BRIEFING PAPER

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Citizens' Rights and Constitutional Affairs

THE STATUS OF THE RECENT CASE-LAW ON FUNDAMENTAL RIGHTS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

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Résumé:
This paper analyses some cases - between 2004 and 2009 - of the EU Court of Justice and of the European Court of human rights as well as of some national Constitutional Courts in the field of children rights, domestic violence, homophobia, racism and xenophobia, rights of the migrants, fight against terrorism, rights of defendant and data protection.

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The status of the recent case-law on Fundamental Rights in the Area of Freedom, Security and Justice (Analytical Exam)

By Lucia Serena Rossi and Valentina Bazzocchi

Summary: 1. Children Rights 2. Domestic violence 3. Homophobia 4. Racism And Xenophobia 5. Rights Of The Migrants 6.Counter-Terrorism 7 Basic Rights Of Defendant 8. Data Protection 9. Final Consideration: the Application of the Charter of Fundamental Rights

The various judgments examined hereinafter may pertain to more than one section. In this case they have been inserted in the section which they present the closest connection to. The period here in consideration is, apart for some exceptions, from January 2004 until November 2007. The complete references of the judgements are provided for by Annex I.

1. Children Rights

The **EU Court of Justice** recently dealt with cases concerning children under two different profiles: individual rights and family reunification.

As far as the first profile is concerned, reference has to be made to judgements covering situations of EC citizens.

In the case ***Pupino*** (2005) the Court stated that the national law is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision 2001/220/JHA . In this case the rights of young victims to be protected is given priority on the fair trial

According to the Court, the Framework decision requires each Member State to safeguard the possibility for victims to be heard during proceedings and to supply evidence, and to take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings. Hearing of minors as witnesses must therefore be authorised in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held. The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected. It is for the national court to ensure that the application of those measures is not likely to make the criminal proceedings considered as a whole, unfair within the meaning of Article 6 of the Convention.

In ***Garcia Avello*** (2003) the Court discussed the right of minor children having dual Belgian and Spanish nationality to change of surname. In accordance with Belgian law, the children were registered under the patronymic surname of their father. The Belgian Authorities rejected the parents application to change the surname of children, joining to the first surname of the father that of the mother, in accordance with Spanish law.

The Court pointed out that the citizenship of the Union is destined to be the fundamental status of nationals of the Member States and that, although the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law. In the case concerned the children concerned were refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father. This situation could have caused serious inconvenience for the children at both professional and private levels resulting from difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. According to the Court, articles 12 EC (principle of non discrimination on grounds of nationality) and 17 EC (EU citizenship) must be construed as precluding the administrative authority of a Member State from refusing to grant the application for the change of surname.

In the last year (2007) he ECJ also rendered several judgement concerning students' rights (***Morgan*** 2007, ***Schwarz*** 2007, ***Bidar*** 2005,) or disabled young people (***Hendrix*** 2007). Although those cases did not concerned minor children, the rights affirmed (which are closel related with European Citizenship) could be applicable to minors.

As far as the second profile is concerned, the Court rendered several judgements concerning family reunification.

In ***European Parliament v. Council*** (2007), the claimant demanded the annulment of Directive 2003/86/EC whose derogations from the obligations imposed by the Directive on the Member States, were considered as allowing the Member States not to respect fundamental rights. The Parliament contended that the contested provisions did not respect fundamental rights – in particular the right to family life and the right to non-discrimination – as guaranteed by art. 8 ECHR (right to respect for family life) and constitutional traditions common to the Member States of the European Union, as general principles of Community law. In particular, the objective of encouraging parents to have their children come before they are 12 years old does not take account of the economic and social constraints which prevent a family from receiving a child for a short or long period of time.

Although recognizing the important of family reunification, the Court dismissed the action considering that the choice of the age of 12 years is not arbitrary, but was based on the fact that, before that age, children are in a phase of their development which is important for their capacity to integrate into society. The Court expressly cites the EU Charter of Fundamental Rights, affirming that Article 7 while recognising the right to respect for private or family life, must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents. These principles impose to Member States to have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification. The possibility of limiting the right to family reunification of children over the age of 12 may reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary education and language skills in school.

Perhaps the most striking ECJ judgement concerning minor children is ***Zhu Chen*** (2004). The case concerned a Chinese pregnant women arriving in Ireland with a tourist visa and having a baby who, according to Irish Law, immediately gained Irish citizenship. Having moved to UK with the child, she demanded the British authorities a long-term residence permit on the ground that the daughter was European citizen and the mother was applying for family reunification.

The Court recognised that Article 18 EC and Council Directive 90/364/EEC on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

Other ECJ judgements regarding minor children concern the interpretation of the EEC-Turkey Association Agreement.

In ***Gaye Gürol*** (2005), the Court held that the condition of residing with parents in accordance with the first sentence of Article 9 is met in the case of a Turkish child who, after residing legally with his parents in the host Member State, establishes his main residence in the place in the same Member State in which he follows his university studies, while declaring his parents' home to be his secondary residence only. By consequence he enjoys a non-discriminatory right of access to education grants, even when they pursue higher education studies in Turkey.

In ***Ergün Torun*** (2006) the Court stated that he child, who has reached the age of majority, of a Turkish migrant worker who has been legally employed in a Member State for more than three years, and who has successfully finished a vocational training course in that State, does not lose the right of residence that is the corollary of the right to respond to any offer of employment conferred by that provision except on grounds of public policy, public security or public health reason or when he leaves the territory of the host Member State for a significant length of time without legitimate reasons.

A similar reasoning has been developed in ***Polat*** (2007) A Turkish national who was authorised while he was a child to enter in Germany in order to join his family was now over 21 years of age and no longer dependent on his parents, independently living in the Member State concerned. He has not been available to join the labour force for several years because he was during that period serving an unsuspended sentence of imprisonment. The Court held that he loses the right of residence in the host Member State only in two situations: on grounds of public policy, public security or public health or when he leaves the territory of the host Member State for a significant length of time without legitimate reasons . But in this case the Court added that the taking of an expulsion measure against a Turkish national who has been the subject of several criminal convictions, provided that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society is not precluded.

Court of First Instance There is no relevant case-law in the period here in consideration.

European Court of Human rights Recently, the European Court, in line with the national constitutional jurisprudence, acknowledged a reinforced protection system to foreign children. In the ***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*** (12

October 2006) case, European judges claimed that detention of an irregular immigrate minor at the same condition as an adult represented an infringement of Article 3 ECHR and Article 5 (1) ECHR. The solution adopted in the Mubilanzila case represents a completely different tendency if compared to the usual firmness showed by the European Court in this subject (***Rodrigues da Silva v. Netherlands***, 31 January 2006; in the ***Amara v. Netherlands***, 5 October 2005, case, the Court claimed that the right of an irregular foreigner to private life protection did not have to prevail over law and order and national security issues). The Court also claimed that children and other vulnerable people are entitled to be protected by Public Authorities in the form of an efficient prevention (***Siliadin v. France***, 26 July 2007).

This means that the State shall adopt positive measures in order to guarantee family ties, with special consideration of children's rights (***Lafargue v. Romania***, 13 July 2006). In the recent ***Schmid v. France*** (25 July 2007) case, the Court replicated that the ties may be broken only under exceptional circumstances. Should such conditions occur, separation of the child from the mother must be a temporary measure as the purpose shall be to unite him/her again with their parent (see also ***Moser v. Austria***, 21 September 2006). In case of prolonged fostering, the minor's interest may be that not being subjected to another change. The family of origin's unification with the child may cede if this be the child situation ***(Haase v. Germany***, 8 April 2004).

As far as natural and legitimate offspring are concerned, the European Court, during a case of annulment of the will's dispositions in favour of an adulterine son, claimed that such discrimination was not justified at all (***Merger and Cros v. France***, 22 December 2004; ***Sahin v. Germany***, 8 July 2003).

In the child's interest, a ridiculous or whimsical name should also not be given. Even in this case the child interest shall prevail (***Johansson v. Finland***, 6 September 2007).

