

STRATEGIC LITIGATION IN THE AREA OF HUMAN RIGHTS

PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

A guidebook for non-governmental organizations
and human rights defenders



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Goals of strategic litigation

Strategic litigation involves conducting court cases of public interest with the purpose of:

- changing a practice or law that violate a right or freedom of an individual;
- implementing a specific international or constitutional standard;
- engaging in advocacy of specific and serious problems to the general public and authorities;
- raising public awareness.

Non-governmental organisations can carry out strategic litigation in a number of different ways:

- by providing pro bono counsel to persons involved in matters of considerable social importance;
- by joining litigation as an intervening party exercising the rights of a participant in the proceedings;
- by initiating litigation on their own;
- by submitting amicus curiae briefs, in which organisations present human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- by conducting cases before international bodies.

To Luxembourg or to Strasbourg? Proceedings before European courts as human rights protection mechanisms

The Court of Justice of the European Union (hereinafter: the CJEU) and the European Court of Human Rights (hereinafter: the ECtHR) play a special role as venues of strategic litigation brought by non-governmental organisations and human rights defenders.

We can distinguish five types of proceedings that can be used as a means of protecting rights and freedoms before European courts:

- if only ECtHR offers an avenue for protecting the rights of individuals because of:
- if only CJEU offers a avenue for protecting the rights of individuals because of:
- if either ECtHR or CJEU can be chosen
- if ECtHR and CJEU offer a combined avenue for protecting the rights of individuals
- if neither ECtHR nor CJEU offers a remedy



Only ECtHR offers an avenue for protecting the rights of individuals because of:



Only CJEU offers a avenue for protecting the rights of individuals because of:



Either ECtHR or CJEU can be chosen



ECtHR and CJEU offer a combined avenue for protecting the rights of individuals



Neither ECtHR nor CJEU offers a remedy

A substantive law argument

the legal problem falls outside the scope of application of EU law

A procedural argument

- ✗ the national proceedings are already concluded
- ✗ the court decided against making a reference to CJEU despite having been petitioned to do so

A substantive law argument

the case concerns a right that is not protected under ECHR but is protected by the EU

A procedural argument

the matter is currently being considered in national proceedings, but the client's case will be negatively impacted if nothing is done until the conclusion of national proceedings, which is when an application to ECtHR may be lodged (cases pending in countries that signed Protocol No. 16 to ECHR are an exception to this rule)

A substantive law argument

the legal problem is linked to rights governed and protected by both ECHR and EU law (if this is the case, it is advisable to take note of the existing case law of both Courts on similar issues)

A procedural argument

- ✗ the matter is currently being considered in national proceedings and it is still possible to petition the court for making a preliminary reference
- ✗ upon the conclusion of national proceedings and exhaustion of domestic remedies, the applicant will have an opportunity to lodge an application before ECtHR

A substantive law argument

the legal problem is linked to rights governed and protected by both ECHR and EU law

A procedural argument

the national court decided to refer a question for a preliminary ruling in the course of pending proceedings, but certain issues must be resolved by ECtHR

