**Notes for Law Society Panel Contribution**

**EU Law and Human Rights: Implications for Legal Practice in Ireland**

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- Under Article 6(1) TEU, the Charter has the same legal value as the Treaties. But note Article 6(3), which omits reference to fundamental rights deriving from other international human treaties upon which Member States have collaborated or to which they are signatories as constituting general principles of the Union's law, cf. Case 4/73 *Nold v Commission* [1974] ECR 491, para 13; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. What other such treaties have been lost from sight?

- According to Ms Justice Finlay Geoghegan (writing extra judicially), the Charter primarily provides assistance for the interpretation of EU legislation and the interpretation of implementing and transposing measures of Member States.

- This primarily interpretative characterisation is borne out by a consideration of the detailed provisions of Articles 51 and 52 of the Charter.

- At the EU level, fundamental rights cases have a different nature depending on the European fora they are decided in. Thus, cases before the General Court tend to focus more on balancing the societal interest pursued through competition law with the fundamental rights mostly of legal persons rather than natural persons. These cases deal for example with the protection against self-incrimination, the presumption of innocence, rights of defence, equality of arms in terms of access to documentation, and non-retroactivity of sanctions.

- On the other hand, judgments before the CJEU, with the exception of appeal cases from the General Court, tend to be more complex. They deal with situations when fundamental rights are invoked against Member States when implementing Union law, and the question is whether Member States do comply with the Union's fundamental rights standards, as set out in the Charter.

- According to Koen Lenaerts (also extra judicially, The Irish Jurist, 2011), there is a division between the EU and national legal systems, with the EU system providing

the rights and the national legal systems providing the remedies. He is correct in this, and correct also in emphasising the importance of national remedies.

- National courts have a duty under EU law to ensure that national measures falling within the field of operation of EU law accord with respect for fundamental rights as interpreted and applied by the CJEU. As the Grand Chamber of the CJEU emphasised in Case C-275/06 *Produtores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271 at para 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."

- It is also well established that the actions of Member States when seeking to implement or enforce an EU law provision may be subjected to the same fundamental rights review as the CJEU applies to the actions of the EU institutions, Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Case C-235/99 *R v Secretary of State for the Home Department ex parte Kondova* [2001] ECR-I 6427. Furthermore, fundamental rights as protected by EU law govern the actions of Member States when seeking to implement an EU Directive, Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood GSP v Scottish Ministers* [2003] ECR I-7411; as well as in seeking to derogate from it, Case C-260/89 *ERT v DEP* [1991] ECR I-2925, Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* [1997] ECR I-3689, at paras 18-27.

- Critical importance of Article 51(1) of the Charter. A Member State acts within the scope of EU law both when it implements EU law and even when it derogates from EU law, Case C-260/89, *ERT* [1991] ECR I-2925; see also AG Sharpston's Opinion in Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*, 30 September 2010.

- The national courts are assisted in their task by the preliminary reference procedure. As stated by the CJEU in Case C-299/99 *Kremzow v Austria* [1997] ECR I-2629 at paragraph 15:-

> "[W]here national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law."

- It follows from Case C–213/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I–2433 that a referring court must have power to grant interim measures including suspension of statutory provisions. Furthermore, although only an EU court may declare an EU measure to be illegal and thus void, the CJEU has affirmed the entitlement of national courts, where the validity of EU regulations are challenged and where certain conditions are satisfied, to suspend the enforcement of those EU measures pending delivery of the CJEU ruling on the preliminary issues referred, see Joined Cases C–143/88 and C–92/89, *Zuckerfabrik Süderdithmarschen & Zuckerfabrik Soest* [1991] ECR. I–415, concerning the legality of a special EU levy in the sugar sector.

- It also follows from Article 53 of the Charter that the Charter recognises and encourages the capacity for double scrutiny of implementing measures, by reference to national human rights standards as well as Community law, in accordance with what is known as the principle of co-existence of several layers of fundamental rights protection. For example, this Court's judgment in case C-135/08, *Rottmann*, [2010] ECR I-1449, paragraph 55, admits a double scrutiny of national acts implementing Union law, in that case proportionality under EU and national law; cf also Case C – 399/11, *Melloni* (pending). Commenting on this double scrutiny jurisdiction, Clemens Ladenburger, of the Commission Legal Service, in his Report at the XXV Congress of FIDE, in Tallinn, May/June 2012, states as follows:-

> Admittedly, the principle of co-existence of several layers of fundamental rights protection as arguably enshrined in Article 53 has a price: complexity. Particularly in situations of colliding rights, it can become a daunting task for a national administrator or judge to assess which margin, if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case law of the Strasbourg, Luxembourg and the national constitutional court. But in our view, this complexity cannot be avoided by imposing a stern antagonism between applying either the Charter or national fundamental rights. It is rather one more factor commending a prudent determination of the field of application of Article 51 (1).