The analysis of the jurisprudence indicates that minors have an autonomous position and are entitled to rights which differentiates them from other persons. This conclusion matches with what is expressly ruled in Article 24 of the Charter of Fundamental rights of the European Union.

National Constitutional Courts The analysis of recent national constitutional jurisprudence shows a common aspect: children's interests prevail over any other interest, both public or private (***Italian Constitutional Court***, 23 June 2003, and 4 August 2003). Increasing the equalization of natural offspring's rights to those of legitimate offspring is also observed. According to the Spanish Constitutional Court, also natural offspring are entitled to be given the deceased father widow's pension (***Spanish Constitutional Court***, 22 May 2006).

2. Domestic violence

EUCourt of Justice There is no relevant judgements

Court of First Instance There is no relevant judgements

European Court of Human Rights The European Court, on the other hand, recently dealt with a case of sexual abuses perpetrated by a father towards his daughter

(***W.S. v. Poland***, 19 June 2007). Strasbourg judges claimed that in these cases it is necessary to find the adequate balance between the victim's protection needs, especially if a minor, and those of the accused person (see also ***Lemasson and Achat v. France***, 14 January 2003). The Court believed an infringement of Article 6 ECHR was committed. In the ***Wieser v. Austria*** (22 February 2007) case, the appellant was subjected to a search and an arrest warrant because his wife had accused him of aggression, sexual abuse and threatening her with a weapon. The Court concluded that the Police Task Force procedure (they entered by force into the appellant's house and took off his clothes completely) infringed the intimacy of the person concerned and humiliated him.

National Constitutional Courts There is no relevant judgements

3. Homophobia

Homophobia has not been specifically considered by the EU Courts, but some important judgements show that the Court jurisprudence on gender discrimination is increasingly and broadly applied to homosexuals and transsexuals.

The **EU Court of Justice** has been confronted with two questions concerning transsexuals.

The first one (***K.B,* 2004**.) regarded a woman who shared an emotional and domestic relationship for a number of years with a person born a woman and registered as such in the Register of Births, who, following surgical gender reassignment, has become a man According to the British law, a person's sex is deemed to be that appearing on his or her birth certificate and the Births and Deaths Registration Act does not allow for any alteration of the register of births. By consequence, the couple, contrary to their wishes were not able to legally marry They were also informed that in case of pre-deceasing the trans-sexual partner would not be able to receive a widower's pension, since that pension was payable only to a surviving spouse,

The Court held that the fact that the national provisions restricting the pension to widowers and widows of members of the scheme amounted to discrimination based on sex, contrary to the provisions of Article 141 EC and Directive 75/117. In this judgement the Court, expressly evoking to the European Court of Human Rights, stated that such a legislation is a breach of their right to marry under Article 12 of the ECHR (see Eur. Court H.R. judgments of 11 July 2002 in Goodwin v United Kingdom) and must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.

The second case (***Richards,* 2006**) concerned a person whose had been registered as male gender in the birth certificate. Having underwent gender reassignment surgery, she applied to the British Secretary of State for Work and Pensions for a retirement pension to be paid as from the date on which she turned 60, the age at which, under British law, a woman is eligible to receive a retirement pension. Such an application was refused on the ground that the claimant had not reached the age of 65, which is the retirement age for men in the United Kingdom.

The Court affirmed that, given the impossibility according to the British legislation, to alter the birth certificate, Directive 79/7 and the principle of non

discrimination on the ground of gender must be interpreted as precluding legislation which denies a person who has undergone male-to-female gender reassignment entitlement to a retirement pension to whom she would have been had she been held to be a woman.

These two judgements represent an important twist in respect to the *Grant* case of 1998, in which the Court was not prepared to qualify as discriminatory the refusal of granting a partner of the same sex. the travel allowance which spouses are normally entitled to.

A new case similar to K.B is still pending (***Tadao Maruko***). AG Damaso Ruiz-Jarabo Colomer has recently rendered his Opinion 2007, which fully recognizes the right of homosexual registered partners to be granted the same rights of eterosexual married couples.

Court of First Instance There is no relevant case-law in the period here in consideration. It is worth to remind that as far as public employment is concerned, neither the CFI nor the ECJ have been very generous so far in recognizing the rights of homosexual EC officials. The case ***D. and Kingdom of Sweden v Council*** (CFI 1999 confirmed by ECJ 2001) may be evoked , in which the EU judges refused to recognized a duty for the EU institutions to treat a registered partnership as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations.

Yet it could be argued that of the more recent above mentioned judgements should influence also the future decisions concerning EU public employment.

European Court of Human Rights Cases involving the Court on the subject of transsexuals' rights are progressively increasing. After the well-known ***Goodwin v. The United Kingdom*** case (11 July 2002), the ***L. v. Lithuania*** case (11 September 2007) is to be highlighted, in which the applicant complained about a limited legislative gap in gender-reassignment surgery. The Court believed that Lithuanian Public Authorities infringed Article 8 ECHR, because they left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity (see also ***Grant v. The United Kingdom***, 23 May 2006, where the applicant makes a specific complaint about the refusal to accord her the pension rights applicable to women of biological origin).

In several occasions the Court condemned Austria because under Austrian Law, prior to 2002, it was a criminal offence for males of 19 and over to engage in consensual homosexual acts with males aged between 14 and 18, while consensual heterosexual or lesbian acts between adults and persons over the age of 14 were not criminal (See ***V. v. Austria***, 9 January 2003; see ***S.L. v. Austria***, 9 January 2003).

In the ***Karner v. Austria*** case (14 July 2004) the European judges considered homosexual couples comparable to heterosexual ones, concluding that discrimination between the traditional family and the homosexual couple with regards to the tenancy contract was in contrast with Articles 14 and 8 ECHR and, more specifically, with the right to respect for home.

Finally, another relevant case is the ***Baczkowsky and others v. Poland*** (3 May 2007) one. The Court had to find a balance between the freedom of expression on the one hand and the freedom of assembly and non discrimination on the other hand. In front of the obstacles encountered by an organization that offered protection to

minorities in organizing demonstrations in the streets of Warsaw in order to make the public opinion aware of discriminations against minorities, women, disabled people and homosexuals, the European Court considered relevant the statements made by the Mayor of the city, who showed his denial to authorise demonstrations supporting homosexuality. The Court claimed that politicians should make use of their freedom of expression with certain restraint as their statements may be interpreted as orders by civic officers.

National Constitutional Courts Recent cases involving National Constitutional Courts on the subject of homophobia are not abundant. The ***Spanish Constitutional Court*** believed that firing an employee due to his sexual preference was in contrast with a ban of discrimination guaranteed not only by the Constitution but also by EU Treaties and by the Charter of Nice (Spanish Constitutional Court, 13 February 2006). In turn, the House of Lords recognised the right to succed to a tenancy contract to a homosexual partner (House of Lords, 21 June 2004).

4. Racism And Xenophobia

EUCourt of Justice There is no relevant case-law in the period here in consideration.

Court of First Instance ***Afari v ECB*** (2004) is the only judgement concerning racism . The claimant, who is black, was assistant accountant in the Back Office Division of Directorate General Operations of the European Central Bank. She submitted that during the time she worked in the Back Office Division one of her colleagues, put her under strong pressure and harassed and discriminated against her on grounds of race. She also accused the European Central Bank of attempts at intimidation, of having encouraged xenophobia and racism. Director of Human Resources of the European Central Bank, informed the applicant that the standards prevailing within the Bank did not allow staff members to adopt an aggressive attitude lacking in professionalism and respect towards a colleague and that he was obliged to open a disciplinary procedure against her .

The Court found no reason in support of the claimant application to annul the disciplinary decision and to her demand of damages because she had not been able to support her serious accusations. The Court recognizes instead that the staff of the European Central Bank are subject to the duty of dignity, according to the Conditions of Employment.

European Court of Human Rights The issues related to racism and xenophobia have been the focus of some important judgments by the European Court. Article 14 ECHR is repeatedy used in relation to fundamental rights guaranteed by the European Convention. In fact this article is not applied by the European Court independently. According to the case-law of the European Court, every article of the European Convention should be read and applied in light of this equality principle. Despite this, it is possiblethat Article 14 ECHR is violated in cases in which others articles attribuing a

fundamental right, are not violated. Usually the European Court first verifies the violation to the fundamental right, and secondly analises the non-discriminatory aspects.

