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BRITISH-POLISH PROTOCOL IN LIGHT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JURISPRUDENCE (N.S. V SECRETARY OF STATE, BONDA, FRANSSON)

1. DIFFICULTIES WITH THE CHARTER OF FUNDAMENTAL RIGHTS RATIFICATION

Although the Charter of Fundamental Rights of the European Union[1] was proclaimed by the European Parliament, the European Council and the European Commission in Nice, December 2000, it would gain legal power only after ratification of the Lisbon Treaty. Therefore, the Constitutional Treaty was supposed to introduce the Charter directly to the treaties, giving it primary law status. Nevertheless, withdrawal from a Lisbon Treaty left the Charter as a political declaration only and led to a stormy discussion concerning its legal status. As a result of a compromise, instead of incorporating the Charter of Fundamental Rights directly into the treaties, art. 6 of the Treaty on European Union ensured that "the Union recognises the rights, freedoms and principles set out in the Charter" and granted the Charter "the same legal value as the Treaties"[2].

Broaden duties of the states towards European citizens in the area of fundamental rights caused strong objections, mainly in Poland and United Kingdom. Polish government concerns are pointed in 61st Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union[3], purpose of which was to render impossible the Charter to affect "in any way the right of Member States to legislate in the sphere of public morality, family law, as well

[1] The Charter of Fundamental Rights of the European Union (2012), OJ C 326 from October 26, 2012, pp. 391–407.

[2] The Treaty on European Union (Consolidated version 2012), OJ C 326 from October 26, 2012.

[3] The Declaration No. 61 by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon signed on December 13, 2007, OJ C 115/335 from May 9, 2008.

as the protection of human dignity and respect for human physical and moral integrity". Precisely, objections were related to abortion, euthanasia and same sex partnerships. Moreover, Polish authorities raised the argument that application of the Charter would facilitate the claims of German individuals concerning lost properties[4]. On the other hand, United Kingdom reservations pertained strictly to Chapter IV of the Charter titled "Solidarity"[5], caused by fear of extended influence of the social rights regulated in the Charter on the British labour law. However, to clarify that Poland is bound by the rights regulated in Chapter IV, Polish government decided to notify another declaration concerning the application of the Charter, where "Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects them, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union[6]".

2. BRITISH-POLISH PROTOCOL ENCLOSURE

Therefore, the Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom[7], so called "British-Polish Protocol", was annexed to the Treaties in 2007 by the means of Lisbon Treaty. According to art. 51 of the Treaty on European Union (TEU)[8], the Protocol No. 30 is an integral part of the Treaty on European Union,

[4] Minister of Foreign Affairs, Anna Fotyga, on 24th of October 2007, during the television interview on the TVN24 channel, declared that the Charter of Fundamental Rights contains provisions (property rights) which can be applied to German compensation claims against properties left in Poland, cited by A. Wyrozumska, *The Charter of Fundamental Rights – polish objections*, "Sprawy Międzynarodowe" 2007, No. 4, p. 80, footnote no 27.

[5] The Chapter IV of the Charter titled *Solidarity* (Articles 27–38) have regard for workers' right to information and consultation within the undertaking, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working condition, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection.

[6] The Declaration No. 62 by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom; Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon signed on December 13, 2007, OJ C 115/335 from May 9, 2008.

[7] The Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom, OJ C 83/13 from March 30, 2010, p. 313.

[8] According to Article 51 of the Treaty on European Union, "The Protocols and Annexes to the Treaties shall form an integral part thereof".

the Treaty on the Functioning of the European Union[9] and the Treaty establishing the European Atomic Energy Community[10]. Thanks to that, the Protocol obtains the same legal force as the treaties and the status of, supreme in the European Union law hierarchy, primary law.

Nevertheless, the Protocol enclosure raised concerns about its legal force in national laws of Poland and United Kingdom. Although the prevailing view of a legal doctrine declares its clarifying character only[11], some authors see the Protocol as an opt-out clause[12], which excludes the application of the Charter of Fundamental Rights provisions in Poland and United Kingdom. It seems that the legitimacy of the Protocol's auxiliary character is supported by its recitals. According to the preamble, the purpose of the Protocol is "clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justification within Poland and within the United Kingdom". One of the motives states also that the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does

[9] The Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326 from October 26, 2012.

