judgment of elements of fact resulting in the disappearance or decrease of the threat posed by the appellant's behaviour, the appellant would, by virtue of national legislation, be entitled to apply for a reduction of the effects during his expulsion from the country.

Bundesverwaltungsgericht, judgment of 10 July 2012, 1 C 19/11,www.bverwg.de

QP/06535-P1

[TLA]

Austria

Article 47 of the Charter – Right to an effective remedy and to a fair trial – Environmental impact assessments on railway construction projects – No possibility of appeal against the administrative decision adopted by the federal minister before the Independent Environmental Senate before reference to the Verwaltungsgerichtshof, which is a tribunal within the meaning of Article 47 of the Charter – Admissibility

In 2010, the Verwaltungsgerichtshof (Administrative Court), when ruling on a number of cases concerning environmental impact assessments for railway construction projects, had concluded that Article 10a of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council, required there to be a possibility of appealing against an administrative decision made by the federal minister before the Umweltsenat (Independent Environmental Senate) before bringing the matter to the Verwaltungsgerichtshof. The Austrian law on the evaluation of environmental impact did not provide for such appeals, finding that the Umweltsenat did not have jurisdiction in matters relating to environmental impact assessments for infrastructure projects. The Verwaltungsgerichtshof had ruled that environmental impact studies involved complex issues that should be discussed and clarified on the basis of opinions from experts representing both sides of the debate. According to this line of reasoning, such discussion and clarification could not be performed by the Verwaltungsgerichtshof as it did not have full jurisdiction to establish the facts given that its review powers were concentrated on questions of law (see VwGH, 30 September 2010, 2010/03/0051, 0055; VwGH, 30 September 2010, 2009/03/0067; VwGH 21 October 2010, 2010/03/0059).

In its judgment of 28 June 2011, the Verfassungsgerichtshof (Constitutional Court) did not share the Verwaltungsgerichtshof's opinion. With reference to various judgments of the European Court of Human Rights (ECHR), including its judgment of 21 September 1993 in the Zumtobel case (Zumtobel v. Austria, application no. 12235/86) and its judgment of 10 December 2009 in the Koottummel case (Koottummel v. Austria, application no. 49616/06), the Verfassungsgerichtshof determined that the Verwaltungsgerichtshof is a tribunal within the meaning of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. Therefore, the Verwaltungsgerichtshof must also be considered a judicial body with absolute jurisdiction within the meaning of the

corresponding Article of the Charter, namely Article 47.

The Verfassungsgerichtshof's judgment of 26 September 2011, which clarified this negative conflict of jurisdiction, ruled out the possibility of bringing an appeal before the Umweltsenat *contra legem*, as had been suggested by the Verwaltungsgerichtshof. However, the Verfassungsgerichtshof ruled that the Verwaltungsgerichtshof was the only body with jurisdiction to rule directly following an appeal against an administrative decision by the federal minister in relation to environmental impact assessments. The Verwaltungsgerichtshof accepted and adhered to this viewpoint in its later judgments (see, for instance, the judgment about the construction of a street, VwGH, 24 August 2011, 2010/06/0002).

Verfassungsgerichtshof, judgment of 28 June 2011, B 254/11, and judgment of 26 September 2011, KI-1/11, www.verfassungsgerichtshof.gv.at

IA/33251-A
IA/33252-A

[WINDIJO]

United Kingdom

European Union law – Fundamental rights – Right to an effective remedy – Article 47 of the Charter – The Member States' obligations in terms of legal aid – Existence of an obligation to provide aid in all cases – Absence – Discretion of the competent authorities as regards conditions for obtaining legal aid

In a judgment handed down on 15 January 2013, the Court of Session ruled that Article 47 of the Charter, which guarantees the right to an effective remedy, requires a system for legal aid to be set up but leaves it to the national authorities to determine the conditions for granting such aid.

The appellant, a prisoner serving a life sentence in Scotland, appealed against the Scottish Legal Aid Board's decisions to refuse him legal aid to challenge the compatibility with international agreements of a law depriving prisoners of the right to vote. In the appellant's view, Article 47 paragraph 3 of the Charter had been violated to the extent that this provision guarantees a right to legal aid. Given the complexity of the points of law raised by the appellant's challenge and appellant's lack of resources, legal representation would be necessary to ensure effective access to justice.

While acknowledging that the rights guaranteed by Article 47 of the Charter could be broader than those guaranteed by Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), the Court of Session nevertheless found that that the right to legal aid provided for in Article 47 was not absolute. In that connection, it referred to the European Court of Justice's judgment in the DEB case (judgment of 22 December 2010, C- 279/09, ECR 2010, p. I-13849, paragraphs 59-60) and concluded that the effect of Article 47(3) of the Charter was to require of the Member States that a scheme for the provision of legal aid be available in order that persons (whether natural or legal) would have the possibility of receiving legal aid so they could vindicate their rights under EU law. However, it was for national authorities, under the supervision of the national courts, to determine the conditions, consistent with proportionality, under which legal aid may be granted. This being the case, according to the Court of Session, a simple refusal of an application for legal aid in respect of litigation to vindicate an EU right did not in itself constitute a contravention of the Charter, and that would even be so where the decision-making process was flawed by an error of law. For there to be a contravention, it would have to be established that there were systematic barriers to the granting of legal aid, which was not the case here.

By ruling thus, the Court of Session followed the approach adopted by the same court in a judgment of 11 August 2011 on the compatibility with Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment of a Scottish government decision to authorise a road construction project. One of the appellants

submitted, among other arguments, that the fact that legal aid was not available for the appeal constituted a breach of Article 47 of the Charter.

Dismissing this argument and the appeal in its entirety, the Court of Session took note of Article 52(3) of the Charter, according to which the meaning and scope of the rights guaranteed by the Charter were the same as those laid down in the corresponding articles of the Convention. The court also took account of Protocol No. 30 to the Treaties, which aims to rule out the application of the Charter to the United Kingdom and Poland. However, the Court of Session acknowledged that the situation may have been different had there been a violation of the appellants' rights under Council Directive 85/337/EEC. The court considered that in that scenario, the existence of rights under the Charter would have made a difference to the range of remedies available.

The Court of Session's judgment of 11 August 2011 was subsequently upheld on appeal by the Inner House of the Court of Session on 29 February 2012, then by the Supreme Court on 17 October 2012. Neither of these courts examined the issue of the interpretation of Article 47 of the Charter.

Court of Session (Outer House), judgment of 15 January 2013, McGeoch v. Scottish Legal Aid Board [2013] CSOH 6, www.bailii.org

IA/33408-A

Court of Session (Outer House), judgment of 11 August 2011, Walton v. Scottish Ministers [2011] CSOH 131, www.bailii.org

IA/33416-A

[PE]

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Charter of Fundamental Rights – Guarantee of procedural rights – Grounds of public security – Exception

In a judgment handed down on 19 April 2011, the High Court examined the effect of Article 47 of the Charter on disclosure obligations in the context of an appeal to the SIAC (Special Immigration Appeals Commission).

In 2005, the Secretary of State had withdrawn the permanent leave to remain held by the appellant, a dual French and Algerian national, on the ground that his presence was not conducive to the public good. In 2006, the Secretary of State had refused him admission to the United Kingdom for reasons of public security.

An appeal against this decision was dismissed by the SIAC in 2008 on the ground that the decision to refuse entry had been justified by overriding grounds of public security.

The SIAC procedure for handling two different forms of information provides for the appointment of two special advocates as well as the legal representatives chosen by the appellant. The appellant consulted with the special advocates on the basis of the public evidence alone. The confidential evidence was only shared with the special advocates. Part of the hearing was public and part was closed; the closed sessions were not attended by the appellant and his legal representatives, but were attended by the special advocates.

The appellant challenged the SIAC's decision before the Court of Appeal, claiming that there had been a breach of Article 47 of the Charter, which guaranteed procedural rights.

After examining the Charter's scope of application, the Court of Appeal considered that the SIAC procedure was a national procedure falling under the sole responsibility of the State and did not fall under Union law within the meaning of Article 51 of the Charter.

With regard to the guarantee of procedural rights, the Court of Appeal drew a distinction between the situation in the case in point and the judgments of the European Court of Justice in the Kadi cases (judgment of 3 September 2008, C-402/05 P and C415/05 P, ECR 2008 p. I 06351; judgment of 30 September 2010, T-85/09 P, ECR 2010, p. II 05177), which related to the procedural fairness obligations imposed on the European institutions. The Court of Appeal determined that the principles established in the Kadi

judgments did not apply to a Member State's decision regarding an expulsion measure.

The judge, Lord Justice Kay, found that the SIAC procedure was not susceptible to challenge on the ground of procedural unfairness. The other two judges stated the reverse was possible. The Court of Appeal therefore decided to submit a reference for a preliminary ruling to the European Court of Justice with a view to determining whether there had been a contravention of the principle of the principle of effective judicial protection, mentioned in Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States, as interpreted in the light of Article 346(1)(a) TFEU.

On 12 September 2012, Advocate-General Bot presented his conclusions on the case (C-300/11), finding that Article 47 of the Charter was applicable and could guide the ECJ's interpretation. He concluded that in exceptional circumstances, a State could prevent the grounds of public security justifying the expulsion of a Union citizen being disclosed to that person, if certain procedural tools were provided. It was for the national court, in accordance with the principle of proportionality, to use all the procedural tools available to it to adapt the level of disclosure of the grounds of public security to the requirements relating to State security.

Court of Appeal, judgment of 19 April 2011, R (on the application of ZZ) v. Secretary of State for the Home Department [2011] EWCA Civ 440, www.westlaw.com

IA/33191-A

[HANLEVI]

Slovakia

Constitutional Court of the Republic of Slovakia – Constitutional appeal by private individuals regarding a violation of fundamental rights – Proceedings closed due to the dissolution of one of the parties – Right to an effective remedy and to a fair trial – Influence

With its order of 5 April 2011, the Ústavný súd Slovenskej republiky (Constitutional Court) ruled on the Charter's scope of application, among other matters.

In the case in point, the appellants had lodged a constitutional appeal arguing that their fundamental rights – and more specifically the right to an effective remedy and to a fair trial, as guaranteed by Article 47 of the Charter – had been breached by the approach adopted in the main proceedings. In these proceedings, the court of first instance had decided, without examining the appellants' arguments, that there was no longer any need to give a decision and had closed the proceedings due to the dissolution of one of the parties, a trade cooperative that had ceased to exist following its liquidation and removal from the Slovak companies register. The Krajský súd (Regional Court) and the Najvyšší súd Slovenskej republiky (Supreme Court) had confirmed this decision.

The Ústavný súd dismissed the appeal as being, in essence, manifestly unfounded. It referred to the principle of subsidiarity and found that the Najvyšší súd's decision was well founded. The Ústavný súd also specified the scope of application of the Charter, which is set down in Article 51(1) of the same as being when Member States implement Union law. In that respect, the court concluded that the Charter could not be applied when a dispute only concerned national provisions to the extent that this was not connected to implementation of Union texts, a situation in which the Slovak Republic wished to derogate from Union law, or the application of a substantive rule of Union law.

This case law has already been applied positively in another judgment of the Ústavný súd, handed down on 11 April 2011, which also concerned a violation of Article 47 of the Charter in connection with a lack of impartiality on the part of a bailiff.

Ústavný súd order of 5 April 2011 (III. US 141/2011)

IA/32984-A

[MREKAEV]

Article 49

Principles of legality and proportionality of criminal offences and penalties

France

Charter of Fundamental Rights – Principle of legality of criminal offences and penalties – Offence of concealed work – Number of hours of work mentioned on the payslip lower than the number of hours actually worked – Hours spent on the ferry by drivers not counted – Time defined as "period of availability" by Directive 2002/15/EC of the European Parliament and of the Council – Time not constituting actual working time – Actions not constituting an offence

In a judgment handed down on 5 June 2012, the Cour de Cassation based its decision to quash an appeal court judgment directly on Article 49 of the Charter, which concerns the principle of legality of criminal offences and penalties.

