Subject-matter concerned	☒ 1) non-discrimination on grounds of nationality ☒ 2) freedom of movement and residence - linked to article 27 of the Directive 2004/38 ☐ 3) voting rights ☐ 4) diplomatic protection ☐ 5) the right to petition
Decision date	30 June 2016
Deciding body (in original language)	Ανώτατο Δικαστήριο, Δευτεροβάθμια Δικαιοδοσία
Deciding body (in English)	Supreme Court, Appeal Jurisdiction
Case number (also European Case Law Identifier (ECLI) where applicable)	Appeal Nos. 42/2013, 43/2013, 44/2013 and 45/2013 (Case Nos. 290/2012, 291/2012, 292/2012, 293/2012)
Parties	Kristian Bekefi et al v. The Republic of Cyprus through the Minister of the Interior Kristian Bekefi et al v. Κυπριακής Δημοκρατίας μέσω του Υπουργού Εσωτερικών]
Web link to the decision (if available)	http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2016/3-201606-42-13etcapof.htm&qstring=%F7%E1%F1%F4%2A%20and%202016

Legal basis in national law of the rights under dispute	• Article 12 of the Cypriot Constitution and article 6 of the ECHR, both of which safeguard the presumption of innocence; • Article 29 of Law 7(I)/2007 which transposes Directive 2004/38 (corresponding to Directive article 27); • Articles 21.2, 45 and 48 of the EU Charter.
Key facts of the case (max. 500 chars)	The appellants were Union citizens lawfully residing in Cyprus. They were expelled from Cyprus in 2011, after the Minister of the Interior declared them to be 'prohibited immigrants' under the national immigration law[1] for posing a serious threat to public order. In 2012, the Interior Minister cancelled the expulsion orders which had been issued against the applicants, having established that they were premised upon the wrong legal provision. Article 29 of Law 7(I)/2007 which transposes Directive 2004/38 (corresponding to Directive article 27) was added to the grounds for expulsion and a re-entry ban of 10 years was issued. The justification attached to the administrative decision ordering the applicants' expulsion was a police letter stating that all the applicants were members of a 'criminal group' carrying out 'various criminal activities' such as blackmailing citizens for protection and assaults. The police letter claimed that information about the applicants' criminal activity was supplied to the police daily even though there was never any formal complaint. With regard to one of the applicants in particular, the police claimed he was believed to be the 'executioner' in a murder case where he was tried as main suspect but was acquitted by the Court, even though there was 'scientific evidence' implicating him. The applicants challenged this decision on the ground that it violated the free movement acquis and the presumption of innocence, safeguarded by the Cypriot Constitution (article 12) and the ECHR (article 6). The trial court rejected these applications on the ground that the contested decision was an expression and exercise of the administration's discretion which, in the case of deportations or entry bans, was wide enough so as to conform to the principle of state sovereignty. The Court was satisfied that the public order concerns invoked by the authorities, relying on information supplied by the police regarding some criminal activity of the applicants, were valid and adequately investigated. The applicants appealed the first instance decision on the grounds that: • The trial court had erred in its finding that the presumption of innocence and the right of free movement had not been infringed. The trial Court's finding ignored article 45 of the EU Charter which safeguards the right to free movement, a fundamental right which can only be restricted exceptionally and under circumstances specified in the acquis.

[1] Cyprus, Aliens and immigration law (*Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος*), Cap 105, article 6 (1)(g), available at http://cylaw.org/nomoi/enop/non-ind/0_105/full.html, accessed on 20 April 2017.

	• Article 21.2 of the EU Charter requires member states to assess the conduct of Union citizens using the same criteria as when assessing its own nationals and that no Cypriot would have been deemed to be a threat to public order based solely on vague and unconfirmed information. • The trial court's reliance on the legal precedents of *Eddine*[2] and *Moyo,*[3] in order to conclude that the respondents could evaluate information at their discretion and expel the applicants in the framework of such discretion and state sovereignty, was wrong because those cases involved third country nationals. The trial court was also wrong to apply the national immigration law (Cap 105) in the case of Union nationals whose right to move and reside is regulated by the EU acquis. The Court rejected all of the above arguments and dismissed the appeals.
Main reasoning / argumentation (max. 500 chars)	The applicants cannot benefit from the principle of the presumption of innocence because they are not suspects or accused persons in a criminal procedure and therefore the trial court finding that the presumption of innocence had not been violated was correct. They all resided in Cyprus for under five years and therefore could not be afforded protection under Directive article 27.1. The trial court was right to rely on judicial precedent relating to third country nationals (*Moyo* and *Eddine*) since information collected from appropriate sources can lawfully provide the premise for expulsion, provided the administration viewed the rights of the Union citizen affected in good faith. No issue of discrimination arose, since measures were also being taken against the Cypriot members of the same suspect group.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The concepts of 'public order' and 'public safety' are not defined either in Directive 2004/38 or in CJEU case law and therefore state discretion in this field remains wide, vague and unspecified, precisely because there are sensitive issues at stake falling within the sphere of the sovereignty of the member states and their rights to control the entry and stay of foreigners in their territory on an ad hoc basis. Citing the CJEU ruling in *Rutili* the Court concluded that member states are free to determine their own public order and public safety needs based on their own values and circumstances which may differ from state to state and from a certain period to another. The presumption of innocence, as safeguarded by Charter article 48.1 and by ECHR article 6 applies only to criminal proceedings and has no application to administrative procedures. This is obvious from the preamble to Directive 2016/343 of 9 March 2016 on the strengthening of

