Fundamental Rights of the European Union: The Jurisprudence of the Supreme Administrative Court of Lithuania

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Abstract: The article analyses different levels of fundamental human rights protection, which national courts face when adjudicating cases: a standard enshrined in national constitutions, a European Union standard stemming from the Charter of Fundamental Rights of the European Union and an international standard embedded in the fundamental international documents – the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular. The article reviews relations between different fundamental rights protection standards through an analysis of the jurisprudence of the European Court of Justice and the European Court of Human Rights and puts emphasis on the decisions, which provide guidance for national courts when dealing with conflicting standards. Furthermore, the article entails a comprehensive overview of the case-law of the Supreme Administrative Court of Lithuania, where the court dealt with the issue of the collision of different human rights protection standards.

Key words: *fundamental human rights, Charter of Fundamental Rights of the European Union, European Convention for the Protection of Human Rights and Fundamental Freedoms, standards of human rights protection, interplay of different standards of human rights protection*.

The principle that the aim of administrative justice is to defend human rights from unlawful actions of public administration actors is already a matrix. There is no doubt that the main purpose of administrative courts is to ensure justice and to safeguard human rights in the sphere of administrative legal relations. It follows, firstly, from the Constitution of the Republic of Lithuania (hereinafter – also the Constitution), which proclaims that constitutional democracy may not exist without the effective realization of human rights. Secondly, the fact that the ultimate aim of administrative courts in Lithuania is strengthening the judicial protection of human rights and freedoms, is also apparent from the founding documents of administrative courts[1]. When preparing to establish administrative courts in Lithu-

1 Explanatory notes of the Law of the Republic of Lithuania on Administrative Cases, the Law on the Establishment of Administrative Courts of the Republic of Lithuania, the Law on

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ania, administrative judicial systems and their characteristics in various European countries (Austria, Italy, France, Germany, Poland, Finland) were researched and the Lithuanian administrative justice system was oriented towards the generalized standards of analogous systems in the European countries.

In accordance with Article 112 of the Constitution, which provides that specialized courts may be established for adjudication of administrative, labour, family and other categories of cases, an autonomous system of administrative courts was established in Lithuania in 1999. The reform of administrative judicial system was finalized in 2001, with the establishment of the Supreme Administrative Court of Lithuania (hereinafter – the Supreme Administrative Court, the Court or SACL). Adjudication of disputes arising out of administrative relations, including disputes entailing violations of human rights fall under the competence of administrative courts. The Supreme Administrative Court is vested with powers to take final decisions and form unified administrative jurisprudence. Therefore, the case law of this particular Court in the realm of fundamental rights is analysed in this article.

Protection of fundamental human rights and freedoms is a constant priority of the Court since its establishment. The Court usually deals with violations of human rights and fundamental freedoms when adjudicating cases in the sphere of adequate protection of the right to property, the right to respect for private and family life, the freedom of assembly and association, the right to a fair trial. When ensuring justice and protection of fundamental rights, the Supreme Administrative Court relies on the Constitution and provisions of international agreements – the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – also the Convention, the ECHR) and the source of EU law – the Charter of Fundamental Rights of the European Union (hereinafter – also the Charter).

The preamble of the Constitution proclaims that the Lithuanian Nation, striving for an open, just and harmonious civil society and State under the rule of law, adopts and proclaims this Constitution. Article 18 of the Constitution provides that human rights and freedoms shall be innate. The Constitutional Court of Lithuania has stated in its rulings that recognition of the innate nature of human rights and freedoms means, *inter alia*, that a person ipso facto possesses rights and freedoms, which are inseparable from him and which cannot be taken away (rulings of 19 August 2006, 24 September 2009). Therefore, one of the constitutional

Administrative Disputes Commissions of the Republic of Lithuania, the Law on Amendments and Supplements to Articles 9, 12 and 15 of the Law on Courts of the Republic of Lithuania and the Draft Law on Amendments and Supplements to the Code of Civil Procedure of the Republic of Lithuania.

foundations of the Republic of Lithuania as a democratic State abiding the rule of law, is the recognition of the principle of an innate nature of human rights and freedoms (Rulings of the Constitutional Court of 29 December 2004; 22 December 2010). This principle is also a fundamental constitutional value, inextricably linked with other constitutional values – independence of the State, democracy, Republic – which form the basis of the foundation of Lithuanian Republic as a common good of the whole society enshrined in the Constitution (Ruling of the Constitutional Court 19 December, 2012). There is no doubt that human rights and freedoms are one of the fundamental values enshrined in the Constitution and protected by the Constitution and other legal acts.

Mechanisms of human rights and their protection are not only determined by the provisions of national law but are also enshrined in international legal acts. The international realm of human rights protection is not homogeneous, the following protection systems exist: the universal human rights protection system of the United Nations (the International Charter of Human Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its optional protocols and the International Covenant on Economic, Social and Cultural Rights and its optional protocol) and regional human rights protection systems, the most relevant of which is the Council's of Europe system and one of its most important conventions – the European Convention on Human Rights and Fundamental Freedoms. In the Conclusion of 24 January 1995 the Constitutional Court of Lithuania stated that after its ratification and entry into force the Convention has become an integral part of the legal system of the Republic of Lithuania and is applicable in the same manner as the laws of the Republic of Lithuania. The Constitutional Court also noted that the Convention is a special source of international law, which has a different purpose than most other international legal acts. This purpose is universal – to seek that the rights proclaimed in the Universal Declaration of Human Rights are universally and effectively recognized, respected and further realized. The Convention performs the same function as the constitutional guarantees of human rights because the Constitution consolidates these guarantees on national level, and the Convention on the international level.

International legal acts have become an important source of law, the standard which is used in adjudicating cases at the Supreme Administrative Court[2]. It

2 With regard to the International Covenant on Civil and Political Rights, a decision of 12 May 2021 no. A-671-756/2021 *G. J.* should be taken into account. The decision was taken when the proceedings were reopened after the decision of The United Nations Human Rights Committee in 2019, establishing a violation of the right to enter public service on an equal basis, enshrined in Article 25 of the Covenant of Civil and Political Rights. The Supreme Administrative Court had to decide whether violations of the Covenant affected the validity and legality decisions of administrative courts had previously been adopted in the case. In the decision of 6 March 2014

is recognized that the European Convention for the Protection of Human Rights and Fundamental Freedoms may be applied directly when deciding cases and, in the event of a conflict with national laws, has priority[3].

For example, in its judgement of 7 May 2010, in administrative case also locally known as the "Gay pride" case[4], the Supreme Administrative Court directly applied Article 11 of the ECHR and relied on the practice of the European Court of Human Rights (hereinafter also – the ECtHR) in the case *Bączkowski and Others v. Poland*[5]. The Court has annulled interim measures applied by the court of first instance – to suspend the validity of the order allowing the demonstration, after finding that the interim measures were neither appropriate nor proportionate in relation to the aim pursued and taking into account the positive duties of the State to ensure effective use of freedom of assembly by minorities. In the administrative case *R.S. v. the Republic of Lithuania*[6], the Supreme Administrative Court found a violation of Article 8 of the ECHR (right to respect for private and family life) due

in a case No. R-525-8-14, the court relied on the International Covenant on Political and Civil Rights and found that although this covenant establishes guarantees related to the elections to the executive power, it does not prohibit the countries from establishing reasonable restrictions. The court took a decision that in this case the applicant was subject to a restriction to participate in the Presidential elections, taking into account that the period of time, which has passed since the beginning of this restriction, is not obviously disproportionate. In this instance a conclusion of 25 March 2014 of the Human Rights Committee was important. The conclusion provided that the State, Party to the Covenant, had violated the rights of the applicant enshrined in points b and c of Article 25 of the International Covenant on Civil and Political Rights. The applicant requested to reopen the proceedings, claiming that the above-mentioned conclusion of the Human Rights Committee proved that the court did not properly apply provisions of substantive law in his case, but the case was not reopened (decision of the Supreme Administrative Court No. P-492-71-14). Certain decisions, regarding the Convention on Access to Information, Public Participation in Decision-making, and the Right to Apply to Courts in Environmental Matters (Aarhus Convention), should be noted – 26 May 2021 decision in administrative case No. eA-1115-789/2021, 23 September 2013 decision in administrative case No. A^{520}-211/2013, 19 December 2013 decision in administrative case No. A^{822}-989/2013.

3 See, e.g., decision of 11 February 2003 of the Supreme Administrative Court No. 259-03, decision of 14 April 2008 No. A^{575}-164/08, where the Court concluded that through direct application of the ECHR and jurisprudence of the ECtHR, the Republic of Lithuania implements the decision of the ECtHR and does not perform unlawful activities that manifest in non-implementation of the decision.

4 In a 7 May 2010 decision in administrative case No. AS^{822}-339/2010, the Court had decided that although the case was on the lawfulness of provisionary measures, it was necessary to examine the case on its merits. If the dispute regarding the lawfulness to organize a march "For Equality" had not been examined on its merits by the scheduled day of the march, the suspension of the validity of the permission to organize the march would have denied an essential condition for the effective use of the right of assembly, based on the practice of the European Court of Human Rights.

5 *Bączkowski et al. v. Poland* (no. 1543/06, 3 May 2007).

6 Decision of the Supreme Administrative Court of 29 November 2010 in administrative case No. A^{858} – 1452/2010.

to the failure to establish the appropriate legal mechanisms (failure to adopt relevant national legal acts) to receive health care services in case of gender change, as well as failure to effectively legally recognize the applicant's changed identity and awarded non-pecuniary damages.

