Chapter 3

The EU Charter of Fundamental Rights and Immigration and Asylum Law

1. Introduction

The tension between a rights-based approach to immigration and asylum policy and states’ desire to control their borders and populations as an essential aspect of their sovereignty is well-known. Inevitably, when the European Union (EU) institutions finally, after decades of discussion, decided to draw up a European Union Charter of Fundamental Rights, immigration and asylum matters proved to be controversial issues. With the enhanced legal effect of the Charter resulting from the entry into force of the Treaty of Lisbon, and the subsequent pre-eminence of the Charter in the relevant case law of the Court of Justice, the Charter is now playing a significant role in the development of EU immigration and asylum law.

2. Background and Context

2.1. Before the Treaty of Lisbon

As is well known, the three founding treaties of the European Communities initially made no reference to human rights. The European Court of Justice therefore at first rejected arguments that Community legislation (as it then was) could be invalid for breach of human rights. When the German and Italian courts in particular faced such allegations, they felt obliged to apply the human rights protections in their national constitutions, threatening the supremacy of Community law. The Court of Justice responded by ruling that protection of human rights was one of the general principles of Community law after all.2

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1 This chapter is an adapted and updated version of “Immigration, Asylum and the EU Charter of Fundamental Rights”, in Guild and Minderhoud, eds., The First Decade of EU Migration and Asylum Law (Brill, 2011), 437–78.

Community measures had to be interpreted in light of such general principles and could be ruled invalid in light of such principles, but it was not permissible to apply national concepts of human rights protection to find that Community law was invalid. The sources of such principles were international treaties upon which Member States had collaborated and principles common to national constitutions. One particular international source of the human rights principles of Community law was the European Convention on Human Rights (ECHR), which obtained a privileged place as part of the Community concept of human rights protection.

The Community institutions responded to this case law by agreeing a Declaration confirming it. Subsequently, the 1986 Single European Act, the first major amendment to the EC Treaties, referred to human rights protection in its preamble, and the 1992 Treaty on European Union contained an Article F(2) (later Article 6(2), after the entry into force of the Treaty of Amsterdam) stating that the 1950 ECHR and the constitutional traditions common to the Member States were general principles of Community law. This Article appeared to suggest a narrower range of sources for the EC human rights principles. Moreover, according to Article L of the EU Treaty, Article F(2) was not justiciable before the Court of Justice.

Nevertheless, the Court continued to apply its prior jurisprudence concerning human rights as a general principle of Community law, and also continued to draw upon other international treaties besides the ECHR, as well as the Protocols to the ECHR, as sources of EC human rights protection. However, the scope of application of human rights as a general principle of Community law always remained subject to limits: the Court continued to rule that the principles only applied as regards Community acts or Member States’ application of or derogation from those acts. The Treaty of Amsterdam of 1997, which entered into force on 1 May 1999, amended Article L EU (then renumbered Article 46 EU) to give the Court of Justice jurisdiction to interpret Article 6(2) EU, to the extent that the Court had jurisdiction over measures conferred by the EC or EU Treaties.

Following the entry into force of this Treaty, the Court of Justice asserted that Article 6(2) EU merely confirmed the prior jurisprudence of

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4 Case law beginning with Case 222/84 Johnston [1986] ECR 1651.