



The European Union (Withdrawal) Bill: Charter of Fundamental Rights

Summary: This briefing paper considers two linked issues under the European Union (Withdrawal) Bill. Firstly, it considers the provision that the Charter of Fundamental Rights shall not form part of retained EU law. Secondly, it considers the removal of a right of action based on the General Principles of EU law. The briefing considers the scope of the rights contained in the Charter compared to those rights contained in other international treaties which the UK has ratified, and the respective remedies available under the Charter and the Human Rights Act 1998. It argues that removing the Charter shall result in a reduction of substantive rights and remedies available to individuals living in the UK. Accordingly, it contends that the Charter should be retained, as should the right to bring court action under the “General Principles” of EU law.

What is the Charter of Fundamental Rights of the European Union?

The Charter sets out in a single document the fundamental rights protected in the EU. It brings together the rights found in the EU Court of Justice case law, the European Convention on Human Rights (ECHR) together with other rights and principles arising from the constitutional traditions of EU Member States and their participation in other international human rights treaties. The Charter is binding on EU institutions and on Member States when they are acting within the scope of EU law.¹ Where domestic law conflicts with a Charter right, domestic judges are under a duty to “disapply” the national legislation in that particular case if it cannot be interpreted in a manner consistent with the Charter. The Charter also forms part of the devolution settlements. Acts of the devolved parliaments are invalid if they conflict with EU law, including the Charter.² Similarly, ministers in the devolved governments do not have the power to act contrary to EU law, including the Charter.³

How does the Charter of Fundamental Rights promote and protect children’s rights?

The Charter supports children and young people’s rights in a number of ways: It enhances rights that already exist in the ECHR such as the right to education.⁵ It also condenses rights enshrined in the UN Convention on the Rights of the Child (UNCRC) within one article.⁶ These include the right to care and protection, to express views freely, in accordance with their age and maturity, the principle of best interests being a primary consideration and the right to know both parents.⁷ Children’s rights enshrined into the Charter have been translated into practice through EU legislation, policy and case law.⁸ This has included areas as diverse as legislation on child-friendly justice systems⁹ and ensuring the best interests

¹ CFR Article 51: Scope of Charter

² See Scotland Act 1998 section 29(2)(d); Northern Ireland Act 1998 section 6(2)(d); Government of Wales Act 2006 section 94(6)(c).

³ See Scotland Act 1998 section 57(2); Northern Ireland Act 1998 section 24(1)(b); Government of Wales Act 2006 section 80.

⁵ CFR Article 14: Right to Education

⁶ CFR Article 24: Rights of the Child.

⁷ These can be aligned with UNCRC Article 3 (best interests), Article 5 (the evolving capacities of the child), Article 6 (survival and development), Article 7 (to know and be cared for by both parents), Article 12 (to express views freely and have them taken into account).

⁸ Eurochild (2014) [Applying the EU Charter of Fundamental Rights to children’s rights in the EU](#)

⁹ [Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings](#), 2013/0408 (COD). [Directive establishing minimum standards on the](#)

of unaccompanied asylum seeking children¹⁰, through to policies designed to tackle high youth unemployment rates¹¹ and child obesity.¹²

Removal of the Charter by the European Union (Withdrawal) Bill

Whilst the general approach of the Withdrawal Bill is to incorporate EU law into UK law, the Bill provides that the Charter will not be retained.¹³ The UK Government's position is that the rights in the Charter are found elsewhere within the body of EU law which will be incorporated. These rights and principles which exist "irrespective of the Charter" shall form part of retained EU law.¹⁴ However, the effect of such retention is limited as the Bill provides that there shall be no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.¹⁵ Effectively, the rights which exist "irrespective of the Charter" shall therefore only be a tool for interpreting retained EU law, but they will be unenforceable in UK courts.¹⁶

How would the removal of the Charter affect individual rights?

The White Paper which preceded the Bill stated that the rights in the Charter and General Principles were also found in domestic law and other international treaties which the UK has ratified. Therefore, the UK Government's position is that the Charter can be removed without the rights of individuals being affected. This position can be challenged on the following grounds:-

The Charter includes rights not found in other international treaties

As well as being a consolidation exercise, the creation of the Charter was intended to take account of changes in society which had occurred since the creation of older human rights treaties, such as the ECHR, which nonetheless include important rights for children. Accordingly, the Charter contains certain rights of great importance to children and young people, which are not found in other international treaties which the UK is party to, nor are they protected in domestic law at constitutional level.¹⁷ Additional rights under the Charter include a specific provision on the rights of the child and a stand-alone right not to be discriminated.¹⁸ There are other "novel" Charter rights which may fall within the scope of broader provisions in other international treaties. However, the specificity of the Charter expression of these rights gives additional clarity. Examples here include a right to physical and mental integrity, a guarantee of human dignity and a prohibition on human trafficking.

