



The EU Referendum and Human Rights

A Briefing Note

June 2016

The Human Rights Consortium is a coalition of over 160 civil society organisations from across Northern Ireland representing a diverse range of communities, sectors and issues but which are united in our ongoing mission to work towards a human rights based society with a strong and inclusive Bill of Rights. As part of that work we seek to inform our members, civil society and the wider public about the application and protection of human rights across our society with a view to enhancing public understanding, support and utilisation of those rights. In light of the forthcoming UK referendum on whether to remain or leave the European Union and the dearth local human rights analysis of the current human rights protections emanating from the EU this briefing note seeks to fill that gap and highlight some of the human rights considerations of the forthcoming referendum.

Human Rights in the EU

The EU Charter on Fundamental Rights (Charter) is distinct from the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Charter finds its origins in the EU, rather than the Council of Europe. The supervising court of the Charter is the Court of Justice of the EU (CJEU). The ECHR is incorporated into UK law via the Human Rights Act 1998, which is binding on all bodies exercising public functions, but which recognises the supremacy of the UK Parliament. The supervising court for the ECHR is The European Court of Human Rights. The Charter is part of the body of law which makes up EU law and is incorporated into UK law via the European Communities Act 1972. In the event of inconsistency, EU law takes precedence over UK law, including legislation of the UK Parliament. The Charter therefore has great potential to be used for human rights protection and to hold bodies to account in the UK. The Northern Ireland Act 1998 makes it clear that the Northern Ireland Assembly does not have the power to make any law which is incompatible with any EU law obligation (including the Charter) or ECHR right. Human rights litigation and discussion in Northern Ireland and the UK is usually based around the ECHR and the Human Rights Act, however this briefing note will focus on the EU Charter and how this may impact

on rights protection if the result of the referendum on 23rd June 2016 is a 'leave' vote.

What is the Charter?

The Charter was initially conceived of as a political declaration designed to identify fundamental rights in the EU to emphasise their importance and make them more visible to citizens. Prior to the Charter entering into force, the jurisprudence of the CJEU had recognised fundamental rights as an important feature of EU law. For example, in 2003 the CJEU made it clear that 'according to settled case law, fundamental rights form an integral part of the general principles of the law, whose observance this Court ensures'.¹ The jurisprudence of the CJEU had long recognised that both institutions of the EU and member states (when implementing EU law) should give effect to the fundamental rights recognised by the court. In defining those rights, the CJEU drew inspiration from the constitutional traditions common to the Member States and from the international human rights treaties to which member States were party. As all member states of the EU are required, as a precondition to accession, to sign and ratify the ECHR, this underpins a number of the rights in the Charter. The Charter consolidated into a single document the substantive and procedural rights derived from EU law; contained in the ECHR; and those rights derived from the common constitutional traditions of EU member states as general principles of EU law. Furthermore, it codified the rights associated with EU citizenship and take into account the rights of the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.²

The Charter is accompanied by extensive Explanations which do not have the status of law, however, they are 'a valuable tool of interpretation intended to clarify the provisions of the Charter'.³ The Explanations tie the rights contained in the Charter to their originating legal source whether in EU treaties, other legal sources in the EU or member states or other international agreements. The Charter was brought into legal force by the Treaty of Lisbon in 2007 and now forms part of the foundational law of the EU, having the same legal value as the Treaties – which are the foundational documents of EU law setting out the legal basis and scope of EU competences.⁴ Article 6 of the Lisbon Treaty states that the Charter does not in any way extend the competences of the EU as defined in the Treaties.

Did the UK negotiate an opt out to the Charter?

Protocol 30 on the Application of the Charter of Fundamental Rights of the EU to UK and Poland clarified how the Charter was to be interpreted. It has often been referred to as an 'opt out' to the Charter by the UK and Poland, but this is incorrect. In fact, this Protocol provides a clarification that the Charter does not *extend* the powers of the CJEU or UK courts to find that UK laws or administrative practices are inconsistent with the Charter. It further states that nothing in Title IV of the Charter – the solidarity rights – creates rights that can be used to make a claim

¹ Cases C-20/00 *Booker Aquaculture Ltd and C-64/00 Hydro Seafood GSP Ltd v The Scottish Ministers* CJEU (10 July 2003)

² Annex IV of the European Council Conclusions (Cologne, 3-4 June 1999), *European Council Decision on the Drawing Up of a Charter of Fundamental Rights of the European Union*

³ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02

⁴ Article 6 Consolidated Version of the Treaty on European Union [2008] OJ C115/13

through the courts, unless those rights already exist in UK law. This distinction replicates the language of the Charter between 'rights' and 'principles' (see What is the difference between 'rights' and 'principles' in the Charter?) and helps clarify this distinction. Protocol 30 is recognised as an interpretative tool to underscore the limited application of the Charter.⁵

What Rights are protected by the Charter?

