

Conference on the Charter of Fundamental Rights

The Senate Department of the Administrative Cases of the Supreme Court of the Republic of Latvia

Questionnaire

A– General

1. In how many cases before your court and other administrative courts in your country has the Charter of Fundamental Rights of the European Union (the EU Charter) been at issue since 1 December 2009?

Answer

The EU Charter has not been at issue in Latvian administrative courts yet, excluding the case mentioned in an answer to the question 4. There are several other cases in which the EU Charter has been mentioned casually as background information, but it had not been interpreted and applied in these cases.

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

Answer

See answer to the question 4.

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

Answer

See answer to the question 4.

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.

Answer

Yes, there is a case C-23/12 before the Court. Our court asked a preliminary ruling about interpretation of provisions of the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). In one of the questions we asked how to interpret article 13, paragraph 1 of the regulation in accordance to other provisions of the regulation and article 47 of the EU Charter. Namely, we asked if the provisions of the regulation in accordance with the article 47 of the EU Charter obligate the member state to ensure judicial review of decision made by border guard officer in the institution which complies with the same guarantees as the court.

B– Scope *ratione temporis*

The EU Charter, as amended in 2007, acquired the status of primary Union law when the Treaty of Lisbon entered into force on 1 December 2009. On that date it replaced the previous version of 2000. There are a number of differences between the two texts. It is therefore important to consider the Charter's scope *ratione temporis*?

In the judgment in the *Küçükdeveci* case (ECJ, 19 January 2010, case C-555/07) the Court held that article 21, paragraph 1 of the EU Charter prohibits all discrimination, in particular on the grounds of age. Although in this judgment the Court derives support for the prohibition on age discrimination from the fact that it is enshrined in the Charter, it did not conduct any further examination for compatibility with Charter. One reason for this may be that the facts in this case date from before the entry into force of the Lisbon Treaty on 1 December 2009, when the Charter became binding.

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*)?

Answer

In our national administrative law proceedings the EU Charter can be invoked as a binding legal rule only *ex nunc*. If the decision in question was taken before the EU Charter became binding then provisions of the EU Charter can be taken into account in interpretation of legal rules which are applicable in the case.

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)?

Answer

In the theory the EU Charter of 2000 can be taken into account in interpretation of legal rules which are applicable in the case. But this possibility has not been used in practice frequently.

C– Scope *ratione materiae*

Article 51, paragraph 1 of the EU Charter states that its provisions are directed to the member states only when they are implementing Union law, though it does not define what it means by ‘implementing Union law’. It emerges from ECJ case law that three situations may be distinguished which ‘fall within the scope’ of Union law.

Category 1 – Implementing obligations which fall within the scope of Union law

The first category of situations which clearly fall within the scope of Union law are those in which the member states are implementing or applying EU legislation. This comprises:

- implementation of Directives;¹
- enforcement of Regulations;²
- enforcement of other secondary law (for example Decisions);
- enforcement of primary law;³
- application of EU rules;⁴
- the application of general principles of Union law.⁵

¹ See for example case C-2/92, Bostock, ECR 1994, p. I-955, paragraph 16; case C-442/00, Caballero, ECR 2002, p. I-11915, paragraph 31; joined cases C-20/00 and 64/00, Booker Aquaculture, ECR 2003, p. I-7577, paragraph 88; case C-144/04, Mangold, ECR 2005, p. I-9981, paragraphs 75-77; case C-427/06, Bartsch, ECR 2008, p. I-7245; case C-555/07, Küçükdeveci, ECR 2010, p. I-0000.

² See for example case C-5/88, Wachauf, ECR 1989, p. I-2609, paragraph 19; case C-345/06, Heinrich, ECR 2009, p. I-1659, paragraph 45; case C-384/05, Piek, ECR 2007, I-289, paragraphs 32 and 34; case C-16/89, Spronk, ECR 1990, I-3185, paragraph 13; case C-400/10 PPU, J.McB, ECR 2010, p. I-0000, paragraph 50.