In the case in point, the manager of a haulage company had been convicted by the appeal court of the offence of unlawful use of the device meant to monitor working conditions (the 'tachygraph' installed in the lorries) because she had asked her drivers to set their tachygraphs to "rest/break" when crossing the Channel on the ferry instead of setting them to "period of availability", as required by Article 3(b) of Directive 2002/15/EC of the European Parliament and of the Council on the organisation of the working time of persons performing mobile road transport activities. She was also convicted of the offence of concealing work because she had not included these hours as working time on the drivers' payslips. The appeal court had concluded that the first offence inevitably led to the second and that it was not important to know whether periods of availability were paid or not.

However, the Cour de Cassation quashed the appeal court judgment convicting the company manager of concealing work. The Cour de Cassation observed that by virtue of Article 3(b) of Directive 2002/15/EC, which had not been transposed into French law but was directly applicable and could be relied upon by the company manager against the State, the periods spent on the ferry were periods of availability but did not constitute actual working time. In French law, the offence of concealing work consists in concealing paid work and results from a lower number of working hours being mentioned on the payslip than the number of hours actually worked. The Cour de Cassation found that the hours not mentioned on the payslip, that is, hours during which drivers were not doing any work and were free to see to personal errands, did not constitute actual working time. Thus the fact that these periods were not mentioned on the payslip did not constitute an offence. On the basis of Article 49 of the Charter in particular, the Cour de Cassation concluded that there had been no offence since "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed".

As Nicolas Maziau, an advising judge to the Cour de Cassation, said in his comment piece on the judgment (*Revue de droit du travail*, 2012, p. 616), the Cour de Cassation is rejecting the idea that the time spent by drivers on the ferry, which is considered by Union law to be constitute "periods of availability and not working time, can, through being considered *de facto* equivalent [to the domestic concept of] service time in the absence of a provision clarifying the state of law, give rise to prosecution for concealing work when fewer working hours are mentioned on the payslip than were actually performed, whereas – since criminal law is interpreted strictly – there are no texts that allow the offence of concealing work to be based on failure to remunerate periods of availability".

The Cour de Cassation therefore quashed the judgment on the basis of Article 49 of the Charter and Directive 2002/15/EC of the European Parliament and of the Council (not transposed), and of the relevant national provisions.

Cour de Cassation, Criminal Chamber, 5 June 2012, no. 1183.319, Criminal Bulletin, no. 143, www.legifrance.gouv.fr

IA/32983-A

[MEYERRA]

Article 51

Scope

Hungary

Fundamental rights – Charter of fundamental rights – Scope – Scope ratione temporis – Scope ratione materiae – Implementation of Union law by the Member States – Interpretation

In a judgment handed down on 17 May 2011, the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest, judgment no. 5.Pf.22.054/2010/5.) ruled that only cases dating from after 1 December 2009 fell within the scope ratione temporis of the Charter, which therefore only operated ex nunc.

The subject of the case was a liability action against a court. The appellant had applied for damages for the harm he had suffered because the court had violated his right to good administration in a prior case regarding rights of way affecting his property. The court proceedings had started in 1997 and the final judgment had been handed down in 2005. In the appellant's view, the violation resulted from erroneous interpretation of the rules of law and an unreasonable assessment of the facts and the evidence on the part of the court, as well as the unreasonably long duration of the proceedings. As a legal basis for his arguments, the appellant cited the Charter, Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), the case law of the European Court of Justice (particularly its judgment of 19 November 1991 in the Francovich case, C-6/90 and C-9/90, ECR 1991, p. I-05357) and the relevant provisions of the Hungarian Civil Code and Code of Civil Procedure.

As the court of first instance dismissed his action, the appellant lodged an appeal against its judgment on the basis of the same arguments he had raised before the court of first instance.

The Fővárosi Ítélőtábla ruled out the application of the Charter to the case, finding that it had "become part of Union law with the Treaty of Lisbon, which was fully ratified during the month of December 2009. [T]hus it [was] not applicable to the proceedings in question, which [had] finished long before then". The Fővárosi Ítélőtábla also ruled out the application of the Convention, arguing that it could only be used as a legal basis when a liability action is brought directly against the State, which is the object of the obligations imposed by the Convention. Since the relevant provisions of the Civil Code, which establish liability without negligence, did not apply in this case, the Fővárosi Ítélőtábla ruled on the matter on the basis of the provisions on restitution for harm caused in the exercise of judicial functions. As it did not take account of these provisions of the Civil Code, the appellant's application on the basis of these provisions was also declared unfounded by the Fővárosi Ítélőtábla.

With regard to the interpretation of the expression "when they are implementing Union law", the express reason for non-application of the Charter in the following case was its inapplicability ratione materiae.

The judgment handed down by the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest) on 27 January 2011 (5.Pf.21.342/2010/5.) concerned a liability action brought against the State in connection with the violation of the appellant's fundamental rights by public administrative bodies and by the court ruling in the final instance. The alleged harm originated in the decisions by these public bodies, made between 1994 and 2005, to refuse the appellant a permit to build on a plot of land belonging to him. In the appellant's view, this refusal had violated his rights to human dignity, property, legal certainty, good administration and an effective remedy, as guaranteed by Articles 1, 2, 3, 17, 21 and 47 of the Charter and several articles of the Hungarian constitution, as well as the Civil and Criminal Codes. He referred to the European Court of Justice's case law on State liability for violation of European Union law and argued that the Charter was already part of Union law even if the Treaty of Lisbon had not been ratified by all the Member States.

The court of first instance having dismissed his action, the appellant brought an appeal against its judgment.

The Fővárosi Ítélőtábla upheld the contested judgment, based on the same grounds. It pointed out that in accordance with national civil law, the obligation to make restitution for harm caused to private individuals was incumbent upon the public bodies that had caused that harm. Since there was no relationship under civil law between the appellant and the State, the State could not be held liable for harm caused by State bodies with separate legal personalities. Since there was no connecting factor to European Union law, "the dispute [had to be] settled on the basis of national law, as Union law [had] no role in it".

Fővárosi Ítélőtábla, 17 May 2011, no. 5.Pf.22.054/2010/5, *www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara*

IA/33341-A

Fővárosi Ítélőtábla, 27 January 2011, no. 5.Pf.21.342/2010/5, *www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara*

IA/33340-A

[VARGAZS]

United Kingdom

Charter of Fundamental Rights – Administrative decision-making procedure with regard to export control – Scope – Effect of the application of a derogation – Inclusion – Effect of non-decision – Inclusion – Scope and interpretation of rights and principles – Extra-territorial jurisdiction – Exclusion

In a judgment handed down on 29 November 2010, the High Court ruled on the lawfulness of a British minister's decision to refuse to oppose the export to the United States of products intended for use in lethal injections. The appellants, both of whom had been sentenced to death in the United States, based their appeal on three arguments, of which one was an alleged contravention of Article 4 of the Charter, which prohibits torture and inhuman or degrading treatment or punishment.

In order to determine whether this contravention was justified or not, the High Court had to establish that the minister's decision fell within the scope of the Charter and that the rights guaranteed by it applied to the appellants.

The respondent argued that the minister's decision implemented EU law within the meaning of Article 51(1) of the Charter on two grounds: i) the minister had granted a derogation to the Member States in the domain of export control; and ii) the Minister had not imposed any controls.

The High Court examined the European Court of Justice's judgment in the ERT case (judgment of 18 June 1991, C-260/89, ECR 1991, p. I-02925) and confirmed that granting such a derogation in an area covered by EU law corresponded to Article 51 of the Charter. The High Court also found that the minister's decision to exercise – or not exercise – his right to impose controls was a decision implementing EU law, regardless of the result.

With regard to the applicability of rights, the appellants acknowledged that the rights guaranteed by the European Convention on Human Rights (hereinafter referred to as "the Convention") did not apply because the appellants were not physically present on the territory of the United Kingdom. However, they argued that they were protected by the Charter despite being in the United States because the Charter did not set down any territorial limitations in terms of jurisdiction.

By virtue of Article 52(3) of the Charter, to the extent that the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of the rights guaranteed by the two texts is the same. Consequently, the High Court considered that the territorial scope of the Convention applied and that the appellants were therefore not protected by the Charter in the United States.

To arrive at its conclusion, the High Court analysed Article 1(1) of the Protocol on the application of the Charter to Poland or the

United Kingdom, which provides that the Charter reasserted existing rights but did not create new ones. However, it is important to note that the High Court's judgment was not based on the existence of the Protocol, as a reference for a preliminary ruling on the Protocol's effect had been submitted to the European Court of Justice by order of the Court of Appeal. In its judgment on the case (N.S., judgment of 21 December 2011, C-411/10), the ECJ had ruled that the Protocol did not call into question the Charter's applicability to the United Kingdom.

High Court (Queen's Bench Division), judgment of 29 November 2010, R (on the application of Zagorski) v. Secretary of State for Business, Innovation and Skills, [2010] EWHC 3110 (Admin), www.westlaw.com

IA/33190-A

[HANLEVI]

Sweden

Charter of Fundamental Rights – Scope – Article 51 – Implementation of Union law – Failure to declare income to the competent authority – Administrative and criminal consequences – Article 50 –* Ne bis in idem *principle – Request by one party to refer the matter to the European Court of Justice for a preliminary ruling – Dismissal

With an order issued on 29 June 2011, the Högsta Domstolen (Supreme Court) dismissed a request to submit a reference for a preliminary ruling to the European Court of Justice in connection with the applicability of Article 50 of the Charter. It also refused to examine the appellant's appeal, meaning that the judgment handed down by the Skäne och Blekinge Court of Appeal is the final judgment in the case in question.

The case in point bore certain similarities to the Åkerberg Fransson case (judgment of 26 February 2013, C-617/10) and concerned the *ne bis in idem* principle. The person in question had not duly declared all of his income to the tax authorities, thus neglecting his obligation to pay VAT to the Swedish State. He was required to pay a surcharge for late payment. The public prosecutor then opened proceedings against the appellant, arguing that the offence (tax fraud) had been serious because the amounts involved were very large and the offence had been committed systematically. After losing the case before both the local court and the appeal court, the appellant brought a challenge before the Högsta Domstolen, arguing that the case should be dismissed because there had been a violation of Article 4 of Protocol No. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Article 50 of the Charter.

As part of an application to have an appeal on a point of law deemed admissible, the appellant asked the Högsta Domstolen to submit a reference for a preliminary ruling to the European Court of Justice.

Before settling the question of the admissibility of an appeal on points of law, the Högsta Domstolen dealt with the matter of the request for a preliminary ruling. In this connection, it found that the matter of the applicability of Article 50 of the Charter and the matter of the obligation to refer for a preliminary ruling to overlap as a connection with European Union law is required in both cases. In the view of the Högsta Domstolen, neither the rules on tax fraud nor the surcharge for late payment fell under Union law and were not the result of a model chosen under Union law. Since European Union law did not apply to the case in point, there were no difficulties with the interpretation of Article 50 of the Charter. The Högsta Domstolen thus dismissed the request for a preliminary ruling.

However, the Högsta Domstolen's judgment was not unanimous. Two of the five judges filed dissenting opinions and raised three points in support of their view. The first matter they addressed was the applicability of the Charter to the issue of a system like the Swedish system of imposing surcharges for late payment of taxes and bringing proceedings for tax fraud and this system's compatibility with Article 50 of the Charter. In the view of the judges with dissenting opinions, it could not be ruled out that the system of sanctions may have a connection

with Union law, meaning that the Charter would apply; there was therefore relative uncertainty about the Charter's applicability. Secondly, they mentioned that the Member States are bound to take the required measures to ensure that VAT was paid correctly and that taxable persons met their obligations. In this sense, Sweden is required to comply with Union law and respect the principles of law, including the principle of proportionality. Thirdly, quite aside from the appellant's failure to pay VAT, the case was linked to European Union law in that the appellant was a Danish citizen who was living in Sweden over the period in question and had supplied services subject to VAT to a client in another Member State, as well as services linked to intra-EU trade to Swedish companies.

