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THE EUROPEAN CHARTER ON FUNDAMENTAL RIGHTS:

RELEVANCE AND IMPORTANCE IN THE ASYLUM AND IMMIGRATION FIELDS

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(I) Some General Reflections

1. The Charter of Fundamental Rights of the European Union ("*the Charter*") entered into force, in tandem with the Lisbon Treaty, on 1st November 2009. It represents a landmark achievement for the Member States of the European Union. The Charter stands proudly as one of the three dominant instruments of governance of the EU.

2. One may say that, in its current state of evolution, the Charter has probably not been fully explored and exploited by the citizens of the Union. It is a veritable Aladdin's cave, with its unprecedented cocktail of rights and freedoms, principles and explanations. Its riches, prowess and pedigree shine brightly in its Preamble. Within these stirring, striking words one finds it genesis, rationale and aims. It recalls the resolution of the peoples of Europe "*to share a peaceful future based on common values*". It draws on the "*spiritual and moral heritage*" of the Union, which is founded on the "*indivisible, universal values of human dignity, freedom, equality and solidarity*". It reaffirms that the Union is "*based on the principles of democracy and the rule of law*". It boldly proclaims that through the twin mechanisms of Union citizenship and the creation of an area of freedom, security and justice, the EU "*places the individual at the heart of its activities*". While emphasising common values, it notes that the Union simultaneously respects "*the diversity of the cultures and traditions of the peoples of Europe*", their national identities and how they are governed at national, regional and local levels. It explicitly recognises the principle of subsidiarity. The Preamble is unequivocal: it enunciates that the Charter is based on a recognition that "... *it is necessary to strengthen the protection of fundamental rights*" [my emphasis]. These rights, it proclaims, derive from:

> "*…….. the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights.*"

This lengthy menu of sources is important, as it helps to explain the broad scope and potentially far reaching impact of the Charter. These sources will also doubtless be influential in cases concerning its interpretation and application.

3. One of several striking features of the Charter is its espousal of **responsibilities**:

> "*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.*"

Furthermore, the Charter is clearly designed to operate as a single, central instrument of human rights protection in the EU environment.The explicit mention of **the responsibilities of the individual** may be linked to the incorporation of the (now familiar) principle of proportionality **and** the balancing exercise required in contexts where particular rights are in competition with each other. These features qualify the Charter for the description of an instrument which adopts a rounded, balanced approach to human rights and freedoms. It is well equipped to resist the familiar charge preferred by detractors of human rights protection instruments that human rights are a one way street.

4. In many of its provisions, the Charter approximates very closely to the European Convention on Human Rights and Fundamental Freedoms ("*The Strasbourg Convention*"). However, its reach is altogether more expansive. In some instances, it goes further than the Convention. Moreover, it enshrines rights which the Strasbourg Convention does not contain – economic and social rights; cultural rights; workers employment and solidarity rights; and a host of others: environmental, consumer, criminal justice, fair trial. The diversity, breadth and evident versatility of the Charter are three of its hallmarks.

(II) <u>The Charter's Origins</u>

5. The twin founding instruments of the Council of Europe and the European Union provide an obvious point of departure. The Statute of the Council of Europe (adopted in London on 5th May 1949) formulated the aim of this newly established organisation in the following terms:

> "*…. To achieve a greater unity between its members for the purpose of safe guarding and realising the ideals and principles which are their common heritage and facilitating economic and social progress.*

By Article 3, every COE member was required to accept *"the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."* This was followed swiftly by the ECHR (operative from ……..), the states signatories whereto resolved as follows:

"…….. *As the governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the [UN Universal Declaration of Human Rights, 10th December 1948]*."

Pausing, one recognises from this text the modest aims of the Convention. It was designed as a **first** step in human rights protection in Europe. The States parties reaffirmed:

"*their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights on which they depend.*"

One can readily identify in the text of the ECHR the origins of the Lisbon Charter, which followed some six decades later.

6. During the same period the rationale, aims and scope of what ultimately became the European Union were the subject of ever increasing expansion, via the Treaties and, notably, the case law of the CJEU. One of the features of this expansion was the progressive influence of human rights protection in the EU machinery. This was, ultimately, reflected in *inter alia*, the second recycle of the Preamble to the TEU [Lisbon, December 2009]:

"***Drawing inspiration*** *from the cultural, religious and humanist inheritance of Europe, from which we have developed the universal values of the unviable and inalienable rights of the human person, freedom, democracy, equality and the rule of law*."

