



**SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND
IN COOPERATION WITH ACA-EUROPE**

**MAPPING THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPEAN ADMINISTRATIVE
COURTS**

Questionnaire

The Finnish presidency of ACA-Europe focuses on the vertical dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This questionnaire addresses this vertical dialogue from the perspective of the pluralist framework of European fundamental rights protection on the one hand and the national constitutional framework of fundamental rights on the other hand.

The term “fundamental right” in the title of the questionnaire is used as an umbrella concept. It refers to rights recognized as fundamental by the respective legal orders. This implies that those rights are in some sense supreme norms, often judicially protected against violation by public authorities, including the legislature.

In national legal systems, these rights are usually laid down by the constitution, or they may be provided by domestically applicable international human rights conventions. Within the scope of application of European Union law, the Charter of Fundamental Rights (CFREU) provides the main source of fundamental rights. Quite often, these various sources of law are simultaneously applicable in concrete cases. Furthermore, each individual system usually provides for specific court(s) or other authorities regarded as supreme or authoritative. In this sense, the fundamental rights protection in Europe may be regarded as “pluralist”.

As legal norms, fundamental rights norms in Europe have several features that complicate their application in national courts. First, they are usually open to different interpretations, which in turn emphasises the role of precedents delivered by both national and European courts. Secondly, because of the pluralist nature of the European fundamental rights system, national courts sometimes need to decide which of the different sources of fundamental rights should be given primacy over the others and on what grounds. Third, it seems that there is not a single right answer to the second question. For instance, European Union law has primacy over national law, and this also applies to national constitutions. However, as provided by Article 52.4 of the CFREU, fundamental rights recognized by the Charter should be interpreted in harmony with the constitutional traditions of the Member States.

Building on the above-mentioned framework, the following questionnaire is prepared with a view to a comparative assessment of the functioning of the system of fundamental rights protection in the light of the legal practice of supreme administrative jurisdictions in Europe.

For this purpose, the questionnaire starts with questions concerning the basic institutional framework for the application of fundamental and human rights in the domestic legal order and then moves to questions about the modes in which the interpretation of national and European fundamental rights norms interact in the practice of national courts.

Acknowledging the differences between European legal cultures, please, feel free to complement any answer with additional and/or clarifying information.





I Background information

1. *The formal title of your court? Please include the country.*

Supreme Administrative Court, Sweden (Swedish answers will be in black, bold letters below)

Supreme Administrative Court, Finland.

2. *The number of decisions your court gives annually (average)?*

A little above 7000.

3700-4500

3. *The number of published precedents your court gives annually (average)?*

70-80

150-200

II Constitutionality of legislation and the applicability of fundamental rights norms. Mark your answer with bold letters.

4. *Does your country have a written Constitution?*

- Yes - Yes**
- No

5.a *Is your court authorised to apply the (written or unwritten) Constitution directly in its decisions?*

- Yes - Yes**
- No

5. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes - Sometimes**
- Often

5. c. *If yes, what areas of constitutional law are typically involved in these cases?*

- Fundamental rights – Fundamental rights**
- Democratic principles
- Rule of law
- Federalism and local self-government – **Local self-government**
- Legislative process – **Legislative process**
- Finance
- Other. Please describe below.

5. d. *If your court is not authorized to apply the Constitution directly, please explain briefly how your national system works.*





6. a *Is your court authorised to repeal a piece of ordinary legislation if it is found unconstitutional?*

- Yes
- No - No**

6. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often
- Very often

6.c. *If not, which institution, if any, has the power to decide on the constitutional validity of ordinary legislation (either in abstracto or in concreto)?*

All Swedish courts have, according to Chapter 11 § 14, the duty to check for the constitutionality of norms or decisions if such an issue arises with regard to a specific case in that court. If a conflict of norms would be at hand, the higher norm will be given primacy and the conflicting, lower norm will not be applied. The constitution is of course the highest norm in the Swedish legal system so if the conflict is with a constitutional provision, that will prevail. Such a decision does not formally affect the lower norm's validity, as it is still a legal norm until removed by the relevant institution (i.e. parliament). However, due to the role of precedent within the Swedish legal system, a decision by a supreme court to not to apply a specific norm for constitutional reasons will almost certainly lead to all courts doing the same, in effect rendering the norm "void" even if still formally in effect.