A substantive law argument

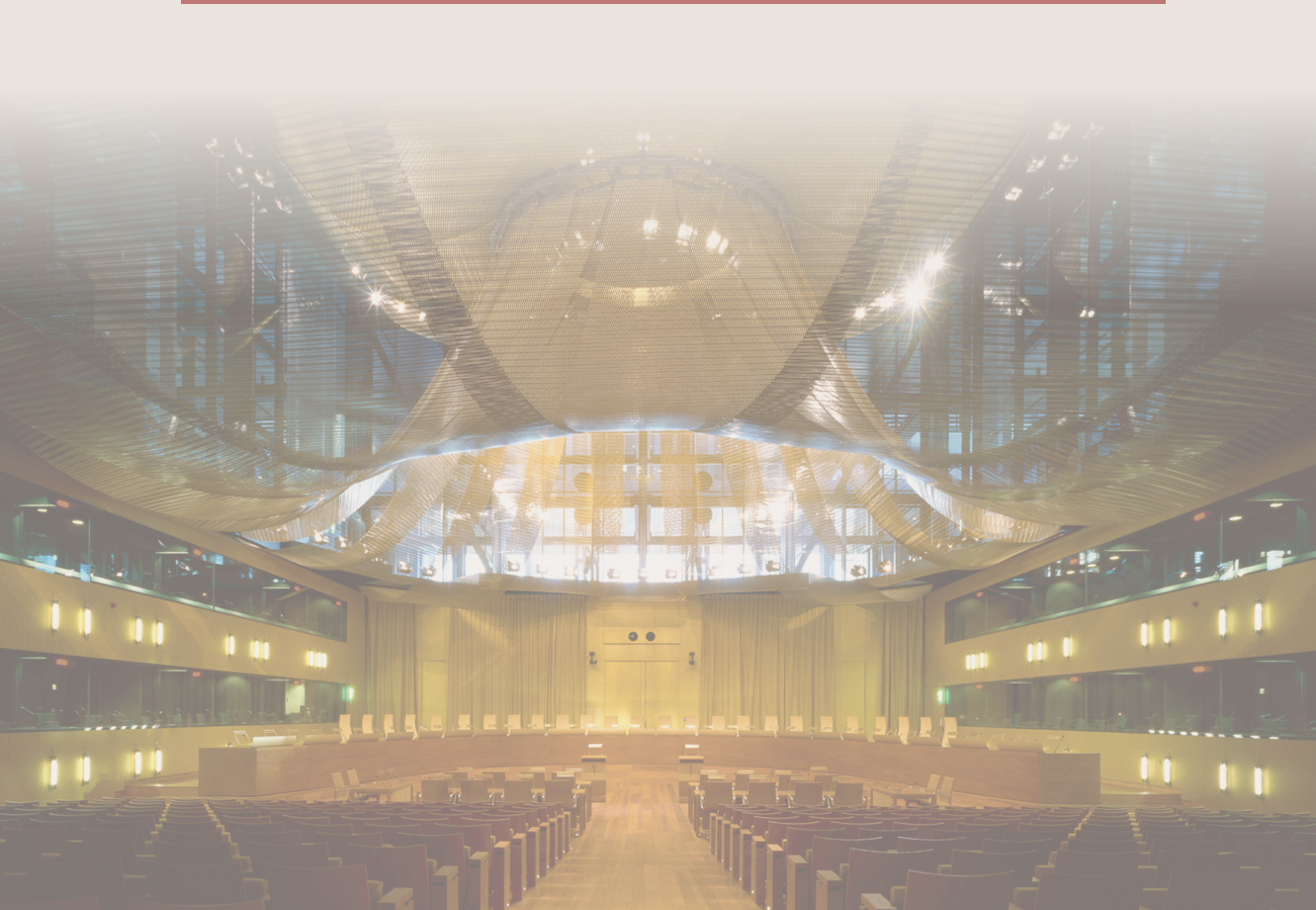
the legal problem is not governed by ECHR or EU law

A procedural argument

- ✗ the case is concluded at the national level and there are no proceedings in which a preliminary reference to CJEU can be made
- ✗ the time limit for lodging an application to ECtHR (6 months after the final conclusion of the case) has expired

REMEMBER!

- It is not possible for an individual to initiate, on their own, preliminary ruling proceedings before the Court of Justice of the European Union. Only a court has the right to refer a question for a preliminary ruling! However, parties and their counsel can make submissions to persuade the court that there is a reasonable cause for asking a preliminary question.
- Proceedings before the European Court of Human Rights are initiated by an application, which may be lodged with the Court by any person on their own (at this initial stage, there is no requirement to use the assistance of professional counsel).
- On 1 August 2018, following ratification by 10 State Parties, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms came into force. This instrument is designed to improve collaboration between the ECtHR and national authorities by introducing the possibility for the highest national judicial authorities to ask the Strasbourg Court for an advisory opinion on questions relating to the interpretation or practical application of the rights and freedoms set out in the Convention and its Additional Protocols in cases pending before those courts.