In the ***Natchova and others v. Bulgaria*** case (26 February 2004) the Court for the first time noted a violation of Article 14 ECHR regarding racist discrimination. Up to this judgment, the case-law of Strasbourg had been undecisive and disappointing. The complementary nature of Article 14 with respect to other articles of the European Convention, has created a gerarchy of rights that did not favour the fight against racism discrimination.

The ***Menson and others v. United Kingdom*** case (6 May 2003) highlighted the contradictions of the Court's case-law. The relatives of a young Afro-American man who died due to agressive racist behaviour towards him, complained that the police investigation was not serious and thorough because of racist discrimination. The Court concluded that instead a diligent and fair investigation had been undertaken. The Court considered the non-discrimination principle secondary to the prevailing fundamental right (Article 2 ECHR). Instead in other judgments when other serious acts of discrimination are committed, the Court puts the principle of non-discrimination at the same level of fundamental rights. For those acts which are less serious, the Court needs proof beyond an unreasonable doubt. In the cases preceding the Natchova and others v. Bulgaria case, the Cour inverted the burden of proof, stating that it is the State's responsability to guarantee the success of a proper investigation in order to collect the evidence of a possible racist discriminatory act (in the ***Bekos and Koutorpoulos v. Greece***, 13 December 2005, the Court condemned Greece for not having completed a proper investigation). In this way, the Court demonstrates that it is no longer sotisfied with general inti-racist proclamations, but rather that the non-discriminatory act be guaranteed. This stand does not question the complementaty nature of Articel 14 ECHR. Its violation constitutes an aggravating circumstance to the violation of other rights.

This position taken by the Court in the Natchova and others v. Bulgaria case (2004) changed after the judgment passed by the Grand Chamber (***Natchova and others v. Bulgarie***, 6 July 2005). The European judges declared that Bulgaria could not be considered responsible for the motivations behind the racist acts by State agents. The behaviour of these State agents was attributed to their personality and not tied to their position. The stand taken by the Grand Chamber sollicited strong criticism in doctrine because it risks weakening the fight against racist discrimination. We are to ask if in fact the passive nature and inactivity of Bulgaria could indirecly constitute a judicial base for the responsability of the State according to Articles 14 and 2 ECHR. The Court has numerous times intervened in cases that need a balance between the freedom of expression and of association and the non-discrimination principle. In the Gündüz v. Turkey case (4 December 2003), the European judges, called upon to speak on behalf of a head of an Islamic sect who was condemned for hate declarations expressed during a relevision debate, stated that Article 10 had been violated. The Court examined the case very scrupulously because the abusive use of the media can become an easy target for the diffusion of hateful and violent speech. Additionally, limiting a politician's freedom of expression, calls upon a scrupulous check, taking into account his role and the interest of his seech in a democratic society (see also ***Erbakan c. c Turkey***, 6 July 2006).

In the ***Norwood v. United Kingdom*** case (16 november 2004), the applicant was condemned for having pubicly writen and exposed a threatening and offensive

manifestation towards a religious group. The Court maintained that the manifestation was such a violent attack against all the Muslims living in the United Kingdom that it was considered as going against the values proclaimed and guaranteed by the Convention, such as tollerance, social peace and non-discrimination. The appellant's behaviour falls under Article 17 ECHR that regards the abuse of rights. In the ***W.P. and others c. Poland*** case (2 september 2004) a similar situation occurred in that antisemetic declarations were contained in the statute of some associations, violating the Convention's rights. In the Garaudy v. France case (24 June 2004), the Court maintained that the main content and general tenor of the applicant's book, relevant to the ecvents of the Second World War, and its aim, were markedly revisionist and therefore ran counter to the fundamental values of the Convention, namely justice and peace (see also ***Ivanov. v. Russia***, 20 February 2007).

Inversely, the Court held another position with regards to a politician's speech, the national judicial authosities had judged as instigating racial hate (***Erbakan v. Turkey*** case, 6 juillet 2006). In this case, the Court highlighted that in a democratic society, it is fundamental to defend the freedom of political debate. Politicians must, however, avoid spreading opinions that can provoke intollerance. In the balance of interests, the Court took into consideration the nature of the declarations and the context in which they were proclaimed. It concluded that there had been a violation to the freedom of expression because the proceedings taken against the politicia were not proportionate to the objectives, taking into account the interest of a democratic society to guarantee and maintain freedom of expression in political debates.

Called upon to proclaim itself with regards to ethnic minorities, the Court maintained that the government dit not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any case, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect dor differents cultures (***Timichev v. Russia*** case, 13 December 2005).

Finally, in the ***Toxo v. Greece*** case (20 October 2005), the Court considered that the risk of arousing tension within a community by the public use of terms that are liable to offend the patriotic or political feelings of the majority of inhabitants of a particular area does not in itself suffice to justify obstacles to the freedom of association. The local authorities, instead of exacerbating feelings of confrontation, should foster an attitude of conciliation.

National Constitutional Courts The National Constitutional case-laws associated to racism and xenophobia are not numerous. Nonetheless it is important to note the judgment with which the Slovak Constitutional Court declared incompatible with the Constitution, Section 8 of the anti-discrimination law, which authorise the adoption of special positive measures to compensate for the situation in which the members of some ethnic groups are in. According to the Court these rules that introduce positive measures must not be phrased in such a way as to be perceived as violation to the general principle of equality or as a misinterpretation of this principle. The Court therefore concluded that these rules were incostitutional because they are subject to equivocations (***Slovak Constitutional Court, 18 October 2005***).

5. Rights Of The Migrants

The **ECJ** has delivered several judgements regarding the rights of three categories of persons: 1) the EU citizens, 2) the non-EU relatives of EU citizens (→ see also the section on the *rights of the children*) and 3) the non-EU nationals.

1) As far as the rights of the European citizens, a general trend may be registered: the ECJ tries to make the citizen's right more absolute, i.e. independent on their residence place. The Court mostly interprets Article 18 (1) EC in connexion with other provisions of the Treaty, granting the EU citizens rights in different fields, such as taxation in ***Pusa*** (2004) and ***Schempp*** (2004), unemployment allowance, in ***Gérald De Cuyper*** (2006), benefit for civilian war victims ***Tas-Haegen Tas*** (2006), or the right to vote for a Nederland citizens residing in Aruba ***Eman Sevinger*** (2006).

The Court also widens the rights for students and for job-seekers. In ***Ioannidis*** (2004) the Court declared contrary to Community law (in particular Articles 12, 17 and 18 of the EC Treaty) the Belgian law which provided for an allowance to be given to a job seekers who are less than 30 years old on the basis of the secondary education they have completed only if the required education has been completed in an educational establishment run, subsidised or recognised by one of the three national Communities. The effect of such a legislation was that the allowance is refused in the case of a young job seeker who is not a member of the family of a migrant worker, but who is a national of another Member State in which, before moving within the Union, he had pursued and completed secondary education, recognised as equivalent to the Belgian education. In ***Morgan*** (2007) the Court affirmed that Articles 17 EC and 18 EC preclude a legislation in accordance with which, in order to obtain an education or training grant for studies in a Member State whose the students applying for such assistance are not nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin.

The Court has also interpreted the limits applicable to the citizens' freedom of movement, concerning in particular the public policy exception.

