

## CURRENT DEVELOPMENTS

### EUROPEAN UNION LAW

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#### I. FUNDAMENTAL RIGHTS

##### *A. Introduction*

The goal of constructing an Area of Freedom, Security and Justice across the Union was agreed at the Tampere EU Summit of 1999. The objective was to create the conditions in which EU citizens could exercise their rights of free movement while at the same time addressing legitimate security concerns. Central to this debate has been the need to ensure that not only are the free movement rights granted by the Treaty protected, but that more broadly, the fundamental rights of EU citizens are not infringed. The Tampere programme was a five-year agenda that concluded in 2004. In June 2004, the Commission presented a Communication taking stock of the implementation of the Tampere agenda and setting future guidelines for a new justice and home affairs strategy for the years to come. Following Council discussions in July and October 2004, the Dutch Presidency produced a new programme for justice and home affairs (subsequently renamed as ‘freedom, security and justice’). This will cover the period for the years 2005–2010, and is known as ‘The Hague Programme: Ten priorities for the next five years—The Partnership for European Renewal in the field of Freedom, Security and Justice.’<sup>1</sup>

Since Tampere, the Union’s policy in the area of justice and home affairs has been developed in the framework of a general programme. Even if not all of the original aims were achieved, comprehensive and coordinated progress has been made. By contrast, the Hague programme is a more specific and direct response by the EU to the security challenges which it faces particularly after the terrorist attacks on Madrid in 2004 and London in 2005. In terms of controlling the movement of citizens into, and within, the EU the objective of the Hague programme is to improve the common capability of the EU to regulate migration flows and to control the external borders of the Union, to fight organized cross-border crime and repress the threat of terrorism. Simultaneously, the Hague programme commits Member States to guarantee fundamental rights and provide minimum procedural safeguards and access to judicial protection in accordance with the requirements of the Geneva Convention.

<sup>1</sup> Council of the European Union *Presidency Conclusions*, 4–5 Nov 2004, Annex 1, 8 Dec 2004, 14292/1/04.

Sensitive to criticism that EU policy may be considered as focused too much upon securitization, the Hague programme includes an important development in relation to the protection of fundamental rights in the EU. To achieve the 2005–10 objectives the Hague programme provides a ‘roadmap’ of ten key priority areas which will require action during this period. At the top of this list is the improved protection, promotion and monitoring of fundamental and citizenship rights. In December 2003, the European Council, stressing the importance of human rights data collection and analysis with a view to defining more closely EU policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia (EUMC) and to extend its mandate to become a Human Rights Agency to that effect.<sup>2</sup> The Commission agreed and submitted a proposal to amend the Regulation<sup>3</sup> establishing the EUMC. Furthermore, the European Council on 16–17 December 2004 called for a rapid implementation of the agreement to establish an EU Human Rights Agency, which it considered as central to playing a major role in enhancing the coherence and consistency of EU human rights policy.<sup>4</sup>

#### *B. Proposal for a Fundamental Rights Agency*

In October 2004 the European Commission, with the full support of the European Council, launched a public consultation on the scope, missions and tasks of the future Fundamental Rights Agency of the EU.<sup>5</sup> The establishment of this Agency raises delicate questions of legal base, as well as the Community’s limited powers in the field of fundamental rights. Since the Agency is an instrument of implementation of a specific Community policy, it follows that the legal instrument creating it must be based on the provision of the Treaty which constitutes the legal basis for that policy. In the current institutional framework, the legal basis for an action in the area of fundamental rights is Article 308 EC thereby necessitating that the instrument setting up the Agency must also be based on this provision.

The Commission’s consultative Communication highlights the key tasks of the Agency and in particular states that the Agency should be a ‘crossroads’ for facilitating contacts between the different players in the field of fundamental rights.<sup>6</sup> The objective of the Agency is to provide the institutions and authorities of the Community, its Member States and civil society with assistance and expertise relating to fundamental rights when implementing EC law. The Agency will seek to promote synergies and increased dialogue between the various stakeholders in the collection of data on racism, xenophobia and other forms of discrimination. Despite the apparent inclusive nature of the proposal it is not without limitations and the Commission’s Communication recognizes that the Agency will not have either judicial or decision-making powers. Perhaps the most appropriate description of the Agency is that by virtue of its advisory status it

<sup>2</sup> Council of the European Union *Presidency Conclusions*, Brussels European Council Meeting, 12–13 Dec 2003, 28. Brussels, 5 Feb 2004, 5.

<sup>3</sup> Regulation (EC) No 1035/97 of 2 June 1997.

