

**Association of the Councils of State and Supreme Administrative
Jurisdictions of the European Union**

Seminar on the Charter of Fundamental Rights

Madrid 17-19 June 2012

Answers to the Questionnaire: Portugal

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?

Since 1 December 2009, the Charter has been mentioned in, at least, 8 judgments handed down by the Supreme Administrative Court (Supremo Tribunal Administrativo). These are the judgments:

Acórdão de 08/09/2010, Processo n.º 0634/10;

Acórdão de 24/02/2011, Processo n.º 0113/11;

Acórdão de 03/05/2011, Processo n.º 0113/11;

Acórdão de 02/06/2011, Processo n.º 0442/11;

Acórdão de 16/06/2011, Processo n.º 0225/11;

Acórdão de 27/07/2011, Processo n.º 0442/11;

Acórdão de 16/11/2011, Processo n.º 0470/11;

Acórdão de 24/01/2012, Processo n.º 0783/11.

In the same period we can mention the following seven judgements delivered by the Tribunal Central Administrativo Sul (one of the two Administrative Courts of Appeal we have in Portugal):

Acórdão de 10/02/2011, Processo n.º 07107/11;

Acórdão de 13/10/2011, Processo n.º 06925/10;

Acórdão de 10/11/2011, Processo n.º 08055/11;

Acórdão de 23/11/2011, Processo n.º 08016/11.

Acórdão de 19/01/2012, Processo n.º 08253/11;

Acórdão de 12/01/2012, Processo n.º 08316/11;

Acórdão de 22/03/2012, Processo n.º 07694/11

All these judgements can be found free of charge at www.dgsi.pt

We have not been able to search on time, into the decisions delivered by the administrative courts of first instance (tribunais administrativos e fiscais).

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

The provisions of the EU Charter at issue were the following:

Article 7, Respect for private family life;

Article 9, Right to marry and right to found a family;

Article 15, Freedom to choose an occupation and right to engage in work;

Article 17, Right to property;

Article 33, Family and professional life;

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

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

According to the case-law above, the EU charter was mainly invoked in cases relating to:

The right to the family reunification;

The right to effective judicial protection;

The right to property

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.

We have no notice of any request in the period concerned.

B – Scope ratione temporis

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?

We do not find any discussion of this problem in any of the judgements listed above (A. 1).

6. Does the EU Charter 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)?

The EU Charter 2000 has played a small role, at least in the administrative jurisdiction; having said that, it is obvious that every court of the administrative jurisdiction does not forget the importance it may bring to the reasoning of its decisions.

C – Scope ratione 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?

According, again, to the judgements we have listed above (A. 1), this problem has not yet been discussed.

D – Review ex officio (on its own motion)

8. When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of the decisions with the EU Charter:

a) only at request of the parties, or

b. also ex officio / through supplementation of the pleas in law?

According to the Portuguese law system, courts are free in their reasoning in matter of law. We suppose here the distinction between matter of fact / matter of law. This rule is generally established in article 664 of the Civil Procedure Code (Código de Processo Civil).

Moreover, according to article 95 of the Procedure Code of the Administrative Courts (Código de Processo nos Tribunais Administrativos, CPTA – vide Lei n.º 15/2002, de 22.2), when examining a remedy against an administrative act, courts should decide not only over the strict invalidity causes brought up by the complainant but also they should decide taking into account other invalidity causes they may discover in the course of their analyse. Obviously, in the latter case, courts have to give the parties the right of saying what they think about these new invalidity causes.

So, there is no reason to think differently when you apply the EU Charter.

E – Distinction between rights and principles

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

Portuguese law has got the distinction between principles and rights.

But we are yet to know whether that distinction is similar to the distinction that arises in article 52, paragraph 5, of the EU Charter, since the latter is still under discussion.

Having said that, we shall observe that, according to the case-law, the parties raise, often without distinction, in their favour, either principles or rights.

And still according to the case-law, the courts examine the existence of these principles and rights. Sometimes the courts decline to examine the alleged breach of a principle; that occurs when the correspondent allegation is raised without a minimum specification.

Having examined the case, and if the court reaches the conclusion that a principle of law is infringed, it has to determine its consequences. Then, that depends upon the nature of the principle (see, also, 12. below).

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?

See answer to question 9.

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)?

The question is still to arise.

However, we may think that there are no specific peculiarities derived of the only the fact that we deal with the EU Charter.

The peculiarities will instead derive of the scope of the remedy that is in question in each case, and of the correspondent powers conferred to the courts by the national procedure system.

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?