[10] The Treaty establishing the European Atomic Energy Community (Consolidated version 2012), OJ C 327 from October 26, 2012.

[11] J. F. Lindner, *Zur grundsätzlichen Bedeutung des Protokolls über die Anwendung der Grundrechtekarta auf Polen und das Vereinigte Königreich – zugleich ein Beitrag zur Auslegung von Art. 51 EGC*, "Zeitschrift Europarecht" 2008, Vol. 6, p. 794, cited by E.-M. Thierjung, *The legal effectiveness of the Polish-British Protocol in the light of the doctrine and judgment of the ECJ in the case N.S. v Secretary of State for Home Department*, www.prawaczlowieka.edu.pl (visited January 17, 2017); I. Pernice, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Wien: Springer–Wien–New York–Verlag 2008, pp. 247–248, cited by E.-M. Thierjung, *The legal effectiveness of the Polish-British Protocol*...; A. Wyrozumska, *The Legal Significance of the Change of the Status of the Charter of Fundamental Rights in the Treaty of Lisbon and the Polish-UK Protocol*, "Przegląd Sejmowy" 2008, No. 2, pp. 25–40; R. Wieruszewski, *The Role of the Charter of Fundamental Rights of the European Union and its Significance for Human Rights Protection*, "Przegląd Sejmowy" 2008, No. 2, pp. 41–59; W. Czapliński, *A Few Comments on the Possibility of Poland's Withdrawal from the Polish-British Protocol*, "Studia Europejskie" 2012, No. 1, pp. 83–94; J. Łacny, A. Sakowicz, *Addendum to the opinion concerning the proposal for a regulation of the European Parliament and of the Council establishing for the period 2014 to 2020 the Rights and Citizenship Programme (COM(2011) 758 final) on legal relationship between a regulation and the Charter of Fundamental Rights of the European Union*, "Zeszyty Prawnicze" 2012, No. 2, pp. 83–91.

[12] C. Barnard, *The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, "ECSA Austria" 2008, Vol. 1, pp. 256–283, cited by E.-M. Thierjung, *The legal effectiveness of the Polish-British Protocol*...; J. Jirásek, *Application of the Charter of Fundamental Rights of the EU in the United Kingdom and Poland according to the Lisbon Treaty*, Brno: Masaryk University Press, 2008, cited by E.-M. Thierjung, *The legal effectiveness of the Polish-British Protocol*...; M. Muszyński, *Opinion of 17 March 2008 on the Charter of Fundamental Rights legal effects*, RL-0303-8/08, http://radalegislacyjna.gov.pl/dokumenty/opinia-z-17-marca-2008-r-w-sprawie-skutkow-prawnych-karty-praw-podstawowych (visited January 17, 2017).

not create new rights or principles. The preamble refers as well to art. 6 of TEU which requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations.

3. PROTOCOL CONTENT

Certainly, the British-Polish Protocol was aimed to limit the Court of Justice of the European Union (CJEU) capability to control the Chart application only when the rights confirmed by the Charter are regulated in Polish or British law as well. Article 1 paragraph 1 states that "the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".

Paragraph 2 also clarifies the application of the Charter: "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter create justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law". It should be noted that art. 2 paragraph 2 of the Protocol literally confirms art. 51 paragraph 1 of the Charter which states that the Charter applies "to the Member States only when they are implementing Union law". Paragraph 2 of art. 51 of the Charter relates to the scope of the Charter's application as well: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". By excluding the attribution of new rights and claims from the Chapter IV, the Protocol prevents an extensive interpretation of the Charter.

Article 2 of the Protocol, states that to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom. It specifies that fundamental rights, confirmed in the Charter can be the claim basis only if they are implemented in the British or Polish law. Moreover, this possibility depends on the scope of state regulation.

4. N.S. V SECRETARY OF STATE

Nevertheless, it's an undeniable fact that British-Polish Protocol led to many interpretational disputes about its legal status and consequences for application

of the Charter in those countries. However, the Court of Justice of the European Union, continuing the protection of human and fundamental rights contained in the Charter, dispels some doubts concerning the Protocol significance through its case law.