All of these values and standards find expression in Article 1 of the TEU:

"*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.*"

Harmonious with this provision, one of the EU's stated aims in its relations with the wider world is the protection of human rights, in particular the rights of the child: per Article 2/5.

7. The theme of protecting human rights grows stronger and stronger. By Article 6/1 of TEU, the Union recognises the rights, freedoms and principles enshrined in the Charter of Fundamental Rights ("*the Charter*"). Moreover, the Charter is accorded the same legal status as the Treaties. Against this background, the language found in the Preamble to the Charter does not contain anything particularly new, to begin with:

> "*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.*"

However, the immediately succeeding words are novel:

> "[The Union] *places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*"

Notwithstanding its novel nature, this landmark proclamation is readily traceable to the Statute of the Council of Europe, 60 years previously.

8. Panoramically, the Lisbon reforms effected a significant transformation of the EU landscape, with a greater emphasis on human rights protection than ever before. This is reflected in the joint publication of the EU Agency for Fundamental Rights and the European Court of Human Rights in 2011 (page 3):

> "*With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable, but in fact essential ……*"

The human rights revolution in EU law, viewed in retrospect, now appears a natural progression. However, it is nonetheless remarkable, given that this subject did not feature in the European Treaties in their original incarnation. There was no Bill of Rights and nothing equivalent thereto. However, realistically, the EU institutions, in particular the Court of Justice, were bound to be alert to the ECHR machinery, not least because the Statute of the Council of Europe had as one of its aims the achievement of greater unity amongst European states and devised an elaborate human rights protection model as one of the vehicles for this. Furthermore, the Court of Justice found itself operating in an environment in which many of the Member States

had written constitutions. In retrospect, it is unsurprising that these constitutions began to have an impact, given the composition of the Court of Justice, particularly in cases where there was an interface between EU law and national constitutional law.

9. In the EU legal order, the Court of Justice progressively assumed responsibility for the recognition and protection of fundamental rights and freedoms. The jurisprudence of the Court gradually developed the doctrine that EU law contained unwritten principles protecting fundamental rights and freedoms. This facilitated the task of establishing EU law as supreme, a new supranational legal order and eased the tensions and uncertainty which had arisen from the allegiance of national Constitutional Courts and Supreme Courts to their respective constitutions. In this way, the Court of Justice was doing more than paying mere lipservice to the constitutional traditions of EU member states. Moreover, it was gradually recognising the elephant in the room, namely the ECHR and other international treaties of which Member States were signatories. Doctrinally and conceptually, all of this was expressed in clear and comprehensive terms by the Court in **Kremzow – v – Austria** [1997] ECR I-2629:

> "[It is] *…… well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the* [ECHR] *has special significance. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed.*"

Thus the protection of fundamental rights evolved under the guise of one of the general principles of EU law.

10. In its landmark statement in the **Kremzow** case (*supra*), the Court of Justice enunciated that one of its tasks was to ensure compatibility with fundamental rights, particularly those enshrined in the ECHR, within the field of application of EU law. In the **Kondova** case [2001] ECR I-6427, the Court of Justice had forged an important nexus between the Treaty right of establishment and the affected rights of the individual concerned, particularly the ECHR rights to respect for family life and property. The gradual expansion of EU protection for fundamental rights under the guise of general principles of Community Law, was graphically expressed by the Grand Chamber of the CJEU in the **Telefonica** case [2008] ECR I-271:

> "[68] …… *Member states must, when transposing the*

Directives ..... take care to rely on an interpretation of the Directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those Directives, the authorities and Courts of the Member States must not only interpret their national law in a manner consistent with those Directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."

By this stage of its evolution, the jurisprudence of the Court of Justice had developed the principles of equal treatment, non-discrimination, transparency, legal recognition and protection of fundamental rights and freedoms in the jurisprudence of the Court of Justice was a natural progression. Furthermore, this did not require any formal links with the Strasbourg Court. Rather, these two supra national Courts developed a process of dialogue through their decision making.

