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10 June 2011

A General

1. In how many cases before your court and other administrative courts in your country has the EU Charter been at issue since 1 December 2009?

An article of the EU Charter has been mentioned ten times in a Supreme Administrative Court decisions since 1st December 2009. However, in some cases the article of EU Charter is only included in the list of applicable paragraphs without further elaboration.

According to an unofficial enquiry, the situation seems to be similar in the lower administrative courts. There are only a few examples of the decisions where the EU Charter has been considered in more depth.

The same applies to the appeals brought to the Supreme Administrative Court or Administrative Courts. Inconsistency of the decision with the rights guaranteed in the EU Charter is only relatively seldom mentioned as a basis for the appeal.

2. Which provisions of the EU Charter were at issue in these cases?

Article 7 (respect for private and family life)

Article 9 (right to marry and right to found a family)

Article 11 (freedom of expression and information)

Article 12 (freedom of assembly and of association)

Article 15 (freedom to choose an occupation and right to engage in work)

Article 16 (freedom to conduct a business)

Article 18 (right to asylum)

Article 19 (protection in the event of removal, expulsion or extradition)

Article 21 (non-discrimination)

Article 22 (cultural, religious and linguistic diversity)

Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence)

3. In which areas of law in particular does the EU Charter play a role?

So far, the EU Charter has in Finland been particularly emphasized in the following areas of law:

- Immigration and asylum (residence permits and asylum)
- Excise duties and VAT (increase in taxation)
- Trade permits (including reindeer management)
- Discrimination (TV –programme; racial grounds; directive 2000/43/EC)

It seems obvious that the importance of the EU Charter will increase in the future as it becomes more known and there will be more case law from the ECJ.

4. Has your court or another administrative court in your country recently asked the European Court of Justice (ECJ) for a preliminary ruling, which has not yet been published on the ECJ website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference.

No

5. From what point can the EU Charter be invoked in your national administrative law proceedings, bearing in mind the date on which the decision in question was taken (ex tunc or ex nunc)?

There is no case law from the Supreme Administrative Court concerning the temporal limitation of the Charter. Furthermore, there was no discussion concerning the issue as the Lisbon Treaty was accepted in the Finnish parliament.

According to the generally recognized rules of international law (non retro-activity of the treaties), a provision of the treaty do not bind a Contracting party in relation to any fact which took place or any situation which ceased to exist before the entry into force of the treaty.

However, where the alleged violation constitutes a continuing situation and the situation continues after the entry in to the force of the treaty, the treaty will be applicable.

The EU Charter has become binding as a part of the Lisbon treaty. According to the principles mentioned above it is not applicable to a situation ceased to exist prior to the 1st December 2009. If the alleged violation constitutes a continuing situation the Charter is applicable even if the situation begun before 1st December 2009. This might be the case for example concerning article 47 of the Charter –the right to an effective remedy and to a fair trial- in a case where proceedings continue after 1.12.2009.

However, the importance of the question is relatively limited as the Charter has been widely recognized even before it become binding 1.12.2009. Accordingly, it seems to me that until now the entry into the force of Lisbon treaty did not have a dramatic impact to the case law in Finland. Its impact will increase as there will be more case law from the ECJ.

6. Does the EU Charter of 2000 play any role in your national legal system even though it did not have the status of primary Union law? If so, in what way and with what result(s)?

First, it should be mentioned that the EU Charter 2000 was recognized in the case law of the ECJ. Through the case law of the ECJ the EU Charter of 2000 affected the national legal system indirectly. As indicated above (question 5) the Charter had a direct role also in the Finnish case law already before 1.12.2009. In Finland it was often mentioned as “a source of inspiration”. For example in a request for a preliminary ruling (Case C-73/07) the Supreme Administrative Court referred to the impact of the EU Charter 2000 given by the ECJ in its jurisprudence and to the article 8 paragraph 1-3 as well as to article 11 paragraph 1. The case concerned processing and flow of tax data of a personal nature and freedom of expression.

