The Charter of Fundamental Rights of the EU in Practice

Killian O'Brien · Benjamin Koltermann

© ERA 2013

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (Charter)¹ became a legally binding document on 1 December 2009. The Charter purports to make fundamental rights more readily accessible and offers, *inter alia*, legal practitioners a potentially effective new tool to defend the rights of their clients. As the Charter is an integral part of EU primary law, the rights can be enforced before the Court of Justice of the European Union (CJEU) and before national courts where EU law is concerned. Indeed, the CJEU has warmed to the Charter quite quickly, having relied on, or at least referred to, the Charter in over 150 judgments and counting. Increasingly, as was perhaps to be expected, the jurisprudence of the Court has seen a shift towards progressively more substantive deliberations on the scope and content of individual norms. In the early days, the Court was quite content to make passing references to the Charter,² whereas the more recent jurisprudence is illustrative of an increased willingness, and maybe even a desire, to

¹ OJ C 326, 26. October 2012, p. 391.

² Case C-555/07 *Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

‘The Charter of Fundamental Rights of the EU in Practice’ is the name of a series of eight decentralised seminars for legal professionals, which are organised by ERA with the financial support of the Specific Programme ‘Fundamental Rights and Citizenship of the European Commission’ (more information is available at www.era.int/charter).

K. O'Brien, Deputy Head of Section, European Public Law (✉) · B. Koltermann, PR-Officer
Academy of European Law (ERA), Trier, Germany
e-mail: KOBrien@era.int

elucidate the provisions to a greater extent.³ However, the scope of application of the Charter is still unclear and somewhat disputed, particularly with regard to its relationship to national law and when it is applied in the domestic courts of the Member States.

1 Scope of application

The aim of Article 51 of the Charter is to determine its scope. It provides that the Charter's provisions are addressed primarily to the institutions, bodies, offices and agencies of the Union, a reflection of Article 6(2) TEU. It also applies to the Member States, however, "only when they are implementing Union law". It is not always immediately evident whether national institutions are acting within the so-called scope of EU law. Moreover, although the Charter states that fundamental rights must be respected by the Member States "only" when they implement EU law, the Explanations of the Charter⁴ would seem to indicate a wider application of fundamental rights.

By way of example, the Court of Justice of the EU pronounced on the scope of application of the Charter in the case of *Iida v Ulm*.⁵ This reference for a preliminary ruling concerned the question whether a Japanese national residing legally in the Member State of origin of his daughter and wife can rely on their EU citizenship as grounds for his stay in this state despite his family moving to another Member State. Mr Iida submitted, *inter alia*, that his right to full enjoyment of his family rights under Article 7 of the Charter, which is analogous with Article 8 ECHR, were affected. This would appear to be a classic example of the exercise of free movement by a Union citizen (Mr Iida's daughter) and would appear to fall squarely within the scope of EU law covered by the Charter. The CJEU held, nonetheless, that Mr Iida's "situation shows no connection with European Union law" since he cannot claim a right of residence based on Directive 2004/38/EC (Directive on the right of movement of Union citizens and their family members⁶) and has not applied for a right of residence within the meaning of Directive 2003/109/EC (Long-Terms Residents Directive⁷). Hence, the CJEU made clear, the case does not fall within the scope of application of the Charter. Notwithstanding the apparent clarity of this particular decision and the seemingly strict interpretation of the scope of the Charter's application pursued thus far, the exact reading of Article 51(1) remained unclear.

³Note the progression from *Küçükdeveci* through to the decisions in Joined Cases C-411/10 and C-493/10 *NS v SSHD and ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011 (not yet reported), and, more recently, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013 (not yet reported).

⁴Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14. December 2007, p. 17).

⁵Case C-40/11, judgment of 8 November 2012 (not yet reported).

⁶Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 of 30.4.2004, p. 77).

⁷Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 of 23.1.2004, p. 44).

Recently, the Court had occasion to explore further the meaning of “Member States only when they are implementing Union law” and to shed some more light on the scope of application of the Charter. In what looks set to become a seminal case on the issue,⁸ the CJEU issued its judgment on 26 February 2013 in the case *Åklagaren v Hans Åkerberg Fransson*.⁹ The proceedings came before the Court on the basis of a request for a preliminary ruling on the issue of whether the accused could invoke the *ne bis in idem* principle enshrined in Article 50 of the Charter. Notwithstanding that the question raised by the Swedish court which made the referral made no mention of Article 51, the case turned on the issue of the admissibility of the order for reference in the first place. It was argued that none of the proceedings to which the accused had been subjected arose from the implementation of EU law and that the matter was one of domestic law alone. The accused had been penalised for tax offences relating to the payment of income tax and VAT. A financial penalty was initially imposed by way of administrative proceedings and subsequently the public prosecutor initiated criminal proceedings for the same offences. As the offences had already been dealt with, the potential applicability of Article 50 was raised.