11. Article 6/3 TEU may be viewed as the culmination of several decades of jurisprudence of the Court of Justice. It provides that fundamental rights **shall** constitute general principles of EU law. The definition of "*fundamental rights*" is especially noteworthy. It consists of those rights guaranteed by the ECHR **and** resulting from the constitutional traditions common to the Member States. The previous era – characterised by the imaginative, sophisticated and, arguably, somewhat clandestine approach of **discovering and implying fundamental rights –** has undoubtedly been superseded by a model which is transparent, unequivocal and dynamic. A new era in the EU legal order has unmistakably dawned. Hallmarks of this new legal order include visibility, coherency, accessibility and transparency.

12. This prompts a brief reference to another development of indisputable and historic importance, namely the proposed accession of the EU to the ECHR. It is impossible to divorce this measure from the context already outlined. The proposal is not novel. It first surfaced in the 1970s, enthusiastically espoused by the European Commission [see particularly the Memorandum of 4th April 1979 – Bulletin of the EC, Supplement No 2/79]. Interestingly, as this idea evolved, the Court of Justice had a significant part to play. In 1996, it delivered an advisory opinion in response to a request by the Council. The Court opined that EU accession to the ECHR would result in a substantial change to its system for the protection of human rights and that the EU lacked the necessary competence to become a party to the ECHR (Opinion number 2/94 [1996] ECR I-1759). During the period which followed, the Fundamental Rights Charter was first proclaimed, on 7th December 2000. The nexus between these two highly significant developments is plain to see.

13. The ECHR working group has advocated strongly that EU accession to the ECHR will provide natural and legal persons with ECHR protection against acts of EU institutions, including the Court of Justice, comparable to that already in place vis-à-vis national authorities. Accession would place the EU in a position analogous to that of its Member States. The position of the Court of Justice would be comparable to that of any national court of last resort. In this scenario, the Lisbon Charter would approximate to a national constitutional instrument or bill of rights – restricted to, of course, its constrained sphere of operation. The overarching motivation is probably best described as establishing and guaranteeing a more coherent and harmonious system for the protection of human rights throughout the EU area. Political and symbolic thinking, with both internal and external dimensions, is also evident.

14. The COE perspective is noteworthy. This is to the effect that the EU has developed a legal order separate from that of the COE/ECHR machinery, with its own Supreme Court, the CJEU. All EU Member States are also parties to the ECHR. It is suggested that the non-membership of the EU itself is anomalous, particularly since the EU is founded on respect for fundamental rights, the observance whereof is ensured by the CJEU. Whereas all EU Member States have an obligation to comply with the ECHR irrespective of whether they are operating within the realm of EU law, this does not apply to the EU institutions. Thus, it is argued, EU accession to the ECHR will strengthen the protection of human rights in Europe by submitting the EU legal order to this control and supervision **and** by giving EU citizens the same protection vis-à-vis acts of the EU as they presently enjoy vis-à-vis Member States.

15. Accession by the EU to the ECHR has not materialised, overnight or at all. Over three years after adoption of the Lisbon Treaty, this historic act remains a work in progress. The provisions of the ECHR itself have not been the stumbling block. Article 59(2) was amended by Protocol Number 14, paving the way for EU accession, with effect from 1st June 2010 (just 6 months after the operative date of the TEU and its two sister instruments). Protocol No 14 was no newcomer, having been first drafted in 2004. From that date, the need for an accession treaty between the EU and the State parties to the ECHR was recognised. Since mid-2010, the COE steering committee for human rights (the "CDDH") and the European Commission (representing the EU) have been in negotiations. These two groups have held a series of working meetings. There have also been formal discussions between the ECTHR and the CJEU. These have focused particularly on the question of whether the CJEU should be involved prior to engagement of the ECTHR in cases where the EU is a Respondent. A draft Accession Agreement has been in existence since October 2011.

(III) The Flourishing Charter: Asylum and Immigration Cases in the EU Legal Order

16. In **MM – v – Minister for Justice (Ireland) and Attorney General [Case C-277/11]** the Irish High Court made an Article 267 reference in a

