



Funded by the European Union's Justice Programme (2014-2020).

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1. Case Study 5 - Use of psychological tests to confirm sexual orientation

Field - Asylum and migration

Handout for participants

The facts of the case

In April 2015, Mr Okorie, a Nigerian national, submitted an application for asylum in an EU Member State. In support of that application, he claimed that he had a well-founded fear of being persecuted in his country of origin on account of his homosexuality. As a result of a decision made on 1 October 2015, the national immigration authorities rejected Okorie's application for asylum. Although they considered that his statements were not fundamentally contradictory, they concluded that he lacked credibility on the basis of a psychologist's expert report. That expert's report entailed an exploratory examination, an examination of his personality and several personality tests, and concluded that it was not possible to confirm Okorie's assertion relating to his sexual orientation.

Okorie brought an action before the national administrative court, contending in particular that the psychological tests he had undergone seriously prejudiced his fundamental rights under Article 1 (human dignity) and Article 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union (the Charter) and did not make it possible to assess the plausibility of his sexual orientation. The national immigration authority contested the violation of fundamental rights, stating that the tests are necessary to confirm sexual orientation and do not involve any physical examination or an obligation to view pornographic photographs or videos. In addition, Okorie consented to the test.

Which pieces of EU Law are relevant here?

Charter

Article 1 – Human dignity

“Human dignity is inviolable. It must be respected and protected.”

Article 7 – Respect for private and family life

“Everyone has the right to respect for his or her private and family life, home and communications.”

Article 47 – Right to an effective remedy and to a fair trial

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

“Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Qualification Directive 2011/95/EU¹

Article 4 provides that:

“1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

“2. The elements referred to in paragraph 1 consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

“3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

“(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

“(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

“(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

“(d) whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

“(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.”

It follows from the case law of the Court of Justice of the European Union (CJEU) that Article 4 of Directive 2011/95/EU does not preclude national immigration authorities from ordering that an expert’s report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant.

Questions

¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337, p. 9.

Please answer question 1 before moving on to the next questions.

Question 1: Mr Okorie claims that certain aspects of the procedure before the national court violate Article 47 of the Charter (effective judicial protection). Does Article 47 of the Charter apply to the proceedings before the national administrative court?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b. Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.
- c. No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Notes

Assuming the Charter applies:

Question 2: Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 1 and 7 of the Charter must comply with the same standards as those laid down by the ECHR and the case law of the European Court of Human Rights (ECtHR).

Notes

Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation? Specify the Charter provisions that are relevant to this question and the relevant factors to be taken into account.

Notes

Background information for trainers

Introductory Notes

This case study is based on CJEU, C-473/16, *F.*, ECLI:EU:C:2018:36, 25 January 2018.

The case study only concerns the first question (see *F.*, paragraphs 47–71) on the *psychologist's* expert report. The fact that the French and Dutch governments as well as the Commission had vigorously contested the reliability of the expert's report at issue is left outside the case study (see *F.*, paragraph 58).

Questions and Answers

Question 1. Does Article 47 of the Charter apply to the proceedings before the national administrative court?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.**
- c. No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *F.*, and Article 47 of the Charter does not play a role in that case.

Correct answer

Option b is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by the Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 4 of Directive 2011/95/EU, which concerns the duty of Member States to assess the relevant elements of the application for international protection.

Option c is not correct. The exercise by Member States of such discretion qualifies, in principle, as “implementing Union law”, regardless of whether it concerns a mandatory or optional exercise of discretionary powers (see situation A.3 in the FRA handbook). That is why *option c* is not correct. In addition, it is possible to refer to situation A.4 in Chapter 7 of the FRA handbook: measures falling within the procedural autonomy of Member States qualify as implementation in the sense of Article 51 (1) of the Charter.

Option a is not correct (see introductory remarks).

Option d is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the explanations on Article 47 and Article 52 (3) of the Charter).

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant to the interpretation of Articles 1 and 7 of the Charter.

Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 7 of the Charter. In this case, however, the CJEU does not refer to case law of the ECtHR. This is probably because the use of a psychologist’s expert report on the basis of projective personality tests does not pass the proportionality test of Article 52 (1) of the Charter.

Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR (“corresponding rights”). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see the last sentence of Article 52 (3) of the Charter, and Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

“3. In so far as this Charter contains rights which correspond to rights guaranteed by the 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. This provision shall not prevent Union law providing more extensive protection.”

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and in the explanation on the specific Charter provision at issue in 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

Explanation on Article 7 – Respect for private and family life

"The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology, the word 'correspondence' has been replaced by 'communications'.

