The Scottish Parliament
Pàrlamaid na h-Alba

EQUALITIES AND HUMAN RIGHTS COMMITTEE

AGENDA

7th Meeting, 2016 (Session 5)

Thursday 3 November 2016

The Committee will meet at 9.30 am in the Mary Fairfax Somerville Room (CR2).

1. **Departure of the UK from the European Union - implications for equalities and human rights:** The Committee will take evidence from—

   Lynn Welsh, Head of Legal in Scotland, Equality and Human Rights Commission;

   Judith Robertson, Chair, Scottish Human Rights Commission;

   and then from—

   Dr Tobias Lock, Senior Lecturer in EU Law, and Dr Cormac Mac Amhlaigh, Senior Lecturer in Law, University of Edinburgh;

   Prof Muriel Robison, Lecturer in Law, University of Glasgow;

   Prof Nicole Busby, Professor of Labour Law, University of Strathclyde.

2. **Departure of the UK from the European Union - implications for equalities and human rights (in private):** The Committee will consider the evidence received.

Claire Menzies
Clerk to the Equalities and Human Rights Committee
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Edinburgh
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The papers for this meeting are as follows—

Agenda Item 1

Paper from the Clerk	EHRiC/S5/16/7/1
SPICe Briefing: Brexit the impact of equalities and human rights (951KB pdf)	EHRiC/S5/16/7/2
PRIVATE PAPER	EHRiC/S5/16/7/3 (P)

Equalities and Human Rights Committee

7th Meeting, 2016 (Session 5)

Thursday 3 November 2016

Witness submission

Background

1. At its meeting on 6 October 2016, the Committee agreed to undertake a scoping session, with witnesses, on the potential impact for equalities and human rights in Scotland of the UK's departure from the European Union.

2. The Committee will hear from two panels of witnesses at this meeting on this subject.

Submissions received

3. Dr Tobias Lock, Senior Lecturer in EU Law at the University of Edinburgh has provided a written submission in advance of this session.

4. This is attached in the Annex to this paper, for information.

Claire Menzies
Clerk
3 November 2016

What are the human rights implications of Brexit?

Departure of the UK from the European Union - implications for equalities and human rights

Evidence to the Equalities and Human Rights Committee of the Scottish Parliament

Dr Tobias Lock*

Introduction

1. This submission is confined to an assessment of certain **legal questions** within the author's area of expertise.

2. Much of the following will depend on the future relations between the UK and the EU and the intensity of cooperation between them. In the absence of concrete proposals from the Government regarding these future relations, it is necessary to make a number of assumptions in order to frame the following remarks.

3. First, it is assumed that the UK will cease to be bound by the EU Treaties and consequently by the EU Charter of Fundamental Rights.

4. Second, it is assumed that the future relationship between the UK and the EU will not include express treaty obligations concerning fundamental rights protection. While this is, of course, theoretically possible, it is unlikely given that the closest known relationships between the EU and third countries (the law of the European Economic Area and the law governing the relations between the EU and Switzerland) do not make the Charter binding.

5. Third, it is assumed international treaties on which these future relations will be based will not be directly effective in the UK legal order and will not take primacy over domestic UK law (including statute) in case of conflict.

6. Fourth, it is assumed that recourse to the European Court of Justice (CJEU) will no longer be available. This means that UK courts will no longer be able to request preliminary rulings from that court on the interpretation of points of EU law; nor will they be bound by its future case law.

7. Fifth, the Great Repeal Bill – announced at the recent Conservative Party conference – may temporarily retain many, if not all, EU rights. Nonetheless, these will no longer be underpinned by treaty obligations. Depending on the exact terms of the Great Repeal Bill, they may become subject to executive repeal, e.g. through a Henry VIII clause. If this allowed the executive to decree a reduction in individual rights, this in itself would be problematic and should be avoided.

Implications of Brexit for human rights: general remarks

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8. Brexit will lead to a weakening of the legal human rights framework in the UK. It will remove numerous legal obstacles to a wide-ranging reduction in human rights standards. This is chiefly because the current human rights framework is to a large degree underpinned by EU Treaty obligations. This will be demonstrated in what follows.

9. The **main sources of EU human rights** are the EU Charter of Fundamental Rights, the EU Treaties (in particular Article 157 TFEU on equal pay), and the so-called general principles of EU law. These **primary law sources** are directly applicable and therefore judicially cognisable in the law of the UK thanks to s. 2 (1) of the European Communities Act 1972. If there is a conflict between them and domestic law, including statute, EU law prevails. It results in domestic law being disapplied as far as it conflicts with EU law (more details to follow).

10. In addition, there are a number of **EU equality directives**, in particular: the Race Equality Directive (outlawing racial discrimination)[1], the Framework Directive (outlawing discrimination on the basis of religion or belief, disability, age or sexual orientation as regards employment and occupation),[2] the Equal Treatment Directive (on equal treatment of men and women in matters of employment and occupation),[3] and a Directive extending the principle of equal treatment between men and women in the access to and supply of goods and services.[4] These Directives are not in and of themselves applicable in the law of the UK, but they have been transposed into domestic law by the Equality Act 2010.

11. The UK will leave the EU once a withdrawal agreement negotiated on the basis of Article 50 TEU has entered into force. Failing that, the UK will leave two years after Article 50 TEU has been invoked unless the two-year negotiating period is extended.

12. As a non-Member State, the UK will no longer be bound to comply with the Treaties, including the Charter and the general principles of EU law. It will therefore no longer be obliged to make them applicable within the UK's domestic legal order so that the European Communities Act 1972 can be repealed. If this happens, the Charter and other Treaty-based rights will no longer be available to individuals in the UK given that the legislative 'hook' for invoking these rights in domestic judicial proceedings will have disappeared.

13. Furthermore, the UK will **no longer be obliged to comply with the equal treatment directives**. Given that these directives have been transposed by Act of Parliament, however, they will not be immediately affected by Brexit. Yet Parliament

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22
[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[3] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[4] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

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will no longer be under any constraints from EU law if it wishes to modify or repeal the Equality Act 2010. In addition, domestic courts will no longer need to follow the CJEU's lead in the interpretation of equality law, so that over time the standards in the UK and in the EU may come to diverge. There are numerous examples for the advancement of equality law by the Court of Justice. The following two can illustrate this. In *P v S and Cornwall County Council* the Court of Justice held that discrimination arising from gender reassignment (which was the ground for the claimant's dismissal) constituted 'sex discrimination'.[5] And in in *Coleman v Attridge Law* the Court of Justice held that discrimination of a mother because of her son's disability constituted disability discrimination 'by association' and was unlawful under the Framework Directive.[6]

14. The **removal of the Charter** from the UK legal order will further weaken the human rights framework in a number of ways. It should be noted that the scope of the Charter is limited. According to Article 51 (1) CFR it applies to Member States only 'when they are implementing Union law.' The CJEU has interpreted this to mean that they are only bound to comply with Charter rights when they are acting in the scope of EU law.[7] This is the case either when a Member State is acting in pursuance of an EU law obligation, e.g. transposing a Directive into national law or applying a Regulation[8], or when a Member State is derogating from one of the fundamental freedoms of the EU.[9] Where this is not the case, the Charter does not apply.[10]

15. First, it will lead to a **reduction in substantive rights** available to persons living in the UK. The Charter includes numerous rights not protected by the Human Rights Act 1998 (HRA). These include a guarantee of human dignity; a right to physical and mental integrity; a prohibition on human trafficking; the right to conscientious objection; a right to marry that is not restricted to different-sex couples; a right to asylum; and the social protections contained in Title IV of the Charter.[11] In so far as the Charter mirrors the rights protected by the HRA, the loss of the Charter is likely to lead to tangible losses of rights in three areas: data protection law (see next part on privacy); the right to a fair trial – which is broader under the Charter than under the HRA in that it includes administrative proceedings; and migration law (see next part on family life).

[5] Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170.
[6] Case C-303/06 *S. Coleman v Attridge Law and Steve Law* ECLI:EU:C:2008:415.
[7] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.
[8] See e.g. Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* ECLI:EU:C:2011:865.
[9] Case C-390/12 *Pfleger* ECLI:EU:C:2014:281, paras 35-37.
[10] As for instance in Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126 or Case C-265/13 *Torralbo Marcos v Korota* ECLI:EU:C:2014:187; on this case law in more detail see e.g. Filippo Fontanelli, 'Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and 'non-preclusion' troubles loom large' (2014) 39 European Law Review 782.
[11] A further right contained in the CFR and not guaranteed by the HRA is the right not to be punished twice, see Article 50 CFR, even though the rule against double jeopardy exists at common law and is also protected by statute (see Criminal Justice Act 2003; Double Jeopardy (Scotland) Act 2011).

