

Introductory case:

I. Facts

By Directive 2003/87/EC the European Union established a scheme for greenhouse gas emission allowance trading for the cost-effective reduction of such emissions. Since January 2005, all installations carrying out any of the activities listed in Annex I to this Directive (activities in the energy sector, iron and steel production and processing, the mineral industry and the wood pulp, paper and board industry) and emitting the specific greenhouse gases associated with this activity must be in possession of an appropriate permit issued by the competent authorities.

The Directive was transferred into national law in Germany by the Law on Greenhouse Gas Emission Trading in 2004. According to art. 4 of the law any activity which evaporates greenhouse gas needs a permission which includes the necessary amount of permits.

An enterprise from the cement industry operated several production plants for which permissions were issued before the new law entered into force. During the production a big amount of carbon acid gas is emitted. Under the new law new permissions have to be issued including the acquisition of permits under the greenhouse gas regime.

The enterprise filed a case at the competent administrative court of first instance by which it wanted the court to establish that there is no obligation to apply for new permission under the new law. Due to the unavoidable high amount of greenhouse gas emissions during the production of cement the enterprise would be particularly affected by the new law, although the amount of emissions was permitted by the old and timely unlimited permissions already. The regime under the new law would have the effect of an expropriation. It therefore claimed a violation of the rights under art. 12 and 14 of the Basic Law.

II. Legal framework

1. National:

Basic Law

Art. 12 par. 1- Professional freedom

(1) All Germans have the right freely to choose their trade or profession, their place of work and their place of professional training. The practice of trades and professions may be regulated by law.

Art. 14 - Property, right of inheritance, expropriation

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the

interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Art. 100 - Concrete judicial review

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.

(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3) If the constitutional court of a Land, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court.

2. European:

Fundamental Rights Charter FRC

art. 17 – right to property

- (1) Everyone has the right to own, use, dispose and bequeath his or her lawfully acquired possessions.
- (2) No one may be deprived of his or her possession, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation paid in good time for their loss.
- (3) The use of property may be regulated by law insofar as is necessary for the general interest. (...)

art. 15 – freedom to choose an occupation and right to engage in work

- (1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
- (2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
- (3) Nationals of third countries are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Art. 52 – scope of guaranteed rights

- (1) Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

- (2) Rights recognized by this Charter which are based on the Community Treaties or the Treaty on the European Union shall be exercised under the conditions and within the limits defined by those treaties.
- (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.

III. Questions to be discussed regarding the scope of judicial review:

in relation to national legislation

Is a national court empowered or obliged to review a national legal act (law passed by parliament) in the light of national fundamental rights? Can a national court quash a national legal act of parliament?

If so, how broad is the control with regard to national fundamental rights, e.g. is there a right to set aside the national law?

Has a national court jurisdiction over the consistency of national legislation with EU legislation?

in relation to EU law

Is a national court empowered or obliged to review a European legal act, e.g. a Directive? Can it be quashed? Because of violation of national law? Because of violation of EU-law?

Must a national court review a case in the light of EU law, e.g. even if such violation is not invoked by the parties (ex officio principle)?

Case 2 (policeman case)

In 1979, the applicant, at that time an active policeman, was found guilty by the Criminal Court, to have committed a crime by having homosexual contacts with a male person younger than 18. Such contacts were forbidden by Art 209 of the Austrian Criminal Code at that time. The decision (three months imprisonment, suspended on probation) became final and absolute.

As a consequence, disciplinary proceedings started before the competent tribunal (which is seen as an administrative authority in the Austrian legal system). The disciplinary tribunal pensioned him off with reduced pensions as a disciplinary measure. This (administrative) decision became final and absolute as well.

In 2003, ECHR decided (in other cases) that acts of criminal prosecution based on Art 209 of the Austrian Criminal Code violate Art 8 and 14 of the Convention.

The mentioned Article was annulled by the Austrian Constitutional Court later.

In 2005 the applicant asked the authority to treat him as if the disciplinary decision would not have been taken. That means to pay the higher active salary as a policeman for the time until his 65th birthday (regular retirement age) and from that time on to pay his pension, figured out under the presumption that he had been active until 65. He urges this payment for the time from 2002 onwards, arguing that paying him less is a discrimination on the ground of his sexual orientation.

Legal framework

The Directive 2000/78/EC that has to be transposed into national law until 2nd December 2003 has the following wording:

“Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular

disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.”

Please note that pensions of civil servants are seen as a part of their salary in Austria (they are not part of a social system), but of a continuing alimentation by the state for lifetime.”

