

Derviša Zahirović*¹

IS THERE SOMETHING NEW IN THE EUROPEAN UNION? – RIGHT TO A FAIR TRIAL ACCORDING TO THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

ABSTRACT

The paper discusses if there are differences in the protection level between the right to a fair trial guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Several rights are recognized by the Court of Justice of the European Union and the European Court of Human Rights of the right to a fair trial such as: the right to a fair hearing, right to a public trial and public pronouncement of judgement, right to adjudication by an impartial and independent tribunal, right to a trial within a reasonable time and right to enforcement. Relevant decisions of the Court of Justice of the European Union will be presented and the development of the right to a fair trial in Bosnia and Herzegovina contrasted.

Key words: right to a fair trial, Court of Justice of the European Union, fundamental rights, human rights, Charter of Fundamental Rights, European Convention on Human rights

Introduction

Right to a fair trial and effective remedy are fundamental rights guaranteed essentially through constitutions and laws (Criminal law provisions, Administrative law provisions) of worldwide modern states and by Conventions (e.g. *the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *the International Covenant for Civil and Political Rights (ICCPR..)* and by the Charter of Fundamental Rights of the EU.

The protection of Fundamental Rights in the European Union is a very well known issue, but certain issues continue to pose challenges. Two of those are of systematic relevance because they result from the position of EU fundamental rights between European Convention of Human Rights on the one hand, and member state guarantees, on the

¹ Mr.sc. University of Zenica

other hand.²

Until the adoption of the Charter of Fundamental Rights of the European Union (CFR) we were accustomed to understanding the protection of fundamental human rights as belonging to two separate universes: on the one hand, that of national constitutional settlements and, on the other hand, that of international, including regional, human rights instruments.³

Furthermore, Article 6 (3) TEU constitute general principles of EU law and the Court of Justice of the European Union recognizes fundamental rights as general principles of law.⁴ Before the Charter of Fundamental Rights of the European Union entered into force there was no codified catalogue of fundamental rights. Instead they additionally were based on certain common constitutional traditions of the Member states that underpin general principles of EU law.⁵

As we can notice there are several legal sources on international, supranational and national level that guarantee fundamental rights and right to a fair trial as well, so why do we need one more? There is an European Convention on Human Rights for all states members of this Convention, regardless if they are members of European Union or not.

The European Convention on Human Rights became a human right standard for determining the legality and legitimacy of the acts of Member States applying European Community law.⁶ The Court of Justice of the European Union made this clear in its judgment in *Rutili v. Minister for the Interior* (1975), in which it invoked several provisions of the European Convention on Human Rights in order to rule on the limitations placed on the powers of Member States regarding the control of aliens. Therefore, the Court of Justice of the European Union (CJEU) used the European Convention on Human Rights as a clear hu-

2 J.Kokott, C. Sobotta: *Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection*, Yearbook of European Law, Oxford University press (2015),1

3 The relationship between the ECJ and the ECtHR: the case of asylum. Available from: https://www.researchgate.net/publication/261360048_The_relationship_between_the_ECJ_and_the_ECtHR_the_case_of_asylum [accessed Sep 08 2018].

4 Article 6(3) of the TEU [2008] OJ C 115/15 states: 'The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to member states as general principles of Community law.

5 J.Kokott,C.Sobotta, (2015), 4

6 L. Rincón – Eizaga:*Human Rights In The European Union conflict between the Luxembourg And Strasbourg courts regarding interpretation of Article 8 of The European Convention on Human Rights*,Int. Law: Rev. Colomb. Derecho Int. Bogotá (Colombia) N° 11: 119-154, 2008,128

man rights standard to interpret the “public policy” exception to the free movement of workers, justifying Member States to restrict this freedom only to the extent authorized by the European Convention on Human Rights that is, when it is necessary for the protection of the interests of national security or public safety “in a democratic society”.

The problem is what will happen when European Union in process of creating a law, adopting directives or regulations in conflict with fundamental rights? At the moment of speaking European Union did not sign the European Convention on Human Rights and there are a lot of discussions about signing or not.