In ***Orfanopoulos*** (2004), the ECJ pointed out that the right of nationals of a Member State to travel to and reside in another Member State is not unconditional.. It is for the national court to determine the provisions of Community law, if any, other than Article 18(1) EC, on which the person concerned may rely. Articles 39 EC and 3 of Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, which provides that the measures in question must be based exclusively on the personal conduct of the individual subjected to them and that previous criminal convictions cannot in themselves be grounds for these measures, preclude national legislation and practices whereby a national of another Member State who has received a particular sentence for specific offences is ordered to be expelled, in spite of family considerations being taken into account, on the basis of a presumption that that person must be expelled, without proper account being taken of his personal conduct or of the danger which he represents for the requirements of public policy. On the other hand, EC legislation do not preclude the expulsion of a national of another Member State who has received a particular sentence for specific offences and who, on the one hand, constitutes a present threat to the requirements of public policy and, on

the other hand, has resided for many years in the host Member State and can plead family circumstances against that expulsion, provided that the assessment made on a case-by-case basis by the national authorities of where the fair balance lies between the legitimate interests at issue is made in compliance with the general principles of Community law and, in particular, by taking proper account of respect for fundamental rights, such as the protection of family life. The Ec law also precludes a provision of a Member State which provides neither a complaints procedure nor an appeal, comprising also an examination of expediency, against a decision to expel a national of another Member State taken by an administrative authority, where no authority independent of that administration has been put in place.

In ***Trojani*** (2004) the Court held that A citizen of the European Union who does not enjoy a right of residence in the host Member State under Article 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, including the requirement of having sufficient resources, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a citizen of the Union who is not economically active is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimum subsistence allowance.

In ***Oulane*** (2005), the Court stated that the recognition by a Member State of the right of residence of a recipient of services who is a national of another Member State may not be made subject to his production of a valid identity card or passport, where his identity and nationality can be proven unequivocally by other means. It is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law. A detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services and is therefore contrary to Article 49 EC. It is for nationals of a Member State residing in another Member State in their capacity as recipients of services to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.

In ***Commission v. Belgium*** (2006) the State was condemned for breach of Community legislation on the right of residence of citizens of the Union for the administrative practice of automatically giving an order to leave on citizens of the Union who do not produce within the prescribed period the documents required to obtain a residence permit, and as far as the requirement of sufficient personal resources is concerned by excluding the income of a partner residing in the host Member State in the absence of an agreement concluded before a notary. In the period here in consideration many other member States (notably the actions of the Commission versus **Germany, Greece, The Netherlands, UK and Ireland**) have been condemned for failure to accomplish community obligations maintaining into national legislation or administrative practices limits to the residence right of the EU nationals.

Resuming a well-established jurisprudence, it can be said that a Member State, when expelling nationals of other Member States on public policy grounds, must take adequate account of the existence of a serious threat to public order, take adequate account of the fundamental right to respect for family life, avoid systematic use of immediate expulsion although the situation is not urgent, not to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion.

2) With regard to the non-EU familiars of EU citizens, the rule affirmed by the Court is that their rights are not autonomous, depending on the rights of their EU nationals familiars. In ***Cynthia Mattern*** (2006), the Court stated that the right of a national of a third country married to a Community national to have access to the labour market may be relied on only in the Member State where that Community national pursues an activity as an employed or self-employed person. The right conferred by Article 11 of the Regulation on family members of migrant workers to pursue employed activity is not a direct right to free movement, since that provision benefits the migrant worker whose family includes a national of a third country as a spouse or dependent child. In ***Yunying Jia*** (2007) the ECJ pointed out that Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State. It can be considered as dependent on the EU national those familiars established in another Member State who need the material support of that Community national or his or her spouse in order to meet their essential needs. The proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.

In ***Commission v. Spain*** (2006) the ECJ condemned the defendant State which had refused to issue a visa for the purpose of entry into the Schengen territory to a national of a third country who is the spouse of a Member State national, on the sole ground that he is a person for whom an alert was entered in the Schengen Information System for the purposes of refusing him entry, without first verifying whether the presence of that person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. According to the Court, in any event, the time within which a response to a request for information is given cannot exceed what is reasonable with regard to the circumstances of the case, which may be assessed differently according to whether a visa application or the crossing of a border is involved. In the latter case, it is essential that the national authorities who, having established that a national of a third country who is the spouse of a Member State national is the subject of an alert entered in the Schengen Information System for the purposes of refusing him entry, have requested additional information from the State which issued the alert receive it from the latter rapidly.

In ***Commission v. Luxembourg*** (2005), the State was condemned because both its legislation and practice demanded a working leave for citizens of third countries married with EU migrant workers

3) Regarding the nationals of third States , in ***Bot*** (2006) the ECJ clarified that Article 20(1) of the Convention implementing the Schengen Agreement is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the territories of the Contracting States to that agreement, to the first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

The ECJ also dealt with many aspects of the Association Agreements concerning the free movement of the third-countries nationals. Some judgements have been examined in the → *children rights*

In ***Lili Georgieva Panayotova*** (2004) the Court examined the Europe Agreement (pre-accession of the Eastern Europe new member States). Such an agreement do not preclude legislation of a system of prior control which impose to obtain a temporary residence permit by the diplomatic or consular services of that Member State in the country of origin of the person concerned or in the country where he is permanently resident. Such a system may legitimately make grant of that permit subject to the condition that the person concerned must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources for carrying out the activity as a self-employed person and has reasonable chances of success. The system must, however, be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings.

Several judgements concern the EC-Turkey Association Agreement and the Association Council Decisions concerning Turkish workers and their familiars..In ***Sakir Öztürk*** (2004) the Court resumed some important principles of the migrant workers social security, assuming that the Agreement precludes the application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon fulfilment of the requirement that the person concerned has received, within a certain period prior to his application for the pension, unemployment insurance benefits from that Member State alone. In ***Engin Ayaz*** (2004), the Court clarified that stepson who is under the age of 21 years or is a dependant of a Turkish worker duly registered as belonging to the labour force of a Member State is a member of the family of that worker, for the purposes of that provision, and enjoys the rights conferred on him by that decision, provided that he has been duly authorised to join that worker in the host Member State. In ***Inan Cetinkaya*** (2004). The ECJ stated that a person who has attained his majority and is the child of a Turkish worker duly registered belongs to the labour force of the host Member State, even though that person was born in and has always resided in the host State. The requirement that family members obtain authorisation to join the Turkish worker is intended to exclude from the scope of that provision those who have entered and reside in the host Member State in breach of that Member State's legislation. It cannot validly be raised as against a member of that family who, as in the case before the national court, was born and has always lived in that Member State and who therefore did not need authorisation to join the worker. In ***Ergül Dogan*** (2005) the Court affirmed that a Turkish national who, after four years of legal employment, enjoys the right of free access to any paid

employment of his choice does not forfeit that right because he is not in employment during his imprisonment, even for several years, if his absence from the labour market of the host Member State is only temporary. The employment rights and the concomitant right of residence may be limited only on grounds of public policy, public security and public health, or on account of the fact that the Turkish national concerned has failed to find new paid employment within a reasonable time after his release. Similarly, in ***Ceyhun Aydinli*** (2005) the Court held that a Turkish national who is a family member of a Turkish worker who, after having been legally resident for at least five years in the host Member State, enjoys the right of free access to any paid employment of his choice, does not forfeit that right either as a result of his prolonged absence from the labour market due to imprisonment, even for a period of several years, followed by long-term drug treatment, or on account of the fact that at the time of the decision to expel him the person concerned was an adult and no longer resided with the Turkish worker from whom he derived his right of residence, but lived independently. In ***Mehmet Sedef*** (2006) the Court ruled out that the rights conferred on a Turkish worker to enjoy free access, after four years of legal employment in a Member State, to paid employment of his choice, presupposes in principle that the person has worked for three years for the same employer. A Turkish worker who does not yet enjoy the right of free access to any paid employment must be in legal employment without interruption in the host Member State unless he can rely on a legitimate reason to justify his temporary absence from the labour force, since such interruptions are beyond the employee's control. In ***Hasan Güzeli*** the Court précised that a Turkish worker may rely on the rights conferred upon him by that provision only where his paid employment with a second employer complies with the conditions laid down by law and regulation in the host Member State governing entry into its territory and employment. Similar principles have been developed in the more recent case-law (***Derin***, 2007, ***Tum & Dari***, 2007, ***Polat,*** 2007).

Also the Euro-Mediterranean Agreement has been interpreted by the EU judges as a source of significant rights for the workers originating from the third States involved : see the ECJ judgement on ***Gattoussi*** (2006) relating to a Tunisian worker and the ECJ Order ***Mamate El Youssfi*** (2007), concerning a Moroccan worker.

