Asylum and the EU Charter of Fundamental Rights

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editoriale scientifica

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Table of Contents

Foreword 7

Section I

Gabriel N. Toggenburg
The Charter of Fundamental Rights: An Illusionary Giant? Seven brief points on the relevance of a still new EU instrument 13

Lorenza Violini, Alessandra Osti
The Effectiveness of the Charter of Fundamental Rights in a Comparative Perspective: which Level of Integration? 23

Andrea Crescenzi
The Prominence of the EU Charter of Fundamental Rights in the Light of the CJEU Case Law and the Application of the Dublin System 43

Marcelle Reneman
Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review 59

Chiara Favilli
Overview and Summary of the Obligations of the EU Institutions and State Authorities with regard to the Charter in the Field of Asylum. Proposals for Possible Improvements in EU Legislation and Policies 79

Section II

Rosita Forastiero
The Right to an Effective Remedy and the Protection of Particularly Vulnerable Persons as Asylum Seekers in Light of the Charter of Fundamental Rights 99

The Effectiveness of the Charter of Fundamental Rights in a Comparative Perspective: which Level of Integration?

Lorenza Violini e Alessandra Osti*

Contents: 1. Introductory Remarks. – 2. The Application of the Charter of Fundamental Rights in the Light of the Italian Constitutional Judgment No. 269/2017. – 3. The Austrian Approach to the Charter of Fundamental Rights in the Light of the 2012 Constitutional Decision. – 4. The Strange Case of the UK Application of the Charter of Fundamental Rights. Recent Developments. – 5. Concluding Remarks

1. *Introductory Remarks*

The EU Treaties do not have a constitutional character and, indeed, the term "constitution" is expressly avoided, as decided by the EU Council following the failure of the French and Dutch referenda.[1] However, the incorporation of the Charter of Fundamental Rights[2] (hereinafter EUCFR) in the Lisbon Treaty (2009) has certainly contributed to a *de facto* constitutionalization of the European legal space and, therefore, to the emergence of the issue of the constitutional identity of the Member States.[3] The scenario briefly presented here has also

* Although resulting from a combined and coordinated effort and representing a shared view of the issue, the present chapter was written separately: paragraphs 1, 2 and 5 written by Lorenza Violini (Professor of Constitutional Law at the University of Milan) and paragraphs 3 and 4 written by Alessandra Osti (Research Fellow in Public Comparative Law at the University of Milan).

[1] IGC 2007 Mandate, Doc. 11218/07, 26 June 2007, 3.

[2] A first version of the Charter of Fundamental Rights of the European Union had been proclaimed at Nice in 2000. It only acquired the legal status of the highest-ranking fundamental rights catalogue with the Lisbon Treaty by the reference in article 6 (1). Since 2009, the main, legally binding source of fundamental rights in EU were the general principles of the EU law derived by international convention (especially the ECHR) and from the constitutional traditions common to the Member States.

[3] On the point of the national/constitutional identity see, among others, A. Von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for National Identity Under the Lisbon Treaty*, in *Common Market Law Review*, 48, 2011, 1417-1454; G. Van Der Schyff, *Eu Member State Constitutional Identity: a Comparison of Germany*

developed due to the evolving jurisprudence of the European Court of Justice (hereinafter CJEU), which, at least in some cases, acts as a proper European constitutional court or a quasi-constitutional court.[4] This might elicit opposition by national states and potentially strain relationships with national constitutional courts.[5]

As an example of the CJEU's admittedly tentative entry into the national constitutional spaces, ("stirring up", at times, the aforementioned emergence of national constitutional identities), we may consider the recent decision in the Portuguese case *Associação Sindical dos Juízes Portugueses,* delivered in February 2018.[6] In this judgment, the CJEU, in its Grand Chamber composition, had to establish whether Law No. 75/2014, which temporarily reduced the remuneration (among others) of the judges of the Court of Auditors, was compatible with EU Law (especially with the principle of *judicial independence*, enshrined in the second subparagraph of Article 19(1) Treaty of the European Union (hereinafter TEU) and in Article 47 EUCFR).

Even though the CJEU ruled that «the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures», it is worth noting that the Court, in its reasoning, pointed out that the considered EU provisions relate to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter. Consequently, the Luxembourg judges elaborated on the guarantee of independence of the judiciary, which undeniably represents a key constitutional issue.[7]

and the Netherland as Polar Opposite, in *ZaöRV,* 76, 2016, 167-191; E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlan Journal of Legal Philosophy*, (45) 2, 2016, 82-98.

[4] G. Itzcovich, *The European Court of Justice as a constitutional Court. Legal Reasoning in a Comparative Perspective*, STALS Research Paper 4/2014; E. Billis, *The European Court of Justice: a "Quasi-Constitutional Court" in criminal matters? The Taricco Judgment and its shortcomings*, in *New Journal of European Criminal Law*, (7) 1, 2016, 20-38.

[5] J. Komárek, *The Place of Constitutional Courts in the EU*, in *European Constitutional Law Review*, 9, 2013, 420-450 and from the same author, *Constitutional Courts in the European Constitutional Democracy*, in *International Journal of Constitutional Law*, (12) 3, 2014, 525-544.