The substantive rights contained within the Charter fall under six titles. The articles which correspond to rights protected in the ECHR are indicated in blue.

- **Title I: Dignity**
 - Article 1 – Inviolability of human dignity
 - Article 2 – Right to life

- **Title II: Freedoms**
 - Article 3 – Right to integrity of the person
 - Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment
 - Article 5 – Prohibition of slavery and forced labour
 - Article 6 – Right to liberty and security of the person
 - Article 7 – Respect for private and family life
 - Article 8 – Protection of personal data
 - Article 9 – Right to marry and found a family
 - Article 10 – Freedom of thought, conscience and religion
 - Article 11 – Freedom of expression and information
 - Article 12 – Freedom of assembly and of association
 - Article 13 – Freedom of arts and science
 - Article 14 – Right to education
 - Article 15 – Freedom to choose an occupation and right to engage in work
 - Article 16 – Freedom to conduct a business
 - Article 17 – Right to property
 - Article 18 – Right to asylum
 - Article 19 – Protection in the event of removal, expulsion or extradition

- **Title III: Equality**
 - Article 20 – Equality before the law
 - Article 21 – Prohibition of discrimination
 - Article 22 – Respect for cultural, religious and linguistic diversity
 - Article 23 – Equality between women and men
 - Article 24 – Rights of the child
 - Article 25 – Rights of the elderly
 - Article 26 – Integration of persons with disabilities

- **Title IV: Solidarity**
 - Article 27 – Workers' right to information and consultation
 - Article 28 – Right of collective bargaining and action
 - Article 29 – Right to access placement services
 - Article 30 – Protection in the event of unjustified dismissal
 - Article 31 – Fair and just working conditions

⁵ Report of the House of Commons European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: A State of Confusion* (HC 2013-14 979)

Article 32 – Prohibition on child labour and protection of young people at work
Article 33 – Family and professional life
Article 34 – Social security and social assistance
Article 35 – Health care
Article 36 – Access to services of general economic interest
Article 37 – Environmental protection
Article 38 – Consumer protection

- **Title V: Citizen's Rights**

Article 39 – Right to vote and stand as a candidate at elections to the European Parliament
Article 40 – Right to vote and to stand as a candidate at municipal elections
Article 41 – Right to good administration
Article 42 – Right of access to documents
Article 43 – Right to refer matters to the European Ombudsman
Article 44 – Right to petition
Article 45 – Freedom of movement and residence
Article 46 – Diplomatic and consular protection

- **Title VI: Justice**

[Article 47 – Right to an effective remedy and to a fair trial](#)
Article 48 – Presumption of innocence and right of defence
Article 49 – Principles of legality and proportionality of criminal offences and penalties
Article 50 – Right not to be tried or punished twice in criminal proceedings for the same offence

Title VII sets out the general provisions governing the interpretation and application of the Charter.

The Charter therefore contains a much more extensive set of rights than those contained within the HRA, however its scope is limited to EU law matters. Some of the rights contained within the Charter have updated rights in line with the jurisprudence of the ECHR or other international human rights treaties. For example, respect for the right to privacy in Article 7 of the Charter includes 'communications' which is a more expansive term than 'correspondence' which is used in the ECHR. Similarly, in Article 9 of the Charter the right to marry and the right to found a family are disaggregated out to recognise arrangements other than marriage for founding a family. Whereas in the ECHR, Article 12 recognises the 'right to marry and to found a family'. Protocol 30 makes clear that none of rights in Title IV are justiciable in the UK except in so far as such rights are provided for in UK law. Some rights received enhanced protection through the Charter. For example, the protections relating to privacy, specifically data protection and retention, have been augmented by the CJEU. In a decision in 2014, the CJEU found that an EU directive which required Member States to retain a significant amount of telecommunications data was contrary to the Charter. It was a strong judgment that emphasised that although the essence of the rights

contained in articles 7 and 8 of the Charter were protected, there was a disproportionate interference with these rights.⁶

When does the Charter apply?

