Human rights case law of the European Court of Justice, July 2002 to December 2002.

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Introduction

In the period under review, late July to December 2002, there were several cases where important issues of fundamental rights were raised. However, this autumn session of the Court began under the shadow of the "summer storms", in the shape of the *Carpenter* and *UPA* cases,[1] and was, admittedly, a quieter period for the courts. We do see, however, significant cases in relation to citizenship (*Baumbast* and *d'Hoop*) and competence (*BAT*) during these months. This does not mean that fundamental rights were not at the forefront of many cases - indeed in those very citizenship and competence cases they are dealt with - but rather that the EU courts had less opportunity to develop the fundamental rights dimension of the legal order. Undoubtedly, these courts will also, during this period, have been hypersensitive to developments in the framework of the Convention on the Future of Europe, a context which could not be ignored and which must have affected human rights pronouncements in the latter half of 2002.

Rights of the child citizen and Article 8 ECHR

In *Baumbast and R*,[2] the European Court of Justice (ECJ) asserted the status of citizenship as a new and autonomous constitutional right. Article 18 EC was declared directly effective and independent residence rights were as a result granted to an EU national who was not a worker. Furthermore, it was decided that the family of the citizen should be protected and entitled to educational rights, even if the latter no longer lived in the Member State in question. This was a preliminary reference from an Immigration Appeal Tribunal. The Court was required to consider the relationship between Article 18 EC and Article 12 of Regulation 1612/68 in order to determine the residence and education rights in the UK of the children of a migrant worker. A plenary Court (13 judges) reached the decision that children who have established "original" residence rights on the basis of one parent being a migrant worker under 1612/68 do not lose those rights and attendant educational entitlements if their parents divorce, or if the migrant worker parent ceases to be such. It was deemed irrelevant by the Court that the children were not in fact citizens of the

[1] See Peers 2 IHRR 331 (2002).
[2] Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, 17 September 2002.

Union themselves. Further, the Court went on to state that, where such children are availing themselves of educational entitlements under Article 12, 1612/68 in such circumstances (that is divorce of parents or EU citizen parent no longer a migrant worker), then their primary carer, whatever her or his nationality, is entitled to reside with the children so as to facilitate the exercise of their educational rights. Finally, the Court stated that a citizen of the EU who ceases to enjoy rights of residence as a migrant worker will have a right of residence by direct application of Article 18 (I) EC, thus according direct effect to Article 18 EC. The ECJ, faced with a situation where the essential requirement for a right of residence (that is a relationship with a worker) was not fulfilled, departed from the technicalities of 1612/68 and issued a decision of great significance in terms of the development of EU citizenship.

This is a remarkable judgement overall, which offers the direct benefit of an EC law provision to a "non-moving", non-worker and non-citizen. It is a mantra of EC (free movement) law that there must be a link with Community law, normally arising from movement, however temporary, as a migrant worker, to a Member State other than your own.[3] From the early days where the Court struggled over the meaning of worker[4] and of "sufficient connections" with EC law, we have certainly come a long way to reach the point where people (children) who are neither movers, nor workers, nor Member State nationals reach the holy grail of rights under 1612/68 through expansive interpretation of Article 18 EC. The case arose from the following set of joined (for the purposes of the Article 234 referral) but unrelated facts. Firstly, a Colombian national, who already had one daughter, married a German man (Baumbast) in the UK in 1990. The couple subsequently had a daughter, thus making a family of four subject to the proceedings in this case. Of this family, only two (Baumbast and his daughter) had the nationality of a Member State, in this case Germany. The case arose from an application by Mrs Baumbast for indefinite leave to remain in the UK, which was rejected. Her husband had been both an employed and self-employed person in the UK since 1990, but by the time of the main proceedings he had ceased to work in the UK and was employed in fact outside the EU. Secondly, in the case of R, a US national who was divorced from a migrant worker, with the children of the marriage living with R (the mother), she sought indefinite leave to remain in the UK, which was refused.

The UK government submissions to the Court acknowledged the rights of the children in both the Baumbast and R situations to continue to receive educational services in the UK under Article 12 1612/68. However, it submitted, such rights do not extend to admitting non-national primary carers. Indeed, to concede this point would, according to the UK, lead to absurd results with a second level of derivative rights; the children on the basis of father's (once) migrant worker status, the mother on the basis of the children's derivative right. The Commission's argument was based on migrant worker status. In *R*, mere physical separation from the

[3] See case C-192/99 Kaur for a recent reassertion of this principle by the ECJ, 20 February 2001, noted by Toner (2002) in 39 *CMLRev*, at 881-93.

[4] See, generally, Craig and de Búrca, *EU Law* (Oxford: Oxford University Press, 2002), at ch. 17.

migrant worker did not affect derivative children's rights. But, the loss of that status, as in the case of Baumbast, rendered the position of the children there more precarious. There is a certain circularity to all these arguments, which seems or seeks to hide the main preoccupation of the parties. The disconnection with the migrant worker was glaringly obvious in these cases, either through loss of employment status in the UK (Baumbast) or through divorce (R). In fact, it is interesting in itself that these cases were heard together, as they present two fundamentally different situations at one level; either the Court was dealing with the impact of divorce on Community free movement law, which has such an intrinsic attachment to the institution of marriage,[5] or it was faced with a *Singh* type situation - that is, once a worker always a worker.[6] What is not admitted openly in this case is that Community law has been much less willing to embrace the non-standard family than it has the migrant worker who loses that status. Combining the two cases here allows that history to be elided by the Court, but one wonders were it not for the comparative element whether Ms R would have fared as well as Mrs Baumbast in Luxembourg. The latter remained married to a (once) migrant worker, whereas R had divorced one and maintained no connection to Community law (except via her children). Ironically, both the Commission and the UK seem to suggest that the Baumbast case is the harder of the two, undoubtedly for resources-related reasons; but, conceptually, within EU jurisprudence the R situation is less clear.