Högsta Domstolen, order of 29 June 2011, no. B 5302-10, www.domstol.se

A/33351-A

[LTB]

Article 52

Scope and interpretation of rights and principles

Bulgaria

Charter of Fundamental Rights – Protection of health – Limitation on the exercise of recognised rights and freedoms – Compulsory vaccination of children – Balancing interests between the right to make a personal choice and the protection of the public interest – General interest taking priority over private interest

In a judgment handed down on 30 June 2011, the Varhoven Administrativen Sad (Supreme Administrative Court) referred to Articles 35 and 52 of the Charter as it ruled on the issue of striking a balance between the right to make a personal choice and the protection of the public interest in connection with compulsory vaccination of children.

In the case in point, the appellant had brought an appeal before the Varhoven Administrativen Sad (panel of three judges) with a view to the annulment of a provision from a lower-ranked piece of legislation (Article 4(2)(5) of ordinance no. 3 of 5 July 2007, issued by the Minister for Health and relating to health requirements in nursery schools) on the grounds that it did not comply with higher-ranked domestic legislative acts or with Union law.

Under the contested provision, parents may enrol their child in a school after submitting a document certifying that the child has received the compulsory vaccinations appropriate to his or her age, as defined by law.

It is important to note that under the law on legislative acts, an ordinance is a legislative act passed with a view to implementing certain provisions or parts of another, higher-ranked legislative act. In that connection, the Varhoven Administrativen Sad determined that ordinance no. 3 had been issued in accordance with the procedure set down in the Code of Administrative Procedure and had been published in the Bulgarian Official Gazette as per the relevant rules in domestic law.

With regard to the claim that the contested disposition did not comply with domestic and European Union law, the court determined that the provision conflicted with neither Bulgarian not Union law as, firstly, it did not restrict the right to education (since nursery school is not compulsory in Bulgaria) and, secondly, it did not infringe on fundamental rights recognised by the constitution, such as the right to life and the right to a healthy and favourable environment in line with established standards and legislation.

It should be pointed out in this connection that under Article 7 of the law on national education, children in Bulgaria are required to attend school from the age of 7. In certain circumstances, 6-year-old children may also attend school.

The Varhoven Administrativen Sad considered that the appellant's claim that his son had been subject to discrimination was unfounded, since all children attending nursery school were required to be vaccinated. The court also stressed that compulsory vaccination is consistent with the State's policy, which is to protect its citizens' health, and with the

fundamental principles set down by the law on health. The measure is also consistent with the European Union's objectives of guaranteeing the physical well-being of its citizens and protecting public health. In that connection, the Varhoven Administrativen Sad referred to Article 35 of the Charter, which specifies that "[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices", and that "[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities". The court pointed out that under the law on health, the protection of citizens' health as a state of physical, mental and social well-being was a national priority guaranteed by the State through the application of certain principles, like the principle of special protection of children's health.

Against this backdrop, the court also referred to Article 52 of the Charter, which conceded that limitations may be placed on the exercise of the rights and freedoms recognised by the Charter. Article 52 provides that any such limitation " 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".

Similarly, in the grounds for its judgment, the Varhoven Administrativen Sad referred to Title XIV of the TFEU, which deals with public health, and more specifically to Article 168. The court stated that it followed from that article that a high level of human health protection would be ensured in the implementation of all Union policies and activities and that Union action, which would complement national policies, would be directed towards improving public health, preventing physical and mental illness and diseases and obviating sources of danger to physical and mental health. Such action would also cover the fight against major health scourges by promoting research into their causes, their transmission and their protection.
On the basis of the above, the Varhoven Administrativen Sad concluded that the contested provision of ordinance no. 3 did not contravene any higher-ranked legislative acts or Union law. The appellant's appeal against the Minister for Health was thus dismissed as lacking any legal basis.

Consequently, the Varhoven Administrativen Sad ruled that although some people feel that compulsory immunisation restricted individual rights, it was not the same thing as forced vaccination. Every parent had the right to be informed about the products contained in compulsory vaccines and about any possible negative side-effects. Penalties were applied (fines, refusal of registration with the local authorities) in the event of non-compliance with compulsory vaccination, unless there were recognised medical contraindications.

In conclusion, it should be stressed that when evaluating the purpose of the State's vaccination policy in this judgment, the Varhoven Administrativen Sad gave the protection of the general interest precedence over the protection of the private interest on the basis of the Charter and the TFEU, highlighting that vaccination was not merely a measure for individual protection but rather had a group effect in that it prevented the spread of disease.

The appellant appealed against the Varhoven Administrativen Sad's judgment of 30 June 2011, but it was upheld by a judgment of 3 January 2012 handed down by the Varhoven Administrativen Sad ruling in the final instance (five-member panel).

Varhoven Administrativen Sad, judgment of 30 June 2011, no. 9666, www.sac.government.bg/

IA/32990-A

[NTOD]

Others

Denmark

Treaty of Lisbon – Application to have the law ratifying the treaty declared unconstitutional – Dismissal – Transfer of powers to international authorities by the Charter and by the EU's signature of the

Convention requiring a specific ratification procedure – Absence

The Højesteret dismissed an appeal on the constitutionality of the Treaty of Lisbon brought against the Prime Minister and the Minister for Foreign Affairs by 30 Danish citizens (see also *Reflets no. 1/2011,* p. 14, and *Reflets no. 2/2012,* p. 9).

The appellants claimed that the Treaty of Lisbon transferred powers to international authorities, so the ratifying law should not have been adopted by a simple majority in the Danish parliament, as was the case, but rather in line with the procedure for transferring powers to international authorities, set out in Article 20 of the Danish constitution, which requires approval by a majority of five-sixths of the parliament's members or a simple majority of members and a referendum.

The Højesteret pointed out that Article 20 of the constitution had been introduced to enable Denmark to participate in international cooperation that involved the transfer to an international authority of legislative, administrative and judicial powers with direct effect in Denmark without amending the constitution. Thus such transfer of powers may only be made in line with the procedure set down in Article 20, unless the constitution is amended.

The Højesteret stated that ratification of a treaty amending a treaty that had already been ratified following the procedure set down in Article 20 required a new procedure under that provision when the amendment entailed transferring to an international authority legislative, administrative or judicial powers that have direct effect in Denmark, and when the amendment concerned the subject or nature of the transferred powers. The procedure set down in Article 20 also applied when other powers were transferred to the international authority. However, the procedure did not have to be used if the amendment to the treaty only served to clarify the powers that had already been transferred by virtue of that provision.
Similarly, the procedure set down in Article 20 did not have to be used for changes to the organisation, working method, voting rules and administration of the international authority, though it did have to be applied for amendments entailing fundamental changes to the international authority's organisation, such that its identity was changed. Cases such as these would have to be considered equivalent to transferring powers to another international authority. By contrast, the procedure set down in Article 20 did not have to be used in the case of significant changes to the administration of transferred powers.

The Højesteret found that the amendments to the organisation, working method, voting rules and administration of the European Union were not so fundamental as to change the European Union's identity. Furthermore, it observed that the transfer of powers in question was not connected to conditions relating to the organisation of the European Union or the administration of its powers.

It dismissed the argument that the European Union's powers had been extended indirectly by Declaration No. 17 on the primacy of EU law, the flexibility clause contained in Article 352 TFEU and the recognition of the rights, freedoms and principles set down in the Charter, which has the same legal value as the Treaties.

In this connection, it observed that the Danish government was under an obligation to ensure that Article 352 TFEU, which requires unanimity, was not used to adopt acts that overstepped "the framework of the policies defined in the Treaties". The government was under a similar obligation with regard to the Charter, of which the provisions, according to Article 6(1)TEU, "shall not extend in any way the competences of the Union as defined in the Treaties".

It also referred to its own case law (Ufr. 1998.800H), according to which the Danish courts must declare an act of Community law inapplicable in Denmark in the extraordinary event that it has been established with sufficient certainty that the act in question, which has been upheld by the European Court of Justice, is based on an application of the treaties that goes beyond the transfer of sovereignty performed by the accession law.

Thus it was very likely that the Danish courts would be responsible for examining any questions as to whether a legal act or court decision tangibly and currently affecting Danish citizens was based on an application of the treaties that went beyond this transfer of sovereignty. This would also be the case if the transfer of sovereignty was overstepped by an act of Union law or ECJ judgment that referred to the Charter.

With regard to the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, provided for in Article 6(2) TEU, the Højesteret found that there was no basis for dismissing the government's argument that there was no transfer of competences necessitating the application of the procedure set down in Article 20. The courts would have jurisdiction if the transfer of sovereignty was overstepped by an act of Union law or ECJ judgement that referred to the Convention.

Højesteret, judgment of 20 February 2013, (199/2012), www.domstol.dk/hojesteret/nyheder/Pages/default.aspx

IA/33305-B

[JHS]

B. Brief summaries

I. Application of the Charter by national courts

Article 7

Respect for private and family life

* *United Kingdom*: In a judgment handed down on 21 December 2012, the Court of Appeal ruled that a non-EU national who was married to a Union citizen with whom he had a child, could not validly rely on Article 7 of the Charter and the principle established in the Ruiz Zambrano judgment (judgment of 8 March 2011, C-34/09, ECR 2011, p. I-01177) to challenge a deportation ruling. In the Ruiz Zambrano judgment, the European Court of Justice had ruled that third-country nationals who are the parents of minor EU citizens could be granted a right of residence in the European Union even if the minor citizens had never left the Member State of which they were nationals. In the view of the Court of Appeal, this principle only applied if deportation of the third-country national would also require that person's partner, a Union citizen, to leave the country. However, in the case in point, there was no *de facto* obligation for the appellant's partner to leave. With respect to the application of the Charter, the court dismissed an argument that even if the Union citizen was under no obligation to leave the Member State, the non-EU national could have grounds to claim a right of residence if his deportation would interfere with his partner's enjoyment of her rights as a Union citizen, including the right to family life. In this connection, the appellant argued that it followed from the Dereci judgment (ECJ judgment of 15 November 2011, C-256/11, paragraphs 70-74) that the court had to determine whether refusing a right of residence would contravene Article 7 of the Charter. The Court of Appeal considered that such an interpretation would have the effect of extending the principle developed in the Ruiz Zambrano judgment beyond the limits intended by the European Court of Justice. In the court's view, the current state of EU law regarding the appellant's situation was *acte clair*.

Court of Appeal (Civil Division), judgment of 21 December 2012, Harrison (Jamaica) v Secretary of State for the Home Department [2012] EWCA Civ 1736, www.bailii.org

IA/33409-A

[PE]

* *Slovenia*: In a judgment handed down on 10 May 2012 in the matter of whether a deportation ruling was consistent with the right to respect for private and family life, the Ustavno sodišče Republike Slovenije (Constitutional Court of the Republic of Slovenia) ruled that the birth of a child after the ruling in question had become binding constituted a new development of a personal nature. As such, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) would have to take

account of this circumstance when it re-examined the ruling.

The case concerned a Lithuanian national (hereinafter referred to as "the appellant") who had been the subject of a ruling ordering his deportation from Slovene territory, thus depriving him of the right to maintain a personal relationship with his second child, who lived in Slovenia. The Vrhovno sodišče had considered that since the decision had been based on the fact that the appellant's first child lived with its mother in Lithuania, the birth of the second child in Slovenia did not constitute a new development of a personal nature. Furthermore, the ruling did not deprive the appellant of the right to maintain a personal relationship with his first child.

