

CHARTERING A WAY TO PROTECTION:

THE EU CHARTER OF FUNDAMENTAL RIGHTS – AN INDISPENSABLE INSTRUMENT IN THE FIELD OF ASYLUM

ECRE'S OVERVIEW OF HOW THE CHARTER CAN BE USED TO FURTHER THE RIGHTS OF THOSE IN NEED OF PROTECTION

I. INTRODUCTION

The Charter of Fundamental Rights of the EU was first drawn up in 1999-2000 with the original objective of consolidating fundamental rights that are applicable at the EU level into a single text. With the entry into force of the Treaty of Lisbon in December 2009, the Charter of Fundamental Rights of the EU has now become a binding bill of rights for the European Union. It brings together in one text all the fundamental rights protected in the Union, and through the explanations, provides guidance on their scope, ultimately making them visible and predictable. This has significant scope and can be used as a powerful tool to implement better protection standards in the EU asylum acquis. Some of these will be discussed below. Within the EU legal framework, the Charter of Fundamental Rights of the EU (hereinafter 'the EU Charter') has a higher normative status than all EU legislation adopted under the Treaties and all national laws implementing Union law. It now has the same legal status as the Treaties themselves, and as such, offers more legally secure and visible rights. Given that the EU Charter is now part of primary EU law, it reinforces the necessity of interpreting EU law including secondary law in light of fundamental rights. What this means in practice is that a provision of EU legislation or national law that is implementing EU law is invalid if it breaches the EU Charter.

II. ANALYSIS

While the EU Charter mostly reaffirms rights which already existed in the EU legal order, it also includes some innovative rights that are not directly included in the European Convention on Human Rights. These provisions can assist in the interpretation of the EU asylum acquis. For instance, it includes the right to dignity, the right to asylum, the prohibition of non-refoulement, and the right to good administration. It now includes in primary EU law the rights of the child and has a more expansive provision on the right to an effective remedy and a fair trial than its ECHR counterparts. These rights can increase the protection afforded to those in need of protection. Given that the scope for some of these provisions (such as the right to dignity and the right to asylum) have not yet been defined by the Courts, there is a lot of potential to use and shape these rights to enhance the protection afforded to asylum seekers. Nevertheless, the main value of the EU Charter lies in the categorical acknowledgment of the key role fundamental rights play in the EU legal order. It explicitly acknowledges that the EU has a binding set of rights and that these lie at the heart of the EU, and that any action undertaken by the Union and Member States when implementing EU law must be in compliance with the EU Charter.

The EU Charter contains 54 Articles grouped into seven Chapters. The first six Chapters enumerate the substantive rights under the headings: dignity, freedoms, equality, solidarity, citizens' rights and justice, while the last Chapter contains four horizontal clauses which govern the interpretation and application of the EU Charter. The content of the rights is based on the European Convention on Human Rights, the European Social Charter, the case-law of the Court of Justice of the European Union (hereinafter 'CJEU'), Member States' constitutional traditions and pre-existing provisions of EU law.

- » The first Chapter, 'dignity', guarantees the right to life and prohibits torture, slavery, the death penalty, eugenic practices and human cloning.
- » The second Chapter, 'freedom', covers amongst others: the right to liberty and security, respect for private and family life, freedom of thought, conscience and religion, freedom of expression and information, privacy, the right to asylum and protection in the event of removal, expulsion or extradition.
- » The third Chapter, 'equality', contains the right to equality before the law, the prohibition of all discrimination, including on the basis of sex, race, ethnic or social origin and political or any other opinion. This title also includes the rights of the child and the rights of the elderly.
- » The fourth Chapter, 'solidarity' covers social and workers' rights including the right to fair working conditions, protection against unjustified dismissal, and access to health care, social and housing assistance.
- » The fifth Chapter, 'citizens' rights' includes several administrative rights such as the right to good administration and the right of access to documents.
- » The sixth Chapter, 'justice', includes the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence as well as the principles of legality, and proportionality of criminal offences and penalties.
- » The seventh Chapter contains the articles which refer to the interpretation and application of the EU Charter.

I. THE SCOPE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

In accordance with Article 51 (1) of the EU Charter, the EU Charter is only applicable to EU institutions and to Member States when they are implementing EU law. The CJEU equated 'implementation' of EU law to 'falling within the scope of' EU law, meaning the EU Charter is only applicable in instances where EU law is applicable. As most of asylum law is an area of EU competence, national asylum legislation will commonly be regarded as implementing Union law, and the EU Charter consequently applies. Furthermore, Article 51 (1) contains no jurisdictional clause that limits its territorial applicability. The EU Charter binds the EU institutions in their external actions, as confirmed by the Front Polisario case from the General Court of the EU (now being appealed). As such, there is no territorial limitation on the scope of application of the EU charter.

II. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Many of the rights contained in the EU Charter have their origin in the European Convention on Human Rights (ECHR). Article 52 (3) of the EU Charter is designed to ensure consistency between the EU Charter and the ECHR. It provides that the meaning and scope of EU Charter Articles that correspond to ECHR Articles should be given the same meaning and scope as those laid down in the ECHR. This also includes the case law of the European Court of Human Rights (ECtHR). Where there is a corresponding ECHR right, it is not precluded to grant wider and greater protection.

III. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND EU INSTITUTIONS

As the EU Charter applies to the institutions and bodies of the Union (Article 51(1) of the EU Charter), all their actions must be in conformity with the EU Charter. This is particularly pertinent for the legislative and decision-making work of the Commission, Parliament and the Council; any piece of legislation passed must be in compliance with the provisions therein, otherwise that particular provision can be invalidated.