The Constitutional Law Committee of Parliament has the authority to review the constitutionality of legislative proposals in abstracto and during the legislative process. The Courts are authorized to give primacy to the provision in the Constitution in a concrete case, if the application of a provision of an Act would be in evident conflict with the Constitution. They do not have authority to decide on the validity of such an act.

7. *During the last 10 years, has your court given precedents involving the following topics:*

- Right to asylum**
- Social rights** Social rights
- Environmental rights** Environmental rights
- Rights of future generations**
- Rights of indigenous peoples** Rights of indigenous peoples
- Human Dignity**
- Fundamental rights in the context of national security**
- Fundamental rights in the context of state of emergency**

8. *In the cases where your court has referred to the Constitution, what kind of role has the Constitution had in the reasoning? Choose all applicable options.*

- Symbolic / Decorative**
- An additional argument supporting a decision which is inherently based on ordinary legislation**





- **A source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e. fundamental rights friendly interpretation)** - A source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e. fundamental rights friendly interpretation)
- **A decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand** - A decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand
- **An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds** - An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds
- Other. Please explain and/or provide an example. **The right to access to public documents is to a high degree regulated on the constitutional level in Sweden and such court-decisions are therefore often based solely on constitutional provisions.**

III Interplay of national and European fundamental rights and international human rights norms

9.a. Is your court authorised to apply international human rights conventions and follow their international case law in its decisions?

- **Yes - Yes**
- No

9. b. If yes, how often does this happen in practice?

- Rarely
- **Sometimes - Sometimes**
- Often
- Very often

10.a. Is your court authorised to apply the Charter of Fundamental Rights of the European Union (CFREU) in its decisions?

- **Yes - Yes**
- No

10. b. If yes, how often does this happen in practice?

- Rarely
- **Sometimes - Sometimes**
- Often
- Very often

11. When applying fundamental rights provisions of the Constitution, is your court also simultaneously applying similar provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR)?

- Very rarely
- Sometimes





- Often - **Often**
- Very often**

12. When applying fundamental rights provisions of the Constitution in the field of application of European Union law, is your court also applying corresponding provisions of the CFREU?

- Very rarely
- Sometimes - **Sometimes**
- Often
- Very often**
- My court does not apply the Constitution in the field of application of European Union Law.

13. In the cases where your court refers to the ECHR, what kind of role does the convention have in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation**
- A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation) - A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation)**
- A decisive role so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand - A decisive role so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand**
- An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR. - An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR.**
- Other. Please explain and/or provide an example.

14. It follows from the case law of the CJEU (see, eg, C-14/83, von Colson) that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law. Within the scope of the application of EU law, how frequently does this kind of interpretation and application of law appear in the argumentation of your court?

- Never
- Rarely
- Sometimes - **Sometimes**
- Often**

15. The obligation to interpret national legislation in line with EU law is extensive, but it is not without limits. According to the case law of the CJEU (eg, C-12/08, Mono Car Styling), that obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem. Where there is any inconsistency between national law and Union law, which cannot be removed by means of such a construction, the national court is obliged to declare that the provision of national law which is inconsistent with (directly effective) Union law





is inapplicable (eg 152/84, Marshall). How frequently does this kind of reasoning appear in the argumentation of your court?

- Never
- Rarely - Rarely**
- Sometimes
- Often

16. Has your court given any precedents regarding the application of Article 51 (Field of application) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No, not in a precedent. However in some cases the court may have to decide if a situation falls within the ambit of union-law. An example can be HFD 2020 not 10, where the issue was if a father, suspected to be involved in terrorist-activities, could be sent back to his home-country. An argument was that such a decision would affect his child's right to the benefits of a union citizenship according to article 20 in the Treaty of the Functioning of the European Union and thus give rise to a right to access to court according to CFREU. The majority of the court found that the case did not concern the application of union law and that the rights in CFREU was not applicable.

In the case ECLI:FI:KHO:2021:161 A had asked the Bank of Finland to exchange some euro coins for new money. In its decision, the Bank of Finland ordered the euro coins to be removed from circulation and refused to redeem and refund them. Appealing against a decision made by the Bank of Finland required, based on national procedural law, that the right to appeal had been provided for separately in law. There was no separate provision for the right to appeal the Bank of Finland's decision regarding the redemption of euro coins, so according to Finnish law, the Bank of Finland's decision could not have been appealed to a court. However, the matter fell within the scope of European Union law (Regulation 1210/2010 concerning authentication of euro coins and handling of euro coins unfit for circulation). The Supreme Administrative Court stated that Article 51 of the Charter of Fundamental Rights required Finland as a member state to guarantee an effective remedy in court in accordance with Article 47 of the CFREU. Therefore, A had the right to appeal against the decision of the Bank of Finland.