[6] CJEU (Grand Chamber) 27 February 2018, Case 64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.

[7] On the same topic we can also consider the Hungarian case: CJEU (First Chamber) 6 November 2012, Case 286/2012, *Commission v. Hungary*.

Focusing on the Charter of Fundamental Rights, it is worth to remember that this instrument is meant primarily to bind EU institutions and to restrict their power; this application is uncontroversial. Matters become more problematic when it comes to applying the fundamental rights enshrined within the Charter to the obligations of Member States that are already constrained by the rights contained in their own national constitutions. As general rule, it can be said that the EU Charter has a limited field of application. Indeed, the Charter applies to EU Member States only "when they are implementing Union law" because, in such situations, they are not acting on their own but merely as agents for the EU: in giving effect to EU rules they are obviously also required to respect EU fundamental rights. However, the aforementioned passage "when they are implementing the Union law", contained in Article 51 (1) of the Charter, has been translated by CJEU jurisprudence into a much broader and less clearly defined "when they are acting within the scope of EU law".[8] This broader reading of Article 51 (1) EUCFR has been the subject of intense debate among academics and practitioners, but it still remains a grey area of uncertainty in which it is difficult to orientate.

As we said, it is not always easy to define the boundaries of the Charter's field of application and therefore national judges (as well as parliamentarians and governments) represent the core "Charter agents" that the EU system relies on and that should contribute to the evolution of the EU legal space towards integration. However, the main problem is that they are still – all too often – unaware agents. This observation becomes clearer if we consider, at first, national legislators as core Charter agents. The Italian legislator, for instance, during the last legislature approved a law on the Treatment Advance Directives (an issue that it is quite difficult to link with EU competencies) which in its Article 1 expressly refers to the EUCFR, possibly paving the way for future intrusion of the CJEU outside the scope of EU law.

Then, if we consider the judges as "Charter agents" (or, more generally, natural allies of the EU legal system or again recipients of the European Mandate),[9] their unawareness may produce two different kind of

[8] CJEU 26 February 2013, Case 617/10, *Aklageren v. Akerneg Fransson*; see also CJEU 26 February 2013, Case 399/11, *Melloni v. Ministerio Fiscal*.

[9] The term "Chart agents" is used by the FRA in the Fundamental Rights Report 2018, the term allies is used by B. Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the CJEU's Case Law in Context*, in *Fordham*

behaviours. Firstly, judges might refer to the Charter in an inconsistent way, bundling to it together with other legal sources, especially national constitutional provisions and ECHR articles. The Fundamental Right Agency (FRA) justifies this practice as a signal that judges (generally speaking) are aware of the existence of the Charter but not of its potential added value, so that they prefer to «package various human rights sources in order to play it safe».[10] Secondly, judges might use the Charter improperly – without any consideration about its field of application – in order to drive the national legal system towards new frontiers, potentially jeopardising the certainty of the rule of law. Examples of this tendency in the Italian context may be found in the case law concerning the introduction of stepchild adoption by Court of Cassation No. 19962/16 or, even more to the point, in the case concerning the disapplication of national provisions of the criminal procedural code about legal aid, which the Court of Appeal had deemed in conflict with Article 47 EUCFR,[11] without any reference to its field of application.

The latter behaviour is particularly dangerous both at national and at EU level, since it contributes to enhance the internal tensions between Constitutional Courts and ordinary Courts and to trigger a "clash of titans" between national Constitutional courts and the CJEU. Moreover, it is not even useful for European integration.

The above-described context is essential for a better understanding of the jurisprudence of national Constitutional Courts and of their sometimes strained relationship with the CJEU.

A comparative perspective, which implies the contextualization of the selected judgments, becomes therefore important in order to evaluate the different approaches to the Charter and their impact on the EU integration process.

The choice of comparing the effectiveness of the Charter in Italy, Austria and UK in the light of recent jurisprudence of the Supreme/Constitutional Courts can be easily explained. With judgement No.

International Law Journal, 38, Issue 4, 2015, 1097-1133; the term recipients of the European Mandate is deducted from M. Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of the Constitutional Courts*, in M. De Visser and C. Van De Heyning (eds), *Constitutional Conversations in Europe*, Cambridge, 2012, 287-308.

[10] FRA, Fundamental Rights Report, 2018.

[11] A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia*, availabele at: https://www.cortecostituzionale.it/documenti/convegni…/SIVIGLIA_BARBERA.pdf.

269/2017 the Italian Constitutional Court has questioned CJEU competence interpreting the Charter and the constitutional traditions common to the Member States,[12] or, more correctly, has tried to preserve the concept of a centralized constitutional jurisdiction (as the Austrian Constitutional Court did) in order to guarantee higher certainty to the protection of fundamental rights. However, the probably positive intentions of the Court have been misunderstood, and the most obvious reason is that the Constitutional Court has tried to import the model of the Austrian constitutional court judgment, which, as we are going to see in detail, had obtained positive reaction by the EU institutions, without considering the different context.