According to the article 51. (1) provisions of the Charter of Fundamental Rights of the European Union are obligatory for Member states only in cases when they are conducting EU law: „*The provisions of the Charter of Fundamental Rights of the European Union are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*”

The Court of Justice of the European Union explained in case *Akerberg Fransson* from 2013 which situations could be related as implementation of EU law⁷: For applying fundamental rights it is not needed

103

⁷ That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C466/11 *Curà and Others* [2012] ECR, paragraph 26).

These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law

that national provisions are violating EU law, it is necessary enough that applicable primary and secondary EU law exist e.g (directives, regulations).

According to art. 52 Charter of Fundamental Rights of the European Union the Charter has to be applied in coherence with the European Convention on Human Rights. This means that whichever of the two systems guarantees protection this should be considered. It is often difficult to speak of a 'more extensive' protection. This is because sometimes a case has come before one of the courts, where the other court has not yet had an opportunity to rule on the same matter. In such cases it is perhaps more appropriate to speak of a more specific, rather than a more extensive, interpretation.⁸

Right to a fair trial is one of the most important human rights and it is surely the most important process right. It is related to a protection of individual civil rights: through guarantees to a fair and fast discussion in determining civil-law rights and obligations of individuals or making a decision about suspicion or a charge for a crime.⁹

Right to a fair trial and effective remedy are guaranteed by the Article 47 of the Charter of Fundamental Rights of the European Union:

„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.*¹⁰

beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties

8 M. Hazelhorst: *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, The Hague, The Netherlands, 2017, 133.

9 D. Šarin: *Aspekti prava na pravično suđenje - pravo na pristup sudu kroz jurisprudenciju Ustavnog suda Republike Hrvatske*, Zbornik radova Pravnog fakulteta u Splitu, 3/2016, 732.

10 Article 6 of the European Convention on Human Rights

1. *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 prote-*

Article 6 of the European Convention on Human Rights is limited by the text and it refers to civil and criminal procedures, but according to the interpretation of these provisions by the European Court of Human Rights this may be classified as the right to a fair administrative procedure, not only in administrative procedure but also in administrative procedure that is in national legislative and does not have a court character.¹¹

These provisions have their echo in the different rights provided for in the European Convention on Human Rights whose interpretation by the European Court of Human Rights has to be taken into account in order to set the content and scope of the rights provided for by the Charter of Fundamental Rights of the European Union as stated in its Article 52 (Scope of Granted Rights).

The correspondence is as follows:

- The right referred to on the first paragraph corresponds to the right to an effective remedy granted by Article 13 of the European Convention on Human Rights;
- The right referred to on the second paragraph corresponds to the right to a fair trial granted by Article 6 (1) of the European Convention on Human Rights;
- The right referred to on the third paragraph corresponds to legal aid which has been recognized by the European Court of Human Rights case-law as eventually being part of the right to access to the courts.¹²

105

ction 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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

11 S.Mirat, *The ECtHR Case Law as a Tool for Harmonization of Domestic Administrative Law in Europe, Review of European Administrative Law*; Paris Legal Publishers, 2012. str. 48.

12 S.Galera, *The Right to a Fair Trial in The EU: Lights and Shadows*, Revista de Derecho Político N.º 87, 2013, 52

Right to a fair trial is not an absolute right that means it can be limited by the state. The limitation can be an obligatory mediation and resolving a case, for example.

2. The right to a fair trial

The Court of Justice of the European Union has repeatedly stated its protection at Community level, distinguishing the following as included in this right: the right to a fair trial, (inspired in Article 6 of the European Convention on Human Rights); the right to an independent court, (independent, in particular, from the executive powers); rights of defence relating to an administrative procedure and a judicial one; and the duty to state the reasons on which decisions are based, so as to allow the parties to defend their rights and the court to exercise its jurisdiction.

The right to a fair trial has been acknowledged as a general principle of EU law in the Court of Justice of the European Union's case law for a long time and the right to a fair trial was initially developed as ancillary to other substantive or material questions of EU law. In cases *Les Verts* and *Factortame* the Court of Justice of the European Union held that substantive rights provided by EU law must always be enforceable before a national court, which in turn may require that effective remedies are implemented at the national level.¹³

We have to emphasize that right to a fair trial in large number of cases is related to criminal procedure and criminal law, but the Court of Justice of the European Union and the European Court of Human Rights ruled in other areas such as civil law, administrative law, freedom to establishment, some social rights as asylum and others.