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16. Second, it will lead to a **loss of EU law remedies**. The disappearance of the Charter from the UK legal order will end the possibility of reviewing Westminster primary legislation as to its compliance with Charter rights where the legislation was enacted within the scope of EU law. The case of *Benkharbouche and Janah* is instructive for the Charter's procedural strength.[12] This Court of Appeal decision dealt with the question whether the right to a fair trial – guaranteed in Article 6 ECHR and in Article 47 CFR – can be invoked in order to restrict the scope of the State Immunity Act 1978. The two claimants respectively worked as a cook and a member of the domestic staff of two foreign embassies in London. They brought claims of unfair dismissal, failure to pay the minimum wage, breaches of the Working Time Regulations 1998, racial discrimination and harassment, and arrears of pay. The State Immunity Act confers general immunity from jurisdiction on other states, i.e. in strict application of the Act neither claim could be successful as the respondents were immune from jurisdiction.

17. The Court of Appeal considered whether this general immunity from jurisdiction was a) compatible with Article 6 of the ECHR as guaranteed by the HRA; and b) with Article 47 of the Charter of Fundamental Rights. Both provisions are nearly identically worded and guarantee the right to fair proceedings, implicit in which is a right of access to a court. The Court of Appeal recognised that these rights can be limited and that immunity from jurisdiction – as required by international law – can be such a limit. However, it came to the conclusion that the limitations on these rights went too far and were disproportionate.

18. The judgment revealed stark differences in the consequences of claims based on the HRA and claims based on the Charter. Unfair dismissal, failure to pay the minimum wage, and arrears of pay are based solely on domestic (English) law, whereas the claims based on the Working Time Regulations and racial discrimination and harassment are based on domestic law implementing EU directives. Hence those parts of the claims came within the scope of EU law and Charter rights could be invoked in their regard.

19. As far as the claims based on English law were concerned, the Court of Appeal made a declaration of incompatibility under the HRA. This means that the claimants still lost their case as far as these claims are concerned, but there is a prospect that Parliament will amend the State Immunity Act and make it human rights compatible for future cases. By contrast, as far as the claims based on EU law were concerned, the Court of Appeal 'disapplied' the State Immunity Act, i.e. it did not consider the two respondents immune from jurisdiction, so that a remedy can be granted to them. This is because EU law – in sharp contrast to the law of the ECHR, which the HRA incorporates – has primacy over conflicting national law.

20. *Beankharbouche and Janah* demonstrates that the remedies available under EU law – disapplication of the Act of Parliament concerned resulting in the claimant

[12] *Benkharbouche and Janah* [2015] EWCA Civ 33; the same effects could be observed in *Google v Vidal-Hall and others* [2015] EWCA Civ 311.

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succeeding in her claim – are stronger than under the HRA, where in the absence of a possibility to 'read down' the Act, the best a claimant can hope for is a declaration of incompatibility, which nonetheless results in the claimant losing their case. Furthermore, one should mention that the Charter opens up the possibility of suing for damages under EU state liability rules.[13] However, this option is likely to remain more theoretical than practical given the high hurdles a claimant must overcome. Not only must he convince a court that there has been a breach of his Charter rights by a Member State authority acting within the scope of EU law and that this has caused him to suffer damage. He must also convince the court that this breach of EU law was 'sufficiently serious'[14], which in practice is very difficult to do.[15]

21. Third, Brexit will make it **impossible for persons living in the UK and for the UK itself to effectively challenge EU legislation which infringes human rights**. Despite Brexit, some EU legislation may continue to be binding on the UK and within the domestic legal order because a future UK-EU relationship may make this necessary. For instance, EEA membership is founded on the principle of homogeneity, which means that EU legislation is routinely transformed into EEA law by annexing it to the EEA Agreement.[16] Yet there is no way of challenging it in the Court of Justice for persons living in EEA countries. The same would be true if e.g. the UK were to continue to take part in the European Arrest Warrant.

22. Fourth, Brexit will **remove practical and legal obstacles** to human rights reform. As long as the Charter – which incorporates all rights in the HRA – is binding, albeit in a limited way, there is not much point in reducing the rights contained in the HRA as this would only be effective in some cases – those not arising within the scope of EU law – but not in others. Furthermore, Brexit will remove the legal obligation arising from EU law to be signed up to the European Convention on Human Rights.[17]

Losses of substantive human rights law

23. The protection of the Charter is particularly strong in the area of **data protection law.** In this field the Charter provides 'added value' compared with the HRA. In contrast to the HRA the Charter contains an express right to data protection in Article 8. This added value came to the fore in the High Court's decision *Davis and others v Secretary of State for the Home Department*, where the compatibility of the Data Retention and Investigatory Powers Act 2014 (DRIPA) with Articles 7 and 8 CFR was at issue. Parliament enacted DRIPA in response to the CJEU's declaration that the EU Data Retention Directive 2006/24/EC was incompatible with

[13] EU state liability law was introduced in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428 and refined in Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1996:79.
[14] This requirement was introduced in *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 13).
[15] See e.g. Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? : An Assessment 20 Years after Francovich' (2012) 49 Common Market Law Review 1675.
[16] See Article 102 EEA Agreement.
[17] On that obligation see e.g. Kanstantsin Dzehtsiarou and Tobias Lock (eds.), *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights* (2015) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487.

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the Charter and therefore invalid in the case of Digital Rights Ireland. DRIPA mirrors the Data Retention Directive in many respects in that it gives the Home Secretary wide-ranging powers to require telecommunications operators to retain all communications data – though not content - for up to twelve months. The High Court considered that DRIPA had to be considered an implementation of Union law according to Article 51 (1) CFR given that due to Directive 95/46/EC the field of data protection fell within the scope of EU law. The High Court was therefore in a position to measure DRIPA and its implementing regulations by the substantive standards of the Charter set out in Articles 7 and 8 CFR and defined by the CJEU in Digital Rights Ireland. The CJEU had stipulated strict standards to be complied with in order for an interference with Articles 7 and 8 CFR to be justified. It noted in particular that the measures foreseen in the Data Retention Directive went too far and therefore disproportionate as they were not strictly necessary to achieve the aim of fighting serious crime and terrorism. It required in particular that minimum safeguards to protect the data retained had to be in place. In addition, the Directive provided for far-reaching collection of everyone's communication data in a generalised manner without exception, which was disproportionate. Moreover, the Directive did not contain objective criteria for access to the data by national authorities, which according to the CJEU would need to be made dependent on prior review carried out by a court or other independent body. Finally, the Directive failed to make the retention period in each case subject to objective criteria. Given that DRIPA failed to comply with these standards, the High Court declared it inconsistent with EU law and disapplied it.

24. The case has been appealed to the Court of Appeal, which requested a preliminary ruling from the CJEU. While the ruling is still pending, the Advocate General's opinion followed a similar line of argument as the High Court.

25. Another example for the Charter's added value is the case of *Google Spain* in which the Court of Justice interpreted Articles 7 and 8 of the Charter to include a **'right to be forgotten'**.[18] By considering internet search engines to be data processors under Directive 95/46,[19] the CJEU enabled individuals to invoke Charter rights against a private operator.[20] It ruled that 'the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful'.[21] This duty exists where a data subject requests the removal of a link from the list of results following a balancing exercise 'having regard to all the circumstances of the case

[18] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.
[19] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[20] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (n 18) para 60.
[21] Ibid, para 88.

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[…] the information and links concerned in the list of results must be erased'.[22] Key factors are the continued relevance of the information yielded by the search, particularly in light of the length of time elapsed since they were first published[23] and the role of the data subject played in public life.[24] It is particularly remarkable that the CJEU held that the rights guaranteed in Articles 7 and 8 CFR 'override, as a rule, not only the economic interests of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name.[25]

26. However, the **impact of Brexit on data protection law may be limited**. This is because the Court of Justice has been adamant that any processing of personal data belonging to persons living in the EU, which is taking place outside the EU, can only happen in third countries that offer 'adequate protection'.[26] The Court interpreted the term 'adequate protection' in light of the Charter, which results in a third country being required 'to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter'.[27] It follows from this that a third country must in effect comply with Charter standards in order to qualify. The logic behind the CJEU's ruling is that if third countries did not have to comply with EU standards in this regard, these standards could easily be circumvented by transferring data to third countries.[28] Hence if UK companies wanted to continue to do business with clients in the EU and if any processing of personal data was involved, this would only be possible if the UK provided equivalent standards.[29]

27. Overall, the main loss is a **loss of potential**. The Charter has only been in force since December 2009 and consequently there has not been much time for significant case law to develop. After Brexit, the UK is unlikely to take part in the further development of Charter rights and therefore miss out on the potential the Charter offers.