case involving an application for subsidiary protection viz the protection which can be claimed by a third country national who does not qualify as a refugee but in respect of whom there are substantial grounds for believing that, if returned to the country of origin, the person would face a real risk of suffering serious harm: per Article 2(3) of Directive 2004/83, the "Qualification" Directive. The Applicant was a Rwandan national. Article 4(1) of the Directive provides that: "…. *It is the duty of the Member State to assess the relevant elements of the application.*" The reference to the CJEU concerned the content and scope of this obligation. The prominence given by the CJEU to Article 41 of the Lisbon Charter in its judgment is striking. Article 47 also features: see paragraphs [3] – [4]. The Court analysed Article 4 of the Qualification Directive as involving a two stage "assessment": establishing the facts [stage 1] and then applying the relevant legal rules [stage 2]. The Court specifically held that stage 1 could, in a given case, involve requests by the relevant national authority to the applicant for further information, noting simultaneously that national authorities may be better equipped than the applicant to obtain same. The Court then proceeded to examine "*more generally*" what it described as "*the question of the right of a foreign national to be heard in the course of examination of his* [subsidiary protection] *application*": paragraph [75]. In doing so, it drew on its jurisprudence which establishes that the observance of the rights of the defence is a fundamental principle of EU law (for example **Krombach** [2000] ECR I – 935, paragraph 42]. It continued:

> "[82] *……. That right is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to a fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration …… [83] …..* [which] *includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy and the obligation of the administration to give reasons for its decisions*".

Tellingly, the Court emphasised that Article 41 is a provision "***of general application***": paragraph [84]. As a result, where (as in the case of Ireland) the legal system of a Member State has separate procedures for dealing with asylum and subsidiary protection –

> "[91] *…. it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures*".

17. In discursive mode, I focus particular attention on the European Court's answer to the first question referred. In the first place, this answer is provided in the circumscribed context of Article 4(1) of the Qualification

Directive. Secondly, it is couched in narrow terms: Article 4(1) does not require the relevant national authority, prior to making its decision, to inform the applicant that it proposes to reject his application and to notify him of its proposed reasons for doing so, so as to enable him to make known his views in that regard **after he has been refused refugee status**. The unexpressed premise is that the person affected has already had a fair opportunity to be heard **and** has no new evidence to present and no new or modified representations/arguments to make. Furthermore, this answer to the first question does not absolve the national authority from ensuring that the subsidiary protection decision making process is itself fair **and** does not prevent the person affected from making properly informed representations. Nor is there any prohibition on the person's ability to submit new evidence and/or new representations. Finally, there is no suggestion that the national authority is **not** obliged to consider any such material. Thus it may be said that the Court's answer to the first question is of narrow compass. Moreover, given the Court's answer to the second question – in which the Charter shines like a beacon – the practical impact of the first answer may, in practice, be fairly nugatory.

18. In the wake of the decision of the CJEU, the Irish High Court held that in the determination of applications for subsidiary (ie humanitarian) protection by a failed asylum applicant, there is a discrete right to be heard and a correlative duty on the responsible Minister to give the application separate, independent consideration. Thus the Minister was held to have erred in law by relying slavishly on credibility findings adverse to the person concerned previously made by the Refugee Appeal Tribunal. The Court held that the Minister had failed to give the applicant a fair hearing. The issues which arose in **MM** form part of the staple diet of judges and practitioners in common law jurisdictions. The latin maxim "*audi alteram partem*" has long been a cornerstone of the common law right to a fair hearing. Furthermore, one of the indelible features of this right is its contextual nature: in determining its content and scope in any given case, the Court must be acutely alert to the factually sensitive context. My final comment is that while Article 41 of the Charter has an obvious affiliation with Article 6 ECHR, its reach is substantially wider.

19. The decision of the Irish High Court in **MM** postdated the landmark judgment of the Grand Chamber of the CJEU in the combined cases of **NS** and **ME** [2011] EUECJ C-411/10, pursuant to preliminary ruling references under Article 267 TFEU by the Court of Appeal of England and Wales and the Irish High Court. The subject matter of these references was the interpretation of Article 3(2) of the Dublin II Regulation [343/2004]. They concerned asylum applicants who were to be returned to Greece by the relevant authorities of the two Member States involved. In **NS**, there was a single litigant, who originated from Afghanistan. In **ME (and others)** there were five litigants who had originated from Afghanistan, Iran and Algeria. All of them had travelled through Greece en route to the United Kingdom and Ireland. Their asylum applicants were lodged in the United Kingdom and Ireland respectively. Before the national authorities and courts of these two

Member States, they resisted return to Greece on the ground that this would violate their fundamental rights under EU law and the ECHR. Specifically, they asserted the existence of inadequate procedures and conditions for asylum applicants in Greece and a risk of refoulement, ill treatment or suspension of their asylum claims contrary to Article 3 ECHR.