There are several rights that Court of Justice of the European Union and the European Court of Human Rights recognized as a part of the right to a fair trial:

a) The Right to a Fair Hearing

The right to a fair hearing gives litigants protection against the administration of justice in secret with no public scrutiny. This is a general fundamental principle of Community law¹⁴ but of course, there are ex-

¹³ M. Hazelhorst: *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, The Hague, The Netherlands, 2017, 134.

¹⁴ The Court of Justice of the European Union in Case C-322/81 *Michelin v Commission of the European Communities* paragraph 7 stated- „In this regard it should be recalled that the necessity to have regard to the rights of the defence is a fundamental principle of Community

exceptional circumstances that justify dispensing with such a hearing. The exceptional character of such circumstances stems essentially from the nature of the questions at issue, for example in cases where the proceedings concern exclusively legal or highly technical questions and also at second and third instance which may be justified by the special features of the proceedings concerned, provided a hearing has been held at first instance.

The Court of Justice of the European Union ruled a large numbers of cases with a main problem related to the Right to a Fair Hearing but for the purpose of this paper we choose an explanation that this court stated in C-276/12¹⁵.

Mr. Sabou claimed that in procedure of paying of taxes that he had an extra cost in several Member states in a view of a possible transfer to one of the football clubs in the European Union. His incoming taxes for that period (2004 year) were approx. 1.100 Euro. This claim was very suspicious for Czech authorities so they decided to investigate this situation. Procedure was that Czech authorities sent requests for information from the tax authorities of the Member States concerned acting according provisions of Law No 253/2000 and Directive 77/799 without sending information about this to Mr. Sabou. Authorities found out that Mr. Sabou claims were incorrect (were not as he said) and decided that Mr. Sabou needs to pay 9.800 Euro for taxes. After Sabou challenged that notice of assessment in front of the Financial Directorate for the Capital City of Prague (Finanční ředitelství pro hlavní město Prahu), which adjusted the notice by setting the amount of the tax at CZK 283 604 (approximately EUR 11. 000).

At the end Mr. Sabou brought the action before the City Court in Prague. He claimed that the Czech tax authorities had obtained information about him illegally. First, they had not informed him of their request for assistance to other authorities, so that he had not been able to take part in formulating the questions addressed to those authorities. Secondly, he had not been invited to take part in the examination of witnesses in other Member States, in contrast to the rights he enjoys under Czech law in similar domestic proceedings.

law which the Commission must observe in administrative procedures which may lead to the imposition of penalties under the rules of competition laid down in the Treaty. Its observance requires inter alia that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement”

¹⁵ The Court of Justice of the European Union, Case C- 276/12 *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu*

Questions that Czech Court brought before Court of Justice of the European Union:

1. Does it follow from EU law that a taxpayer has the right to be informed of a decision of the tax authorities to make a request for information in accordance with Directive [77/799]? Does the taxpayer have the right to take part in formulating the request addressed to the requested Member State? If the taxpayer does not derive such rights from EU law, is it possible for domestic law to confer similar rights on him?
2. Does a taxpayer have the right to take part in the examination of witnesses in the requested Member State in the course of dealing with a request for information under Directive [77/799]? Is the requested Member State obliged to inform the taxpayer beforehand of when the witness will be examined, if it has been requested to do so by the requesting Member State?
3. Are the tax authorities in the requested Member State obliged, when providing information in accordance with Directive [77/799], to observe a certain minimum content of their answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided? May the taxpayer challenge the correctness of the information thus provided, for example on grounds of procedural defects of the proceedings in the requested State which preceded the provision of the information? Or does the principle of mutual trust and cooperation apply, according to which the information provided by the requested tax authorities may not be called in question?¹⁶

Answering the first and the second question Court of Justice of the European Union said that according to the Directive 77/799 tax authorities of one Member State *may* request information from the tax authorities of another Member State. The European Union legislature, using the term ‘may,’ indicated that national tax authorities have the possibility of making such a request, but are not in any way obliged to do so.