Implications for equality law

28. Given that equality law is largely effective in the UK through the Equality Act 2010, withdrawal from the EU will not in itself lead to any changes. However, the UK will no longer automatically benefit from changes to EU equality law. These changes may result from advancements in the case law of the European Court of Justice (ECJ). For instance, the ECJ introduced the notion of 'discrimination by

[22] Ibid, para 94.
[23] Ibid, para 93.
[24] Ibid, para 97.
[25] Ibid.
[26] In the absence of adequate protection such transfers can still take place, but are subject to much stricter conditions, such as the consent of the data subject, see Article 26 of Directive 95/46.
[27] Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.
[28] Ibid, para 73.
[29] This line of reasoning may soon be confirmed by the Court of Justice in Opinion 1/15 (pending) on whether the EU's international agreement with Canada on Passenger Name Records is compatible with fundamental rights to private and family life and data protection. The Court's Advocate General has already opined that this was not the case, see Opinion 1/15 *Opinion of Advocate General Mengozzi* ECLI:EU:C:2016:656.

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association'[30] and improved the protection of trans people against discrimination very early on.[31] Furthermore, the UK will not necessarily take part in legislative developments taking place at the EU level.

Edinburgh, 26 October 2016

P v S and Cornwall County Council Case C-13/94 ECLI:EU:C:1996:170
S. Coleman v Attridge Law and Steve Law Case C-303/06 ECLI:EU:C:2008:415

[30] Case C-303/06 *S. Coleman v Attridge Law and Steve Law* ECLI:EU:C:2008:415.
[31] Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170

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The Human Rights Implications of the European Union referendum

Authored by Dr Tobias Lock, University of Edinburgh
for the Scottish Human Rights Commission

May 2016

The views expressed in this report are the views of the author, and do not necessarily reflect the views of the Scottish Human Rights Commission.

ANNEX

The Human Rights Implications of the EU Referendum

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The Human Rights Implications of the EU Referendum

Summary

1. In case of a vote to leave the European Union (EU), the United Kingdom would not leave the EU overnight. Instead, European Union law – and with it EU fundamental rights law – would (most probably) continue to apply until a date specified in a withdrawal treaty between the EU and the UK.
2. EU law protects fundamental rights chiefly through the Charter of Fundamental Rights and through EU anti-discrimination law laid down in various directives.
3. The Charter is binding on the EU and its institutions in all circumstances; it is binding on public authorities in the UK and Scotland only when they are implementing EU law. This means that the Charter does not (and cannot) act as the sole source of human rights protection at the national level.
4. The UK does not have a general opt-out from the Charter under Protocol 30 to the Treaty of Lisbon. It is still unclear, however, whether the UK has an opt-out from chapter IV of the Charter (on solidarity rights) under this Protocol.
5. In case of a withdrawal from the EU, the Charter would no longer apply to the UK or in Scotland. Individuals living here would therefore no longer be able to invoke Charter rights in national courts. Given that – in contrast to rights guaranteed by the Human Rights Act – these EU rights can result in Westminster legislation being dis-applied by a national court, withdrawal from the EU would result in a tangible loss of human rights *protection in procedural terms*.
6. In addition, withdrawal from the EU there would also result in a *substantive reduction* of the human rights protection available to individuals living in the UK and Scotland.
    a. The Charter of Fundamental Rights guarantees more rights than the Human Rights Act. Some rights, such as the 'right to be forgotten' and other data protection rights would disappear from UK and Scottish law unless they were replaced either by way of legislation or by judicial developments. Other rights – in particular social rights – have not yet been fully defined by the Court of Justice of the EU. It is clear, however, that a withdrawal from the EU would deprive people living in Scotland and the UK from benefiting from any future development in this area.
    b. In case a British Bill of Rights leads to a procedural or substantive reduction in the human rights protection in the UK

and Scotland, the Charter would have a mitigating effect, which would be lost in the event of a withdrawal from the EU.

c. The EU's anti-discrimination directives are incorporated into the Equality Act 2010, which –in the absence of parliamentary repeal – would continue to protect individuals even after an EU withdrawal. However, the directives would no longer underpin anti-discrimination law in the UK so that a repeal or reduction in standards would become easier for Parliament to attain. In addition, the UK would not have to follow future developments at the EU level so that individuals might be deprived of advancements in anti-discrimination law happening there.

d. Furthermore, individuals living in the UK would no longer be capable of challenging EU legislation on the basis of the Charter even though some EU legislation might remain applicable within the UK after a withdrawal from the EU.

ANNEX

The Human Rights Implications of the EU Referendum

1. Background: the EU referendum and the withdrawal process

On 23 June 2016 the electorate will be asked whether the United Kingdom should remain a member of the European Union (EU) or leave the European Union. Article 50 of the Treaty on European Union – introduced by the Treaty of Lisbon – provides that a Member State 'may decide to withdraw from the Union in accordance with its own constitutional requirements'. Within the UK legal order, the referendum finds its legal (and constitutional) basis in the European Union Referendum Act 2015.

The referendum outcome itself would not have any immediate legal consequences for the UK's EU membership. Should there be a 'leave' vote, the UK would not leave the EU overnight. Instead, the Westminster government would need to take the necessary steps for withdrawal from the EU (a so-called 'Brexit') outlined in Article 50 of the Treaty on European Union.[32] This provision requires a Member State intending to withdraw from the EU to notify the European Council of its intention to do so. Once this has been done, a period of negotiations starts. A reading of Article 50 suggests that normally the legal ramifications of withdrawal are dealt with by an international agreement 'setting out the arrangements for […] withdrawal' between the withdrawing Member State (the UK) and the European Union. The provision does not stipulate what precise questions the withdrawal agreement would deal with. What is clear, however, is that the UK's membership of the EU comes to an end when the withdrawal agreement enters into force.

Article 50 further states that a withdrawal agreement should take into account the future relationship of the withdrawing Member State with the Union. Three basic scenarios are conceivable for this future relationship: 1) the UK and the EU could conclude a specific and bespoke 'deal' (which can range in intensity

[32] The wording of Article 50 is as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

from a basic free trade deal to 'quasi-membership'); 2) the UK could join the European Free Trade Association and the European Economic Area (together with Norway, Iceland, and Liechtenstein)[33]; 3) no specific deal is agreed and both the UK and the EU rely on international law (e.g. WTO law) to govern their relationship. If an agreement is made as to the future EU-UK relationship, this can either be done as part of the withdrawal agreement itself or in a separate agreement. Again, nothing in Article 50 pre-determines the shape and form of this future relationship.

Once the withdrawal agreement enters into force, the EU Treaties (and with them all EU law, including EU fundamental rights law) would cease to apply to the UK. The withdrawal agreement could, however, stipulate that certain legal obligations under the EU Treaties continue to bind the UK and the EU and for how long this should be the case.

It is additionally worth noting that Article 50 limits the period of negotiations to two years. If the UK and the EU cannot agree within two years of notification of the intention to withdraw, the Treaties equally cease to apply to the UK, unless the period for negotiations is extended.

This paper written for the Scottish Human Rights Commission will at 2) briefly introduce the key features of the EU legal system before at 3) sketching the development of human rights[34] protection in EU law; it will then at 4) introduce how fundamental rights are protected at the EU level and at 5) elucidate on how these EU fundamental rights are woven into the legal orders of the UK and Scotland. The paper discusses at 6) whether the UK government's renegotiation of the UK's EU membership affects human rights. The final section will at 7) present the possible changes that a withdrawal from the EU might bring for fundamental rights protection in the UK and Scotland.

[33] Note that Switzerland is a member of EFTA, but not the EEA; the Swiss-EU relationship is regulated through a large number of bilateral agreements and in many respects resembles the relationship of the EU with the EEA countries.

[34] Note that the terms 'human rights' and 'fundamental rights' are used interchangeably throughout this paper.

2. Key features of the European Union legal system

The European Union legal system is characterised by a quasi-federal constitutional structure. EU primary law consists of the EU Treaties (the Treaty on European Union; the Treaty on the Functioning of the European Union; and the Euratom Treaty), the Charter of Fundamental Rights and the general principles of Union law. EU secondary law must be in compliance with EU primary law. It consists of regulations, which are directly applicable in the Member States; directives, which are binding on the Member States as to the result to be achieved and need to be transposed into national law (regulations and directives are EU legislative acts); and decisions, which usually have an addressee. The prime example for these would be the European Commission's decisions in the field of competition law (e.g. a decision to fine two companies for price-fixing). There are also non-binding recommendations and opinions.[35]

If there is a conflict between European Union law and national law, European Union law takes primacy over national law. This means that a national court must not apply the conflicting provision of national law, but is obliged to apply Union law instead.[36] Notably, this does not mean that the national court must declare conflicting national law to be void; it is only not applicable in case of conflict. The doctrine of primacy was developed by the Court of Justice of the EU in the landmark ruling of *Costa v ENEL*. It was later interpreted to extend to all provisions of national law, including national constitutional law.[37] Moreover, the Court of Justice held that all national courts – no matter how low in the hierarchy of courts they find themselves – are under the obligation to disapply national law conflicting with EU law.[38] Viewed from the perspective of a national legal order, this shows the force of the principle of primacy: it must be given effect independently of procedural or jurisdictional constraints under national law. In fact, even in Member States such as the UK that do not allow for the judicial review of legislation, national courts are under the obligation to give effect to the primacy of EU law and disapply conflicting legislation.

