

Potential use of the CFR in strategic litigation

Anna Śledzińska-Simon
Helsinki Foundation of Human Rights
Poland

The significance of the Charter

- since Lisbon a binding law
- internal limitations:
 - scope of application,
 - limitations of rights and freedoms,
 - ECHR interpretations (minimum threshold)
 - constitutional traditions
- progressive formulation of certain rights and freedoms
(ie. Article 9)
- source of authority
- growing number of references to the CFR by the CJEU and national courts

Strategic litigation

- Among methods of NGOs (monitoring, advocacy, education, strategic litigation)
- Aims to make significant changes in law or legal practice
- Identify a legal problem – choose a case – involve *pro bono* lawyers / represent your client / submit *amicus curiae* brief - choose a strategy to litigate – inform the public – judgement – monitor its enforcement

Strategic Litigation in brief

- effect of scale
- sufficient, even if not a victory
- awareness-raising
- education about rights, also for lawyers and courts
- involvement of civil society
- forstering public discussion (media)
- speeding up legal reforms
- evolution of legal interpretation
- elimination of unjust loopholes in the legal system
- enforcement of international court judgments on national level

NGOs before the CJEU

- Prospects for direct involvement of the NGOs
- *locus standi* problem
- individual concern requirement for Art. 263 (4) TFUE
- preliminary questions for the national court but also quasi-judicial equality body (C-394/11 Belov case)
- important development – CJEU jurisdiction covers also asylum, immigration and border control
- no practice to accept amicus curiae briefs
- no legal ground for third party intervention (Rules of Procedure and Court's Statute)
- only MS and EU institutions can intervene

„Indirect“ third party interventions

- third party interventions before the ECHR – spill over effects (M.S.S. v. Belgium and Greece, 2011 => N.S. v. SSHD)
- „Indirect“ third party interventions before national courts
- Diversity of national rules on third party interventions
- Public statements published by the NGOs in regard to a preliminary question (the UNHCR)
- thus, possibilities for activities only before the ECHR and on national level

The CFR in the case-law

- **C-403/09 *Deticek v. Sgueglia* 23.12.2009**
- Article 24(3) of the Charter – the right of every child 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.
- Brussels IIa Regulation interpreted in the light of the CFR

Deticek

- Article 20 of Regulation No 2201/2003 cannot be used by the parent who has wrongfully removed the child as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.
- the requested court cannot take provisional measures in matters of parental responsibility if another court in the MS which has the jurisdiction over the matter of custody, already decided about the provisional custody rights and it has been declared enforceable.

SABAM cases

- **C-70/10 Scarlet v. SABAM, 24.11. 2011**
- **C-360/10 SABAM v. Netlog, 16.02.2012**
- ISP and HostSP (social network)
- Balancing fundamental rights
- Article 17 – right to intellectual property
- Article 16 - freedom to conduct business by ISPs and
- Article 8 - protection of personal data and
- Article 11 - freedom to receive and import information

SABAM (I)

- prohibition of injunction made against an internet service provider which requires it to install a system for filtering
- all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;
- which applies indiscriminately to all its customers;
- as a preventive measure;
- exclusively at its expense; and
- for an unlimited period,
- which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

Volker

- **C-92/09 and C-93/09 Volker&Markus Schecke; Eifert, 9.10.2010**
- Art. 7 and 8 of CFR – privacy and personal data
- limitations must correspond to those accepted under the ECHR
- Invalidation of the Regulation provisions, which with regard to natural persons who are beneficiaries of EAGF and EAFRD aid, impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof.

N.S. and M.E.

- **C-411/10 N.S. v. Secretary of State for Home Department**
- **C-493/10 M.E. v. Refugee Applications Commissioner, Grand Chamber, 21.12.2012.**
- Dublin Convention – no return to the country of the first asylum application if risk of refoulment
- Refusal to extradict if probability of inhuman and degrading treatment

N.S.

- Article 4 of the CFR must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

N.S.

- Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.
- Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland
- Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article.
- The Charter does not create new rights or principles.

The CFR is not an opt-out

- In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and **does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.**
- Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

Other fundamental rights issues

- Article 21 – non-discrimination (broad category)
- Non-discrimination with regard to age recognized as the general principle of the EU law
- **C-144/04 Mangold and C-555/07 Küçükdeveci**
- Not in case of sexual orientation

- Citizens' rights – Article 45 – free movement and Art. 7 – protection of family life
- **C-34/09 Ruiz Zambrano, C-434/09 McCarthy and C-256/11 Dereci**
- Article 7 – respect of family life only in exceptional situations grants the 3^{cn} the right to stay (not internal)

Dereci

- the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted

**Thank you for your
attention**