

Seminar on the Charter of Fundamental Rights

Statement on behalf of the Supreme Court of Republic of Slovenia

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?

Until February 29th 2012 no case was solved on the base of Charter, but five cases¹ decided by the Administrative Court of Republic of Slovenia (1st instance administrative court) have been reported in which the EU Charter was at issue. In addition the Slovenian Constitutional Court has recently made a reference to the EU Charter.²

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

In the cases of the Administrative Court at the issue were:

Article 6 (right to liberty and security): 2 cases

Article 18 (right to asylum): 2 cases

Article 19, para 2 (protection in the event of removal, expulsion or extradition): 1 case

Article 24, paragraphs 2 and 3 (the rights of a child): 1 case

Article 47 (right to an effective remedy and to fair trial): 2 cases

Article 52, paragraph 1 (scope of guaranteed rights): 1 case

Article 52, paragraph 3: 1 case

Article 52, paragraph 5: 1 case

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

EU Charter plays the role in several areas of law, but till now slovenian court have used it in the area of international protection - asylum.

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.

¹ Questions are answered on the basis of cases reported to the legal database »Ius info«, which is the largest legal database in Slovenia (www.ius-software.si against payment). Administrative Court decisions I U 1828/2010, 22 December 2010; I U 502/2010, 12 May 2010; I U 1353/2011, 18. July 2011; I U 1780/2010, 10 December 2010; I U 377/2011, 28 March 2011.

² Constitutional Court, U-I-92/2007, 12 April 2010.

No.

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 (*ex tunc* or *ex nunc*)?

Generally EX NUNC.

But since our Constitution (from december 1991) and the Convention for the protection of human rights and fundamental freedoms with protocols – ECHR (to which Slovenia acceded in 1994) have a lot of the same provisions, in Slovenia the substance of the Charter was “in force” even before December 1st 2009.

In general, EU Charter is applicable to the cases in which the decision issued after the EU Charter became binding in December 2009, in some cases even when the facts of metter took place before. This would be in accordance with Slovenian Constitution (article 155), under which no laws (not even Act or Statue) can have retroactive effect, there are some exceptions possible, for some provisions in acts or statues but under the strict conditions (article 155 aline 2). In the act with which Slovenian Parialment adopted the Lisbona Treaty there are no provisions about retroactive effect of the Treaty or Charter.

Slovenian Adminisrative procedure act – APA prescribes the general procedure that is compulsory for the administrative authorites, in the substantial acts are the exceptions of this general procedure and special provisions for the procedure in cases from some special administrative fields. In APA there is the provision in article 6 by which the administrative bodies decide in administratitve cases on the bases of laws that are on power at the time of decision, so the exceptions must be prescribed in the substancial acts.

In the administrative dispute (prescribed in Administrative Dispute Act – ACA) the administrative court decides on legality of final individual acts with which administative authorities (bodies) decide the rights or obligations and legal entitlements of individuals and organisations, if other legal protection is not provided by law for a particular metter. So the administrative courts generally control the use of the law which was on force or was applicable at the time in which the decision of administrative body had issued.

But because of exceptions for determining whether certain law is applicable to the case at hand and for determining which facts are relevant, the substantive law governing the decision in question has to be taken into account.

Some of the reviewed decisions³ apply the EU Charter to the facts that took place after the EU Charter became binding on 1 December 2009, but some⁴ apply it also to the facts that took place prior to that date.

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)?

Slovenia became EU member on May 1st 2004.

There was no decision made exclusively on the ground of EU Charter of 2000, since it was not binding, as the 2009 version is. However, it was used to reinforce conclusions made under existing law and therefore cited among already binding documents: Slovenian Constitution and ECHR, assuming that the Charter stated comparable fundamental rights to be respected.

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?

There is no case law in Slovenia regarding the interpretation of the phrase “*implementing union law*” from Article 51, paragraph 1 of the EU Charter.

Under the provisions of ADA the court is obliged to pay *ex officio* special attention to the application of substantive law (article 350 of Civil Procedure Act which is subsidiary applicable also in administrative dispute on the bases of provision of first alinea of article 22 of ADA, article 86 of ADA). Since the EU Charter is binding substantial law the administrative court determines *ex officio* whether a case falls within the scope of *ratione materiae* of the EU Charter.

The cases (mentioned in the answer to the 2nd question of this questionnaire) that have fallen within the scope of the EU Charter were based on article 78 of the Treaty on the Functioning of the European Union – TFEU which provides that “*The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*” The Slovenian Administrative court held that the European asylum law sets certain standards, which are implemented in the national asylum law.