A step-by-step guide to strategic litigation before the CJEU

The map of strategic litigation



A. Identifying a legal problem that is controversial from the human rights perspective

B. Determining that the problem is connected with EU law

Preliminary questions on purely national matters, which have no link to EU law, are inadmissible. It should also be noted that the EU Charter of Fundamental Rights is not as broad in scope as, for example, the European Convention on Human Rights, and can only be applied in cases where a Member State applies EU law.

C. Selecting a case that presents the legal problem

The case should be appropriate, which means that it should not involve any additional circumstances that are non-specific for its core characteristics or disrupt its link with the legal problem sought to be resolved by means of strategic litigation. For example, cases involving time-barred claims or those that can be discontinued on procedural grounds are unsuitable for the purposes of strategic litigation.

It is also advisable to engage in cases at the very outset of proceedings, rather than at a later stage.

It should also be remembered that the admissibility of a question for a preliminary ruling depends on whether an answer from the CJEU is necessary for the adjudication of the national proceedings. A preliminary question should not, therefore, concern only issues which have a purely hypothetical link to the case at hand.

D. Developing a detailed litigation strategy

E. Making a submission to the national court

- The admissibility of a preliminary reference made to the CJEU does not depend on whether or not a party to the national proceedings made a relevant request to the national court;
- However, the parties may petition the court to make a preliminary reference;
- Before making such a submission to the national court, counsel should consider if a preliminary reference would have a positive impact on their client's case:
 - notably, the submission of a preliminary reference to the CJEU results in a longer duration of the national proceedings;
 - it is also necessary to consider, based on the existing case law of the CJEU, how likely is that the preliminary ruling sought will advance the client's case;
- The submission made to the national court should include the proposed wording of the preliminary question.

F. Drafting the proposal of a preliminary question

- The question must concern the interpretation of EU law or the validity of EU secondary legislation;
- The question may also concern the interpretation of provisions of the Charter of Fundamental Rights; the Charter is a binding act and has the same status as the Treaties;
- A preliminary question about the Charter may be phrased e.g. as follows: "Must Article X of the Charter of Fundamental Rights be interpreted as...";
- As a rule, the question should not concern the assessment of the compatibility of national law with EU law. However, the court may inquire about the compatibility in an indirect manner by asking whether a provision of EU law must be interpreted as precluding the application of a measure such as that provided for in a particular national provision;
- The question should be phrased in a clear and precise manner;
- A single reference for a preliminary ruling can include several questions; questions may be conditional;
- Apart from the question itself, a request for a preliminary ruling must specify the referring court and the parties to the proceedings and a statement of grounds that should include the following: :
 - a description of the subject matter of the dispute and the relevant findings of fact;
 - the wording of the applicable national provisions and a summary of any relevant case law of national courts;
 - the reasons which prompted the referring court to inquire about the interpretation or validity of provisions of EU law;
 - the description of the link between the provisions of EU law sought to be interpreted in the preliminary reference and the applicable national law.
- In its request for a preliminary ruling, the referring court may also include additional elements such as a motion for determining the request pursuant to an expedited procedure or an urgent procedure:
 - The **urgent procedure** may only be used in cases relating to the area of freedom, security and justice. The motion for the urgent procedure must describe the matters of fact and law which show the urgency and justify the application of that procedure; in so far as possible, the motion should indicate the proposed answer to the question referred for a preliminary ruling. A decision on whether or not to consider a reference for a preliminary ruling under the urgent procedure is taken by a designated Chamber of the CJEU;
 - The **expedited procedure** may be used if a preliminary ruling must be issued in an especially urgent matter. The referring court should present appropriate arguments showing that due to its special nature, the case should be dealt with in that procedure. A decision on whether or not to consider a reference for a preliminary ruling under the expedited procedure is taken by the President of the Court;

- Proceedings considered by the CJEU pursuant to the urgent or expedited procedure are dealt with more quickly. However, motions for applying such procedures are relatively rarely granted.