But the most important in this case is that Court of Justice of the European Union said that respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in procedure of the requesting for information sent from one Member State to the other Member State. Also it is not necessary that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or befo-

¹⁶ Court of Justice of the European Union in Case- 276/12

re that Member State sends the information to the requesting Member State. But there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage so the authorities can involve the taxpayer in various stages of the gathering of information, in particular the examination of witnesses.

And at the end, answering the first and second question, Court of Justice of the European Union stated that EU law based to Directive 77/799 and fundamental right to fair hearing must be interpreted in a way that taxpayer of Member State has no right to be informed about requested information from the other Member State about investigation of taxpayer obligations for paying taxes. Also, the taxpayer has no right to collaborate in procedure of making a request to the Member State and has no right to participate in the hearing of the witness.

b) The Right to a Public Trial and Public Pronouncement of Judgment

There is no place for private hearing during process before the court especially if we have in mind the rule of law principle. According to the Article 6 of the European Convention on Human Rights and European Court of Human Rights practice a right to public hearing is obligatory in cases when an oral hearing takes place, same as public pronouncement of judgment. Of course, there are some exceptions like in criminal law cases when it is important to take care of a private life of victims, minors or in sexual delicts and for example in civil cases like divorces. But we have to emphasize that publicity of trial and pronouncement is a general principle.

For the purpose of this paper we tried to find out judgments of the Court of Justice of the European Union related to this right – right to a public trial and public pronouncement of judgment but we did not succeed. The reason is that maybe the Court of Justice of the European Union did not have a chance to rule related to this right.

c) The Right to Adjudication by an Impartial and Independent Tribunal

The right to adjudication by an impartial and independent tribunal means that only court established by law and independent (independent from political, organizations and government influence) may adjudicate. Independence implies the availability of a judge to determine a matter free from the improper influence of any outside source. Impar-

tiality requires that an adjudication be open minded and unprejudiced in determining the dispute.¹⁷

The Court of Justice of the European Union already ruled in cases that are related in the right to adjudication by an Imperial and independent Tribunal. For the purpose of this paper we will analyze Case C403/16¹⁸.

Mr. El Hassani applied for the Schengen visa in Republic of Poland Consulate in Rabat for the visiting his family, a wife and a son, Poland citizens. His application was refused by the Consuls decision. According to the Polish rules he had a right to take a request for a review but to the same Consulate who again refused to grant that application on the ground of the lack of certainty as to his intention to leave Poland before the visa expired. Mr. El Hassani brought an action before the Court (administrative court) requesting to make a reference to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 32(3) of the Visa Code in order to determine whether that provision also includes within its scope the right to bring a judicial appeal against a decision refusing to issue a visa. Administrative court stated that this case does not fall within the jurisdiction of the administrative court and refused to refer a question to the Court of Justice of the European Union for a preliminary ruling.

Mr. El Hassani brought an action before Supreme Administrative Court claiming that the right to a fair trial guaranteed by the Article 13 of the European Convention on Human Rights related with the article 47 of the Charter of Fundamental Rights of the European Union has been denied. At the end Supreme Administrative Court decided to stay the proceedings and to refer the question to the Court of Justice of the European Union for a preliminary ruling.

In this case the Court of Justice of the European Union stated that: “.... the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union provides that everyone is entitled to a hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues (judgment

17 A. Power, *Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights*, Page 4

18 Court of Justice of the European Union in Case C- 403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych*,

16 May 2017, Berlioz Investment Fund, C-682/15, EU: C:2017:373, paragraph 55).”

d) The Right to a Trial Within a Reasonable Time

The right to a trial within a reasonable time is guaranteed by the provisions of the article 6 of the European Convention on Human Rights as European Court of Human Rights ruled in large number of cases.¹⁹ This right protects litigants for having an excessively long time for a decision in their case.