Article 51 clarifies that the Charter applies to institutions and bodies of the EU and Member States only when they are *implementing* EU law. This article also makes clear that the Charter does not establish any new power for the EU. The Explanation on article 51 states: 'it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights ... is only binding on the Member States when they act in the *scope* of Union law'. The issue of scope of the application of Charter was addressed by the CJEU in *Fransson*.⁷ The CJEU using the Explanation decided that: 'fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law'. This decision equates 'implementation of EU law' with 'within the scope of EU law'.

Unlike the HRA which is binding on all public bodies and can be used to question the human rights compliance of any law passed by the UK Parliament, the application of the Charter is limited to scope of EU law. The scope of EU law is defined by the treaties, as interpreted by the CJEU. The Charter does not cover areas of UK law which are outside the scope of EU law. This is a technical but important point and means that the application of the Charter, and the fundamental rights, it protects is rather limited. Where a UK law within the scope of EU law (for example relating to VAT or voting in European Parliament elections) interferes with a right protected in the Charter, it is possible for a court to disapply that law if necessary to ensure the right is protected. However, if the subject matter of the UK law is outside the scope of EU law and would appear to interfere with a right set out in the Charter (eg, the right to protection of personal data), it is not possible to raise a claim of interference with this right as the Charter can only be used in relation to matters relating to EU law. (It may, however, be possible to use the HRA in some circumstances.) Whether something falls within or outside the scope of EU law can be complex. Where there is doubt and confusion it can be a matter for the Court to clarify. If necessary, the UK courts may make use of the 'preliminary reference' procedure to ask the CJEU to adjudicate on whether a matter falls inside the scope of EU law. The CJEU has not consistently taken an expansive approach to this issue, particularly when deciding cases under the Solidarity Title of the Charter, and has regularly found that a rights claim cannot be made as the issue is beyond the scope of EU law.⁸

What is the difference between 'rights' and 'principles' in the Charter?

There are some areas of confusion within the Charter between which elements are 'rights' and which are 'principles'. The Explanations state that 'subjective rights shall be respected, whereas principles shall be observed'. Rights are directly enforceable and can be used to invalidate EU law or national law within the scope of EU law and apply between private parties. Principles, on the other hand, may be implemented through legislative and other acts of the EU and Member States,

⁶ C-293/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* CJEU Grand Chamber (8 April 2014)

⁷ C-617/10 *Åklagaren v Hans Åkerberg Fransson* CJEU Grand Chamber (26 February 2013)

⁸ C-134/12 *Ministerul Administrației și Internelor (MAI) v Corpul Național al Polițiștilor* CJEU (10 May 2012)

but are merely interpretative provisions within the Charter and 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.⁹ Therefore, principles 'do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities'.¹⁰

It is not always clear which articles within Charter relate to rights and which relate to principles and even experts in this area of law can be in dispute. Therefore, it is likely that this issue would have to be decided on by the CJEU on a case by case basis. This was clear in the evidence given to the House of Commons European Security Committee.¹¹ Prof Paul Craig giving evidence to the Committee stated: 'even when the court does come around to delineating more specifically the Charter rights that are only principles, one should not conclude that they will be devoid of legal impact'.¹²

What is the effect of the Charter?

As a document of equivalent legal status as the treaties, the Charter is directly effective in the UK through s2 of the European Communities Act 1972. As with other provisions of EU law, where there is a conflict with a domestic legal provision, the Charter will take precedence and the domestic law will be set aside to the extent required to effect to the EU law obligation flowing from the Charter. The Charter can be used to interpret EU law and any national measure giving effect to EU law by the CJEU and by the UK courts. Similarly, it is possible to use the Charter to quash an EU law. The CJEU can, for example, invalidate EU legislation or other measures of EU bodies for non-compliance with the Charter. Moreover, the national courts of the Member States (including in the UK) can use the Charter to challenge national legislation and decisions of public authorities which are within the scope of EU law. Where a cause of action was possible under both the HRA and the Charter in relation to a piece of primary legislation, there would be an added advantage to bringing that action under the Charter as it would require the court to disapply any law to the extent necessary to vindicate the Charter right.¹³ Whereas, any similar claim under the HRA would only permit a Court to make a 'declaration of incompatibility' which would not affect the 'validity, continuing operation or enforcement' of the legislation against which it was given and nor would it place direct obligations on the parties to such an action.¹⁴

The HRA in section 6 places an obligation on public bodies to ensure they are working in compliance with Convention rights. There is no standalone cause of action for a breach of rights against a private body.¹⁵ The EU Charter is not limited to public bodies and like other areas of EU law, many of the rights are directly effective between private parties.¹⁶

What rights exist in EU law?

