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The principle of effective protection: reaching those parts other [principles] cannot reach?

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Introduction

1. It is trite law that EU principles can only operate within scope of application of EU law.

2. So, whilst Article 6 TEU gives Treaty status to both (i) general principles of law and (ii) the EU Charter - and further provides that the Union shall accede to the ECHR - it nonetheless remains the case that neither the general principles of law nor the Charter[1] can extend in any way the competences of the Union as defined in the Treaties.

3. In relation to Union competences, Article 5 TEU now provides:

> "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only with the limits of the competences conferred upon it by Member States in the Treaties to attain the objectives set out therein."

4. In so far relation to Member State action, the general principles of law, as well as the rights enshrined in the Charter, will apply only when Member

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1 Art. 6(1) TEU; Declaration 1 concerning the Charter of Fundamental Rights of the European Union and Art.51(2) Charter.

States act in the implementation of EU law, or (more generally) within the scope of application of EU law[2].

5. Indeed, in relation to the principle of effective protection (itself recognised as a general principle of law), this might of course be thought self-evident. Its classic role is the protection of a pre-existing and independent EU law right. In particular, the principle of national procedural autonomy and the qualifications to that principle by the twin principles of effectiveness and equivalence has had as its focus the *procedural* protection to be afforded to the relevant *substantive* EU law right. In its original formulation, the aim was to ensure "the protection of rights which citizens derive from the direct effect of Community law"[3].

6. This paper will first sketch out the emergence of the principle of "effective protection" as a dominant organising principle (Part 1). It will then go on to focus on the following three areas so as to consider whether, and if so to what extent the principle of effective protection itself may be influencing the "reach" of EU law:

   a. the changing dynamics between (i) the principles of direct effect and effective protection and (ii) the principles of effectiveness and equivalence *inter se* on the other.

      (Case C-268/06 *Impact*: Judgment of 15 April 2008.)

   b. the principle of effective protection, reverse discrimination and fundamental rights protection.

      (Case C-34/09 *Zambrano*[4]: Opinion of AG Sharpston of 30 September 2010, Judgment of 8 March 2011.)

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2 See, in relation to the Charter, the Explanations Relating to the Charter of Fundamental Rights, OJ 2007, C 303/17, p.32: "it follows unambiguously from the caselaw of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act *in the scope of Union law.*"

3 Case 33/76 *Rewe* [1976] ECR 1989, para 5 (cited below at para 10b).

4 [2008] ECR I-2483.

c. the principle of effective protection in the area of overlapping EU and international law (eg ECHR, Refugee Convention) obligations:

(*Zambrano,* Case C-410/10 *NS v Secretary of State for the Home Department* (pending)[5], and *FA (Iraq) v Secretary of State for the Home Department* [2011] UKSC 22[6].)

7. In light of the above, I will venture to suggest 2 things:

a. that the principle of effective protection is playing (and has the potential to play a further) increasingly active role in shaping and directing the reach of EU law itself;

b. further, that within the principle of effective protection, there are clear signs that principle of equivalence is emerging and evolving as a general principle of consistency.

PART 1: THE PRINCIPLE OF EFFECTIVENESS - THE BACKGROUND

I: A brief look back

the principle of national procedural autonomy and the twin principles of effectiveness and equivalence

8. The principles of effectiveness (alongside the principle of equivalence) first came into existence as provisos to the general principle of national procedural autonomy. According to this principle, in the absence of Community legislation, the enforcement of Treaty-based rights and obligations is subject to existing national remedies and procedural rules, subject to the requirements – that the rules applicable to rights derived from Community law (i) cannot be less favourable than those relating to similar domestic actions and (ii) cannot in any case render it impossible in practice to exercise rights derived from Community law.

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5 On reference from the Court of Appeal: [2010] EWCA Civ 990.

6 On appeal from [2010] EWCA Civ 696. The Supreme Court decided (on 25 May 2011) to refer questions (as yet unformulated) to the Court of Justice.

context: direct effect and supremacy

9. The principles of direct effect and supremacy had been shot like flares into what was then the relative darkness of the Community landscape. And the principles of effectiveness and equivalence followed behind - more gingerly - to assist in the entrenchment of Community law into the national legal orders.

modest beginnings: Rewe I and Comet

10. The modest beginnings of these principles are illustrated by the early case of Cases 33/76 *Rewe-Zentralfinanz*[7] and 45/76 *Comet*[8]:

    a. nowhere in these cases do we see the language of "effective protection" as such. Instead it is the duty placed on the national courts to protect directly effective Community law rights that forms the foundation of these principles:

> "Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law."[9]

    b. the primary focus appears to be on the principle of equivalence – the duty to ensure that the rules governing actions for the enforcement of Community law rights are not less favourable than those for the enforcement of rights under national law:

> "Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, *it being understood that such conditions cannot be less*

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7 [1976] ECR 1989.

8 [1976] ECR 1043.

9 *Rewe*, Judgment, para 5.

> *favourable than those relating to similar actions of a domestic nature*."[10]
>
> (emphasis added)

c. And, what has come to known as the principle of effectiveness is expressed separately (almost as an afterthought):

> "Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.
>
> In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.
>
> *The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect*."[11]
>
> (emphasis added)

11. It is not surprising perhaps that non-discrimination[12], being a corner stone of the single market and the development of the fundamental freedoms, took centre place in the articulation of the principle of national procedural autonomy; whilst "effectiveness" appeared to take a secondary role.[13]

effectiveness and equivalence: a summary

12. In summary, in relation to the principle of *effectiveness*, the transformation of the somewhat negatively expressed proviso to the principle of national procedural autonomy (indicating the presumptive legitimacy of the national procedural rule) to the 'mantra' of effective protection (of rights

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10 Ibid.