The “reasonableness” of the length of proceedings must be assessed in the light of the circumstances of the individual case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.²⁰

The Court of Justice of the European Union in Case C-385/07²¹ determined „..... as the Advocate General stated at point 307 et seq. of his Opinion, the failure on the part of the Court of First Instance to adjudicate within a reasonable time can give rise to a claim for damages brought against the Community under Article 235 EC and the second paragraph of Article 288 EC.“

The first case where the Court of Justice of the European Union dealt with the right to a trial within a reasonable time was Case – 185/95²². The Court of Justice of the European Union stated that the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.²³

Furthermore, the Court of Justice of the European Union argued that such a long elapse time between the end of written procedure and oral hearing (32 months). A duration of this procedure, even if we inc-

¹⁹ this right is specially relevant for criminal law cases

²⁰ I. Varga: *BREACH OF THE REASONABLE TIME REQUIREMENT IN HUNGARIAN LAW AND IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS*, http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_11_2008/varga_varianta.pdf, last seen on May 14 2018, page 274.

²¹ The Court of Justice of the European Union in Case C-385/07 - *Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities*

²² The Court of Justice of the European Union in Case 185/95 - *Baustahlgewebe GmbH v Commission of the European Communities*

²³ Ibidem, paragraph 19.

lude judicature, investigation and deliberations, can be justified only by exceptional circumstances. The Court of Justice of the European Union did not find any of a such circumstances in this case.

e) The Right to Enforcement

“The purpose of judicial proceedings is a practical one:“ [a] judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective.²⁴

The most important judgment of the European Court of Human Rights related to the right to enforcement in *Hornsby vs Greece*.

Mr. David Hornsby and Mrs. Ada Ann Hornsby born in Great Britain, residents of Rhodos island, professors of English language. Mrs. Hornsby is at 5 June 1984 applied to educational authorities for a licence to establish a private school for learning foreign languages on Rhodos.

However she was informed that according to Greece Law this licence could not be issued to the foreigners. Then Hornsbys brought the action to the Supreme Administrative Court, that concluded, according to the European Court of Human Rights case law, that there has been no restrictions for citizens of the Member states to establish a private school for learning foreign languages, no matter if they are not citizens of the Greece.

Judgment of the Supreme Administrative Court was not enforced (executed) and case was brought to the European Court of Human Rights. The European Court of Human Rights stated that this „right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.²⁵ Execution of a judgment given by any court must therefore be regarded as an integral part of the ‘trial’ for the purposes of Article 6”, and the European Court of Human Rights infers this right of execution from “the principle of the rule of law.”²⁶

There are, however, certain limitations to the right to enforcement. For example state cannot be held responsible if enforcement is impossible due to the debtor’s lack of funds. Also, the right to enforcement

24 F. Tulkens, *Execution and Effects of Judgments of the European Court of Human Rights: The Role of the Judiciary*, in: *Dialogue between Judges*, Council of Europe, Strasbourg, 2006, 12.

25 European Court of Human Rights in *Hornsby v Greece*, (Application no. 18357/91), 19 March 1997

26 *ibidem*

does not preclude the existence of statutory limitation periods, though the nature of such measures and the manner in which they are applied must be compatible with the European Convention on Human Rights, the judgment creditor may be expected to take action. Finally, authorities are provided some margin of appreciation where enforcement could disturb the public order or where rights of others are involved.²⁷

For the purpose of this paper we could not find any judgment of the Court of Justice of the European Union related to the right to enforcement. It seems that the Court of Justice of the European Union did not rule about this right. Here we have to emphasize article 52 of the Charter of Fundamental Rights, in so far as this Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights shall be the same as those laid down by the said European Convention on Human Rights. This provision shall not prevent law providing more extensive protection.

3. C-73/16 Decision (Peter Puškár v Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy)

Mr. Puskar thought that he was a victim of an infringement of his rights relating to personality because his name was on a list of persons considered by the Finance Directorate to be ‘front-men’, drawn up by the latter in the context of tax collection and the updating of which is carried out by the Finance Directorate, the tax offices subordinate to it and the Financial Administration Criminal Office (further more ‘the contested list’).