G. Persuading the court to ask the preliminary question

- A counsel who seeks to persuade the court to make a request for a preliminary ruling should present appropriate arguments;
- It must be shown that the preliminary question would be admissible or even, in the case of courts of the last instance, mandatory;
- A link between the case at hand and EU law must be shown;
- It is advisable to describe the uncertainty concerning the interpretation of EU law, by referring, for example, to the earlier case law of the CJEU and views of the scholarship;
- If there are grounds for the CJEU to consider the case under the urgent or expedited procedure, it is advisable to make this known to the national court in the submission for referring a question for a preliminary ruling and to present arguments that might convince the CJEU to make a decision in this respect.

H. Implementation of the standard set out in the preliminary ruling

- A preliminary ruling of the CJEU merely interprets EU law and does not in any way resolve the case pending before the national court;
- The CJEU ruling is therefore primarily intended to assist the national court to correctly apply EU law while adjudicating on the pending national matter;
- Therefore, strategic litigation does not end with the entry of the CJEU ruling: it is crucial to complete the national proceedings in order to obtain a final resolution that complies with the standard set by the CJEU.

Decision to make a preliminary reference¹

- A detailed designation of the referring court and, where appropriate, the chamber or formation of the court making the reference, with full contact details for that court
- Designation of the parties to the main proceedings and anyone representing them before that court: the exact postal address of the persons concerned, their telephone or fax number and, in so far as they have one, their email address.

¹ The template was prepared by Agnieszka Frąckowiak-Adamska PhD.

The question referred for a preliminary ruling

"Should provision X of EU law be interpreted in a way that enables (or prohibits) Y (a situation defined in the national provision)?"

- The question should be understandable on its own terms, without it being necessary to refer to the statement of grounds included in the request;
- Questions can be conditional ("if the answer to question 1 is negative/positive, then...")

Statement of grounds

I. The subject matter of the dispute and the relevant facts

- A summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court, or, at the very least, an account of the facts on which the questions are based,

- 1.
- 2.
- 3.

II. National legislation (and case law, if any) and EU legislation

- Include the exact tenor of any national provisions applicable in the case and, where appropriate, designate the relevant national case law; the court also should accurately identify the provisions of EU law whose interpretation is sought or whose validity is challenged.

- 4.
- 5.
- 6.

III. The reasons which prompted the referring court to inquire about the interpretation or validity of provisions of EU law, and the relationship between those provisions and the national legislation applicable in the case

- 7.
- 8.
- 9.

Signature and date

Optional elements of the request:

- A brief summary of the relevant arguments of the parties to the main proceedings (if necessary).
- The view of the national court (this is particularly important in the expedited or urgent procedure)
- A request for an expedited or urgent preliminary ruling procedure
- Anonymisation of the parties
- A request for limitation of the temporal effects of the judgment

The request, **accompanied by originals or copies of the case files**, sent, by registered post, to the following address:

rue du Fort Niedergrünewald,
2925 Luxembourg,
LUKSEMBURG

General formal requirements:

- The request should be drafted simply, clearly and precisely, without superfluous detail and **have a maximum of 10 pages**,
- the requests should be typed on white, unlined, A4-size paper,
- the text should be typed in a commonly used font (such as Times New Roman, Courier or Arial), in at least 12 point in the body of the text and at least 10 point in any footnotes, with 1,5 line spacing and horizontal and vertical margins of at least 2,5cm (above, below, at the left and at the right of the page), and
- all the pages of the request, and **the paragraphs they contain, should be numbered consecutively**.



example

Strategic litigation before the CJEU – The case of the HFHR's client (Case C-403/16)

The procedural history of a case of the HFHR's client shows an illustrative picture of the proceedings pending before national courts and the CJEU in connection with a national court's preliminary reference:

- A Moroccan national applied to the Consul of the Republic of Poland in Rabat for a Schengen visa to visit his wife and child who are Polish nationals.
- On **5 January 2015**, the consul refused to issue a visa so the Moroccan national sought the re-examination of the case by the consul. In accordance with the Visa Code, the refusal decision was issued on a form, without a statement of reasons.
- On **27 January 2015**, the consul again refused to issue a visa on the grounds of no certainty as to the applicant's intention to leave the territory of Poland before the visa's expiration date.