The judgment at hand has been strongly criticised by the majority of academics and practitioners, who regarded it as an inappropriate interference with, and opposition to, the CJEU. Furthermore (and more in general) it has been argued that the judgment diminishes the role of ordinary judges as recipients of the European Mandate, restricting their freedom to disapply, on their own initiative, a national provision in conflict with the EUCFR.

Choosing Austria as a term of comparison is therefore an obligated choice because of the reference that the Italian Constitutional Court made to the Austrian Constitutional Court's landmark decision. Moreover, this analysis will help to understand why similar decisions had such different outcomes. The choice of the UK as the third term of comparison is not only due to the fact that it represents an interesting and recent example of valorisation of the Charter but also to the similarities that the UK legal system shares with Austria. At a first glance, Austria may not seem to have much in common with the UK in this aspect, but a closer look will reveal that the two systems are more similar than it appears: in both countries, in the absence of a fully national bill of rights (such as the one found in the Italian constitution), the domestic fundamental rights system is in fact based mainly on the ECHR, which – either as a whole or in part – applies at the national level through the Human Rights Act 1998 in UK and through its constitutionalization in Austria.[13] In this scenario,

[12] R. Di Marco, "*The path toward European integration" of the Italian Constitutional Court: The Primacy of EU Law in the light of the Judgment No. 269/17*, in *European Papers* – European Forum, 14 July 2018, inserire pagine.

[13] A. Müller, *An Austrian ménage a trois: The Convention, The Charter and The Constitution*, in K. S. Ziegler, E. Wicks, L. Hodson (eds.), *The UK and the European Human Rights. A strained relationship*, Oxford, 2015, 299-320.

the valorisation of the Charter as a complementary fundamental rights catalogue is therefore very interesting and, at the same time, very challenging for both the national and the European legal orders.

2. *The Application of the Charter of Fundamental Rights in the Light of the Italian Constitutional Judgment No. 269/2017*

Before engaging in an examination of judgment No. 269/2017 of the Italian Constitutional Court, it seems necessary to mention briefly that, in the nine years since the Charter was first proclaimed and before it became legally binding, the Italian Constitutional Court has more than once referred directly to it in order to support its legal reasoning. Hence, in doing so the Court has recognised the importance of the Charter, among other international instruments such as the European Convention of Human Rights (hereinafter ECHR), as an instrument devoted to protect fundamental rights. Even after the entry into force of the Lisbon Treaty, which conferred legally binding force to the Charter, its use in practice by the Italian Constitutional Court has not changed significantly either on the quantitative or on the qualitative point of view. Indeed, on one hand, the number of references has certainly increased, but remains low in proportion to the total number of decision delivered; on the other hand, the quality of the references remains insubstantial since it is usually used *ad adiuvandum* or *ad definendum* without even considering whether the matter is within the scope of the EU law. Leaving aside the so-called Taricco saga, it is worth noting that the trend described here may change due to the shifting approach of the Constitutional Court, as inaugurated by a decision issued at the end of 2017.

Indeed, the Italian Constitutional Court, in a very controversial *obiter dictum* of decision No. 269/2017, describes the "state of the art" of the antinomy between EU law and domestic law. Therefore, (i) when a national law clashes with a European Union law that has direct effect, «it falls to the ordinary judge to evaluate the compatibility of the challenged internal rules with the European law, making use – where necessary – of a reference for a preliminary ruling to the CJEU». Then, in case of noncompliance, the national judges must apply the European rule instead of the national one.

(ii) If the situation of noncompliance regards European rules with no direct effect, the ordinary judge tries to resolve the evaluated incom-

patibility through interpretation; if this fails, the judge must raise the question of constitutionality before the Constitutional court, which is the sole competent Court.

It is with the following reasoning that the Italian Constitutional Court inaugurates a new, and potentially slippery, path:

> It bears considering that the aforementioned Charter of Rights is a part of Union law that is endowed with particular characteristic due to the *typically constitutional stamp of its contents* [italics added]. The principle and rights laid out in the Charter largely intersect with the principles and rights guaranteed by Italian Constitution (and by other Member States). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter (… omissis). Therefore, violations of individual rights posit the need for an *erga omnes* intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution).

Thus, according with the reasoning of the constitutional judges, (iii) when a national law clashes with the Charter the ordinary national judges must address the Constitutional court, although in principle they remain free to submit a reference for preliminary ruling to the CJEU. It seems quite clear that the reasoning of the Court aims to preserve the concept of a centralized constitutional jurisdiction (as the Austrian Constitutional Court did, although on a different basis) in order to guarantee higher certainty to the protection (*erga omnes*) of fundamental rights. Were it not so, the rights enshrined in the national constitution would enjoy a lesser degree of protection (only among the parts of the proceeding) for the sole reason that they are also protected in the Charter. Nevertheless, the loyal cooperation with the CJEU is not forgotten by the Constitutional Court that expressly recalled it by referring to the importance of judicial dialogue.

However, we can imagine two different scenarios resulting from this reasoning. In the first one, the Constitutional Court upholds the claim based on fundamental rights and the national provision is no longer available in the national legal system. In that case there would be no more reason for the ordinary judge to knock at the door of the CJEU.