11 Ibid.

12 At least in so far as it lays down that the Community law right is subject to less favourable treatment is concerned. The problem of 'reverse discrimination' however is discussed below.

13 The relationship between the principles of equivalence and effectiveness can perhaps (loosely) be compared to the twin considerations of discrimination and market access, which have characterised the debate in relation to the fundamental freedoms.

derived from Community law) – is a familiar narrative: viz (i) the requirement on national courts to give "full effect" to Community legislation intended to confer rights on individuals – through the provision of adequate redress in cases of breaches of those rights[14]; (ii) the requirement that the should set aside national legislation restricting the right to an effective remedy[15]; (iii) ensuring the protection of rights intended to be conferred (or in fact conferred) by Community directives through the requirement for Member States to provide damages in case of non-implementation[16] and (iv) (thereby) the establishment of the general principle of state liability for breach of Community law[17] (and in certain cases, an right to damages against a private party[18]).

13. Correspondingly, the principle of *equivalence* has also played its part, and in so doing enjoyed a symbiotic relationship with the principle of effectiveness. In particular, as the principle of effectiveness has given rise to a Community system of remedies, the, at times, bold and 'transcendental' application of the principle of equivalence as regards the identification of a national law comparator[19], has facilitated the further entrenchment of Community law rights into the national legal orders.

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14 See Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, where the Court, relying in particular on the "specific enforcement" provisions contained in Article 6 of the Equal Treatment Directive, held that in the absence of adequate remedies for discrimination, the rights conferred by the Directive would not be "fully effective, in accordance with the objective that it pursues."

15 Case C-213/89, *R v Secretary of State, ex parte Factortame Ltd. [*1990] ECR I-2433, where the national rule prohibiting the award of interim relief against the Crown was required to be set aside.

16 See Case C-6 & 9/90, *Francovich,* [1991] ECR I-5357 where the Member State was held liable in damages for the failure to implement a directive.

17 See further Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* [1996] ECR I-1029 in which the Court outlined the conditions giving rise to state liability.

18 Case C-453/99 *Courage v Crehan* [2001] ECR I-7289, as affirmed in Cases C-295-298/04 *Manfredi* [2006] ECR I-6619 and C-421/05 *City Motors Groep* [2007] I-653.

19 In Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, the Court was called upon to consider the question of equivalence in relation to a rule of national law which fixed a one year limitation period in respect of actions for loss or damage sustained as a result of the belated implementation of a Community directive relating to the protection of employees in the event of insolvency of their employer. The Court rejected as comparable to a claim for damages for belated implementation, a claim for compensation as introduced under the Directive in question, instead preferring to look to the ordinary system of non-contractual liability, under which claims are "directed against public authorities which have failed to act or have committed an unlawful act for which they can be held responsible in the exercise of their powers." See further Cases C-326/96

II: 'Effective protection' as a general principle of Union law

14. The principles of equivalence and effectiveness have developed alongside the principle of effective judicial control. However, with the transformation of the principle of effectiveness into a positive duty to protect the enjoyment of the Union right, it is perhaps a matter of little surprise that the principles of effectiveness (as a qualification to the principle of national procedural autonomy) and the principle of effective judicial control (as a general principle of Union law) have found common expression through the (general) principle of "effective protection".[20]

Unibet

15. The more recent decision in Case C-432/05 *Unibet*[21] illustrates the coming together of these two principles. The following passage in the Opinion of Advocate General Sharpston is instructive:

> "35. […] national legal systems are not immune from Community judicial oversight. First, domestic rules must observe the principles of equivalence and effectiveness. Second, although it is, in principle for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (*Verholen*[22], paragraph 24). Thus, in certain circumstances Community law *may* require a new remedy where that is the only way to ensure that a Community law right can be protected (as was *de facto* the case in *Factortame I*[23]). In *Heylens*, for example, the Court stated that, since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, '*the existence of a*

Levez [1998] ECR I 7835 and C-78/98 *Preston* [2000] ECR I-3201. In the latter case, the Court had stated that the key was to identify an action that is similar as to its "purpose, cause of action and essential characteristics."

20 See now Article 19(1) TEU:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

21 [2007] ECR I-2271

22 Cited above, at n. 14.

23 Cited above, at n.15.

> *remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential* in order to secure for the individual effective protection for his right' (Case 222/86 [1987] ECR 4097, paragraph 14, emphasis added). Similarly in *Vlassopoulou* the Court stated that 'any decision [on recognition of professional diplomas] taken must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed' (Case C-340/89 [1991] ECR I-2357, paragraph 22)."

16. In the following paragraphs, the Advocate General refers, in general terms to "the principle of effective protection" (para 36) and "the principle of effective judicial protection" (para 37), and goes on:

> "38. […] the principle of effective legal protection itself reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle, the right to a fair trial, is enshrined in Article 6(1) of the European Convention on Human Rights and is now recognised as a general principle of Community law by virtue of Article 6(2) EU."

17. See to similar effect, the judgment of the Court, at paras 37 to 44, where, in particular, the Court gives separate recognition to the principle of effective judicial protection (as a general principle of Community law – referring in to Articles 6 and 13 ECHR[24] and to Article 47 of the EU Charter - para 37) and the principles of equivalence and effectiveness (as qualifications to the principle of national procedural autonomy - paras 39 to 44).[25]

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[24] And citing Cases 222/84 *Johnston* [1986] ECR 1651, paras 18 and 19 (equal treatment for men and women), 222/86 *Heylens* [1987] ECR 4097, para 14 (free access to emploment), C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45 (inclusion of a product in the list of medicinal products covered by the health insurance systems), C-55/00 *UPA* [2002] ECR I-6677, para 39 (reviewability of a Community regulation) and C-467/01 *Eribrand* [2003] ECR I-6471, at para 61 (reviewability of decisions of a national export authority).