20. There was significant focus on Article 3(2) of the Dublin II Regulation. This empowers a Member State, *at its discretion,* to examine an application for asylum lodged with it by a third party national where it is not obliged to do so under the Regulation. Where this occurs, such state becomes the 'responsible' Member State. The first question for the CJEU was whether a Member State's decision under Article 3(2) falls within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter. The Court (unsurprisingly) answered this question affirmatively: see paragraph [69]. Four of the other five questions referred focused on the conditions prevailing in the proposed responsible Member State, Greece. In answering these questions, the Court drew attention to the Common European Asylum System, which is based on the full and inclusive application of the Geneva Convention and the guarantee that no person will be returned to a place where they again risk being persecuted. The Court also referred to Article 18 of the Lisbon Charter and highlighted the principal of mutual confidence among EU member states. The Court concluded:

    (a) There can be no conclusive presumption that the responsible Member State observes the fundamental rights of the EU.

    (b) The transfer by a Member State to the responsible Member State is unlawful where the former State is aware of systemic deficiencies in the asylum procedure and reception conditions in the second State, such as to amount to substantial grounds for believing that the claimant would face a real risk of inhuman or degrading treatment. This would be unlawful **as contrary to Article 4 of the Lisbon Charter:** see paragraphs [94] and [106].

    (c) **Articles 1, 18 and 47 of the Lisbon Charter** (the right to human dignity, the right to asylum and the right to an effective remedy and a fair trial) do not require a different answer to the four questions concerned.

Finally, the Grand Chamber declined to construe the joint UK/Polish protocol as conferring any exemption on either of these Member States from the fundamental obligation to comply with the provisions of the Charter: see paragraph [120].

21. One reason why I have devoted time and attention to the joint decision in **NS** and **ME** is that, throughout the lifetime of the UK litigation and the ensuing Article 267 reference, the Lisbon Charter was largely dormant in the

United Kingdom. The Grand Chamber's judgment was promulgated on 21st December 2011. Notably, while various provisions of the Lisbon Charter featured, the judgment of the Court gave prominence to Article 4 (the prohibition against torture and inhuman or degrading treatment) only. It was not founded on Article 1 (the protection of human dignity) or Article 18 (the right to asylum). Thus, from the perspective of the Charter, this undoubtedly landmark decision was of comparatively narrow dimensions. Moreover, one must not overlook that while the Article 267 references were progressing to a hearing, the European Court of Human Rights made a decision of some significance, in **MSS – v – Belgium and Greece** [2011] …….. By this decision two Member States were found to have violated the claimant's rights under Article 3 ECHR: Greece, on account of the applicant's detention and living conditions there **and** Belgium, by exposing the applicant, by transfer, to these conditions and, further, by exposing him to the risks arising out of the significant deficiencies in the Greek asylum procedures. This clearly influenced the Grand Chamber's approach to Article 4 of the Charter in the particular circumstances of the two references. Furthermore, in this way, there was no disharmony in the decisions of these two supranational courts. Given that some of the Lisbon Charter rights replicate, or approximate very closely to, ECHR rights, the future interaction between these two courts will be extremely interesting – particularly if any indications of disagreement materialise.

22. The Lisbon Charter loomed again in the case of **CIMADE** [Case C-179:11, 27/09/12]. Here, the relevant juxtaposition was that of the Reception Directive [2003/9/EC] and Article 1 of the Charter. The questions referred under Article 267 TFEU raised the issue of whether the obligation to guarantee the minimum reception conditions under the Directive rested on the transferring Member State or the responsible Member State or both, giving rise to associated issues of timing and succession. The CJEU gave judgment on 27th September 2012. In answering the questions referred, the CJEU stated:

> "*The provisions of Directive 2003/9 must also be interpreted in the light of the general scheme and purpose of the Directive and,* ***in accordance with recital 5 in the preamble to that Directive, while respecting the fundamental rights and observing the principals recognised in particular by the Charter. According to that recital, the Directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter.***"
>
> [Emphasis added]

Thus, the Court held, the obligations under the Directive apply not only to asylum applicants awaiting the decision of the responsible Member State, but also to those awaiting a "Member State allocation" decision: see paragraph [43]. The Court further held that this obligation endures until transfer to the

requested Member State has been effected: paragraphs [58] and [61]. By way of commentary, it may be said that the influence of the Lisbon Charter in this case, while significant, was indirect.