In addition, European Union law is capable of having direct effect. This means that it can be invoked by individual claimants in the courts of the Member States. It is not necessary for national law to specifically provide for this. Instead, direct effect means that EU law can be self-executing. This was decided by the Court of Justice in the seminal case of *Van Gend en Loos*.[39] Two conditions must be met for a provision to have direct effect: it must be precise, clear and unconditional; and it must not entail additional implementing measures. Many EU law measures are in principle capable of

[35] See Article 288 TFEU.
[36] Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.
[37] Case 11/70 *Internationale Handelsgesellschaft v Vorratsstelle für Futter und Getreide* ECLI:EU:C:1970:114.
[38] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49.
[39] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

having direct effect: Treaty provisions; the provisions of the EU Charter; regulations; and, exceptionally, even directives where they have not been implemented within the implementation period.[40]

The UK's obligations under EU law have been transposed into national law by the European Communities Act 1972. The courts in the United Kingdom have held that Parliament has thereby accepted both the doctrine of primacy and the doctrine of direct effect. In its famous ruling in *Factortame* the House of Lords held that:

> If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the E.E.C. Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law […] Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply.[41]

This suggests that there are in principle no hurdles under UK law to invoke either doctrine in a national court.[42]

As implied in the previous paragraphs, due to direct effect much of European Union law can be enforced in the courts of the Member States. This is necessary chiefly because most European Union law is executed by Member State authorities. Where a court in a Member State has a question on the interpretation of a provision of EU law or doubts the validity of a piece of EU legislation, it can – and where the validity of EU law is concerned must - ask the Court of Justice for a preliminary ruling.[43] The answers given in such a ruling are binding. By contrast, direct access to the Court of Justice for individual claimants is very much restricted. They can only bring a direct action where an EU measure (usually a decision) is addressed to them; or if this is not the case, only where it is of direct and individual concern to them. This is a test that is very difficult to meet.[44]

EU law is further enforced by the European Commission. Where the Commission is satisfied that a Member State is not in compliance with its obligations it can bring that Member State before the Court of Justice.[45]

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[40] Case 41/74 *van Duyn v Home Office* ECLI:EU:C:1974:133.
[41] *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 AC 603 HL (per Lord Bridge).
[42] Note, however, that Lords Neuberger and Mance hinted at certain limits to this in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[43] Article 267 TFEU; courts of last instance are additionally under a duty to refer cases on the interpretation of EU law to the CJEU.
[44] See Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17; recently confirmed in Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625.
[45] Article 258 TFEU.

ANNEX

The Human Rights Implications of the EU Referendum

3. The development of human rights protection in the EU

The European Union is not a human rights organisation. Originally founded as an economic community, the protection of fundamental human rights was not an apparent concern for the original Member States and there was no mention made of human rights in the foundational Treaty of Rome.

Fundamental rights were instead developed as unwritten (so-called) general principles of EU law by the Court of Justice.[46] Subsequent Treaty revisions included express references to human rights in the Treaties[47] and the current version of the Treaty on European Union mentions the 'respect for human rights' both in the preamble and as one of the values on which the Union is founded.[48]

Moreover, the European Union adopted a Charter of Fundamental Rights, which became binding with the entry into force of the Treaty of Lisbon. The Charter expressly codifies the rights developed by the Court of Justice. The fundamental rights guaranteed in the Charter can be invoked by individuals before the European courts, but also before national courts. It is binding on the European Union and its institutions, as well as on the Member States, but only 'when they are implementing Union law'.[49]

While all Member States are bound by the European Convention on Human Rights (this is also a precondition for EU membership), the European Union itself is not (yet) a party to it even though the Lisbon Treaty foresees the EU's accession to it. Accession negotiations have encountered some difficulties following a decision by the Court of Justice of the EU, which declared that a draft agreement on EU accession was not compatible with the EU Treaties.[50] Hence the draft agreement will have to be re-negotiated before accession can take effect.

[46] Starting in 1969 with Case 29/69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57.
[47] Still found in Article 6 (3) TEU.
[48] See Article 2 TEU.
[49] For details see below.
[50] See Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

ANNEX

The Human Rights Implications of the EU Referendum

4. Fundamental rights protection at the EU level

a. The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights is the most prominent legal instrument for human rights protection in EU law. The Charter has the same legal value as the Treaties[51] and it is binding on all EU institutions. It is also binding on the Member States, but only when they are implementing Union law.[52] While this will be discussed in detail in the next section, it suggests that the main purpose of the Charter is to rein in the powers of the European Union rather than those of the Member States. This means that all measures taken by the EU's institution, including all EU legislation, must comply with the fundamental rights set out in the Charter. If an EU legal act fails to do so and cannot be interpreted in conformity with fundamental rights, it is declared invalid by the Court of Justice.

The Charter is legally independent from the European Convention on Human Rights (ECHR), but nonetheless closely connected to it. The fifty-four articles of the Charter incorporate (and partly update) the rights contained in the ECHR. Where Charter rights 'correspond' to rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'.[53] Crucially, however, this 'shall not prevent Union law providing more extensive protection'. This means that the Convention rights as interpreted by the European Court of Human Rights provide the minimum standard of human rights protection within the EU.

The Charter additionally guarantees a number of rights not found in the ECHR (at least as far as it is binding on the UK). These include freedom rights, such as a right to protection of personal data, freedom of the arts and sciences, the freedom of occupation and the right to conduct a business, and also a right to asylum and protection in the event of removal, expulsion or extradition as well as procedural rights, such as the right not to be punished twice.[54]

The Charter additionally replicates the rights of EU citizens, which can already be found in the EU Treaties.[55] And, more importantly perhaps, the Charter contains twelve articles in a chapter entitled 'solidarity'. These are provisions dealing with working conditions; access to social security and health care; prohibitions of child labour; the protection of young people at work and families; access to services of general economic interest. It also contains articles on environmental and consumer protection.

These provisions must, however, be read in light of an important distinction in the Charter between rights and principles. Many provisions in the 'solidarity' chapter are not fully fledged rights, but principles, i.e. they cannot be invoked in the courts without having first been implemented either by the Union or by the Member States. This means that, in contrast to rights, they are only

[51] Article 6 (1) TEU.
[52] On this see the next section.
[53] See Article 52 (3) CFR.
[54] See Articles 8, 13, 15, 16, 18, 19, 50 respectively.
[55] Articles 20-25 TFEU.

operative if either the Union or a Member State has legislated in an area – e.g. workers' rights – and even then, they can only be invoked in the interpretation of that legislation or in a review of its validity.[56] The Court of Justice has not yet clarified which provisions of the Charter, and in particular of the 'solidarity' chapter, contain rights and which contain principles, so that the law in this regard is still unclear.

The Court of Justice has found a number of legal measures of the European Union to be incompatible with Charter rights and declared them invalid, many in the broad area of data protection. For instance, it considered the EU's Data Retention Directive to be incompatible with the right to private and family life contained in Article 7 and with the right to data protection in Article 8 of the Charter.[57] This directive allowed national authorities to access individuals' electronic communication data – e.g. time, duration, location, source and destination of mobile phone calls – for up to two years after the communication had taken place. The Court considered this to be disproportionate and thus in violation of the Charter. In another case the Court took issue with a requirement contained in EU regulations that a number of personal details of the beneficiaries of agricultural subsidies had to be published online.[58]

In a similar vein, the Court of Justice declared invalid a Commission decision that decreed that companies that sign up to the so-called 'safe harbour principles' did not violate EU data protection law if they transferred personal data from the EU to servers the United States.[59] One of the key reasons for this finding were revelations that US intelligence services had accessed personal data transferred from the EU to the US by the company 'Facebook'.

The Court also held an exception in the Equal Treatment Directive[60] allowing insurers to take into account sex as a factor in the determination of insurance premiums to be incompatible with Articles 21 and 23 of the Charter, which prohibit discrimination on the basis of sex.[61]

The Court of Justice further extended Articles 7 and 8 of the Charter to include a 'right to be forgotten'.[62] As a result individuals can ask internet search engines to no longer display as part of their search results websites containing information about that person if it relates to events in the past which might prejudice the individual concerned.[63]

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[56] See Article 51 (5) TFEU.

[57] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238.

[58] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Eifert* ECLI:EU:C:2010:662.

[59] Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

[60] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

[61] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* ECLI:EU:C:2011:100.

[62] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.