One ruling (Administrative Court, I U 377/2011, 28 March 2011, p. 18). touched the

³ For e.g. Administrative Court, I U 1828/2010, 22 December 2010.

⁴ For e.g. Administrative Court, I U 502/2010, 12 May 2010; I U 377/2011 of 28 March 2011.

question of “*implementation of union law*” in a different way. It said that even though Article 78 of the TFEU provides that the Union shall “*develop a common policy on asylum, subsidiary protection and temporary protection...*” it has to follow higher standards for protection of human rights of the national law. This is in accordance with a “*wide margin of appreciation*” doctrine and principle of subsidiarity.

The mentioned rulings do not say explicitly that a situation falls within the scope *ratione materiae* of the EU Charter. However, some point out the binding nature of the EU Charter ([Administrative Court, I U 1353/2011, 28 July 2011, p. 7.5](#)).

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 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 ?

Slovenian Administrative Court has to decide a case according to the claims, made by the parties and within the limits of the reasons invoked by them, but they have to examine the compatibility of administrative decisions with all relevant substantial rules *ex officio* (*article 350 of Civil Procedure Act which is subsidiary applicable also in administrative dispute on the bases of provision of first aline of article 22 of ADA, article 86 of ADA*). Consequently, they have to examine the compatibility with EU Charter, wherever the Charter is applicable and the decision may be annulled or amended even if the breach of that kind was not invoked by the parties. This applies also to the Supreme Court, which is obliged to consider relevant substantive law *ex officio*.

E– Distinction between rights and principles

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?

Slovenian national law makes a general distinction between rights and principles, similar to that in EU Charter, under which the rights “*shall be respected*” and principles “*shall be observed.*” Such distinction is a question of legal theory.⁵ If someone has a claim or is being entitled to something, or where obligations with regard to an individual are stated precisely, a right is assumed that can be invoked in court. The provision constituting a right is formed in a way “all or nothing,” while a principle sets only a value criterion and is applicable only through certain legal rules, thus when they transform in to provisions constituting “rights.”⁶

⁵ M. Pavčnik, *Teorija prava*, Cankarjeva založba, 1997, p. 79.

⁶ *Ibidem*, p. 81.

The Slovenian Constitution distinguishes between two types of principles. Human rights and fundamental freedoms are exercised directly on the basis of the Constitution (Article 15 of the Slovenian Constitution) and are directly applicable. These rights are absolute. An example is Article 17 of the Constitution which proclaims that “*human life is inviolable. There is no capital punishment in Slovenia.*” The other type of principles is not directly applicable by the courts and needs further legislative implementation. However, lack of a direct application does not mean that these provisions lack a binding nature. If they are breached, the consequence is that a law in contradiction with one of such principle can be invalidated as unconstitutional at the Constitutional Court of Republic of Slovenia (see article 160 of Slovenian Constitution).

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?

Up to now, there was one national case law defining the difference between Charter's rights and principles namely in the field of the rights of a child.⁷ The provision in question was Article 24, paragraphs 2 and 3.

The administrative court held that the best interest of a child must be paramount.⁸ However, when the court determines what is the best interest of a child in a particular case, that does not necessarily lead to a decision that is fully consistent with that interest. The explanation is that a concept of a child's interests is not a right that would deny a member state a certain margin of appreciation when they examine applications for family reunification, when giving members of a family an individual right to be allowed to enter the territory of a State. It held that a children's right is for example to have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests (Article 24 paragraph 3). On the other hand it determined that Article 24 paragraph 2 constitutes a principle providing that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration.

In this case the Administrative Court referred to the ECJ's decision C-540/03⁹ in which it was held that “...various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification” (para 59). However, sufficient attention need to be paid to the best interest of a child (para 63 and 73).

⁷ I U 377/2011 from 28.3.2011.

⁸ Case Neulinger and Ahuruk vs. Switzerland, 2 June 2010.

⁹ Case C-540/03, European Parliament, ECR 2006, paragraphs 59, 63 and 73.

When the need to interpret the difference between rights and principles will appear, Slovenian administrative court will, while respecting the jurisdiction of the ECJ, probably have to rely on legal theory, since even the Charter does not state explicitly the criteria defining the difference. In article 52 paragraph 7 the Charter merely states that “the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and the Member States.” However, the Explanation itself does not distinguish clearly between rights and principles but states that an article of the Charter may comprise elements of the one as well as the other. Thus, determining whether given provision constitutes a right or a principle, is purely a matter of interpretation. In legal theory individual Articles of the Charter are classified as a principle, for example Art. 25, 26 and 27, and also Art. 35.1 and 3 and Art. 35, 36, 38.¹⁰

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 reason under Slovenian law that the courts would use only a limited standard of review when examining the compatibility of administrative acts with the principles of the EU Charter. When a certain standard will be implemented in to regard to a certain principle, courts will examine mainly if that standard is being respected, and will examine for compatibility in that regard.