³ Case C-309/96, Annibaldi, ECR 1997, p. I-2925, paragraph 14-21; case C-300/04, Eman and Sevinger, ECR 2005, p. I-8055, paragraphs 44-45, 52-53, 61.

⁴ See for example case C-349/07, Sopropé, ECR 2008, p. I-1036, paragraph 34-38; case C-107/97, Rombi, ECR 2000, p. I-3367, paragraphs 65-67 and 73; case C-28/05, Dokter, ECR 2006, p. I-5431, paragraph 79; joined cases C-317/08, C-318/08, C-319/08, C-320/08, Alassini, ECR 2010, p. I-0000.

⁵ See for example case C-276/01, Steffensen, ECR 2003, p. I-3735, paragraphs 60-64; case C-262/99, Louloudakis, ECR 2001, p. I-5547 paragraph 71.

Category 2 – Departure from a fundamental economic freedom

The second category of situations falling within the scope of Union law are those in which the member states depart from a fundamental economic freedom guaranteed by Union law. In the ERT case,⁶ the Court held that if a member state relies on imperative grounds (such as public policy, public security or public health) to justify a statutory provision which is likely to obstruct the exercise of the freedom to provide services, such justification, provided by Community (now Union) law must be interpreted and applied in the light of general principles of law and of fundamental rights.

Category 3 – a ‘binding factor’ in relation to Union law

The third category of situations falling within the scope of Union law are those in which the ECJ considers some kind of link with Union law to be present, as a result of which the situation (action taken by member state/national legislation) falls within the scope of Union law and the fundamental rights it guarantees become applicable.⁷ This category of situations, however, has by no means been clearly formulated in ECJ case law.

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?

Answer

Article 51, paragraph 1 of the EU Charter has not been interpreted in our national proceedings yet.

D– Review *ex officio* (on its own motion)⁸

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 ?

⁶ Case C-260/89, ERT, ECR 1991, p. I-2925, paragraphs 42-45.

⁷ See for example case C-71/02, Karner, ECR 2004, p. I-03025, paragraphs 49-50; joined cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide, ECR 1997, p. I-7281, paragraphs 44-88; case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH, ECR 2010, p. I-0000.

⁸ See for an example of review *ex officio* joined cases C-222/05 to C-225/05, Van der Weerd, ECR 2007, p. I-4233.

Answer

Answer b - also *ex officio*.

E– Distinction between rights and principles

In addition to article 51, paragraph 1 of the Charter, article 52, paragraph 5 and the accompanying Explanations (:‘Explanation’) draw a distinction between the rights and principles enshrined in the Charter.

Article 51, paragraph 1 reads as follows:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

Article 52, paragraph 5 reads as follows:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’

According to the Explanation accompanying article 52, paragraph 5,

‘Paragraph 5 clarifies the distinction between "rights" and "principles" set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities (...).’

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?

Answer

There is no distinction between rights and principles in Latvian law (in the meaning of article 52, paragraph 5 of the EU Charter). All the provisions in regard to human rights and fundamental freedoms which are included in the constitution of Latvia can give rise to direct claims for positive action (or for keeping from action which restricts realization of human rights or fundamental freedoms) by public authority.

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?

Answer

There is no national case law which deals with application and interpretation of the EU Charter thus the matter of distinction between rights and principles has not been considered yet. However, one of the criteria determining whether a provision is deemed to constitute a right or a principle is clarity and specificity of the provision. If the provision is clear enough in order to deduce specific positive or negative duty of public authority from it, then it can be considered to constitute a right. Whereas provision which contains general and abstract guidelines for realization of a right can be considered to constitute a principle.

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.)?

Answer

See answer to the question 1.

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?

Answer

See answer to the question 9.

F- Scope and interpretation of rights and principles

The purpose of Article 52 of the EU Charter is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights.

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?

Answer

See answer to the question 1.

G- Direct effect

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.