Mr. Puškár claimed that the Finance Directorate and the Financial Administration Criminal Office have drawn up and are using the contested list, a list of natural persons, numbering 1 227 which the public authorities refer to by the expression ‘biele kone’ (‘white horses’). That expression is used for persons acting as ‘fronts’ in company director roles. Each natural person is, in principle, together with his national identity number and a tax identification number, associated with a legal person or legal persons — of which there are 3 369, according to Mr. Puškár’s indications — within which he is deemed to be performing duties during a determined period.²⁸

He requested from the Supreme Court of the Slovak Republic to

²⁷ M. Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* *The right to a fair trial in civil cases*, Springer, 2017, 160

²⁸ Court of Justice of the European Union in C-73/16 Decision, Paragraph 26

order to all the Finance Directorate, all tax offices under its control and the Financial Administration Criminal Office not to include his name on the contested list or any other similar list and to delete any reference to him from those lists and from the finance authority's IT system.

The Supreme Court refused Mr. Puskar because of procedural reasons, he had not exhausted the remedies before the national administrative authorities, or on substantive grounds.

The case was brought in action before the Constitutional Court of the Slovakia Republic who stated that according to the case law of the European Court of Human Rights, The Supreme Court had infringed several of those applicants' fundamental rights, namely: the right to a fair trial, the right to privacy as well as the right to the protection of personal data. The Constitutional Court referred the cases back to that Supreme Court so that it would rule again. Furthermore Supreme Court noticed that Constitutional Court did not referred on provisions of The EU law and provisions of the Charter of Fundamental Rights of the European Union.

Supreme Court decided to stay the proceedings and to refer the questions to the Court of Justice of the European Union for a preliminary ruling. In this paper we will refer to questions as it follows:

- „Can a list held by a financial authority of a Member State, which contains the claimant's personal data and the inaccessibility of which has been secured by appropriate technical and organisational measures for the protection of personal data against unauthorised disclosure or access within the meaning of Article 17(1) of Directive 95/46, be regarded as unlawful evidence by virtue of the fact that it was obtained by the claimant without the lawful agreement of the relevant financial authority, which the referring court must refuse to admit in accordance with the requirements of EU law on a fair hearing in the second paragraph of Article 47(2) of the Charter of Fundamental Rights of the European Union?
- Is the abovementioned right to an effective legal remedy and to a fair hearing (in particular under Article 47 of the Charter of Fundamental Rights of the European Union) consistent with an approach taken by the referring court whereby, when, in this case, there is case-law from the European Court of Human Rights which differs from the answer obtained from the Court of Justice of the European Union, the referring court, in accordance with the principle of sincere cooperation in Article 4(3) TEU and Article

267 TFEU, gives precedence to the Court of Justice's of the European Union legal approach?"²⁹

The Court of Justice of the European Union stated that Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it does not preclude national legislation, which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, has been infringed, subject to the prior exhaustion of the remedies available to him before the national administrative authorities, provided that the practical arrangements for the exercise of such remedies do not disproportionately affect the right to an effective remedy before a court referred to in that article. It is important, in particular, that the prior exhaustion of the available remedies before the national administrative authorities does not lead to a substantial delay in bringing a legal action, that it involves the suspension of the limitation period of the rights concerned and that it does not involve excessive costs.³⁰

Furthermore, Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding that a national court rejects, as evidence of an infringement of the protection of personal data conferred by Directive 95/46, a list, such as the contested list, submitted by the data subject and containing personal data relating to him, if that person had obtained that list without the consent, legally required, of the person responsible for processing that data, unless such rejection is laid down by national legislation and respects both the essential content of the right to an effective remedy and the principle of proportionality.

115

4. Right to a fair trial in Bosnia and Herzegovina

Protection of fundamental rights is guaranteed by the Article II of the Bosnia and Herzegovina's Constitution from 1995.

„Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms,” and also “The rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws”. It is interesting that rights guaranteed by the Constitution listed in Ar-

²⁹ Court of Justice of the European Union in C-73/16 Decision, Paragraph 32

³⁰ Court of the Justice of the European Union in C-73/16 Decision, Rules 1 and 2

ticle II do not recognize a right to a fair trial as we presented earlier. It recognizes only the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

What is the difference between rights guaranteed in Article II of the Constitution and rights guaranteed by the Convention? If someone claims that their rights to a property have been violated according to the Article II paragraph 3 k) of the Constitution, the level of the protection is the same as it is according to the European Convention on Human Rights. Constitutional Court of Bosnia and Herzegovina stated that there is a difference. The European Convention on Human Rights guarantees a minimum protection to private and legal persons, but provisions of Article II of the Constitution guarantees this right also to institutions with public authorities.³¹

A right to a fair trial is also guaranteed by the provisions of the Criminal Law Procedure: right to adjudication by the impartial and independent court,³² right to a public trial,³³ right to a trial within a reasonable time,³⁴ right to be present at a trial³⁵, *ne bis in idem*³⁶ etc.³⁷

The Constitutional Court of Bosnia and Herzegovina has pointed out that every person who's rights have been directly or indirectly violated by the administrative bodies, has a right to adjudication by the full jurisdiction court. It considers unlimited access to question all administrative acts³⁸.

According to above, right to a fair trial in Bosnia and Herzegovina is guaranteed in criminal procedure, civil and administrative procedures, also.

As authors previous research was in a field of the administrative law, specifically "Enforcement of administrative courts decisions in Bosnia and Herzegovina and neighbourly countries"³⁹, we can point out that the main problem in Bosnia and Herzegovina is a right to enforce judgment, especially in administrative law. There are a large numbers of

31 N. Ademović, J. Marko, G. Marković, *Ustavno pravo Bosne i Hercegovine*, Konrad Adenauer Stiftung, Sarajevo, 2012., 242.

32 Article 23-28 of the Criminal Procedure Act of Bosnia and Herzegovina

33 Article 234- 237 of the Criminal Procedure Act of Bosnia and Herzegovina

34 Article 13 of the Criminal Procedure Act of Bosnia and Herzegovina

35 Article 247 of the Criminal Procedure Act of Bosnia and Herzegovina

36 Article 4 of the Criminal Procedure Act of Bosnia and Herzegovina

37 Criminal Procedure Acts of Federation of Bosnia and Herzegovina, Republic of Srpska and Brcko District include the same provisions

38 H. Sijerčić- Čolić, *Krivično procesno pravo, Krivičnoprocesni subjekti i krivičnoprocesne radnje*, Pravni fakultet Univerziteta u Sarajevu, 2012, 131.

39 D. Zahirović, "Enforcement of administrative courts decisions in Bosnia and Herzegovina and neighborly countries" Master thesis, Faculty of Law, University of Zenica, July 2017

judgments of the European Convention on Human Rights that Bosnia and Herzegovina did not enforce, that surely violate principles of legal security and principles of rule of law.⁴⁰

The European Court of Human Rights published a judgment in Case of Roman Catholic Archdiocese of Vrhbosna v. Bosnia and Herzegovina⁴¹ in the beginning of June 2018, also related to a valuation of the Article 6 of the European Convention on Human Rights. The applicant complained that the non-enforcement of the domestic decision given in its favour had violated its rights under Article 6 of the European Convention on Human Rights and Article 1 of Protocol No. 1.

By decision of 9 May 2003, which became final and binding on 4 September 2003, the Human Rights Chamber for Bosnia and Herzegovina found that the Federation of Bosnia and Herzegovina had discriminated against the applicant in its enjoyment of the right to freedom of religion guaranteed by Article 9 of the European Convention on Human Rights. In order to remedy the situation it ordered the Federation of Bosnia and Herzegovina to ensure the relocation of public schools housed in the Archdiocese High School building in Travnik, and to reinstate the applicant in the premises within one year but the Public authorities did not enforce the judgment for 15 years. The European Court of Human Rights ruled as it follows:

- Holds that there has been a violation of Article 6 of the European Convention on Human Rights and of Article 1 of Protocol No. 1 to the Convention.
- that the respondent State is to secure the immediate and full enforcement of the Chamber's decision of 9 May 2003, and pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses.⁴²

40 For more see: The European Court of Human Rights Case Sejdic and Finci Vs Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06, 22 September 2009; Case of Zornic Vs Bosnia and Herzegovina, Application no. 3681/06, 15 July 2014; Case of Pilav VS. Bosnia and Herzegovina, Application no 41939/07, 9 June 2016

41 The European Court of Human Rights, Case of Roman Catholic Archdiocese of Vrhbosna v. Bosnia and Herzegovina, Application no. 40694/13, 5 June 2018

42 The European Court of Human Rights, *Case of Roman Catholic Archdiocese of Vrhbosna v. Bosnia and Herzegovina*

According to the Stabilisation and Association Agreement in Bosnia and Herzegovina, in order to harmonise legislative to EU law, we'd have to become a Member state as soon as possible.