In the case ECLI:FI:KHO:2018:117 (plenary judgment) the question concerned the granting of international protection and whether the referendaire of the court was disqualified in the case given that he had a permanent position as an inspector at the Finnish Immigration Service, from which he was on leave. The subjective and objective test of the court's impartiality and independence developed in the jurisprudence of the ECtHR had to be taken into account when applying the grounds of disqualification contained in Finnish legislation. The matter concerning international protection also fell within the scope of article 46 of the Procedures Directive (recast). The Supreme Administrative Court referred to Article 51, paragraph 1 of the CFREU and stated that, therefore, in the evaluation of the case concerning international protection, Article 47 of the Charter and the jurisprudence of the CJEU regarding the impartiality and independence of judges also had to be taken into account.

17. Has your court given any precedents regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No.





The Supreme Administrative Court does not usually mention Article 52 of the CFREU but it does apply the principles stated in that Article. There are, however, some references to Article 52 in the earlier case law of the Court.

In the case ECLI:FI:KHO:2014:152 the Supreme Administrative Court expressly referred to Article 52 paragraph 3 of the Charter according to which the meaning and scope of Charter rights shall be the same as those laid down by the ECHR. The Court noted that since the issue in that case fell within the scope of Union law, the requirements of fair trial contained in Article 47 of the Charter, which largely correspond to Article 6 of the ECHR, should be applied. Accordingly, the Court went on to thoroughly assess the right to be heard in the light of the case law of the ECtHR. The Court came to the conclusion that the jurisprudence of the ECtHR and the CJEU required that the situation of a person who applied for international protection had to be assessed individually and in such a way that the assessment was based on up-to-date country of origin information.

In the case ECLI:FI:KHO:2014:114 the Court stated that according to Article 52 paragraph 3 of the CFREU, the meaning and scope of the protection of fundamental rights in the European Union is similar to that in the ECHR. The Court further referred to the case-law of the Austrian Constitutional Court which had interpreted this as meaning that in a case falling within the scope of the Charter, even if it does not fall within the scope of Article 6 of the ECHR, an oral hearing must in principle be held under the same conditions as, according to the jurisprudence of the ECtHR, an oral hearing must be held in parallel cases falling within the scope Article 6 of the ECHR (Verfassungsgerichtshof U 466/ 11-18, U 1836/11-13, 14 March 2012). On that basis the Court concluded that, in the circumstances of the individual case, an oral hearing was not required either by the Charter or the ECHR.

18. In the cases where your court has referred to the CFREU, what kind of role has the Charter had in the argumentation? Choose all applicable options.

- Symbolic / Decorative**
- An additional argument supporting a decision based on EU law and ordinary domestic legislation**
- A source of interpretation which provides for a correct application of EU law and ordinary legislation in the concrete case at hand**
- A decisive role so that the decision is based solely on the CFREU in a situation where EU law and national legislation is silent on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside / declared invalid on grounds based on the CFREU**

Other. Please provide an example.

As the Swedish Supreme Administrative Court has not had the opportunity to refer to CFREU in any precedents so far, none of the options above is relevant.

19. Has your court given any precedents regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR? If yes, please provide a brief description of the context and outcome of the decision(s).

No. – No.





20. Has your court given any precedents regarding the application of Article 53 (Level of protection) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No. – No.

21. Has your court applied fundamental rights laid down in the Constitution in a way that provides for a better standard of protection of individual rights than those provided for in international human rights conventions? If yes, please explain and/or provide an example.

When it comes to certain areas of law, that might be the case even if the Supreme Administrative Court usually does not make any explicit comparisons between systems when a case is decided on national constitutional basis. An example might be mentioned. In HFD 2021 ref. 43 the court found – against the background of the constitutional protection of the right to freedom of association – that the police may not deny an application for a licence to keep a fire-arm only with regard of the applicants membership in a political movement that is known in general to be associated with violence and crime. It is uncertain whether ECHR or CFREU would have demanded the same narrow scope for the police in such a case.

The Supreme Administrative Court does not usually compare the differences of the standard of protection provided by the Constitution on the one hand and the international human rights conventions on the other. There is, however, one case where the Court specifically stated that the international human rights conventions provide for the minimum standard of individual rights.