In the second scenario, the Constitutional Court dismisses the claim and therefore the interpretation of the Charter by the CJEU might re-

main the last recourse. At this point, however, the ordinary court could be persuaded by the legal arguments of the Constitutional judgment, or simply be discouraged from making another time-consuming reference within the same case. However, if it persevered, and if the European claim based on the EUCFR provisions succeeded (and only in this case), the divergence in interpretation might trigger an overt conflict between the CJEU and the Constitutional Court, which could potentially lead to questioning even the consolidated principle of the primacy of the EU, since many fundamental rights find a counterpart in other rules of EU law.[14]

It is probably with the latter scenario in mind that the Court of Cassation has reacted to the Constitutional judgment at hand and has made references both to the Constitutional Court, for a Charter-based judicial review of legislation, and, in a different case, for a preliminary ruling to the CJEU.[15]

In the first case the Court of Cassation has formally respected the procedural rule specified by judgment No. 269 but at the same time has asked for clarification on the dual preliminarity, highlighting the possible problems connected with this hypothesis. In the second case the Cassation Court has ignored that procedural rule (since it was contained in a *obiter dictum*) and has knocked directly at the door of the CJEU. These two reactions demonstrate that the main problem arising from constitutional judgment No. 269/2017 is not at European level nor does it concern relationships with the CJEU; it is instead at the national level, where national ordinary judges may feel deprived by the Constitutional judges of that "European Mandate" that empowers them to be judges of the European legal space and to enforce EU law,[16] including the Fundamental Rights enshrined in the Charter. It is this element, among others that we will highlight in the next paragraph, which differs from the Austrian case. The conflict between the Con-

[14] B. Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the CJEU's Case Law in Context*, in *Fordham International Law Journal*, 38, Issue 4, 2015, 1097-1133. It is quite interesting to notice that the author has forecast, in general terms, the described scenarios.

[15] Court of Cassation., II Civil Section, 16 February 2018, judgment No. 3831 and Court of Cassation, Labour Section, 30 May 2018, judgment No. 13678.

[16] It is worth noting that this European Mandate has been recognized by the Italian Constitutional Court in 1984 (*Granital* decision) where the Court stated that a national piece of legislation which clashes with EU provisions endowed with direct effect must be disapplied in favour to EU law.

stitutional Court and the CJEU is going to be an exceptional case and, moreover, the dialogue concerning the development of rights among these two Courts might eventually turn out to be very fruitful.

Concluding, however, it is important to notice that the aforementioned constitutional judgment leaves some grey areas: is it possible that the violation of an individual right infringes only those rights codified by the European Charter? If so, who is going to decide over this case? And is it even possible, in this case, to forgo the "constitutional content" of the Charter?

3. *The Austrian Approach to the Charter of Fundamental Rights in the Light of the 2012 Constitutional Decision*

Since Austria's accession to the European Community in 1995, the *Verfassungsgerichtshof* (hereinafter VfGH), which has sole jurisdiction to declare general acts invalid and is responsible for the protection of constitutionally guaranteed rights, has recognized the supremacy of EU norms having direct effect. However, even though EU law was considered by the same VfGH as applicable law, it was not deemed to have constitutional status and therefore it could not be used as a standard of review of legislative or administrative acts before the Constitutional Court. Indeed, as the VfGH stated for example in 2000, "the compatibility of the statute with community law as such cannot be subject of the Court's control".[17]

The decision of 14 March 2012, the one that the Italian Constitutional Court refers to, deviates from the above-mentioned view on the role of EU law in the Austrian legal system and therefore represents a landmark decision.[18]

The case before the Constitutional Court concerned an issue of asylum law: the applicants, two Chinese citizens who had applied for international protection (Asylum), were claiming a violation of their right to an effective remedy and to a fair trial as enshrined in Article 47 of the Charter (not in a constitutional norm) because they had been denied an oral hearing before the Asylum Court.[19] The applicants' decision

[17] VfGH, 15753/2000 but also VfGH 19496/2011.

[18] VfGH, 14 March 2012, U466/11.

[19] The piece of legislation under constitutional review was the Austrian Asylum Act (2005), which indeed omitted to provide an oral hearing before a national asylum court.

not to rely on the almost corresponding provision of Article 47 EUCFR, i.e. Article 6 of the ECHR, which – by the well-established logic of the VfGH – would have constituted the surest way to see their claim considered, is due to the fact that this convention provision was of no avail, since jurisprudence of the European Court of Human Rights had already made it clear that proceedings regarding asylum do not concern civil rights and obligations within the meaning of Article 6 ECHR.[20]

Therefore, Article 47 of the Charter, with its broader content, was the exclusive source of law invoked as a yardstick for constitutional complaint, and thus the Court could not avoid to verify whether the Charter itself would qualify as a standard of review for proceedings under Article 144a of the Federal Constitutional Law (B-VG).