[25] The more specific significance of *Unibet* lies in the 'clarification' by the Court that where the compatibility of national provisions with Community law is being challenged, the grant of interim relief to suspend the application of such provisions should (contrary to the suggestion in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, para 20) be governed by the criteria laid down by *national* law (Judgment, paras 79 to 81), subject to the observance of the principles of effectiveness and equivalence (ibid, para 82). Accordingly, this situation was distinguished from the situation (as in *Zuckerfabrik*) where interim relief is sought in respect of a national measure adopted in accordance with a Community regulation where the legality of that Community regulation is itself contested: see Judgment, at para 79. As explained by the

18. The articulation of these principles in this way demonstrates the Court's desire to articulate an overall conceptual framework for the (future) development of the overarching principle of effective protection, and within that, the principle of national procedural autonomy (as qualified by the twin requirements of effectiveness and equivalence)[26].

PART 2: THE PRINCIPLE OF EFFECTIVE PROTECTION "*PART 2*"

I: Changing dynamics: the decision of the Court in 'Impact'

19. As mentioned above, the principles of effectiveness (and equivalence) operated in the first instance to protect directly effective Community law rights. That is, it served to ensure procedural (and remedial) protection to rights which were directly effective. Furthermore, effectiveness and equivalence were very much "twin" principles – each with its own distinct role.

20. The caselaw on direct effect has itself, of course, been the subject of significant development.

significance of Impact

21. However, the decision of the Court in Case C-268/06 *Impact*[27] is perhaps a further indication that the principle of effective protection may go beyond and operate outside the ambit of directly effective rights. For the issues which arose, direct effect either (i) could not[28] or (ii) did not[29], afford the

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Advocate General, it was only in this latter case that there was need, to depart from the general rule of national procedural autonomy (see her Opinion, at paras 93 to 95).

26 This desire is all the more evident given the Court's rejection of the contention that the national rules in question (which did not allow for a free-standing declaration that a measure was contrary to Community law) did <u>not</u> breach the principles of equivalence and effectiveness.

27 Cited above, at n. 5.

28 See para 24b below.

29 See para 27 below.

means by which the Court gave "full effect" to the rights arising from the Directive and Framework Agreement.

22. The decision also illustrates the evolving interplay between the principles of effectiveness and equivalence, and the emergence of equivalence as a general principle of consistency.

facts

23. This case was a reference by an Irish court on the interpretation of the framework agreement on fixed-term work annexed to Directive 1999/70/EC in circumstances where Ireland had delayed its implementation by 2 years. Questions arose as to the position of government employees who had sought to complain of breaches of the Framework Agreement during the period when Ireland should have, but had not, implemented the Directive ("the Default Period") (as well as for the period after implementation).

extending the benefit of national implementing enforcement mechanisms in respect of the Default Period

24. The first issue arose in the following way:

a. the Irish implementing measure (the Protection of Employees (Fixed-Term Work) Act 2003) made provision for the enforcement of claims under the Directive to be brought before a specialised tribunal (the Rights Commissioner). However this tribunal had no express jurisdiction under the Act to determine complaints in respect of the period prior to implementation. The first question for the Court was whether the complainants could nonetheless invoke this national procedure so as to bring claims in respect of both periods before the Rights Commissioner;

b. there was no question of relying on the principle of direct effect for this purpose - as the precise mechanism for enforcement had been a matter expressly left to Member States' national law, collective agreements and practices;

a. furthermore, and crucially, it was not contended that there was no other means by which the complainants could bring a claim in respect of the Directive in respect of the Default Period.[30]

25. In upholding the complainants' contentions that they should be entitled to bring a claim before the Rights Commissioner in respect even of the Default Period, the Court:

a. first elaborated on the duty of a Member State to adopt all the measures necessary to ensure that the directive concerned is fully effective (Judgment, para 40) and the related duty of national courts to provide the legal protection with individuals derive from the rules of Community law to ensure that those measures are fully effective (para 42). It went on:

> "43. In that regard, it is important to note that the principle of effective judicial protection is a general principle of Community law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited)."

b. It then went on to reiterate the principle of national procedural autonomy and the twin requirements that the national rules must not be less favourable than those governing similar domestic actions (the principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (paras 44 to 46) and then stated:

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30 See paragraph 56 of AG Kokott's Opinion:

> "In any event, it would appear that the provisions of Directive 1999/70 or of the Framework Agreement could – in principle – certainly be relied upon directly in proceedings before the ordinary Irish courts, since, according to the referring court, the complainants could bring proceedings against Ireland (the State) in its capacity as their employer and thus seek redress directly for the alleged infringement of their rights under the Directive. They would not be restricted to seeking redress by claiming compensation against Ireland on account of the failure to transpose Directive 1999/70 on time."

> "47. Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.
>
> 48. A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable[31] to undermine the principle of effective judicial protection."

c. It then "borrowed" from the Court's caselaw on equivalence in the following way:

> "50. It must be observed that, since the 2003 Act constitutes the legislation by which Ireland discharged its obligations under Directive 1999/70, a claim based on an infringement of that legislation and a claim based directly on that directive must, as the referring court itself pointed out, be regarded as being covered by the same form of action (see, to that effect, Case C-326/96 *Levez* [1998] ECR I-7835, paragraphs 46 and 47, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 51). Notwithstanding formal distinctions as to their legal basis, both claims, as the Advocate General noted at point 58 of her Opinion, seek the protection of the same rights deriving from Community law, namely Directive 1999/70 and the framework agreement."
>
> (emphasis added)

26. On the basis of the above it concluded that the complainants should be permitted to available themselves of the enforcement machinery in the 2003 Act so as to be able to bring claims in respect of the Default Period (as otherwise they would be required to bring parallel proceedings – with the attendant "disadvantages … in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive."