When ensuring justice and protection of human rights, the Supreme Administrative Court also applies legal provisions of the European Union and the EU catalogue of fundamental rights. Pursuant to Part 2 of the Constitutional Act "On the Membership of the Republic of Lithuania in the European Union", the legal provisions of the European Union are an integral part of the legal system of the Republic of Lithuania; where it concerns the founding Treaties of the European Union, the norms of European Union law are applied directly, while in the event of the collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania. In the ruling of 14 March 2006, the Constitutional Court elaborated on the principle of the EU law supremacy in relation to the provisions of Lithuanian legal acts enshrined in the Constitutional Act. The Constitutional Court noted, that the Constitution consolidates not only the principle that, in cases where national legal acts establish such a legal regulation that competes with that established in an international treaty, the international treaty must be applied but also *expressis verbis* establishes the collision rule concerning EU law, consolidating the priority of the application of EU legislative acts in cases where the provisions of EU law arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of their legal force), with the exception of the Constitution itself. On the other hand, it should be taken into consideration that decision on collision of EU law and constitutional law in a formalistic manner would not be in accordance with the obligations of an EU Member State and the principle of loyal cooperation between the European Union and a Member State enshrined in Article 4 of the TEU and if a Member State fails to comply with its obligations, the European Commission may file an infringement claim at the European Court of Justice[7]. In its jurisprudence the Supreme Administrative Court prioritizes harmonious interpretation and application of the Constitution and European Union law[8], affirming

7 Vadapalas, V. *Lietuvos Respublikos konstitucinė teisė, tarptautinė teisė ir Europos Sąjungos teisė.* In Jarašiūnas, E. et al. (ed.). *Lietuvos konstitucinė teisė*, Mykolo Romerio universitetas, Vilnius, Registrų centras, 2017, p. 189-212.

8 In 17 July 2014 decision No. R^{858}–11/2014 of the extended panel of the Supreme Administrative Court it was stated that the legislative proposal of the organizers of a referendum (applicants) would cause a contradiction between the Constitution of the Republic of Lithuania and the law of the European Union, which would have been incompatible with the constitutional obligations of the Republic of Lithuania and membership in the European Union. Adoption of such a legislative project would mean that the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of *pacta sunt servanda* would be ignored. This would imply

the notion of E. Kūris that both legal systems may converge through jurisprudence[9], through the path of harmonious interpretation. However, not all Member States of the EU follow this path of harmonious interpretation. For example, Poland has a different position towards the possibility of converging constitutional and EU law systems through jurisprudence[10].

It should also be noted that the role of the Supreme Administrative Court in the sphere of human rights protection is not static but has changed from a passive observer to an active provider of a high protection standard when human rights are considered an integral part of administrative courts' legal culture[11]. The Supreme Administrative Court is regarded as a modern court, which takes panoramic legal perspective and is simply destined to go beyond the boundaries of national law and use the instruments of international law. Therefore, the analysis and application of jurisprudence of European Court of Human Rights and other international courts is becoming an every-day task of a national administrative court[12]. On the other hand, the jurisprudence of Supreme Administrative Court is continuously influenced by changing legal and social realities, thus it should further be monitored and evaluated in order to attain progressive and fective development.

the emergence of internal inconsistency in the Constitution, because the constitutional principle of *pacta sunt servanda* would require compliance with the obligations of the Republic of Lithuania to the European Union arising from the concluded agreements, and the provision proposed by the applicants do not allow to do that. On the basis of these arguments, it was concluded that the proposed legal provisions are incompatible with other provisions of the Constitution (*inter alia*, the constitutional principle of *pacta sunt servanda*) and this conflict cannot be reconciled at this time. When adjudicating this case, an appeal to the Constitutional Court lodged. In the ruling of 24 January 2014, the Constitutional Court held Article 1 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" as a basis for opening the Constitution to European Union law.

9 Kūris, E. *Europos Sąjungos teisė Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje: sambūvio algoritmo paieškos*. In Katuoka, S. (ref. ed.). *Teisė besikeičiančioje Europoje. Liber Amicorum Pranas Kūris*. Vilnius, 2008, p. 694.

10 The Constitutional Court of Poland declined recognition of the principle of EU law in relation to the Polish Constitution. On 11 May 2005, the Constitutional Court of Poland stated that even after joining the EU, the Constitution remains the supreme law in Poland. If a conflict arises between the Polish Constitution and EU law, it cannot be resolved by the interpretation of law. It also stated that the application of the principle of the EU law supremacy does not eliminate its competence to review the compatibility of EU legislation with the Polish Constitution, especially if related to an unacceptable decrease in the level of protection of fundamental rights.

11 Piličiauskas, R. *Žmogaus teisės kaip teisinės kultūros dalis. Žmogus, teisinė valstybė ir administracinė justicija. Mokslo studija, skirta Lietuvos vyriausiojo administracinio teismo dešimtmečiui*, 2012, p. 51-69.

12 Valančius, V. *Žmogus ir administracinė justicija. Pastebėjimai. Žmogus, teisinė valstybė ir administracinė justicija. Mokslo studija, skirta Lietuvos vyriausiojo administracinio teismo dešimtmečiui*, 2012, p. 124-136.

I. The Standard of Protection of Human Rights in the European Union

1. Codification of Fundamental Rights

In the beginning, protection of fundamental rights at the European Communities was shaped only through the jurisprudence of the Court of Justice of the European Communities (later – the Court of Justice of the European Union). It therefore follows that the protection of fundamental rights was basically created by judicial institutions, since the Founding Treaties of the European Communities were silent on the issue. However, when analysing the case-law of the Court of Justice of the European Communities, it is clear that the court was of the opinion that fundamental rights is an inherent part of the common principles of the European Communities law, even though the law itself did not provide a detailed list, which would be obligatory to the European Communities and Member States as well as easily accessible to its citizens.

On the level of primary acts of the European Union, the protection of fundamental rights for the first time was established in Article F, Part 2 of the Treaty on European Union (signed in Maastricht on 7 February 1992 and entered into force on 1 November 1993), which provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Finally, on the 7 December 2000 in the Nice Conference the European Parliament, Council and Commission have proclaimed the catalogue of fundamental rights – the Charter of Fundamental Rights of the European Union, and thus fundamental rights were incorporated in the EU law. However, only on the 1 December 2009, when the Treaty of Lisbon came into force, the Charter became binding to the EU Member States and acquired the same legal power as Treaties. In accordance with the Part 1 Article 6 of the TEU, the Union recognizes the rights, freedoms and principles set out in the Charter and the Charter has the same legal value as the Treaties. Charter is an innovative instrument, where the fundamental EU rights are embedded, giving them visibility, precise and clearly predictable content. The rights, freedoms and principles enshrined in the Charter are also starting to acquire a new essential aspect: it is linked to the protection of the fundamental rights, which have become a concern on such a level that in an event of collision of fundamental rights provided in the Charter and the main economic freedoms embedded in the primary EU law, the non-fulfilment of obligations or restriction of the rights stemming from the economic freedoms could be justified, even in instances related to implementation of fundamental economic EU freedoms.

The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights (Article 2 TEU). Respect for human rights is emphasized as one of the most important values of the EU. The Union law is based on an essential presumption that each Member State shares with other Member States common values, on which the Union is founded as laid out in the Article 2 of TEU and acknowledges that other Member States share the same values with it. This assumption presupposes and justifies mutual trust between the Member States in recognition of these values and thus in compliance with the Union law, which implements them[13]. The common values are shared by Member States, which exist in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. It is clear that the legal system of the EU is based on the same values. In this instance it is simple to indicate the similarity between this principle and the one already mentioned that the constitutional foundations of the Republic of Lithuania as a democratic legal state lay in recognition that fundamental human rights are innate. Pursuant to Article 19 of the TEU, which aims to broaden the scope of the rule of law value and respect for human rights enshrined in Article 2 of the TEU, an obligation to ensure judicial control over the legal system of the Union lies not only with the courts of the European Union, but with national courts as well[14]. Thus precisely the courts (European Union courts and national courts) give concrete effect to fundamental rights enshrined in the Charter and directly ensure that individuals can employ all remedies in instances where their fundamental rights, which are a component of the EU law, have been violated. Ensuring fundamental rights at the national level is directly related to the successful implementation of the principle of the rule of law and since 1 December 2009 administrative courts are obliged to apply the provisions of the Charter.

The jurisprudence of the CJEU in many instances provides a comprehensive interpretation of fundamental rights. The CJEU itself is influenced by legal and social changes and does not act in isolation, but constantly seeks to find a

13 Judgment of the Court of Justice of the European Union of 25 July 2018 in *Minister for Justice and Equality (Deficiencies in the Judicial System)*, C-216/18 PPU (ECLI:EU:C:2018:586), p. 35. Also judgement of 25 July 2018 *Generalstaatsanwaltschaft (Imprisonment conditions in Hungary)*, C-220/18 PPU (ECLI:EU:C:2018:589), p. 48.

14 Muir, E. *The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer*. In: European Administrative Law 12, 2, 2019. *See also* an 8 March 2011 opinion in *Agreement to establish a common patent dispute resolution system*, C-1/09 (ECLI:EU:C:2011:123), p. 66. Decision of 3 October 2013 *Inuit Tapiriit Kanatami et al. v. Parliament and Council*, C-583/11 P (EU:C:2013:625), p. 90; decision of 28 April 2015 *T & L Sugars and Sidul Açúcares v Commission*, C 456/13 P (EU:C:2015:284), p. 45. National courts and the CJEU together carry out the task mutually entrusted to them – to ensure that through interpretation and application of Treaties the law is observed (Opinion 1/09 of 8 March 2011).

proper balance among fundamental rights as well as to strike a balance between the fundamental rights and other legal values. Pursuant to Part 1 Article 6 of the TEU, the provisions of the Charter do not expand the competence of the Union, provided in the Treaties, in any manner. A corresponding provision is embedded in Part 2 Article 51 of the Charter that it does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Article 51 Part 1 of the Charter provides that it is addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are *implementing Union law*.