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 Slovenian national law principles are equally binding as rights and have to be applied as legal provisions. Often they are considered as enforcing individual rights. If an administrative decision is in contrary to a principle, it is unlawful. If a law is in contrary to a constitutional principle it is considered invalid and has to be declared as such by the Constitutional Court. Only purely programmatical provisions which lack binding force are irrelevant for the lawfulness of the administrative decisions and legal provisions under national law.¹¹

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 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

¹⁰ Hermann-Josef Blanke and others, *The European Union after Lisbon, Constitutional Basis, Economic Order and External Action*, p. 165.

¹¹ M. Pavčnik, *Teorija prava, Cankarjeva založba*, 1997.

regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights? Or otherwise?

In one of the reviewed cases¹² the Administrative Court held that European legislator defined the principle of proportionality in Article 51 paragraph 1 of the EU Charter in primary union law and has to be respected. The provision in question was Article 6 of the Charter, right to liberty and security. The Court held that in accordance with the third subparagraph of Article 6/1 TEU and title VII of the Charter, the Explanation has to be taken into consideration for the interpretation of the Charter. Regarding Article 6 of the Charter the Explanation provides that the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR.

Defining the criteria for the limitation of a right to liberty the Administrative Court explained that even the ECJ confirmed the link of the EU law to the judicial practice of the ECtHR. In a case C-61/11 of 28 April 2011 the ECJ held that "*Directive 2008/115 is...intended to take account...the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued (see, inter alia, ECtHR, Saadi v United Kingdom, 29 January 2008, § 72 and 74),...«.* However the Administrative Court held that the link is not precise, since the ECJ uses terms "the principles of proportionality and effectiveness."

At the end the Administrative Court eliminated the decision of the administrative body, since it has breached Article 6 of the EU Charter, Article 19 of the Slovenian Constitution and Article 5 (1) (f) of the ECHR. The reasoning said that the administrative body has breached the law regarding the restriction of the right to liberty in connection to application for asylum, since it did not consider whether the proportionality test was met.

It can be concluded that ECHR does not have a general limitation clause and there is a room for a differentiated treatment of the various rights.

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 Lisbon Treaty was ratified by the Slovenian parliament on 29 January 2008 by the "Act Ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community". The

¹² Administrative Court, I U 1353/2011, 28 July 2011.

Slovenian Constitution provides that international treaties, **when ratified and published in the official journal, become a part of the domestic order and are directly applicable. The legal basis for such application is given in article 8 of Slovenian Constitution (“Ratified and published treaties shall be applied directly”.)**

The EU Charter has the same legal value as the EU Treaties according to the Article 6 of the Treaty on the European Union and has to be considered as a part of international treaty. Thus, it is directly applicable not only as primary EU law, but also as an international treaty. However, the EU Charter has not been directly transposed.

The ECHR has been directly transposed into national law by the “Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11« from 31 May 1994. It is directly applicable on the basis of article 8 of Slovenian Constitution.

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

Yes, on the bases of article 8 of Slovenian Constitution. Article 6 of the EU Charter, as mentioned in answer no. 13 of this questionnaire.

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

There are no special criteria prescribed and there is not a vast case law on this question. So we can only presume that the EU Charter will be directly applied together with provisions of Slovenian Constitution (which contains nearly all human rights and freedoms as the Chart) or ECHR, or exclusively if the ECJ will give a special explanations of the Chart, different than the explanations of Slovenian Constitution or explanations of ECHR given by ECtHR.

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.)?

Most aspects will be subject to full judicial review.

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?

Incompatibility with a provision of the EU Charter would have the same consequences as incompatibility with certain provisions of the national law. Under Slovenian ADA such decision would be quashed and under some conditions changed (see articles 63, 64, 65 and 66 further articles 79, 80 and 94 of ADA). In some cases, when the decision has already been carried out and the consequences would be excessive, it only declares unlawfulness of the act

(see article 64, paragraph 2, of ADA). The aggrieved party may claim damages(see article 7, paragraph 2, and article 64, paragraph 2, and article 67 of ADA).