⁹ Article 52(5) of the Charter of Fundamental Rights

¹⁰ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02

¹¹ Report of the House of Commons European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: A State of Confusion* (HC 2013-14 979)

¹² At paragraph 96 of the Report

¹³ Following on from the decision of the House of Lords in *Factortame* and subsequent decisions.

¹⁴ Section 4 of the Human Rights Act

¹⁵ It may however be possible to raise human rights claims indirectly in litigation between private parties.

¹⁶ Case C-555/07 *Küçükdeveci v Swedex* [2010] IRLR 346

Many of the rights in the Charter have been expanded on through the directives and regulations of the EU and the law of the UK. Some of these rights are elaborated below, but there are many more areas where the EU has taken a role in ensuring the rights of people within the EU are protected.

- **Citizenship Rights**
The citizenship directive clarified how the right to family life operates when EU citizens move through the EU to work. It also put in place measures to protect non-EU citizen family members of EU citizens and allow them to travel and work within in the EU.
- **Right to Vote in EU and Municipal elections**
This right is linked to EU citizenship rights and is set out in the Treaty and in the Charter of Fundamental Rights. How it operates has been clarified in a directive of the EU and allows for EU citizens to vote in local and European Parliament elections wherever they live in the EU.
- **Environmental protection**
The EU has used regulations and directives to align EU law with the international agreements on climate change and the environment and these have included clarification on the right to environmental information and the need for public participation in environmental decision making.
- **Women's Rights**
EU laws make it clear that direct or indirect discrimination in terms of pay on grounds of sex is prohibited. This directive has been used to argue that work of equal value should be paid at the same rate between men and women. This has been important in redressing pay imbalances between male-dominated and female dominated jobs, where workers in male-dominated jobs often received enhanced wages which were not paid to workers in female-dominated jobs. These differences were found to be unjustifiable.
- **Workers' Rights**
Directives have clarified what the maximum working week should be for workers across the EU, to ensure that no one is forced to work unreasonably long hours. Similarly, EU law has clarified and protected workers' rights in a situation where the ownership of the employers business changes hands.

What would be the implications of a 'leave' vote?

The aim of the Charter was to increase visibility and place fundamental rights at the heart of the EU in all its areas of operation. It places a direct obligation on the EU institutions to assure human rights in all the work that they do and this obligation also applies to member states when operating within the scope of EU law. The Charter is limited in its scope, but it does add an important extra layer of rights protection in EU law. This limited scope and the complicated nature of the Charter rights have meant that it has not received the same level of attention as the HRA and it is perhaps underused in making human rights arguments to public bodies and in challenging laws.

If the UK were to vote to leave the EU, this would lead to a period of uncertainty as to application of EU law generally in the UK, including the Charter. There is a process in place for a two-year period of negotiation between the UK and the rest of the EU member states, so any decision to leave would not have immediate

effect. This period of negotiation could be used to clarify any continued uncertainty about the potential application of EU law in the UK.

Whether the Charter would continue to have any role in rights protection in the UK in the longer term would depend on the nature of the relationship between the UK and the EU. Two possible examples are identified below:

- **The 'Norway' model:**
the Charter would continue to have a function in the application of EU law within the UK, although how it operates would change. The other rights derived under EU laws would continue to operate insofar as they are necessary to ensure that the UK meets its obligations to access the EU market.
- **Complete independence from EU law and EEA:**
the Charter would no longer have direct effect in UK law, but would likely continue to have an interpretive function in the operation of EU law principles until such time as these were systematically replaced by local UK laws. Similarly, the other rights derived under EU law would continue until the UK parliament replaced or repealed those laws. The effect of the Charter would lessen over time.

What would be the impact on Northern Ireland law?

At the moment, the Northern Ireland Assembly and Executive is prohibited from making any law or decision which is not compatible with EU law, including the Charter of Fundamental Rights. If the outcome of the referendum was that the UK should leave the EU, then the Northern Ireland institutions would continue to be bound by EU law, including the Charter of Fundamental Rights during the two-year negotiation period. After that point, the extent to which the Northern Ireland institutions would be bound by any EU laws would depend on the options above: What would be the implications of a 'leave' vote?.

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