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31 In the original text:

> "48. En effet, un non-respect desdites exigences sur ce plan est, tout autant qu'un manquement à celles-ci sur le plan de la définition des modalités procédurales, de nature à porter atteinte au principe de protection juridictionnelle effective."

giving effect to the policy underlying a non-directly effective provision

27. Assuming that the Rights Commissioner did have jurisdiction for claims in respect of the Default Period, the question arose as to whether certain provisions of the Framework Agreement were directly effective. In relation to this this question, the Court concluded that Clause 4(1) of the Framework Agreement was directly effective but that Clause 5(1) was not. Clause 5(1) required Member States to adopt one or more of the measures listed in that provision where the domestic law does not include equivalent measures. It was due to the discretion afforded to Member States in this regard that the Court held that the measure was not directly effective. Of significance is the fact that the notwithstanding its conclusion in relation to Clause 5(1), the Court went on nonetheless to find that the respondent employers (which the Court was careful to point out were essentially all emanations of the State) could not act in contravention of the policy which that provision sought to reflect – namely by renewing contracts for an unusually long term in the period between the deadline for transposing the Directive and the date on which the transposing legislation entered into force.

analysis

28. The ruling in this case demonstrates a novel application of the principles of effectiveness and equivalence: the Court effectively filled the gap left by tardy national implementation by extending the benefit of the particular enforcement mechanism chosen by Ireland in its national implementing measures to the prior period when Ireland was in default.

29. Furthermore, the Court, undeterred by its finding that Clause 5(1) lacked direct effect, nevertheless felt able to give effect to the clear policy underlying that provision. The principle of effectiveness is no longer no longer conditional on the existence of a directly effective right.[32]

30. The employers in this case were all emanations of the state, and Ireland was at fault for failing to implement the Directive in time. Is this an explanation for the outcome in this case?

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32 It has been suggested that the Court's increased preoccupation with ensuring effective judicial protection of Union law rights may help to explain the case-law on the 'incidental effect' of directives, which began with Case -194/94 *CIA Security* [1996] ECR I-2201: see A. Arnull, "*The principle of effective judicial protection in EU law: an unruly horse?*" (2011) Eu L Rev 51. See also C-144/04 *Mangold* [2005] ECR I-9981.

a. one (perhaps better view) is that the Court's extension of the national enforcement mechanism to the Default period is not necessarily based on this feature of this case. Indeed passages in the Court's judgment highlighting the duty of national *courts* also to provide the legal protection which individuals derive from the rules of Community law to ensure that those measures are fully effective (see para 42) clearly leave open the possibility that the principle of effectiveness *could* lead to a similar result in the context of claims brought between private parties for the enforcement of Community law rights. After all, the Court's concern here was to give effect to the *procedural* enforcement machinery (adopted by Ireland for the enforcement of rights under the Framework), and not to give "horizontal effect", as such, to the substantive rights arising under the Directive. (Moreover, those substantive rights could already be asserted against both public and private employers – albeit before the ordinary courts- in respect of the Default Period.[33])

b. in contrast, the Court's willingness to give substantive effect to the policy underlying Clause 5(1) of the Framework Agreement, in circumstances where that provision was not directly effective, was directly based on the public law nature of the employees.

31. Finally, the Court's novel reliance on the Court's caselaw on equivalence (so as to assimilate the protection afforded post and pre (delayed) implementation demonstrates that equivalence is being invoked - not only to ensure that actions for the enforcement of a Community right do not suffer less favourable procedural treatment than similar domestic law actions – but also so as to promote consistency in the procedural protection afforded to similar (or in this case the same) Community right. Equivalence as a principle of consistency?[34]

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33 See para 24 c, and n. 30.

34 See further Case C-460/06 *Paquay* [2007] ECR I-8511 where the Court held that the principle of equivalence requires that the Member State guarantee in its domestic rules equal treatment in the remedies and procedural rules applicable not only to comparable Union and national actions, but also to Union rights inter se where the latter are of similar nature and importance. In its judgment, at paras 50 to 52, it explains:

II: The problem of reverse discrimination and fundamental rights

32. The problem of reverse discrimination is one that has been highlighted by the principles of equivalence and effectiveness. If the principle of equivalence requires only that the Community law right is not subject to less favourable treatment, what then, when the principle of effectiveness might result in a situation where the protection afforded to the Community law right is more favourable than that afforded to equivalent domestic law situations?[35]

33. However, the increasing prominence given to the principle of effective protection, in particular in the area of fundamental rights, has only focused more attention on this issue.

34. The question arises – can the principle of effective protection (so effectively deployed so as to ensure the adequacy of national procedural rules) be applied by analogy to promote the effective (and coherent) protection of

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> "50. If, under Articles 10 and 12 of Directive 92/85 and to comply with the requirements established by the case-law of the Court on the issue of sanctions, a Member State chooses to sanction the failure to respect obligations arising under Article 10 by granting a fixed amount of pecuniary damages, it follows, as the Italian Government pointed out in the present case, that the measure chosen by the Member State, in the case of infringement, in identical circumstances, of the prohibition on discrimination under Articles 2(1) and 5(1) of Directive 76/207 must be at least equivalent to that amount.
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> 51. If the compensation chosen by a Member State under Article 12 of Directive 92/85 is judged necessary to protect the relevant workers, it is difficult to understand how a reduced level of compensation adopted to comply with Article 6 of Directive 76/207 could be deemed adequate for the injury suffered if the injury was brought about by a dismissal in identical circumstances and contrary to Articles 2(1) and 5(1) of that latter directive.
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> 52. Moreover, as the Court has already stated, in choosing the appropriate solution for guaranteeing that the objective of Directive 76/207 is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24, and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraph 29). That reasoning applies *mutatis mutandis* to infringements of Community law of a similar nature and importance."