The Advocate General delivered his Opinion on 5 July 2001. In a clearly reasoned and contextual Opinion, Advocate General Geelhoed analyses the effect of Article 8 of the ECHR on the case. He prefaces his discussion by stating that discrimination between one's own nationals and those of other Member States (as in the case of UK immigration law rights) is not necessarily justified. He recalls that fundamental rights apply only if the case falls within the scope of Community law, that lawful marriage is the basis for family life, and that Article 8 ECHR cannot be considered to impose on a state a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.[7] The issue of the children's rights in both situations were assessed first by the Advocate General. In concluding that the case of the R children was straightforward, Geelhoed, ironically, relies on *Diatta* as authority;[8] this may be a selective reading of *Diatta* for, on another reading, it is that case specifically which would suggest that divorce should fundamentally affect those with derivative rights only. Articles 10 and 12 of 1612/68 are found to substantiate the rights of the Baumbast and R children respectively. As for the mothers, the blunt preliminary observation is that, as is evidenced by these two situations, Community law fails to adequately address situations where the family circumstances change after entry into the host Member State and,

[5] Dating from the days of the *Diana* case, case 267/83, *Diana v Land Berlin* [1985] ECR 567.
[6] Case C-370/90, *Ex parte Surinder Singh* [1990] ECR I-4265.
[7] Paras. 58-60 of the Opinion. Interestingly, Geelhoed's Opinion came a mere year and six days before the ECJ decision in *Carpenter*, which effectively does employ Article 8 ECHR to overrule a Member State immigration decision.
[8] Para. 80 of the Opinion.

therefore, "the legislation is in need of an overhaul".[9] In order to fill the lacunae, the Advocate General relies on both the *Martinez Sala* ruling[10] and citizenship benefits (to the children) as well as Article 8 ECHR; without directly stating that a refusal to grant leave to the mothers would constitute a breach of that provision, the Advocate General does suggest that "a decision to grant such leave [to the mothers] does justice to Article 8 ECHR".[11] His treatment of the question of the direct effect of Article 18 EC is extensive and, as such, this constitutes one of the most lengthy assessments on the nature of EU citizenship that has issued from the Courts in Luxembourg. As such, too, it is probably the assessment which (some) Member States have tried to guard against, namely the implication that Article 18 adds to the existing free movement law rather than merely being composed of it.[12]

Advocate General Geelhoed has indicated his willingness to refer to the Charter of Fundamental Rights in his Opinions in other cases[13] and this Opinion is no exception. Here he recalls the connection between Article 8 ECHR and Article 7 of the Charter of Fundamental Rights, which enshrines respect for family law. This, of course, is yet another Advocate General reference to the Charter that does little more than recall its existence and alert the reader to its non-enforceable status.[14] Indeed, as Geelhoed specifically remarks, "as Community law currently stands, that Charter has no binding force".[15]

The general position of the rights of children under EU law is considerably enhanced by this decision. As McGlynn[16] says, children are largely invisible in terms of EU laws and policies. The Charter, though, does contain specific references to children.[17] These provisions were not mentioned in the Court's judgment, but this decision may presage a very real awareness by the judges that it is not only the types of rights in the EU legal order that may alter in the future, but also the types of people affected, people previously excluded from the realm of EU fundamental rights and their inherent economic link focus.[18] The Charter provisions on children may well be limited, but the attitude evident in *Baumbast* suggests already a generous interpretation of them. The most significant element of this case I would argue is that children are accorded rights in their own name, not as mere "supports" for a migrant worker. The previous case law and EC measures relating to children emphasised this necessary link and granted them no rights qua children. As

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[9] Para. 87 of the Opinion.
[10] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.
[11] Para 93 of the Opinion.
[12] Para. 109 of the Opinion.
[13] In cases C-313/99 *Mulligan*, C-224/98 *D'Hoop*, C-491/01 *BAT*, C-94/00 *Roquette Frères*.
[14] See Morijn, *Judicial Reference to the EU Fundamental Rights Charter* (2002), for analysis of the treatments of the Charter in the CFI and ECJ, http://europa.eu.int/futurum/documents/other/oth000602_en.pdf
[15] Para. 59 of the Opinion.
[16] See McGlynn, "Rights for Children? The potential impact of the European Union Charter of Fundamental Rights" (2002) 8 *European Public Law* 387, at 387-400 for a recent discussion of the position of children's rights under EU law.
[17] For the text of Charter, see OJ 2000 N0 C364/1 of 18 December 2000. Articles 20, 24, 32 and 14 are the most significant in terms of the rights of children.
[18] Beggars or indigents and stateless persons, for example. We may of course, even one day see animal rights embraced in a future EU rights Utopia; see generally Radford, *Animal Welfare Law in Britain* (Oxford: Oxford University Press, 2001) at ch. 6.

McGlynn says, their rights were "parasitic" - they were accorded rights so long as a parent is or was exercising Community law rights.[19] This position fundamentally affected the vulnerability of children in the EU legal order.[20] Article 24 of the Charter recognises that children have to be accorded certain substantive rights without the prior establishment of a relationship with a migrant worker. Here, it is asserted, unsurprisingly, that the child's best interests must be a primary consideration (Article 24(2)). But this provision, while reflecting common national and international criteria and terminology for determining the rights of children, is a potentially huge step forward in the sphere of EU rights as it inherently accords rights protection to non-economic actors. Article 14, furthermore, refers to the right to education, which is "likely to give the green light to the Court of Justice to continue developing its jurisprudence on the educational rights of children".[21] The significant question is, does *Baumbast* already hint at the establishment of this right as an independent right of the child even before the Charter's status has been altered?

Obviously, the divorced, non-EC national parent also benefited from the Court's decision in *Baumbast* and this extension of the scope of 1612/86 rights underlies an emphasis on the right to family life being protected within the EU legal space even if Article 8 ECHR was only briefly referred to. There is a significant link here with the recent case of *Carpenter*;[22] in that case the couple were married, but the Court's emphasis on the nature of the family and the importance of caring for children is shadowed in *Baumbast*, albeit in different circumstances.

In both the *Baumbast* case and the recent case of *d'Hoop*,[23] it has either been a direct (*d'Hoop*) or indirect (*Baumbast*) reference and/or a generous interpretation of EU citizenship that has transformed the rights of the applicants. The case of *d'Hoop* also raised similar issues concerning children and education rights. Although not a child at the time of the proceedings, Marie d'Hoop, a Belgian national, had attended secondary school in Lille and it was this period of time that was the subject of the dispute - a claim for a "tideover" allowance granted in Belgium during the year after university studies have finished. The full court stated: "such inequality of treatment [by Belgium] is contrary to the principles which underpin the status of citizenship of the Union"[24] and ruled in her favour. In both of these cases, of course, claims were being made against Member States and it is in that relationship context (Member State-Citizen) that we have observed the Court increasingly willing to render expansive decisions on the meaning of EU Citizenship. This does fundamentally call into question the purpose and meaning of citizenship in the EU; indeed this must, increasingly, be a question posed by Member State public authorities in their management of immigration

[19] McGlynn *supra,* n.16 at 388.
[20] See further, Stalford, "The Citizenship Status of Children in the European Union" (2000) 8 *International Journal of Children's Rights*, at 101.
[21] McGlynn *supra,* n.16 at 400.
[22] Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, 11 July 2002 and *supra*, n.1.
[23] Case C-224/98, *D'Hoop*, 11 July 2002.
[24] Para. 35 of the Judgment.

and social services benefits. Member States underlined their limited conception of EU Citizenship by, firstly, endorsing an extremely narrow original definition at the Maastricht negotiations.[25] Not satisfied with this, the "complementary" provision was introduced under the Amsterdam Treaty changes,[26] thus stressing the Member State view of a relatively empty definition of citizenship. Little could it be foreseen from the early cases before the ECJ that Article 18 might evolve into the enabling provision that the Court has fashioned in the last couple of years.[27] But a very large question still remains about the nature and meaning of EU citizenship; what does it mean in terms of participation or functioning within the EU legal order (as opposed to the obvious benefits it now seemingly offers vis-à-vis Member States in national legal orders)? In other words, it is undoubtedly of great interest to those seeking to win free movement related disputes in Member State courts, but what of its worth in terms of the larger EU legal order?