Another example is the decision of the Supreme Administrative Court (KHO 3.2.2009 taltio 219). The situation was following: a married person made an application in order to have his gender confirmed as a woman and to have a social security number for a female person. The confirmation would have required his marriage to be transferred to a registered relationship which his wife refused.

In its reasoning the Court referred to the article 9 (right to marry and right to found a family) and 7 (respect for private and family life) of the EU Charter 2000. The applicant asked the Supreme Administrative

Court to make a request for the preliminary ruling. The Court rejected this demand as the question did not concern interpretation of the EU-law.

SCOPE RATIOE MATERIAE

- 7. How is the phrase ‘implementing Union law’ in article 51, paragraph 1 of the EU Charter interpreted in national proceedings? Can you give details of situations that have to date fallen within its scope? Do rulings explicitly state that a situation falls within the scope *ratione materiae* of the Charter?**

First it should be mentioned that the Article 51 as it is drafted in the Finnish version of the EU Charter differs from the English wording. The English: “implementing Union law” is in Finnish: “soveltavat unionin oikeutta”, which means “applying the law of the Union”.

The wording of the article in Finnish covers situations where MS apply EU law directly, when MS adopt national implementing measures and situations which fall within the scope of application of the union law in general.

I assume there are usually no difficulties in determining whether a case concerns union law in Category 1 and 2. The answer can be found from the existing case law of the ECJ. The Category 3 is of course more demanding to identify. The applicability depends on the context of the case.

So far the Supreme Administrative Court has not explicitly stated in any case that a situation falls within the scope *ratione materiae* of the EU Charter. The overall impression is that the Article 51 has not raised many questions in the Finnish case law (see above also the answer to the question 6 of the case law before 1.12.2009)

In the decision KHO 2011:41 of the Supreme Administrative Court it was stated that union law was not applicable. The question concerned illegal importation of tobacco from Estonia to Finland. The person has been prosecuted and convicted in Finland for fiscal fraud. At the same time an administrative decision was made - the excise duty to be paid was increased because the normal tax declaration was not made. The question concerned article 50 of the Charter (*ne bis in idem*).

The Supreme Administrative Court came first to the conclusion that the administrative decision did not violate the article 4 of article No 7 in the Protocol annexed to the ECHR as interpreted by the ECtHR. Thereafter the Court (SAC) stated that nothing in the EU Charter, in its explanation or in the current case law of ECJ indicates that the guaranteed right had a wider meaning in the Charter than in the ECHR: The Court (SAC) noted

that the question concerns sanctions inside one and the same MS and there were no harmonisation in this respect (sanctions). According to the SAC the applicable question did not concern union law. It was not necessary to make a preliminary ruling question or wait until the answer to the pending preliminary ruling C -610/10 from Sweden.

8. **When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of those decisions with the EU Charter: a. only at the request of the parties, or b. also ex officio /through supplementation of the pleas in law ?**

The compatibility of the decisions with the EU Charter will be examined ex officio. The court should know the law and apply the fundamental rights in their judicial work. Jura novit curia principle applies to EU Charter. For example in the above mentioned case KHO 2011:41 the EU Charter was not mentioned in the appeal made by the appellant. However, the facts and the general context of claims need to be explained in the appeal so that possible problems can be identified.

9. **Does your national law make a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter? What implications does this have for review by the courts?**

There is no distinction in the Finnish legislation between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter. All the paragraphs are directly applicable.

However, the wording of the different paragraphs in the Finnish Constitution might differ from each other. For example section 18 of the Finnish Constitution quarantines the right to work and the freedom to engage in commercial activity. The second paragraph of the section 18 is vaguer by its wording and seems rather than a stipulation to be a principle to be applied more or less. However, as stated above, both paragraphs can be applicable in court proceedings even if their impact might slightly differ.