- On **30 March 2015**, the Moroccan national filed a complaint against the refusal with the Provincial Administrative Court (PAC) in Warsaw.
- The Minister of Foreign Affairs, acting as an administrative body in the case, moved for the rejection of the complaint on the grounds that Polish law (Article 5(4) of the Procedure before Administrative Courts Act, PACA) precludes the possibility of filing a complaint in such a case.
- The Moroccan national petitioned PAC to make a reference for a preliminary ruling to the Court of Justice on a question about the interpretation of Article 32(3) of the Community Code on Visas (establishing the right to an appeal against the refusal of a visa), namely whether this provision requires a Member State to guarantee an effective judicial review of a decision refusing the extension of a Schengen visa.
- On **24 November 2015**, the PAC in Warsaw rejected the complaint, invoking the lack of its jurisdiction as an administrative court to hear a complaint against a consul's refusal of a Schengen visa. The Provincial Administrative Court thereby denied the petition for making a preliminary reference to the CJEU.
- On **28 April 2016**, the Moroccan national submitted a complaint in cassation to the Supreme Administrative Court (SAC), alleging, inter alia, a violation of his right to an effective remedy based on Article 32(3) of the Visa Code read in conjunction with Article 47 of the Charter of Fundamental Rights. In the cassation proceedings, the complainant once again submitted for referring the same question referred for a preliminary ruling.
- The Minister of Foreign Affairs moved for the dismissal of the complaint in cassation, relying on the Opinion of the Advocate General delivered on 11 April 2013 in case C-84/12 *Rahmanian Koushkaki*, which stated that the Visa Code could not be a source of a foreign national's subjective right to obtain a Schengen visa.
- On **28 June 2016**, SAC issued a decision suspending the proceedings and asked the CJEU whether Article 32(3) of the Visa Code in view of Recital 29 of the Visa Code and Article 47 of the CFR should be interpreted as requiring the Member States to guarantee an effective remedy (appeal) before a court of law.
- On **13 December 2017**, the CJEU issued a ruling (C-403/16) in which it held that in the light of Article 32(3) of the Visa Code, read in conjunction with Article 47 of the Charter of Fundamental Rights an appeal procedure against decisions refusing visas must, at a certain stage of the proceedings, guarantee a judicial appeal.
- On **19 February 2018**, SAC re-opened the previously suspended proceedings and overturned the contested decision of the PAC in Warsaw, holding that the first instance court had unreasonably rejected the complaint against the refusal of the visa. The Supreme Administrative Court noted that the secondary law of the European Union takes precedence in the event of its conflict with national rules and consequently directly applied EU law.
- On **20 September 2018**, the Provincial Administrative Court made a judgment in which revoked the consul's decision on all counts. PAC ruled that the consul's decision issued following the re-examination of the application should include a statement of reasons, invoking relevant provisions of the EU Charter of Fundamental Rights.

Strategic litigation before national courts: implementation of standards set by the CJEU

The binding force of judgments of the CJEU in cases of questions referred for a preliminary ruling

- Formally speaking, judgments of the CJEU in cases of questions referred for a preliminary ruling are binding only on the referring court and all other courts adjudicating on the matter;
- In practice, however, preliminary rulings have a wider impact, establishing the interpretation of EU law;
- EU law should be applied as interpreted by the CJEU, otherwise, EU law may be violated;
- If a particular problem of interpretation has already been resolved by the CJEU, the courts do not have to repeat questions on the same issue (the *acte éclairé* doctrine);
- In such a situation, the implementation of standards stemming from EU law can already take place at the national level, without the need to ask a preliminary question;
- If the court raises a question that has already been answered by the CJEU, the CJEU will reply with an order that refers to its case law.