In the case ECLI:FI:KHO:2014:1 it was held that the application for the registration of the Finnish Cannabis Association could not be rejected on the basis that the purpose specified in the association's rules was contrary to accepted norms. The Court pointed out that provisions of the ECHR expressed the minimum level of human rights protection to which Finland had internationally committed. At a minimum, this level had to be achieved in accordance with the fundamental rights provisions of the Constitution. The Court referred to the case law of the ECtHR and stated that, when interpreting the Association Act in a fundamental rights friendly way and in the light of the case law of the ECtHR, the purpose of the association, as specified in its rules, did not constitute a sufficiently weighty justification for denying registration.

22. Has your court applied fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to either international human rights conventions or to CFREU, and the case law relating to them? If yes, please explain and/or provide an example.

The protection of rights in the constitution of Sweden is inspired by the ECHR in particular and in case law from both supreme courts of Sweden this has had some practical effects on the interpretation and application of constitutional rights in Sweden. A recent example may be HFD 2022 ref. 10, in which the court had to decide how the constitutional right to a fair trial – introduced in 2011 with obvious reference to article 6 of ECHR – would affect the existing order of no reimbursement of costs for litigation in the administrative courts unless legislation specifically provided for such a right. The court found that such costs could – in cases where it was constitutionally necessary – be reimbursed in other ways than by a direct order by an administrative court and that this was enough to fulfill the constitutional standard. The approach of the court could perhaps be seen as somewhat similar to how the ECHR affects national systems.





The Supreme Administrative Court often applies the fundamental rights provisions of the Constitution in the light of the ECHR and its case law.

For instance, in the case ECLI:FI:KHO:2022:129 the Court had to determine whether the police department could issue written warnings to a police officer in the years 2017 and 2019 and temporarily remove him from duty for one month in 2020, on the grounds that his conduct was considered contrary to the duty of a police officer. Because the basis for the administrative sanctions had primarily been the statements made by the police officer on his social media accounts, in a newspaper column, and during a television appearance, the sanctions constituted a restriction of his freedom of speech. Therefore, in this case, an assessment was made to determine whether the restrictions met the criteria for limiting freedom of speech as provided for in the constitution and the ECHR.

The starting point in the assessment was, on one hand, the specific duty of conduct that applies to police officers and extends to their leisure activities, aimed at ensuring the public's trust in the appropriateness of police actions as well as the impartiality, fairness, and non-discrimination in the operations of the police organization. On the other hand, in the balance, it was important to consider that the police officer also has the right to express critical opinions about the police organization and its leadership and to participate in societal discussions on topics of general interest. In the assessment, the police officer's status as a politically active individual and the heightened protection of freedom of political expression were also taken into account. The criticism of the statements made by the police officer were assessed not only based on the individual expressions used but also in the context of the overall impression they conveyed.

The police department was considered to have had, given the circumstances, a justifiable reason to address the police officer's actions through administrative means. The sanctions were considered in line with the administrative principle of proportionality and the requirement for restricting freedom of speech to be proportionate to the misconduct.

In the case ECLI:FI:KHO:2021:46 the appellant A had stated that he considers himself to be a Sámi and requested that he be included in the electoral roll for the Sámi Parliament under section 3(2) and 3(3) of the Act on the Sámi Parliament. However, the Sámi Parliament Election Committee had rejected A's request to be registered as a voter in the Sámi Parliament electoral roll. The Sámi Parliament Election Committee and the Sámi Parliament had rejected A's requests for administrative review. In his appeal to the Supreme Administrative Court, A had argued, among other things, that his sister had been deemed to meet the requirements stipulated in the Act on the Sámi Parliament. His sister had been included in the electoral roll by a decision of the Supreme Administrative Court. According to A, the Sámi Parliament's government should have followed this decision in his case as well.

The Court stated that, in addition to self-identification, an objective criterion stipulated in section 3 of the Act on the Sámi Parliament must be met for A to be considered a Sámi as defined in section 3 of the Sámi Parliament Act. Because the assessment had to take into account the views expressed by the United Nations Human Rights Committee in 2019, the mere fact that A's sister had been included in the electoral roll by a decision of the Court in 2015 did not mean that A should also be included in the electoral roll. The Court considered that the differential treatment of A in this case had an acceptable basis as defined in section 6(2) of the Constitution and as indicated by the views of the Human Rights Committee.

Since A did not provide evidence by which it could be established that any of the objective criteria stipulated in Section 3 of the Act on the Sámi Parliament were fulfilled, the Court dismissed the appeal.