I would argue that this has all to be seen in the context of, and in intimate relationship with, competence issues within the EU polity; immigration issues and social rights and benefits, and a Member State's ability to control both of these, lie at the heart of the competence debate. They are, and always have been, grey areas from the point of view of division of competence within the EU, being both politically and financially sensitive. It has been regarded in the past as overly intrusive, for the EU, in the shape of judicial pronouncements, to interfere too much in either of these areas. Competence in immigration matters has, of course, become gradually and partially part of the EU political institutional competence (Title IV, Articles 61 - 69 ECT which deal with visa, asylum and immigration policies), but many questions of inclusion and exclusion clearly remain solely a matter for the Member States themselves. However, both human rights (see for example, *Carpenter*[28]) and citizenship (see for example, *Kaur*[29]) arguments raised in "internal" immigration disputes/cases increasingly bring such (internal) matters before the ECJ. It can be seen that drawing a clear line around what constitutes Member States immigration competence - as distinct from EU common principles - will become even harder in the future. Obviously, the question of competence within the EU legal order is one of the most fundamental considerations for the Convention on the Future of Europe,[30] but in the meantime (and arguably too in the future, given the impossibility of determining every situation where human rights or citizenship might be raised) it falls to the Court to deal with sensitive clashes between Member State control over immigration and EU general principles or citizenship. That body has, in recent times, shown itself to be more willing to intrude into this tricky field (see especially *Carpenter*) when

[25] The original Article 8 EC. See, for example, Closa, "The Concept of Citizenship in the Treaty on European Union" (1992) 29 *Common Market Law Review* 1137 and d'Oliveira, "European Citizenship: its meaning, its potential", in Dehousse (ed.), *Europe after Maastricht* (Law Books in Europe, 1994), 81.
[26] Article 17(I) EC was changed with the addition of the following sentence: "Citizenship of the Union shall complement and not replace national citizenship".
[27] Contrast the approach in cases such as Case C-193/94 *Skanavi* [1996] ECR I-929 and C-65/96 *Uecker* [1997] ECR I-3171 with the recent cases under consideration here.
[28] *Supra*, n.22.
[29] *Supra*, n.3.
[30] http://european-convention.eu.int/bienvenue.asp?lang=EN

it concerns Member State law or policy. *Baumbast* is another case in that line; Article 234 references are being increasingly used to demonstrate the Court's support of strong EU rights principles (whether those be human or citizenship) over Member States' policies. In other words, if it is a question of competence when a Member States practice is pitted against EU general principles, then the latter is quite likely to be judicially endorsed. But it may be that we have double standards here, for when it is a question of EU institutional competence the Court's attitude is much less likely to be "intrusive" and it is that which we see in the following case under examination, from the very end of the 2002 session, the *BAT* case of 10 December (the Tobacco Products Directive case).

Fundamental rights and competence questions

One of the most significant cases to be decided by the Court during latter half of 2002 was of course the *BAT/Tobacco Products* case.[31] It is outside the scope of this review to consider its competence-related significance, but a few comments on the fundamental rights elements of the case are merited. In this Article 234 referral from the High Court, the referring court asked the ECJ to consider whether Directive 2001/37 (Tobacco Products) might be invalid by reason of infringement of the fundamental right to property. This claim arose essentially in relation to the trademark rights of the various tobacco companies involved in the case. Five of the Member States and the three political institutions all argued for a limited interpretation of the right to property in this regard. The ECJ supports this view and recalls that the right to property is not an absolute right and "it must be viewed in relation to its social function".[32] That being so, the exercise of the right to property may be restricted, as case law from the Court has previously stated. Given that the stated aim of the Directive is a high level of health protection, it is easy for the ECJ to find that as such "it constitutes a proportionate restriction on the use of the right to property compatible with the protection afforded that right by Community law".[33] The Advocate General, Geelhoed, refers to fundamental rights principles first when considering the admissibility of the reference (this question arose as the implementation period for the Directive had not yet expired).[34] In support of admissibility, the Advocate General relies partially on the need for the Community legal order to provide effective safeguards for claimants' rights.[35] He refers, naturally, to Article 6 ECHR in this regard, but his reference to the Charter here is intriguing; "the principle [of effective safeguards] ... is expressed for the European Union in Article 47 of the Charter of Fundamental Rights".[36] There is no reference to the status of the Charter, but of more interest is the suggestion that the

[31] Case C-491/01 of 10 December 2002.
[32] Para. 149 of the Judgment.
[33] Para. 150.
[34] Opinion delivered on 10 September 2002.
[35] Para. 47 of the Opinion.
[36] *Ibid*.

ECHR may well lay down a general fundamental rights principle but we will, or ought to, look to the Charter for the specific EU expression of that right or principle. As the merest hint of a possible use of the Charter (if/once given legal force), this is quite significant. Of course, Geelhoed's support for the need for a wider view of Article 234 in the light of the restrictions under Article 230, and indeed his specific endorsement of the views of Jacobs in his *UPA* Opinion,[37] are contradicted by the Court in that case several months earlier.[38] In relation to the question of property right infringement, the Advocate General again refers openly to the Charter: "the right to property is not a right recognised as such by the EC or EU Treaties. Article 17 of the Charter of Fundamental Rights does, it is true, recognise the right to property".[39] Once again, an indication of, one could say, affectionate support for this newly proclaimed Cinderella document. Relying however on the combination of Article 6 TEU, ECHR principles of property rights and ECJ case law, the Advocate General ultimately reaches the same conclusion as the Court, namely that the interference with (trademark) property rights in this case is not disproportionate or unreasonable. The ECJ is, in general, walking a careful line in such cases as *BAT*, particularly in the light of the Convention's and Draft Constitution's emphasis on clarity of boundaries in competence matters. There is a charged and heightened political environment where the appropriate boundaries of EU competences at both the highest political and constitutional levels are at issue.[40] One might also make the same comment in relation to EU fundamental rights.