<sup>4</sup> Council of the European Union, *Presidency Conclusions*, Brussels European Council Meeting, 16–17 Dec 2004, Brussels, 22. 5 Feb 2005, 1.

<sup>5</sup> Communication of the Commission of the European Communities *The Fundamental Rights Agency Public Consultation Document*, COM(2004)693 final. For the House of Lords’ EU Committee response see: 29th Report of Session 2005–6, HL Paper 155 (4 Apr 2006).

<sup>6</sup> *ibid* 3.

will be an instrument to coordinate European policies on fundamental rights and will, where appropriate, indicate best practice solutions for the Member States. A formal task of the Agency will be to encourage Member States to exchange information and experiences in relation to balancing security concerns while guaranteeing a high standard of human rights.

The Communication emphasizes that the tasks of the Agency should not encroach on the powers conferred by the Treaties upon the EU institutions, nor should it interfere with the supervisory role of the European Commission as regards the application of EC law. Specifically, the primary task of the Agency will be to carry out technical, research or administrative tasks which come within the objectives of Article 308 EC. Consequently, the proposed Regulation<sup>7</sup> limits the Agency's substantive mandate to reviewing activities of the Member States within the competencies of the Community pillar and does not extend to enforcing compliance when Member States act autonomously outside that framework.<sup>8</sup> The scope will be marginally extended to the third pillar matters, albeit only those relating to police and judicial co-operation in criminal matters under Articles 30, 31, and 34 TEU. This is achieved through the inclusion of a parallel Council Decision annexed to the Regulation.

The Agency's geographical scope focuses on the Union and the Member States as well as to the present and potential candidate countries which participate with the Agency by virtue of a Council decision. As regards other third countries, the Regulation provides that the Commission may request information and analysis on the fundamental rights situation in such countries with which the Community has concluded an association agreement or an agreement including a human rights clause, or with which the Community has opened or intends to open negotiations over such agreement. This would include, for example, the Western Balkans and the Neighbourhood Policy countries.

By building upon the work of the EUMC it is envisaged that the Agency will monitor more broadly the application of fundamental rights across Community policies and move beyond the narrow remit of racism and xenophobia. The Charter of Fundamental Rights is the point of reference for the mandate of the Agency but the Charter lacks legal force and to date has not been formally acknowledged by the Court of Justice.<sup>9</sup> Consequently the Agency has acquired a role of being responsible for the general promotion of the Charter and to raise awareness of the Charter and fundamental rights amongst all actors. The designation of this task to the Agency would appear to suggest that the Commission and Member States had anticipated that the Constitutional Treaty would be ratified, thereby providing the Charter with a clear legal status. The consequence of the French and Dutch 'No' votes has left the Charter in a legal limbo and raises questions as to how, and to what extent, the Agency will be able to achieve this objective. While the activities of the Agency are subject to the jurisdiction of the Court of Justice<sup>10</sup> and can be reviewed under both Articles 230 and 232 EC, the substantive

<sup>7</sup> Proposal for a Council Regulation Establishing a European Union Agency for Fundamental Rights, COM(2005)280 final.

<sup>8</sup> *ibid.* Proposal for a Council Decision Empowering the European Union Agency for Fundamental Rights to Pursue its Activities in Areas Referred to in Title VI of the Treaty on European Union.

<sup>9</sup> This policy is evident in the case law of the Court. See, eg, Case C- 50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

<sup>10</sup> See Art 29.

issue of permitting review by the Court of Justice of breaches of fundamental rights granted within the Charter is not provided for by the Regulation. Finally, the Agency has no powers to examine individual complaints or carry out normative monitoring for the purposes of Article 7 TEU.

A key task identified for the Agency will be to promote a closer synergy with the work of the Council of Europe. This idea also appears to be based upon the premise that with the Constitutional Treaty ratified the EU would have become a signatory to the European Convention on Human Rights. The Regulation provides for a cooperation agreement to be concluded between the Agency and the Council of Europe. In the context of national human rights institutions, coherence and cooperation will be ensured with independent persons appointed by the Member States to the Management Board of the Agency who will, when appropriate, represent the national institutions. The Council will negotiate over the final proposals with the European Parliament being consulted through an informal trilogue between the three institutions. It is intended that the Agency will be operational from 1 January 2007.