In the Portuguese legal system the consequences of the breach either of a principle or of a right depend upon their nature.

Adding to what we said about question 9, you should consider that article 135 of our Administrative Procedure Code (Código de Procedimento Administrativo, CPA – Decreto Lei n.º 442/91, de 15 de Novembro) establishes a general rule of annulment.

In circumstances of a very serious infringement the consequence may be the nullity, which is somewhat compared to the inexistence of administrative act concerned (see, for instance, article 133 of the CPA).

These two figures, annulment and nullity are particularly important to determine the time limit to lodge an action in court.

F – Scope and interpretation of rights and principles

13. How do you interpret the general limitation clause of Article 52, paragraph 1, of the Charter? In accordance with 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?

The questions are still to arise in the case-law.

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.

The EU Charter is part of the Portuguese law as long as the Lisbon Treaty was approved by the Assembly of the Republic and ratified by the President of the Republic (Resolução da Assembleia da República n.º 19/2008, de 19 de Maio, e Decreto do Presidente da República n.º 31/2008, de 19 de Maio).

Portugal is part of the ECHR having deposited an instrument of ratification, for the first time, on 9 November 1978. Portugal has been ratifying its successive protocols.

The provisions of the ECHR are directly arguable before the Portuguese courts.

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

From the cases listed above we do not find any judgements questioning the direct effect of the rights contained in the EU Charter. But the opposite is also true.

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

See answer to question 15.

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

As we have said to the question 11, we may think that there are no specific peculiarities derived of the only the fact that we deal with the EU Charter.

The peculiarities will not derive from the fact that we are dealing with a provision of the EU Charter or a provision of our national legislation; the peculiarities will instead derive of the scope of the remedy that is in question in each case, and of the correspondent powers conferred to the courts by the national procedure system.

Obviously, it is to be expected that the courts will ask the European Court of Justice for preliminary rulings, every time it is necessary.

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?

Our CPTA (vide 8. above) establishes a specific remedy against regulatory provisions deemed invalid. The parties may lodge a case demanding the declaration of their invalidity. This remedy, this action, also applies to the invalidity based upon an infringement of the EU Charter.

And you can also put in question an administrative act that has been issued according to those regulatory provisions.

H – Interpretation methods

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

We find an explicit reference to the Explanation in the Acórdão de 08/09/2010, Processo n.º 0634/10 (vide 1, above), in relation to article 9. The absence of other examples can be justified by the fact that you do not yet find in the case-law any real contradictory discussion about the decisive meaning of the provisions.

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?

Having in mind the answer to question 19, we may add that our national courts are free to apply all the methods adequate to determine the exact and decisive meaning of any provision, either from internal legislation or from international conventions.

It is to the courts to decide in each circumstance, in a case by case basis, where to look for. We can not expect that anyone say in advance that it will be this or that the most important method.

I – Relationship between EU Charter and ECHR

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?

We have been having an application of both. Moreover, we have been applying both and the text of the Portuguese Constitution. The judgements take into account these three instruments without any conflict among them.

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 played an important role in our national courts in several areas. However, we are yet to see the same importance in the interpretation of the EU Charter.

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

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)?

This is yet to be raised. However, as far as the Portuguese courts are concerned we should say that our Constitution establishes a vast number of provisions similar or identical of those of the Charter and the CEDH. So it is not expectable that there will be decisive problems in what concerns the interpretation of the Charter. And that is why, as we have mentioned, you can see these instruments invoked in our national courts without any conflict among them.

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

25. Would you consider it useful for ACA-Europe to set up a central register containing judgements handed down by the national courts

concerning their constitutions which member of the Association could consult?

It is always good to take part in a forum where one can learn and exchange views with others who are thinking about the same problems.

Besides, the most important role of a central register would perhaps be to put at disposal of everybody the case-law of the peripheral countries, peripheral in terms of linguistic importance.

In fact, it is already easy for everyone to accede to the case-law of the vast majority of the national superior courts. The problem is the linguistic barrier, and this linguistic barrier puts effectively out of reach the case-law of less important linguistic countries.

K – Relationship between the EU Charter and other instruments

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?

This problem was not yet figured in our case-law. Anyway we could reassume the answer to question 20.

L – Other

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 are no special structures on the matter. In fact, our national legal system has a remedy to unify the interpretation of the law, whether it is strict national law or law of the European Union or other. As far as the administrative courts are concerned this remedy is established in article 152 of the CPTA.

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

This is already a very comprehensive questionnaire, isn't it?

Lisboa, 13 April 2012

Supremo Tribunal Administrativo