Rights of third-country nationals

The case of *MRAX*[41] deserves a mention in this review of 2002 precisely because very few fundamental rights arguments were raised in the judgement, despite its subject matter being inherently deserving of a human-based assessment. The case concerned proceedings before the Belgian Conseil d'Etat where MRAX[42] sought annulment of a Belgian law/Circular of 1997 regulating the marriage requirements of third-country nationals with Belgian nationals, and related provisions on visas and residence permits for marriages contracted outside Belgium. In essence this was the review of a general, abstract national rule rather than an examination of a specific set of circumstances. As such, it is rather surprising that admissibility arguments were not raised before or by the Court; this could be considered to be a "hypothetical" case in many respects,

[37] Case C-50/00 *UPA v Council*, 25 July 2002, and see Peers, *supra* n.1 for analysis.
[38] Para. 51 of the Opinion.
[39] Para. 259
[40] See de Búrca, "The European Court of Justice and the Evolution of EU Law", in Boerzel and Cicowski (eds.) *The State of the European Union, Vol. III: Law, Politics and Society in Europe* (Oxford, Oxford University Press, 2003) (forthcoming).
[41] Case C-459/99 *Mouvement contre le racisme, l'antisemitisme et la xenophobie ASBL (MRAX) v Belgium*, 25 July 2002.
[42] Mouvement contre le Racisme, l'Anti-Sémitisme et la Xénophobie, a Belgian-based NGO established for the protection of victims of racial discrimination.

yet it was not refused admission for that reason.[43] On the other hand, one could well envisage that this type of case, "constitutional" in many respects,[44] is precisely the kind of Article 234 referral which the ECJ is happy to entertain, in preparation for an internal division of Article 234 competence between the Luxembourg courts, where the ECJ takes "les grandes questions' and the CFI deals with "nightdress v pyjama" issues.[45]

MRAX had specifically relied on Article 6 TEU in its attempt to challenge the national legislation, but the Conseil d'Etat did not refer to Article 6 in its four referred questions. The Advocate General, Stix-Hackl, delivered her Opinion on 13 September 2001. Her assessment begins with an analysis of the issue of family reunification under Community law, during which she makes the stark observation that Community law as it stands does not contain any provisions on reunification of families.[46] Therefore, if there is no link with Community law (that is, the member state national to whom the third-country national is married has not "moved", has not exercised her/his free movement rights) the matter falls to be determined exclusively by national law. In other words, if you are fortunate enough, like Mrs Carpenter, to have married somebody who has, whether by good fortune or design, exercised movement rights, the outcome of your case falls to be determined by EC rules.[47] Advocate General Stix-Hackl pays more attention to the ECHR in the determination of the substantive rights of non-Member State national spouses here; the ECHR, for example, is said to play a role in so far as it is a yardstick against which the relevant provisions of secondary law are to be measured[48] and the core relevance of Article 8 ECHR to this case is heavily underlined. The Advocate General makes a brief, non-committal reference to the Charter in a footnote in this regard, recalling that Article 8 ECHR corresponds to Article 7 of the Charter.[49] She essentially finds that protection of the right to family life and the principle of proportionality must take precedence over Member State immigration restrictions in relation to the three substantive questions relating to expulsion raised by the national court. The final question, concerning remedies, calls into question the personal scope of Directive 64/221. Stix-Hackl considers that the wording of Article 9 of the Directive should be broadly interpreted, adding that "the general principles of Community law, including those of the ECHR, also militate in favour of an interpretation of the conditions for the right of application [to review] which is not too strict".[50] It is, overall, an Opinion

[43] See Case 104/79 *Foglia v Novello* [1980] ECR 745 for the classic statement from the Court in this regard. For more recent judicial appreciation of the role of the ECJ under Article 234, see Case C-491/01 *BAT* of 10 December and Case C-153/00 *Paul der Weduwe* of 11 December 2002.

[44] In raising questions of EU v Member State competence (indirectly), fundamental rights, judicial review, equality and non-discrimination amongst others.

[45] See comments of Advocate General Jacobs in Case C-338/95 Weiner [1997] ECR I-6495 and also Draft Council Decision of 13 February 2003, no. 6202/03 on the Protocol of the Statute of the Court of Justice, addressing the division of competence internally in Luxembourg.

[46] Para. 28 of the Opinion.

[47] See generally on this issue, Nic Shuibhne, "Free Movement of persons and the wholly internal rule: time to move on?" (2002) 39 *Common Market Law Review* 731.

[48] Para. 62 of the Opinion.

[49] Footnote 26 of the Opinion.

[50] Para. 141.

which is tight in its reasoning but bountiful in its outcome and its significance for non-Member State nationals in certain specific circumstances. The Court largely follows Stix-Hackl but, if anything, is even more parsimonious in its justifications for its pro-Third Country national decision, carefully staying on neutral territory with little reference to the ECHR and none, unsurprisingly, to the Charter.

The starting point of the Court's response is its emphasis on the importance of the protection of family life and its inherency in Community free movement law;[51] it cites *Carpenter* as support for this principle, but not directly any ECHR provision. Subsequently, it maintains the same emphasis, with the wording "in view of the importance which the Community legislature has attached to the protection of family life",[52] again, without referring to any supporting provision. This is not entirely accurate to the extent that the high level of protection of family life may be derived more from the jurisprudence than the legislature. As the Belgian government plaintively, but understandably, observed, the ECJ has no jurisdiction where it is a question of the legal situation of a third country national married to a Belgian national. The Belgian state later asserts that expulsion orders against third country nationals (for lack of proper visa and having entered the territory unlawfully) must at any rate take priority over (a limited) interference with family life for reasons of public policy requirements. As in *Carpenter*, the "host" state believed it still had the full competence to control immigration matters concerning their own nationals. But the Court here regarded the proposed provisions on expulsion as manifestly disproportionate to the gravity of the infringement.[53] In doing so, it automatically places third country nationals in such circumstances in the same position as EC nationals. Austria had indeed presaged this argument by suggesting that if a host state may expel an EC national who has entered unlawfully, then so can it a third country national. The Court takes this argument, inverts it, and holds in general terms that entry infringements by *anybody* cannot justify expulsion[54] and, if a third-country national can furnish proof of identity and of marriage to an EC national, then s/he may not be expelled. A similar conclusion was reached by the Court in relation to expulsion from the territory for non-application of a visa after the expiry of a residence permit; it would be "manifestly disproportionate" to issue an order to expulsion in these circumstances.[55] The national control of aliens does not justify such a provision. Finally, the Court is required to consider the proposed administrative practices that would restrict and deprive third-country nationals of rights of review. The Court states: "the provisions of Article 9 of Directive 64/221 ... call for a broad interpretation as regards the persons to whom they apply",[56] The (nine) judges draw on Articles 6 and 13 ECHR to continue that, "in the field of Community law, the requirement for judicial review of any decision of a national authority reflects a general principle stemming from the constitutional traditions of