[63] It should be pointed out that there are limits to such a request, in particular if the person concerned played an important role in public life.

b. EU anti-discrimination law

EU anti-discrimination law provides further protection for individuals. The original Treaty of Rome contained a provision outlawing unequal pay for men and women, which was subsequently complemented by EU legislation outlawing sex discrimination more generally.[64] In addition, the EU adopted directives outlawing race discrimination[65] and discrimination on the basis of religion or belief, disability, age or sexual orientation.[66] In many respects, EU anti-discrimination law has had more impact in practice than the Charter of Fundamental Rights. This is because it applies between private parties – mainly in employment relationships[67] – whereas the Charter is normally only binding on the Union and on the Member States.[68] In addition, anti-discrimination law is binding on the Member States at all times whereas the Charter only binds them when implementing Union law (see below).

c. Human rights mainstreaming

As pointed out in the introduction, human rights form part of the values on which the European Union is founded. Every state applying to join the EU must comply with these values, so that – in theory at least – all EU Member States must guarantee a minimum level of human rights protection in their legal orders.[69] Where they fail to do so, the European Treaties foresee a sanctions mechanism[70] even though this has never been used.

The EU Commission's strategy for implementing the Charter points out that the Union must be exemplary in making fundamental rights as effective as possible. Hence fundamental rights compliance forms part of the European Commission's 'Better Regulation Guidelines'.[71] Fundamental rights play an important part in the impact assessment of the various policy options available to the Commission before a concrete proposal is made. And each legislative proposal or other Commission measure must be checked for its compliance with the Charter of Fundamental Rights.

Human rights have also been mainstreamed into the external action of the European Union. The EU has appointed a special representative on human rights, whose task it is to increase the coherence, effectiveness and visibility

[64] See Article 157 TFEU; the current incarnations of that legislation are Gender Directive; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[65] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
[66] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[67] Note that race discrimination and gender discrimination are prohibited also in the supply of goods and services; whereas the remaining characteristics are protected only in the field of employment and occupation.
[68] The potential for horizontal effect of Charter rights has not yet been clarified by the Court.
[69] See Article 49 TEU.
[70] Article 7 TEU; the European Commission has introduced additional procedure designed to complement Article 7 TEU, see Commission Communication 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final/2.
[71] COM(2015) 215 final.

of human rights in EU foreign policy. The promotion of human rights features prominently in 'political dialogues' between the Union and non-Member States and it has been incorporated into various trade agreements concluded by the EU.

5. EU Fundamental rights protection in the UK and Scotland

a. The human rights landscape in the UK and Scotland

Human rights in the UK are chiefly protected by the Human Rights Act 1998 (HRA), which incorporates most of the rights contained in the ECHR by which the UK is bound.[72] The HRA is binding on all 'public authorities', but cannot be used to override Acts of Parliament. Where an Act of Parliament is contrary to one of the rights protected by the HRA, higher courts can make a 'declaration of incompatibility'. This leaves the Act of Parliament intact, but serves the purpose of pointing out that the legislation is problematic in human rights terms and gives Parliament the opportunity to rectify this. The HRA also provides for a fast track procedure to remove the incompatibility by way of a remedial (ministerial) order if there are compelling reasons for this.[73]

Furthermore, the EU's equality directives mentioned above have been incorporated into the Equality Act 2010. The Equality Act builds on previously existing and 'home-grown' anti-discrimination legislation, such as the various Race Relations Acts.[74] Its scope is wider than what is required by European Union law in that it prohibits discrimination on all protected grounds also in the supply of goods and services. European Union law, however, has considerably complemented and reinforced the development of anti-discrimination legislation in the UK. For instance, the prohibition on discrimination on the basis of age, religion or belief, and sexual orientation can be traced back to EU law.[75] The same can be said for the prohibition of discrimination because of gender reassignment.[76]

The situation differs as far as Acts of the Scottish Parliament are concerned: section 29 of the Scotland Act provides that the Scottish Parliament acts outside its competence if an Act is 'incompatible with Convention rights or with EU law' (i.e. it is *ultra vires*). The consequence is that such an Act 'is not law'. This provision therefore gives the courts the power to review Scottish legislation as to its human rights compatibility.

The following discussion focuses on the applicability of the EU Charter of Fundamental Rights in the UK and Scotland. It first shows that the UK does not have a general opt-out from the Charter; second, it details the types of

[72] It protects all the rights contained in the original ECHR except Article 13 (right to an effective remedy) and the rights contained in the first Protocol to the ECHR.
[73] See s. 10 HRA.
[74] The Race Relations Act 1965 was the first piece of anti-discrimination legislation in the UK.
[75] These grounds have only been covered since the implementation of the Race Directive and the Framework Directive (see n 65) into UK law.
[76] While not expressly provided for in EU law, this goes back to a decision by the Court of Justice interpreting sex discrimination to entail discrimination against transsexuals, see Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170.

scenarios in which the Charter is applicable to alleged fundamental rights violations committed by UK or Scottish authorities. This part also contains a case study demonstrating the different effects of the HRA and the Charter in a domestic setting. Third and finally, the discussion briefly addresses what a future British Bill of Rights might mean for the applicability of EU fundamental rights in the UK.

b. Does the UK have an opt-out from the Charter?

Protocol No 30 to the Lisbon Treaty, which deals with the application of the Charter to the UK and Poland, has by some been hailed as an opt-out of the UK from the Charter of fundamental rights. Its wording, however, does not say that the UK is not bound by the Charter. Instead it stipulates that the Charter 'does not extend the ability' of the Court of Justice or a national court to find that UK laws and practices are inconsistent with the fundamental rights 'that it reaffirms'. Given that the Charter is considered a codification of rights that already existed as 'general principles', the Court of Justice has held that the Protocol 'does not call into question the applicability of the Charter in the United Kingdom.' Hence the UK does not have a general opt-out from the Charter.

There is, however, some uncertainty as far as the Charter's solidarity chapter IV is concerned. The Protocol says that 'nothing in Title IV of the Charter creates justiciable rights' applicable to the UK except in so far as they have been provided for in UK law. The Court of Justice has not yet decided what the implications of this part of the Protocol are. On one reading, the wording suggests that – as far as the UK is concerned – the provisions on 'solidarity' cannot be considered rights, but mere principles. As explained above, principles offer weaker protection than rights in that they can only be invoked if they have first been implemented either by the Union or by the Member States. Whereas many of the provisions in chapter IV must probably be considered principles, the Protocol suggests that even if they are not, they are not judicially cognisable in the UK without recognition in national law. Hence if one adopted this reading of the Protocol one could conclude that the UK has a partial opt-out from the Charter. On the other hand, one could also regard this part of the Protocol as a mere confirmation of the status quo, i.e. that the Protocol does not *create* new solidarity rights, but that those rights already existent as general principles of EU law would continue to apply in the UK. There is thus a degree of uncertainty about the extent to which the provisions contained in chapter IV of the Charter are applicable in the United Kingdom.

c. What is the influence of the EU Charter in the UK?

Given that the UK has no general opt-out from the Charter of Fundamental Rights, the human rights guaranteed by it are applicable here. However, reflecting the fact that the European Union possesses only those powers that have been conferred upon it by the Member States[77] and given that the EU

[77] Article 5 TEU.

does not have power to legislate in the field of fundamental rights, the Charter is only binding on Member states in limited cases. Hence there are areas of national sovereignty over which EU law, including Charter rights, does not have influence.[78]

The Charter states that it is only binding on the Member States 'when they are implementing Union law'.[79] Bearing in mind that most EU law is carried out by Member State authorities, the basic idea behind this phrase is that in such scenarios the Member States are acting as the 'agents' of the Union; and if the Union is bound by the Charter, the Member States should be bound by it if they are acting on behalf of the Union. However, as will be demonstrated, this 'agency model' cannot explain all situations in which Member States must comply with the Charter.

A Member State is deemed to implement EU law when it acts within the scope of EU law. This is typically the case in two types of situations. First, situations where a Member State acts on the basis of EU law; and second cases where Member States derogate from European Union free movement law.

i. Member States acting on the basis of EU law

There is already a substantial body of case law concerned with the first type of situation. According to the leading decision in *Åkerberg Fransson* 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations'.[80] The most basic scenario in this regard is a Member State acting on the basis of an obligation laid down in European Union law, e.g. a regulation. The Court of Justice has held that a Member State was 'implementing Union law' even where it made use of a discretionary power given to it by Union law. Thus in the case of *N.S.*, which concerned the return of asylum seekers under the Dublin II Regulation,[81] the Court held that use of the discretionary power to process an asylum application even though under the regulation another Member State would be responsible for doing so, came within the scope of EU law so that Charter rights were applicable.[82] This category of cases includes, for instance, a situation where a Member State

[78] Article 53 of the Charter also suggests that the Charter, like the ECHR, constitutes a mere minimum standard of protection. However, the wording is deceptive: national fundamental rights that provide a stronger protection than the Charter cannot be invoked in order to circumvent the primacy of EU law. This was shown in the case of *Melloni* where Spain was not allowed to refuse the execution of a European Arrest Warrant (which was fully compliant with EU law requirements including Charter rights) on the basis that the Spanish constitution provided for better protection against extradition (in that case concerning trials in absentia), see Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

[79] See Article 51 (1) of the Charter.