2. Multi-layered Protection of Fundamental Rights in the European Union

Protection of Fundamental Rights in the European Union is ensured through a multi-layer system: national system, based on the constitutions of the Member States; international system, such as the European Convention on Human Rights and Fundamental freedoms; and the EU system, based on the Charter, which is applicable towards the actions of the EU institutions or when the Member States implement EU law[15]. Therefore, three human rights protection systems (layers) operate in the Member States: constitutional, international (ECHR and other) and the protection of fundamental rights enshrined in the Charter. Despite the common basis and affinity of these systems, they operate with distinct catalogues of personal rights and freedoms as well as with their own standards of protection of those rights and freedoms. Each of them has its own centre of interpretation (the CJEU for the Charter, the ECthR for the ECHR and national constitutional courts – for the constitutional protection systems). In this realm, the issue of ensuring consistency of interpretation and application of protection systems arises.

The Charter aims at uniform EU law operation and the EU law should be interpreted and applied in harmony with various national requirements. However, an assumption should be made that national courts encounter requirements of fundamental rights protection stemming from different layers. Those enshrined in the Charter, the ECHR and other international documents and national constitutions. Therefore, a question naturally arises whether a court should apply the system of fundamental rights protection, which ensures higher protection in Europe? It may be concluded from the jurisprudence of the CJEU that a national court does not possess a right to opt for a system, which is the most favorable to a person.

15 See more Žaltauskaitė-Žalimienė, S. *Europos Sąjungos pagrindinių teisių chartijos turinio paieškos*. Teisė, 2015, vol. 97, p. 57–72.

Questions on the interplay of systems are relevant not only on a theoretical level, but also from a standpoint of case law. The standard of protection of a particular right under the Charter may differ from the standard developed in a particular country: it may be on higher or lower level than in the national law. It is obvious that room for tension between different levels of fundamental rights protection systems exist. National courts, which encounter such overlapping of systems are faced with a problem, which catalogue of rights to refer to and which standard to prioritize in a particular case.

3. Application of the Charter Standard in the Jurisprudence of the Supreme Administrative Court

It is visible from the jurisprudence of the Supreme Administrative Court that the Charter is relevant for the court in several instances: (1) as a source of interpretation of national law, (2) in instances, when the provisions of the Charter are analyzed reviewing of the arguments of the parties, and finally, (3) when the provisions of the Charter are applied directly[16]. Attention should be brought to a certain particularity. In all of the abovementioned instances, whether the Court makes references to the Charter, relies on it or applies it directly, it does so in a broader scope than set out in Article 51 of the Charter, i.e. not necessarily within the scope of EU law or national legislation implementing the latter.

Charter as a Source of National Law Interpretation

In a decision No. A^{756}-686/2010 of 8 December 2010, regarding a cancellation of an subsidiary protection and temporary residence permit in the Republic of Lithuania, the Court has relied on the principle of good administration provided in the Article 41 of the Charter and noted that this provision proclaims common legal values, which may be taken into consideration as an additional source of legal interpretation when deciding on the content of the principle of good administration in Lithuania. This method was also used in decision No. A^{552}-1250/2013 of 23 September 2013 regarding the decision by the Inspector of Journalist Ethics on publishing untrue information and statements infringing applicant's professional reputation. In its decision the Supreme Administrative Court relied on Article 11 of the Charter, which provides guarantees for the freedom of expression, information, media and pluralism as a source of interpretation of applicable law in the

16 Žaltauskaitė-Žalimienė, *S. Europos Sąjungos pagrindinių teisių chartijos taikymas supra- ir nacionaliniu lygmenimis*. In Collective monograph. Vilnius University Publishing House. 2019, p. 39–44.

case. The same situation may also be witnessed in the decision No. A[822]-198/2013 of 23 April 2013. In a decision No. A-1317-822/2017 of 7 February 2017 on a refusal to allocate monetary social support, the dispute did not fall into the sphere of the EU law implementation, therefore the Court has adjudicated this dispute relying on the principle of good administration, which stems from the constitutional imperative that "the governmental institutions serve the people" (Article 5 Paragraph 3 of the Constitution), but the principle itself was interpreted in the light of the same principle within Article 41 of the Charter. The Court reiterated that such a manner of interpretation was possible because the abovementioned provision of the Charter embodied common values and could be regarded as a source of interpretation. In this particular case the Court came to a conclusion that the institution did not properly cooperate with the applicant in order to determine the circumstances relevant to the assessment of the applicant's right to social allowance.

There also are instances when the Court regards the Charter as a source of interpretation in disputes falling within the sphere of EU law implementation. For example, such a situation may be witnessed in a decision No. A-36-662/2015 of 15 January 2015, on partial recovery of EU support (direct payments for agricultural land and crop areas), stemming from Article 9 and Article 33 Paragraph 2 of the Commission Regulation (EC) No. 796/2004. When adjudicating this dispute, the Court relied on the principle of good administration provided in the Charter and the right to be heard as an integral part of this principle, and at the same time noted that the provision of the Charter embodied common values and may be used as an additional source of interpretation when deliberating on the content of the good administration principle under the Lithuanian law.

When parties assert violation of the Charter

The Court also often assesses the provisions of the Charter in the light of the arguments of the parties, who assert that that the provisions of the Charter were violated. The Court normally examines a possible violation of the Charter in a broader manner than established in the Article 51 of the Charter, i. e. regardless of whether the dispute falls within the sphere of the EU law implementation. For example, in a decision No. A[261]-1675/2012 of 2 April 2012 the Supreme Administrative Court adjudicated a dispute regarding individual's right to state-guaranteed secondary legal aid. In this case, the subject matter of the case was a decision denying secondary legal aid to the appellant and the Court upheld this decision. In order to arrive to such a conclusion, the Court examined the reasoning provided by the appellant on whether Article 47 Paragraph 3 of the Charter, establishing free legal aid if necessary to ensure the right to effective justice, was violated, disregarding the fact that the applicant sought to receive free legal aid in circumstances not related to the defence of rights stemming from an EU law instrument.

On the other hand, there are instances when the Court examines whether a dispute is related to the implementation of the EU law. In the judgement No. eA-3773-602/2016 of 8 July 2016, where an annulment of a decision to refuse to create a hunting unit and to change its boundaries was requested, the applicant also requested the Court to apply to the CJEU for a preliminary ruling, on whether Article 17 of the Charter should be understood and interpreted in a manner that owners of agricultural or forest land have the right to use their property for hunting-related economic activities or to receive income from this activity. The Supreme Administrative Court noted that the dispute is related to the field, which is governed by national law, and the provisions of the Charter do not apply to such legal relationship, therefore deciding that the request for a preliminary ruling was unfounded.

Provisions of the Charter Applied Directly

One of the first instances when the Charter was applied directly was a decision No. A^{858}-1013/2011 of 18 April 2011. The case concerned the decision of National Paying Agency to decline payments under Lithuanian rural development programs supporting agricultural land and crop areas. The Court took notice that the decision was based on a report of an on-site inspection, carried out more than three years ago and therefore provision of Article 41 of the Charter, which enshrines the principle of good administration, the right be informed about established factual circumstances, the right to be heard before a negative decision is taken, was violated. In this instance, the Charter was directly applied in the sphere EU law, taking into account the scope of its application set out in Article 51 of the Charter. Similarities also found in decision A-658-858/2016 of 8 July 2016, which involved a situation of a financial correction when financing of the project was reduced, and the applicant was ordered to pay back the amount of unlawfully received support. The Court examined whether the principle of good administration, enshrined in Article 41 of the Charter was not violated, and determined that the established factual circumstances led to a conclusion that the applicant was properly informed of the ongoing investigation, the incriminated violation, had an opportunity to provide explanations, the consequences of non-provision of explanations were clarified, thus there was no legal basis to conclude that disputed administrative acts were adopted in violation of the principle of good administration.

In decision No. A^{822}-1727/2012 of 13 February 2012, regarding a decision not to renew a temporary residence permit to a foreigner in the Republic of Lithuania, the Court assessed circumstances related to recognition of a fictitious marriage. The Court noted that such a decision may not be guided by a purely formalistic approach. There may not be any reasonable doubts, when declaring a marriage fictitious, otherwise an irreparable damage would be done to the right to respect for

private and family life enshrined, *inter alia*, in Article 8 of the ECHR and Article 7 of the Charter, as well as the right to marriage, enshrined, *inter alia*, in Article 12 of the ECHR and Article 9 of the Charter. Notwithstanding the state's discretion to regulate in manner that would prevent the conclusion of sham marriages in the context of immigration laws, an assessment should be made on a case-by-case basis whether such an interference to human rights is not arbitrary and/or disproportionate.