However, the Ustavno sodišče found that since the case law of the Vrhovno sodišče considered the birth of a child to constitute a new development of a personal nature during proceedings, which would be taken into account for the purposes of adopting a deportation ruling, this development should also be taken into account in the re-examination of such a ruling. Moreover, parents and children have a fundamental right to maintain personal relationships with one another.

While it was true that Union law allowed a person to be deported from a Member State for grounds of public safety or public policy, such deportation would nevertheless have to respect the principle of proportionality, in accordance with Article 7 of the Charter. In particular, the Member State in question should take account of relevant personal circumstances, such as the personal and family situation of the person concerned. This means that a deportation ruling must not interfere disproportionately with the right to respect for private and family life, the content of which is fundamental for parents and children.

Consequently, the Ustavno sodišče ruled that the Vrhovno sodišče's failure to take account of the birth of the appellant's child when re-examining the deportation ruling had disproportionately interfered with the appellant's right to respect for private and family life. It therefore referred the case back to the Vrhovno sodišče.

Ustavno sodišče Republike Slovenije, judgment of 10 May 2012, no. Up-690/10-13, www.us-rs.si/odlocitve/

IA/33337-A

[SAS]

Article 8

Protection of personal data

* *Austria*: In its judgment of 29 September 2012, the Verfassungsgerichtshof (Constitutional Court) had to decide whether a national law that required electricity companies to submit economic data to the authority E-Control for an investigation into the electricity market breached fundamental rights, specifically the right to protection of personal data guaranteed by Article 8 of the Charter. The national law in question transposed Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity, and thus fell within the scope of application of the Charter, as per Article 51(1) thereof.

The Verfassungsgerichtshof referred almost exclusively to the national constitutional law on data protection, concluding that the obligation to submit data did not violate it. In passing, the Verfassungsgerichtshof remarked that the obligation did not violate Article 8(2) of the Charter either, since it was set down in a formal law and met the relevant conditions regarding data protection.

Verfassungsgerichtshof, judgment of 29 September 2012, B54/12 et al., www.verfassungsgerichtshof.gv.at

IA/33250-A

[WINDIJO]

* *United Kingdom*: The Rugby Football Union (hereinafter referred to as "the RFU") claimed that Viagogo, an online trading site, had involuntarily authorised the sale of tickets for rugby matches at exorbitant prices. The RFU makes considerable efforts to ensure that tickets are not sold for more than their face value. With a view to restricting the practice,

the RFU asked the High Court to order Viagogo to disclose information that would enable the RFU to identify the tickets that had been sold at excessively high prices, as well as their sellers. The High Court issued an order requiring Viagogo to divulge the information sought, with no reference to the Charter.

Viagogo submitted a new argument in its appeal against this order. In its opinion, the order constituted a disproportionate and intolerable infringement of its sellers' and buyers' right to the protection of personal data, as guaranteed by Article 8 of the Charter. The Court of Appeal analysed the necessity and proportionality of the measure and concluded that it was appropriate to require Viagogo to supply the requested names and addresses. The Supreme Court upheld this judgment.

The Supreme Court confirmed the approach adopted by Judge Arnold in the Goldeneye judgment ([2012] EWHC 723 (Ch)) with regard to the criteria for proportionality. The Court of Appeal conducted an in-depth examination of the application of the principle of proportionality, with reference to European Court of Justice judgments made before and after the entry into force of the Treaty of Lisbon dealing with balancing fundamental rights and the possible hierarchy of rights (see the ECJ's judgments of 29 January 2006, Promusicae, C-275/06, ECR 2008, p. 1-271 and of 24 November 2011, SABAM, C-70/10).

Supreme Court, judgment of 21 November 2012, Rugby Football Union v. Consolidated Information Services Ltd [2012] UKSC 55, www.westlaw.com

IA/33189-A

[HANLEVI]

Article 17

Right to property

* *Latvia*: With its judgment of 19 October 2011, the Satversmes tiesa (Latvian Constitutional Court) ruled on the consistency of a provision of the law on financial institutions (*Kredītiestāžu likums*) with Article 105 of the constitution (*Satversme*), which provides for protection of property rights.

The provision at the heart of this dispute introduced a new capital increase method for the banks in which the State had acquired a large shareholding or of which the State had increased the capital after they had requested aid from the government. This provision was inserted in the law on financial institutions after assistance was granted to the bank Parex in 2008 to remedy the severe disruption of the economy.

In the case in point, after the State acquired 84.83% of the capital of Parex, its capital was increased without other shareholders being given the opportunity to acquire new shares. As a result, the appellants only held 2.1% of the shares, rather than the 8.4% they had held before the capital increase. They thus argued that they had been deprived of their right to property, as guaranteed by Article 105 of the constitution.

The Satversmes tiesa concluded that the protection of owners' rights also covered the right to make decisions about the property and found that the restrictions enacted by the contested provision were unjustifiable.

The court's analysis drew on a number of points, including the applicability of Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, and its interpretation in the case of Pafitis and Others (judgment of 12 March 1996, C-441/93, ECR 1996, p. I-01347), as well as the protection of property rights set down in Article 17(1) of the Charter and Article 1(1) of Protocol No. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

However, the Satversmes tiesa deemed that it was not necessary to submit a reference for a preliminary ruling to the European Court of Justice as national law provided for a higher

level of protection of property rights, so its judgment did not depend on the interpretation of European Union law.

Latvijas Republikas Satversmes tiesa, judgment of 19 October 2011, no. 2010-71-01, www.satv. tiesa.gov.lv

IA/33342-A

[AZN]

Article 24

The rights of the child

* *Belgium*: The Cour de Cassation ruled on the direct applicability of Article 24 of the Charter, which deals with the rights of the child.

The subject of the appeal on points of law was a judgment issued by the Court of Appeal of Liège, which took Article 332quinquies of the Civil Code as a basis for establishing filiation. The appellants' second argument was that establishing filiation was manifestly not in the child's interests and that Article 332quinquies therefore violated Articles 24(2) and 24(3) of the Charter, among others.

The Cour de Cassation pointed out that "to have direct effect, a provision of an international agreement must be sufficiently precise and complete" and found that the relevant provisions of the Charter were not, "in themselves, sufficiently precise and complete to have direct effect since they left the State with several options for meeting the requirement linked to the child's interests. They cannot be a source of subjective rights and obligations for private individuals. They enable the State and the contracting authorities, in particular, to better identify the child's interests within the framework of the procedure for establishing biological filiation".

The Cour de Cassation also stressed that "as per Article 51 of the Charter, the provisions contained therein only apply to the Member States when they are implementing Union law. Article 332quinquies of the Civil Code does not implement Union law".
Consequently, the Cour de Cassation dismissed the argument.

Cour de Cassation, judgment of 2 March 2012, RG C.10.0685.F, www.cass.be

IA/33186-A

[FLUMIBA]

* *Slovenia*: In a judgment handed down on 14 February 2012 in connection with the examination of a decision on the international protection of a minor, the Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia) found that the Slovenian Ministry of Foreign Affairs (hereinafter referred to as "the Ministry") had not correctly applied the requirement to ensure that the child's best interests were a primary consideration, a requirement that features in Article 24(2) of the Charter, among other texts.

The case concerned a minor Afghan national (hereinafter referred to as "the appellant") who no longer had a relationship with his family. He filed an application for international protection, which the Ministry refused, finding it to be unfounded.

Ruling on the appeal against this decision, the Upravno sodišče considered that the best interests of the child, mentioned in Article 24(2) of the Charter, did not constitute a fundamental right but rather a principle of Union law. However, it pointed out that in accordance with Article 24(3) of the Charter and the Detiček judgment (judgment of 23 December 2009, C-403/09 PPU, ECR 2009, p. I-12193, paragraphs 53 to 59), the maintenance on a regular basis of a personal relationship and direct contact with both parents was a fundamental right of the child.

Nevertheless, the Upravno sodišče considered that the Member States had to take into consideration the best interests of the child, as a principle, when examining applications for international protection. As per Article 24(2) of the Charter, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Furthermore, the twelfth recital to Council

Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted also refers to the best interests of the child. The recital states that "'the best interests of the child' should be a primary consideration of the Member States when implementing this Directive". This principle is set down in Article 16(1)(1) of the Slovenian law on international protection, which transposes the directive.

In the light of these provisions and recommendations, the Upravno sodišče concluded that the Ministry had not correctly taken into consideration the best interests of the child. Moreover, merely adapting the proceedings to the appellant's age – in that the appellant was only asked short, simple questions – was not sufficient to ensure respect of this principle. Besides, the Ministry had considered that it was for the appellant's legal representative to take his best interests into consideration.

The Upravno sodišče found that the Ministry should have taken this principle into account when examining the conditions for granting refugee and subsidiary protection status, as well as in the context of the appellant's possible return to Kabul (Afghanistan).

Thus finding that the principle had been applied incorrectly, the Upravno sodišče quashed the Ministry's decision and referred the case back to it.

Upravno sodišče Republike Slovenije, judgment of 14 February 2012, no. I U42/2012, www.sodisce.si/usrs/odlocitve/

IA/33339-A

[SAS]

Article 30

Protection in the event of unjustified dismissal

* *Italy*: This judgment is part of a series of rulings by the Corte di Cassazione on the rights of workers who have been subject to unfair dismissal, in which the court referred to the Charter (see, in particular, the judgments of 17 September 2012, no. 15521, 20 September 2012, no. 15873, 21 November 2012, no. 20420, and 27 November 2012, no. 21010).

With this judgment, the Corte di Cassazione recognised these workers' right to receive remuneration until they actually received their severance pay.

It found that this right derived from the nature of the "interests" harmed by the dismissal. It considered these interests to be "individual [interests] of constitutional rank" related to the requirement to guarantee the freedom, dignity and material subsistence of workers.

In this connection, the Corte di Cassazione added that the requirement to provide genuine protection against unjustified dismissal was also one of the values and principles set down in the Charter, specifically in Article 30 thereof. The court pointed out that this provision was not applicable to the case in hand since, bearing in mind Article 51 of the Charter, the dispute did not relate to matters of European Union law. However, Article 30 constituted "a source of free interpretation" of national rules, to the extent that the Charter had the role of "expressing principles common to the legal orders of the Member States [...][,] which must be considered to apply within these legal orders".

Corte di Cassazione, judgment no. 41 of 3 January 2013, www.dejure.giuffre.it

IA/32895-A

[CI]

Article 41

Right to good administration

* *Hungary*: In a judgment handed down on 26 June 2012, the Győri Ítélőtábla (Regional Court of Appeal of Győr) (Pf.V.20.345/2010/20.) ruled that in a dispute before a national court, where there was no cross-border element, applications for legal aid had to be assessed on the basis of the relevant national law. Since 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 and Article 41 of the Charter did not apply to the decision, "the application of Union law [was] not justified".

Győri Ítélőtábla, judgment of 26 June 2012, no. Pf.V.20.345/2010/20,
www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara

IA/33350-A

[VARGAZS]

* *Lithuania*: The Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, hereinafter referred to as "the LVAT"), taking account of the Charter, and especially Article 41(2)(a) thereof, as a source of authority, ruled several times on the content of the national principle of good administration. In its judgments of 8 December 2010 and 3 May 2012, the LVAT recognised the right of every person to be heard with regard to decisions that would have a significant impact on their interests. The LVAT noted that the right to be heard, as guaranteed by the Charter, expressed common legal values and could be taken into consideration, as a subsidiary element, when interpreting the national principle of good administration. This right was previously not recognised in Lithuanian case law. This development therefore demonstrates the Charter's importance for national law, even though its application at national level has been minimal so far.