"In accordance with Article 52 (3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Explanation on Article 52 – Scope and interpretation of rights and principles

"Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR: [...] Article 7 corresponds to Article 8 of the ECHR,".

Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation?

Introductory remarks

Chapter 8 of the FRA handbook gives a structured framework for the examination of whether or not a national provision is compatible with the Charter. To make sure all necessary steps are taken, it is advisable to use this checklist. In this case, the assessment should involve Article 52 (1) of the Charter (the general clause for limitations).

The conditions laid down in Article 52 (1) of the Charter are as follows.

- Are the limitations provided for by law?
- Is respect for the essence of the fundamental right at issue guaranteed?
- Do the limitations serve a legitimate objective?
- Is the limitation appropriate to address the problem identified?
- Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?
- Are the limitations proportionate to the aim pursued?

In this case, the focus is on the *proportionality test*.

Correct answer

No. It is incompatible with Article 7 of the Charter (see *F.*, paragraphs 50–70). The CJEU does not deal with Article 1 of the Charter.

Explanation

The use of a psychologist's expert report such as that at issue in the main proceedings constitutes an interference with that person's right to respect for their private life (see *F.*, paragraph 54). The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is, in view of its nature and subject matter, *particularly serious* (see *F.*, paragraph 60).

In this regard, it is relevant that consent is not necessarily given freely; it is de facto imposed under the pressure of the circumstances in which applicants seeking international protection find themselves (see *F.*, paragraph 53).

As this case concerns an interference, the conditions laid down in Article 52 (1) should be checked (see introductory remarks).

The CJEU goes directly to the proportionality test. What is decisive is that the impact of such an expert's report on the applicant's private life seems disproportionate to the aim pursued. In the light of the seriousness of the interference with the right to privacy, the test cannot be regarded as proportionate to the benefit that it may represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95/EU. The following elements viewed together are relevant in this regard.

- The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is particularly serious.
- Such an expert's report is based, in particular, on the fact that the person concerned undergoes a series of psychological tests intended to establish an essential element of their identity that concerns their personal sphere in that it relates to intimate aspects of their life.
- Principle 18 of the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation and gender identity states that no person may be forced to undergo any form of psychological test on account of their sexual orientation or gender identity.

In addition, such an expert's report cannot be considered essential for the purpose of confirming the statements of an applicant for international protection relating to their sexual orientation to adjudicate on an application for international protection based on a fear of persecution on the grounds of that orientation.

Further Reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4, 7 and 8 of the FRA handbook.

Ferreira, N. and Venturi, D. (2018), 'Testing the untestable: The CJEU's decision in Case C-473/16, *F V Bevándorlási És Állampolgársági Hivatal* (28 June 2018)', *EDAL – European Database of Asylum Law*, available at <https://ssrn.com/abstract=3204321>.

2. Case Study 6 - Suspension of a return decision

Field - Asylum and migration

Handout for participants

The facts of the case

On 15 April 2009, Mr Madagi submitted an application pursuant to national law for a residence permit on medical grounds, on the basis that he was suffering from a particularly serious illness. That application was considered admissible on 4 December 2009. As a result of a decision made on 6 June 2011, Mr Madagi's application for leave to reside was rejected on the ground that his country of origin (Nigeria) has adequate medical infrastructure to care for persons suffering from his illness. On 29 June 2011, Mr Madagi was notified of that decision and was ordered to leave France. This decision must be classified as a "return decision" within the meaning of Article 3 (4) of Return Directive 2008/115/EC. On 7 July 2011, Mr Madagi appealed against this return decision, stating that no appropriate treatment for his illness is available in Nigeria. Under the relevant national rules, no judicial remedy is available to Mr Madagi to suspend the enforcement of a return decision.

Which pieces of EU Law are relevant here?

Charter of Fundamental Rights of the European Union (the Charter)

Article 19 – Protection in the event of removal, expulsion or extradition

"2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[...]"

Article 47 – Right to an effective remedy and to a fair trial

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Return Directive 2008/115/EC²

Article 3 (4) provides the following:

² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, p. 98.

“For the purpose of this Directive the following definitions shall apply:
[...]

“(4) ‘return decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return”.

Article 5 is worded as follows:

“When implementing this Directive, Member States shall take due account of:
[...]

“(c) the state of health of the third-country national concerned and respect the principle of non-refoulement.”

Article 9, entitled ‘Postponement of removal’, provides in paragraph 1:

“Member States shall postpone removal:

“(a) when it would violate the principle of non-refoulement, or

“(b) for as long as a suspensory effect is granted in accordance with Article 13 (2).”

Article 12 states:

“Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.
[...]