All these judgements show that the instrument of the Association Agreement and the decisions adopted in its framework may grant to the workers of third countries significant rights.

European Court of Human Rights In the ***Siliadin v. France*** case (26 July 2005), the European judges believed that France infringed Article 4 ECHR, which forbids slavery and forced labour. The fact that the appellant was an adolescent girl residing irregularly in a foreign country who was, therefore, afraid to be arrested by the Police, was crucial for the decision making. In the ***Gebremedhin v. France*** case (26 April 2006), the Court claimed that the Public Authorities should guarantee the foreigner (who needs to be repatriated to a country where he would risk to be subjected to inhuman and degrading treatments) an appeal from the suspended effects against the decision of being repatriated. The Public Authorities risk to infringe Articles 2 and 3 ECHR if they repatriate a foreigner to a country where he risks to be condemned to a death sentence (***Bader and others v. Sweden***, 8 November 2005).

Migrants should be guaranteed the right of private and family life respect. In fact, decisions made by Public Authorities about immigration issues may represent, in some cases, intrusions into a foreigner's private and family life. In the ***Kaftailova v. Latvia*** case (15 June 2006), the Court believed that Latvian Authorities exceeded the limit of discretion that Public Authorities enjoy in this issue, since they did not find the adequate balance between the defence of law and order and the appellant's interest to protect her private and family life. In the ***Üner v. Netherlands*** (18 October 2006), on the other hand, the Court hesitated about the role possessed by the family ability to adapt to life conditions in the destination country and to the firm and solid bounds with the sheltering country.

The decision of separation seemed, in the case in point, justified by a safety social need. Nature and severity of infringement perpetrated by the foreigner, in fact, resulted vital for the Court's decision (see also ***Mokrani v. France***, 15 July 2003; ***Rodavanovic v. Austria***, 22 April 2004; ***Keles v. Germany***, 27 October 2005). The analysis of the European Court's recent jurisprudence results in an incoherent position about protection of private and family life of a foreigner who is in an illegal position. The Court, even in presence of family ties, considered law and order and national security needs predominant (***Amara c. Netherlands***, 5 October 2005).

In the ***Aoulmi v. France*** (17 January 2006) case, the Court, acting against the general tendency to consider admissible the temporary interdiction from the territory, considered the definitive interdiction compatible with ECHR (see contra: **Yilmaz v. Germany**, 17 April 2003). In fact, the infringement's severity decisively influenced the solution adopted. The jurisprudential frame indicates, therefore, a reinforcement of Public Authorities' discretion in regulating the situation of foreigners who perpetrated crimes.

National Constitutional Courts The condition of Migrants was the object of several rulings by national Constitutional Courts. The ***French Constitutional Court*** intervened on this subject several times. When it was invited to judge the law that modified the rules and regulations regarding foreigners' admissions and right to asylum, it claimed that foreigners may be detained only for the period of time strictly necessary for their departure. The Judicial Authority may interrupt the detention extension, on its own initiative or at the foreigner's request, when circumstances in law and in fact justify it (French Constitutional Court, 20 November 2003).

In a following case, it clarified that the five day period indicated by the law does not include the period that the stranger might have spent in detention in a place different from the detention centres (***French Constitutional Court***, 6 July 2005). Finally, the French Constitutional Court positively welcomed the law on immigration. After repeating that no constitutional principle guarantees the general and absolute right of access and residing in the national territory to foreigners, it claimed that the new discipline on the residence permit issue is compatible with the Constitution. It reached the same conclusions regarding family reunification measures which introduced new conditions (French Constitutional Court, 20 July 2006).

The ***Italian Constitutional Court*** also intervened on the foreigner's condition, judging the legislative measure, according to which a foreigner, who is still on the national territory despite a decision of expulsion, will be subjected to a larger punishment, compatible with the Constitution (Italian Constitutional Court, 20 June 2005). In turn, the Belgian Constitutional Court claimed that the domestic measure

requiring that a non European foreigner who has an expired visa and is married to a non European foreigner regularly staying in Belgium goes back to their country in order to solicit the necessary authorisation, is a general requirement set by Article 8 (2) ECHR (***Belgian Constitutional Court***, 22 March 2006). Finally, according to the ***House of Lords***, the right to asylum shall also be guaranteed in case of threats of religious harassment (House of Lords, 10 December 2004).

6. Counter-Terrorism

Both **Court of First Instance and EU Court of Justice** delivered many judgements related to the black lists concerning suspect terrorists. Such lists are enacted by a decision of the Sanction Committee of the UN Security Council, which demands the States to freeze the assets of the listed persons Subsequent acts of the EU (common positions) and of the EC (regulations or decisions) take the necessary implementing measures. Apart from some cases (***Minin***, ***Segi, Sison*** and ***Ocalan***,), all the judgements concern measures directed against certain persons and entities alleged to be associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

The first CFI decision in the case ***Segi*** (2004) rejected the claim of the applicant affirming that such a common position –as an act of second or third pillar- cannot be annulled. Such Acts raised the question of the violation of the applicants' fundamental rights (property rights, statement of reasons, right to be heard and fair trial).

In two subsequent (almost identical) judgments (2005, ***Yusuf,*** et ***Kadi***), the CFI assessed the question of competence, finding that the combination of Articles 60,301 and 308 EC may provide a legal basis for adopting sanctions against individuals (given that the EC Treaty only provides for sanctions against States). This is probably the weakest point of these judgements (and of all the subsequent ones) because the provisions enacted can hardly be considered as "necessary for the good functioning of the internal market" (according to the prescription of art.308 EC) As far as the applicant legal standing, the CFI said that an action for annulment, when a regulation of direct and individual concern to a person is replaced, during the proceedings, by another regulation having the same subject-matter, the latter must be considered a new factor allowing the applicant to adapt its pleas in law and claims for relief , with no need for a new application. The CFI declared then that EU is compelled to observe the resolutions of UN bodies, even in spite of EC and ECHR fundamental principles. According to the CFI, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and, for those that are also members of the Community, their obligations under the EC Treaty. That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations are bound to accept and carry out the decisions of the Security Council. Although it is not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. First, it may not infringe the obligations imposed on its Member States by that charter or impede their performance. Second, in

the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations. When implementing the UN resolutions, the European institutions had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration. Any review of the internal lawfulness of the EC implementing Regulations would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions.

The CFI found nevertheless that it would be competent to review indirectly the lawfulness of decisions of the Security either on the basis jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. The freezing of funds does not infringe the fundamental rights of the person concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by jus cogens.

These judgements have been strongly and almost unanimously criticised by the doctrine. The following decisions of CFI and of ECJ, without dismissing the previous reasoning, have tried to soften it under many profiles, in order to assure some minimal guaranties to the claimants. In the ***Chafiq Ayadi*** and ***Faraj Hassan*** cases (2006), CFI stressed that the respect of fundamental rights must allow the national judges to exclude form the freezing some basic assets such as the house of inhabitation, a car or everyday consumers goods. In ***Othman*** (2006) CFI granted the applicant the sum necessary for legal aid.

A new attitude which put more attention in considering the rights of defence of the applicants has been recently confirmed both by the Court of Justice and the Court of First Instance. In the case ***Organisation des Modjahedines du Peuple d'Iran*** (*OMPI*, 2006), the CFI for the first time annulled a Council's decision. The case was different because the UN Security council resolution did not individuate itself the names of the persons to be sanctioned, leaving so a discretionary power to the EU and EC institutions. For this reason, the institutions were expected to apply the fundamental guarantees of the applicants, such as the right to be heard and the duty to state the reasons of the act. The CFI however annulled only the EC decision but affirmed the impossibility of annulling a JHA Common Position.