It may be useful to follow the arguments of that decision to better understand its outcomes as well as its context. First of all, the VfGH referred to Article 6 (1) TEU and held that the Charter is a part of EU primary law, but it concluded that its previous case law could not be applied to the examined case because "the Charter is an area that is markedly distinct from the Treaties".[21]

Having said this, the Court referred to the principle of equivalence and effectiveness and concluded that "rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States".[22] The VfGH equated the Charter rights with constitutionally guaranteed rights pursuant to Articles 144 and 144a B-VG and argued that many Charter rights are modelled on the ECHR, which has in Austria constitutional rank.[23] Therefore, in order to preserve the concept of a centralized constitutional jurisdiction, a core concept of the Austrian Constitution, the VfGH concluded that it is competent to decide on Charter rights identical in content to the Austrian counterparts.[24]

[20] The same VfGH considers the issue in order to estabilish that article 47 and article 6 have different meaning.

[21] VfGH, 14.03.2012, U466/11, para. 25.

[22] VfGH, 14.03.2012, U466/11, para. 27 which refers to the CJEU case law and in particular to CJEU 1 December 1998, Case 326/96, *Levez v. T.H. Jennings (Harlow Pools) Ltd.*

[23] Austria acceded to the Council of Europe in 1956 and ratified the Convention in 1958. In 1964 the dispute about the legal status of the ECHR was solved (with reatroactive effects) by the (constitutional) legislator which elevated the Convention to the rank of constitutional law (Budesgesetzblatt 121/1956).

[24] VfGH, 14 March 2012, U466/11, para. 34.

> … it follows from the equivalence principle that the rights guaranteed by the Charter of Fundamental Rights may also be invoked as constitutionally guaranteed rights pursuant to Articles 144 and 144a respectively, Federal Constitutional Act (B-VG) and they constitute a standard of review in general judicial review proceedings in the scope of application of the Charter of Fundamental Rights, in particular under Articles 139 and 140, Federal Constitutional Act (B-VG)".[25]

However, the Court seems to restrict this view to those Charter rights corresponding to constitutionally guaranteed rights under Austrian law: "this is true if the guarantee contained in the Charter of Fundamental Rights is similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution". Therefore, not the whole Charter is elevated to serve as a yardstick for constitutional complaints. To identify the relevant parts of the Charter that may be considered as standard of review, one must establish, on a case-by-case basis, which rights guarantee the same wording and purpose as those enshrined in the Austrian Federal Constitution and in the ECHR, which – as already mentioned – has the same constitutional rank. The VfGH explained that some provisions, such as e.g. Articles 22 or 37 of the Charter, do not resemble constitutionally guaranteed rights so much as "principles" and thus cannot be regarded as standard of review, since they cannot be compared to a detailed catalogue of rights and duties.[26] One may object to this approach on the basis of legal certainty: actually, aside of course from Article 47, on which the VfGH has already made its (not fully satisfactory) evaluations, it remains unclear which other Charter rights will qualify as constitutionally guaranteed rights. For instance, following that leading decision, Article 21 (1) and (2) has also already been afforded this "constitutional" status.

Moreover, the VfGH recognized the importance of CJEU case law for interpreting the Charter rights and expressly stated that, in the case of doubts on the interpretation of those rights enshrined in the Charter provisions, it would have initiated a preliminary reference procedure according to Article 267 TFEU.

> In summary, the Constitutional Court – after having referred a matter for a preliminary ruling to the Court of Justice of the European Union according to article 267 TFEU as appropriate – takes the Charter of

[25] Ibidem, para. 35.
[26] Ibidem, para. 36.

> Fundamental Rights in its scope of application as a standard for national law (article 51(1) EUCFR) and sets aside contradicting general norms according to Article 139 and/or Article 140 Federal Constitutional Act (B-VG). In this manner, the Constitutional Court *fulfils its obligation to remove from the domestic legal order provisions incompatible with Community law*, which is also postulate by the Court of Justice of the European Union".[27]

The Court goes further in its argumentations by offering a distinctive interpretation of the obligation of reference for preliminary ruling under Article 267 (3) TFEU. In particular, the Court states that, as far as the Charter is concerned, if a constitutionally guaranteed right (especially one of those of the ECHR) has the same scope of application as a right of the Charter, the Court has no obligation to bring the matter to the attention of the CJEU, since it can base its decision upon the Austrian Constitution alone. In the wording of the VfGH, the rationale for this lack of obligation is linked with the interpretation of Articles 52 and 53 of the Charter: indeed, fundamental rights are recognized in the Charter as they result from the constitutional traditions common to the Member States and, therefore, must be interpreted in accordance with those traditions. "In so far as this Charter contains rights which correspond with rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention" (Article 52(3) EUCFR).

The Court then, after having addressed the general issue, applied (or at least attempted to apply) these arguments to the specific field of the case. It stressed that Article 47 EUCFR has a broader scope of application than the corresponding Article 6 ECHR. However, this remark did not prevent the VfGH from deciding on whether an oral hearing may be restricted in accordance with Article 47 EUCFR without referring the issue to the CJEU, as it was, instead, quite reasonable to expect on the basis of the above-mentioned arguments. The Court, therefore, concluded that:

> In the light of this case, the Constitutional Court neither holds any reservation as to the constitutionality of sec 41 (7) 2005 Asylum Act, nor does it find that the Federal Asylum Tribunal subsumed an un-

[27] Ibidem, para. 39. The italics is added in order to emphasize the statement of the Court.

