



Analysis

Court of Justice: The NS and ME Opinions - The Death of “Mutual Trust”?

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Introduction

The Advocate-General’s opinions of 22 September 2011 in Case C-411/10 *NS* and Case C-493/10 *ME* deal with a key issue: the suspension of the EU’s ‘Dublin’ system for sending asylum-seekers to other Member States. The *NS* opinion also addresses a second key issue: the British ‘opt-out’ from the EU Charter of Fundamental Rights.

The key arguments in the opinions are that (a) there is no complete ‘opt-out’ from the Charter for the UK and Poland, although the effect of the Charter might be limited for those States as regards social rights; and (b) despite the Dublin system, asylum-seekers cannot be sent to a Member State where there is a serious risk that their Charter rights will be violated.

The Opinions would mean the end of the concept of absolute mutual recognition of other Member States’ decisions in EU Justice and Home Affairs law, as they would confirm that Member States cannot automatically rely on ‘mutual trust’ that other Member States will observe human rights. Logically, the judgment should apply by analogy to other areas of Justice and Home Affairs law, like the European Arrest Warrant (EAW), where the Court of Justice has also been asked whether an EAW must be executed even though human rights have been breached (Cases C-396/11 *Radu* and C-399/11 *Melloni*, pending).

The Opinions are not binding on the Court of Justice,

which can be expected to give its judgment in this case within several months. However, such Opinions are usually followed by the Court.

The British ‘opt-out’ from the Charter

Since the *NS* case concerns a dispute originally brought before the British courts, which referred questions relating to the EU law aspects of the case to the Court of Justice, the question arose whether the special Protocol relating to the EU Charter of Fundamental Rights, which was attached to the EU Treaties by the Treaty of Lisbon, applies. That Protocol appears to limit in some way the application of the Charter to the UK and Poland; an amendment to the Treaties which would extend the scope of this Protocol to the Czech Republic is likely to be open for signature and ratification soon, in parallel with the ratification of the Accession Treaty of Croatia. The *ME* case was referred from the Irish courts, so this issue did not arise.

First of all, the *NS* Opinion rejects the idea that the Protocol is a general ‘opt-out’ for the UK: ‘the question whether Protocol No 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative’ (para. 167). First of all, the Opinion states that Article 1(1) of the Protocol, which states that the Charter does not extend the powers of the British or Polish national courts or the EU courts to strike down national law in light of fundamental rights, merely repeats the general point in Article 51 of the Charter

that the Charter does not extend the EU's powers. Also, the wording of the Protocol suggests that it merely clarifies the application of the Charter in those countries, rather than prevents it from operating.

Next, the specific rule in Article 1(2) of the Protocol, which states that the Charter does not create new social rights in the UK or Poland, is irrelevant, since the dispute does not concern such social rights. Finally, Article 2 of the Protocol, which states that full account must be taken of national laws referred to in the Charter, is also irrelevant, since none of the Charter rights at issue in this dispute refer back to national laws. (In fact, again it is the provisions on social rights in the Charter which refer back to national laws).

In summary

- (a) the UK and Poland do not have a complete opt-out from the Charter;
- (b) Article 1(1) of the Protocol adds nothing to the provisions of the Charter;
- (c) Article 1(2) of the Protocol is only relevant as regards social rights; and
- (d) Article 2 of the Protocol is also only relevant, in effect, as regards social rights.

So while the Protocol does not exempt the UK and Poland from the Charter entirely, and does not have any effect in this case, it might have effect in cases dealing with the social rights in the Charter. (It might be arguable that some asylum cases do concern social rights - for instance if an asylum-seeker would not have access to health care or social assistance in another Member State - but that argument was not raised before the Court in the *NS* case). But the question would then arise whether those social rights were in any event granted by the 'general principles of EU law' - which pre-existed the Charter, which are still preserved in force by Article 6(3) of the Treaty on the European Union, and which do not appear to be restricted by the Protocol as regards the UK and Poland. The Opinion does not consider the relationship between the Charter and the general principles.