When deliberating a case, concerning the refusal of the Ministry of Foreign Affairs to release frozen financial funds of foreigners in extent that they were necessary to pay for legal services, the Supreme Administrative Court faced a question whether such a situation was compatible with the EU law, including the provisions of the Charter. The Court thus applied for a preliminary ruling and submitted questions related to the interpretation of Article 3 of the Regulation No. 756/2006. In this particular case the applicants were on the lists of persons subject to restrictive measures in the Member States of the Union by Regulation No. 588/2011 and Council Decision 2011/357/CFSP. In *Peftiev*[17] decision of 12 June 2014, the CJEU, when deciding on the issue of releasing frozen financial funds to the extent necessary to pay for the legal services, must exercise their competences in accordance with the rights provided for in the second sentence of Paragraph 2 Article 47 of the Charter and the requirement that the plaintiff must be represented by a lawyer before the General Court. When the Supreme Administrative Court resumed the proceedings after the preliminary ruling, it found that decisions of the Ministry of Foreign Affairs not to release the funds were illegal. The Court noted that the ministry does not enjoy unlimited discretion when applying exceptions, the reasoning of the disputed decisions was insufficient, flawed, and also pointed out that, when making a decision to apply the exception, the competent authority must assess specific situation and circumstances, check whether the funds are reasonable or not used for other purposes[18].

The issue of application of the Charter also arose in a case concerning recognition of professional qualifications. The Court dealt with a situation, where an applicant had in fact fulfilled all requirements for obtaining professional qualification of a pharmacist, under Section 7 Article 44 of Directive 2005/36/EC, but the professional qualification was not granted to her for purely formal reasons – she did not possess a proof of her professional qualification. The applicant could not obtain such a proof, because due to complex personal circumstances she had fulfilled the requirements to obtain the qualification not in a single Member State, which is ordinarily the case, but in several EU Member States taking advantage

17 Judgment of the Court of Justice of the European Union of 12 June 2014 *Peftiev* C-314/13 (EU:C:2014:1645).

18 Decision of the Supreme Administrative Court of 23 September 2014 in administrative case No. A-858-47/2014.

of a fundamental EU freedom – free movement of persons. The Court applied to the CJEU for a preliminary ruling on the interpretation of Articles 45, 49 TFEU and Article 15 of the Charter and Directive 2005/36/EC[19]. In the ruling C-166/20 *BB v. Ministry of Health of the Republic of Lithuania* of 8 July 2021[20] the CJEU decided that in accordance to the facts of the case, the interpretation of Article 15 Paragraph 2 of the Charter coincides with the interpretation of Articles 45 and 49 of the TFEU and they have to be interpreted in a manner that where a person has acquired professional competence related to this profession both in the Member State of origin and in the host Member State and does not possess a proof of formal qualification, the competent authorities of the host Member State must assess this competence and compare it with the requirements of the host Member State that need be fulfilled to become a pharmacist. In the light of the preliminary ruling the Supreme Administrative Court granted the appeal[21].

II. The Level of Protection of EU Fundamental Rights on the Basis of Article 53 of the Charter

When referring to a relationship between the fundamental rights of the EU Member States and fundamental rights under the Charter, it is important to note that constitutional and supreme courts of the EU Member States have constructively contributed to the formulation of the EU fundamental rights content and clarification of the relationship between these two systems of rights. This allowed to enrich the content of the EU fundamental rights with the EU constitutional principles and values and the constitutional courts have acted as engines of European integration in this instance. The jurisprudence of the CJEU in the sphere of fundamental rights was formulated by taking into consideration the jurisprudence of the constitutional courts of Germany and Italy which avoided unconditional recognition of the supremacy of European law until the EU had an adequate system for the protection of fundamental rights. This *Solange* and "contro limiti" (limited powers) line[22] of cases

19 Decision of the Supreme Administrative Court of 8 April 2020 in administrative case No. eA-3312-822/2020.

20 Judgement of the Court of Justice of the European Union of 8 July 2021 *BB v. Ministry of Health of the Republic of Lithuania*, C-166/20 (ECLI:EU:C:2021:554).

21 Decision of the Supreme Administrative Court of 5 January 2022 in administrative case No. eA-694-822/2021.

22 The German Federal Constitutional Court on 29 May 1974 in the decision *Solange I* had stated that as long as the European Community law did not have an equivalent catalog of fundamental rights, it was necessary to take into account the fundamental rights enshrined in German law when applying the provisions of European Community law in Germany.

is often presented as Eurosceptic, in a boarder sense, as representing the development of European constitutionalism.

However, even though the EU already has a system for the protection of fundamental rights and the doctrine of the CJEU on this matter is clear and unambiguous, the doctrine developed on the basis of German Constitutional Court *Solange* cases and Italian Constitutional Court limited powers doctrine, according to which the national courts of these countries retain the authority to make final decisions on the basic principles and rights enshrined in their constitutions, even when they are related to EU law, is with certain modifications reflected in the practice of some constitutional and supreme courts[23]. It is therefore clear that the EU courts and national courts of the Member States have a shared responsibility in

Similar provisions on the application of national catalogs of fundamental rights have also been established in Belgium, France and Italy. On 22 October 1986, in the decision *Solange II*, the Federal Constitutional Court of Germany declared that it did not have a jurisdiction to review the compliance of European Union law with the fundamental rights enshrined in the German constitutional provisions because the practice of the European Community and the CJEU jurisprudence provides for an effective protection of fundamental rights. Hence, in the opinion of the Constitutional Court, the protection of fundamental rights ensured by the CJEU was equivalent to the protection provided by the Constitution. However, this does not mean that the Federal Constitutional Court of Germany has permanently abandoned the control of the provisions of European Community law because according to its decision of 12 May 1989 *Wenn nicht* the protection of fundamental rights developed in the jurisprudence of the CJEU may not always be sufficiently effective. The CJEU controls whether the provisions of secondary law of the European Communities meet the standard of fundamental rights established by Community law and not by national constitutions. Therefore, if there is a doubt about the compliance of the provisions of secondary law of the European Communities with the standard of fundamental rights enshrined in the Constitution, this issue can be decided by the Federal Constitutional Court of Germany. On 12 October 1993, in the *Maastricht* decision, the Federal Constitutional Court of Germany clarified the issues of its competence in an even more obscure manner: it stated that the CJEU directly ensures the compatibility of European Union acts with fundamental rights in accordance with the Community standard, while the competence of the Constitutional Court is to ensure the universal mandatory standard of fundamental rights for the German population. The limits of competence of the CJEU and the Federal Constitutional Court of Germany for the control of conformity of European Community acts with fundamental rights, fixed in the judgments *Solange II* and *Wenn nicht*, were in essence confirmed. However, in the *Maastricht* decision, the Federal Constitutional Court of Germany also stated that it can exercise its jurisdiction over questions of the application of European Community secondary law only by taking into account the jurisprudence of the CJEU. Accordingly, on 18 December 1973 the Italian Constitutional Court in *Frontini* decision No. 183/73 decided that judges must review whether Community law does not conflict with the fundamental principles and human rights, which it saw as the basis for limiting the primacy of European Communities law. This position was affirmed on 8 June 1984, in *Granital* decision of the Italian Constitutional Court.

23 Cartabia, M. *Fundamental Rights and the Relationship between the Court of Justice, the National Supreme Courts and the Strasbourg Court*. In 50th Anniversary of the Judgment in van Gend en Loos. Conference Proceedings. Luxembourg, 13 May 2013. Access: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf>

guarding fundamental rights and constitutional principles from the interference of governments and political institutions.

1. Legal Foundations of the Relation Between Fundamental Rights of the EU Member States and the Charter

The provisions of Article 53 of the Charter are relevant to identify the relation between the systems of the fundamental rights of the EU Member States and the Charter. It provides that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. In accordance with the interpretation of the Charter, this provision aims to safeguard the levels, currently provided by the EU law, national law, and international law. With regard to its importance, the European Convention on Human Rights is also mentioned.

There are discussions on the meaning of Article 53 of the Charter. On the one hand, it is considered that Charter rights are elevated to a higher protection level; based on the provisions of Article 53 of the Charter, the protection of fundamental rights is strengthened in the EU[24]. On the other hand, it is also considered that the provisions of Article 53 of the Charter allow the application of the fundamental rights of the Member States, deviating from the principle of the supremacy of the EU law application[25].

In accordance with Article 52 Paragraph 4 of the Charter, in so far as the fundamental rights, resulting from the constitutional traditions common to the Member States, are recognized by the Charter, the rights have to be interpreted in harmony with the traditions. However, due to the nature of constitutional traditions, not all aspects of the fundamental rights of the Member States are characteristic to the EU fundamental rights. The jurisprudence in the sphere of the fundamental rights of the Member States is also not uniform. The scope of the application of the EU fundamental rights and fundamental rights of the Member States also does not necessarily coincide. Fundamental rights of the EU are binding for EU institutions and Member States when they implement EU law. This determines to the differences of fundamental rights and their application in the

24 Calliess, Ch., Ruffert, M. *Kommentar zu Art. 53 der Europäischer Grundrechtecharta.* In Kommentar zu EUV / AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. *2016, 5 Aufl., p. 3.*

25 Griller, S. *Grundrechte für Europa*. 2002, p. 131.

Member States. It is also often the case that the fundamental rights recognized by the Charter arise from constitutional traditions common to the Member States, but they are characteristic only to several Member States. The above-mentioned factors may lead to differences between the fundamental rights of the EU and those of the Member States. Also, the EU courts and courts of the Member States may define the content of the fundamental rights differently and thus the realization of these rights will also differ[26].

Arguably, these differences between the fundamental rights of the EU and the fundamental rights of the Member States will not be viewed in favor of the Member States[27], but the Charter should not weaken the protection of the Member States' fundamental rights, since the supremacy of the EU fundamental rights, superseding the fundamental rights of the Member States, would be contrary to the objectives of Article 53 of the Charter. Similarly, the fundamental rights of the Member States cannot be relied upon when their application would conflict with EU law. The fundamental rights of the EU should be considered when interpreting the fundamental rights of the Member States. It is also worth considering whether a person should be granted a possibility to rely on a fundamental EU right when it provides greater protection.

