

Mariann Dósa and Éva TESSZA Udvarhelyi from A Város Mindenkié (The City is for All), in Budapest, Hungary write about the criminalization of homelessness. Dósa and Udvarhelyi take us through the recent history of homelessness in Hungary and show us the roots of the cruel law passed last year that made rough sleeping illegal and saw the opening of 'holding cells' in some homeless shelters in Hungary.

Finally, as usual, the newsletter provides updates on case from law the European Court of Human rights, reviews of new publications of interest and information about relevant events.

Please send us your comments and suggestions: samara.jones@feantsa.org

Samara Jones
Housing Rights Watch

The Kamberaj Case and the EU Charter of Fundamental Rights

By DR. PADRAIC KENNA, *Housing Rights Watch and National University of Ireland, Galway*
padraic.kenna@nuigalway.ie

Case 571/10. *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*.

Reference for a preliminary ruling: Tribunale di Bolzano - Italy.

Judgment of the Court (Grand Chamber) of 24 April 2012.

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-571/10>

Introduction

Since the creation of the Charter of Fundamental Rights (CFR) in 2000, housing rights advocates have looked to EU law to legal definitions of minimum housing standards and State obligations. Although only "solemnly proclaimed" initially, Article 34(3) of the Charter states:

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Indeed, the European Court of Justice (now Court of Justice of the European Union - CJEU) has been noticeably slow to give legal weight to the CFR, and European governments and officials directed its rights approach into "soft law" measures, rather than the development of harmonized EU standards of housing for all. Agencies such as the Fundamental Rights Agency have been restricted in their terms of reference from developing enforceable rights. Yet, with the incorporation of the EU Charter of Fundamental Rights (CFR) into EU law, on the same basis as the Treaties, the situation has now changed significantly.¹ The Charter became binding EU law in December 2009. The FEANTSA Expert Group on Housing Rights has been tracking the development of housing rights under the CFR, but only now are cases being decided which clarify the CFR obligations.

¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 83/13, 30.3.2010). Available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>

As part of binding EU Treaty law, this provision has the potential to create an EU wide minimum standard for housing and housing assistance, offering a wider legitimacy for measures to alleviate and prevent homelessness. Of course, the CFR is not a free-standing human rights instrument, but can only be invoked where there is an EU issue involved, such as a Directive, Regulation or Treaty provision. This nexus is created where a Member State or an EU institution is operating under a provision of EU law, including where the provision is a national or local law based on an EU provision. According to the CURIA (the EU law database) the CFR has been referred to in 86 judgments of the CJEU between 2010 and 2011, although Article 34 has not been litigated until this case.²

The Kamberaj Case

Mr Kamberaj, an Albanian national, residing legally in Italy since 1994, was refused housing benefit on the grounds that the funds allocated for third-country nationals were exhausted. He had received this benefit between 1998 and 2008 under a provincial law. Italian nationals were able to continue to receive these housing benefits, but third-country nationals were not. Mr Kamberaj claimed that there was discrimination and a breach of EU law. He relied on Article 11 of the Long Term Residents Directive³ and Article 34 of the CFR. Article 11(d) states that long term residents “shall enjoy equal treatment with nationals” as regards “social security, social assistance and social protection as defined by national law,” while Article 11(f) obliges equal treatment in access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing. However, under Article 11(4) Member States may limit equal treatment to “core benefits.”

The CJEU had to consider whether housing benefits fell under the concept of social security and assistance as set out in the Directive and, secondly, whether the Italian State could limit the principle of equal treatment to “core benefits” (allowed in Article 11(4) of the Directive), in such a way as to exclude housing benefit. The Respondents claimed that since these benefits were defined and

authorized under national law the CJEU could not apply an autonomous and uniform definition of social security and social assistance to that national law. This is an issue which resonates with homeless legislation at national and local level, where provision is authorized under national and local laws, and States resist any redefinition of their obligations arising from EU law, and especially the CFR.