35 Indeed, this concern may have been one of the factors inhibiting the Community-wide harmonisation of procedural rules.

fundamental rights in areas 'traditionally' considered to be within the exclusive competence of Member States?

Case C-34/09 Zambrano[36]*: Part 1*

35. The case of *Zambrano* is a good case in point. The case involved the rights of Union citizenship. The issue, in essence, was whether Columbian parents who were living in Belgium could remain there under EU law. Their children had been born in Belgium and had been given Belgian nationality. The situation was one which could in many ways be described as 'wholly internal': the children, whilst Union citizens, had never exercised their free movement rights. In these circumstances, did citizenship – in particular Article 21 TFEU[37] - confer a free-standing right of residence? Alternatively, could the Treaty right to non-discrimination (Article 18 TFEU[38] – ex Article 12 TEC) be invoked to resolve reverse discrimination[39]? How should fundamental rights protection be articulated in such a case? The fact that Member States are, quite apart from Union law, subject to obligations to

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36 Opinion of AG Sharptson, delivered 30 September 2010; Judgment of the Court, delivered 8 March 2011.

37 Articles 20 and 21 TFEU:

> "Article 20 (ex Article 17 TEC)
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> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
> 2. […]
>
> Article 21 (ex Article 18 TEC)
>
> 1. Every citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
>
> […]"

38 Article 18 TFEU reads:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

39 The reverse discrimination arising on the facts of this case was explained by the Advocate General at paragraph 123 of her Opinion. See n.41 below.

respect fundamental rights – in what direction should that point the analysis?

36. These were questions considered in great detail by the Advocate General Sharpston in her Opinion, delivered on 30 September 2010. In many ways the notion of effective protection of the rights of Union citizens implicitly permeates much of her reasoning.

a wholly internal situation?

37. On the question as to whether Mr Zambrano's children's rights as Union citizens were engaged – notwithstanding that they have not yet ventured outside their Member State of nationality:

a. the Advocate General was of the view that the situation could not properly be characterised as a 'purely internal situation' – if, instead of looking to the past (and asking whether Mr Zambrano's children had previously exercised a free-movement right), one looked to the future exercise by them of their rights as Union citizens: they "cannot exercise their rights as Union citizens (specifically their rights to move and to reside in any Member State) fully and effectively without the presence and support of their parents" (para 96);

b. on this basis she recommended that the right in Article 21 TFEU (ex Article 18 EC) – of Union citizens "to move and reside freely within the territories of the Member States" – should be recognised as including a *free-standing* right of residence (ie a right which is not predicated on prior movement between Member States) (paras 100 and 101) as: "it would be artificial not openly to recognise that (although in practice the right to reside is, in the vast majority of cases, probably exercised after exercise of the right to move) Article 21 TFEU contains a separate right to reside that is independent of the right of free movement."

c. the Court did not go as far as recognising a free-standing right of residence within Article 21 TFEU. Nonetheless it upheld the right of Mr Zambrano to be granted a residence permit (relying instead on Article 20 TFEU) (paras 41 to 44). In particular:

> "42. […] Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottman*[40], para 42)."

(In so doing it implicitly rejected the contention that the situation was 'wholly internal' to the Member State of residence.)

<u>tackling reverse discrimination 'head on': Article 18 TFEU as a means of accessing the 'internal situation'?</u>

38. The Advocate General went on to address an alternative way by which EU law could "access" the "internal situation" – through considering the question of reverse discrimination[41]:

a. the Advocate General referred to the 'curiously random' nature of the results in a number of earlier cases (*Carpenter*, *Chen* and *Metock*) – all based on the distinction drawn by the Court between Union citizens who had already exercised their rights to freedom of movement and those who had not (paras 136 to 138);

b. she then proceeded to invite the Court[42] to deal openly with the question of reverse discrimination by suggesting the following approach (para 144):

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40 Case C-135/08 *Rottman*, Judgment of 2 March 2010.

41 The Advocate General stated the problem as follows (para 123):

> "If young children (such as Catherine Zhu) have acquired the nationality of a different Member State from their Member State of residence, their parent(s) will enjoy a derivative right of residence in the host Member State by virtue of Article 21 TFEU and the Court's ruling in *Zhu and Chen*. Diego and Jessica [Mr Zambrano's children] have Belgian nationality and reside in Belgium. Can Mr Ruiz Zambrano rely on Article 18 TFEU, which prohibits, within the scope of application of the Treaties, 'any discrimination on grounds of nationality', so as to claim the same derivative right of residence?"

42 See further the Opinion of AG Sharptson in Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 29.

> "144. I therefore suggest to the Court that Article 18 TFEU should be interpreted as prohibiting **[1]** reverse discrimination caused by the interaction between Article 21 TFEU and national law that **[2]** entails a violation of a fundamental right protected under EU, where **[3]** at least equivalent protection is not available under national law."
>
> (numbering, added)

39. In the following passages of her Opinion (paras 146 to 148) the Advocate General explains that, on this approach, Article 18 TFEU would be triggered when 3 conditions are met: (i) that there must in fact be a situation of reverse discrimination arising because of the non-exercise of a free movement right (as would be the case if Mr Zambrano were denied a right of residence) (ii) that the instance of reverse discrimination would entail the violation of a fundamental right protected under EU law (in this case Article 8 ECHR) and (iii) finally Article 18 TFEU would be available only where national law did not afford a subsidiary remedy (ie if it did not afford adequate ECHR protection). The Advocate General's elaboration in respect of conditions (ii) and (iii) are particularly illuminating, and suggest the possibility of creating a coherent and a complete system of protection – straddling the ECHR and EU legal orders. She explains:

> "147. Second, the reverse discrimination complained of would have to entail a violation of a fundamental right protected under EU law. Not every minor instance of reverse discrimination would be caught by Article 18 TFEU. What constituted a 'violation of a fundamental right' would be defined where possible by reference to the case-law of the Strasbourg court. (112) Where reverse discrimination led to a result that would be considered to be a violation of a protected right by the Strasbourg court, it would likewise be regarded as a violation of a protected right by our Court. Thus, EU law would assume responsibility for remedying the consequences of reverse discrimination caused by the interaction of EU law with national law when (but only when) those consequences were inconsistent with the minimum standards of protection set by the ECHR. By thus guaranteeing, in such circumstances, effective protection of fundamental rights to minimum 'Strasbourg' standards, the Court would in part anticipate the requirements that might flow from the planned accession of the European Union to the ECHR. Such a development could only enhance the existing spirit of cooperation and mutual trust between the two jurisdictions. (113)
>
> 148. Third, Article 18 TFEU would be available only as a subsidiary remedy, confined to situations in which national law did not afford adequate fundamental rights protection. EU law has an extensive history of conferring protection that is subsidiary in nature. Thus, the principles

> of effectiveness (114) and equivalence, (115) the right to effective legal protection (116) and the principle of State liability for breach of EU law (117) are all tools that come into play only when domestic rules prove inadequate. This final condition serves to maintain an appropriate balance between Member State autonomy and the 'effet utile' of EU law. (118) It ensures that subsidiary protection under EU law complements national law rather than riding roughshod over it. It would be for the national court to determine (a) whether any protection was available under national law and (b) if protection was in principle available, whether that protection was (or was not) at least equivalent to the protection available under EU law."
>
> (emphasis added)

40. The Court did not adopt the Advocate General's suggestion (instead contenting itself with adopting the 'classic' formulation based on whether the contested measure would have the effect of depriving the Union citizen of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citzens of the Union: see para 42 cited above, at para 37c).

41. However, the Advocate General's suggestion merits closer consideration:

    a. para 148 of her Opinion (cited above, at para 39) invites the drawing of an analogy with the "classic" case where the principles of effectiveness and equivalence are invoked so as to protect a Community law right.

    b. what is the relevant Community law right for the purpose of this analogy? This must, on the Advocate General's analysis, be "a fundamental right protected under EU law" (para 147);

    c. however, as ECHR/Charter rights cannot themselves be the basis of EU competence, EU competence in this area must, on the Advocate General's analysis be based on Article 18 (non-discrimination) and/or Article 21 TFEU.

42. Article 18 TFEU itself however applies only "within the scope of application of the Treaties"[43], and so the basis for EU competence here must be the citizenship provisions in the Treaty (Article 20/21 TFEU) - whether alone or in combination with Article 18 TFEU. Accordingly, is the Advocate

[43] See n. 38, above.

General's analysis predicated on the view that Article 20/21 TFEU can be a sufficient basis on which citizens can enjoy fundamental rights as a matter of EU law? That is, another way of saying that Union citizens should enjoy a free-standing right under the Article 21 TFEU?

43. Be that as it may, in the field of citizenship rights the latest word comes from the recent judgment of the Court of Justice (delivered on 5 May 2011) in Case C-434/09 *McCarthy v Secretary of State for the Home Department*[44] where the Court rejected the argument that Article 3.1 of the Citizenship Directive[45] is applicable to a Union citizen (Mrs McCarthy) who has never exercised her right of free movement, who has always resided in a Member State of which she is a national and who is also a national of another Member State (Mrs McCarthy had dual UK and Irish nationality[46]). Furthermore, in so far as a right of residence might be put forward on the basis of Article 21 TFEU, the Court affirmed the approach which it took in *Zambrano* holding in general terms that:

> "Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States."
>
> (emphasis added)

44. Nonetheless, and notwithstanding the patent similarities between the facts of the case and the facts of *Zambrano* it held that: "by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in

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44 On a reference from the House of Lords:

45 Directive 2004/38/EC. Article 3.1 provides:

> 'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

46 She was however married to a Jamaican national whose right to reside in the UK, on the basis of her EU law right of residence, was in issue.

the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom" (para 50).

III: effective protection (of fundamental rights) and the scope of application of EU law

Zambrano (Part 2) - fundamental rights and 'the scope of application of Union law'

45. Finally, Advocate General Sharpston went on to consider (in the alternative) whether the fundamental rights (here Article 8 ECHR) should have a role in determining the scope of application of Articles 20 and 21 TFEU. Put another way, could Mr Zambrano rely on the EU fundamental right to family life independently of any provisions of EU law? The Advocate General commented (para 152):

> "This raises a very major issue of principle: what is the scope of application of fundamental rights under EU law? Can they be invoked as free-standing rights against a Member State? Or must there be some other link with EU law? It is necessary to dwell on the potential significance of the answer to that question."

46. The Advocate General recognised that EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law. On this basis, she went on (para 156):

> "All measures enacted by the institutions are therefore subject to scrutiny as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. (128) <u>This aspect is obviously delicate, (129) as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR</u>. The consequential issues that arise as to overlapping levels of protection under the various systems (EU law, national constitutional law and the ECHR) and the level of fundamental rights protection guaranteed by EU law are well known; (130) and I shall not explore them further here."
>
> (emphasis added)

47. Having explored the Court's case law as to the question whether a measure falls within the scope of EU law (para 161), she (at first) suggested the following approach to the determination of this question:

> "162. Is the specific area of law involved and the extent of EU competence in that area of law of relevance to the question of fundamental rights? The question seems an important one to ask. The desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence. As long as the European Union's powers remain based on the principle of conferral, EU fundamental rights must respect the limits of that conferral[47]. (141)
>
> 163. Transparency and clarity require that one be able to identify with certainty what 'the scope of Union law' means for the purposes of EU fundamental rights protection. It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*."

48. She then went on to articulate the advantages of such an approach (see paras 167 to 170)[48]. However, she concluded that given that the material

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47 The principle of conferral is now reinforced in the TEU: Article 5(1) and 5(2), cited at para 3, above.