2. The CJEU Approach to the Relationship Between the Fundamental Rights of the Member States and Fundamental Rights of the Charter

The CJEU case-law, related to the application of Article 53 of the Charter, is consistent and in line with the principle of EU law supremacy. The Spanish Constitutional Court requested a preliminary ruling in *Stefano Melloni*[28] case, concerning the European arrest warrant. It sought to clarify whether Article 53 of the Charter had to be interpreted in a manner that a transferring state may set a condition for the transfer that a person, convicted in *absentia*, would be given an opportunity to appeal the decision in an attempt to prevent a violation of the constitutional right to a fair trial. S. Melloni had submitted a claim, maintaining that, indirectly, the absolute requirements, deriving from the right to a fair trial proclaimed in Article 24(2) of the Spanish Constitution, were violated. The essential issue in the Melloni case was difference in standards of fundamental rights protection under

26 *See more* Žaltauskaitė-Žalimienė, S. *Interpretation and Application of the European Union Charter of Fundamental Rights. Lithuanian Legal System under the Influence of European Union Law*. Vilnius: Faculty of Law, Vilnius University, 2014, p. 543–573.

27 Jarass, H. D. *Zum Vehältnis von Grundrechtecharta und sonstigem Recht*, *EuR* 2013, 29, p. 30–38.

28 Judgment of the European Court of Justice of 26 February 2013 *Stefano Melloni v Ministerio Fiscal*, C-399/11 (ECLI:EU:C:2013:107), p. 57–63.

the Charter and the Spanish Constitution. The CJEU was therefore called to voice an opinion on the issue of "the difference in the standards of fundamental rights protection"[29]. The national court preferred an interpretation, which would have allowed for a Member State to apply the standard of fundamental rights enshrined in its constitution when it was higher than enshrined in the Charter. The CJEU did not agree, noting that such an interpretation of Article 53 of the Charter would undermine the primacy[30] of EU law in as much as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

The preliminary ruling of *Melloni* states that Article 53 of the Charter confirms that, *where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter*, as interpreted by the Court, *and the primacy, unity and effectiveness of EU law are not thereby compromised*. The CJEU therefore came to a conclusion that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution[31]. The Spanish Constitutional Court concluded that the decision to transfer the applicant to the Italian authorities did not indirectly violate his right to a fair trial, since it was established that the accused had a lawyer and had deliberately refused to participate in the trial. From the *Melloni* ruling it may be seen that one of the essential factors for the CJEU's decision was the Framework Decision 2009/299 setting a uniform standard of protection of fundamental rights, which could not be altered by the constitutional standards of a Member State, regardless of whether they would be more favorable to individuals in a particular case.

29 Jarašiūnas, E. *Apie bylų Melloni, Jeremy F. ir Gauweiler ir kt. įnašą į Europos Sąjungos Teisingumo Teismo ir konstitucinių teismų bendradarbiavimo plėtotę*. Bulletin of the Constitutional Court of the Republic of Lithuania, 2016, vol. 2 (45), p. 218–274.

30 According to established jurisprudence of the CJEU, the principle of EU law primacy, which is fundamental to the EU legal system (*see* Opinion 1/91 of 14 December 1991, *EEA Agreement – I* (EU:C:1991:490), p. 21; 2011 Opinion 1/09 of 8 March 2014 *Concerning the agreement establishing a common patent dispute resolution system* (EU:C:2011:123), p. 65; and Opinion 2/13 of 18 December 2014 *Accession of the European Union to the ECHR* (EU:C:2014:2454), p. 157), it is not possible to violate a national legal provision, even a constitutional provision, otherwise the effectiveness of EU law on the territory of that state would be undermined (*see*, *inter alia*, judgment of the European Court of Justice of 17 December 1970, *Internationale Handelsgesellschaft* C-11/70 (ECLI:EU:C:1970:114), p. 3; and judgment of 8 September 2010 *Winner Wetten*, C-409/06 (EU:C:2010:503)).

31 Advocate General Bott on 2 October 2012 in the opinion of *Stefano Melloni* expressed the same position.

Even though the Charter was not yet of a primary legal force, another important ruling from a perspective of application of Article 53 of the Charter, is *Parliament v. Council*[32]. In this case, the CJEU examined an action of the European Parliament, where the annulment of Article 4 Paragraph 1, last paragraph, Article 6 and Article 8 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification was requested. The Parliament maintained that the abovementioned provisions violate fundamental rights, such as the right to family life and the right to non-discrimination, guaranteed by the ECHR and arising from the constitutional traditions common to the Member States as general principles of Community law, with which the Union undertakes to comply in accordance with Article 6(2) of the TEU. Regarding Article 8 of the Directive, which established a possibility for a Member State to require that the guardian would have legally resided in their territory for a maximum of two years before his or her family members would join him, the CJEU found that it did not violate the fundamental right to respect family life or the duty to first adhere to the best interests of the child and does not allow the Member States to do so. The CJEU drew attention to the fact that the directive left discretion to the Member States, and it was broad enough to allow the Member States to apply the rules of the directive in a manner compatible with the requirements arising out of the protection of fundamental rights[33]. The requirements, arising out of protection of general principles recognized in the Community law including fundamental rights, oblige Member States, when implementing the Community legislation, to apply it, as far as possible, in a manner that does not violate the aforementioned requirements.[34] Finally, it noted that the implementation of the Directive is subject to review by the national courts, and if those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the CJEU for a preliminary ruling. In this case, the CJEU noted that the provisions of the directive allow for a broad discretion, which does not set obstacles to apply the provisions of the directive in a manner compatible with the fundamental rights protection requirements. Therefore, a possible incompatibility of the directive's provisions with the provisions of the ECHR and the constitutional traditions common to the Member States that are of the power of general principles

32 Judgement of the European Court of Justice of 27 June 2006 *Parliament v Council*, C-540/03 (EU:C:2006:429).

33 To this effect, see also Judgement of the Court of Justice of the European Union of 13 July 1989 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, C-5/88 (ECLI:EU:C:1989:321), p. 22.

34 Judgement of the European Court of Justice *Parliament v. Council*, 77/88 (ECLI:EU:C:1990:217); judgement of 24 March 1994 *Bostock*, C-2/92 (ECLI:EU:C:1994:116), p. 16; judgement of 18 May 2000 *Rombi and Arkopharma,* C-107/97 (EU:C:2000:253), p. 65; and on this effect in judgement ERT, C-260/89 (ECLI:EU:C:1991:254) p. 43. Judgement of 26 February 2013 Åkerberg *Fransson*, C-617/10 (ECLI:EU:C:2013:105), p. 29; judgment in *Melloni* C-399/11, p. 60.

of Community law, was compensated with the broad discretion, which would allow the Member States to apply the rules of the directive in a manner compatible with the abovementioned requirements.

In the ruling *Åkerberg Fransson,* the CJEU has emphasized that, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity, and effectiveness of European Union law are not thereby compromised[35].

The jurisprudence of the CJEU on application of Article 53 of the Charter is consistent and allows to apply fundamental constitutional rights of a Member State only when an application is compatible with the provisions of EU law[36]. National courts are obliged to follow the practice of the CJEU. For example, it should be noted that the standpoint of the German Federal Constitutional Court towards the EU fundamental rights is changing. When faced with a possible collision of German constitutional provisions and provisions of the Charter, on 15 December 2015 it had decided[37] that in certain cases, concerning the protection of fundamental rights, it would be possible to assess the conformity of the provisions of EU legislation with German constitutional provisions if it was absolutely necessary for the protection of the constitutional identity guaranteed by Article 79 of the German Basic Law. However, in this particular case there were no grounds to limit EU law primacy.

In another case, the Federal Constitutional Court of Germany[38] relied on the fact that fundamental EU rights and constitutional fundamental rights are es-

35 *Åkerberg Fransson*, p. 29; *Melloni*, p. 60.

36 Žaltauskaitė-Žalimienė, S. *Europos Sąjungos pagrindinių teisių chartijos taikymas supra- ir nacionaliniu lygmenimis. In* Collective monograph. Vilnius University Publishing House. 2019.

37 The decision No. 2 BvR 2735/14 of the German Constitutional Court. In this case, the guarantee of human dignity under Article 1 of the Basic German Law was relevant when application of a criminal sanction means that the violation and the offender's guilt must be proven in due compliance with the applicable norms of procedural law.

38 In the decision of 27 April 2021 No. 2 BvR 2006/14, the German Federal Constitutional Court examined whether European or national fundamental rights were applicable in the case and whether the reference to the applicants' data during the authorization procedure did not violate these rights. The court reasoned that the Charter should be applied in instances where the legal question to be resolved is completely within the EU law. Court noted that if it was the case, the Federal Consumer Protection and Food Safety Authority's use of the applicant's data must comply with Article 16 of the Charter. If not, it must comply with Article 12 of the German Basic Law (Grundgesetz).

sentially based on common constitutional traditions and, in this respect, are an expression of common universal European values. Therefore, when applying and interpreting the German Basic Law, it is necessary to refer to the Charter, the European Convention on Human Rights, and the common constitutional traditions of the Member States, as well as the case-law of the highest courts. In the case under consideration, the court found that both standards offered equal protection.