Answer

The international law and regulations (with the exception of directives of the EU) are directly applicable in Latvia thus there is no necessity to transpose these acts in national law. Accordingly, the EU Charter has not been transposed into national law. The EU Charter and the ECHR both are directly applicable.

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

Answer

See answer to the question 14.

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

Answer

See answer to the question 14.

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.)?

Answer

There is no case law regarding application of the EU Charter in Latvia. However, there should not be any difference between examination for compatibility with a provision of the EU Charter and with a provision of the national law. In both cases a full judicial review should be applied.

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?

Answer

Although there is no case law, it can be noted that there should not be different consequences from those that follow from violation of a provision of the national law. The consequences can be as follows: an annulment of the legal or executive act (decision), duty to act or to keep from action in a particular way, and a duty to compensate financial loss or moral or personal harm caused by unlawful action or decision of the public authority.

H– Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.⁹ The ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (case C-279/09, paragraph 32) confirmed that in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the Explanations have to be taken into consideration for the interpretation of the Charter.

⁹ OJ EU 14 December 2007, C 303.

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

Answer

So far there has been no national court judgment in which Explanation relating to the Charter of Fundamental Rights has been used. However, in one case the constitutional court has cited Draft Charter of Fundamental Rights of the European Union in interpretation of the EU Charter.

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?

Answer

Because in our national court judgments there are mostly only general references to the EU Charter (i.e., norms of the EU Charter have been used as a supplemental argument additionally to the norms which have directly influenced the outcome of the case) there has been no necessity for the courts to interpret the provisions of the EU Charter and accordingly to use the interpretation methods.

I– Relationship between EU Charter and ECHR

Article 52, paragraph 3 of the EU Charter reads: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

The Explanation accompanying article 52, paragraph 3 of the EU Charter contains a list of rights that at the time when the Explanation was adopted in 2007 were considered to correspond to the rights guaranteed by the ECHR within the meaning of this paragraph. The Explanation also includes a list of articles where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider.

ECJ case law also discusses the correspondence between the EU Charter and the ECHR.¹⁰

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?

Answer

In the cases where the text of the ECHR and the EU Charter is identical Latvian national courts refer both to ECHR, and the EU Charter.

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

Answer

Because in our national court judgments norms of the EU Charter have been used as a supplemental argument additionally to the norms which have directly influenced the outcome of the case, there is no case law about interpretation of the EU Charter so far.

- J– Relationship between the EU Charter and the ‘constitutional traditions’ of the member states

Article 52, paragraph 4 of the EU Charter states: ‘In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions’.

According to the Explanation accompanying article 52, paragraph 4, rather than following a rigid approach based of 'a lowest common denominator', the Charter rights in question should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

It emerges from the ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (case C-279/09, paragraph 44) that the Court took account of the Advocate General’s comparative survey of the law of the member states as contained in paragraphs 76 to 80 of his Opinion, which concluded that that there was no truly common

¹⁰ Case C- 400/10 PPU, J. McB, ECR 2010, p. I-0000; cases C-92/09 and C-93/09, Schecke et al., ECR 2010, p. I-0000; case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH, ECR 2010, p. I-0000.

principle which is shared by all the member states as regards the award of legal aid to legal persons.

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 recognizes rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?

Answer

See answer to the question 22.

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

Answer

ACA-Europe Forum could be the place where exchange of information between member states about their common constitutional traditions takes place. That would help to ensure that the interpretations of the rights of the EU Charter are uniform and in harmony with the common constitutional traditions.

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?

Answer

Yes, that could definitely be useful.

K– Relationship between the EU Charter and other instruments

A number of rights contained in the EU Charter are derived from instruments other than the ECHR. For example, article 28 of the Charter, the right to collective bargaining and action, is based on article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers point 12-14, while article 24 of the EU Charter, the rights of the child, is based on the UN Convention on the Rights of the Child.

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?

Answer

See answer to the question 22.

L– Other

26. 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?

Answer

No, in our state there is no special structure for consultation between administrative courts on EU law issues.

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