[80] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.

[81] Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

[82] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* ECLI:EU:C:2011:865 para 68.

issues a European Arrest Warrant. Given that the legal basis for the European Arrest Warrant is found in EU law (in a so-called framework decision[83]), the Member State must comply with the rights laid down in the Charter when applying this framework decision. For example, it must not issue a European Arrest Warrant where the person to be arrested has already been convicted (or cleared) of the alleged crime.[84] Another example for this type of cases would be the recovery of unduly paid farm subsidies under the EU's Common Agricultural Policy.[85] These subsidies are administered by the Member States, and any claim for their recovery must be made by the relevant national authority (e.g. the Scottish Government for Scotland; the Rural Payments Agency for England). Again, the national authority must comply with the rights contained in the Charter, e.g. there has to exist an effective remedy before the courts allowing farmers to challenge such a claim.[86]

However, determining the scope of European Union law, and thus of the Charter, is not always straightforward as the case of *Åkerberg Fransson* itself demonstrates. That case concerned criminal proceedings brought for tax evasion. The defendant claimed a violation of the double jeopardy principle found in Article 50 of the Charter. The defendant had provided the national (Swedish) exchequer with false information leading *inter alia* to a loss in value added tax revenue. He was fined by the Swedish tax authorities and subsequently criminally prosecuted. The provision in the criminal code on which the prosecution was based pre-dated Sweden's EU membership and generically makes it an offence to 'provide false information to the [tax] authorities'. Even though the prosecution appeared to be based on Swedish law only, the Court of Justice considered it to constitute an implementation of Union law. This was because an EU directive places Member States under an 'obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion.'[87] In addition, Member States were under an obligation to counter illegal activities affecting the financial interests of the EU; and VAT revenue directly affects the EU budget.[88] Hence the Court of Justice held the Swedish provision of criminal law sanctioning tax evasion to constitute an implementation of Union law. For this reason Charter rights were applicable in the case.[89]

The example of *Åkerberg Fransson* shows that in some cases it may prove difficult to decide with confidence whether a legal situation falls within the

[83] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.
[84] See Article 50 of the Charter, which contains the rule against double jeopardy (or *ne bis in idem*).
[85] E.g. under Article 73 of Commission Regulation 796/2004 national authorities must recover unduly paid subsidies from farmers plus interest.
[86] See Article 47 of the Charter.
[87] *Åklagaren v Hans Åkerberg Fransson* (n 80) para 25; the directive referred to is Council Directive 2006/112/EC on the common system of value added tax [2006] OJ L 347/1.
[88] Ibid, para. 26.
[89] The defendant was unsuccessful in invoking Article 50 of the Charter, however.

scope of European Union law. The Court of Justice provided an indicative checklist in *Siragusa*:

> In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[90]

Charter rights – in particular procedural rights laid down in Chapter VI of the Charter – are also applicable to national court proceedings where the national court is deemed to be implementing Union law. This would primarily be the case where the national court is determining claims founded on European Union law. For instance, in *DEB* the claimant was relying on a remedy for state liability found in EU law. Hence it was able to rely on the right to effective judicial protection laid down in Article 47 of the Charter in order to challenge German rules excluding legal persons from claiming legal aid.[91] The *Benkharbouche* case – discussed as a case study below – is a further example. Here the applicants (partly) based their claims on national rules implementing EU directives and were thus able to invoke Article 47 of the Charter.

ii. Member States derogating from EU free movement law

Member States are also bound to comply with Charter rights when they are derogating from one of the four freedoms of the EU: free movement of goods, persons, services and capital.[92] The same is true for derogations from the rules on the free movement of EU citizens and their family members. Such derogations are possible in a limited number of circumstances, in particular in order to protect public policy or public security.[93]

Two situations can be distinguished here: first, Member States can restrict these freedoms in certain (exceptional) circumstances, but if they do this, they must not violate the rights contained in the Charter. Thus for instance, if a Member State regulates broadcasting services from other Member States, it must comply with Article 11 of the Charter, which guarantees freedom of expression.[94] Another example would be that a Member State must comply with the right to conduct a business in Article 16 of the Charter if it subjects the operation of gambling machines to a licencing requirement provided that this requirement also affects an operator of such machines based in another

[90] Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126, para 25.
[91] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* ECLI:EU:C:2010:811
[92] See Articles 34, 45, 49, 55, and 63 TFEU; in this regard the 'agency model' is not entirely accurate as such derogations can hardly be said to be made 'on behalf of the Union'.
[93] See e.g. Article 36 TFEU or Article 45 (3) TFEU.
[94] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* ECLI:EU:C:1991:254.

Member State.[95] In these scenarios Charter rights are an important factor in balancing whether the derogation from a fundamental freedom is proportionate.

The second situation concerns cases where the Member State relies on the fundamental rights in the Charter themselves in order to limit the exercise of certain free movement rights. For instance, in *Schmidberger* Austria decided to allow a demonstration by environmentalists against the amount of traffic on the major route crossing the alps, which involved a blockade of that route for some time. This constituted a restriction on the free movement of goods. However, the Court of Justice considered it justified if the restriction is necessary in order to enable the demonstrators to exercise their fundamental rights to expression and assembly guaranteed in Articles 11 and 12 of the Charter.[96] It is important to note in this regard that as part of the proportionality assessment in such cases the Court of Justice requires a balancing to take place between the fundamental freedom on the one side and the fundamental right on the other. This balancing does not always result in the fundamental right prevailing as the (in-)famous case of *Viking* shows.[97] In that case Viking Lines – a ferry operator – was subjected to and threatened with collective action by the Finnish Seamen's Union and the International Transport Workers' Federation for its plans to operate one of its ferries under an Estonian flag rather than a Finnish flag. The re-flagging of the vessel from the flag of one EU Member State to that of another constitutes an exercise of a company's freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union. In the case of *Viking* the purpose was to save costs as the operation of a vessel under an Estonian flag would lead to Estonian law governing the employment relationship of the crew. The International Transport Workers' Federation called upon its members – among them the relevant Estonian union – to refrain from negotiating with Viking; and the Finnish union threatened strike action. The Court of Justice recognised that the right to strike was a fundamental right.[98] However, it considered the collective action a restriction of the fundamental freedom so that it needed to be justified. In concrete terms this meant that both rights needed to be balanced.[99]

iii. The practical influence of the Charter in the UK

Given many Charter rights mirror the rights guaranteed by the HRA, its practical influence is in many cases negligible, in particular where the claimant challenges acts of the UK's various executives. As the following case study will demonstrate, however, it is more potent than the HRA when it comes to primary legislation.

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[95] Case C-390/12 *Pfleger* ECLI:EU:C:2014:281.
[96] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333.
[97] Case 438/05 *Viking* ECLI:EU:C:2007:772
[98] This was before the entry into force of the Charter; now see its Article 28.
[99] A parallel scenario arose in Case 341/05 *Laval* ECLI:EU:C:2007:809.

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Case study:
The practical difference between invoking the HRA and the Charter – *Benkharbouche and Janah*

This Court of Appeal decision dealt with the question whether human rights can be invoked in order to restrict the scope of the State Immunity Act 1978.[100] The two claimants respectively worked as a cook and a member of the domestic staff of two foreign embassies in London. They brought claims of unfair dismissal, failure to pay the minimum wage, breaches of the Working Time Regulations 1998, racial discrimination and harassment, and arrears of pay. The State Immunity Act confers general immunity from jurisdiction on other states, i.e. in strict application of the Act neither claim could be successful as the respondents were immune from jurisdiction.

The Court of Appeal considered whether this general immunity from jurisdiction was a) compatible with Article 6 of the ECHR as guaranteed by the HRA; and b) with Article 47 of the Charter of Fundamental Rights. Both provisions are nearly identically worded and guarantee the right to fair proceedings, implicit in which is a right of access to a court. The Court of Appeal recognised that these rights can be limited and that immunity from jurisdiction – as required by international law – can be such a limit. However, it came to the conclusion that the limitations on these rights went too far and were disproportionate.

The judgment revealed stark differences in the consequences of claims based on the HRA and claims based on the Charter. Unfair dismissal, failure to pay the minimum wage, and arrears of pay are based solely on domestic (English) law, whereas the claims based on the Working Time Regulations and racial discrimination and harassment are based on domestic law implementing EU directives.[101] Hence those parts of the claims came within the scope of EU law and Charter rights could be invoked in their regard.