> constitutional content under this provision by desisting from holding an oral hearing. Desisting from holding a hearing in cases in which the facts seem to be clear from the case-file in combination with the complaint, or where investigations reveal beyond doubt that the plea submitted is contrary to the facts, is consistent with article 47 EUCFR, if preceded by administrative proceedings in the course of which the parties were heard.[28]

The principle of coherence demands that the Court can also review alleged violations based on the Charter and this argument seems to be a very important point on the relationship between the Austrian and the EU legal orders. However, an important condition for allowing an EU Charter complaint before the Austrian Constitutional Court is that the Charter right be similar to a national human right under the ECHR, which – as we have already noted – has constitutional rank and represents the main catalogue of rights. The EUCFR might therefore play a pivotal role in Austria as a constitutional yardstick for ordinary law, which can be declared null and void in case of incompatibility, but in principle only when the Charter right is at least "similar" to those protected within the ECHR.

The decision has received mixed reactions from the Austrian legal academia,[29] which has generally criticized the reasoning of the Constitutional Court, and from the jurisprudence of other national courts such the Supreme Administrative Court. The latter, in particular, with its judgment of 23 January 2013[30] repealed, based on a violation of Article 47 EUCFR, a decision of the independent Tax Panel, which had denied the applicant an oral hearing. The main point here, at least for our purposes, does not so much concern the outcome of the decision, which we may agree on, as the relationship between the courts. In fact, the Supreme Administrative Court has find itself obligated to implement the Charter without considering that the Constitutional Court in the examined judgment had qualified the rights of the Charter (certainly including Article 47 EUCFR) to be equivalent to constitutionally guaranteed rights for which it is the sole competent judge. This evaluation seems especially relevant if we consider the data on the impact

[28] Ibidem, para. 64.

[29] K. Lachmayer, *The Austrian approach toward European human rights*, in *Vienna J. on Int'l Const. L.*, 2013, 105-107.

[30] Austrian Supreme Administrative Court (VwGH), 23 January 2013, judgment No. 2010/15/0196.

of the Charter at national level presented by the Fundamental Rights Agency (FRA) in 2018. The report of the Agency shows that in Austria the Constitutional Court referred to the Charter 34 times, whereas the Supreme Administrative Court did so 140 times.[31]

However, the most interesting reaction came from the CJEU: Vassilios Skouris, the former President of the CJEU, sent a congratulatory note to the President of the VfGH, Gerart Holzinger. According to this note, the decision at hand can be read as a substantial contribution to transforming the EUCFR into a shared asset of the EU and to further developing the cooperation between the CJEU and the national constitutional courts to the benefit of Fundamental Rights protection in Europe.[32] Of course, this positive reaction might be influenced by the ongoing cooperative approach that the Austrian Constitutional Court has developed since its first preliminary reference to the CJEU back in 1999.[33]

In the light of this positive reaction, we may also look favourably to CJEU decision *A v. B and others*, which the Luxembourg Court delivered in 2014, and consider it as one more step forward in the constructive dialogue between the two Courts.[34] Indeed, the CJEU held that, according to VfGH case law, ordinary courts must apply to the Constitutional Court if they consider a statute to be contrary to the Charter. However, the obligation to refer the case to the Constitutional Court for the general striking off of statutes does not affect the right of ordinary courts (as correctly expressed by the VfGH in wording borrowed from the CJEU judgment) to refer any question they consider necessary to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they might deem appropriate, even at the end of the interlocutory procedure for the review of constitutionality. While a divergence of interpretation leading to potentially dangerous conflicts between the CJEU and the VfGH remains possible, it seems a rather marginal risk *vis a vis* the benefits of a fruitful relationship with the VfGH.

[31] FRA, Fundamental Rights Report 2018. The data considered only cases where the reference to the Charter is within the reasoning of the court and not cases where the Charter is considered merely in order to report that the parties had refer to it.

[32] Letter of 25th May 2012. The reference to the letter can be found in A. Müller, *An Austrian ménage a trois: The Convention, The Charter and The Constitution*, in K.S. Ziegler, E. Wicks, L. Hodson (eds.), *The UK and the European Human Rights. A strained relationship*, Oxford and Portland, 2015, 307 ss.

[33] VfGH, 10 March 1999, judgment No. B 2251/87.

[34] CJEU (Grand Chamber) 11 September 2014, Case 112/13, *A v. B and others*.

Facts seem to support this statement for the time being. Indeed, the FRA reported that in Austria the Charter does not have a decisive overall impact on the outcome of the judgments. This might indicate that, after all, the added value of the Charter is overall still limited, especially compared to other sources of law and the ECHR *in primis*.

4. *The Strange Case of the UK Application of the Charter of Fundamental Rights. Recent Developments*

It can be noted that the European Charter of Fundamental Rights has met a rather frosty reception in the United Kingdom. Under the Human Rights Act, in which parliamentary sovereignty is protected, the courts may only issue a declaration of incompatibility, rather than a proper remedy, but the Charter can be directly enforced and any incompatible national law set aside due to the supremacy of EU law.