Broader scope of certain Charter rights also found in other treaties

In cases where certain rights are expressed in both the Charter and other international instruments, the scope of the Charter-based right is often broader. For example, whilst the right to a fair trial under Article

[rights, support and protection of victims of crime, and on-going FRA research on forms of child participation in criminal and civil judicial proceedings](#), 2012/29/EU

¹⁰ COM (2014) 382 final

¹¹ [EU Work Plan for Youth \(2014 –2015\)](#)

¹² [EU Action Plan on Childhood Obesity 2014-2020](#), 24 February 2014.

¹³ EU(W)B Clause 5(4)

¹⁴ EU(W)B Clause 5(5)

¹⁵ EU(W)B Schedule 1 para 3

¹⁶ EU(W)B Schedule 1 para 3(no right of action in relation to breach of "general principles of EU law")

¹⁷ Contrast those rights which are included in the ECHR, which are given constitutional protection at UK domestic level through the Human Rights Act 1998.

¹⁸ Contrast the right to non-discrimination under the Article 14 ECHR which is "parasitic" upon another ECHR right being engaged. Whilst the ECHR does have a stand-alone right to non-discrimination under Protocol 12, the UK has not ratified this, the UK Government having considered that to ratify it would make its "potential application....too wide" see UK Parliament, "Joint Committee on Human Rights—Seventeenth Report" (Joint Committee on Human Rights, 23 March 2005)(available at: <https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm>)

6 ECHR is limited to civil and criminal proceedings, Article 47 of the Charter is not. Accordingly, the Charter's protection is also available in administrative cases, such as immigration decisions.²¹ Other examples of the broader scope of particular rights can be found in the areas of data protection and migration law.

The Charter provides a stronger mechanism for enforcing human rights in certain cases

In certain cases, the Charter provides a stronger way of enforcing human rights than the Human Rights Act 1998 (incorporating the ECHR). This is because under the Charter the conflicting national legislation is "disapplied", whereas under the Human Rights Act conflicting legislation is merely subject to a "declaration of incompatibility".²² The recent *Benkharbouche*²³ decision is illustrative of the practical effects of this. In this case, a violation was established under both the Charter and the Human Rights Act. However, a remedy was only available under the Charter.

The UK has not fully incorporated certain UN human rights treaties

The UK Government is correct in stating that certain Charter rights are also contained in UN treaties which the UK has ratified. However, as no action has been taken to incorporate these treaties, the rights they contain do not have direct effect in domestic law.

Concerns

The UK Government has stated that the Withdrawal Bill is not intended to affect the rights of individuals in the UK and that the rights in the Charter are already protected elsewhere, for example in the UNCRC. However, the UK Government has neither identified these rights nor where they are protected and has made no specific reference to children's human rights. Crucially, it has been noted that the UK Government has made no pledge to preserve the sources of these rights after Brexit, a matter particularly relevant in relation to those rights protected through the Human Rights Act.²⁴

Recommendations

Retaining the Charter for the interpretation and application of retained EU law

Currently the Charter only applies to Member States when they are acting within the scope of EU law. Therefore, it is logical that the Charter is retained in relation to the interpretation and application of "retained EU law". **Amendment 8 achieves this goal.**

Whilst it may be possible to retain the Charter *universally* (i.e. in relation to all domestic law), it has been noted that this could raise difficulties regarding the relationship between it and the Human Rights Act.²⁵ Retention of the Charter as an instrument with universal domestic effect appears to be the aim of Amendment 46.

Allowing challenges to be brought to retained EU law on the grounds that it is in breach of the general principles of EU law

In order to protect against regression in human rights protection, those sections of the Bill which remove the ability of people to rely on rights contained in the General Principles of EU law must be removed. This would mean that, even if the Charter was not to be retained, individuals would still be able to enforce those rights which also exist as part of the General Principles. **Amendment 10 achieves this goal.**

²¹ AZ [2017] EWCA Civ 35

²² Human Rights Act 1998, Section 4

²³ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, see also decision at Court of Appeal level: [2015] EWCA Civ 33

²⁴ See concerns raised by [Liberty & Amnesty \(October 2017\)](#)

²⁵ See discussion in Mark Elliot, "[The EU \(Withdrawal\) Bill: Initial Thoughts](#)" (July 2017); Law Society of Scotland, [Second Reading Briefing](#) (August 2017), para 5.6

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November 2017

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