In the judgment of December 21, 2011 in joined cases N.S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform[13], the CJEU referred to the applicability of the Charter in the United Kingdom and Poland. The subjective case pertain to Afghan asylum seeker who brought an appeal against a decision of the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) by which the appellant challenges his return to Greece by the United Kingdom. On his journey from Afghanistan N.S. travelled to Greece, where he was arrested, ordered to leave and was subsequently deported to Turkey. He escaped from detention and reached United Kingdom, where he lodged an asylum application.

The Secretary of State for the Home Department made a request to Greece, pursuant to Regulation No. 343/2003[14], to take charge of examining N.S. asylum application[15]. In consequence of failing to respond within the time limit[16], Greece was deemed to have accepted responsibility for examining the claim. Subsequently, asylum seeker requested the Secretary of State to accept responsibility for examining his asylum claim[17]. He rose that his return to Greece would risk

[13] Judgment of the Court (Grand Chamber) of December 21, 2011 in Joined Cases C-411/10 and C-493/10, references for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of July 12, and October 11, 2010, lodged at the Court on August 18, and October 15, 2010 respectively, in the proceedings N. S. (C-411/10) v Secretary of State for the Home Department and M. E. (C-493/10), A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform.

[14] The Council Regulation (EC) No. 343/2003 of February 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1 from February 25, 2003.

[15] According to Article 17 of Regulation No. 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

[16] According to Article 18(7) Regulation No. 343/2003, provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

[17] On July 31, 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, which stipulates that (…) each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation (…)".

an infringement of his fundamental rights under European Union law, the European Convention of Human Rights and/or the Geneva Convention. However, the Secretary of State found the claim clearly unfounded, because Greece is on the "list of safe countries" (in the Schedule to the 2004 Asylum Act) and maintained his decision to transfer to Greece. As a result, N.S. issued proceedings seeking judicial review of the Secretary of State's decisions. Claim, examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), was dismissed[18].

Nevertheless, N.S. appealed to the Court of Appeal (England & Wales) (Civil Division). According to the proceedings before the Court of Appeal, asylum procedures in Greece reveal serious irregularities – "applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care". Moreover, the proportion of asylum applications which are granted is extremely low and judicial remedies are inadequate and very difficult to access. Finally, the conditions for reception of asylum seekers are inadequate, because of detaining applicants in inadequate conditions or living outside in destitution, without shelter or food. On the other hand, the High Court of Justice stated that the risks of turning back from Greece to Afghanistan and Turkey were not proven. Besides, the Secretary of State declared that "the fundamental rights set out in the Charter can be relied on as against the United Kingdom" and the Administrative Court committed a mistake stating otherwise. He maintained that the Charter not only repeats the rights, which are already an integral part of European Union law but does not create new rights as well. However, the Secretary of State claimed that the High Court of Justice is not bound to take into account risk of fundamental rights infringement if asylum seeker, according to art. 3 of the Regulation, would be returned to Greece. In other words, he claims that the provisions of the Charter of Fundamental Rights do not apply in the United Kingdom.

Because the N.S. case raised doubts concerning the application of foregoing Regulation No. 343/2003 and its consequence on fundamental rights guaranteed mainly by the Charter of Fundamental Rights, the Court of Appeal made reference to the Court of Justice of the European Union for a preliminary ruling. One of the foregoing reference questions regarded the content and scope of the Protocol No. 30 on the application of the Charter to Poland and to the United Kingdom. The Court of Appeal asked if taking account of the Protocol would have any influence on the answers to the previous questions concerning obligations of the

[18] By judgment of March 31, 2010, Mr. Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

United Kingdom[19]. Otherwise, whether the British-Polish Protocol excludes the effectiveness of the Charter.

5. THE CJEU JUDGMENT

First of all, the Court of Justice of the European Union declared that the Protocol "does not call into question the applicability of the Charter in the United Kingdom or in Poland". For confirmation, the CJEU referred to the Protocol recitals[20]. Therefore, the Court stated that art. 1 paragraph 1 of the Protocol confirms only art. 51 of the Charter which relates to the scope of the Charter's application. As a result, it is not aimed at exclusion of Poland and United Kingdom from the obligation to observe the Charter provisions or make the courts and tribunals care for the Charter compliance impossible.