23. I shall deal briefly with some of the most recent decisions of the CJEU concerning the Charter, which have received much attention. In **Melloni – v – Ministerio Fiscal** [Case C-399/11, 26/02/13], the Constitutional Court of Spain made an Article 267 reference concerning national EAW procedures and decisions. In very brief compass, the Italian authorities requested Spain to issue an EAW for the execution of a prison sentence against the Applicant pronounced in his absence. Could the Spanish judicial authority refuse to execute the warrant on the ground that there was no procedure for reviewing the sentence in the requesting Member State? The Grand Chamber answered "no". Next, the Court focused its attention on Article 4a(1)(a) of Framework Decision 2002/584, which prescribes the circumstances in which the person concerned is deemed to have waived, voluntarily and unambiguously, his right to be present at the trial giving rise to the relevant sentence. The question was whether this provision is compatible with the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter. The Grand Chamber answered this question affirmatively. In doing so, it recalled that an accused person's right to attend his trial is not absolute and is capable of being waived: see paragraph [49]. Accordingly, while the aspiration of a Member State may be to confer on a person rights over and above those belonging to the EU legal order (for example, to give effect to a specific constitutional right) this is impermissible where it compromises the efficacy and operation of a relevant measure of EU law. In summary, it –

> "[63] *.... would undermine the principles of mutual trust and recognition which* [the Framework Decision] *purports to uphold and would, therefore, compromise* [its] *efficacy ....*"

In this way, the CJEU reaffirmed the primacy of EU law and interpreted Article 53 of the Charter to this end.

24. The decision of the Grand Chamber in **Aklagaren – v – Fransson** [Case C-617/10], also very recent, has generated some controversy. It concerned two provisions of the Charter. Firstly, Article 50, the "ne bis in idem" principle) and Article 51 (scope of the Charter). The decision of the Grand Chamber has, broadly, two dimensions, one narrow and the other more expansive. The narrow dimension held that a Member State which imposes both a tax penalty and a criminal penalty for infringements of VAT laws does not contravene Article 50 of the Charter, provided that the first of these penalties is not criminal in nature (which is a matter for the national legal system). The more expansive dimension of the decision is captured in the following passage:

"[49] *European Union Law does not govern relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that Convention and a rule of national law .....*

European Union Law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it ...."

In other words, national courts must not be placed in a straightjacket in deciding whether a provision of national law is compatible with the Charter. The aspect of the Court's decision which has generated most debate concerns its holding that the Swedish tax penalties and criminal proceedings for tax evasion under scrutiny, constituted the implementation of certain provisions of Directive 2006/112 and Article 325 TFEU. It reasoned that while the relevant national legislation had not been adopted for the purpose of transposing the Directive, its application was nonetheless designed to penalise an infringement of the Directive: see paragraphs [27] and [28]. As a result, Article 51 of the charter applied and the CJEU had jurisdiction to adjudicate on the questions referred. A decision of the influential German Bundesverfassungsgericht, which followed soon afterwards, was scarcely a ringing endorsement of the Grand Chamber's approach [given on 24th April 2013]. Of course, in some Member States, such as Germany, the national laws protecting fundamental rights are highly developed. However, this does not apply uniformly to all Member States. The German Constitutional Court was anxious to confine the decision in **Akerberg** to the specific context of the distinctive features of EU VAT laws.

25. Most recently, in **Schindler – v – Commission** [Case T-138/07], the CJEU had to rule on the compatibility of EU competition enforcement procedures with fundamental rights. The Court held that the European Commission can assume the roles of investigator, prosecutor and enforcer in the sphere of competition laws. In thus holding, the Court rejected arguments that these procedures infringe Article 6 ECHR and Article 47 of the Lisbon Charter. This harmonises with the decision of the ECTHR in **Menarini – v – Italy** [27th September 2011] that a system of administrative enforcement of the EU competition rules is compatible with Article 6 ECHR provided that the decisions of the national authority concerned are vulnerable to review by a judicial body having unlimited jurisdiction: see paragraph [59]. Some commentators view this as a disappointingly conservative decision.