[51] Para. 23 of the Judgement.
[52] Para. 61.
[53] Para. 78.
[54] Para. 80.
[55] Para. 90.
[56] Para. 101.

the Member States and enshrined in Articles 6 and 13 of the Convention".[57] This is indeed a loaded and extremely potent paragraph. Firstly, a Community measure (Directive 64/221) is given a wide scope and one surely never intended by the legislature, in being applied to third country nationals and/or to situations where there is no link with Community law. Secondly, the basis on which this scope is established is a general principle of the right to judicial review of public authority decisions. Here, the Court again uses general principles to answer the national Court's questions in favour of third country national rights over Member States immigration control. On this occasion, it specifically refers to the ECHR[58] as the source of this principle and uses ECJ jurisprudence to support this.[59] Given that on exactly the same day the Court was giving its judgement in *UPA v Council*,[60] where it refused to accept that Article 6 and 13 ECHR should be used to change the law on judicial review of EC legislation, this extension of the scope of Dir 64/221 is even more astounding. At the level of judicial psychology one can only hazard the wildest of guesses as to how this inconsistency can be embraced by the judicial "pride". Exactly the same arguments that were put forward in *UPA*, namely that the Member States need to endorse a change in judicial review law, could be made in *MRAX*. But this is part of a trend where "intrusions" into national law and policy will be justified by EC rights and principles, but challenges to Community measures will be restrictively viewed. This schizophrenia is all the more worrying when, in principle, we are undergoing a process of creating a solid human rights dimension for the EU (see further below); the kaleidoscopic image that emerges after *Carpenter*, *UPA* and *MRAX* and others may well be intellectually delectable, but it is just not good enough. Nonetheless, in terms of the real effects of this judgement for third-country nationals, the Court, with its careful, cautious and curt reasoning, has stopped third-country nationals rights being purely parasitic.

And so, the intrusion into national immigration control competence is clearly stated and at the same time the protection of third country nationals considerably enhanced. Much has been written about the precarious position that third-country nationals occupy within the EC legal order[61] and this decision by the ECJ signals an important re-envisaging of their situation. The *MRAX* case too is notable for the indication of the Court's willingness to acknowledge implicitly that, if it has competence to adjudicate on free movement within the EU, then such competence will also embrace third country nationals. From the dark days of *Demirel*[62] and similar cases, where EC free movement law was preserved for the privileged (EC nationals), and discrimination inherently endorsed, we have come a long way. If certain fundamental principles are part

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[57] *Ibid*.

[58] It is interesting too in a minor way that the judgement uses the term "the Convention" rather than "the ECHR", suggesting a rather casual familiarity in judicial discourse, as if there were only one significant Convention to which it might be referring. The untrained reader would indeed wonder "what Convention"?

[59] Case 222/86 *Unectef*, Case C-97/91 *Oleificio* and Case C-226/99 *Siples*.

[60] Case C-50/00 *UPA v Council*, 25 July 2002, not yet reported. And see Peers 2 IHRR 331 (2002), for a commentary.

[61] See for example, Lyons, "The politics of alterity and exclusion in the European Union" in Fitzpatrick and Bergeron (eds.) *Europe's Other: European Law between Modernity and Postmodernity* (Aldershot: Ashgate, 1998) 157.

[62] Case 12/86 *Demirel v Stadt Schwabisch Gmund*, (1987) ECR 3719.

and parcel of Community free movement, then they should be fundamental for everybody. While Member States may see red after *Carpenter* and *MRAX*, these cases signal a more mature concept of what constitutes "fundamental" in the EU. These cases, if analysed from a "competence" perspective, may be less easy to justify, but that's another story. But, finally, we are still in the dark as to a very clearly defined basis for EC competence over Member State control of "aliens": in *Carpenter*, the ECHR (protection of family life) was directly invoked; in *MRAX*, the ECHR is mentioned only in terms of procedural rights.

Human rights in competition

In an interesting competition law case during the period under review, fundamental rights were considered by the Court. In *Roquette Frères*[63], a 13-judge court was directly called upon to consider the scope of the fundamental principle of the inviolability of the home, having being requested to answer a question on this by the Cour de Cassation in a 234 referral. The context was the Roquette Frères (RF) objection to entry upon and seizures at its premises in relation to the gathering of evidence for a possible participation in agreements falling foul of Article 81 EC. The authorisation for the seizures was granted by the Tribunal de Grande Instance at Lille upon application by the EC Commission. The Cour de Cassation, hearing the case on appeal by RF against that order, directed itself to the issue of fundamental rights protection against inviolability of the home (Article 8 ECHR), and resorted to citing both recent case law of the Strasbourg court and Article 6 (2) TEU to consider that the law in this area has changed since *Hoechst*,[64] and that the Commission would be bound by such changes. But this was an issue for the ECJ and the question posed by the French Court in its referral was centred upon the extent of the obligations and/or discretion of national courts in the light of fundamental rights when requested by the Commission to make entry/seizure orders. The ECJ went immediately to its "according to settled case-law ..." common statement on fundamental rights in what is, overall, a very carefully worded judgment. It cannot be forgotten, after all, that the highest court in the French civil (ordinary, non-administrative) system was directly concerned with the state of the law in relation to fundamental rights protection for persons/companies affected by the Commission's relatively extensive competition law enforcement powers. In terms of judicial politesse, and the fact that the Cour de Cassation accepted itself bound by Article 234 (3), this case is significant; the subtleties of the questions posed imply that the French Court already knows the law on Article 8 ECHR in this regard, but is requiring its Luxembourg colleagues to acknowledge these changes and, inherently, to impose more stringent obligations on the Commission.

[63] Case C-94/00 *Roquette Frères v Directeur General de la Concurrence*, EC Commission (third party to case), decided on 22 October 2002.
[64] Case 46/87 *Hoechst AG v Commission*, (1989) ECR 2859.