The suspension of the 'Dublin' system

The key argument of the Opinions is that in some cases, the Dublin system (which allocates responsibility for each asylum-seeker to a single Member State based, among other things, on which Member State's border the asylum-seeker illegally crossed first - must be disapplied in light of the Charter). There are several different elements to this argument.

First of all, the *NS* Opinion argues that the Charter applies to the national decision whether or not to use the *option* provided for in the Dublin Regulation, to take responsibility for an asylum-seeker even though the Dublin rules say that another Member State is responsible for the application. It was necessary to examine this issue because the Charter applies to Member States only where they are 'implementing EU law' (Article 51 of the Charter). The Opinion takes a broad approach to the interpretation of Article 51, but not an overly broad one. After all, the option to consider an asylum application operates in the context of a system of allocating responsibility for those applications established by EU law. Without such an EU law system, a Member State might unilaterally decide that another Member State ought to consider an asylum application - but there would be no guarantee that this other Member State would agree.

Next, the Opinions argue that the Dublin system as such does not in principle breach the Charter, given the guarantees in EU asylum law and international treaties (the ECHR and the Geneva Convention on refugees) that asylum-seekers' rights will be respected. However, the Greek asylum system has been overloaded, leading to the situation that Greece cannot comply with its obligations; the evidence for this is a judgment of the European Court of Human Rights (*MSS v Belgium and Greece*), the rulings of Member States' national courts and the evidence submitted to the national courts in the *NS* and *ME* cases.

The breakdown of the Greek asylum system creates a risk of breaches of the EU Charter, namely Articles 1 (the right to dignity), 4 (freedom from torture et al), 18 (the right to asylum) and 19(2) (non-removal to face torture et al). In particular, Article 18 means that the Geneva Convention rule on *non-refoulement* (non-return to an unsafe country) applies; and this rule precludes 'chain deportation' to an unsafe country - ie refugees cannot be returned to a safe country (Greece) if it would in turn remove them to an unsafe country. The Opinions conclude that 'the transfer of asylum seekers to a Member State in which there is a serious risk of violation of the asylum seekers' fundamental rights is incompatible with the Charter' (para. 116, *NS* opinion). On the other hand, breaches of EU asylum legislation which do not amount to breaches of fundamental rights do not require a Member State to suspend transfers. Given the close connection between the EU asylum legislation and fundamental rights obligations, it will not always be easy to establish whether a Member State is 'merely' breaching EU legislation, or is also

breaching the Charter.

It follows, logically enough, that a **conclusive presumption** (as in British law) that all Member States are always safe for asylum-seekers **breaches the Charter**, for it makes the exercise of Charter rights nugatory. On the other hand, a rebuttable presumption is acceptable.

The Opinions then address the question of whether the Charter provides for wider protection than the ECHR as regards the suspension of transfers of asylum-seekers to other Member States. However, they do not squarely answer this question, on the grounds that in the meantime the *MSS* judgment of the European Court of Human Rights has clarified that the transfer of asylum-seekers to Greece *does* breach the ECHR. So instead the Opinions clarify the relationship between the Charter and the ECHR, confirming that the level of protection in the Charter

cannot fall beneath that of the ECHR, and suggesting that judgments of the European Court of Human Rights are not binding upon the EU but are highly persuasive precedents.

Finally, the *NS* Opinion concludes that the conclusive presumption that Charter rights cannot be violated by another Member State breaches Article 47 of the Charter, which provides for the right to a fair trial and effective remedy.

In summary:

- (a) the Charter applies even when Member States exercise an option provided for by EU law;
- (b) asylum-seekers cannot be sent to another Member State where there is a 'serious risk' that their Charter rights will be violated;
- (c) there cannot be a conclusive presumption that all other Member States are safe.

Sources

1. Opinion of the Advocate General in *N.S.*, Case no 410:

<http://www.statewatch.org/news/2011/sep/ecj-n-s-case-opinion-advocate-general.pdf>

2. Opinion of the Advocate General in *M.E.*, Case no 493:

<http://www.statewatch.org/news/2011/sep/ecj-m-e-case-493-advocate-general-opinion.pdf>

3. Press release on both cases:

<http://www.statewatch.org/news/2011/sep/ecj-n-s-case-advocate-general-prel.pdf>

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