From the start, i.e., from the solemn proclamation of the Charter in Nice, the British government had taken a rather dim view of the Charter, which it only tolerated insofar as it remained a non-legally binding statement of policy. It worth noting that by the time it obtained binding legal effect in 2009 with the entry into force of the Lisbon Treaty, the Charter had already made its first steps in the European legal order through the jurisprudence of the CJEU.[35]

In 2007 the UK, through a joint UK and Poland Protocol, had negotiated an opt-out from the Charter, but this document, Protocol 30 to the Treaty of Lisbon, showed the full extent of its weakness and ambiguity when the Treaty entered into force in December 2009.

UK judges, at first, stated that applicants could not rely on the Charter, which was not applicable in UK, but at the same time argued that, in spite of this, the Charter still had an indirect influence as an aid to interpretation.[36]

The Government subsequently began to soften its (op)position to the Charter, admitting that Protocol 30 did not altogether prevent the Charter from applying within the UK, but only served to explain its effect. As one would expect, this position was endorsed by the European Court of Justice (CJEU) in its case law. Indeed, in the wording of the CJEU:

[35] The first decision that refer to the Charter is CJEU (Grand Chamber) 27 June 2006, Case 540/03, *Parliament v. Council of the European Union*.

[36] See *R (Saeedi) v. Secretary of State for the Home Department* [2010] EWHC 705.

> Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, (… *omissis*) 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. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.[37]

In 2012, the UK Supreme Court had the occasion to confirm that the Charter takes effect in national law, binding Member States when they are implementing EU law.[38] However, although some steps in the direction of embracing the Charter had been taken, the issue of the legal status of the Charter was still unresolved and the state of uncertainty regarding its effect on the UK national order persisted for several years. In this regard it is worth noting, for example, that key government officials – including Secretary of State for Justice Chris Grayling in 2013 and Home Secretary Theresa May in 2014 – kept opposing the EUCFR by saying that it should not apply to the UK and that it had merely declaratory value. Amid this contradictory scenario, the House of Commons European Scrutiny Committee in its 2014 report issued a very strong recommendation to adopt primary legislation aiming to exclude the applicability of the Charter in the UK, without considering the fact that the UK could not unilaterally alter EU law nor disapply the Charter, which is EU law as well.

However, the fortunes of the Charter were going to change shortly afterwards. The wind of change turned in 2015, when the Court of Appeal delivered two decisions which recognized that some provision of the Charter of Fundamental Rights not only have effect in the national legal order but also have a horizontal, direct effect; on this basis, the Court disapplied the primary UK legislation in contrast with those provisions.

The first case, *Benkharbouche v. Sudanese Embassy*, concerned claims brought by foreign domestic workers employed by the London Embassies of Sudan and Libya. Ms Benkharbouche, a Moroccan citi-

[37] CJEU 21 December 2011, Case 411/10, *N.S. v. Secretary of State for Home Department*, para. 119.

[38] *Rugby Football Union v. Consolidated Information Services* [2012] UKSC 55, paras. 26-28.

zen, was employed as a cook at the Sudanese embassy in London before her dismissal. She brought a claim against the embassy for wrongful dismissal, failure to pay the minimum wage and breach of working time regulation (which incorporated Directive 2003/88/EC). Ms Janah, also a Moroccan citizen, was instead fired from her post as a member of the domestic staff at the Libyan embassy in London. Her claim against the Libyan embassy was based on wrongful dismissal, racial discrimination and harassment (relying on law incorporating the Race Discrimination Directive) as well as breach of working time regulation. As it will be clear shortly, the reference to the substance of the claims is a very important point.

Both States claimed to be covered by immunity under section 1 of the State Immunity Act (hereafter SIA) and thus they relied on the fact that UK Courts had no jurisdiction. The claimants, on the contrary, argued that the grant of immunity under the SIA infringed their own right to access to a court, as enshrined in Article 6 ECHR as well as in Article 47 EUCFR. The Court of Appeal held that indeed Article 47 EUCFR (right to a Court and right to effective remedies) had horizontal effect and, therefore, the SIA (especially sections 4 (2) and 16 (1), which granted the embassies immunity from employment claims) had to be disapplied.

> Article 47 must fall into the category of Charter provisions that can be the subject of horizontal effect. It follows from the (CJEU's) approach in *Kucukdeveci* and *AMS* that EU Charter provision which reflect general principles of EU law will do so. (… *omissis*) The order of this court will disapply sections 4 (2) (b) and 16 (1) (a) to the extent necessary to enable employment claims falling within the scope of EU law by members of the staff service, whose work does not relate to the sovereign function of the mission staff.

It is worth noting that here the English judges referred to CJEU jurisprudence and developed it. Indeed, the CJEU judgments mentioned by the Court of Appeal had concluded that the Charter was capable to have horizontal direct effect, but they did not recognize it in the examined provisions (Articles 27 and 31 EUCFR).