- In Ireland, the relatively weak manner of incorporation of the ECHR into Irish law by the European Convention on Human Rights Act 2003 means that the remedies available under that Act may not adequately vindicate the rights concerned, particularly where an issue of compatibility of legislation arises. The immunity of acts and measures necessitated by Union membership from review for invalidity on constitutional grounds, pursuant to Article 29.4.10° of the Constitution, provides a further limitation. On the other hand, compliance with EU law is mandatory. Against this background, it is precisely because it is in the exercise of discretions under EU Directives, and under implementing and transposing laws and regulations, that the balance may be tipped against the proportionality of particular measures or decisions, that scrutiny for compliance with Charter rights assumes particular importance.

- EU law itself requires national procedural rules to provide the remedies (of which Judge Laenerts speaks) in a manner that ensures effective judicial protection – see Article 19(1) TEU.

- This reflects the duty of sincere co-operation developed in the case law, but may perhaps also itself derive from Article 51 of the Charter insofar as the courts of Member States may themselves be implementing Union law when interpreting and applying EU Directives and Regulations. Put another way, there is both a positive and a negative obligation on the Member State, including its courts. The State must take positive measures to ensure the fulfilment of EU law, but in addition there is a negative obligation, incumbent on the national referring court, to refrain from an interpretation or application of the national implementing measures that would frustrate the achievement of the Union's objectives including the due protection of fundamental rights deriving from the Community legal order.

- In Case C-1/11 *Interseroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* 29 March 2012 at para 46 the CJEU confirmed – with reference to Articles 15(1), 16 and 17 of the Charter which, provide, respectively, for the right to engage in work and to pursue a freely chosen or accepted occupation, the freedom to conduct a business and the right to property, that the protection of business secrets is a general principle of EU law. But the Court observed that even if a particular requirement under a secondary provision of EU law might be said to constitute a breach of the protection of the business secrets of dealers, that, in itself, did not have the consequence of restricting the scope of a provision of secondary law that was clear and unconditional. It would

appear that the Court considered that provisions of or derived from the Charter could not be relied upon indirectly to affect the interpretation of clearly stated EU law provisions holding instead that any unjustified breach of the protection of business secrets, assuming it were established, would not be such as to limit the scope of the Regulation at issue, but rather to call into question the validity of that provision.

- This contrasts with many other recent cases in which the Charter has been relied upon by the CJEU in preliminary references as an important interpretative aid, see for example Case C-510/10 *DR, TV2 Danmark A/S v NCB - Nordisk Copyright Bureau* 26 April [2012] at para 57, in relation to the Copyright Directive 2001/29/EC; Case C-92/12 PPU *Health Service Executive v S.C. and another*, 26 April 2012, in which the the Brussels II Regulation was interpreted, not surprisingly,in the light of the best interests of the child as protected by Article 24 of the Charter.

- This is akin to an extension of the *Marleasing* principle according to which laws must be interpreted in an EU-compatible manner 'in so far as is possible', Case C-106/ 89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* 1992] 1 CMLR 305. Contrast section 2 ECHR Act 2003.

- See also the decision of the Grand Chamber in Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)* 24 April 2012, in which the Court referred to and relied upon general principles relating to the elimination of social exclusion and poverty (which it saw as implicit within the specific provisions of Article 34 of the Charter - right to social security and social assistance) to the question of the proper interpretation and application of Italian laws concerning the entitlement of third-country nationals, who were lawfully long-term residents in Italy, to housing benefit for low income tenants.

- In Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* December [2011] at para 77 the Grand Chamber CJEU confirmed that the Charter compatible interpretative obligation applies to national courts and other national authorities, as well as to national law within the ambit of EU law:

> "[T]he Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR

I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28)."

- Contrast the outcome in *NS* with the position in respect of European Arrest Warrant decisions, see *Minister for Justice, Equality and Law Reform v Joseph Adam* [2011] IEHC 68 (Edwards J). See also Kuijpers, *Case Comment* (2012) EHRL Rev 397 in which he highlights tensions between the jurisprudence of the CJEU and the ECHR in the context of international child abduction.

- The interpretative obligation is now the subject of a specific question in the preliminary reference made by the High Court earlier this year in *Digital Rights Ireland Ltd v Minister for Communications Marine & Natural Resources* (Question 3). This presents an opportunity for the CJEU to elucidate the particular duty of national courts when interpreting and testing the validity having reard to the Charter of national implementing or transposing measures.

- The tension between i) the principles of the primacy of Union law and of direct effect, and ii) national procedural autonomy, is balanced by two further principles, the principle of equivalence and the principle of effectiveness.

- Equivalence equates with non-discrimination in respect of remedies.

- Effectiveness tackles procedural blocks that make it 'virtually impossible or excessively difficult' to vindicate rights deriving from EU law – now subsumed within Article 47 of the Charter, see *Unibet* [2007] ECR-I 2271, paras 37-45.

- A good illustration of how the principle of effectiveness may operate to temper a strict application of national standing rules, when Charter rights are invoked, may be seen in the judgment of McKechnie J in *Digital Rights Ireland Ltd v Minister for Communications Marine & Natural Resources* [2010] 3 IR 251, paras 43-49.