The creation of a Fundamental Rights Agency is an attempt by the EU to create a 'joined up policy' in relation to the protection of fundamental rights. The establishment of the Agency is the latest in a series of developments in the field of human rights in the EU. To date other developments include the adoption of the Charter of Fundamental Rights in 2000, the establishment of an EU Network of Independent Experts in Fundamental Rights in 2002, a Commission communication on the possible application of Article 7 of the Treaty on European Union (TEU) in 2003 regarding human rights compliance by EU Member States, and the establishment in 2004 of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities headed by Commission President Barroso. On paper, at least, these developments constitute significant progress towards shaping a distinct and strong human rights policy in terms of standards, institutional framework and implementation and enforcement within the EU. In reality, the impact so far has been minimal and it is difficult to envisage the Agency faring any better.

With the EU's constitutional process in limbo, the prospect of making clear progress is weakened in the area of human rights. The Charter of Fundamental Rights, which was to be incorporated into the Constitutional Treaty, now remains in the form of a Declaration. The planned accession of the EU to the European Convention on Human Rights is for the same reason delayed, and perhaps in doubt altogether. The failure to ratify the Treaty calls into question the reality of the Agency being able to fulfil the tasks it has been designated. Consequently the EU appears to be adopting a minimalist concept for its proposed Fundamental Rights Agency.

At a time when the EU is facing significant security challenges, it is also under pressure from its citizens to ensure that their fundamental rights are not overridden when facing up to terrorism or organized crime. The absence of a legal status for the Charter makes this task more difficult for the Agency and raises the question of whether the Agency will have both the resources and status to make a significant impact. Under the existing Treaty framework the Agency would appear to be able to do no more than 'name and shame countries' which are in breach of Charter principles within the context of first pillar activities. While the impact of the Agency is likely to be limited, the creation of the Agency should not be dismissed, if for no other reason that it continues the political momentum and progress towards creating an internal EU human rights policy. In this context, the specific task of the Agency to raise awareness of fundamen-

tal rights will be an important role and may help to maintain the issue of fundamental rights close to, if not at the top of, the EU agenda while the EU ‘pauses for reflection’ and considers what the next step should be to achieving a broader constitutional settlement.

## II. EU CITIZENSHIP

### A. Introduction

The Court has continued with its expansive interpretation of the Citizenship provisions in Article 18 EC which it had previously acknowledged as being a fundamental right granted to all EU citizens by the Treaty.<sup>1</sup> The case-law of the Court has, in particular, stressed the relationship between the free movement rights under Article 18 EC and preventing discrimination against EU nationals on grounds of nationality and without which the Citizenship provisions would lack force. Two recent judgments of *Bidar*<sup>2</sup> and *Ioannidis*<sup>3</sup> demonstrate the extent to which the Court will prevent covert discrimination on grounds of nationality. In a third judgment, that of *Schempp*,<sup>4</sup> the Court, seemingly sensitive to criticism of interfering in domestic tax policy, adopts a more measured interpretation of discrimination when considering whether the rights granted under Article 18 EC are interfered with.

### B. Case Law

In *Bidar*, a French national, moved to the United Kingdom in August 1998, accompanying his mother who was to undergo medical treatment there. He lived with his grandmother and completed his last three years of secondary education. In September 2001, he enrolled at University College London and applied to the London Borough of Ealing for financial assistance. While he was granted assistance with tuition fees, he was refused a maintenance loan on the basis that he was not ‘settled’ in the United Kingdom.

The Court held that an EU citizen who is lawfully resident in another Member State can rely on the prohibition of discrimination on grounds of nationality in all situations which fall within the scope of Community law, and this includes the exercise of rights under Article 18 EC. In this case the Court stated that the Treaty does not exclude from its scope students who are EU citizens and pursue educational studies in another. On the contrary the Court held that a national of one Member State who moves to another and pursues secondary education exercises the freedom to move guaranteed by Article 18 EC. The Court makes clear that a national of a Member State who, like Mr Bidar, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of Article 18 EC and Directive 90/364 on the right of residence.<sup>5</sup> The judgment confirms that the principle of equal treatment

<sup>1</sup> See, eg, Case C-148/02 *Garcia Avello* [2003] ECR I-7091.

<sup>2</sup> Case C-209/03 *Bidar* [2005] ECR I-2119. See also RCA White ‘Free Movement, Equal Treatment and Citizenship of the Union’ (2005) 54 ICLQ 885, 899.

<sup>3</sup> Case C-258/04 *Ioannidis* [2005] ECR I-8275.

<sup>4</sup> Case C-403/03 *Schempp* [2005] ECR I-6421.

<sup>5</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence. This Directive will be replaced by Directive 2004/38/EC on the right of citizens of the Union to move and reside freely within the territory of the Member States, ‘the Citizenship Directive’.