Article 13 (1) and (2) provide the following:

“1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12 (1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

“2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12 (1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.”

Article 14 (1) states the following:

“Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:
[...]

“(b) emergency health care and essential treatment of illness are provided”.

Which provisions of national law apply?

Article 3 (i) of the law on entry, residence, establishment and removal of foreign nationals provides in paragraph 1:

“A foreign national residing in France who can prove his identity in accordance with paragraph 2 and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in France”.

Questions

Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).

Yes, because these rules qualify as the implementation of Directive 2008/115/EC.

No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have suspensive effect.

No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Notes

Assuming that the Charter applies:

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 47 and 19 of the Charter must comply with the same standards as those fixed by the ECHR and the case law of the European Court of Human Rights (ECtHR).

Notes

Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health?

Notes

Background information for trainers

Introductory Notes

This case study is based on the Court of Justice of the European Union (CJEU), C-562/13, *Abdida*, ECLI:EU:C:2014:2453, 18 December 2014.

The case study concerns only the suspensive effect of an appeal against a return decision, dealt with by the CJEU in paragraphs 39–53. It does not cover the question of whether there is a duty to provide for their basic needs. The facts of the case study have been simplified, and this aspect has been left aside.

Questions and Answers

Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. Yes, because these rules qualify as the implementation of Directive 2008/115/EC.**
- c. No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have a suspensive effect.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *Abdida*. The CJEU uses the Charter to interpret Articles 5 and 13 of Directive 2008/115/EC.

Correct answer

Option b is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 13 (2) of Directive 2008/115/EC, which gives discretion to Member States to grant temporary suspension of return decisions. The exercise by Member States of such discretion qualifies, in principle, as “implementing Union law”, regardless of whether it concerns a mandatory or optional exercise of discretionary powers. It may even be the case that respect for the Charter leads to the mandatory exercise of discretion on the basis of Union law. This is exactly what happens in this case (other examples in which a discretion turns out to be a duty are CJEU, C-411/10 and C-493/10, *N.S.*, 21 December 2011, paragraphs 55, 68–69 and 106–108; and CJEU, C-329/13, *Stefan*, 8 May 2014, paragraph 35). This is why *option c* is not correct.

Option a is not correct (see introductory remarks).

Option d is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the underlined parts of the explanation for question 2).

Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant.

Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 47 and Article 19 (2) of the Charter. The CJEU also refers to case law of the ECtHR (see *Abdida*, paragraphs 47 and 51).

Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR (“corresponding rights”). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

“3. In so far as this Charter contains rights which correspond to rights guaranteed by the 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. This provision shall not prevent Union law providing more extensive protection.”

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and the explanation on the specific Charter provision at issue in ‘Explanations relating to the Charter of Fundamental Rights’ (available on EUR-LEX, in ‘Treaties/Other treaties and protocols’; OJ C 303, 14.12.2007).

Explanation on Article 19 – Protection in the event of removal, expulsion or extradition

[...]

Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see *Ahmed v. Austria*, judgment of 17 December 1996, 1996-VI, p. 2206, and *Soering*, judgment of 7 July 1989)."

Explanation on Article 47 – Right to an effective remedy and to a fair trial

"The first paragraph is based on Article 13 of the ECHR:

"'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

"However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.

[...]

"The second paragraph corresponds to Article 6 (1) of the ECHR which reads as follows:

"'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

"In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law, as stated by the Court in Case 294/83, '*Les Verts*' v. European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

"With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union."

Explanation on Article 52 – Scope and interpretation of rights and principles

"Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:

[...]

"Article 19 (2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,

[...]

“Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:

[...]

“Article 47 (2) and (3) corresponds to Article 6 (1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, [...]”.

Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health?

Correct answer

Yes (see *Abdida*, paragraphs 46–53).

According to the CJEU, Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, must be interpreted as precluding national legislation that does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health.

Explanation

The directive does not require that the remedy provided for in Article 13 (1) has suspensive effect. Nonetheless, the characteristics of such a remedy must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.

In this regard, it should be noted that Article 19 (2) of the Charter states that no one may be removed to a state where there is a serious risk that they would be subjected to inhuman or degrading treatment. By referring to the case law of the ECtHR, the CJEU considers that, in the *very exceptional cases* in which the removal of a third-country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-*refoulement*, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter, proceed with such a removal.

Those very exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national to a country in which there is a serious risk that they will be subjected to inhuman or degrading treatment.

For the appeal to be effective in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health, that third country national must be able to avail themselves, in such circumstances, of a remedy with suspensive effect, to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter.

[Further Reading](#)

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4, 7 and 8 of the FRA handbook.