- Possible implications for national rules of evidence, for example conclusive burdens, immunities etc.

- Note from Case C–268/06, *Impact v Minister for Agriculture and Food and Others* [2008] E.C.R. I–2483 that specialised tribunals may be required to extend their jurisdiction to encompass rights protected by Community legal order including rights

deriving from the Charter. There, the CJEU held that, in so far as dividing an action into two separate complaints would result in procedural disadvantages for individuals seeking to rely directly on EU law, the principle of effectiveness mandates specialised national courts to extend their jurisdiction accordingly, in order to remedy that discrepancy. That would be the case where the costs, the duration, or the rules governing representation rendered the exercise of EU rights excessively difficult. The Court did not decide whether the applicant was actually disadvantaged in the case at hand, that determination being left to the Labour Court.

- Note the recent reference from the Equality Tribunal in *Z v A Government Department & Another*, a claim to discrimination under the Employment Equality Acts arising from the unavailability of paid maternity leave for the mother of a child born to a surrogate, in which one of the arguments advanced by the respondents is that the Tribunal has no jurisdiction to consider the constitutional and fundamental rights issues arising.

- There is now for the first time an express guarantee of legal aid, in Article 47 of the Charter, and the early signs are that the CJEU will carefully scrutinise legal aid schemes for proportionality, as for example in Case C-279/09, *DEB* [2010] ECR I-13849, concerning a requirement of advance payment of costs. The CJEU found that the principle of effective judicial protection, as enshrined in art.47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it was for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule sought to achieve. The Court further held that, in making that assessment, the national court must take into consideration the subject matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him- or herself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.

With regard, more specifically, to legal persons, the national court may take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

- Note also that *DEB* confirms that Article 47 is co-terminous with Article 6 ECHR, so that one can now rely on Article 6 jurisprudence through the prism of Article 47, e.g., in asylum cases. This is quite important.

- It is also of some interest, and potential usefulness, that the right to good administration, as addressed to the institutions of the Union in Article 41 of the Charter, may constitute a general principle of EU law such as to bind Member States when deciding matters falling within the scope of EU law. This proposition, perhaps a surprising one, has been advanced in the Opinion of Advocate General Bot in Case C-277/11 *MM*, 26 April 2012, on a reference from Mr Justice Gerard Hogan in an asylum context, in which he stated:-

> 30. The Court has affirmed the importance of the right to be heard and its very broad scope in the EU legal order.
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> 31. Thus, according to settled case-law, that right is a general principle of EU law pertaining, on the one hand, to the right to good administration, laid down in Article 41 of the Charter and, on the other, to observance of the rights of defence and the right to a fair trial enshrined in Articles 47 and 48 of the Charter.
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> 32. The right to be heard must be applicable in any procedure which may culminate in a decision of an administrative or judicial nature adversely affecting a person's interests. Observance of that right is required not only of the EU institutions, by virtue of Article 41(2)(a) of the Charter, but also – because it constitutes a general principle of EU law – of the authorities of each of the Member States when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement. Consequently, the right to be heard must apply in relation to the procedure for examining an application for international protection followed by the competent national authority in accordance with rules adopted in the framework of the common European asylum system.
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> 33. According to settled case-law, the right to be heard ensures that every person is entitled to make representations, in writing or orally, on the matters on which the authorities intend to base a decision liable to affect him adversely. It requires the authorities to enable the person concerned to consider those matters in the course of the procedure and actually put his case effectively. It also implies that the authorities must take note, with all requisite attention, of the representations made by the person concerned.

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- Note that under Article 5(3) of the Charter, trafficking in human beings is prohibited. Can this simple provision make a difference? Ireland severely lacking in this area.

- In relation to equality and non-discrimination, it appears that Article 21 of the Charter may bolster developments in the case law of the CJEU towards bringing about horizontal direct effect by ensuring that courts must disapply provisions of national legislation that are contrary to the Equality Directives in proceedings between individuals, see Howard, *EU Equality Law: Three Recent Developments* (2011) 17 ELJ 785, 797-798 and the cases cited therein including in particular Case C-555/07, *Kucukdeveci v Swedex GmbH & Co. KG* [2010] All E.R. (EC) 867.

- By contrast, in Case C-400/10 PPU, *J McB v LE* [2010] ECR I-0000 the Third Chamber of the Court of Justice made specific reference to Article 51 of the Charter in the context of a preliminary reference, holding that the Charter's substantive provisions could not be prayed in aid to scrutinise national law (as opposed to the Regulation) which, in the context of a previously stable and long-term cohabitation, gave no custody rights to an unmarried father over his children in the absence of a joint parental agreement or court order.

- Note Article 33(2) of Charter – may surpass Pregnancy Directive and CJEU case law: in Explanations of Praesidium it is stated that pregnancy extends from conception to weaning, cf. Case C-506/06, *Mayr v Backerei Und Konditorei Gerhard Flockner* [2008] ECR I-1017 - "advanced stage of the IVF process" but difficult issue of when life begins neatly avoided.

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**13th October 2012**