[2] Cyprus, Supreme Court, Mahmood Hussein Alaa Eddine v. The Republic of Cyprus, Case No. 99/2005, 14 February 2008. Available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2008/rep/2008_3_0095.htm&qstring=Eddine accessed on 24 April 2017.

[3] Sydney Alfred Moyo et al v. The Republic of Cyprus, Revisional Jurisdiction Appeal No. 811, 10 June 1988. Available at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/1988/rep/1988_3_1203.htm&qstring=Moyo accessed on 24 April 2017.

	certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, whose scope is restricted to criminal proceedings by virtue of preamble article 11 [*Author's note: the Court may have missed the non-regression provision in Article 13 of this Directive].* There is no need for a prior conviction in order for a 'genuine, present and sufficiently serious threat' to exist. Indeed such a threat may exist even where there is no illegal activity at all. The participation in an organisation whose activities are considered by the member state as a social risk may be taken into account where a person evidently identifies with the aims and plans of such organisation. Given that states cannot expel their own nationals, expulsion forms an exception to the nondiscrimination rule of Charter article 21.2.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The findings of the trial court were confirmed. The administrative decisions regarding the applicants' expulsion and re-entry ban were confirmed as lawful. This Court in this case was acting in its appellate jurisdiction: the decision is final and cannot be appealed again in Cyprus. This was a five-member bench and the decision was unanimous.
	Our comment on this case
	The issue as to whether the national immigration law can or cannot be applied to Union nationals was extensively dealt with, concluding that the restrictions and safeguards afforded to Union nationals by Directive 2004/38 must be applied in addition to Cap 105, albeit the threshold was set very low: involvement in an organisation posing a 'social risk' suffices to meet the test of Directive article 27.2 (genuine, present and sufficiently serious threat affecting one of the fundamental interests of society), no presumption of innocence applies and there can be no issue of equality with the host country's nationals in the field of deportation. The case amounts to a clear departure from the principle established in *Mendonca* (see 1.5 above) that the rights of Union nationals are regulated only by the acquis.
Key quotations in original language and translated into English with reference details (max. 500 chars)	Η απέλαση αποτελεί τον πιο σοβαρό περιορισμό στην ελευθερία κυκλοφορίας, αλλά και εξαίρεση, ταυτοχρόνως, της αρχής που διατυπώνεται στο Άρθρο 21.2 του Χάρτη της μη διάκρισης λόγω ιθαγένειας, αφού τα κράτη μέλη δεν έχουν την εξουσία να απομακρύνουν τους δικούς τους υπηκόους από την επικράτεια τους ή να απαγορεύσουν την είσοδο τους σ' αυτή, ενώ τέτοια μέτρα μπορούν να λαμβάνονται έναντι των υπηκόων άλλων κρατών μελών. Η απέλαση αλλοδαπών, είτε είναι Ευρωπαίοι πολίτες είτε όχι, παραμένει κυρίαρχο δικαίωμα των κρατών μελών της Ευρωπαϊκής Ένωσης.