In this judgement the Court also held that, as a rule, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is fully applicable in the context of the adoption of a decision to freeze funds under the contested regulation. The Court has inferred from that principle, interpreted in the light of the case-law, that the statement of reasons for an initial decision to freeze funds must at least make actual and specific reference to the reasons why the Council considers, having regard to the precise information or material in the relevant file available to it, that a decision has been taken by a competent authority of a Member State in respect of the person concerned, unless overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, militate against it. This judgement has also drawn a fundamental distinction between the first application of a freezing measure, which require a surprise effect in order to be effective and the decision of maintaining such a measure: The right to be heard of the victim should be contextual in the first case and preliminary in the other.

In ***Ocalan-PKK*** (2007) the ECJ annulled a decision of CFI (on the grounds of manifest error). In ***Segi*** (2007) and ***Gestoras*** (2007) the ECJ rejected the criticism that

the third pillar acts are not provided with a sufficient system of judicial remedies. Differently from what the CFI had affirmed in previous judgements, the ECJ declares that a judicial review of the JHA common positions, when affecting individual rights, is possible, both for annulment and preliminary rulings.

The same Court of First Instance in ***Stichting-Al Aqsa*** (2007), annulled a Council decision of freezing assets because it failed to state reasons and the state of uncertainty in which the applicant has been left, regarding the actual and specific reasons for its inclusion in the list at issue, has been exacerbated by the reply given to its request for access to all the documents made use of by the Council before adopting the decision originally challenged. That request, was rejected by decision of the Secretary General of the Council on the ground that the only document concerned was classified as "Confidential Eu" and that its disclosure would undermine the protection of the public interest as regards public security and international relations. The CFI underlines the strict connection between the duty to state reasons and the defence rights.

In ***Sison*** (2007) the CFI not only annuls a Council decision for failure to state reasons and clarifies the duties of the EU/EC Institutions to respect Fundamental Rights when the UN provisions leave them discretional powers: the Council must carry out a periodic review of the measures (at least twice a year) in order to ascertain whether they are still necessary. The Court also considers in principle that a the breach of the applicant's rights of defence may be sufficiently serious for the Community to incur in liability (although the Court finds in the present case no proof of a direct causal link between the measures and the losses alleged).

The ECJ, in the very recent ***Möllendorf*** judgement, dealt for the first time with the rights of third parties, which may be jeopardized by the application of freezing measures. In this case the prohibition on making economic resources available to persons listed in a EC regulation prevented the registration of the transfer of ownership in the Land Register for a sale of immovable property. The Court stated that it is for the referring court to determine whether the repayment of the sums received by the sellers would constitute a disproportionate infringement of their right to property and, if that is the case, to apply the national legislation in question, so far as is possible, in such a way that the requirement of proportionality is not infringed.

The concept of proportionality –which is a classic test in EU law- may be useful. Such a test, whose application is left to national jurisdictions and authorities could offer the best way for conciliating the obligation to respect of the UN sanctions and the exigency of applying them with the least prejudice of the fundamental rights.

European Court of Human Rights The European Court intervened in cases involving people suspected of perpetrating acts of terrorism several times. Like the House of Lords, it claimed that even in extremely complex situations, such as those related to the fight against terrorism, the Convention bans torture and inhumane and degrading treatments in absolute terms. Article 3 ECHR, in fact, is not subject to any derogation in compliance with article 15 (1) ECHR (***Jalloh v. Germany***, 11 July 2006; see also ***Söylemez v. Turkey***, 21 September 2006; ***Ramirez Sanchez v. France***, 4 July 2006).

However, according to the European Court, unlike some National Courts, the applicant's personality and the needs for an efficient fight against terrorism do not influence the protection of the suspected person's trial guarantees, resulting in a

consequent reduction of the level of protection (see Hélène Tigroudja, in *RTDH*, 69/2007, page 22). With regards to this issue, the ***Ocalan v. Turkey*** case is emblematic (Öcalan v. Turkey, 12 May 2005). The Grand Chamber believed that the accused person's rights to a defence were not fully guaranteed. The sentence, in fact, was essentially based on the declarations given by the accused during the detention, without being able to confer in private with his lawyer and without being able himself to access the case file. The Grand Chamber also added that should the sentence be issued by a national court that does not meet the impartiality and independence requirements, a new trial or the reopening of the proceedings at the request of person concerned are adequate means to amend the ascertained infringement. Finally, the Grand Chamber declared that the death sentence inflicted as a result of an unfair trial may generate in the condemned person, if the chance that this sentence is enforced exists, such an anguish that it would fall into the range of enforcement of article 3 ECHR.

National Constitutional Courts In the fight against terrorism it is necessary to balance the needs of the parties: the needs related to security on one hand and those regarding fundamental rights on the other hand.

National Constitutional Courts have been requested to face such issues. The French Constitutional Court declared partially unconstitutional the law regarding the fight against terrorism in the part ascribed to the Administrative Police not only regarding prevention functions, but also the repression of acts of terrorism. The same Court, however, declared that the provisions that allow to requisition Internet data gathered by electronic communication operators, service providers as well as Internet cafes, and that allow to temporarily archive vehicle and drivers' pictures taken in strategic points of road traffic, are compatible with the Constitution, and more specifically with the principle of personal freedom and respect for the protection of private life. The Constitutional Court therefore declared such provisions useful in the fight against terrorism and not detrimental to private life (***French Constitutional Court***, 19 January 2006).

The House of Lords, on the other hand, declared illegitimate the British law relating to the fight against terrorism as the foreigners suspected to perpetrate acts of terrorism were not guaranteed a fair trial (***House of Lords***, 16 December 2004). The House of Lords also excluded that the evidence obtained from the person suspected of terrorism through torture may be subject to judgment (***House of Lords***, 8 December 2004).

The German Constitutional Court, in turn, declared unconstitutional the law on air security that allowed the Air Force to shoot down a civil airplane with passengers on board in case of a hijack by a terrorist. The German Supreme Court declared such a law in contrast to the right to human life and dignity (***German Constitutional Court***, 15 February 2006).

Finally, the ***Belgian Constitutional Court*** (13 July 2005) ruled on the compatibility of the national law for enforcement of the framework decision on the fight against terrorism with the principles of legality and equity set by the Constitution. The applicants had claimed that the definition of terrorist infringement was too wide and therefore in contrast with the principles of legality. The Court concluded that Belgian law, even leaving a vast power of interpretation to the national judge, does not provide the latter with the autonomous power of incrimination. Nor the principle of equity was

infringed since the legislator considered it necessary to punish people suspected of perpetrating acts of terrorism more severely.

7. Basic Rights Of Defendant

As we have seen, most of the judgements examined in section 6 (→ counterterrorism) are also relevant for the Right of defence (see in particular ***Kadi, Al Aqsa, Hassan, OMPI, Sison***). Other judgements are related with judicial cooperation in criminal or in civil matters.

ECJ In the field of police and judicial cooperation in criminal matters the Court delivered several judgements on Article 54 of the Convention implementing the Schengen Agreement regarding the *ne bis in idem* principle.

In ***Miraglia*** (2005) the Court held that the principle is not to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. In ***Gasparini*** (2006), the ECJ affirmed that the principle applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred. A necessary implication in the *ne bis in idem* principle, is that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. In ***Jean Leon Van Straaten*** (2006), the ECJ held that the Article 54 must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In particular, in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical, and punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts. The Court also considered that the ne bis in idem principle falls to be applied in respect of a decision of the judicial authorities by which the accused is acquitted finally for lack of evidence. A similar position has been taken in ***Kretzinger*** (2007). In ***Kraaijenbrink***,(2007) the Court decided that different acts consisting, in holding in one Contracting State the proceeds of drug trafficking and in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts'. According to the ECJ, it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, to find that they are 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement.

Examining the Framework Decision on the European Arrest Warrant, in ***Advocaten voor de Wereld*** (2007), the ECJ held that in so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2(2) of the Framework Decision does not breach Article 6(2) EU or, more specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination.

In ***Giovanni Dell'Orto*** (2007) the Court examined the 2001 Council Framework Decision on the standing of victims in criminal proceedings, affirming that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, the concept of 'victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

The ECJ also clarified some important points connected to the civil trials. In ***Unibet*** (2007) the Court held that the principle of effective judicial protection of an individual's rights under Community law, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, requires it to be possible in the legal order of a Member State to obtain interim relief suspending the application of national measures until the competent court has given a ruling on whether those measures are compatible with Community law., where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights. The grant of any interim relief to suspend the application of such provisions is governed by the criteria laid down by the national law applicable before that court, provided that those criteria are no less favourable than those applying to similar domestic actions and do not render practically impossible or excessively difficult the interim judicial protection of those rights.