Art. 46 of the Convention:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

Questions:

- 1./ Did the criminal conviction in 1979 contravene the Convention?
- 2./ Did the criminal conviction in 1979 contravene EU-law, in particular Art. 22 FRC or the directive mentioned above?
- 3./ Answer questions 1./ and 2./ with respect to the disciplinary conviction in 1979.
- 4./ How would you assess such convictions if they happened now?
- 5./ In how far and by which rules did the legal situation change between 1979 and 2005?
- 6./ Must legal validity of the decisions mentioned above still be observed, if
 - a./ they contravened the Conventioned at the time they were adopted;
 - b./ they contravened EU-law at the time they were adopted?
- 7./ What do you think about the impacts of changes in the legal situation according to question 5./ on legal validity in our case?
- 8./ What would be the consequences in your country if you come to the result that upholding the consequences of the convictions
 - a./ contravenes the Convention
 - b./ contravenes EU-law?

Legal Aid – CASE 3

National procedural law for the proceedings before administrative courts provides for legal aid as follows:

„Legal aid can be granted only for appeals against administrative convictions, but not in other administrative cases. The conditions are the following:
....“

In November 2013 the Constitutional Court quashes this law as unconstitutional, because Art. 6 ECHR that has the rank of a constitutional law requires according to the jurisprudence of ECHR to grant legal aid even in „civil law“-cases in the understanding of Art. 6 that also may be administrative cases according to national law. It grants to the legislator a period until 1st of January 2015 in order to „repair“ the law. According to national law during this period the old law has to be applied and cannot longer be attacked before the Constitutional Court.

In January 2014 a party asks for legal aid

a./ in a VAT-Case

b./ in a construction permit case

c./ in following case:

A medical doctor has started her career in a private hospital in Austria. Afterwards she changes to work as a medical doctor in a hospital owned by a „Land“ (province), being now civil servant. She asks to be treated concerning her salary bracket (on which remuneration depends) as if she would have worked for the „Land“ during all her career.

Due to national law such times of the career before the appointment cannot be considered as equal to the times passed by a public entity employment.

According to the jurisprudence of CJEU (in a case of a German medical doctor that continued his career as a civil servant in Austria) freedom of movement is violated by a national Austrian provision that prohibits equal consideration of times passed in an employment as a medical doctor in Germany, be it private or be it as a German civil servant and of times passed as a medical doctor by a public entity in Austria.

She argues that the Austrian law has to be disapplied because it is conflicting with EU-law.

Art. 47 FRC provides for legal aid.

Is the national court obliged to grant legal aid as a consequence of

a./ Art. 6 ECHR

b./ Art. 47 FRC?

Casestudy 4 (Swedish case)

The facts

The applicant is a transsexual who was registered at birth as being of male sex. Under the name of John. As a male he married Lucy. He felt a growing desire to live as a woman and got the diagnosis gender dysphoria. He underwent gender reassignment surgery and hormone replacement treatment and became eventually a woman. He/she changed her name to June and is still living in her marriage with Lucy.

In order to be legally recognized as of female sex – which was necessary before she could obtain a passport in her female name, among other things – June requested to the National Board of Health to determine that she is of female sex.

The National Board of Health dismissed her request. The reason for its decision was the following. According to the 1972 Act on the determination of Sex in Special Circumstances a request could never be granted if the applicant is married. Therefore June must divorce Lucy before her request could be granted.

The appeal

Lucy appealed to the Administrative Court in Stockholm and claimed that the decision of the National Board was contrary to article 8 ECHR. She underlined that since 2009 same-sex marriages are allowed in the Marriage Code in Sweden. The 1972 act is based on the old legislation and is now obsolete. If she was forced to divorce her wife it would mean legal and economic consequences, regarding pension, insurance benefit, etc as well as emotional trauma. It was also discrimination of her and her wife as nobody else could be forced to divorce.

The National Board of Health objected to the appeal and said. According to the Swedish constitution the wording of a legal act is legally binding. The National Board therefore has to follow the 1972 act even if it is obvious that this act is obsolete now when same-sex marriages are allowed. It is the legislator that has to decide to adapt the 1972 act to the new Marriage Code.

The ECHR is legally binding in Sweden according to a special law from 1994. The ECHR and the national Swedish legislation are on the same level in the law hierarchy. According to the Swedish legal doctrine the ECHR can be applied before the national legislation only if there is a very clear support either in the convention itself or in the case law from the European Court of Human Rights.

Case law: *Parry against the United Kingdom* and *R. and F. against the United Kingdom*, the 28 November 2006. The Court decided that there was not a breach of Article 8 to require that the applicant divorce before he or she could obtain a legal recognition of his or her new gender. The Court took into account that according to the national law in the cases (English respectively Scottish law) same-sex marriages are not permitted. The Court thus took into account that the national legal system was “coherent”.

Questions:

- 1./ Do the respective Swedish provisions contravene Art. 8 of the Convention?
- 2./ Which are the relevant rules for the duties of the national judge in such a situation? Is this question governed by the Convention itself or by national law?
- 3./ How would you handle such a situation in your national legal system?
- 4./ How would you decide this case if you were in the position of a Swedish judge?
- 5./ What do you think about the Swedish doctrine of “very clear support”?
- 6./ How would you solve question ./2 in case of a contradiction of national law (also) with the FRC or other norms of EU-law directly applicable in the respective case?