Nonetheless, it is worth noting that in its judgment of 8 December 2010, the LVAT observed that the right to information and consultation was not absolute. The person concerned may waive that right or make it impossible for it to be applied by not fulfilling his or her own duties or refusing to cooperate.

Lietuvos vyriausiasis administracinis teismas, judgment of 8 December 2010, no. A756-686/2010, and judgment of 3 May 2012, no. A442-1529/2012,
www.lvat.lt

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IA/33344-A

[LSA]

Article 47

Right to an effective remedy and to a fair trial

* *Austria*: Article 47 of the Charter has featured in several judgments of the Verfassungsgerichtshof (Constitutional Court) on asylum.

It should be noted that in its judgment of 14 March 2012, the Verfassungsgerichtshof ruled that it would use the rights contained in the Charter as criteria for constitutional review (within the framework of the Charter's scope within the meaning of Article 51), giving these rights equal status to the fundamental rights protected by the national constitution, and especially the Convention (see *Reflets no. 2/2012,* p. 5).

In this first case on asylum, the Verfassungsgerichtshof decided that the Asylum Tribunal's refusal to hold a hearing did not constitute a breach of Article 47(2) of the Charter if the facts of the case had clearly been established by the file and documents submitted by the appellants and if the parties had been heard during the prior administrative proceedings.

Next, in its judgment of 9 October 2012, the Verfassungsgerichtshof ruled that a national law explicitly ruling out State liability (*Amtshaftung*) for rulings by the Asylum Tribunal, of which the decisions can no longer be challenged before the Verwaltungsgerichtshof (Administrative Court), did not violate the fundamental rights guaranteed by the Austrian constitution and, more specifically, the principle of the right to a fair trial. However, the Verfassungsgerichtshof demanded that the law be interpreted in the sense that it did not rule out the State's obligation to provide redress for harm caused by illegally and neglectfully exceeding a reasonable timeframe for making a decision. The Verfassungsgerichtshof indicated that this interpretation not only followed Article 6 of the Convention, but also Article 47 of the Charter.

Finally, with its judgment of 20 September 2012, the Verfassungsgerichtshof found that in principle, an asylum seeker has a fundamental right to an effective remedy, as guaranteed by Article 47 of the Charter, in that the judge handling his or her application must be impartial and objective. However, a procedural decision on asylum matters issued by the president of the Asylum Tribunal may only be challenged in an appeal against the final decision on the asylum application. An asylum seeker's constitutional appeal against the president of the Asylum Tribunal's negative decision regarding an objection by an asylum judge was therefore dismissed with no analysis of the substance.

Verfassungsgerichtshof, judgment of 14 March 2012, no. U 466/11-18 and U 1836/11-13, judgment of 9 October 2012, G64/10, and judgment of 20 September 2012, U1740/11

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IA/33254-A

[WINDIJO]

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With its judgments of 7 November 2012 and 14 June 2012, the Verwaltungsgerichtshof (Administrative Court) determined that the UVS (Administrative Chamber of Appeal) had to, in principle, hold a hearing on an appeal against a deportation ruling, with this obligation arising from Article 47 of the Charter within the framework of its scope as defined by Article 51.

Verwaltungsgerichtshof, judgments of 7 November 2012 (2012/18/0057) and 14 June 2012 (2011/21/0278), www.vwgh.gv.at

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IA/33256-A

[WINDIJO]

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In its judgment of 23 January 2013, the Verwaltungsgerichtshof (Administrative Court) had to rule on withholding deductible VAT for a convertible. The plaintiff had requested a hearing before the Unabhängiger Finanzsenat (Independent Finance Senate). An audience was held, but the plaintiff did not attend it because the summons was incorrect due to a mistake by the Unabhängiger Finanzsenat. According to the Austrian law on the Verwaltungsgerichtshof (*Verwaltungsgerichthofsgesetz*), such an error would invalidate the contested decision, but only if the plaintiff could prove that a hearing would have led to a different decision.

With reference to Article 47 of the Charter, the Verwaltungsgerichtshof ruled that the general obligation to organise a hearing was derived from that provision when the area covered by the law in question implemented Union law. VAT procedures were not covered by Article 6 of the Convention, but did fall within the scope of European Union law. Consequently, the Verwaltungsgerichtshof decided not to apply Austrian procedural rules and to grant the right to a hearing in accordance with Article 47 of the Charter.

Verwaltungsgerichtshof, judgment of 23 January 2013 (2010/15/0196), www.vwgh.gv.at

IA/33255-A
IA/33256-A

[WINDIJO]

* *Italy*: The Corte Costituzionale (with its judgments no. 93 of 12 March 2010 and no. 80 of 11 March 2011) and the Consiglio di Stato (with its judgment no. 1220 of 2 March 2010) ruled on the force that should be accorded to the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"). The first two judgments dealt with the constitutionality of certain provisions on criminal procedure with regard to the prevention and security measures adopted by the court of first instance or the appeal court (first judgment) and by the Corte di Cassazione (second judgment) to the extent that these measures violated the principle of a public hearing, set down in Article 6 of the Convention and Article 47 of the Charter. In the first judgment, the Corte Costituzionale concluded that the provisions in question were unconstitutional, by virtue of the international

provisions mentioned above as "intervening provisions" under Article 117(1) of the constitution, and that it could not interpret them in accordance with the case law of the European Court of Human Rights (ECHR), which had directly adopted a position on the matter (the judgments in Bocellari and Rizza v. Italy, 13 November 2007, and Pierre and Others v. Italy, 8 August 2008). In the second judgment, it found the question as to the provisions' unconstitutionality to be unfounded since the ECHR had never ruled explicitly on proceedings before the Corte di Cassazione.

In its grounds for the second judgment, the Corte Costituzionale stated that neither the general principles of Union law nor the provisions of the Convention were directly applicable in the Member States. It extended this line of reasoning to the provisions of the Charter, declaring that the Charter, too, was not an instrument for the protection of fundamental rights going beyond the competences of the European Union. It pointed out that under Article 6(1) TEU and Declaration No. 1 annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, the condition for the Charter being applicable is that the case brought before the court must have some connection to European Union law. Consequently, none of the international sources of law mentioned (general principles, Convention, Charter) could provide grounds for ruling that the provisions in question were unconstitutional in proceedings before the Corte di Cassazione, given that the case in the main proceedings had no connection to European Union law.

The Consiglio di Stato handed down a judgment that differed from those issued by the Corte Costituzionale, by which it concluded that it was possible to apply the principles regarding the right to an effective remedy derived from Article 24 of the constitution and Articles 6 and 13 of the Convention "which became directly applicable in the national legal system, by virtue of Article 6 TEU, once the Treaty of Lisbon came into force". Thus the Consiglio di Stato applied and interpreted Article 389 of the Code of Civil Procedure, which relates to recovery of undue payment, in the light of the principles contained in these provisions, such as to guarantee effective judicial protection and provide the appellant public authority with a directly enforceable decision, although it was fulfilling its interpretative function as it did so.

Corte Costituzionale, judgments no. 93 of 12 March 2010 and no. 80 of 11 March 2011, Consiglio di Stato, judgment no. 1220 of 2 March 2010

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IA/32900-A

[MSU]

* *Romania:* Article 47 of the Charter is one of the articles cited most frequently by the Romanian courts, in combination with Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"). A broad base of case law has been established, particularly with regard to administrative disputes. The principle of legal certainty, which is considered to be the corollary of Article 47 of the Charter, has been at the origin of a number of judgments by which the Romanian courts have set aside various principles of applicable domestic law which they considered to be contrary to that principle.

For example, with judgment no. 356 of 26 January 2012, the administrative and tax section of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ruled out the application of the provisions of Article 4(1) of law no. 554/2004 on administrative disputes and Article II(2) of law 262/2007 on the amendment thereof. Under these provisions, the lawfulness of an individual administrative act may be contested by way of a plea in objection, even administrative acts that were adopted before the law on administrative disputes came into force. Despite these provisions having been declared constitutional several times, the Înalta Curte de Casație și Justiție found that by virtue of Articles 20 and 148(2) of the constitution, the national court had both a duty and a right to check the compatibility of these articles with fundamental rights and with Union law.

In conclusion, the Înalta Curte de Casație și Justiție found that the possibility of

challenging the lawfulness of individual administrative acts by way of a plea in objection, with no temporal limitation on such challenges, contravened Article 6 of the Convention and Article 47 of the Charter.

Înalta Curte de Casație și Justiție, judgment no. 356 of 26 January 2012, www.legalis.ro

IA/32980-A

[CLU]

* *United Kingdom*: In a judgment handed down on 7 February 2012, the High Court ruled that it did not follow from Article 19(2) of the Charter, read in conjunction with Article 47 of the same, that the courts had the discretion to amend or set aside the time limit for bringing appeals against decisions ordering the enforcement of European arrest warrants. The appellant, a Latvian citizen, was the subject of a European arrest warrant issued by the Latvian authorities. He appealed against the extradition order issued by an English court, but not within the seven-day timeframe required under the Extradition Act 2003. The appellant claimed that the Charter required the High Court to set aside the strict time limit set by the Extradition Act 2003 because he might otherwise be subjected to inhumane or degrading treatment in Latvia. The High Court dismissed this argument, finding that setting short time limits for appeal did not contravene Articles 19(2) or 47 of the Charter, and nor did transferring the appellant to the Latvian authorities.

High Court (Queen's Bench Division, Administrative Court), judgment of 7 February 2011, R (on the application of Andris Preiss) v. Dobele District Court, Latvia [2011] EWHC 316 (Admin), www.westlaw.com

IA 33410-A

[PE]

* *Slovakia:* The judgment handed down by the Najvyšší súd Slovenskej republiky (Supreme Court of the Republic of Slovakia) on 24 April 2012 concerned the re-examination of a 'summary administrative' judgment. The Najvyšší súd also ruled on the appellant's procedural rights, namely the right to an effective remedy, the right to a fair trial and the right to an interpreter.

The dispute in question was between a Polish citizen and the police authorities. The appellant, who had broken the law on road tolls, had been sentenced to a fine under 'summary administrative proceedings'. After the sentence was passed, he attempted to have the ruling overturned, arguing that he had not understood the police's instructions, which were issued in Slovak, and that he had not been duly informed of the consequences of his actions.

With its judgment, the Najvyšší súd recognised the appellant's right to an interpreter and sent the case back to the police authorities. The Najvyšší súd arrived at its conclusion through combined reading of Articles 47 to 50 of the Charter, Directive 1999/62/EC of the European Parliament and of the Council on the charging of heavy goods vehicles for the use of certain infrastructures, and Directive 2004/52/EC of the European Parliament and of the Council on the interoperability of electronic road toll systems in the Community. The court explained that within the framework of the law mentioned above, the appellant, as a foreign national and a party to administrative sanction proceedings in the Slovak Republic, had the right to exercise his procedural rights or draw attention to the fact that the relevant administrative bodies had not recognised his rights. In that connection, the Najvyšší súd confirmed on the basis of existing Slovak case law that if a foreign national is a party in administrative sanction proceedings, the assumption that he or she is familiar with Slovak legislation may be mitigated by the fundamental and procedural rights provided for in national and international law.

Najvyšší súd, judgment of 24 April 2012 (1Szd/32/2011),

IA/32985-A

[MREKAEV]

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

* *The Netherlands*: In a judgment handed down on 13 May 2011, the Gerechtshof Arnhem ruled that Article 50 of the Charter did not preclude criminal proceedings being opened against a prisoner for the assault and battery of a warden in a penal institution when that prisoner had already been given a 14-day disciplinary sanction for the same offence. In the court's view, the disciplinary sanction had not been issued within the framework of criminal proceedings, so the national provision regarding *ne bis in idem* did not apply. With this judgment, the Gerechtshof Arnhem overturned the ruling of the court of first instance, the Rechtbank Almelo, by which it had been determined that Article 50 of the Charter precluded criminal proceedings being opened against a prisoner as in the case in point, since he had already been punished for his actions.