So, how did the ECJ react? Much can be told from the very first sentence of the substantive decision: "As is apparent from the judgment making the reference, the Cour de Cassation is uncertain as to the possible effect of the principles established by the Court in *Hoechst* ... and of certain developments which have taken place in the field of the protection of human rights since ... [that case]".[65] Touché! Indeed, as it goes on to state, the ECJ is "clearly competent to provide the referring court with all the criteria of interpretation needed by that court to determine whether the applicable national rules are compatible ... with Community law, including ... rights established by the ECHR ..." and later proceeds to amalgamate the two separate questions raised in the referral. Not quite the kind of "horizontal" relationship between equals imagined to exist by some under Article 234 (3). The substantive question is the scope of the principle of protection against arbitrary or disproportionate intervention by public authorities. Recent case-law from the ECourtHR suggests that this principle may extend to business premises; in another piece of judicial one-upmanship, the ECJ cites a 2002 Strasbourg case on this matter, whereas the referring court had cited an earlier 1992 case in support of its views. But there is a very self-conscious effort by the ECJ here; clearly cautious about its response, and presumably therefore about its relationship with the Cour de Cassation, the Court resorts to a reminder about the duty to co-operate in good faith and to the need to give a helpful answer to the referring court.[66] Delivered in somewhat coded language however, it is not in fact clear to whom exactly, in the circumstances of this case, the ECJ is directing this co-operation dictat. The ECJ begins by stating that it is for the national court to ensure observance of the principle of non-arbitrary interference and to evaluate the coercive measures requested in a Regulation 17 investigation by the Commission. The emphasis, moreover, is on these measures, as the national court may not involve itself in any assessment of the need for the investigation in the first place.[67] For the purposes of offering guidance to the national court as to the extent of its powers of review, the ECJ breaks down such powers into review of a) arbitrary measures and b) disproportionate measures. The whole judgement, for which La Pergola was the Juge Rapporteur, reads very coherently and clearly, almost as if textbook-like advice, largely delivered in short, one- or two-sentence paragraphs, were being doled out in a very cautiously drafted decision, where nothing was left to chance (or to the discretion of the referring court). Of course, one of the "rules" of the 234 mechanism is that the ECJ will not answer hypothetical questions,[68] and, technically speaking, the questions asked by the Cour de Cassation are not abstract (referring as they do to a particular case, where RF would have the order supporting the Commission's powers annulled). But the answers by the ECJ seem increasingly abstract and general as the judgment progresses. The ECJ judges are clearly concerned that this case be used to delineate (and protect) both Commission investigation powers, but also, significantly, the ECJ's own competence to review Commission action in this regard. Indeed, there is a "warning" that for a national court to resort to a

[65] Para. 22 of the Judgment.
[66] Para. 30.
[67] Para. 39.
[68] *Supra*. n.43.

preliminary ruling before an investigation is carried out would possibly jeopardise the outcome of any resulting investigation.[69] Here, ironically, in a paragraph beginning "In the context of the allocation of competences in terms of Article 234 EC ...", the ECJ is very close to exceeding the boundaries of the questions posed by the Cour de Cassation, which focused on possibilities of refusal of a Commission request on human rights grounds. Indeed, two-thirds of the way through the decision, the ECJ still has not directly addressed the fundamental rights dimension. Furthermore, the Court strays widely from its 234 jurisdiction in declaring that "it is clear ... that the Commission gave a sufficient account of the features of the suspected cartel" when that is the fundamental factual basis of the Roquette appeal; that is, that an order was granted for entry and seizure without sufficient information being provided by the Commission. But, though the ECJ sees fit to make its observations on the latter, it effectively totally avoids providing a coherent statement on the current state of the law on the relationship between Article 8 ECHR and the Commissions' investigatory powers. In its final "answer", the Court does not even mention fundamental rights as such, and the whole focus of its response is on "instructing" national courts about what they may and may not do when faced with a Commission request for coercive measures. There is no enlightenment whatsoever as to how such a national court may balance fundamental rights concerns with the granting of an entry order. Although, as stated above, recent case law from the ECtHR is mentioned, its significance is left unanalysed. In other words, a national court faced with a Commission request is directed to look to this ECJ judgement as if at a code of conduct and is offered no guidance as to how fundamental rights on inviolability of the "home" might assist a party affected by its order. The Cour de Cassation referred to Article 6 (2) TEU in its referral, presumably in an attempt to focus the issue precisely on how to interpret ECHR developments since *Hoechst*. But it is Article 5 EC which trumps that reference in the ECJ response, as it loftily states that a national court cannot, without violating that provision, simply dismiss Commission applications that are brought before it. This was a fundamental rights case when it began its journey in Paris, but by the time it returned there, it was transformed into a competence case. It is a serious failing by the ECJ, whatever its concerns on the role of national courts, to have failed to address the state of the law on the right to the protection of a business premises within the field of EC law.[70]

There were interventions in the case by five Member States[71] and Norway. There is no reference in the judgement to the submissions, of these intervenors, nor, indeed, to the Opinion of the Advocate General. That was delivered on 20 September 2001 by Advocate General Mischo. He was more open about the Cour de Cassation's objective in sending a question to the ECJ: "... the Cour de Cassation is asking, essentially,

[69] Para. 67 of the Judgment.

[70] It should also be noted that the case took from 1998 to 2002 for this "resolution"; the order from the TGI issued on 16 September 1998 and the investigation took place over the following two days. The appeal process within France resulted in the Cour de Cassation's referral being sent to the ECJ on 7 March 2000 and, eventually, the case concluded on 22 October 2002. Not exactly a helpful situation for the litigants and an instructive comment for those entering into disputes within the Community legal order.

[71] France, Italy, Germany, UK, Greece.

whether the decision in *Hoechst v Commission* ought not to be reconsidered".[72] He then engages in an extensive analysis of Article 8 ECHR and the recent, relevant case law. He does conclude, however, that the ruling in *Hoechst* remains unchanged by the recent developments. He then considers the issue of the extent of the review function to be performed by the national court, which he states to be "what is really at issue in the questions referred by the Cour de Cassation".[73] Arguably, the question of the effect of fundamental rights on the review process was equally of concern to the French Court, but the Opinion, like the ECJ, focuses primarily on review powers. In proposing his assessment of the role of the national court, the Advocate General appears to have been influenced by the submissions of the intervening Member States, all of which supported a limited review function. All in all, this case is far from being a triumph for fundamental rights.

A shot rang out …

A few words are called for about the overall context in which we might want to view future developments by the Court in the human rights field. Given that the vast majority of cases emanate from 234 preliminary ruling proceedings,[74] no doubt the case of *Arsenal FC v Reed* may have been the subject of a few comments in the corridors of Luxembourg. On 12 December 2002, Laddie J. in the High Court in London, in a direct hit on his "colleagues" in Luxembourg, refused to follow the answers given by the ECJ to his questions raised in a 234 referral. This was a trademark infringement and "passing off" case, and the facts were widely reported in the media at the time; in a David v Goliath scenario, Matthew Reed had been selling, for 20 years or more, football souvenirs and memorabilia outside the gates of Arsenal's grounds. The ECJ, on 12 November 2002, had answered the High Court's questions by stating that trademark rights had been in infringed, "in circumstances such as those in the present case".[75] When the case came to be heard after the 234 ruling, counsel for Reed argued that the ECJ had exceeded its jurisdiction, had made findings of fact and that its direction therefore should not be followed. It has to be said that the ruling of the ECJ appeared relatively innocuous when read before Laddie J.'s decision. In other words, a fairly typical 234 ruling where we have come to accept as standard that the ECJ will "intervene" in the main proceedings and refer to the circumstances of the case, demonstrating less of a horizontal relationship than the theory might support.[76] Laddie J. conducts a thorough examination of the ruling and finds that the ECJ disagreed with findings of fact at the trial and, this being so, "the ECJ exceeded its jurisdiction and [he was] not bound by its final conclusion".[77] He is aware that this "is a most unattractive judgement" and that there is no advantage to be