Section 18:1 and 18:2:

- (1) Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force.
- (2) The public authorities shall promote employment and work towards guaranteeing for everyone the right to work.

Provisions on the right to receive training that promotes employability are laid down by an Act.

According to the Constitutional Law Committee of the Finnish Parliament, the distinction between rights and principles in the EU Charter might lead to difficulties in the interpretation of the EU Charter as there is no definition of the rights/principles. The question needs to be clarified by the ECJ.

10. **How do you determine whether a provision in the EU Charter can be deemed to constitute a ‘right’ or a ‘principle’ as referred to in article 52, paragraph 5 of the Charter?**

In cases where it is necessary to make the distinction, the normal interpretation principles apply. In order to make the distinction, the wording of the provision, the explanation thereto and also the context of the case etc should be considered. Ultimately it is for the ECJ to decide.

11. **How do the national administrative courts examine for compatibility with principles such as that contained in the second sentence of article 52, paragraph 5 of the EU Charter? (full review/limited scope of judicial review/etc.)?**

There is no formal distinction between rights and principles. Thus, national courts can take the provisions into account in full review if the facts and the content of the case allow it. The question of compatibility can be raised in all types of procedures and all normal remedies are applicable.

See also the answer to question # 9

12. **What are the legal consequences of a violation of a principle in national proceedings with no European dimension? Are these different from those that follow from the violation of a right?**

As stated before, there is no formal distinction between rights and principles. Thus, there is no formal distinction between the consequences of a violation of rights or principles. The possible consequences depend on the contents of the case and the provision in question. For example, it is possible to declare the decision in question void. There are no special fundamental rights remedies. Fundamental rights issues can be raised in all types of procedures and all normal remedies are applicable.

13. **How do you interpret the general limitation clause of Article 52, paragraph 1, of the Charter? In accordance with the limitation clauses of the Convention for the Protection of Human Rights and Fundamental Freedoms? In accordance with the case-law of the European Court of Justice that restrictions may be imposed in the context of the economic freedoms, provided that those restrictions correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights? Or otherwise?**

So far there is no case law in Finland. The variety of the situations will be seen in the future.

Also, the case law of the ECJ will be needed before the principles of interpretation are clarified. However the importance of the Article 52, paragraph 3 should be emphasized also in the interpretation of the limitation clauses.

14. **Has the EU Charter been transposed into your national law, in full or in part, or via reference? If so, please state whether this also applies to the ECHR.**

The EU Charter has been transposed via reference. It has the same status (ordinary law) as the ECHR:

It should be mentioned here that the human rights friendly interpretation has always been emphasized in Finland.

15. **Are the rights contained in the EU Charter directly applicable in your country? If so, which provisions already have direct effect?**

Even if there is no case law so far, it seems obvious that all rights contain in the EU Charter are applicable in Finland if the context of the case allows.

16. **What criteria do your national administrative courts apply in determining whether a provision of the EU Charter has direct effect?**

There is no national case law concerning the question so far. Whether a provision of the EU Charter has direct effect depends on the substance of the provision (sufficiently clear, unconditional, confers a right etc) and situation in question.

The very nature of a provision of the EU Charter is different from the nature of a provision of a directive. Therefore a provision of the EU Charter might have a direct effect even if in a similar kind of situation a provision of a EU directive does not have a direct effect.

The question will be clarified in the case law of the ECJ.

17. **In what way do your national administrative courts examine for compatibility with a provision of the EU Charter that has direct effect (full review/limited scope of judicial review/etc.)?**

There are no special fundamental rights remedies. Fundamental rights issues can be raised in all types of procedures and all normal remedies are applicable. Full review is possible. See answers before.

18. **If a case involves incompatibility with a provision of the EU Charter that has direct effect, what legal consequences do you attach to this?**

There are no special fundamental rights remedies. Fundamental rights issues can be raised in all types of procedures and all normal remedies are applicable. (For example: declare void or return the issue to a lower instance or administration for a new process.)