Because the case was not related to the Chapter IV of the Charter or to the provisions of the Charter which make reference to the national law and practices, the CJEU does not interpreted art. 1 paragraph 2 and art. 2 of the Protocol. Finally, the court stated that taking into account the Protocol does not affect answers to the previous questions referred in this case. Nonetheless, it should be noted that the Court undertook to interpret the scope of British-Polish Protocol's application to mark out strict judicial line in the direction of full protection of fundamental rights.

6. ADVOCATE GENERAL'S VERICA TRSTENJAK OPINION

Nevertheless, Advocate General's Verica Trstenjak opinion concerning N.S. case, delivered on September 22, 2011, analyses thoroughly the Protocol's No. 30 position in the legal order of the United Kingdom and Poland.

Advocate General maintained that, pursuant to Protocol's wording and preamble motives, it cannot be regarded as an "opt-out" clause which excludes the use of the Charter of Fundamental Rights in Poland and United Kingdom. "According to its wording, Article 1(1) of Protocol No 30 therefore makes clear that the Charter of Fundamental Rights does not have the effect of either shifting

[19] Question no 7 of the reference was: "In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?".

[20] Motives 3 and 6 of the preamble.

powers at the expense of the United Kingdom or Poland or of extending the field of application of EU law beyond the powers of the European Union as established in the Treaties". As a consequence the Protocol confirms the normative content of art. 51 of the Charter of Fundamental Rights, which aim is to "prevent precisely such an extension of EU powers or of the field of application of EU law". As a result, the applicability of the Charter in the United Kingdom or in Poland is unchallengeable.

Furthermore, the opinion raises the question concerning art. 2 paragraph 2, which according to Advocate General, specifies the application of social fundamental rights and principles from the Charter. Article 1 paragraph 2 stipulates that the Chapter IV does not create any rights applicable to Poland or the United Kingdom which can be claimed in litigation, except situations when such rights are provided in their national law orders. By excluding the attribution of new rights and claims from the Chapter IV, "Article 1(2) of Protocol No. 30 first reaffirms the principle, set out in Article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals". What is more, paragraph 2 makes an extensive interpretation of the Charter impossible. It prevents leading out new rights and entitlements from Chapter IV that could be the basis of claims against Poland or United Kingdom.

Regarding the fact that art. 2 applies only to the national laws and practices which are not relevant in a foregoing case, Advocate General withdrew from its detailed interpretation. However, she clearly expressed that, on the basis of recitals, art. 2 cannot be seen as an opt-out from the Charter for Poland and United Kingdom.

7. GENERAL PROSECUTOR V ŁUKASZ MARCIN BONDA

In the light of aforementioned considerations, significance of the Advocate General's Juliane Kokott's opinion, delivered on December 15, 2011, in case General Prosecutor v Łukasz Marcin Bonda (C-489/10) should not go unnoticed.

The reference for a preliminary ruling was made by Polish Supreme Court in criminal proceedings against Mr. Bonda for fraud in his declaration in an application for a grant of European Union agricultural aid. As a result of incorrect statement concerning the area used by him for agriculture and the crops grown on that land[21], on the basis of art. 138 paragraph 1 of the European Union Regu-

[21] It was found that the declaration overstated the area by giving a figure of 212.78 hectares, while the actual area used for agriculture amounted 113.49 hectares.

lation No. 1973/2004[22], the national administration[23] refused payment the aid and deprive of the entitlement to agricultural aid for three following years[24].

Afterwards, by virtue of the Polish Criminal Code[25], he was convicted by a criminal court for submitting a fraud declaration overstating the area used for agriculture as well and sentenced to eight months of imprisonment and a fine[26]. In a result of Mr. Bonda's acknowledged appeal to this judgment, the Regional Court discontinued criminal proceedings[27]. Because of the same unlawful act an administrative penalty had already been imposed, the criminal proceedings were not permissible. The Court made his decision basing on art. 17 paragraph 1 point 11 of the Polish Criminal Procedure Code[28], according to which proceedings shall

[22] Commission Regulation (EC) No. 1973/2004 of October 29, 2004 laying down detailed rules for the application of Council Regulation (EC) No. 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, OJ 2004 L 345, p. 1.