26. The decision of the CJEU in **Association de Mediation Sociale** [Case C-176/12] is awaited with interest, since it raises, in the context of a dispute

between trade union employees and employers, two questions of potentially far reaching effect. The first is whether Article 27 of the Charter applies to a legal dispute between two private parties: or, more broadly, does the Charter have horizontal effect? [Remember the ECHR and HRA 1998 debates?] The second concerns the distinction between rights and principles enshrined in Articles 51(a) and 52(5) of the Charter, in circumstances where the precise classification of Article 57 (right or principle?) is obscure. The Advocate General's opinion was published on 18th July 2013.

27. Finally, I draw attention to three currently pending Article 267 references to the CJEU made by the Netherlands Council of State in proceedings where three asylum applicants claim to have been persecuted on account of their sexual orientation. These cases concern issues of proof and verification. It is argued that it is sufficient for an asylum applicant to simply assert that the person is gay, lesbian or bisexual. It is also contended that to require any further verification of a person's sexuality infringes Articles 3 and 7 of the Lisbon Charter. Once again one has an intriguing juxtaposing of the Qualification Directive and the Charter.

<u>Some Irish Cases</u>

28. The progressive influence of the Charter in the ROI is illustrated in certain other decisions. The following is a brief selection:

- In a deportation case the centrepiece whereof was an asserted consequential denial of education, one finds a fascinating mix of Article 2, Protocol Number 1 ECHR; Article 42 of the Irish Constitution; the Refugee Convention; and Article 14 of the Charter ("*Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education"*): see **D – v – Refugee Appeals Tribunal** [2012] IEHC.

- In a family law case, the final judgment of the Irish Supreme Court followed a fast track reference to the CJEU which confirmed that the Brussels II Regulation, interpreted in light of the right to respect for private and family life protected by Article 7 of the Charter, did not prohibit the requirement in Irish law for agreement or a Court Order as a prerequisite to the acquisition of child custody rights by an unmarried father: see **MCB** [Case C – 400/10].

- In another family law case, the Charter requirement of equality between men and women in all areas [Article 23] was deployed in the interpretation of the Brussels II Regulation in a finding that a child of 6 years should have an opportunity to be heard in an application for return to the place of habitual residence: **MN – v – RN** [2008] IEHC.

- The Charter has also had a manifestation in a corporate law context, entailing an unsuccessful reliance on Articles 16 and 17 (freedom to conduct a business and the right of property) in **McDonagh – v –**

Ryanair [Case C: 12/11, January 2013], following a reference by the Dublin Metropolitan District Court.

- In another case, the compatibility of the Data Protection Directive with Article 8 of the Charter has been raised, generating a pending reference to the CJEU: **Digital Rights Ireland** [Case C – 293/12].

- The limitations of the Charter were highlighted in a jury trial for alleged false imprisonment by the police: **DF – v – Gardai Commissioner** [2013] IEHC.

- Similarly, in a case where the proposed deportation of a family member did not entail deportation of any EU citizen: **Smith – v – Minister for Justice** [2012] IEHC 113. Per Cooke J, paragraph [24]:

> "*It is true of course, that Article 7 of the Charter corresponds to Article 8 of the Convention ……*
>
> *However, as Article 51 of the Charter makes clear, its provisions are addressed to the institutions of the European Union and its agencies; and to the Member states 'only when they are implementing the Union law'. The revocation of a deportation order made under section 3 of the Immigration Act 1999 does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State.*"

This decision also entailed a rejection of a contention based on the **Zambrano** decision.

29. Thus the Charter is alive and flourishing in ROI, where courts have not been hesitant to make references to the CJEU and, in appropriate cases, to invoke the fast track procedure, with resulting impressive expedition, as in **MCB** and **MM** [and see, in a different context, the recent case of **Pringle,** of both ROI and EU constitutional importance**].** Available statistics suggest reliance on the Charter in ROI in some 90 cases to date – in contrast the NI figure seems to be zero.

(IV) <u>Conclusion</u>

29. The growing case law of the CJEU and the experience of the Irish Courts combine to demonstrate the prowess and potential of the Lisbon Charter. No decisively clear orientation is detectable in the decisions of the CJEU. This is perhaps a reflection of the truism that every case has its distinct personality and characteristics. Thus the pendulum will continue to swing from the narrow and immediate to the broad and more distant, from the apparently

bold to the superficially conservative. The operation of the principle of subsidiarity remains something of an *incognito*. One predicts with some confidence that the Charter will feature with increasing prominence in asylum and immigration cases. There are many uncharted waters remaining to be navigated. Judges will look forward to future developments with a mixture of trepidation and fascination.