In the second case, *Vidal-Hall v. Google Inc.,* three claimants alleged that Google Inc. had misused their private information and acted in breach of confidence and in breach of its statutory duties under Data Protection Act 1998, by tracking and collating, without their consent or knowledge, information relating to their internet usage on Apple Safari internet browser. In particular, they claimed damages for the

acute distress they reportedly suffered when they realised that sensitive data information might be revealed to those who saw targeted advertising on the claimants' screens. The Court of Appeal concluded that the Data Protection Act 1998 (especially section 13 (2), which expressly limited damages for pure distress to specific circumstances) had to be disapplied because of Articles 7 (right to private and family life) and 8 (right to protection of data) of the EUCFR, which not only have effect in UK, but also have horizontal direct effect.

Both these decisions seem to open up a new and more effective path for human right protection in the UK: while ECHR provisions, which have become national through the Human Rights Act, may produce only a declaration of incompatibility, the Charter empowers judges to enforce a proper remedy (a legislative disapplication), although only in a restrictive range of cases i.e. to the extent necessary to satisfy claims falling within the scope of EU law.

The abovementioned jurisprudence had a positive impact on the valorisation of the Charter by the lower courts, which have actually used the Charter to disapply legislation, and (surprisingly) by the Government, which has stated to accept both that claimants can rely on the EUCFR in UK courts when the claim is within the scope of EU law, and that violations of the EUCFR must be resolved by disapplication of divergent national provisions. Even the Supreme Court intervened on the EUCFR issue shortly afterwards.

In July 2017, the Supreme Court noted that the fees introduced by the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*, which required payment of an issue fee when a claim form is presented and of a hearing fee prior to the hearing of the claim (which for a single claimant would cost roughly up to £1,200 each), contravened EU law's guarantee of an effective remedy before a court as enshrined in Article 47 EUCFR.[39] Since the fees were unaffordable in practice, the Fees Order was deemed a disproportionate limitation of Article 47 EUCFR in light of Article 52 (1) EUCFR. In this case the decision was made easier by the fact that the domestic provision conflicting with the EUCFR was an Order and not a piece of primary legislation; nevertheless, this can be considered the first step in the direction of a full recognition.[40]

[39] UKSC, 26.07.2017, Case 2015/0233, *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*.

[40] It is interesting to notice that the FRA in its 2018 Report has named the UK as

However, only in October 2017 did the EUCFR reach the highest degree of recognition, when the Supreme Court, dealing with the appeal of *Benkharbouche* case, confirmed, very briefly, that the EU Charter could be used as a stand-alone cause of action in order to disapply primary legislation:

> The scope of article 47 of the Charter is not identical to that of article 6 of the Human Rights Convention, but the Secretary of State accepts that on the facts of this case if the Convention is violated, so is the Charter. (… omissis) The only difference that it makes is that a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.[41]

This judgment is highly interesting not only because of the outcome but also because of its timing: in fact, the case was heard after the so-called Brexit and after the famous *Miller* case, which – in a certain way – "restored" the sovereignty of Parliament and confirmed the primacy of EU law over domestic legislation. Reading the *Benkharbouche* case in light of the *Miller* one, we can argue that accepting disapplication as a standard (to the extent this is required by UK legislation – namely European Communities Act 1972) does not challenge the key principle of parliamentary sovereignty. Indeed, when judges disapply a domestic provision, they merely endorse the real will of Parliament not to contradict directly effective EU law.

Of course, we can only wonder now if disapplication will have a future after the exit day (which will depend on the content of the Withdrawal Bill) and if it will be possible to have a form of disapplication beyond EU law. But this is perhaps not the right place to discuss this very complex issue.

5. *Concluding Remarks*

It is important not to underestimate the Charter's reformatory potential: for instance the UK, after a long period of time in which the

one of the few Member States where the Charter had played a substantial and a decisive role, and has referred to UNISON case.

[41] *Benkharbouche* Case, para. 78.

EUCFR was considered of merely declaratory value, has started to use it as a stand-alone cause of action in order to guarantee highly effective remedy through the disapplication of domestic primary legislation that violates the Charter. It is indeed worth noting that the Fundamental Rights Agency, in its last report, has named the UK as one of the few Member States where the Charter had played a substantial and decisive role in the considered period (2017).

At the same time, however, one must also remember that (re)arranging the balance of EU and domestic fundamental rights may strain relationships between institutional bodies within the State. On this specific point the situations of Italy and Britain are more similar than it appears at first glance. Indeed, the main problem arising from an examination of the jurisprudence of the Italian Constitutional Court and of the UK Supreme Court concerns the relationship with other judges in the Italian context, and with the Parliament in the British context. The relationship with the CJEU may be considered safe, or at least confined to the border of the "dialogue", where the CJEU is not the only party involved in the discussion on fundamental rights. Such dialogue, of course, can only be productive as long as the relationship between these courts is defined by loyal cooperation. As a good example of this we have considered the Austrian case, where, indeed, the choice to give the EUCFR an important role as a constitutional yardstick for ordinary law has been praised by the CJEU, due to the enduring cooperative approach that this constitutional court has developed through the years.

In conclusion, we can highlight the one point which all the "constitutional" courts seem to agree on, i.e. that the issue of fundamental rights needs clear and consistent protection. While the specific instruments may vary from country to country because of the different contexts, the Charter has to be considered an operational tool, emplaced alongside the national catalogues of rights, that can express its added value only within the scope of EU law.