In ***Ordre des barreaux francophones et germanophone*** (2007), the ECJ held that the obligations of information and of cooperation with the authorities responsible for combating money laundering, laid down in the Council Directives on prevention of the use of the financial system for the purpose of money laundering do not infringe the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6(2) EU. In fact, according to the Directives, the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions of a financial nature or concerning real estate, or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

As far as judicial cooperation is concerned, in ***ASML Netherlands BV*** (2006), the ECJ affirmed that Article 34(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given. Given that Article 34(2) of the Regulation No 44/2001 removes the necessary condition for due service laid down in Article 27(2) of the Brussels

Convention, a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement.

The **ECJ and the CFI** enacted an copious jurisprudence on the right of defence also in administrative matters, for instance in competition claims, in which a recent trend has to be registered, towards a stricter control on the Commission behaviour (see, ***Tokai Carbon Co***, 2004, ***General Electric Company*** (2005)***, Akzo Nobel***, 2007). In ***Showa Denko v Commission SGL***(2006), ***Carbon v. Commission*** (2006) , ***SGL Carbon AG*** (2007) the Court also dealt with the principle of *ne bis in idem*, excluding from its scope the decisions of judges and authorities of non- EU member States.

European Court of Human Rights Moving to the European Court jurisprudence as to the right to a fair trial, it must be said that in the last years the Court has elaborated a new interpretation of article 6 (1) based on the law supremacy in a democratic society. According to the Court, the Public Institutions are obliged to preventively verify material and human means which would make effective the enforcement of judicial decisions. The too long-lasting lack of enforcement creates uncertainty in the person concerned and infringes the right to an effective jurisdictional protection (***Sabin Popescu v. Romania***, 2 March 2004; ***Bertani v. Romania***, 22 June 2004; ***Matheus v. France***, 31 March 2005***; Plasse-Bauer v. France***, 26 February 2006).

In the ***Sejdovic c. Italy*** case (1 March 2006 and 10 November 2004), the Court considered incompatible with the right to a fair trial set by article 6 ECHR the proceedings in default set by the Italian Law (see also ***Somogyi v. Italy***, 18 May 2004). According to the Court, the Italian State had to adopt the necessary measures in order to guarantee to the sentenced person in default to be able to reopen proceedings (see also ***Stoichkov v. Bulgaria***, 24 March 2005). This does not mean that the person concerned cannot refuse to renounce explicitly or implicitly to the guarantees of a fair trial, but it is necessary that this renouncement is not equivocal and is not contrary to an important public interest.

Always referring to Italy, the European Court claimed that the decision made by the Court of Cassation and regarding an act of war, did not intend to sanction the immunity of political acts from judicial control, but it was aimed at indicating the scope of a judge's control over a foreign political act, such as an act of war (***Markovic and others v. Italy***, 14 December 2006). The applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in domestic law. It is interesting to highlight that after this ruling, the United Sections of the Italian Court of Cassation, in a similar case, acknowledged the jurisdiction of Italian judges.

As for the gathering of evidence during a criminal prosecution, the Court claimed that it is necessary to find the adequate balance between the respect for human rights and the public interest related to crime assessment. The European judges therefore claimed that the evidence cannot be gathered through inhumane or degrading treatment (***Jalloh v. Germany***, 11 July 2006; see also ***Göçmen v. Turkey***, 26 September 2006). This position is in line with the Constitutional Courts' one (see House of Lords, 8 December 2005). The Court claimed that if the evidence is gathered infringing article 8 ECHR, that is, infringing the right to private life, this does not necessary lead to an infringement of the right to a fair trial (***Heglas c. Czech Republic***, 1 March 2007).

In the ***O'Halloran and Francis v. United Kingdom*** case (29 June 2007), the Court claimed that the right to non self-incrimination is infringed if a direct compulsion was applied to oblige the suspect to give information which will lead to their sentencing. However, this does not mean that any direct cohertion is an infringement of such a right. The right to a fair trail cannot be subjected to any derogation, but the definition of such a concept cannot be subjected to a sole and invariable rule. In order to verify if an infringement of such a right actually happened, it is necessary to analyse the nature and the level of cohertion that has been used, as well as the presence of adequate guarantees and the use of the evidence gathered in the mentioned way.

In the ***Roche v. United Kingdom*** case (19 October 2005), the Court confirmed autonomous meaning accorded to the notion "civil rights and obligations". It also confirmed the distinction, under article 6 (1), between substantive and procedural limitations on the right of access to a civil court. The European judges would reiterate the fundamental principle that Article 6 does not itself guarantee any particular content of the substantive law of the Contracting Parties. If the applicant has no (civil) "right" recognised under domestic law which would attract the application of Article 6 § 1 of the Convention, Article 6 is not applicable and it is not infringed.

In the ***Vilho v. Finland*** case (19 April 2007), the Court adopted a new approach, claiming that a country may appeal the officer status of the applicant before it is denied the protection mentioned in article 6 ECHR only if exclusion from the access to a civil court for public officers is expressly set by the National Laws, and if this derogation is based on objective reasons related to the Country's interests. The latter cannot only demonstrate that the officer was participating in using public power, but it shall prove that the litigation subject is related to the use of such power. Ordinary litigations with respect to work are not excluded from the application of the guarantees set by article 6 ECHR.

Cases in which the European Court condemned the State for excessive duration of an internal proceeding are very numerous. In the ***Sürmeli v. Germany*** case (8 June 2006), the European judges claimed that a reasonable duration of a trial is a right guaranteed by the German Fundamental Law. The infringement of this right may be the object of appeal before the Federal Constitutional Court which, after attesting the unconstitutionality, may request to the National Judicial Authority to accelerate or conclude the proceeding. However, the European Court believed that the constitutional appeal was not able by itself to retrieve an excessive duration of the proceeding.

Finally, in the ***Storck v. Germany*** case (16 June 2005), the Court stressed once more that equality of arms in a proceeding, under art. 6 (1) ECHR, entails the obligation to provide each party with the chance to present its position under conditions which do not create a clearly disadvantageous situation towards the opponent.

National Constitutional Courts National Constitutional Courts have been requested to face issues about the rights of the accused several times. The House of Lords, for instance, declared illegitimate the obtainment of evidence regarding a person suspected of terrorism in a different country through torture (***House of Lords***, 8 December 2005). Always referring to people suspected of terrorism, the House of Lords declared that sections 21 and 23 of the *Anti-Terrorism, Crime and Security Act* were in contrast with the European Convention on Human Rights in the part in which they did not guarantee a fair trial to these people (***House of Lords***, 16 December 2004).

The position of a foreigner who has been accused in a proceeding has been considered by several Constitutional Courts, especially with respect to the accused's ability to understand the proceedings. The Italian Constitutional Court declared that the arrested person should be able to make evident his lack of comprehension regarding the trial proceedings (***Italian Constitutional Court***, 8 July 2004). The Supreme Court declared partially unconstitutional a section of the law about legislative and regulatory provisions with respect to justice costs in the part in which it did not allow a foreigner who does not know the Italian language to appoint an interpreter at the State's expense (***Italian Constitutional Court***, 6 July 2004).

In turn, the Spanish Constitutional Court, requested to rule about the use of the Basque language during the trial, claimed that an interpreter may be necessary to avoid limiting the defendent's rights (***Spanish Constitutional Court***, 19 April 2005). The same Court declared unconstitutional a law that only acknowledged to foreign people with a legal residence in Spain the right to be assisted for free (***Spanish Constitutional Court***, 22 May 2003). Also the Belgian Constitutional Court intervened on the same issue, claiming that the different treatment of the reports presented by refugees or by Belgian citizens were in contrast with the Constitution and with the 1951 Convention regarding refugee status (***Belgian Constitutional Court***, 21 June 2006).