The CJEU, relying on long-established case law, noted from the outset that it had no competence to examine the compatibility Member State legislation with the Charter in instances where that legislation is outside the scope of EU law.¹⁰ However, the Court did reiterate the necessity for Member States to comply with fundamental rights protected in the EU legal order “in all situations governed by European Union law, but not outside such situations.”¹¹ It then fell on the Court to determine whether Sweden was implementing EU law, which it did by considering whether the situation was governed by EU law, whether the legislation was within the scope of EU law and by considering the “field of application” of fundamental rights within the European Union legal order. Relying on the relevant provisions of Council Directive 2006/112/EC on the common system of value added tax¹² as well as Article 235 TFEU requiring Member States to combat illegal activities that would affect the financial interests of the EU, the Court reached the conclusion that there is a direct link between collecting VAT and the availability of such VAT resources to the EU budget.¹³ On this basis (among others), it went on to find that the actions taken by the Swedish authorities were to be considered as an “implementation [...] of European Union law, for the purposes of Article 51(1) of the Charter”,¹⁴ thereby putting the matter firmly within the ambit of the Charter. It should be noted that the Court went on to further specify that the Member States retain a discretion in respect of matters

⁸See the comparison of *Fransson* to *Costa v ENEL* in terms of its significance by Adam Łazowski: Decoding a Legal Enigma: The EU Charter of Fundamental Rights and Infringement Procedures. ERA Forum 14 (4) (2013). doi:10.1007/s12027-013-0331-y.

⁹Case C-617/10.

¹⁰Para. 19.

¹¹*Ibid.*

¹²Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347 of 11.12.2006, p. 1).

¹³Case C-617/10, para. 26.

¹⁴*Ibid.*

that are partially governed by EU law and partially by domestic law. In such cases, national fundamental rights may apply “provided that the level of protection provided for by the Charter, and the primacy, unity and effectiveness of European Union law are not thereby compromised.”¹⁵ On the basis of the foregoing, it would seem plausible to surmise that the *Fransson* decision has confirmed that a partial connection to an EU law obligation will engage the operation of the Charter. Nonetheless, there must be a direct link between the national law and the Charter rights. It will be up to the CJEU in future cases to further delineate the limits of the scope of application of the Charter, in particular the question of the nexus to EU law required. Applying the test set out in *Fransson*, this criterion would appear to be scant but it remains to be seen how the Court of Justice will develop its jurisprudence in this area.

2 The material application of the Charter in practice

Concerning the material scope of the Charter, the CJEU has made some tentative initial statements on the content of individual norms as it did in the Irish request for a preliminary ruling *NS v SSHD* and *ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*.¹⁶ These joined cases concerned several third party nationals who had been arrested following their irregular entry into Greece and then subsequent applications to be granted international protection in the United Kingdom and Ireland respectively. The CJEU was asked whether a Member State which intends to return an asylum seeker to the Member State responsible for examining the asylum request (Greece) in accordance with Article 3(1) Dublin Regulation (343/2003)¹⁷ was obliged to assess whether that State respects fundamental rights.

The CJEU first made clear that national authorities exercising the discretionary power conferred on the Member States by Article 3(2) of the Dublin Regulation must be considered as acting within the scope of Article 51(1) of the Charter. The CJEU further held that the transfer of an asylum seeker to a Member State where he would face the serious risk of inhuman or degrading treatment would amount to a breach of Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment). The Court went on to state that Member States and, by corollary, national courts may not initiate a Dublin transfer 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. This would seem to indicate a positive duty on Member States to ensure that the content of Article 4 of the Charter is observed in all other Member States. The CJEU additionally turned its attention to the comparative scope of protection offered by Articles 1, 18 and 47 of the Charter

¹⁵Op cit. para. 12.

¹⁶Joined cases C-411/10 and C-493/10, judgment of 21 December 2011 (not yet reported).

¹⁷Council Regulation (EC) No 343/2003 of 18 February 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 (OJ L 50 of 25.2.2003, p. 1).

when considered opposite Article 3 ECHR. The Court in its decision seems to have equated the scope of these articles from the respective treaties with each other and for that reason it held that the application of Articles 1, 18 and 47 would not result in a different answer than the application of Article 4 of the Charter. This illustrates the complex but potentially useful relationship between the jurisprudence of the Luxembourg and Strasbourg courts.

3 The relevance of the Charter for legal practitioners

These examples show that the Charter potentially constitutes an important additional tool for legal practitioners in many areas of domestic law as long as the case at bar falls within the scope of EU law. In several other cases the provisions of the Charter on the prohibition of discrimination were used to stop discrimination based on age and sex (see for example *Hennigs*¹⁸ and *Test-Achats*¹⁹). As a consequence, practitioners would be well advised to take the provisions of the Charter into consideration in arguing cases with a nexus to EU law. The challenge, however, is twofold, namely: first, to assess whether recourse to the provisions of the Charter is possible with regard to the scope of application laid down in article 51(1) and; second, what is the extent of the substantive content of the right protected by the Charter.

A further aspect on the role to be played by the Charter is also discussed by Adam Łazowski in this issue. He explores the possibility of the potential implementation of the Charter in infringement proceedings taken by the European Commission against individual Member States. In his contribution, he considers how and under what circumstances the Charter can be invoked by the Commission and applied by the Court of Justice in these proceedings as well as questioning the extent to which the Member States are bound by the Charter. Undoubtedly this is an intriguing time for the development of EU law in this area. All of the judgments mentioned already will give further food for thought and it will not be long before the Charter occupies the minds of the Luxembourg judges again.

¹⁸C-297/10 *Hennings and Mai* [2011] I-07965.

¹⁹C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] I-00773.