[23] Decision of June 25, 2006 of the director of the Office the Biuro Powiatowe Agencji Restrukturyzacji i Modernizacji Rolnictwa (District Office of the Agricultural Restructuring and Modernisation Agency).

[24] Article 138(1) of Regulation (EC) No. 1973/2004, (3) in the version in force at the time the aid application at issue was lodged (May 16, 2005) and at the time of the administrative decision (June 25, 2006), stated that "except in cases of *force majeure* or exceptional circumstances as defined in Article 72 of Regulation (EC) No 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Article 2 of Regulation (EC) No. 796/2004, is more than 3% but no more than 30% of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found. If the difference is more than 30% of the area determined, no aid shall be granted for the year in question. If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding".

[25] Under Article 297 paragraph 1 of the Law of June 6, 1997 – Criminal Code [ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz.U. z 1997 r., Nr 88, poz. 553], "A person who with the intention of obtaining for himself or another person from a bank or organisational entity carrying on a similar economic activity on the basis of a law, or from a body or institution in receipt of public funds, a credit, pecuniary loan, guarantee, warranty, letter of credit, grant, subsidy, confirmation by a bank of an obligation under a guarantee or warranty or a similar financial provision for a specific economic aim, an electronic payment instrument or public order, submits a document that is forged, altered, attests falsehoods or is dishonest, or a dishonest written statement concerning circumstances of essential importance for obtaining the said financial support, payment instrument or order, shall be liable to a penalty of deprivation of liberty for a period of three months to five years".

[26] By judgment of July 14, 2009 of the Sąd Rejonowy w Goleniowie (District Court, Goleniów).

[27] By judgment of March 19, 2010 of the Sąd Okręgowy w Szczecinie (Regional Court, Szczecin).

[28] The Law of June 6, 1997 – Criminal Procedure Code [ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego, Dz.U. z 1997 r., Nr 89, poz. 555].

not be initiated, and those initiated shall be discontinued if there are other circumstances excluding prosecution.

However, the Principal Public Prosecutor lodged an appeal on a point of law to the Supreme Court[29]. As the Supreme Court stated, the Regional Court decision on discontinuance of criminal proceedings taken under art. 17 paragraph 1 point 11 of the Criminal Procedure Code was incorrect. In the Supreme Court's opinion, judgment should be made under art. 17 paragraph 1 point 7 of the Polish Criminal Procedure Code, which stipulates that proceedings should be not initiated, and those initiated should be discontinued, if criminal proceedings concerning the same act and the same person have been definitively concluded or those already initiated are continuing. In those circumstances, the legal nature of the administrative proceedings and the penalty imposed on the basis of art. 138 paragraph 1 of the Regulation No. 1973/2004 must be determined. If they would be regarded as having the criminal nature, the criminal proceedings brought by the District Court would be inadmissible as a result of the prohibition of double penalties.

As the prohibition of double penalties and of double prosecution (*ne bis in idem* principle) is regulated under art. 4 paragraph 1 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[30], the Supreme Court maintained that the provision of art. 138 paragraph 1 of the Regulation must be interpreted in the light of that protocol. As a result of foregoing doubts, the Supreme Court decided to refer to the Court of Justice of the European Union for a preliminary ruling, questioning about the legal character of the penalty provided in art. 138 of Regulation No. 1973/2004[31].

[29] The Prokurator Generalny (Principal Public Prosecutor) appealed on a point of law against that decision to the Sąd Najwyższy (Supreme Court), arguing that there had been a gross infringement of the procedural rule in Article 17(1)(11).

[30] Under Article 4 paragraph 1 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on November 22, 1984), "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[31] By order of September 27, 2010, received at the Court on October 12, 2010, the Sąd Najwyższy referred the following question to the Court for a preliminary ruling: "What is the legal nature of the penalty provided for in Article 138 of Commission Regulation (EC) No 1973/2004 of October 29, 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, OJ 2004 L 345, p. 1, which consists in refusing a farmer direct payments in the years following the year in which he submitted an incorrect statement as to the size of the area forming the basis for direct payments?".

8. ADVOCATE GENERAL'S JULIANE KOKOTT'S OPINION

First of all, Advocate General noticed that this case should be examined under the prohibition of double penalties regulated in European Union law, not in the Polish law as the referring court states. As art. 50 of the Charter of Fundamental Rights provides that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law", *ne bis in idem* principle poses a status of European Union fundamental right and general principle of law.