As far back as 2001, the Commission decided that any proposal for legislation and any draft instrument to be adopted would be examined as to whether it is compatible with the EU Charter. Since the EU Charter became a legally binding instrument, this fundamental rights check was reinforced within the Commission. The Commission also carries out an impact assessment, of which the Charter forms part, to ensure the integration of fundamental rights in the law and policy-making of the EU.

The Commission is required to carry out a compliance assessment during the initial drafting of the proposal, during the impact analysis of the proposal, and finally right up to the checks on the legality of the final text. The EU Charter is not an abstract set of values; it is an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by EU law and the Commission must uphold its role in ensuring that any legislation proposed or passed is in compliance. The Council also recognised its role in ensuring that EU legislation is compatible with the EU Charter and adopted its conclusions on the role of the Council in ensuring the effective implementation of the EU Charter. The European Parliament, a long advocate of the EU Charter, adopted a Resolution on the effective implementation of the EU Charter after the entry into force of the Lisbon Treaty.

IV. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND HOME AFFAIRS AGENCIES

EU agencies such as Frontex, Europol and EASO are also bound by its remit; they must ensure that any action undertaken is in compliance with the EU Charter when implementing EU law. For example, when Frontex is dealing with rescues at sea or policing Member States borders, they must do so in a way that is compatible with the EU Charter and the rights therein, such as Article 1, the right to dignity, Article 18, the right to asylum, Article 19, the protection in the event of removal, expulsion or extradition and Article 4, the prohibition of torture and inhuman or degrading treatment or punishment. Similarly, Europol, given its increased role in the hotspots, must ensure that its actions are compatible with Article 8, the protection of personal data and Article 7 the right to private life amongst others. EASO, whose mandate will soon expand and is increasingly involved in joint processing type of activities, must ensure that their actions comply with the EU Charter, particularly Article 18, Article 19 and Article 41 of the EU Charter.

V. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND MEMBER STATES

Member States are bound by the EU Charter when they are 'implementing EU law.' In such circumstances, Member States are as directly bound by the EU Charter as the EU institutions themselves. Breaches of the EU Charter by Member States when implementing or applying EU law are breaches of the EU Treaties. States must implement EU legislation in a way that is in compliance with the EU Charter.

VI. THE FUNCTION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

The EU Charter has two main functions:

- » To ensure that the interpretation of EU law and national implementing legislation complies with fundamental rights and the general principles of the EU legal order.
- » A breach of a fundamental right (and/ or a general principle of EU law) can be a ground for a judicial review by the EU courts.

In cases involving a possible breach of an EU Charter provision, asylum practitioners may plead that a provision of EU asylum legislation, or a national measure implementing EU law, is invalid because it is incompatible with the EU Charter and ask the national court to make a reference to the CJEU unless the answer is clear and the breach of the EU Charter is obvious. In such cases, any national court has the power to set aside national law and should be asked to do so.

When it involves a breach of an EU law provision, only the CJEU has the authority to declare an EU act invalid. This means that the CJEU alone can review, and invalidate, EU secondary legislation for non-compliance with EU Charter rights. Where the answer is not clear and the provision is capable of being read in more than one way and only one complies with the EU Charter, national courts are obliged to interpret secondary legislation in a manner that is compatible with EU primary law, including the EU Charter. One such example is when the CJEU ruled on whether the Dutch provisions on the income requirement for the reunification of families of third-country nationals complied with the EU's Family Reunification Directive. The Court made clear that the Directive had to be interpreted in accordance with fundamental rights, particularly the right to a family life, as guaranteed by the EU Charter, and that as such, the Dutch rules were contrary to the Directive when interpreted in that way.

In instances whereby EU Agencies are acting in a way that breaches the EU Charter, there are two main legal avenues that individuals can take to get redress. The first is an action for annulment, which can be used when an individual argues that an EU body has acted unlawfully and, if successful, leads to the act being declared void; the second avenue is the compensation for damages procedure. Another avenue that can be considered a redress mechanism is the individual complaints mechanism available under the European Border and Coast Guard Regulation and as proposed by the European Parliament in the EU Agency for Asylum Regulation. The Complaints Mechanism provides that the agency monitors and ensures respect for fundamental rights in all the activities of the Agency. Furthermore, persons directly affected by the Agencies actions can submit a complaint when it is considered that their fundamental rights have been breached by such agencies. While there are (many) difficulties and complexities in bringing a claim against an EU agency, their actions can be challenged before the CJEU as to whether or not they are in conformity with the EU Charter, something that is not currently possible before the European Court of Human Rights.

III. RECOMMENDATIONS

1. More awareness raising and training activities should be carried out on the scope and application of the EU Charter and how it can be used to further the rights of applicants and beneficiaries of international protection.
2. Strengthen the visibility of the compatibility check with the EU Charter of Fundamental Rights when drafting legislation.
3. Strengthen the participation of civil society organisations and legal practitioners in the compatibility check and impact assessment procedure.
4. With the increase of powers being vested in EU Agencies, a specific mechanism is required to ensure that any violation of fundamental rights can be reported and that an effective remedy is available. Therefore, sufficient resources should be put in place to ensure respect of fundamental rights in all Agencies activities. Furthermore, an individual complaints mechanism should be available within each EU Agencies as well as the independent Fundamental Rights Officer with resources commensurate to the size and tasks of the Agency.