The Interface between National and EU Law

The Opinion of Advocate General Bot set out the background law for the Court. This clarified that when EU legislation has made a reference to national law, it is not for the CJEU to give the terms concerned an autonomous and uniform definition under EU law. However, the absence of such an autonomous and uniform definition under EU law does not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision.⁴ Thus, while respecting the differences between Member States national law and the EU provisions, nevertheless, the CJEU was not willing to accept any national measures which undermined the effectiveness of the EU provision. This approach has great potential in relation to article 34(3).

Indeed, the impact of Article 34(3) on the interpretation of the obligations in the Long Term Residents Directive was also a key issue. It follows that, when determining social security, social assistance and social protection measures defined by national law and subject to equal treatment under EU law, Member States “must comply with the rights and principles provided for under the Charter including those laid down under Article 34 thereof.”⁵ Again, this principle can be applied to a whole range of EU measures which relate to homeless persons, the most recent of which the UN Convention on the Rights of Persons with Disabilities (CRPD) ratified by the EU, entered into force on 22 January 2012. Indeed, Article 216(2) TFEU states that “[Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States],”

2 Saiz Arnaz, A. & Torres Perez, A. (2012) *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights – Study*, Brussels, European Parliament, PE462.446.

3 Council Directive 2003/109 of 25 November 2003 concerning the status of third country nationals who are long-term residents.

4 Case C-571/10 Opinion of the Advocate General Bot, para 78.

5 Case C-571/10 Opinion of the Advocate General Bot, para 80.

thus giving a basis in EU law to the treatment of homeless people with disability. Of course, the Commission is bound to take into account the CFR and the UNCRPD in its actions and proposals, although there seems to be little evidence that Article 34(3) is being properly considered in this context.⁶

Decision of the CJEU

In this case, the Grand Chamber of the CJEU ruled that the meaning of “core benefits” under the Directive, must be interpreted both in the context of the integration objectives of the Long-Term Residents Directive, and also in the context of Article 34(3) CFR. Advocate General Bot had pointed out that, so far as the benefit in question fulfils the purpose set out in Article 34(3), it cannot be considered, under EU law, as not being part of the “core benefits” of the Directive.⁷ Thus, the Article 11 of the Long Term Residents Directive must be interpreted as precluding a national or local law which provides different treatment for third-country nationals enjoying the benefits of the Directive, in relation to housing benefit, with national residents.

The CJEU referred to Recital 3 of the Directive which referred to the Charter, as is common in all Directives since 2000. Clearly, this provides an avenue for introducing CFR proofing of Member State implementation of those Directives, opening up new opportunities to investigate compliance with Article 34(3) obligations.

Conclusion

In the *Kamberaj* case the CJEU was not asked to determine what level of housing and social assistance would

ensure a decent existence under Article 34(3) CFR. However, it is inevitable that this issue will emerge soon. The binary nature of the Article 34(3) terminology - *in accordance with the rules laid down by Community law and national laws and practices*, will be used by States to emphasise the subsidiarity principle and to restrict the CJEU from creating autonomous and uniform definitions. However, the *Kamberaj* case shows that the CJEU is unwilling to allow this dissonance to undermine the effectiveness and objectives of EU provisions. In this context, the Explanations attached to the CFR will become more significant for the CJEU, particularly as Article 52(7) of the CFR provides that “[T]he Explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”⁸ The Explanations relating to Article 34(3) state:

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

Clearly, the jurisprudence of Articles 30 and 31 of the Revised European Social Charter, including the *FEANTSA v France* Collective Complaint will become more central to the interpretation of the CFR. It is also likely that the obligations of “ensuring a decent existence” will also become the focus of consideration. Here the range of definitions of social exclusion, poverty and homelessness developed by FEANTSA and others will provide valuable guidance to the CJEU.

⁶ See COMMISSION STAFF WORKING PAPER, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, Brussels, 6.5.2011 SEC(2011) 567 final at 5.

⁷ Case C-571/10 Opinion of the Advocate General Bot, para 92.

⁸ *Explanations Relating to the Charter of Fundamental Rights* (2007/C 303/02)