In this connection, it is worth observing that on 23 June 2011 – after the Gerechtsbank Arnhem had handed down its judgment in the aforementioned case – the Rechtbank Almelo ruled, in a similar case, that even though the case concerned second proceedings, the court no longer believed that Article 50 of the Charter precluded second proceedings being opened in similar cases given that under Article 51 of the Charter, the provisions of the Charter were addressed to the Member States only when they were applying Union law.

It appears that the Hoge Raad does not agree with this assessment. In a judgment handed down on 15 May 2012, the Hoge Raad ruled, without referring to Article 51 of the Charter, that Article 50 of the Charter did not preclude criminal proceedings being opened against someone who had already been given a disciplinary sanction. In the Hoge Raad's view, a disciplinary sanction issued by the director of a penal institution is a measure intended to ensure order and security within the penal institution, whereas in the case in point, criminal proceedings were opened for attempted murder and assault and battery. The Hoge Raad found that since Article 50 of the Charter must be interpreted in the same way as Article 4(1) of Protocol No. 7 to the European Convention on Human Rights, there was no need to change the interpretation in Dutch case law of the national provision concerning *ne bis in idem*.

Gerechtshof Arnhem, 13 May 2011, Officier van justitie/Verdachte, 21-002569-10, LJN BQ4476, www.rechtspraak.nl

IA/33182-A

Rechtbank Almelo, 23 June 2011, Officier van justitie/Verdachte, 08/710866-10, LJN BQ947, www.rechtspraak.nl

IA/33183-A

Hoge Raad, 15 May 2012, Officier van justitie/Verdachte, 11/00561, LJN BW5166, www.rechtspraak.nl

IA/33184-A

[SJN]

Article 51

Scope

* *Czech Republic*: Of the rare judgments in which the Ústavní soud (Constitutional Court) has referred to the Charter, the judgment of 25 November 2010 is particularly interesting because it clarified the court's position in cases where it is asked by a private individual to submit a reference for a preliminary ruling to the European Court of Justice. In the case in point, the appellant claimed that his constitutional right to an effective remedy had been violated in proceedings that he had brought before the civil courts with regard to compensation for harm caused by the public authorities. The Nejvyšší soud (Supreme Court), which was ruling in the final instance, did not respond to the appellant's argument based on an infringement of European Union law, nor did it refer a question raised by the appellant with regard to the interpretation of the Charter to the European Court of Justice. The appellant therefore appealed to the Ústavní soud.

The Ústavní soud pointed out that it was not true that the contested judgment by the Nejvyšší soud did not address the question raised by the appellant as regards the

interpretation of the Charter – and more specifically, Article 21, which concerns the principle of non-discrimination. However, if the Nejvyšší soud refused to submit a reference for a preliminary ruling, this was because the appellant had raised the argument based on an infringement of Union law more than two years after the deadline had passed for lodging an appeal and submitting new arguments, not to mention the fact that the question on interpretation raised by the appellant had no connection whatsoever to the subject of the dispute.

The Ústavní soud also ruled that the appellant's request that it refer the same question to the European Court of Justice was inadmissible. Aside from the fact that the appellant had belatedly raised the issue of the relevant of the Charter's interpretation in the case in the main proceedings, the Ústavní soud pointed out that under Article 51(1) of the Charter, the Charter's provisions were addressed to the Member States only when they were applying Union law. However, the appellant had not cited any other provisions of Union law that would apply to the case in point.

Finally, the Ústavní soud stressed that the only reference framework for proceedings before it was Czech constitutional order, not Union law. Consequently, a question regarding the interpretation of Union law could, in principle, only be relevant if the public authority of which the decision was challenged before the Ústavní soud could and should have ruled on the question.

Ústavní soud, judgment of 25 November 2010, II. US 2079/10, www.nalus.usoud.cz

IA/32979A

[KUSTEDI]

Article 52

Scope and interpretation of rights and principles

* *Hungary*: In a judgment handed down on 16 November 2010 (6.K.21.583/2010/6), Szabolcs-Szatmár-Bereg Megyei Bíróság (Szabolcs-Szatmár-Bereg County Court) ruled out the application of the charter, finding that Articles 17 and 52 thereof were not applicable to sanctions imposed for violation on the rules on the marketing of products subject to excise duty.

Szabolcs-Szatmár-Bereg Megyei Bíróság, 16 November 2011, no. 6.K.21.583/2010/6, www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara

IA/33349-A

[VARGAZS]

* *Czech Republic*: In its judgment of 1 November 2012, the Nejvyšší správní soud (Supreme Administrative Court) took the Charter as its basis to highlight the connection between Union law and the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), which are referred to as the two main pillars of the protection of fundamental rights in the Member States. The Nejvyšší správní soud emphasised the vital role of the Convention and the case law of the European Court of Human Rights (ECHR) in interpreting fundamental rights in Union law, with particular reference to Articles 52(3) and 53 of the Charter and Article 6(2) TEU.

At issue in the case in point was the compatibility of a national provision transposing Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals with the last paragraph of Article 15(2) of that directive and Article 5(4) of the Convention, which guarantees everyone the right to liberty and security of person. Under the national provision in question, if the decision to place a foreign national in detention is quashed by the administrative court, that foreign national must be released from detention immediately, unless the police make a new decision in this respect within three days of the rescinding judgment becoming binding. By virtue of this provision, the appellant in the main proceedings – who was a third-country national – was not released despite the administrative court's annulment of the administrative decision ordering his placement in detention due to procedural

defects, namely insufficient grounds for placing him in detention. Indeed, the police issued a new, duly justified decision extending the duration of his detention from 90 to 120 days.

The Nejvyšší správní soud pointed out that the right to liberty and security of person also entailed, under Article 5(4) of the Convention, the right to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. This right is also guaranteed by Article 6 of the Charter, with the same meaning and scope in both texts. Moreover, the scope of the protection granted by the Charter may not be less than that guaranteed by the Convention. Consequently, the concept of lawfulness, as mentioned in both Article 5(4) of the Convention and the last paragraph of Article 15(2) of Directive 2008/115/EC of the European Parliament and of the Council, must be interpreted uniformly and cover all situations contravening the law. Thus the fact that the original decision to place the appellant in detention was annulled due to procedural defects, rather than substantive reasons, has no bearing on the observation that the appellant's placement in detention was unlawful in itself. Since the national provision in question only provides for the release of the person concerned in the event that the police do not issue a new decision within the given timeframe, it is contrary to the requirements set out in Directive 2008/115/EC of the European Parliament and of the Council and in the Charter and its application must therefore be ruled out.

Nejvyšší správní soud, judgment of 1 November 2012, 9 As 111/2012 - 45, www.nssoud.cz

IA/32978-A

[KUSTEDI]

II. Application of the Charter by courts in non-EU countries

* *Canada:* The Canadian courts' case law with regard to protection of human rights is consistent. In addition to national law, and particularly the Canadian Charter of Rights and Freedoms, the Canadian courts frequently refer to foreign sources of law, including the constitution of the United States and the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"). In recent years, references to the Charter have also appeared in Canadian case law.

In the case of the Commission on Human Rights and Youth Rights v. Jeanne Valée (judgment of 3 June 2003, QC TDP), the Commission claimed that the defendant had compromised an elderly person's right to protection against all forms of exploitation by unlawfully appropriating almost all of that person's savings. With a view to highlighting the wider context in which several of the guarantees set down in the Canadian Charter of Rights and Freedoms are situated, the Quebec Human Rights Tribunal (TDP) referred, from the point of view of comparative law, to Article 25 of the Charter in particular, this being the article that recognises the right of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

In the case of Air Canada v. Thibodeau (judgment of 25 September 2012, 2012 FCA 246), the Federal Court of Appeal referred to a case brought before the Court of Appeal of England and Wales (Stott v. Thomas Cook Tour Operators Ltd and Others, judgment of 7 February 2012, [2012] EWCA Civ 66) to highlight the principle that if there is a conflict between two legal texts, an attempt should be made to reconcile the text in line with the general principle of consistency between laws. In the case of Stott v. Thomas Cook, the Court of Appeal of England and Wales ruled that European Union legal texts and national legal texts had to be interpreted so as to avoid a conflict with the Montreal Convention. The Federal Court of Appeal noted that the Court of Appeal of England and Wales had stated that application of the Charter would not have led it to a different conclusion.

Quebec Human Rights Tribunal, judgment of 3 June 2003, Commission on Human Rights and Youth Rights v. Jeanne Valée, QC TDP

Federal Court of Appeal, judgment of 25 September 2012, Air Canada v. Thibodeau, 2012 FCA 246

IA/33188-A

[TCR] [DUNNEPE]

* *Switzerland*: In a judgment handed down on 29 June 2010, the Tribunal Administratif Fédéral ruled on the lawfulness of a decision by the Federal Office for Migration by which it had ordered the immediate return of asylum seekers to Italy without ruling on the substance of their application, thus applying the Dublin II Regulation for determining the Member State responsible for examining an asylum application. This regulation is applicable in Switzerland by virtue of the 2004 Dublin association agreement between the Swiss Confederation and the European Community. 2004.

In this landmark ruling, the Tribunal Administratif Fédéral concluded that an asylum seeker could rely directly on a provision of the Dublin II Regulation if that provision was worded clearly and precisely enough, if the provision was directed at the authorities implementing the regulation and if the provision aimed to protect the rights of asylum seekers. This is the case with Articles 20(1)(d) and 20(2), which provide that if asylum seekers have not been transferred back to the country responsible for examining their asylum application within six months, the country where the application was filed becomes responsible for examining it.

The Tribunal Administratif Fédéral referred directly to the Charter in its analysis of the scope of this provision, particularly with a view to determining whether its subject was the rights and obligations of asylum seekers and their individual interest in greater protection. The court found that in the light of the text of the regulation itself, it appeared that the principle of the unicity of the State responsible for examining the application was "a principle concretely expressing an asylum seeker's right to have his or her application examined, as set down in Article 18 of the Charter (…), this right also being recognised in Swiss law". Later, it reserved the hypothesis of an abuse of rights and observed that the prohibition of abuse of rights was "a general legal principle that [could] be found in Swiss law and the law of many other countries, and that [was] also guaranteed by Article 54 of the Charter".

It would doubtless be going too far to say that these references to the Charter played a crucial part in the court's solution to the dispute. Nevertheless, it is interesting to note that the Tribunal Administratif Fédéral chose to mention the text of the Charter in its reasoning, despite the Charter not being the subject of an agreement between Switzerland and the European Union and not being directly applicable in Switzerland. Thus this decision seems to point towards the idea that the Charter applies in Switzerland to a certain extent, albeit indirectly and in a very limited manner.

Tribunal administratif fédéral, judgment of 29 June 2010, E-6525/2009, ATAF2010/27, www.bvger.ch

IA/33249-A

[MEYERRA]

C. National legislation

The Netherlands

Creation of a Human Rights College in the Netherlands

The law of 24 November 2011 on the creation of a Human Rights College, which came into force on 1 October 2012, provides for the creation of an independent monitoring body in the domain of human rights. The Human Rights College replaces the Equal Treatment Commission and its primary purpose is to protect human rights in the Netherlands, including the right to equal treatment, raise public awareness and encourage respect for these rights. Its tasks include carrying out research into the protection of human rights, publishing annual reports on the human rights situation in the Netherlands and finally, encouraging compliance with binding decisions on human rights by international public law organisations as well as with European and international recommendations in the field.