48 She explained as follows:

> "167. First, it avoids the need to create or promote fictitious or hypothetical 'links with Union law' of the kind that have, in the past, sometimes confused and possibly stretched the scope of application of the Treaty provisions. […]
>
> 168. Second, such an approach keeps the EU within the four corners of its powers. Fundamental rights protection under EU law would only be relevant when the circumstances leading to its being invoked fell within an area of exclusive or shared EU competence. (147) <u>The type of competence involved would be of relevance for the purpose of defining the proper scope of protection. In the case of shared competence, the very logic behind the sharing of competence would tend to imply that fundamental rights protection under EU law would be complementary to that provided by national law. (148) (This mirrors the approach that I have suggested above in respect of reverse discrimination.)</u>
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> 169. Third, if fundamental rights under EU law were known to be guaranteed in all areas of shared or exclusive Union competence, Member States might be

point in time (1 September 2003 – when Mr Zambrano's second child was born) pre-dated the Lisbon Treaty (and the EU Charter was still 'soft law', with no direct effect or Treaty recognition), "the necessary constitutional evolution in the foundations of the EU, such as would justify saying that fundamental rights under EU law were capable of being relied upon independently as free-standing rights, had yet taken place" (para 175). On that basis, she concluded as follows:

> "176. I therefore conclude, in answer to the last of the questions that I have reformulated, that, at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, either by a non-Member State national or by a citizen of the Union, whether in the territory of the Member State of which that citizen was a national or elsewhere in the territory of the Member States.
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> 177. In proposing that answer, I am accepting that the Court should not, in the present case, overtly anticipate change. I do suggest, however, that (sooner rather than later) the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place. At some point, the Court is likely to have to deal with a case – one suspects, a reference from a national court – that requires it to confront the question of whether the Union is not now on the cusp of constitutional change (as the Court itself partially foresaw when it delivered Opinion 2/94). Answering that question can be put off for the moment, but probably not for all that much longer."[49]

> encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration or criminal law), which would *include* appropriate definition of the exact extent of EU fundamental rights, rather than leaving fundamental rights problems to be solved by the Court on an *ad hoc* basis, as and when they are litigated.
>
> 170. Fourth, such a definition of the scope of application of EU fundamental rights would be coherent with the full implications of citizenship of the Union, which is 'destined to become the fundamental status of the nationals of Member States'. (149) Such a status sits ill with the notion that fundamental rights protection is partial and fragmented; that it is dependent upon whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers. In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship."

[49] Article 47 of the Charter constitutes an unequivocal extension of the principle of effective judicial protection to human rights.

49. The approach outlined by Advocate General Sharpston in *Zambrano* in ascertaining whether a measure falls within the scope of application of EU law may have a bearing in other fields.

Case C-402/04 P & C-415/05 P Kadi & Al Barakat International Foundation v Council[50]

50. It was already the case that a symbiotic relationship exists between questions of competence and fundamental human rights protection. The In *Kadi*, the Court held that the Community has competence to adopt economic sanctions not only against states but also against individuals on the basis of Articles 301, 60 and 308 EC; and where the Community had competence to adopt a particular measure, that measure must be susceptible to judicial review. The fact that the measure in question sought to give effect to UNSC resolutions adopted under the UN Charter did not mean that it was not subject to review by the Community Courts.[51]

Case C-410/10 *NS v Secretary of State for the Home Department* (pending)

51. The analysis foreshadowed by Advocate General Sharpston in *Zambrano* may have a bearing on the approach which might be adopted in relation at least to one of the questions referred by the Court of Appeal in *NS v Secretary of State for the Home Department* – namely whether the exercise of the discretion in Article 3.2 of the Dublin Regulation (pursuant to which Member States retain the discretion not to return an asylum seeker to the 'responsible State' and to determine the individual's claim to asylum itself) falls within the scope of EU law.

52. In particular, at para 168 of her Opinion, the Advocate General stated:

> "The type of competence involved would be of relevance for the purpose of defining the proper scope of protection. In the case of shared competence, the very logic behind the sharing of competence would tend to imply that fundamental rights protection under EU law would be complementary to that provided by national law. (148) (This mirrors the approach that I have suggested above in respect of reverse discrimination.[52])"[53]

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50 [2008] ECR I-6551.

51 Cf *Behrami and Saramti* (2007) 45 EHRR SE10 which the Court sought to distinguish (both by reference to the facts in *Kadi* but also by reference to the Community's autonomous legal order within which states as well as individuals have immediate rights and obligations and on the basis of which the ECJ ensures respect for the fundamental rights as a "constitutional guarantee").

52 See paragraph 148 of her Opinion, cited at para 39 above.

53. The Advocate General had herself suggested that Charter rights should attach irrespective of whether the EU has exercised its competence, exclusive or shared, in the relevant area: see Opinion, paras 163 to 165.

54. However, as she acknowledges, a more nuanced approach might apply where the area involves overlapping EU and international law rights and obligations to which Member States are subject: eg in *NS* – the ECHR and the Refugee Convention.

