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CASE STUDIES: SCOPE OF APPLICATION OF THE EU CHARTER

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Case 1:

Facts:

BETA is a company that was recently put into insolvency administration. BETA, through its new management (the insolvency administrators) wishes to retrieve from the Portuguese tax authorities the following data about the company: had there been any attempts at enforcing taxes by the State against BETA; what (if any) payment had the tax authorities hitherto received from BETA; when did the tax authorities first learn about BETA's financial troubles, etc.

BETA's stated purpose in requesting this information was to assess whether to bring an insolvency avoidance civil claim *against* the tax authority (i.e., to recover taxes collected immediately before or during the insolvency).

BETA based its claim on (fictitious) Portuguese tax legislation, which mandates that the provisions of the General Data Protection Regulation (GDPO) apply to legal persons *mutatis mutandis*.

The Portuguese authorities refused to share the information requested, under a rule of Portuguese law, however.

BETA challenges the refusal before a Portuguese Court, arguing that it breaches EU law, including the Charter (right to a fair trial, data protection, right to receive information).

Does the Charter apply?

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Recitals 2, 4 and 73

(2) The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. ...

(4) The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and

principles recognised in the Charter [of Fundamental Rights of the European Union; “the Charter”] as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

(73) Restrictions concerning specific principles and the rights of information, access to and rectification or erasure of personal data, the right to data portability, the right to object, decisions based on profiling, as well as the communication of a personal data breach to a data subject and certain related obligations of the controllers may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or manmade disasters, the prevention, investigation and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, or of breaches of ethics for regulated professions, other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, the keeping of public registers kept for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes. Those restrictions should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

Article 1 (‘Subject-matter and objectives’)

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.
2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.

Article 15 (‘Right of access by the data subject’)

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information ...

Article 23 (‘Restrictions’)

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:
 - (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security;
 - (j) the enforcement of civil law claims.’

Case 2:

Facts:

B is a Moroccan national. She was employed as a member of the domestic staff of the embassy of Xenos, a non-EU member state, in Berlin. Having worked at the embassy for a number of years, B was dismissed. She brought claims against the embassy claiming rights for:

- unlawful dismissal (according to the German Act on Dismissals);
- failure to pay the national minimum wage laid down in the Minimum Wage Act;
- breach of the German Law on Working Time;
- racial discrimination and harassment contrary to the General Act on Equal Treatment.

The embassy of Xenos claims state immunity in reliance on the (fictitious) German State Immunity Act. German courts have long interpreted the Act to give a blanket immunity to foreign states from German courts' jurisdiction in respect of proceedings concerning employment of the members of an Embassy.

B, however, believes that this immunity unduly infringes on her right to a fair trial found in Article 47 of the EU Charter of Fundamental Rights.

Can B invoke the Charter in this case?

Case 3:

Facts:

A is an Afghan national, who has obtained the status of international protection in Italy, but is now illegally staying in France. French authorities rejected A's application for international protection there, because A already had been granted asylum in Italy, and thus instructed A to go there.

A did not comply with the instruction, and was put in detention for the purpose of forced return to Italy. French authorities considered that they could not issue a return decision to Afghanistan (which would have breached *non-refoulement* duties) and that no other EU or third country would admit A. Italy was therefore the only possible option.

A now challenges the legality and modalities of the detention in a French court. He argues that administrative detention is only lawful under EU law if the State has previously issued a formal return decision against the individual (Article 6, Directive 2008/115).

A also claims a violation of his Charter right to a fair trial; of his right not to be subjected to inhumane detention conditions; and rights to an effective remedy.

Does the Charter apply in this case?

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive)

Recitals 2, 4 and 5

(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.

(5) This directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

Article 1

This directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

1. This directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the [Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)], or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

3. This directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.'

Article 3

For the purpose of this directive:

2. "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. "return" means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

- his or her country of origin, or
- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;'

Article 4(3)

This directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this directive.

Article 5

When implementing this directive, Member States shall take due account of:

- a) the best interests of the child;
- b) family life;
- c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

Article 6

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

Article 15

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- a) there is a risk of absconding or
- b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.