Advocate General referred to the CJEU judicial decisions in the area of Charter's application which has interpreted art. 51 paragraph 1[32]. According to it, this provision means that the Charter applies if the facts of the case demonstrate a connection with European Union law. Also judgment in the Dereci case[33] declares that the Charter applies if the facts of the case are covered by European Union law. Taking the foregoing into account, Advocate General maintains that the Bonda case falls within the scope of the Charter of Fundamental Rights.

Moreover, Advocate General made it clear, that "the applicability of the Charter of Fundamental Rights in the case at issue is not called into question either by the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom". Although art. 1 paragraph 1 of the Protocol "does not distinguish itself by great clarity", she states that Protocol No. 30 cannot be seen as an opt-out clause. Basing on the recitals[34] which "point in favour of the protocol not containing any derogation from the Charter for the two countries", British-Polish Protocol shall be regarded as having only clarifying character and as construction guidelines.

Bearing in mind the scope of application of the Charter regulated under art. 51 paragraph 2, "an extension of the ability of the Court of Justice of the European Union within the meaning of the protocol cannot come into question". Because the prohibition of double penalties was recognised as a general principle of European Union law even before it confirmation in art. 50 of the Charter and taking the previous CJEU judicial decisions into consideration, the foregoing case is covered with the scope of the Charter's application.

Court of Justice of the European Union expressed clearly that the penalties provided in art. 138 paragraph 1 of the Regulation are not regarded as having criminal nature in the European Union Law. As a result, judgment passed over

[32] The CJEU judgments of November 12, 2010 in Case C339/10 Asparuhov Estov and Others [2011] ECR I0000, paragraph 14, and of March 1, 2011 in Case C457/09 Chartry [2011] ECR I0000, paragraph 25.

[33] Case C256/11 Dereci and Others [2011] ECR I0000, paragraph 72.

[34] Motives 8 and 9 of the preamble.

in silence Advocate General's reflection concerning the application of Protocol No. 30. However, by basing on European law standards[35] concerning criminal penalty, it may be assumed that silently shared Advocate General's opinion.

9. FRANSSON JUDGEMENT

Interpretation of the scope of the Charter, Court of Justice of the European Union called only in the Grand Chamber judgment of February 26, 2013 in case Åklagaren v Hans Åkerberg Fransson (C-617/10)[36]. The question for a preliminary ruling from the Swedish court was substantively similar to those specified in the Bonda case and concerned the interpretation of the principle of *ne bis in idem* principle with regard to the possibility of imposing criminal and administrative penalties for the same act which consist breach of tax laws. These sanctions were prescribed for violation of tax rules, regardless of their origin (European Union or national law).

The applicability of the Charter to the Member States actions that are not directly aimed at the realization of European Union commitments was an issue in this case because the provisions introducing sanctions mostly concerned infringements of national legislation and did not simply implement European Union law. CJEU emphasized that its previous case-law remains up to date and in accordance with the provisions of the Charter, it applies to Member States only when they implement European Union law. If national rules fall within the scope of European Union law, the country is legally obliged to respect fundamental rights protected under the Charter. The Court added that the enactment of criminal sanctions for infringements of national provisions implementing VAT directive is the act of applying a number of European Union law provisions. Even if the directive itself does not provide such sanctions, they serve the efficiency of the VAT system and protection of the European Union financial interests. For this

[35] Under the European Court of Justice judgments (see Case 137/85 Maizena and Others [1987] ECR 4587, paragraph 13; Case C-240/90 Germany v Commission [1992] ECR I5383, paragraph 25; and Case C-210/00 Käserei Champignon Hofmeister [2002] ECR I6453, paragraph 43) and the case-law of the European Court of Human Rights (Engel and Others v the Netherlands, June 8, 1976, §§ 80 to 82, Series A No. 22, and Sergey Zolotukhin v Russia, No. 14939/03, §§ 52 and 53, February 10, 2009.