The provisions of Article 53 of the Charter allow for an assumption that all the EU Member States adhere to the European standard of fundamental rights. The question therefore remains what should a national court do if it is uncertain whether the abovementioned standard is not observed in a particular Member State. The legal content of the European standard of fundamental rights should also be agreed upon. In my opinion, the ruling of *Dumitru-Tudor Dorobantu* provides an answer to this issue. In this ruling, the CJEU emphasized an obligation for the Member States to rely on an assumption that other Member States respect fundamental rights.

When implementing EU law, Member States may have such an obligation, and as a result they may not demand that another Member State would ensure a greater national protection of fundamental rights than the one guaranteed by Union law[39]. Also, save for exceptional instances, Member States may not verify whether another Member State really respected the fundamental rights guaranteed by the Union in a particular case. On the other hand, the CJEU also recognizes that "in exceptional circumstances" restrictions on the principles of mutual recognition and mutual trust between Member States may be imposed where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter that judicial authority is bound to assess the existence of such a risk. To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific, and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, *inter alia*, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports, and

39 Judgement of the European Court of Justice of 25 July 2018 *Minister for Justice and Equality* (*Deficiencies in the Judiciary*), C-216/18 PPU (ECLI:EU:C:2018:586), p. 37; judgement of the European Court of Justice of 25 July 2018 *Generalstaatsanwaltschaft* (Prisonment conditions in Hungary), C-220/18 PPU (ECLI:EU:C:2018:589), p. 50; and judgement of the European Court of Justice of 15 October 2019 *Dumitru-Tudor Dorobantu* (*Prisonment conditions in Romania*), C-128/18 (ECLI:EU:C:2019:857), p. 47.

other documents produced by bodies of the Council of Europe or under the UN system[40]. In this ruling, the CJEU relied on Article 3 of the Convention of Human Rights, which imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected.

It may be concluded that the CJEU recognizes that exceptional circumstances may exist, which allow for a deviation from the principles of mutual trust and mutual recognition and the Council Framework Decision 2002/584/TJR on the European Arrest Warrant and the transfer procedure between the Member States, which provides a uniform standard of fundamental rights protection (based on *Melloni's* rhetoric). A situation may arise when this standard established in the Council Framework Decision will not be able to ensure compliance with international fundamental rights standards.

In other words, the CJEU allows deviation from EU law uniform standard of protection of fundamental rights to avoid a violation of a higher international fundamental rights protection standard. It therefore means that situations may exist when the EU standard of fundamental rights will differ from the international standard of fundamental rights or the EU standard will not be able to ensure that the international standard of fundamental rights is intact. It is probable that the above-mentioned exceptional circumstances will mainly occur when there is a danger that through application of a uniform standard of fundamental rights, established in the EU legal act, provisions of the ECHR would be violated. In such an nstance, a rhetorical question may arise whether the CJEU is ready to recognize a priority of international fundamental rights standards over the fundamental rights standards enshrined in the EU law, or, perhaps, simply respect these standards.

3. The European Court of Human Rights Approach to the Relationship of Fundamental Rights under the ECHR and the Charter

The relation between the ECHR and EU law has been determined in the practice of the European Court of Human Rights (hereinafter – the ECtHR). One of

40 Judgement of the European Court of Justice of 5 April 2016 *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU (ECLI:EU:C:2016:198), p. 88-89; and *Generalstaatsanwaltschaft (Detention conditions in Hungary)*, C-220/18 PPU, p. 59–60.

the examples is the judgement of 28 June 2018 *G.I.E.M. S.R.L. and others v Italy*. According to the ECtHR, the "Maginot line", once drawn between Convention law and European Union law, has evaporated. The ECtHR also noted that, in fact, it was always an elusive defensive barrier against the full implementation of the Convention that inspired a false sense of security but did not represent the truly overlapping nature of Convention law and European Union law with its Charter of Fundamental Rights. Primacy over domestic law, even over constitutional law, and direct effect in the domestic legal order are also intrinsic features of the Convention system. This evidently means that all ordinary judges are "ordinary judges of the Convention", entitled to disapply domestic law contradicting Convention law, as interpreted by the ECtHR. Such "diffuse control of conventionality" not only furthers international comity but also domestic judicial transparency, avoiding the temptation of a "forced" interpretation of domestic law according to the Convention which would lead to "masked disapplication". The convergence of Strasbourg and Luxembourg jurisprudence and the mutual influence of their legal standards contribute to the constitutionalisation of the European legal order. If any preponderance has to be given, Article 52 Paragraph 3 and Article 53 of the Charter themselves are crystal clear about it: they establish the axiological subordination of the Charter and consequently of all European law to the human rights standards set by the Convention, as interpreted by the ECtHR[41]. Thus, while using an elaborate style of reasoning, the ECtHR confidently confirmed that the provisions of the Charter cannot conflict with the Convention. This position of the ECtHR towards the relationship between the ECHR and EU law is not novel.

Earlier, in the judgement *Avotinš v. Latvia*, the ECtHR has held that the protection of fundamental rights, afforded by the legal system of the European Union, was in principle equivalent to that for which the Convention provided. Before arriving to that conclusion, it found, firstly, that the European Union offered equivalent protection of the substantive guarantees, observing in that connection that at the relevant time the respect for fundamental rights had already been a condition of the lawfulness of Community acts and that the CJEU referred extensively to Convention provisions and to Strasbourg case-law in carrying out its assessment[42]. Furthermore, the ECtHR found the substantive protection, afforded by EU law, to be equivalent, taking into account the provisions of Article 52 Paragraph 3 of the Charter. Even more, the ECtHR has recognised that the mechanism provided for by European Union law for supervising observance of fundamental rights, in so far as its full potential has been deployed, also affords protection comparable to

41 Judgment of the European Court of Human Rights of 28 June 2018 in case *G.I.E.M. S.R.L. and others v. Italy* (application no. 1828/06), p. 90.

42 Judgment of the European Court of Human Rights of 23 May 2016 in case *Avotinš v. Latvia* (application no. 17502/07), p. 102–104.

that for which the Convention provides. Even earlier, in a case *Bosphorus v Ireland* the ECtHR held that States parties to the Convention have to ensure its proper implementation, however, „if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation". This presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient[43].

III. Triggers of Fundamental Rights in the Jurisprudence of the Supreme Administrative Court of Lithuania

As mentioned before, a multi-tier system ensures fundamental rights protection in the EU: national system, based on the constitutions of the Member States, international system, such as the Convention of Fundamental Rights and Freedoms, and the EU system based on the Charter.

The jurisprudence of the Supreme Administrative Court of Lithuania has taken the direction of non-opposition of constitutional provisions and EU law provisions arising out of the Charter. SACL emphasizes the importance of international obligations and adherence to them but also notes that the contradiction of EU law and Constitutional provisions should not be raised artificially, i.e. the provisions of the Constitution should not be amended in a manner, which conflicts with the EU law.

There are, however, instances when tension arises among different levels of fundamental rights protection standards. In instances when national courts apply fundamental rights standards of national constitutions, which provide for a higher level of protection, it is presumed that such application is incompatible with the concept of the EU law primacy, as established and elaborated in the jurisprudence of the CJEU. On the other hand, attention should be drawn to the fact that neither the CJEU nor other EU institutions exacerbate or escalate the tensions arising between these two fundamental rights standards enshrined in national constitutions and EU law, even if an opportunity arises. It thus, appears that both the CJEU and the national courts are content with such a friendly two-way interpretation.

The question that follows is whether such a tension of different levels of fundamental rights protection has arisen or may arise in the practice of the Supreme Administrative Court of Lithuania. It appears such tension could most like-

43 Judgment of the European Court of Human Rights of 30 June 2005 in case *Bosphorus v. Ireland* (application no. 45036/98), p. 80,156–159.

ly arise in cases related to the inviolability of private life (enshrined in Article 22 of the Constitution of the Republic of Lithuania, Article 7 of the Charter), which covers many areas due to its nature and sensitive social context, as well as its broad scope of application.

One of such areas is the right to use one's name and last name. This right, which is an integral part of the right to family and private life, has been consistently assessed in the jurisprudence of SACL[44], taking into account the official constitutional doctrine and the interpretations provided by the CJEU on the spelling of personal names, taking into account its modern social context (e.g. multiple EU citizenships of a child, administrative, professional, personal inconveniences and restrictions arising from the person's name/surname being spelled differently in documents issued in different Member States, parents' and children surnames being spelled differently, additional administrative burden related to this, etc.), with an emphasis that inability for a person to use the original letters of his surname in a passport, restricts his right to private and family life.

Therefore, when deciding on the issue of legal interpretation, SACL took into consideration the fact that this right is protected in a supranational level[45] and the interpretation of the Constitutional Court. Firstly, it has to be mentioned that the Constitutional Court has noted that Lithuanian language is a specific constitutional value, which is the basis of ethnic and cultural identity of the Lithuanian nation, a guarantee of the nation's identity and survival. Lithuanian language preserves the identity of the nation, integrates civil nation, guarantees integrity and indivisibility of the territory of the state, a regular functioning of governmental and municipal institutions. The status of Lithuanian language as a national language means that the functioning of the Lithuanian language has to be ensured in all areas of public life[46]. In its jurisprudence, the Constitutional Court has also

44 Decision of the Supreme Administrative Court of 27 February 2017 in administrative case No. eA-2413-662/2017.

45 It is important that the Supreme Administrative Court in this case relied on the practice of the CJEU, and in particular the decision of 12 May 2011 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, C-391/09 (ECLI:EU:C:2011:291). In this decision, the CJEU explained that national courts dealing with the spelling of personal names in documents have to determine whether refusal of competent authorities, based on national legislation, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels. It was also noted that differences in spelling would cause inconveniences if a person's surname was spelled in the passport of the Republic of Lithuania differently than in the previously issued passport of the Republic of Lithuania, in the passport of the Republic of France, in the Register of Residents and differently than the surname of his father G.J. is spelled.

