REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 10, NR. 1, 1-3, PARIS LEGAL PUBLISHERS © 2017

The Art of Dialogue

This volume of *REALaw* contains an interesting case law analysis from Tony Marguery on the *Avotins v. Latvia* judgment of the European Court of Human Rights (ECrtHR). Within, the ECrtHR reacts to the negative opinion of the Court of Justice on the draft agreement on the accession of the EU to the ECHR (Opinion 2/13, ECLI:EU:C:2014:2454). The judgment and the opinion can be considered as mutual steps in the continuing dialogue between both European Courts about who in the end determines fundamental rights protection in Europe. As is clear from the case law, this dialogue revolves around the area of mutual recognition and trust. The dialogue started in 2011, when the ECtHR, in the case of *M.S.S.* (no. 30696/09), ruled that the EU Member States cannot apply the Dublin Regulation presumption that all Member States respect the fundamental rights of asylum seekers, if they know or ought to have known that other Member States violate Article 3 of the ECHR systematically. A few months later, the CJEU adhered to this line in the case of *N.S.* (no. C-411/10, ECLI:EU:C:2011:865).

The next step in the 'dialogue' was the CJEU's *negative opinion* on the draft agreement on the EU's accession to the ECHR. Here the Court stated – almost provocatively – that the Member States, on the grounds of the EU principle of mutual trust, may be required to presume that fundamental rights have been observed by the other EU Member States, and, therefore may, save in exceptional cases, not even check whether a Member State has actually, in a specific case, observed fundamental rights. From the *Aranyosi & Caldararu* case (no. C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198) it appears that such an exceptional situation might exist when a Member State's judicial authority must decide on a request for surrender of an individual on the basis of a European Arrest Warrant. Such a surrender must be refused when the individual is exposed to a real risk of inhuman or degrading treatment in the meaning of Article 4 Charter (or Article 3 ECHR), by virtue of general conditions of detention in the issuing state. This judgment undoubtedly reflects the concerns of the CJEU in respect to violations of the fundamental right in question. At the same time, it prevents a possible correction by the ECtHR.

The final step is taken by the ECrtHR in the *Avotins* case. The ECrtHR clearly states that it could run counter the ECHR if the Member State's power to review whether the issuing Member State observed fundamental rights was, on the basis of the principle of mutual trust, limited to 'exceptional cases' as proclaimed by the CJEU in its opinion. For the EU protection of fundamental rights to ensure the *Bosphorus* threshold of equivalent protection to the ECHR system, Member State's courts must at least be empowered to assess whether the fundamental rights protection in the issuing Member State was not 'manifestly deficient'. Furthermore it appears from *Avotins* that the principle of mutual trust may not only be set aside in case of violations of Article 4 Charter (or Article 3 ECHR), but also when Article 6 ECHR is at stake. Most probably, the same will apply to other Convention rights, such as Article 8 ECHR.

Undoubtedly, the dialogue between both courts will continue. The score so far seems to be that the ECrtHR is at the end in control of, and may if necessary, determine the level of fundamental rights protection in Europe, at the same time leaving ample room for the CJEU to ensure equivalent fundamental rights protection within the EU itself. As long as the CJEU ensures this threshold, the ECrtHR will not interfere. Although the ECrtHR approach arguably is – in the wording of Marguery – 'regrettable' from the viewpoint of a high level of fundamental rights protection, it can be applauded from the viewpoint of dialogue. It prevents escalation and conflict between both European courts, which would be detrimental to legal certainty. Both courts still seem to be professional 'friends'. It would be interesting to have more insight into the process of dialogue between the courts. Is the dialogue pursued through formal means of communication (judgments, opinions) only or through informal means (meetings, e-mails, telephone) as well? Do both courts employ a kind of early warning system when they consider a next step in the dialogue, or do they surprise each other with every new step? Do they feel frustration at one another or do such emotions not fit well with the professional attitude of the courts? We just don't know and it seems improbable that such insights will be made public at short notice. Nevertheless, it would be interesting if at some moment in future the process of dialogue in practice would be examined in more depth. Such research would lead to valuable inside in the art of dialogue, that may be used in future similar judicial dialogue processes. Moreover, it would enhance the transparency of the process.

In addition to the case note of Marguery, this volume contains two articles, one other case note and two book reviews. In 'Constitutionalisation and deconstitutionalisation of administrative law in view of Europeanisation and emancipation', Ferdinand Wollenschläger concludes that the latter developments have as such relativised the significance of the German Basic Law, but at the same time that this relativisation is 'not a finding of constitutional decline'. In her article 'Equal distribution of burdens in flood risk management', Willemijn van Doorn-Hoekveld examines the domestic compensation regimes of the Netherlands, Flanders and France for loss caused by flood prevention, flood protection measures and flood recovery, in light of Article 1 First Protocol ECHR (and the corresponding Article 17 Charter), and of the underlying French principle of *égalité devant les charges public*. She concludes that, although the three Member States/regions do not seem to infringe Article 1 First Protocol, the application of the *égalité* principle leads to completely different outcomes in the prevention strategy. In the other case note Sim Haket discusses the Danish Supreme Court's *Ajos* judgment (*Dansk Industri*). In the judgment the Supreme Court does not only reject consistent interpretation of the national law, although this was more or less prescribed by the CJEU in Dansk Industri (Case C-441/14), but also challenges the effects of general principles of EU law in the Danish legal order. Finally, this volume contains a review by Jacobine van den Brink of Matthias Ruffert (ed.), *The Model Rules on EU Administrative Procedures: Ad-*

juciation, and by Laura Parret of A.J. Metselaar, *Drie rechters en één norm, Handhaving van Europese staatssteunregels voor de Nederlandse rechter en de grenzen van procedurele autonomie* (Three judges and one standard. Enforcement of European state aid rules before the Dutch courts and the limits of national procedural autonomy).

Rob J.G.M. Widdershoven