[36] Judgment of the Court (Grand Chamber) of February 26, 2013, in case Åklagaren v Hans Åkerberg Fransson (C-617/10), request for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of December 23, 2010, received at the Court on December 27, 2010, in the proceedings Åklagaren v Hans Åkerberg Fransson. The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr. Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

reason, the Charter, and therefore also the prohibition of double punishment included there, are applicable in *Å*kerberg Fransson case and can be subject to interpretation by CJEU.

At the same time, if the Member State court is called upon to verify the compliance of national law provisions or national authorities action constituting an act of European Union law with fundamental rights – in a situation where Member States' action is not completely determined by European Union law provisions – national authorities and courts are authorized to enforce national standards for the protection of fundamental rights. It happens provided that the application of these standards does not undermine the level of protection resulting from the Charter (interpreted in accordance with CJEU jurisdiction) or the primacy, unity and effectiveness of European Union law.

With regard to the prohibition of double punishment, Court of Justice of the European Union noted that it does not preclude the application by Member States at the same time the tax and criminal penalties for the same offense involving breaching of the disclosure obligations in the field of VAT. Member States are free to choose the means to ensure total exaction of revenues from VAT and therefore, they protect the financial interests of the European Union. These measures may therefore take the form of administrative sanctions, criminal penalties or both penalties at the same time. Only if the tax sanction is a penalty within the meaning of the Charter and is definitive, the prohibition of double punishment is an obstacle to conduct next criminal proceeding against the same person in connection with the same acts.

Court of Justice of the European Union broad interpretation of art. 51 paragraph 1 of the Charter, presented in Fransson judgement not only confirms the continuity of the previous understanding of the binding scope of European Union fundamental rights, but it also equates the scope of the Charters fundamental rights and fundamental rights as general principles of the Union[37].

Although the introduction of the Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union raised many concerns of its application, thanks to the Court of Justice of the European Union judgment in N.S. case, it became clear that the Protocol cannot exclude the use of the Charter in relation to Poland or United Kingdom. Moreover, British-Polish Protocol does not prevent the examination of the Charter by courts and tribunals. Also Advocate General's position taken in Bonda's case confirms that the Protocol cannot be regarded as an opt-out clause, which derogates from the Charter provisions. In the light of aforementioned *Fransson* judgement, the CJEU takes the opportunity to use all reasonable endeavours to extend the protection of fundamental rights and to encourage applying the Charter by the national courts. A broad interpretation

[37] N. Półtorak, *Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej*, "Europejski Przegląd Sądowy", September 2014, No. 9, pp. 17–28.

of the scope of the binding provisions of the Charter allows to develop common standards for the interpretation and application of fundamental rights in the European Union Member States.

BRITISH-POLISH PROTOCOL IN LIGHT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JURISPRUDENCE (N.S. V SECRETARY OF STATE, BONDA, FRANSSON)

Summary

The Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, so called "British-Polish Protocol", annexed in 2007 to the Treaties by means of the Lisbon Treaty, led to many interpretational disputes about its legal status and consequences for application of the Charter in Poland and United Kingdom. However, the Court of Justice of the European Union (CJEU), continuing the protection of human and fundamental rights contained in the Charter, dispels some doubts concerning the Protocol significance through its case law. Judgment of the CJEU of December 21, 2011 in joined cases N.S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, as well as Advocate General's Verica Trstenjak opinion delivered on September 22, 2011, confirms the normative content of art. 51 of the Charter of Fundamental Rights, so that the applicability of the Charter in the United Kingdom or in Poland is unchallengeable. Significance of the Advocate General's Juliane Kokott's opinion, delivered on December 15, 2011, in case General Prosecutor v Łukasz Marcin Bonda (C-489/10) should not go unnoticed. It states that Protocol No. 30 cannot be seen as an opt-out clause, but shall be regarded as having only clarifying character and as construction guidelines. Broad scope interpretation of the Charter was what CJEU called in the case Åklagaren v Hans Åkerberg Fransson (C-617/10). It allowed to develop common standards for the interpretation and application of European Union fundamental rights.

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KEYWORDS

British-Polish Protocol, Charter of Fundamental Rights, the Court of Justice of the European Union, N.S. v Secretary of State, Bonda, Fransson

SŁOWA KLUCZOWE

Protokół polsko-brytyjski, Karta praw podstawowych, Trybunał Sprawiedliwości Unii Europejskiej, N.S. v Secretary of State, Bonda, Fransson