Wet van 24.11.11, houdende de oprichting van het College voor de rechten van de mens, Stb. 2011, 573,3

[SJN]

D. Extracts from legal literature

Application of the Charter to Member States

"The Charter of Fundamental Rights aims to make the importance and relevance of these rights more visible to the Union's citizens"[1]. "By rendering fundamental rights visible and by merging and systematizing in a single document the sources of inspiration scattered in various national and international legal instruments[2], the Charter marks a new stage in the process of European integration"[3]. However, this development has provoked lively debate about the scope of application of this catalogue of rights, particularly as regards the action of Member States. "[Indeed,] during the drafting process of the Charter, some member states feared than an EU catalogue of fundamental rights would threaten their national sovereignty. In their view, similarly to what happened in the US, the European Court of Justice [...] would rely on the Charter as a 'federalising device', replacing fundamental rights as defined by the national constitutions with a single common standard"[4]. "[Thus,] fears of potentially pervasive developments, sometimes inspired by the evocation of the role of declarations of rights in comparative federalism[5], had a major impact on the drafting of the Charter"[6].

This no doubt accounts for the rather restrictive wording used in Article 51(1) of the Charter, which states that "[t]he provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law". "This formulation lends itself to different interpretations and academic opinion is divided on the proper reading thereof"[7]. The difficulties are heightened by the fact that "[t]he Explanations relating to the Charter state that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law"[8] and refer explicitly to *ERT*[9] case law according to which Member States are required to respect the fundamental rights of the Union when they derogate from the freedoms enshrined in the Treaties. "[Whereas] [i]n view of the complex drafting history and relevance of Article 51, doctrinal discussion has flourished on this issue"[10], "[s]everal questions remain open at this point: Should Article 51(1), given its more restrictive wording be understood as reversing the *ERT* case law? If *ERT* remains good law [...], should there be scope for further categories of Member State action coming under Article 51, or even a residual third category encompassing all Member State acts presenting some sort of link with EU law? And how narrowly or expansively should the [...] existing lines of case law be construed in practice?"[11] Legal literature appears to waver between three possible readings of Article 51(1) of the Charter.

According to a restrictive interpretation of the provision, the Charter only applies to Member States in the relatively strict framework defined by the *Wachauf*[12] judgment, i.e. in situations of implementation of Union law in the true sense[13]. "If *Wachauf* concerned the execution of regulations in the field of common agricultural policy [...] [t]he ECJ has subsequently extended the [same] type of reasoning [...] to the transposition and implementation of directives [...] [and] to the adoption of measures aimed at giving effect to Regulations and other EU law provisions. It has also confirmed that this case law applies irrespective of the degree of discretion the Member States enjoy[14]" "in ensuring the implementation of [EU] rules within their territory, as the recent ruling [...] in *N.S.*[15] illustrates"[16]. "For [this] classic [...] line of cases, the need for ensuring fundamental rights protection at EU level is obvious and universally recognized"[17]. "When Member States implement EU law they act as agents of the EU and should be subject to the same constraints as the EU legislator as far as protection of fundamental rights is concerned. Not to review such acts would be legally inconsistent and arbitrary"[18]. "Both the uniform implementation of EU law and the Union's credibility vis-à-vis the citizens concerned requires that such implementation acts obey to uniform EU-wide fundamental

rights standards and that the EU institutions ultimately guarantee their respect"[19].

According to some authors, such an interpretation of Article 51(1) of the Charter is supported by the way in which the provision came into being. "[While] [d]uring the drafting of the Charter, several different proposals pertaining to the application of the Charter to the Member States were put forward and discussed"[20], "the broader clauses presented [...] were rejected by some Member States wishing to limit the obligation to observe the provisions thereof to cases where they have little or no autonomy"[21]. "Likewise, the Convention on the Future of Europe also favoured limiting the scope of application of the Charter, so as to minimize national resistance to the Charter's legally binding status[22] as provided by the Treaty establishing a Constitution for Europe"[23]. This reading excludes the application of the Charter to Member States when the latter derogate from fundamental freedoms. "[T]he protection of fundamental rights for the citizen will [then] be the existing structure of national law and constitutions and important international obligations like [the ECHR]"[24]. "Once it has been established that a restriction is justified from the perspective of [EU] law, the restriction might still be caught as infringing fundamental rights. But that would be a matter for national law, or possibly the [ECHR], not for [EU] law"[25]. However, this appears to be a minority view today.

"[If] [t]he narrow interpretation finds some support in the drafting process of the Charter [...] [a]t the same time, the explanations [...] point in favour of a broader reading of Article 51(1). In the light of the reference to *ERT* it could be argued that the Member States are bound by the Charter both when they implement EU rules and in the context of national derogations to the fundamental freedoms [...]. The principle that fundamental rights have to be respected when a Member State derogates from a EU fundamental freedom applies where justifications set out in the Treaties are being put forward, but also as confirmed in *Familiapress*[26], where [...] overriding requirements [...] are relied upon. Similarly, where a Member State invokes respect for and the protection of fundamental rights as a direct justification for a derogation as in *Schmidberger*[27] such a justification has to be interpreted in the light of the general principles of EU law [...]. The philosophy underlying the *ERT* case law is that defining what constitutes a violation of the fundamental freedoms is a matter of EU law [...]. The Member State is in a sense implementing a power of defence or derogation provided by EU law[28].

Consequently, when it avails itself of a derogation under EU law it also has to respect fundamental rights as general principles of that law"[29]. "Admittedly, here the Member State acts not as an EU agent but in its own interest and on the basis of its own law. However, when scrutinizing whether a restriction to a fundamental freedom is proportionate and thus, justified under the Treaty it is simply impossible to leave aside fundamental rights impacts from the comprehensive assessment required under the proportionality principle"[30]. "[T]hat would allow 'the relevant Treaty provisions [to] be interpreted in a way which tolerates the violation of fundamental rights' [31] [...]. Most importantly, in the 'derogation situation', determining whether a member state complies with fundamental rights vests the rulings of the ECJ with legitimacy. It reassures national courts, in particular the constitutional courts, that the Union embraces the values and principles in which national constitutions are grounded [guaranteeing] 'ideological continuity' [32] between the two levels of governance [...]. It follows [...] that the terms 'implementing Union law' must be read so as to include also the derogation situation"[33].

Some of the literature goes further regarding the interpretation of Article 51(1) of the Charter. "According to [this] understanding of Article 51(1), the field of application of the rights and principles reaffirmed by the Charter would coincide with the scope of application of EU law. Member States would thus be bound by the Charter whenever they act within the realm of that law[34]. What would be important is the existence of a sufficient connecting link with it [which] does exist notably where a specific substantive rule of EU law is applicable to the situation [...]. Several reasons plead for [such] an understanding of Article 51(1) [...]. Firstly, it should be recalled that fundamental rights are part of EU primary law [...]. If an EU norm,

other than a provision of the Charter, is to be directly applied or interpreted, it would be inconceivable that that norm would have to be applied or interpreted by the EU institutions in the light of the Charter, whereas such application or interpretation by the national authorities could take place without regard to that instrument. Secondly, a [narrower] interpretation of the provision at issue would mean that the scope of application of the Charter would be narrower than that of the general principles of EU law. Those principles would take over where the scope of application of the Charter ends. This would lead to the creation of two separate systems of protection of fundamental rights within the EU[35], according to whether they stem from the Charter or from such general principles"[36]. "[S]uch a dual regime would not be without difficulties [...]. While the fundamental rights protected may be the same, [it] could give rise to arbitrary divergences as to the actual quality and potency of those rights[37]. [B]y weakening the protection of fundamental rights at EU level, such a dual regime would [moreover] run counter to Article 53 of the Charter"[38]. "Thirdly, a [more] restrictive reading would imply that the scope of application of the Charter would be narrower than that of the provisions governing EU citizenship and of the principle of non-discrimination. The relevant ECJ case law applies within the scope of application of EU law or in situations envisaged by or governed by EU law[39]". "[Indeed,] recent cases such as *Kücükdeveci*[40] would seem to indicate that national rules, whose subject-matter is 'simply' governed by substantive provisions of EU law, may also fall within the scope of EU law"[41]. "Moreover, the ECJ has already used the phrase 'implementing Community rules' as synonymous with Member State rules that fall within the scope of EU law"[42].

However, according to some authors, such a reading of Article 51(1) of the Charter seems difficult to reconcile with the reference in the Explanations to the *Annibaldi*[43] judgment in which the Court said it did not have jurisdiction to assess the compatibility of national legislation relating to areas that fall within the purview of the Union with the fundamental rights whose observance the Court ensures. "The explanations support the conclusion that the Charter does not apply to Member States when they act within the scope of the powers of the European Union without there being a specific link between the national measure in question and EU law [...]. Thus, the mere fact that a national measure falls within a field in which the European Union has powers may not lead to the applicability of the Charter [...]. [Whereas] the Charter will apply to all national administrative measures that specifically implement EU law [...] measures that simply concern an area governed by a regulation of the European Union without being specifically controlled by that regulation do not fall within the scope of the Charter. Moreover, the Charter does not apply to national legislation even though it is enacted in the context of the transposition of an EU directive in so far as it transcends what is regulated by the directive"[44]. According to this part of the literature, the determining factor in triggering application of the Charter is the existence of an obligation imposed directly by Union law. "As it results from the reference to *Wachauf* and *ERT* by the authors of the Charter, all cases that involve national measures determined by obligations under EU law will fall within the Charter' s scope"[45]. "Conversely, where EU law imposes no obligation on the member states, the Charter simply does not apply [...]. It follows from *Annibaldi* that the compatibility of national measures which are not a means for a member state to fulfill its obligations under EU law, with fundamental rights cannot be examined by the ECJ [...]. Recently, the ruling [...] in *Dereci*[46] confirmed this point"[47].

Without entirely excluding the possibility of a broader interpretation of Article 51(1) of the Charter, other focus on the need to find a convincing justification for applying the Charter to Member States in cases other than those referred to in the *Wachauf* and *ERT* case law. "[T]he EU institutions should not strive to extend the scope of the Charter as largely as ever possible, by accepting any theoretical construable nexus of the situation submitted to EU law. Instead, the guiding question should be whether there really is a convincing justification for adding, as regards the category of Member State action at hand, a layer of fundamental rights protection at EU level, on top of the two existing levels of the ECHR and the national constitutions. This underlying question should inform both the Court's and

the Commission's [...] analysis of whether there is a sufficiently specific link between the national act at issue and a concrete norm of EU law applied. Several good reasons plead in favour of this prudent approach to Article 51(1). The first is derived from its strikingly restrictive wording ("only when they are implementing" – "uniquement lorsqu'ils mettent en oeuvre") and the intentions of the authors [...] to contain the field of application of the Charter to limited sectors of Member State action. A prudent approach is also in line with the principle of non-expansion of EU competences through the Charter, as expressed in Article 51(2) and repeated in Article 6(1) TEU. More fundamentally, it takes into account the broader implications for Europe's multilevel system of human rights protection: [i]t cannot be in the interest of the EU's institutions to vindicate a power - and a corresponding responsibility - of human rights scrutiny for vast areas of Member State action, and thus to duplicate the general system of human rights protection established by the ECHR and to undermine the latter's authority [...]. [Thus,] while future extensions beyond [...] the *Wachauf* [and] the *ERT* case law [...]might not be altogether excluded, any such extension should, if at all, only be contemplated if really there was a convincing justification for adding fundamental rights protection at EU level and if a concrete, manageable definition of the acts covered could be found; for the time being, we fail to discern any compelling case for such an extension. In any event, making the claim that there is a third residual category, comprising any act for which a link to EU law can somehow be intellectually construed, would not bring further dogmatic clarity and not help the tasks of the EU institutions; instead, it would only create legal uncertainty [...]. It should [notably] be clear from the foregoing that the scope of Member State action falling within the scope of Article 51(1) is the not the same as, but indeed much narrower than, the area of Member State action coming 'within the scope of application of the Treaties' within the meaning of Article 18 TFEU, a concept the Court has construed very expansively. That difference of approach is logical: any discrimination of EU citizens on account of nationality is an attack on the very idea of Union citizenship, a core value specific to the EU whose defence is a central mission of the EU's institutions that cannot be left to national constitutional law and to the ECHR, unlike the general mission of upholding, say, freedom of religion or expression"[48].