55. In such cases, the exercise by the EU of its shared competence[54] cannot serve to displace the (pre-existing) international law obligations of Member States. Rather, EU measures must (necessarily) sit alongside, and complement or supplement the Member States' obligations. (Indeed, Article 3.2 of the Dublin Regulation – dubbed 'the sovereignty clause' - may itself have been based on the fact that the Dublin Regulation could not for

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[53] See further her earlier reference to Case [ ] *Kremzow* (at paras 160 and 161 of her Opinion):

> "160. In *Kremzow,* (137) the Court likewise rejected the claims of an Austrian national who had been convicted in Austria, but whose appeal was later held by the Strasbourg court to have breached the right to a fair trial under Article 6 of the ECHR. Mr Kremzow sought compensation and also claimed that his right to freedom of movement under EU law had been infringed as a result of his unlawful imprisonment. The Court disagreed with that approach, stating that 'whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, … a purely hypothetical prospect of exercising that right does not establish a sufficient connection with [EU] law to justify the application of [EU] provisions'. (138)
>
> 161. However, the *Kremzow* judgment adds an important gloss to the earlier case-law. Having confirmed the hypothetical nature of the claim, the Court stated that since 'Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of [EU] law, [it thus follows] that the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of [EU] law'. (139) *A contrario*, it seems to follow that a relevant link with EU law *could* have been found if the offences had had a connection with an area of EU policy (for example, <u>if they had been created in order to secure compliance with an EU law objective laid down in EU secondary legislation</u>). (140)

[54] Article 4(2) TFEU makes clear that the area of freedom, security and justice is an area of 'shared competence'. As to shared competence, see further Article 2(2) TFEU and Protocol (No 25) *On the Exercise of Shared Competence.*

this very reason displace the need for independent assessments by each Member State as to whether in returning an asylum applicant to 'the responsible State' it was acting in compliance with its international law obligations.)

56. In such cases, might there be an argument, based on the approach adopted by Advocate General Sharpston in *Zambrano* - that fundamental rights protection under EU law should be complementary to that provided by national law and that (as the Advocate General proposed in relation to Article 18 TFEU in relation to reverse discrimination: see para 148 of her Opinion, cited above, at para 39) the umbrella of EU law protection might be available "only as a subsidiary remedy, confined to situations in which national law did not afford adequate fundamental rights protection"?

FA (Iraq) v Secretary of State for the Home Department[55]

57. The overlaying of EU law measures in areas which are also the subject of international law rights and obligations has, in addition, given rise to difficulties in the application of the principle of equivalence.

58. The issue in *FA (Iraq)* arose because of the fact that section 83 of the Nationality Immigration and Asylum Act 2002 provided a "status appeal" only against a decision refusing a asylum[56] and not against a refusal of a claim for subsidiary protection (ie humanitarian protection).[57]

59. Both refugee status and subsidiary protection status are addressed within relevant EU legislation – Directive 2004/83 ("the Qualification Directive").

60. The issue was, whether a claim for asylum an "equivalent" to a claim for subsidiary protection?

61. The Court of Appeal answered this question in the affirmative.[58] In so doing, it appears that the Court was influenced by its view that (i) subsidiary

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55 [2011] UKSC 696.

56 Subject to the further condition that leave to remain was granted for an period of longer than 12 months.

57 This was because section 84(3) of the Act provided that an appeal under section 83 could only be brought on grounds that removal of the appellant from the UK would breach the UK's obligations under the Refugee Convention.

58 [2010] EWCA 696 (Pill, Longmore, Sullivan LJJ), [2010] 1 WLR 2545.

protection status was a distinct EU law status (relying on the judgment in *QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620, [2010] 2 All ER 971 that the protection afforded by Article 15 of the Qualification Directive went beyond the protection afforded under Articles 2 and 3 ECHR[59]) and (ii) "the rights of a refugee, as now provided in national law, and the rights of a person with subsidiary protection status, as provided by the Directive, are in many respects similar."

62. The Secretary of State appealed against the decision on the ground that there is no purely domestic law measure against which a comparison of the rules applicable to claims for humanitarian protection can be made; that the mooted comparators (the asylum claim and humanitarian protection claims) both have their origin in the Qualification Directive and that both therefore are rooted in EU law. As such there is no basis for the activation of the equivalence principle.

63. The Supreme Court has now decided (on 25 May 2011) to refer questions (as yet unformulated) to the Court of Justice[60]. In delivering the judgment of the Panel, Lord Kerr identified the numerous questions which the appeal raised:

> "16. The issue has a number of aspects. Must the claim to asylum, in order to qualify as an effective comparator, be based exclusively on domestic or national law? Or is it sufficient that it partake partly of a national law and partly of EU law? If it is a measure that is given effect in domestic law in the fulfillment of a member state's obligations under a treaty, does this affect its status as a comparator? How similar must the rights under domestic and Community law be? If there is a more marked similarity between the Community right and a human rights claim, how does this affect the application of the principle of equivalence."

64. He went on to characterise the competing positions in the following way:

> "24. […] One can acknowledge the strength of the arguments on either side. On the one hand, there is a consistent line of authority (which has not been renounced) to the effect that the domestic measure must be precisely what the term suggests – a purely domestic provision. If

59 This was in turn based on that Court's interpretation of the Court of Justice's ruling in Case C-465/07 *Elgafaji* [2009] 1 WLR 2011.

60 [2010] UKSC 22.

> comparison with another Community law provision was possible, much of the underlying purpose of the principle, it is argued, would be diverted. After all, the essential reason for the development of the principle was that a Community law right should not suffer disadvantageous treatment vis-à-vis national rights which lie outside the field of Community law.
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> 25. On the other hand, the aim of the principle of equivalence is the elimination of discrimination and it would be, it is suggested, anomalous if comparison with another right was precluded because it could be branded as deriving partly from a Community law source. Viewed as a complement to the principle of effectiveness, the principle of equivalence should not be thwarted by the imposition of what might arguably be said to be the artificial or technical requirement of a comparison between a Community law right and one which is distinctively and exclusively domestic."

65. The parties and the Court were all in agreement that the principle of effectiveness was not in issue. Query, however, whether, in the light of the approach it adopted in *Impact*[61], the Court of Justice might apply - within a broader application of the principle of effective protection[62] - what this paper has suggested might be the emerging principle of consistency?

Conclusion

66. To be continued.

27 MAY 2011

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61 See para 50 of its Judgment, cited at para 25c above. See further para 31 above and *Paquay* at n. 34.