Citizens of Bosnia and Herzegovina have no right to bring an action before the Court of Justice of the European Union because of one simple reason: Bosnia and Herzegovina is not a Member State of the European Union, not even a candidate. Citizens of Bosnia and Herzegovina refer to rights guaranteed by the European Convention on Human Rights and have only a right to bring an action before the European Court of Human Rights.

5. Conclusion

The Charter of Fundamental Rights of the European Union is a document that brought together the fundamental rights protected in EU law. It reaffirmed the rights and principles that already existed in EU law. The Charter of Fundamental Rights of the European Union was given legal effect by the Lisbon Treaty on its entry into force in December 2009. And it applies to EU institutions all the time, but only applies to a member state only when they are implementing law.

Article 47 of the Charter of Fundamental Rights of the European Union guarantees right to a fair trial and right to effective remedy that corresponds to provisions of the Article 6 of the European Convention on Human Rights. It is important to emphasize that individuals, citizens of Member States have no right to bring an action before the Court of Justice of the European Union personally as before the European Court of Human Rights. First of all, The Court of Justice of the European Union may rule only in cases related to EU Law (directives for example) and after the national court requested for preliminary ruling.

The Court of Justice of the European Union ruled a large number of cases related to a right for a fair trial but for the purpose of this paper we analyzed only few of them that are relevant for:

- The Right to a Fair Hearing (C-276/12),
- The Right to a Public Trial and Public Pronouncement of Judgment (no case law)
- The Right to Adjudication by an Impartial and Independent Tribunal (C-403/16)
- The Right to a Trial Within a Reasonable Time (C-185/95)
- The Right to Enforcement (no case law).

For the purpose of this paper we did a research on a large numbers of cases of the Court of Justice of the European Union, so that we can conclude that the Court ruled according to the similar principles as the European Convention on Human Rights. Also there are some rights, like right to enforcement and the right to a public trial and public pronouncement of judgment that the Court of Justice of the European Union did not rule yet.

According to a research that we have done for the purpose of this article, we can conclude that Charter of Fundamental Rights of European Union mainly reflects the current scope on the right to fair trial.

Also, we have pointed out that this right is a right guaranteed by the Charter of Fundamental Rights of the European Union to citizens of the European Union. Citizens of third countries, including Bosnia and Herzegovina, are not protected by the provisions of the Charter of Fundamental Rights of the European Union equally.

DA LI JE NEŠTO NOVO U EVROPSKOJ UNIJI? – PRAVO NA PRAVIČNO SUĐENJE U SKLADU S POVELJOM O OSNOVNIM PRAVIMA EVROPSKE UNIJE

Sažetak

U radu ćemo razmatrati da li postoji razlika u nivou zaštite prava na pravično suđenje zagwarantiranih Evropskom konvencijom o ljudskim pravima i Poveljom o osnovnim pravima Evropske unije. Sud pravde Evropske unije i Evropski sud za ljudska prava prepoznali su nekoliko prava koja čine pravo na pravično suđenje kao što su: pravo na pravično saslušanje, pravo na javno suđenje i javno objavljivanje presude, pravo na presuđivanje od strane nezavisnog i nepristrasnog suda, pravo na suđenje u razumnom roku i pravo na izvršenje odluka. Također, u radu će biti predstavljene relevantne sudske odluke Suda pravde Evropske unije, kao i poređenje sa razvojem prava na pravično suđenje u Bosni i Hercegovini.

Ključne riječi: pravo na pravično suđenje, Sud pravde, osnovna prava, ljudska prava, Povelja o osnovnim pravima, Evropska konvencija o ljudskim pravima