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

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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, but 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.¹ 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.

THE LEGAL STATUS OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

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,² and has such, offers all EU residents and citizens 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.

CONTENT OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

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 a right to dignity,³ the right to asylum,⁴ the prohibition of non-refoulement⁵ and the right to good administration.⁶ 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 trial⁷ 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,⁸ 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 are 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

1. European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.

2. Article 6(1) of the Treaty on European Union (TEU), European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01.

3. Article 1 of the EU Charter.

4. Article 18 of the EU Charter.

5. Article 19 of the EU Charter.

6. Article 41 of the EU Charter.

7. Article 47 of the EU Charter.

8. European Parliament, Charter of the European Union Fact Sheet 2016.

States Constitutional traditions and pre-existing provisions of European Union 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 and personal integrity, privacy and the right to asylum.
- » 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.

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.⁹ 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 *Font 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 Charter of Fundamental Rights of the EU.

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.¹⁰ This also includes the case law of the European Court of Human Rights (ECtHR). The provision suggests that the CJEU should follow the jurisprudence of the ECtHR to the extent that it must offer at least the same level of protection.¹¹ Where there is a corresponding ECHR right, it is not precluded to grant wider and greater protection, i.e. certain EU Charter rights can grant a wider scope of protection in their application than their ECHR counterpart.¹²

9. CJEU, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013 and see CJEU, case C-300/11 (Grand Chamber), *ZZ v. Secretary of State for the Home Department*, 4 June 2013, para 51.

10. Explanations relating to the Charter of Fundamental Rights, OJ [2007] C303/17.

11. See also, ECRE and the Dutch Council for Refugees, 'the Application of the EU Charter of Fundamental Rights to asylum procedural law', October 2014.

12. This was also confirmed by the CJEU in Case C279/09, *Energiehandels- und Beratungsgesellschaft mbH v. Germany*, 22 December 2010, para 35.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND EU INSTITUTIONS

The EU Charter applies primarily to the institutions and bodies of the Union (Article 51(1) of the EU Charter) as well as to Member States implementing EU law. 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.¹³ 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, to which the Charter forms part of, to ensure the integration of fundamental rights in the law and policy-making of the EU.

In practical terms, the Commission, who have released the first set of instruments that will amend the Common European Asylum System for the third time must ensure that any proposal and, later, any legislation passed, must comply with the EU Charter.¹⁴ As guardian of the Treaties, the Commission has an important role in setting out the scope of the treaties and the meaning of their provisions. In the Commission Communication on the effective implementation of the EU Charter, it emphasised that the fundamental rights check 'is an essential underpinning of the detailed examination of the necessity for and proportionality of the proposals that the Commission puts forward.'¹⁵ Given the alarming content of some of the new asylum acquis proposals,¹⁶ it is questionable as to whether the fundamental rights check occurred during the drafting phase. Despite this they are still required to check their legality before becoming law which is of particular relevance on account of the fact that many of the substance provisions may change during the negotiation stage between the Council, Commission and the European Parliament. 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 Union law and the Commission must uphold its role in ensuring that any legislation proposed or passed is in compliance.

The Council also recognise its role in ensuring that EU legislation is EU Charter compatible as co-legislators and adopted its conclusions on the role of the Council in ensuring the effective implementation of the EU Charter.¹⁷ 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.¹⁸

The Charter of Fundamental Rights of the EU and Home Affairs Agencies

Any EU Agency 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. They cannot pick and choose as to which rights to comply with and when an individual's dignity must be respected.¹⁹

For example, when Frontex are 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

13. Communication from the Commission; Compliance with the Charter of Fundamental Rights in Commission legislative proposals Methodology for systematic and rigorous monitoring; COM(2005) 172 final, p2.

14. Communication from the Commission; Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, Brussels, 19 October 2010.

15. Ibid.

16. See for example, ECRE Weekly Bulletin, 'Commission Proposals for tougher Dublin system, more data collection under Eurodac and the birth of a new asylum agency', 6 May 2016 available here <http://bit.ly/1WcJN9l>.

17. Council of the European Union, Draft Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 6387/11, Brussels, 11 February 2011(b).

18. European Parliament, Resolution on the situation of fundamental rights in the European Union (2009) – Effective implementation after the entry into force of the Treaty of Lisbon, T7-0483/2010, 15 December 2010.

19. For a comprehensive overview of the relationship between the Charter and Home Affairs Agencies, see European Parliament Study, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office' August 2011.

Article 4 the prohibition of torture and inhuman or degrading treatment or punishment. Similarly, Europol, given their increased role in registering asylum claims in the hotspots, must ensure that their 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 increase under the revised acquis,²⁰ already provide assistance in the development of technical documents, provision of country of origin information reports and training of national experts, including the judiciary. They also have a role in the hotspots in the registration and processing of asylum claims. They must ensure that their actions comply with the EU Charter, particularly Article 18, Article 19 and Article 41 of the EU Charter.

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.

THE FUNCTION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

The EU Charter has two main functions;²¹

- » To ensure that the interpretation of EU law and national implementing legislation must comply 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 should 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 CJEU²² 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 a Union 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 of which 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.²³ 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, 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,²⁴ which can be

20. See, ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271, July 2016, available here <http://bit.ly/29E8yWk>.

21. Indeed, any fundamental right or general principle of EU law have the same function.

22. Article 267 TFEU.

23. Case C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken; judgment delivered on 4 March 2010.

24. See Article 263 TFEU.

used when an individual argues that an EU body has acted unlawfully and, if successful, leads to the act being declared void and the second avenue is the compensation for damages procedure.²⁵ Another avenue that can be considered a redress mechanism is the individual complaints mechanism that is 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,²⁶ 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.²⁷

CONCLUSION

In summation, the EU Charter is a powerful instrument that has much potential to firstly ensure that any proposed legislation is in keeping with the rights and entitlements therein, secondly to ensure that Member States implement and apply relevant EU laws in compliance with the EU Charter and thirdly to ensure that EU Agencies act in accordance with the EU Charter. It includes new innovative rights, whose potential are only beginning to be discovered. The EU Charter at the moment is underused, but with better understanding as to how it can be used, it can provide real additional protection for those seeking asylum in Europe.

25. Article 340 TFEU.

26. For a detailed description of these difficulties see 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office', pp 82-87.

27. This may become possible if the EU accedes to the ECHR but at the moment negotiations have stalled.