These are questions to which the case law does not currently seem to provide definitive answers, according to the literature. Nevertheless, some of the already fairly numerous judgments handed down by the Court to date concerning the Charter provide very useful indications on this subject. "[A] clear consequence of the new legal framework is the significant change of attitude in the Court, which now deliberately engages in thoughtful and sometimes explicit consideration of the elements framing the applicability of the Charter. Indeed, the Court not only refers to Article 51(1), but links its assessment to Articles 6(1) TEU and 51(2) CFREU [...]. The fact that [...] these provisions emphasize that the Charter does not entail an expansion of Union competences, nor of the field of application of Union law, conveys the clear message that the Court is aware of the limitations of the Charter and is completely willing to abide by them. It seems therefore that the introduction of Article 51(1) has led to the need to clarify in each case the basis for relying on the Charter, making it more difficult to rely on EU fundamental rights in cases where the link is too tenuous. This clarification effort was very prominent in the *McB* case[49] [...] [where] the Court emphasized that the Charter could only be taken into consideration for the purposes of interpreting the Regulation in question [...]. This tendency is also apparent in *N.S.*[50] [...] and in the cases related to the principle of non-discrimination on the grounds of age[51]. [It] allows the Court to provide an interpretation of secondary law acts, in conformity with fundamental rights, against which the compatibility of Member States' acts is assessed. This serves as an indirect application of EU fundamental rights to the Member States, reading specific standards of rights into EU law acts of secondary law that leave a certain margin of appreciation"[52]. Moreover, it is clear to the Court that the Charter "is not an 'auberge espagnole' (Spanish inn) [...] allowing extensive challenging of national legislation in the name of the rights that it enshrines"[53]. "Good proof of this are the several cases where the Court has stated that the order for

reference did not advance a sufficient element of connection with EU law[54] [...] [and] cases such as *Rossius*[55], *Rodriguez Mayor*[56], *Vino*[57] and *Gueye*[558], [where] the Court has followed [...] *Annibaldi,* taking a narrow approach when considering the need for the contested national law or practice to fall within a situation directly regulated by EU law, and finding it not enough that there is a connected EU rule in the material field at issue"[59].

"The growing number of cases where the Court has found itself not to have jurisdiction cannot [however] be automatically equated with a restrictive approach towards the interpretation of Article 51(1) [...]. Several other elements of the case law seem to point [rather] towards an interpretation of Article 51(1) that goes beyond a strict reading of the notion of 'implementing'. In the Orders issued in some cases where [it] has stated its lack of jurisdiction [...] the Court has placed emphasis on the need for a 'connection' to the law of the Union, which is a considerably more flexible concept than 'implementation' or 'scope of application' (or, at least, it seems to encompass both of them)" [60]. This arises in particular from the orders in the *Asparuhov Estov*[61] and *Chartry*[62] cases dismissing the actions as inadmissible. "In the former, [...] the ECJ held that its jurisdiction to interpret the Charter was not established, in so far as the order for reference contained nothing showing that the national decision at issue 'constitutes a measure implementing EU law or contains other connections with the latter'. [This] reference to 'other connections' with EU law [...] supports a broader understanding by the ECJ of its jurisdiction to interpret the Charter"[63]. "In the *Chartry* Order, this connection has been further elaborated upon in that the Court highlighted three possible ways to identify it: a connection with the law of the Union, a connection with situations that relate to the fundamental freedoms, and a connection based on the execution or implementation stricto sensu of EU law. It is true that an expansionist approach cannot be deduced from the Orders mentioned"[64]. "The concrete formulations used in [those] Orders [...] are not conclusive"[65], "[yet], the fact that the Court does not limit its response to the sole assessment of the lack of an implementing measure is in itself noteworthy"[66].

In short, although definition of the exact contours of the applicability of the Charter of Fundamental Rights to the Member States has been discussed at length by authors since the instrument's proclamation in Nice in 2000, those contours still remain somewhat unclear, according to the literature. "The discussion on the meaning of the concept of 'implementation' of EU law is [...] still open, mostly when it comes to situations that are not strictly speaking implementing measures but present a substantial element of connection with EU law"[67].

"The recent case law of the ECJ on the Charter constitutes a first step towards a common understanding of Article 51(1). However, the interpretation of the clause 'only when they are implementing Union law' will have to be developed further in order to ensure legal certainty"[68]. In this regard, the judgment handed down by the Court on 26 February 2013 in the *Åkerberg Fransson*[69] case represents a further step towards the necessary clarification of the Charter's scope of application.

[PC]

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NOTES

[1] Rosas, A. and Kaila, H., "L'application de la Charte des droits fondamentaux de l'Union europeenne par la Cour de justice : un premier bilan", *Il Diritto dell 'Unione Europea,* 1/2011, p. 1.
[2] Cf. Rossi, L.S., "How Fundamental are Fundamental Principles ? Primacy and Fundamental Rights after Lisbon", *Yearbook of European Law,* 2008, p. 65, on p. 77.
[3] Lenaerts, K., "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review,* 2012, p. 375.
[4] Ibid., p. 376.
[5] Cf. Eeckhout, P., "The EU Charter of Fundamental Rights and the Federal Question", *C.M.L.Rev,* 2002, p. 945.
[6] Iglesias Sánchez, S., "The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights", *C.M.L.Rev.,* 2012, p. 1565, on p. 1583.
[7] Kaila, H., "The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States", in *Constitutionalising the EU Judicial System -Essays in Honour of Pernilla Lindh,* Hart Publishing, Oxford/Portland, Oregon, 2012, p. 291, on p. 294.
[8] Rosas, A. and Kaila, H., supra note 1, p. 19.
[9] Judgment of 18 June 1991, C-260/89, ECR I-2925.
[10] Iglesias Sánchez, S., supra note 6, p. 1583.
[11] Ladenburger, C., "European Union Institutional Report", *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions,* Reports of the XXV FIDE Congress, Tallinn 2012, vol. 1, p. 141, on p. 161.
[12] Judgment of 13 July 1989, 5/88, ECR 2609.
[13] Cf. Kaila, H., supra note 7, p. 304.
[14] Ibid., p. 304-305.
[15] Judgment of 21 December 2011, C-411/10 and C-493/10, not yet published.
[16] Lenaerts, K., supra note 3, p. 379.
[17] Ladenburger, C., supra note 11, p. 164.
[18] Kaila, H., supra note 7, p. 304.
[19] Ladenburger, C., supra note 11, p. 164.
[20] Von Danwitz, T. and Paraschas, K., "A fresh start for the Charter : Fundamental questions on the application of the European Charter of Fundamental Rights", *Fordham International Law Journal,* 2012, p. 1396, on p. 1402.
[21] Kaila, H., supra note 7, p. 306.
[22] Cf. Knook, A., "The Court, the Charter and the Vertical Division of Powers in the European Union", *C.M.L.Rev.,* 2005, p. 367, on p. 373.
[23] Lenaerts, K., supra note 3, p. 383.
[24] Cf. Goldsmith, Lord P., "A Charter of Rights, Freedoms and Principles", *C.M.L.Rev.,* 2001, p. 1201, on p. 1205.
[25] Cf. Jacobs, F.G., "Human Rights in the European Union: The Role of the Court of Justice", *E.L.Rev.,* 2001, p. 331.
[26] Judgment of 26 June 1997, C-368/95, ECR I-3689.
[27] Judgment of 12 June 2003, C-112/00, ECR I-5659. Cf. " Les justifications des entraves à la libre circulation des marchandises tirées de la protection des droits fondamentaux", *Reflets no. 2/2004,* p. 29.
[28] Cf. Craig, P., "The ECJ and Ultra Vires Action: A Conceptual Analysis", *C.M.L.Rev.,* 2011, p. 395, on pp. 430-431.
[29] Kaila, H., supra note 7, p. 305-306.
[30] Ladenburger, C., supra note 11, p. 164-165.
[31] Cf. Eeckhout, P., supra note 5, p. 977.
[32] Cf. Tridimas, T., *The General Principles of EU Law,* 2nd edition, Oxford University Press, 2006, p. 302.
[33] Lenaerts, K., supra note 3, pp. 384-385.
[34] Cf. Craig, P., supra note 28, p. 430.
[35] Cf. Lenaerts, K. and Gutiérrez-Fons, J.A., "The Constitutional Allocation of Powers and General Principles of EU Law", *C.M.L.Rev.,* 2010, p. 1629, on p. 1658.
[36] Kaila, H., supra note 7, pp. 305-307.
[37] Cf. Dougan, M., "The Treaty of Lisbon 2007: Winning Minds, not Hearts", *C.M.L.Rev.,* 2008, p. 617, on pp. 664-665.
[38] Lenaerts, K., supra note 3, p. 385. Cf. also the conclusions of Advocate General Bot in the *Scattolon* case (judgment of 6 September 2011, C-108/10, not yet published), section 120.
[39] Kaila, H., supra note 7, p. 307.
[40] Judgment of 19 January 2010, C-555/07, ECR I-365. Cf. "General principle of non-discrimination on the grounds of age and direct horizontal effect of directives", *Reflets no. 3/2010,* p. 40.
[41] Pech, L., "Between Judicial Minimalism and Avoidance: the Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez", *C.M.L.Rev,* 2012, p. 1841, on p. 1864.
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[43] Judgment of 18 December 1997, C-309/96, ECR I-7493.
[44] Von Danwitz, T. and Paraschas, K., supra note 20, pp. 1403, 1407 and 1409.
[45] Ibid., pp. 1408-1409.
[46] Judgment of 15 November 2011, C-256/11, not yet published. Cf. "The scope of application of European Union citizenship", *Reflets no. 3/2012,* p. 37.
[47] Lenaerts, K., supra note 3, pp. 378 and 386.
[48] Ladenburger, C., supra note 11, pp. 163 and 168.
[49] Judgment of 5 October 2010, C-400/10 PPU, ECR I-8965.
[50] Judgment of 21 December 2011, supra note 15.
[51] Cf. in particular the judgments of 19 January 2010, *Kücükdeveci,* supra note 40, 8 September 2011, *Hennigs,* C-297/10 and C-298/10 and 13 September 2011, *Prigge,* C-447/09, not yet published.
[52] Iglesias Sánchez, S., supra note 6, pp. 1584-1586.
[53] Rigaux, A., "Champ d'application de la Charte des droits fondamentaux", *Europe,* January 2011, comm. 1.
[54] Cf. in particular the orders of 12 November 2010, *Asparuhov Estov,* C-339/10, ECR I-11465, 1 March 2011, *Chartry,* C-457/09, ECR I-819 and 7 June 2012, *Vinkov,* C-27/11, not yet published.
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[58] Orders of 11 November 2010, C-20/10, ECR I-148 and 22 June 2011, C-161/11, not yet published.

[59] Iglesias Sánchez, S., supra note 6, pp. 1588-1590.
[60] Ibid., p. 1587-1588.
[61] Order of 12 November 2010, supra note 54.
[62] Order of 1 March 2011, supra note 54.
[63] Kaila, H., supra note 7, pp. 311-312.
[64] Iglesias Sánchez, S., supra note 6, p. 1587.
[65] Ladenburger, C., supra note 11, pp. 167-168.
[66] Iglesias Sánchez, S., supra note 6, p. 1587.
[67] Ibid., p. 1590.
[68] Kaila, H., supra note 7, p. 315.
[69] C-617/10, not yet published.
[70] Kaila, H., supra note 7, p. 315.
[71] C-617/10, not yet published.

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