The map of strategic litigation before national courts



A. Identification of a standard of human rights protection derived from the case law of the CJEU, which has not been implemented



general
rules

- It is necessary to determine to what extent a given standard can be relevant to, as opposed to the specific legal situation in the State from which a particular question referred for a preliminary ruling originated.

B. Selection of an appropriate case

- It should be carefully analysed whether a specific standard stemming from the case law of the CJEU can be applied in a given case;
- The case should not involve circumstances adversely that would adversely affect the prospects of success of strategic litigation, e.g. procedural obstacles or unclear factual circumstances that may justify the non-application of the EU standard.

C. Developing a detailed litigation strategy

D. Using EU arguments

Counsel and non-governmental organisations acting for the implementation of a standard resulting from EU case law should invoke EU arguments in their pleadings;

- It is advisable to present to the court what the "EU element" is in a given case (its link with EU law) by referring to EU law and case law of the CJEU;
- In the next step, the standard resulting from the case law of the CJEU should be defined;
- If judgments based on questions referred for a preliminary ruling by foreign courts are relied on, one should present arguments in support of the conclusion that the standard derived from such rulings may be applied in a specific case conducted by a national court;
- If there is a conflict between a law and an EU standard, it should be pointed out that under EU law the court has the authority to refuse to apply a law contrary to EU law.