46 Ruling of the Constitutional Court of Lithuania of 5 May 2007.

explored the issue of orthography of names and surnames in a passport. Paragraph 2 of the resolution No. I-103 of 31 January 1991 of the Supreme Council of the Republic of Lithuania "On writing names and surnames in the passport of a citizen of the Republic of Lithuania", in accordance with which the names and surnames of non-Lithuanian nationals are written in Lithuanian characters in the passport of the Republic of Lithuania, was declared in line with the Constitution by the Constitutional Court[47]. On the other hand, the Constitutional Court has noted that even though the legislator established that the name and surname of a person in a passport of the Republic of Lithuania had to be written in Lithuanian characters, it also had a discretion to determine that in the section "other records" the name and surname of the same person may be written in non-Lithuanian characters and without Lithuanian adaptation when the person so prefers[48].

When faced with a slightly different protection standard of the right to private and family life through the use of a person's name and family name under the EU law and under the Constitution, SACL made a wise decision that complies with the provisions of both EU law and the Constitution. The Supreme Administrative Court has stated in a particular case that a restriction of subjective rights, was carried out without a defined legal basis, and that does not correspond to the constitutional principle of limiting human rights only by law, elaborated in the jurisprudence of the Constitutional Court. The inscription of a person's name in a passport of the Republic of Lithuania in both Lithuanian and non-Lithuanian characters is compatible with the Constitution of Lithuania. The change of social context in this field, emphasized by the Supreme Administrative Court, is also reflected in a new law of the Republic of Lithuania of 1 May 2022 on writing a person's name and surname in documents, which already directly establishes that the names and surnames in documents confirming personal identity of a citizen of the Republic of Lithuania and records of acts of civil status may be inscribed in original letters but only in Latin alphabet and without diacritics. The abovementioned examples lead to a conclusion that administrative courts, in principle, follow the direction of conciliation of the Constitution, Charter and other EU law provisions.

Another example of value alignment and complementarity of Constitutional and EU law provisions is related to the right to the inviolability of private life and may be witnessed in the interpretation of the concept of family members. In this case, SACL dealt with a question whether a refusal to recognize a same-sex marriage concluded in another Member State is a restriction of the right to move and live freely in the territory of Member States, established in Article 21 of the TFEU, and whether such a restriction could be justified by public order and inherent national identities provided in Article 4(2) of the TEU. In this case, al-

47 Ruling of the Constitutional Court of Lithuania of 21 October 1999.

48 Ruling of the Constitutional Court of Lithuania of 6 November 2009.

though same-sex marriages (partnerships) are not possible under the national law of Lithuania, in order to defend the individuals' right of the inviolability of private life, SACL established that the refusal to issue a residence permit in the Republic of Lithuania may not be based solely on the foreigner's gender identity and/or sexual orientation. The Supreme Administrative Court thus had quashed the decision of an institution to refuse a residence permit in the Republic of Lithuania to a citizen of a third country, exercising his right to family reunification with a citizen of a Member State, in the event of a same-sex marriage[49].

When ruling upon this issue, the Court was guided by the jurisprudence of the Constitutional Court which stated that, in accordance with the EU law, a Member State may not rely on public order clause, *inter alia*, the fact that its national law does not provide for same-sex marriage, to deny the unification of a family of a EU citizen (including its own citizen) and a third-country national, who took advantage of their freedom and legally entered into a same-sex marriage in another Member State[50]. The legal regulation was evaluated and applied taking into account the principle of EU law primacy, as well as due respect for the competence and jurisdiction of the national Constitutional Court was maintained. It is also important that, although the issue arose in the field of regulation of EU law, the Supreme Administrative Court of Lithuania turned to the Constitutional Court in order to eliminate any doubts that the implementation of these rights may be incompatible with the provisions of the Constitution in the context of national identity, enshrined in Article 4 Paragraph 2 of the TEU. In this particular case, the legal regulation was also assessed and applied taking into account the social context and legal situation related to the matter in question in other Member States. The position of the Supreme Administrative Court in this case is in accordance with the conclusions of the ruling of 5 June 2018 CJEU in *Coman et al*[51].

49 Decision of the Supreme Administrative Court of 20 March 2019 in administrative case No. eA-3227-624/2019.

50 In the ruling of 11 January 2019, the Constitutional Court emphasized that the provisions of the Constitution related to the free movement of citizens of the European Union, *inter alia*, of the Republic of Lithuania, within the European Union, *inter alia*, within the Republic of Lithuania, must be interpreted taking into account the relevant provisions of the law of the European Union.

51 The obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State, in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law. Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned. Judgment of the European Court of Justice of 5 June 2018 in *Coman et al.,* C-673/16 (EU: C:2018:385), p. 45–46.

The right to the protection of private and family life is closely related to the rights of the child and their protection (Articles 38-39 of the Constitution, Article 24 of the Charter), as well as to the freedom of movement of EU citizens (Article 21 of the Charter, Article 45 Paragraph 1 of TFEU). When ruling on different aspects of realization of the rights of the child, SACL has consistently emphasized that both the Constitution of Lithuanian and fundamental international documents guaranteeing the protection of human rights, including Article 24 of the Charter, enshrine the consensus of the States, parties to them, that when making decisions concerning children, the most important criterion for consideration is the best interests of a child. When assessing the legality of the institution's decision to terminate payment of an allowance from the Child Support Fund due the fact that the child did not meet one of the conditions necessary to receive such an allowance (permanent residence in Lithuania), SACL referred to the Constitutional Court. SACL requested the Constitutional Court to assess whether the provisions of the law, establishing the requirement of permanent residence in Lithuania as a basis to benefit form the Child Support Fund, were in line with the Constitution of Lithuania[52]. It is clear that SACL aimed to find out whether in this particular case it was not faced with a different standard of fundamental rights protection under the EU law and under the Constitution. The provisions of free movement of persons are also relevant in this case: Article 45 Paragraph 1 of the Charter enshrines the freedom of movement and residence in the EU to every EU citizen; and Article 21 Paragraph 1 of the TFEU enshrines the right of an EU citizen to move and settle freely within the territory of the Member States, subject to the limitations and conditions laid down in TEU, TFEU and by the measures adopted to implement them[53].

The Constitutional Court held[54] that a requirement of a child's place of residence in Lithuania in order to implement the right to apply for benefits from the Child Support Fund was important but could not be regarded as a necessary con-

52 Decision of the Supreme Administrative Court of 6 May 2020 in administrative case No. A-3146/261/2020.

53 The CJEU has repeatedly recognized that the possibilities provided for in Article 21(1) of the TFEU in the area of free movement of EU citizens would not be fully effective if a citizen of a Member State could be deterred from using them by creating obstacles for him to settle in another Member State by the legislation of his country of origin, which would result for him in a less favorable position simply because he took advantage of those opportunities. Judgment of the European Court of Justice of 18 July 2013 in *Prinz and Seeberger*, C-523/11 and C-585/11 (ECLI:EU:C:2013:524), p. 28.

54 In ruling of 8 November 2019, the Constitutional Court of Lithuania emphasized the constitutional imperative of the priority of the interests of the child, which presupposes, *inter alia*, the state's duty when establishing legal regulation, to ensure that the child's best interests are primarily taken into account and that there are no preconditions for violating those interests, as well as the constitutional principle of proportionality, as one of the elements of the constitutional principle of the rule of law.

dition for payment of such benefits when they are already assigned. In the light of the ruling of the Constitutional Court, SACL decided that the principle of the priority of the rights of the child, recognized in the EU law, i.e. Article 24 of the Charter, was infringed. SACL also drew attention of a close relation of this principle to other EU law provisions, establishing free movement of persons (Article 45 of the Charter). In its judgement, SACL emphasized that the rights of EU citizens in the area of free movement would not be fully effective if its exercise could be deterred by the legislation of the country of origin creating obstacles to settling in another Member State, resulting in a less favorable situation simply because a person took advantage of free movement opportunities.

An interesting example of a collision of constitutional values and EU fundamental rights may be found in a *Baltic Media Alliance Ltd* case. A company, established in the United Kingdom, broadcasted a television channel "*NTV Mir Lithuania*" dedicated to the Lithuanian audience with majority of programs in the Russian language. On 18 May 2016, a Lithuanian Radio and Television Commission (LRTC) decided that operators broadcasting television channels to Lithuanian audience via cable television networks or the Internet may continue broadcasting, only if they are included in paid TV packages. A 12-month transitional period was previewed. The decision was based on an earlier finding of LRTC that on 15 April 2016 *NTV Mir Lithuania* has broadcasted a TV program containing false information, which did not correspond to reality, incited national discord, and hatred towards the Baltic States. This decision was appealed on the ground that it infringes the Audiovisual Media Services Directive. It would seem that this case was an excellent chance to rely on constitutional legal tools that allow limiting information, not corresponding to reality, inciting national discord and hatred of the Baltic States, in order to achieve of public order.