[72] Para. 26 of the Opinion.
[73] Para. 49.
[74] For example, all of the cases under review here are 234 rulings.
[75] Case C-206/01 *Arsenal Football Club plc v Matthew Reed*, 12 November 2002.
[76] See generally Craig and de Búrca, *EU Law* (Oxford: Oxford University Press,2002) at ch. 11.
[77] Para. 27 of the High Court judgement.

gained by challenging the ECJ but, ultimately, "the High Court has no power to cede to the ECJ a jurisdiction that the Court of Justice does not have".[78] Innocuous though the case may have seemed, certainly to the reader accustomed to the ECJ's broad view of its role in the preliminary ruling mechanism, this little outburst from the High Court is significant indeed. Going to the root of competence questions, it starkly restates the basic premise of ECJ preliminary ruling competence. It is almost certain that the case will be appealed and this may well necessitate another referral to the ECJ or a reappraisal of its original ruling. But, for now, the warning shot has been fired, and in the current climate of a collective reflection on competence generally within the EU polity, Mr Justice Laddie's words may possibly have wide repercussions. How can the ECJ legitimately decide on Member State v institutional competence disputes[79] if it allegedly does not respect the boundaries of its own jurisdiction?

And, finally, how is the Charter faring?[80]

The Charter has been mentioned, as opposed to actually being referred to, by the Court of Justice in one case in recent months,[81] but it is effectively being ignored by the Court of Justice since its proclamation at Nice in 2000. It is worth recalling that the Court was quite reticent as regards judicial pronouncements on Union Citizenship; in the early cases it was ignored by the Court entirely despite being strongly pleaded by the Advocates General. Union Citizenship, of course, has a Treaty basis (Articles 17-22 EC) - in other words a clearly defined, legally binding source - and still the Luxembourg judges were wary of using it. But this has altered significantly in a relatively short space of time and perhaps this may well be the case with the Charter too. In this matter, we are, of course, hugely hampered by the closeted nature of EU judicial thinking; we can only rely on extra-judicial statements or observations, but as for an indication of individual positions (or even collective, if there is one), all we can rely on is pure guesswork. Undoubtedly, though, the judges will be circumspect, especially so in the context of the constitutional moment through which the EU is passing. Perhaps it is less the Court's reluctance than the CFI (and, even more so, Advocate General) endorsement of this non-binding proclamation of rights that is remarkable.

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[78] Laddie J.'s judgment, para. 28.

[79] As in, for example, Case C-491/01 *BAT*, 10 December 2002, where indeed a very wide view of Article 234 competence was proclaimed by the ECJ in admitting the referral in the first place.

[80] See Morijn, *supra*, n.14 for details on Advocate General and CFI references to the Charter. One might wonder, to paraphrase Vlad Constantinesco, who's afraid of the Charter? Constantinesco, "Who's Afraid of Subsidiarity?" (1992) 12 *YEL* 33, at 38.

[81] Case C-491/01 *BAT* of 10 December 2002, where the ECJ simply referred to the fact that one of the parties to the original case had used the Charter to substantiate an argument about infringement of property rights by the Directive. In other words, the Court was willing to only acknowledge the Charter's existence by means of reported speech.

As to the Advocate General, in Case C-63/01 Evans,[82] in the Opinion of Advocate General Alber, who was the first Advocate General to refer to the Charter in his Opinion in *TNT Traco* in February 2001[83] and who was one of the Court's two observers at the Convention process for drafting the Charter, refers to the Charter in the body of the Opinion. In discussing the principle of effective legal protection, he refers to Article 47 of the Charter "which admittedly does not yet have any binding legal effect".[84] But that does not stop it being used as "a standard of comparison, at least in so far as it addresses generally recognised principles of law". This is one of the most forthcoming utterances on the Charter to date by an Advocate General. Of course, it is hardly either extensive or lengthy, but demonstrates a willingness to actually use the Charter rather than simply refer to its existence.[85]

Meanwhile, in the "other place", the CFI, the Charter continues to be more generously received than by the ECJ bench, in that it is cited in decisions as a document having some weight and authority. In the period under review, none of the references were quite as remarkable as that in the *Jego Quere* case,[86] but the embracing of the Charter was still evident. In case T-211/02 *Tideland Signal*,[87] a public procurement case involving the rejection of a tender by the Commission, a three-judge court refers to the Community principle of good administration, citing relevant case law and Article 41 of the Charter. The CFI makes no reference to its non-binding status and the mention might suggest to a non-expert reader that this Charter was an enforceable document. This is an interesting mention nonetheless in that there was no reference to the ECHR (nor could there have been), but a Community source is cited (albeit without effect) in a way that gently hints at the shape of things to come. This may take the form of a more obvious and clearly delineated sphere of EU-specific fundamental rights and principles, which is based on the ECHR but which begins gradually to develop its very own, local culture of fundamental rights use and protection. This possible scenario is not, of course, without a downside. A brief "parable" by way of illustration; it was reported recently that, on a particular section of the Dutch motorway network that was very prone to serious accidents, the authorities decided, by way of experiment, rather than add to the already existing warning signage, to remove it completely, leaving that section of road without any signs. It was immediately observed that, without warning signs, without "rules" (for example, about slowing down) the behaviour of motorists became much more cautious and careful, and the rate of accidents dropped dramatically. We are, metaphorically, in a similar situation in the field of EU fundamental rights at the moment; we do not have any obvious written rules or signs as such, effectively leaving it up to a more organic, implicitly and tacitly

[82] 24 October 2002.
[83] See Morijn *supra* n.14 for details of references by the Advocate Generals up until May 2002. There have been quite a few since then; see *supra* n.13 for example.
[84] Para. 80 of the Opinion.
[85] Note to Morijn *supra* n.14 for more information on types of reference.
[86] See Peers 2 IHRR 331 (2002).
[87] Case T-211/02, *Tideland Signal v Commission*, 27 September 2002.

agreed collective obedience of fundamental rights in the EU, by both EU and Member State courts. The Member States appoint the judges and they can (hypothetically) be removed, the Treaties can be changed, media and academic writing can comment on and clearly affect the behaviour of the Court. But with rules, with the Charter incorporated or given legal, enforceable status in some way, then perhaps the human rights arena in the EU will become much more "dangerous". But this is a dilemma indeed for the Court. It has a choice of two courses of action, neither of which is satisfactory, and it has chosen to be silent for now - unless if you see in cases such as *Carpenter*, *Baumbast* and *d'Hoop* something more like a little whisper that cannot quite yet be heard.