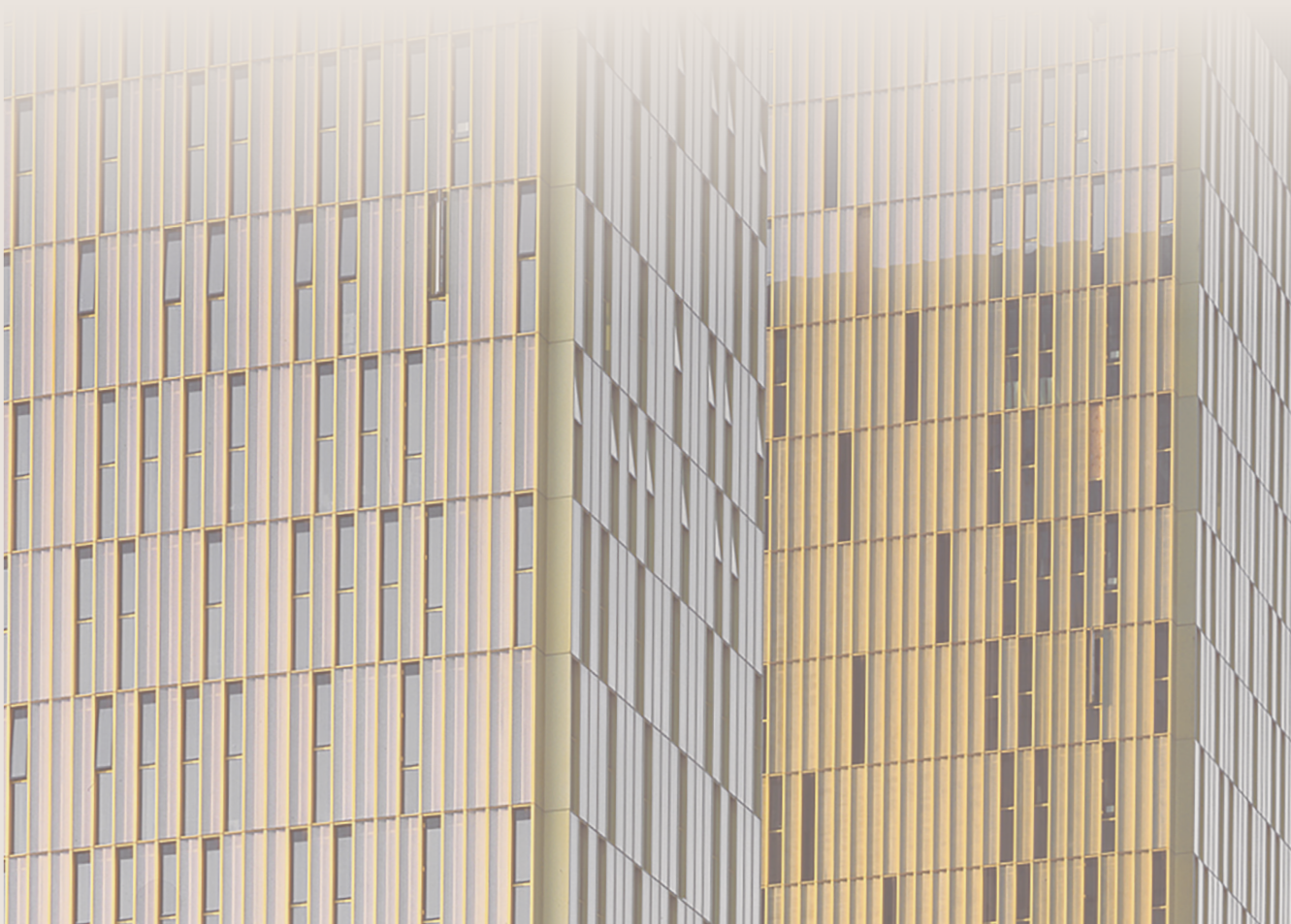
example

Strategic litigation before the national courts – the HFHR's case

The procedural history of a case conducted by the HFHR shows an illustrative picture of the course of national litigation seeking to implement standards of human rights protection stemming from the case law of the CJEU:

- On **3 June 2015**, the Head of the Registry Office in Kraków refused to transcribe a birth certificate drawn up in the United Kingdom. The UK certificate lists two female Polish nationals as parents of the child. According to the head of the Registry Office, in the Polish legal system, the term "parent" means either the mother or the father, while the parents are always the mother and the father, which means that the inclusion of a woman as the father of a child in the birth certificate would violate the national legal order and would also constitute a misrepresentation;
- The child's mother complained against the refusal, seeking the annulment of the first instance authority's decision. In her complaint, she alleged a violation of Article 6 TEU, Article 20(2)(a), Article 21(1) (right of EU citizens to move and reside freely within the territory of a Member State) TFEU and Article 7 (right to respect for private and family life), Article 9 (right to found a family), Article 21 (non-discrimination), Article 24(2) (child's best interests) and Article 24(3) (right to maintain a stable personal relationship and direct contact with both parents) of the EU Charter of Fundamental Rights;
- On **21 August 2015**, the Małopolskie Province Governor upheld the decision of the head of the Registry Office. The Governor argued that the term "the parents" always denotes two persons of different sex. While transcribing the birth certificate, the authority would have to include the particulars of one of the women in the section intended for the father, which would clearly violate the Polish legal order;
- On **11 September 2015**, an interested party filed an appeal with the administrative court against the decision of the authority, arguing that the decision violated, inter alia, EU law, as well as Article 8 ECHR (the right to respect for family life);
- On **22 April 2016**, the Ombudsman notified his intervention in the case and requested the revocation of the contested decision of the Province Governor (and the preceding decision of the Head of the Registry Office). The Ombudsman pointed out that the refusal to transcribe a birth certificate of a person applying for a Polish identity document (and the ensuing unavailability of such a document) may result in the assumption of the status of a de facto stateless person. The Ombudsman further argued that the conduct of the authorities constituted discrimination against the child on the basis of the legal status of the parents;
- On **10 May 2016**, a Provincial Administrative Court dismissed the appeal. The court emphasised that if the content of a foreign birth certificate, which, apart from the mother of the child, lists a woman as the other parent (effectively naming two persons of the same sex as the child's parents) was transcribed to Polish vital statistics records, this would constitute a violation of the basic principles of the Polish legal order. PAC ruled that the refusal to transcribe the birth certificate did not contravene the international law and EU law binding on Poland;
- The appellant filed a complaint in cassation against PAC's judgment, claiming that it violated, among other things, EU law, the ECHR and the Convention on the Rights of the Child;