Vilnius District Administrative Court applied for a preliminary ruling to the CJEU to ascertain whether such a national measure was within the scope of the directive. The CJEU held that such a national measure should not be regarded as a restriction if it pursues a public policy objective and regulates the methods of distribution of a television channel to consumers of the receiving Member State, where the measure does not prevent retransmission of that channel[55]. The CJEU, having regard to the particularly great influence of television on the formation of public opinion, agreed that through the provisions of the Law on Public Information, on which a contested decision of LRTC was based, the national legislature intended to combat active distribution of information discrediting the Lithuanian State and threatening its status as a State in order to protect the security of the

55 Judgement of the Court of Justice of the European Union of 4 July 2019 *Baltic Media Alliance Ltd v. Lithuanian Radio and Television Commission*, C-622/17 (ECLI:EU:C:2019:566), p. 77–84.

Lithuanian information space and guarantee and preserve a public interest in being correctly informed.

LRKT decision was taken on the grounds that a TV programme contained false information, which incited hostility and hatred based on nationality against the Baltic States, in a targeted manner to the Russian-speaking minority in Lithuania and aimed, by the use of various propaganda techniques, to influence negatively and suggestively the opinion of that social group about the internal and external policies of the Baltic States, to accentuate the divisions and polarization of society, and to emphasize that tension in the Eastern European region was created by Western countries and to portray Russian Federation's role as a victim. The CJEU noted that it did not appear that those statements were contested but left it for the national court to ascertain. The CJEU thus took a position that the aim of the national measure was protection of public order, therefore Audiovisual media services directive was not applicable.

However, Vilnius District Administrative Court granted the request of the applicant Baltic Media Alliance LTD and annulled the decision of LRKT even without assessing the aspects indicated by the CJEU. The Supreme Administrative Court of Lithuania upheld this decision, which it based on Article 47 of the Charter (the right to an effective legal defense and a fair trial)[56]. SACL focused its decision on the right to be heard which means that in the course of administrative proceedings any person is guaranteed the opportunity to properly and effectively express his or her opinion before a decision that may adversely affect his or her interests is taken. Having established a violation of the right to be heard, SACL decided to uphold the decision. Since a decision of the LRTC was aimed at combating the incitement of national discord and hatred, it remains only to regret that these arguments of a constitutional level remained unexamined even though the CJEU ordered to verify the above-mentioned circumstances in the preliminary ruling. In this case, SACL gave a priority to a procedural right (the right to be heard), even without examining the validity of the LRTC's decision and did not resolve the conflict between constitutional legal values and the fundamental rights enshrined in the Charter legal rights.

It is clear that in situations when a case is related to the EU law, judges of a Member State have to abide the principle of the EU law primacy and protect the level of fundamental rights established in the Charter. However, in instances where no such connection exist, a dispute may be resolved by formally applying the national standard for fundamental rights. In the abovementioned case, SACL applied provisions of the Charter and took into account the jurisprudence of the CJEU, even though it was clear from a preliminary ruling that the Audio-visual

56 Decision of the Supreme Administrative Court of 5 May 2021 in administrative case No. eA-1383-662/2021.

media services directive was not applicable. Therefore, despite an exceptional opportunity, SACL did not take into account the specific instructions of the CJEU's preliminary ruling and did not rule on a relationship between constitutional legal values and fundamental rights enshrined in the Charter, or simply the question of the primacy of constitutional legal values.

Conclusions

Fundamental EU rights reflect common European values, recognized by the EU Member States. Undoubtedly, the commonality of legal values creates mutual trust among Member States and brings them together for common activities. It is no coincidence that the Paragraph 1 of the preamble of the Charter declares that the nations of Europe, creating an ever closer union among them, are resolved to share a peaceful future based on common values. Meanwhile, the EU's treatment of fundamental rights as legal values creates a certain symbolic order that expresses the identity of the European legal community.

The jurisprudence of the CJEU constantly develops the interpretation of fundamental rights and their content is constantly enriched with new aspects. For example, in the *Discrimineringsombudsmannen v. Braathens Regional Aviation AB* case[57], CJEU ruled on the scope and forms of legal protection based on the Charter. According to the CJEU, in the context of EU fundamental rights, it is required that national procedural rules would allow to submit a claim simply for stating discrimination in instances when the defendant has already paid compensation to discriminated persons without admitting that they were discriminated.

In the context of Article 19 TEU and Article 47 of the Charter, a preliminary question arose in *Randstad Italia SpA v Umana SpA*[58] case as to whether EU

57 In the Judgement of the Court of Justice of the European Union of 15 April 2021 *Discrimineringsombudsmannen v. Braathens Regional Aviation AB*, C-30/19 (ECLI:EU:C:2021:269), the CJEU recognized that Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without, however, recognising the existence of that discrimination. It is for the national court, hearing a dispute between private persons, to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter of Fundamental Rights by disapplying as necessary any contrary provision of national law.

58 The domestic legal system of each Member State must lay down the procedural rules for remedies necessary to ensure individuals that their right to effective judicial protection, as understood in accordance with Article 19 of the TEU and Article 47 of the Charter, will be respected in the areas governed by the EU law.

law requires that the decisions of a last instance administrative court could be appealed to a supreme court of general jurisdiction to ensure remedy for violation of the right to effective legal defense. The CJEU held that there is no such requirement under the EU law and that persons, who may have suffered damages as a result of a violation of their right to an effective legal defense, resulting from the decision of the court of last instance, have a possibility to initiate proceedings against the relevant Member State[59].

To ensure justice and respect for human rights, the Supreme Administrative Court applies legal provisions of the European Union and the catalogue of fundamental rights of the EU. The role of SACL in the field of human rights protection is not static and had varied from a passive observer to an active and independent provider of a high standard fundamental rights protection. It may be witnessed from the jurisprudence of the Supreme Administrative Court of Lithuania that the Charter is relevant for the court (1) when the Charter is considered as a source of interpretation of national law, (2) when the Court analyzes the provisions of the Charter, reviewing the arguments of the parties to the proceedings and, finally, (3) when the provisions of the Charter are applied directly. It is true that cases of direct application of the Charter are rare, but this issue is largely determined by the fact that the provisions of the Charter often have no added value compared to the provisions of EU primary or secondary law (*BB v. Ministry of Health of the Republic of Lithuania case*[60]). However, it also must be recognized that the Charter has not yet become a regular instrument for the protection of the individual fundamental rights on a national level. National courts should more often rely on the Charter as a source of inspiration and a standard of good practice, even in cases, which are not related to the implementation of EU law. Instances, where the national standard of fundamental rights protection can be considered higher than that of the Charter, should be excepted from the previous proposition.

It is clear, that there is a sphere for tension between different levels of fundamental rights protection. When national courts apply fundamental rights guaranteed by respective national constitutions providing for a higher level of protection,

59 Judgement of the Court of Justice of the European Union of 21 December 2021 in *Randstad Italia SpA v Umana SpA and others*, C-497/20 (ECLI:EU:C:2021:1037). The CJEU noted that in a situation where, according to national procedural law, the individual parties are allowed to file a complaint with an independent and impartial court and effectively plead a violation of Union law and violation of national provisions transposing it into the domestic legal system, but the highest administrative court of the relevant Member State, deciding as the court of last instance, unreasonably links the admissibility of the complaint to conditions, which deprive the individuals concerned of the right to an effective legal defence, it is not required under a Union law that a Member State would provide for a possibility to submit a claim to a general jurisdiction Court of Cassation to remedy this breach of the right to an effective legal defence.

60 In this case, the CJEU decided that the interpretation of Article 15(2) of the Charter coincides with the interpretation of Articles 45 and 49 TFEU.

it is usually presumed, as elaborated in the jurisprudence of the CJEU, that such an application of the higher standards laid down in the national constitutions is incompatible with the concept of EU law primacy. On the other hand, the Charter should not weaken the protection of national fundamental rights in the Member States, as the primacy of the EU fundamental rights, displacing national fundamental rights, would not be in line with the objectives and content of Article 53 of the Charter. The provisions of Article 53 of the Charter provide for an assumption that all EU Member States adhere to the European standard of fundamental rights. In addition, the scope of application of EU fundamental rights and Member States' fundamental rights does not necessarily coincide, and this factor can be decisive in many cases of the convergence of national and EU fundamental rights. Taking their national identity into consideration while respecting the rule of law, the EU Member States could enrich the European identity.

When adjudicating disputes, Lithuanian administrative courts consistently emphasize the synthesis of the provisions of the Constitution of the Republic of Lithuania and the legal system of the European Union, the common value context, the fact that those systems complement each other because both European Union law and the Constitution are based on the principles of democracy and respect for fundamental human rights. In the jurisprudence of the Supreme Administrative Court of Lithuania, the provisions of the Constitution of Lithuania and the law of the European Union are adhered to, emphasizing not only the obligations, which are undertaken but also the importance of their observance. On the other hand, the court must be careful and conduct review, in each case individually, whether the arguments of national identity have to be taken into account to defend the fundamental rights enshrined in the Constitution; the latter could be regarded as the basis of the national identity provided for in Article 4 Paragraph 2 of the TEU. Thus, based on essentially the same grounds, and complementing each other, national and European Union law guarantees the standard of effective fundamental human rights and freedoms' protection.

On the issue of relationship between the ECHR and EU law, it should be noted that there may be situations when the EU standard of fundamental rights will differ from the international standard of fundamental rights, or the former will not be able to ensure that the international standard of fundamental rights is not violated. Such exceptional situations are most likely to arise, in the light of a risk that the application of a uniform standard of fundamental rights protection under EU law violates the ECHR. It should therefore be born in mind that Article 52 Paragraph 3 and Article 53 of the Charter are completely clear and establish the axiological subordination of the Charter and thus of the EU law in its entirety, to the human rights standards established in the Convention, as interpreted by the ECtHR.