The context

During the period under review, fundamental rights in the EU have undergone a crucial transformation as the work of the Convention on the Future of Europe evolved from the reporting stage to the production of a Draft Constitution for Europe/EU.[88] As one of the Working Groups of the Convention was dedicated to the question of the status of the Charter and the related issue of incorporation of the ECHR, one could expect fundamental rights in the EU to emerge from the Convention process in a very different shape. The Court can clearly not have been unaware of the likely outcomes from the Convention and the work of that body must have affected its reasoning to some extent. This, of course, is impossible to prove, but the direct appeal to political action in the *UPA* case and the cautious wording of cases like *MRAX* suggest a judiciary operating in limbo to some extent, all too aware that some of its functions will alter significantly in the near future. The emergence of a draft Constitutional Treaty foreshadows an entirely different judicial environment for the EU.[89] The interpretation and application of that Constitution will ultimately necessitate an important change in the judicial culture and structure in Luxembourg. The position of fundamental rights within this new structure will be significantly altered; Article 5 of the Draft Constitution is headed Fundamental Rights. They thus occupy a marked elevated position at the start of the document in its Title II, headed Fundamental Rights and Citizenship. Article 5 (1) provides that the Charter "shall be an integral part of the Constitution", with the text of the Charter set out either in a Protocol or another part of the Constitution. This, after the Working Group's Final Report,[90] is not a surprise, but is, nonetheless, a stark indication of how fundamental rights, for so long effectively the preserve of judicial discretion, will change with a legally binding Charter now providing the main source of fundamental rights. As the Explanatory Note attached to the Draft Constitution states, "the reference to the Charter in the first few articles of the Constitution will underline

[88] See Convention website, http://european-convention.eu.int/bienvenue.asp?lang=EN and the Draft constitution, first 16 Articles, which issued on 6 February and articles 24 - 33 which issued on 26 February, http://european-convention.eu.int/docs/Treaty/cv00571.en03.pdf

[89] Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03 of 6 February 2003.

[90] CONV 354/02.

its constitutional status".[91] Furthermore, Article 5(2) provides that "The Union may accede to the ECHR" without affecting the Union's competences. At last, a response to Opinion 2/94![92] Not many surprises here either given that this was the second central recommendation of the Working Group, but still a startlingly clear indication of new directions in EU fundamental rights. Of course, the significant word is "may"; the competence to accede does not mean that the Member States will automatically proceed to do so. Finally, Article 5(3) states that fundamental rights shall constitute general principles of Union law. This seems to be, at first glance, rather otiose and likely to lead to confusion. If the sources of EU fundamental rights are to be placed on a clearly defined footing with a combination of the Charter and accession to ECHR, why would it be deemed necessary to draw upon them as general principles? This provision suggests that we cannot regard the Charter and the ECHR as finite statements on/of Union human rights, but rather that their definition and potential sources remain open and can be derived further from either the ECHR system or the constitutional traditions of the Member States. The Explanatory Note confirms this, and that there are or can be rights additional to those in the Charter. It was stressed in the Working Group Report that incorporation of the Charter was not to be seen as preventing the Court from drawing on additional sources to permit the development of new rights as the Union evolves. However, this is likely to lead to uncertainty in terms of status; which shall have priority, rights found in the (constitutionalised) Charter or rights that might in the future be derived from additional sources?

There have already been many suggested amendments to Article 5.[93] One of these, from three Dutch members of the Convention, objects to Article 5(1) because it "could result in direct claims by citizens against their government". This is ironic given the current state of EU fundamental rights case law, especially that discussed in this review; as we have observed, the ECJ is quite significantly more willing to uphold human rights based arguments against a Member State as opposed to the EC institutions.

Another amendment suggests that Article 5(2) is unnecessary as legal personality for the Union (Article 4 of the Draft) would deal with the problems raised in Opinion 2/94. Peter Hain's suggestion for a different version of Article 5 is based on the UK not accepting the Charter as an integral part of the Constitution. It is clear that there shall be no automatic acceptance of Article 5 and many words and emotions are likely to be expressed before agreement is reached.

[91] CONV 528/03, Annex II p. 13.
[92] Opinion 2/94 on *Accession by the Community to the ECHR* [1996] ECR I-1759, the well-known Opinion of the ECJ on the issue of EC competence to accede to the ECHR.
[93] These are posted on the Convention's website, *supra* n.88.

Conclusion

Given the extent of political, constitutional momentum in the EU in the latter half of 2002, the relative lack of activity in the human rights area before the Courts seems marked. But, of course, the judges are entirely dependant upon cases being brought before them. That said, it is not entirely the case that no human rights cases were presented before the ECJ and CFI, but that the Court was able to be thrifty in its use of general principles of fundamental rights to reach their decisions. There have been significant cases in this period, not directly dealing with human rights but rather with allied constitutional principles and provisions. As usual, it is a case of a certain lack of clarity concerning the role of rights within the EU judicial space; we rely on the Courts for the continued support and reassertion of their importance given that they are entirely dependant on judicial discretion. At times, like a quirky old Uncle, known for his generosity to children in the past, this spirit can waver and alter without warning, and no handout or little gift will be forthcoming. And it is precisely this lack of predictability which lies at the root of a call for change in the human rights system of the EU; it is not that we decry altogether the authority of the EU judge to amplify, and deal with the conflicts inherent in human rights jurisdiction. But the "moodiness" of the tribunals in Luxembourg is marked in the area of human rights, from early refusnik, reactive days in the 1970's, to the guardedness of *Grogan*, the heights of *P*, the depths of *D v Council* and *Grant*, and the disappointments of *UPA*; the EU citizen cannot ever be certain what might even qualify as a fundamental right within the EU system, let alone what degree of support s/he is likely to receive from the judges.[94] The recent emphasis on the likely position of the judges on the Charter is less significant in itself, but as an indication of the Court's human rights pathology and personality. It is indicative of where we stand, as citizens; on improperly-mapped territory. Or, to put it another way: "Curious, that in Hungarian our words for killing and embracing echo and heighten each other".[95] So, too, there is something of this precarious unpredictability in the position of human rights before the EU courts, in that the citizen litigant can never be entirely sure as to whether fundamental rights will be embraced or "killed" in her or his particular case.

[94] See Craig and de Búrca, *EU Law* (Oxford: Oxford University Press, 2002), at ch. 8 for a good discussion of the development of fundamental rights in the EC/EU.

[95] Ölés and Ölelés, *Embers*, Sándor Márai (1940) (trans. C. Brown Janeway) (London: Viking, 2002), p 126.