- On **9 October 2018**, the Helsinki Foundation for Human Rights applied for a leave to intervene in the proceedings and petitioned for the referral of a question to the CJEU for a preliminary ruling, invoking Article 267 TFEU. The question proposed by the Foundation was whether EU law should be interpreted as precluding the refusal to transcribe a foreign birth certificate based on the contention that the certificate in question violates fundamental principles of the legal order in a given country. In this respect, the HFHR relied on the CJEU judgment delivered on 5 June 2018 in *Coman* (case C-673/16).
- The appellant and the Ombudsman made equivalent submissions for a preliminary reference;
- On **10 October 2018**, the Supreme Administrative Court admitted the complaint in cassation in its entirety, overturned PAC judgment and annulled the preceding decisions. SAC emphasised that a refusal to transcribe constituted a violation of children's rights enshrined in such laws as the Constitution of the Republic of Poland, the Convention on the Rights of the Child and the European Convention on Human Rights. Referring to the CJEU judgment in *Coman*, SAC stated that the obligation to transcribe a birth certificate, carried out for the sole purpose of protecting rights of the child and certifying their identity, did not contravene the fundamental principles of the Polish legal system and the principles of public order. In view of the above, the Supreme Administrative Court decided not to refer the question for a preliminary ruling because, taking into account the existing case law of the CJEU, the interpretation of EU law relevant to the case does not raise any doubts.



Human rights organisations and strategic litigation before the CJEU



general
rules

Participation of non-governmental organisations in CJEU proceedings

- The participation of non-governmental organisations in proceedings before the CJEU depends on their participation in the national proceedings in which a question has been referred for a preliminary ruling;
- If a non-governmental organisation has not participated in the national proceedings, it may not join the proceedings pending before the CJEU;
- An organisation that has not participated in the national proceedings cannot submit an amicus curiae brief in the CJEU proceedings;
- However, if an NGO was a party to the national proceedings, it also becomes a party to the proceedings before the CJEU, and as such may lodge statements of case.

How can organisations support strategic litigation before the CJEU?

- If an NGO is not directly involved in the national proceedings, but the party to such proceedings is represented by a lawyer working for or continuously collaborating with the organisation concerned, the lawyer may also represent the party before the CJEU;
- Non-governmental organisations may also take action to implement standards set out in the case law of the CJEU;
- for this purpose, NGOs may initiate strategic litigation, either on their own or in collaboration with pro bono lawyers (see page 3).



Examples of CJEU proceedings in which NGOs were involved:



example

- CJEU judgment of 6 June 2011, *MA, BT, DA (case C-648/11)*: The CJEU answered a question referred for a preliminary ruling by an English court, which concerned jurisdiction to examine an asylum application submitted by an unaccompanied minor whose family member is not legally present in an EU Member State. The AIRE Centre, a non-governmental organisation which has the status of an intervener in the national proceedings in which a question was referred for a preliminary ruling, took part in the proceedings before the CJEU.
- CJEU judgment of 8 April 2014, *Digital Rights Ireland (cases C-293/12 and C-594/12)*: The Court declared the EU Data Retention Directive invalid on the grounds that it was contrary to the Charter of Fundamental Rights. The national proceedings giving rise to the question referred for a preliminary ruling were initiated by the non-governmental organisation Digital Rights Ireland.
- CJEU judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (case C-664/15)*: The CJEU ruled that national organisations working for environmental protection should have the right to contest before a court a decision granting a permit for a project that poses a threat to the status of bodies of water. The national proceedings were initiated by an Austrian environmental organisation.
- CJEU judgment of 5 June 2018, *Coman (case C-673/16)*: The CJEU ruled that Member States might not refuse to grant a right of residence to a husband of a male EU national on the ground that the law of a Member State does not recognise same-sex marriages. The Romanian association Accept participated in the national proceedings, and thus also in the proceedings before the CJEU.



Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

Since 2004 the HFHR has been operating the **Strategic Litigation Programme**, as part of which the Foundation originates or engages in strategically significant court and administrative proceedings. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious concerns related to the protection of rights of individuals.



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C H A N C E**

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