	Ο Χάρτης δεσμεύει τα κράτη μέλη όταν αυτά ενεργούν, όπως εδώ, εντός του πεδίου εφαρμογής του δικαίου της Ευρωπαϊκής Ένωσης. Όπως ορθά επισημαίνεται από τον ευπαίδευτο συνήγορο των εφεσειόντων, το Άρθρο 48.1 κατοχυρώνει την αρχή του τεκμηρίου της αθωότητας, προβλέποντας ότι κάθε κατηγορούμενος τεκμαίρεται ότι είναι αθώος μέχρι αποδείξεως της ενοχής του σύμφωνα με το νόμο. Σύμφωνα με το Άρθρο 52.3, το δικαίωμα αυτό έχει την ίδια έννοια και εμβέλεια με το δικαίωμα που κατοχυρώνεται στην ΕΣΔΑ. Η αναφορά σε «κατηγορούμενο» στο Άρθρο 48.1 του Χάρτη, προϋποθέτει την ύπαρξη ποινικής διαδικασίας εναντίον προσώπου στο οποίο αποδίδεται η διάπραξη ποινικού αδικήματος. Με αναφορά πάντα στη διοικητική διαδικασία που οδήγησε στη διοικητική απόφαση για την απέλαση τους, οι εφεσείοντες δεν ήταν κατηγορούμενοι, ούτε επρόκειτο για ποινική διαδικασία, ώστε να τίθεται θέμα εφαρμογής των προνοιών του Άρθρου 48 του Χάρτη. Ούτε το Άρθρο 6 της ΕΣΔΑ έχει εδώ εφαρμογή, το ΕΔΑΔ έχοντας καταστήσει σαφές πως το Άρθρο 6 δεν εφαρμόζεται σε υποθέσεις απέλασης. Κι αυτό, προφανώς, για το λόγο ότι αποφάσεις για την είσοδο, παραμονή και απέλαση αλλοδαπών δεν αφορούν στη διάγνωση των αστικών δικαιωμάτων ή υποχρεώσεων τους ή σε ποινική κατηγορία, υπό την έννοια του Άρθρου 6.1. Θεωρούνται, μάλλον, ως δημόσιες πράξεις οι οποίες διέπονται από το δημόσιο δίκαιο (βλ. Mamatkulov and Askarov v. Turkey 41 EHRR 494 (GC) και Maaouia v. France, Application No. 39652/98, 12.1.1999). Η άποψη αυτή ευρίσκει απήχηση και στην αιτιολογική σκέψη της πολύ πρόσφατης Οδηγίας (ΕΕ) 2016/343 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 9ης Μαρτίου 2016 για την ενίσχυση ορισμένων πτυχών του τεκμηρίου αθωότητας και του δικαιώματος παράστασης του κατηγορουμένου στη δίκη του στο πλαίσιο ποινικής διαδικασίας, σκοπός της οποίας είναι να ενισχυθεί το δικαίωμα σε δίκαιη δίκη στο πλαίσιο ποινικών διαδικασιών με τη θέσπιση κοινών ελάχιστων κανόνων για ορισμένες πτυχές του τεκμηρίου της αθωότητας και του δικαιώματος παράστασης του κατηγορούμενου στη δίκη. Συμπληρώνοντας, έτσι, η Οδηγία, το νομικό πλαίσιο που παρέχουν ο Χάρτης και η ΕΣΔΑ. Στην παράγραφο 1 της αιτιολογικής σκέψης της εν λόγω Οδηγίας μνημονεύεται η κατοχύρωση της αρχής του τεκμηρίου της αθωότητας και του δικαιώματος σε δίκαιη δίκη, μεταξύ άλλων, από το Χάρτη και το Άρθρο 6 της ΕΣΔΑ[.] [Unofficial translation below] Expulsion constitutes the most serious restriction to free movement, but it is also at the same time an exception to the principle of non-discrimination on grounds of nationality set out in Article 21.2 of the Charter, as Member States have no power to expel their own nationals from their territory or prohibit their entry into this, while such measures may be taken against nationals of other Member States. The expulsion of foreigners, whether they are European citizens or not, remains a sovereign right of EU Member States. The Charter is binding on Member States when they are acting within the scope of EU law as was the case here. As rightly pointed out by learned counsel for the appellants, Article 48.1 safeguards the principle of presumption of innocence, providing that every accused person shall be presumed innocent until proved guilty according to the law. According to Article 52.3, this right has the same meaning and scope as the right guaranteed by the ECHR.

	The reference to an "accused person" in Article 48.1 of the Charter presupposes the existence of criminal proceedings against a person to whom the commission of a criminal offense is attributed. Referring always to the administrative procedure which resulted in the administrative decision on their expulsion, the appellants were not accused, nor were criminal proceedings instigated so as to trigger the operation of Article 48 of the Charter. Nor can ECHR Article 6 be applied here, since the ECtHR has made it clear that Article 6 does not apply to deportation cases. And this, obviously, because decisions on entry, stay and deportation of aliens do not relate to the diagnosis of their civil rights or obligations or in a criminal charge within the meaning of Article 6.1. Rather, they are considered as public acts governed by public law (see *Mamatkulov and Askarov v. Turkey* 41 EHRR 494 (GC) and *Maaouia v. France*, Application No. 39652/98, 12.1.1999). This position is in agreement with the preamble to the very recent directive (EU) 2016/343 of the European Parliament and the Council of March 9, 2016 **on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,** which aims to strengthen the right to a fair trial in criminal proceedings by establishing common minimum standards for certain aspects of the presumption of innocence and the accused person's legal standing in the proceedings. Complementing in this way the legal framework provided by Charter and the ECHR, paragraph 1 of the recital of that Directive records the establishment of the principle of the presumption of innocence and the right to a fair trial in the Charter and in Article 6 of the ECHR[.]
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	Yes, articles 21.2, 45 and 48.