Some interventions by National Constitutional Courts dealt with the treatment of offenders. The French Constitutional Court claimed that handling recidivism, which allows to condemn the offender for acts committed before the law's effective date to electronic vigilance, does not infringe the principle of an irretrospective penalty because it is a penalty enforcement measure and not a new restriction (***French Constitutional Court***, 8 December 2005). According to Italian Constitutional Judges, the inapplicability of more favourable laws with respect to crime prescription, introduced by Law no. 251, 5 December 2005, to ongoing judgements of first instance, is in contrast with the principle of *favor rei* guaranteed by the Constitution and by widely accepted International Laws (***Italian Constitutional Court***, 5 March 2007).

Finally, Belgian and Czech Constitutional Courts rulings with respect to the European arrest warrant need to be mentioned separately (***Belgian Constitutional Court***, 10 October 2007; ***Czech Constitutional Court***, 8 May 2006). In both proceedings the right to the respect for legality was disputed by the legislation for the enforcement of the framework decision regarding the European arrest warrant. The Czech Court rejected the appeal, stating that the legislation for enforcement of the framework decision was not criminal law but procedural criminal law. Therefore it was not a duty of the Court to define the individual crimes for which the enforcement of double accusation is applicable. The Belgian Constitutional Court maintained the same position, concluding that in order to define crimes listed in art. 2 par. 2 of the framework decision it is necessary to refer to the Member State law to issue the arrest warrant.

8. Data Protection

EUCourt of Justice An important decision concerning data protection is ***European Parliament and EDPS v Council and Commission*** (2006), by which the Court annulled the Council Decision 2004/496/EC on the conclusion of an Agreement between the European Community and the United States of America on the processing

and transfer of PNR data. The Court affirmed that the Council acted ultra vires because the transfer of PNR concerns public security and the activities of the State in areas of criminal law, therefore falling outside the scope of the Directive 95/46/EC. Moreover, the choice of art. 95 EC as legal basis was wrong. Such an article cannot justify Community competence to conclude the Agreement. The Court nevertheless decided to preserve the effect of the decision on adequacy until 30 September 2006.

In the period here in consideration the ECJ has not returned anymore on the question of balancing between the market freedom of movement of personal data and the right to the protection of private life. It is nevertheless useful to remind that in the ***Lindqvist*** judgement (2003) the Court stated that it is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

The Court has been faced instead with the different question of balancing fundamental rights (including the protection of private life) and security reason in the frame of the trials concerning the *fighting of terrorism* (→ *infra*).

In the period here in consideration the ECJ has condemned several Member states for failure to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2002/58/ concerning the processing of personal data and the protection of privacy in the electronic communications sector : ***Commission v Greece***, (2006), ***Commission v Luxembourg*** (2005), ***Commission v. Belgium*** (2005), and with the Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector (***Commission v Nederland*** 2004)

Court of First Instance There is no relevant case-law in the period here in consideration.

European Court of Human Rights Often times the European Court was invited to rule about compatibility of measures adopted in order to maintain law and order and home security with respect of private life. Most of the analysed cases showed interceptions of telephone calls which the Court qualified as interferences of Public Authorities into private life and correspondence (***Matheron v. France***, 29 March 2005). Such interferences are justifiable only if authorised by the Prosecutor on the basis of a law that provides the person concerned with an adequate guarantee against their arbitrary use (***Vetter v. France***, 31 may 2005; see ***Dumitru Popescu v. Roumanie***, 26 April 2007; see ***Heglas v. Czech Republic***, 1 March 2007). In other circumstances, the Court detected an infringement of Art. 8 ECHR as the Public Authorities did not guarantee to the person concerned access to their own personal data (***Roche v. United Kingdom***, 19 October 2005).

National Constitutional Courts The potentially indiscriminate and inadequate nature of the measures adopted at a national level on behalf of the need to prevent terror attacks to the detriment of private life and data protection was reported by several applicants. The use of increasingly sophisticated technological instruments may actually generate issues of compatibility with personal data protection.

With respect to the mentioned aspects, the ***Belgian Constitutional Court*** (21 December 2004) stated that the struggle against particularly severe forms of criminality may force the authorities responsible for investigations to implement methods which

may deeply influence the private life of the accused. The Court claims that the use of such instruments, accepted only to collect evidence and to identify the offenders, is compatible with the Constitution and with article 8 ECHR.
The ***Polish Constitutional Court*** (12 december 2005), on the other hand, claimed that the possibility of denying the destruction of documents collected during a search done by the Police without the Court's consent does not abide by the Constitution. The latter, in fact, rules the intervention's proportionality and the right to solicit the amendment or annulment of the erroneous or deficient information obtained by illegal means. Still with respect to data gathering by the Police, the ***French Constitutional Court*** (19 January 2006) positively criticised the law regarding the fight against terrorism which authorise policemen to obtain, through an administrative requisition, some data gathered by Internet service providers and by Internet cafe owners.

Not only data regarding the accused person's communications are useful for an investigation, but also data arising from blood and biological samples. In this regard, the ***Spanish Constitutional Court*** claimed that taking a blood sample without an effective and reasonable justification prejudices private life rights since blood tests may provide data and information that the person may not like to reveal (Spanish Constitutional Court, 14 February 2005). This attitude is in line with the Spanish jurisprudence with respect to taking biological sample from the accused person, which may be undertaken only with the expressed informed consent by the person concerned or with the judge's authorisation.

9. Final consideration: the Application of the Charter of Fundamental Rights

A last section has been introduced in this research work, which was not included in the EP request for a Briefing Note. It aims to resume a cross cutting trend in the European jurisprudence: the reference made by judges to the EU Charter of Fundamental Rights. It is remarkable to notice how a document with no apparent legal value has increasingly become a term of reference for the Courts.

Many of the judgement listed here above evoke the Charter. The Charter has been referred to by the Opinions of the Advocates General in 109 cases (see annex II). The Advocates General often use the Charter provisions as a demonstration of the increased importance of some fundamental rights in the EC system..

Although the ECJ corresponding judgements often avoids torepeat such a reference, it is nevertheless clearly influenced by the reasoning of the AG. Only three judgements of the EU Court of Justice make reference to the Charter: P*arliament v. Council*, C-540/03, *Unibet v. Justitiekanslern*, C-432/05, 13 *Advocaten voor de Wereld VZW*, C-303/05. The Court of First Instance has referred to the Charter in 34 decisions (see annex III).

In the case-law of ECJ and CFI, the reference to the Charter is not of course the only legal ground of the decision, being always joining to the quotation of Articles of the EC/EU Treaty, or other binding provisions, as well as the precedents of the ECJ or the European Court of Human Rights.

Even the Strasbourg Court has referred several times to the Charter: *Goodwin* (11 July 2002), *Vo* (8 July 2004), *Bosphorus* (30 June 2005) *Anheuser- Busch* (11 October

2005)*Sørensen v. Danemark et Rasmussen v. Danemark*, 11 January 2006, W*allová and Walla v. Czech Republic*, 26 October 2006. L*inkov v. Czech Republic*, 7 December 2006, *Anheuser-Busch inc. v. Portugal*, 11 January 2007, V*ilho Eskelinen and others v. Finland*, 19 April 2007. For the Strasbourg Court the Charter – as well as the perspective of a future accession of EU to the ECHR- confirm the equivalence of the EU standards of protecting fundamental rights in comparison with the European Convention.

Most notably, also many National Courts apply the Charter Just limiting to the Constitutional Courts, the Charter has been referred to by the Spanish Constitutional Court (30 November 2000), the Italian Constitutional Court (24 April 2002), the French Constitutional Court (19 November 2004), the Spanish Constitutional Court (13 December 2004), the Czech Constitutional Court (25 May 2005), (10 July 2006), the Italian Constitutional Court (23 October 2006). An increasing case-law of the other National Courts also makes reference to the Charter, sometimes in connection with the application of EU law, but sometimes also totally outside of the scope of the latter, just by analogy.

Because of these effects of spill over and imitation, the Charter, even before of becoming legally binding has therefore acquired a status of *soft law*.