As far as the claims based on English law were concerned, the Court of Appeal made a declaration of incompatibility under the HRA. This means that the claimants still lost their case as far as these claims are concerned, but there is a prospect that Parliament will amend the State Immunity Act and make it human rights compatible for future cases. By contrast, as far as the claims based on EU law were concerned, the Court of Appeal 'disapplied' the State Immunity Act, i.e. it did not consider the two respondents immune from jurisdiction, so that a remedy can be granted to them. This is because EU law – in sharp contrast to the law of the ECHR, which the HRA incorporates – has primacy over conflicting national law.[102]

For this reason the rights contained in the Charter are stronger than those provided for by the HRA because they can lead to the disapplication of

[100] *Benkharbouche v Embassy of the Republic of Sudan; Janah v Lybia* [2015] EWCA Civ 33.
[101] The Race Directive (see n 65) and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9 respectively.
[102] See *Costa v ENEL*; this was recognised for the UK by the House of Lords in *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* (per Lord Bridge).

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legislation; however, the key weakness of the Charter is that it only applies when a Member State is implementing EU law. This can lead to split results as this case study demonstrates.

An important theme in the public discussion around human rights is whether these rights unduly restrict the United Kingdom's ability to 'deport foreign criminals'. It is therefore appropriate to briefly show that by contrast to the HRA, the Charter has not yet had a great impact on the rights of non-British nationals trying to avoid expulsion or extradition by invoking the right to family life. The Court of Justice has made reference to that right, which is contained in Article 7 of the Charter, mainly in order to bolster the rights that EU citizens and their family already enjoy under EU free movement law. EU citizens may reside in other EU Member States if they have work or are self-employed; if they are students; or in case they do not work if they have sufficient resources to support themselves and their family as well as comprehensive medical insurance.[103] Having exercised their right to free movement in this way, EU citizens returning to their home Member State can continue to rely on their rights under EU law.[104] The right to family life has, for instance, been used to support the free movement rights of a British citizen resident in the UK, whose wife from a non-EU Member State was looking after his children while he was periodically away on business in other Member States.[105] Equally, in a case concerning the question whether the family of a German national who used to be employed in the UK was allowed to stay there in order to allow the children to complete their education, the Court of Justice interpreted the relevant EU legislation in light of the right to family life.[106] There are even exceptional cases in which a family member of an EU citizen can invoke EU free movement rights and therefore the Charter where no movement by the EU citizen concerned. These are mainly cases where the EU citizen is a minor and their primary carer (usually a parent) is a non-EU citizen who is threatened with expulsion.[107] Indeed, in a case currently pending before the Court of Justice concerning the Moroccan mother and sole carer of a child who is a UK citizen, the question arises whether the mother, who had served a 12 month sentence for a criminal offence, can be deported to Morocco. The Court of Justice's Advocate General suggested in a non-binding opinion that any decision to deport the sole carer of an EU citizen must be proportionate and must not deprive the child of the genuine enjoyment of the substance of his rights as an EU citizen. The Advocate General pointed out that an

[103] Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L157/77.
[104] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* ECLI:EU:C:1992:296; Case C-456/12 *O and B v Minister voor Immigratie, Integratie en Asiel* ECLI:EU:C:2014:135.
[105] Case C-60/00 *Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434.
[106] Case C-413/99 *Baumbast v Secretary of State for the Home Department* ECLI:EU:C:2002:493.
[107] See Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124.

important factor in the determination of the proportionality of the deportation order at issue was the child's right to family life.[108]

d. The discussion on a British Bill of Rights

Political discussions are currently underway to repeal the HRA and replace it with a British Bill of Rights. As pointed out above, the HRA transposes the UK's obligations under the European Convention on Human Rights and therefore has nothing to do with the UK's EU membership. Nonetheless, senior politicians like the Lord Chancellor have suggested that the Bill of Rights could be used to also address the effect of the Charter in the UK: first, by ensuring that Protocol No 30 would be adhered to[109]; and second, by introducing a mechanism that would make the Supreme Court a constitutional court, which would allow it to deny EU law (and possibly certain Charter rights) effect in UK law.[110] As there are no concrete proposals currently on the table, it is impossible to predict the concrete impact this may have on the protection of human rights in the UK and Scotland.[111] However, it is suggested that it could lead to a weakening of fundamental rights protection in individual cases. The consequences of a possible withdrawal of the UK from the EU will be assessed in this light in section 7.

6. The UK's Renegotiated EU Membership

Before calling the referendum, the Prime Minister negotiated new conditions for the UK's membership in the European Union.[112] The results of this renegotiation are contained – as a decision of the heads of state and government of the twenty-eight EU Member States – in the conclusions of the European Council of 18-19 February 2016. The decision addresses four themes: economic governance (mainly the UK's position as a Member State that does not use the euro as its currency); competitiveness; sovereignty; social benefits and free movement. The renegotiation does not directly deal with the fundamental rights protected by EU law. It only mentions the Charter in so far as it recalls the content of Article 1 (1) of Protocol 30 to the Lisbon Treaty word for word and quotes the Protocol in brackets. As shown above, Article 1 (1) of the Protocol did not result in an opt-out of the UK from the

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[108] Case C-304/14 *Secretary of State for the Home Department v CS (Opinion of Advocate General Szpunar)* ECLI:EU:C:2016:75, para 172.

[109] Note, however, that the UK does not have a general opt-out from the Charter. Thus a reference to Protocol 30 might well be entirely symbolic and devoid of substance.

[110] See transcript of evidence given by the Lord Chancellor Michael Gove on 2 February 2016 to the House of Lords EU Justice Sub-Committee, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html

[111] It is still not clear in how far the British Bill of Rights would be (fully) applicable in Scotland as it raises complex devolution issues, which the UK government might want to avoid.

[112] See European Council conclusions, 18-19 February 2016 (EUCO 1/16) http://www.consilium.europa.eu/en/policies/uk/2016-uk-settlement-process-timeline/ .

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Charter, so that – as far as the Charter is concerned – the 'renegotiation deal' merely confirms the status quo.

The only aspect of the deal that could be perceived to be reducing the fundamental rights of EU citizens is the possibility afforded to the UK to limit the payment of in-work benefits for EU nationals in case of an 'inflow of workers from other Member States of an exceptional magnitude over an extended period of time' (the so-called emergency break). This would allow the UK to continue paying such benefits to its own nationals, while at the same time denying them to newly arrived EU nationals. This could be considered a violation of the right to non-discrimination found in Article 21 (2) of the Charter. However, it should be noted that this right is not limitless and the compatibility of this emergency break mechanism with the Charter has not yet been tested before the Court of Justice.

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7. What Would Change if the UK left the European Union?

a. Introductory remarks

Finally, this paper needs to address in how far a possible 'Brexit' would affect the human rights protection available in Scotland and in the UK. It is important to point out that much of what follows is the outcome of informed speculation. As long as it is unclear what the exact ramifications of a future relationship between the UK and the EU would be if the UK left the EU, it is impossible to make precise predictions.[113] However, it is probably fair to suggest that any post-Brexit relationship would be mainly concerned with trade relations and less with the protection of fundamental rights. This is evident from the 'renegotiation deal', which only mentions the Charter peripherally. Equally, the Brexit campaigns are fairly silent on fundamental rights issues, apart from the commonplace confusion between the ECHR/HRA-regime and the EU-regime.

It is certain that a possible withdrawal of the UK from the EU has no impact upon the UK's commitment to ECHR and on the continued application of the rights guaranteed in the HRA or in a future British Bill of Rights. Hence it is most likely that human rights will continue to be protected in the UK even in the event of a Brexit.

The consequences of a Brexit for the protection of fundamental rights in the UK can therefore be summarised as depriving people living in the UK firstly from the additional human rights guarantees contained in the Charter – both procedurally and substantively; and secondly from the opportunity to benefit from future improvements of fundamental rights protection at the EU level – be it through treaty change, legislation or through case law. These two considerations pervade the following discussion.

b. The Charter would cease to be binding on the UK

One can predict with relative certainty that the EU Charter of Fundamental Rights would cease to be binding on the UK in case of a Brexit. While it is not a legal impossibility for a non-Member State to commit to the Charter, there is no precedent for this. In particular EEA (and EFTA) membership – which would be the closest currently existing relationship between the EU and a non-Member State – does not make the Charter of Fundamental Rights binding on non-EU Member States. This would mean that people living in the UK would therefore no longer be able to invoke the rights contained in the Charter.

As far as the Charter mirrors the ECHR this would not always result in a reduction of fundamental rights protection in practice. However, there are three conceivable scenarios in which this would be the case.

First, as the above case study shows, there would be a procedural difference notably where the review of (Westminster) primary legislation is at issue. Under the HRA the only option open to (higher) courts is a declaration of

[113] The key scenarios for a post-Brexit relationship were briefly outlined in section 1.

incompatibility, which still results in the applicant losing her case with the prospect of the defective legislation being remedied in the future. By contrast, if the human rights violation occurred within the scope of EU law, then the court (of whatever rank in the hierarchy) is under a duty to disapply the piece of incompatible legislation and the applicant will win his case.