H– Interpretation methods

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

Between 1 December 2009 and 29 February 2012 two decisions of the administrative court explicitly referred to the Explanation.¹³ In both the article in question was Article 6 of the Charter, the right to liberty and security. The court explained that in accordance with the third subparagraph of Article 6/1 TEU and title VII of the Charter, the Explanation have to be taken into consideration for the interpretation of the Charter. Regarding Article 6 of the Charter the Explanation provides that the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR.

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?

Until now, no decision was taken, referring explicitly to methods of interpretation of the EU Charter. In general, Slovenian courts use the linguistic, the teleological, the systematic, the historical and the treaty-compliant method in interpreting EU law. Thus, it can be expected that the same methods will be used to interpret the provisions of the EU Charter.

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?

Slovenian Administrative Court applies both the ECHR and the provisions of the EU Charter in cases where the rights of the Charter correspond to the rights guaranteed by the ECHR. For example in one ruling¹⁴ the Administrative Court stated that Explanation in regard to Article 6 of the EU Charter provides that Article 6 corresponds to Article 5 of the ECHR. Since the enactment of the EU Charter the Administrative Court points out the binding character of its provisions. And we also refer to provisions of Slovenian Constitution which are identical as in the Charter.

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

¹³ Administrative court decision, I U 1780/2010 from 10. 12. 2010, and I U 1353/2011 from 28. 7. 2011.

¹⁴ Administrative Court decision, I U 1353/2011 of 28 July 2011.

The case law of the European Court of Human Rights (ECtHR) should play an important role in the interpretation of the Charter. It is hard to imagine that the interpretation of human rights adopted by ECtHR and ECJ could be different. EU adopted the decision to access to ECHR. Since the ECJ has not developed any case law in regard to the Charter slovenian judges use the case law of the ECtHR.

In one decision¹⁵ the Administrative Court held that the rights from Article 6 of the Charter are the same rights as provided in Article 5 of the ECHR and have, in accordance to Article 52(3) of the Charter, the same meaning and scope as those in the Charter.

J– Relationship between the 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)?

Probably we would refer to the Slovenian constitutional traditions in interpreting the EU Charter, specially if there is no other interpretation existing. Refer to the common constitutional traditions of member states is at the time hardly possible because there is not a bases of “common constitutional traditions of member states” so it needs a vast research and broad knowledge.

Slovenian administrative courts have barely applied the EU Charter. They are used to use the Slovenian Constitution and the human rights and fundamental freedoms they are in it, which are mostly “the same” as in ECHR and the Charter.

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

When the question of applying Article 52 paragraph 4 of the Charter will arise it would certainly be helpful for the judges to have some guidelines. Defining whether a certain provision constitutes “common constitutional tradition” is difficult and requires a broad knowledge, not only of the Union law but also a general mutual knowledge of the legal systems of the other member states. Thus, it is difficult to expect that without special data bases and mutual cooperation or other similar instrument courts would even interpret a provision of the Charter as a common constitutional tradition, but would rather use some other means of interpretation.

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

¹⁵ Administrative court decision, I U 1780/2010 of 10 December 2010.

concerning their constitutions which members of the Association could consult?

In connection to a Forum a central register would be useful. However, consideration needs to be given, whether setting up a central register is OK since it would have its consequences. The judgments of the national courts would have to be translated, which means more time, money and employment. Also the register would have to be “user friendly.” If it would take too much time for a judge to find some information, it is again difficult to expect that it would be used. But at this time we don't have another suggestion.

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?

There are no major consequences at the time, but if this will happen it will make a great confusion and the rule of law will be in big question.

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?

Slovenia is a small country (2 millions of inhabitants and around 20.000 km²). In Slovenia there is one Administrative Court in Ljubljana (with three external departments, organized territorially) as a court of 1st instance in administrative disputes, and in that court exists a special but very small department for EU Law; and there is the Administrative Department in Supreme Court of Republic of Slovenia as a court of 2nd instance in administrative disputes. Supreme court has no special EU department.

Thus, it is not so difficult to ensure that interpretations are uniform. There are informal consultations on a regular basis and some more formal consultations held twice a year “School for administrative judges” and “School of EU law for judges”. In that schools the lecturers and consultants are also university professors and other experts on EU law from Slovenia or other member countries and also judges from ECtHR and ECJ.

It would be useful to have some more or less informal structure at the level of ACA-Europe for consultation between administrative courts (judges) on EU law to ensure that interpretations would be uniform as much as possible.

We are aware that the uniformation of interpretation of the Charter the same as of the EU law is a complex, complicated and longterm process but it must start and go on in most appropriate shape and organisation we can find.

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

Not at the moment.

Prepared by
Julija Oremuž and Martina Lippai

LJUBLJANA, February and March 2012