19. **In interpreting the EU Charter, do your national courts make use of the Explanation? If so, is this mentioned in the judgment?**

Yes. The Explanation and its importance in interpretation is mentioned also in the case law (see KHO:2011:41)

20. **Which interpretation methods (linguistic, systematic, teleological, historical, treaty-compliant, dynamic) are applied by your national administrative courts in interpreting the provisions of the EU Charter?**

The EU Charter is part of the Union law. All the methods used to interpret EU law and national law in general are possible.

21. **In cases where the text of the ECHR and the EU Charter is identical, do your national administrative courts apply the ECHR and/or the Charter?**

In most cases mentioned in the answer to question #1, an article/articles of the EU Charter has/have been included in the list of applicable legislation. However there is no deeper analysis of the EU Charter as the main core of the argumentation concentrates in the national legislation, ECHR and the case law of the ECtHR.

The application of the Charter is especially important in the cases where the EU Charter quarantines wider protection than the ECHR: This may be the case for example in the application of the article 47 of the EU Charter.

The Article 47 of the EU Charter quarantines the right to an effective remedy and to a fair trial. The explanations thereto indicate that the article has a wider scope than article 6 in the ECHR since it covers all the situations where union law is applied. It would be interesting to hear how this has been interpreted elsewhere. For example if the article 47 has influenced the decision on whether to organise an oral hearing in a case concerning environmental leave or public procurement.

22. **What role does the case law of the European Court of Human Rights (ECtHR) play in the interpretation of the EU Charter?**

The case law of the ECtHR has a significant influence if the rights in question are similar in the ECHR and in the EU Charter. The reference to the ECHR in the preamble, text (especially the article 52.3) and explanations of the EU Charter confirms the relevance of the case law of the ECtHR to the interpretation of the EU Charter.

Accordingly, it is to analyze if the rights are similar. The explanations of the EU Charter give valuable information thereto.

23. **Do you refer to the common constitutional traditions of the member states in interpreting the EU Charter? If so, how do your national courts determine whether a provision of the EU Charter also recognises rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?**

In everyday work it would be impossible to compare the constitutions of the 27 MS of the Union. Therefore the case law of the ECtHR is more useful as a guideline.

However occasionally, there is some reference to the constitutional traditions of some MS even if it is not made systematically.

24. **Could there be a role here for the ACA-Europe Forum? Which?**

The initiative to make this enquiry and organise a seminar thereafter has already proven a great method to arise the national courts awareness of the EU Charter as they apply EU law.

A follow-up seminar could be useful as afterwards there will more case law from the national courts and the ECJ. Also some informal collaboration is needed, for example in the form of seminars and training. ACA-Europe could have a role in organising them.

25. **Would you consider it useful for ACA-Europe to set up a central register containing judgments handed down by the national courts concerning their constitutions which members of the Association could consult?**

The register could be useful. On the other hand it is costly and requires a lot of work as the judgements need to be translated.

In this respect ACA-Europe could work together with the Commissions E-Justice project. As far as I know they are developing an automatic translation system.

26. **If a provision of the EU Charter is derived from an instrument other than the ECHR, what consequences does this have for the interpretation of the provision by your national administrative courts?**

A reference to other instruments (European Social Charter, the International Covenant on Civil and Political Rights, the Convention on the rights of the Child) is sometimes made in the case law of the ECJ. Also, the conventions listed above are sometimes mentioned in the case law of the Supreme Administrative Court. Mainly conventions are used as a source of inspiration.

27. **Is there a structure in your member state for consultation between administrative courts on EU law issues to ensure that interpretations are uniform? Would you like to see a similar structure at the level of ACA-Europe?**

There is no structure for consultation in Finland. There is some informal collaboration for example in the form of training.

28. **Do you have any other questions or comments on the EU Charter which have not been addressed in this questionnaire?**

See answer to the question # 21.

The questionnaire is well drafted and results in useful discussion.