Second, certain rights guaranteed in the Charter are not reflected in the ECHR – at least as far as the UK as signed up to it – and cannot therefore be invoked before UK courts through the medium of the HRA. Hence, in the event of a Brexit there would be consequences for the substantive protection of human rights in the UK. People living here would lose these rights in their entirety – unless of course, these were incorporated into a British Bill of Rights. An important example of a right currently only guaranteed in EU law, but not by the ECHR, would be the 'right to be forgotten' mentioned above.[114] Additionally, there are the social rights (or principles – see above) contained in the Charter, which would no longer be at the disposal of people in the United Kingdom.

Third, the UK's own human rights settlement is currently under review and likely to be altered. The question whether a British Bill of Rights might lead to a reduction in the overall protection of human rights in the UK is unclear. In particular, it remains to be seen whether a British Bill of Rights will continue to adhere to the rights formulated in the ECHR or propose a new set of newly formulated rights; whether the duty to take into account Strasbourg case law will remain in place[115]; whether the duty to interpret (Westminster) legislation as far as possible in conformity with human rights continues[116]; whether higher courts will remain competent to make declarations of incompatibility; and – for Scotland – whether section 29 of the Scotland Act will continue to hold Acts of the Scottish Parliament *ultra vires* if they are contrary to human rights.

If the UK continued in its membership of the EU, the Charter would most likely have a mitigating effect on such a reduction in the domestic protection of human rights as far as it is applicable: it makes the ECHR (as interpreted in the ECtHR's case law) the minimum standard for human rights in the EU[117]; any national legislation must – if at all possible – be interpreted in conformity with a Member State's EU law obligations, including those arising from the Charter[118]; if this is not possible, that national legislation – no matter of which rank – must be disapplied; and if the UK continued to be a Member of the EU, it is likely that section 29 of the Scotland Act would continue to lead to Acts of the Scottish Parliament that are contrary to EU law to be *ultra vires*. In the

[114] Of course, the UK courts could develop such a right independently, but there is no evidence that such a development is imminent.
[115] Section 2 (1) HRA.
[116] Section 3 HRA.
[117] See Article 52 (3) CFR and the explanations to it; these can be found in [2007] OJ C 303/17, 33.
[118] See e.g. Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153; and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* ECLI:EU:C:1990:395.

event of a Brexit, this mitigating potential of the Charter would no longer be realisable.[119]

c. People living in the UK would no longer benefit from developments under the Charter

Closely connected to the former sub-section is the concern that in the event of a withdrawal from the EU, people living in the UK would no longer be able to benefit from the potential that the Charter of Fundamental Rights offers. As hinted at above, there is not yet much case law on the substance of many of the Charter rights, but the sheer breadth of rights (and principles) offered in the Charter and their often broader formulation compared with corresponding rights contained in the ECHR, suggest a large potential for improvements, from which the UK and the people living there would be excluded in the event of Brexit. The most obvious category of rights and principles that one can point to are those found in the solidarity chapter, most of which can be classed as social rights.[120] This would, of course, not exclude the UK legislator(s) from mirroring any developments taking place at the EU level. But people living in the UK would not be able to directly profit from any future development of these provisions.

But even outside the solidarity chapter, the Charter contains important updates of rights recognised in the ECHR. Apart from data protection rights[121], there are, for example, a guarantee of human dignity; a right to physical and mental integrity; a prohibition on human trafficking; the right to conscientious objection; a right to marry that is not restricted to different-sex couples; a right to asylum; and a broader fair trial guarantee that is not restricted to civil and criminal cases.[122]

d. Challenges to EU legislation on the basis of the Charter will become impossible

In the event of a UK withdrawal from the EU, the Charter would continue to be binding on the EU and its institutions. Thus, if a post-Brexit deal foresaw – as is the case with Norway and Switzerland – that the UK would continue to be bound by some EU legislation, that legislation would need to be compatible with the Charter. Under current arrangements individuals in the UK affected by such EU legislation can challenge it in the UK courts. They would need to make an argument to that effect in domestic proceedings and if the court concerned then asks the Court of Justice for a so-called preliminary ruling on this question, the Court of Justice will decide whether the provision concerned is compatible with fundamental rights or not. After the UK has left the EU, it is unlikely that this option would continue to exist. It would then depend on

[119] Of course this analysis must be placed under the caveat that a British Bill of Rights might attempt to limit the domestic law effects of the Charter (which would be contrary to EU law).
[120] But bear in mind the caveat that there might be an opt-out from this in Article 1 (2) of Protocol 30: for a discussion see above.
[121] See above.
[122] See Articles 1; 3; 5 (3); 10 (2); 9; 18 and 47 of the Charter respectively.

whether the courts in the UK would be given an equivalent power of review – which, it needs to be pointed out, might be contrary to the UK's international obligations towards the EU. Hence it may well happen that persons in the UK, including businesses, might be bound by pieces of EU legislation without being able to challenge them on human rights (or other) grounds.

e. Migration and expulsion of unwanted immigrants

As far as the politically sensitive issue of immigration (and the removal of unwanted non-nationals) is concerned, it was shown above that, in contrast to the ECHR and the HRA, the Charter has not played a prominent role in this field. Under EU law, immigration cases are usually resolved on the basis of EU free movement and citizenship law with Charter rights playing a supporting role rather than being used as the sole reasons, e.g. to block a deportation. Of course, if the UK left the EU, EU free movement law would cease to apply and thus deportation of criminal EU citizens and their families might become easier for that reason.

However, it should be pointed out that any post-withdrawal relationship involving full access to the single market would necessarily involve full access of EU citizens to the labour market of the UK. This is for instance the case for countries like Norway, Iceland or Switzerland. Hence migration from the EU/EEA to the UK might be as difficult to control freely as it is now as the arrangements might only differ in some minute details from present arrangements. However, in the event of a Brexit the Charter would in all likelihood not apply in such cases so that it would lose its current function of backing up claims by EU migrants trying to avoid expulsion.

f. EU anti-discrimination law: a future that is difficult to predict

As far as anti-discrimination law is concerned, the future is rather difficult to predict. By contrast to the Charter, the EU's equality directives are not directly applicable in the UK, but they have been transposed into the Equality Act, which is an Act of Parliament. This Act would remain in force after the UK left the EU unless it were expressly repealed.

A Brexit would have two possible consequences for anti-discrimination law, however. First, at the moment large parts of the Equality Act are underpinned by the UK's obligations under EU law. In other words, the UK must protect individuals against various types of discrimination, harassment, and victimisation. If the UK left the EU, these obligations would in all likelihood cease to exist, so that parts of the Equality Act could be repealed or changed by Parliament without hindrance from EU law. Whether this would be on the political agenda of the present government or future governments, is of course a different question. Suffice it to point out that there would no longer be any *legal* constraints to changes to the Equality Act.

Second, should there be future developments in EU anti-discrimination law, the UK would not automatically take part in them and would not have to adapt its laws to comply. Again, it is difficult to predict what changes there might be and whether – if the UK remained in the EU – these changes would require

amendments to the Equality Act given that that Act protects individuals in more circumstances than is strictly required by EU law.[123] Two types of development at EU level are conceivable here: legislative and judicial. Given the limited legal basis for legislative activity in Article 19 TFEU[124], developments of anti-discrimination law are more likely to be driven by the Court of Justice. Past experience shows that these developments can be significant as for instance the finding of sex discrimination in favour of a post-operative transsexual in *P v S*.[125] If the UK left the EU, such developments would no longer be automatically effective in the UK.

g. The flipside: fewer human rights constraints on the UK's parliaments

If the Charter ceased to apply in the UK, the UK Parliament would face fewer legal constraints when making law. The same would be true for the Scottish Parliament considering that after leaving the EU, the section 29 of the Scotland Act would probably be amended and no longer refer to EU law.

However, some constraints are likely to remain if the UK chose to partake in certain EU measures. A likely field of cooperation would be justice and home affairs, in particular the European Arrest Warrant or the Schengen Information System. This would need to be separately agreed upon with the European Union by way of an international treaty. It is likely that in such a case the UK would have to continue to adhere to the fundamental right of *ne bis in idem* (the rule against double jeopardy) laid down in Article 54 of the Schengen Convention.[126]

[123] The Equality Act knows three additional characteristics (gender reassignment; pregnancy and maternity; marriage or civil partnership); in addition, all characteristics (save for marriage and civil partnership) are protected in the supply of goods and services whereas EU law only requires this for racial discrimination.

[124] Restriction to the six grounds already legislated on and the unanimity requirement make further development beyond what is already guaranteed under the Equality Act unlikely.

[125] *P v S and Cornwall County Council* (n 76).

[126] This is in any event the case for Norway and Iceland, see Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the association of these two states to the implementation, to application and to the development of the acquis de Schengen - final Act [1999] OJ L 176/36.

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The views expressed in this report are the views of the author, and do not necessarily reflect the views of the Scottish Human Rights Commission.