

**EQUALITY AND HUMAN RIGHTS COMMISSION**

**EUROPEAN UNION (WITHDRAWAL) BILL - E.U. CHARTER OF FUNDAMENTAL RIGHTS**

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**OPINION**

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**The advice sought**

1. I am instructed to advise the Equality and Human Rights Commission (“**EHRC**”) on the treatment of the European Union (“**EU**”) Charter of Fundamental Rights (“**the Charter**”) in the European Union (Withdrawal) Bill (“**the Bill**”). The central question on which my views are sought is whether the Government is correct in assurances it has given that the rights currently conferred by the Charter will not be weakened by excluding the Charter from domestic law after the UK’s exit from the EU.
2. In my view, for reasons set out in more detail below, those assurances are not correct and a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK.
3. In the Bill as currently drafted, the Charter will be expressly excluded from the *corpus* of EU law, and domestic law derived from EU law, which is “retained” as part of domestic law following “exit day”, when the UK leaves the EU. Clauses 2-4 of the Bill provide, broadly, for the retention in domestic law of (a) previously-enacted domestic legislation which gives effect to EU law, (b) directly applicable EU legislation, and (c) directly effective rights, such as those arising under the EU Treaties and EU directives, which have previously been recognised. But clause 5 of the Bill states, so far as material:  
  
*“(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.*  
  
*(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).”*
4. The Government’s position is, in essence, that it is unnecessary to retain the Charter as part of domestic law because it only ever recognised rights which were already present elsewhere in EU

law, and that other EU law is being retained. Hence, §99 of the Explanatory Notes which accompanied the Bill when it was first published stated:

*“The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill.”*

5. The Government has also made clear that it does not intend to weaken the protection of fundamental rights which is currently conferred by the Charter. That intention, originally stated in the White Paper which preceded the Bill (*Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, §2.25), was recently reiterated in a detailed analysis of the impact which the Bill would have on the individual provisions of the Charter (*Charter of Fundamental Rights of the EU: Right by Right Analysis*, p. 4):

*“The Government has been clear that it does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened. Those rights will continue to be protected in a number of ways. First, as explained above, rights will continue to be protected through the EU law that is preserved and converted by the Bill. Second, eighteen of the articles correspond, entirely or largely, to articles of the European Convention on Human Rights and are, as a result, protected both internationally and, through the Human Rights Act 1998 and the devolution statutes, domestically. Finally, the substantive rights protected in many articles of the Charter are also protected in domestic law via the common law or domestic legislation.”*

6. The EHRC’s policy position is that there should be no loss of the rights provided by the Charter following Brexit. In a briefing for the Bill’s House of Commons Committee Stage on 21 November 2017, it supported an amendment which would have removed clause 5(4) and 5(5) from Bill, thereby reversing the exclusion of the Charter from retained EU law. This was in order to ensure that there was no loss of rights and to ensure legal certainty and consistency following Brexit. The EHRC now wishes to confirm the legal position following the Government’s *Right by Right Analysis* document, which was published on 5 December 2017.

### **Summary of conclusions**

7. It is plainly correct that the majority of the substantive rights set out in the Charter (although not the principles recognised by the Charter) will continue to have some measure of protection under domestic law after Brexit. Moreover, it would not be sensible simply to include the Charter in its entirety within the *corpus* of retained EU law since (a) some of the rights conferred by the Charter could not possibly apply after Brexit, such as the right to stand and vote in elections to the

European Parliament, and (b) the Charter applies only within the scope of application of EU law, which will presumably not include the UK after Brexit.

8. Nevertheless, the EHRC's concerns remain well-founded in my view. The Bill's failure to retain any of the provisions of the Charter within domestic law will result in a dilution of current rights protections enjoyed pursuant to the Charter, for the following principal reasons in summary:

- (1) Charter rights are truly fundamental and can be relied upon to challenge domestic legislation and administrative action. Mechanisms by which rights equivalent to Charter rights may be protected after Brexit offer a lesser degree of protection.
- (2) Contrary to the Government's analysis, the Charter has created valuable new rights, and extended the scope of existing rights, and could continue to do so if Charter provisions were incorporated into domestic law.
- (3) The Charter has played a valuable role in ensuring that EU legislation advances, and does not compromise, human rights protection, much of which will be lost if the Charter is not retained. The Bill as currently drafted would incorporate much of that legislation but without the safeguard of Charter protection.
- (4) The rights conferred by the Charter are not comprehensively reflected in other aspects of domestic law such as the Human Rights Act 1998 ("**HRA**") and the common law. There will be significant gaps in rights protection if the Charter is not retained.
- (5) The principles recognised in the Charter are given practical legal effect through Charter rights and through the application of general principles of EU law, in particular the principle of proportionality. The individual protections afforded by these principles will be lost if the Charter is not retained.
- (6) The current drafting of the Bill is a recipe for legal uncertainty and hence for litigation to establish the parameters of rights protection following Brexit which would be unnecessary if relevant parts of the Charter were retained. Given the well-documented restrictions on availability of legal aid and other obstacles to the pursuit of legal claims, this uncertainty is itself bound to compromise human rights protection.

17. I shall now address each of these reasons in more detail.

### **(1) The Charter provides a more powerful protection against rights infringements**

18. It is plain and obvious, and the Government does not dispute, that the Charter currently offers a far more potent protection against human rights infringements than would any mechanism to enforce equivalent rights after Brexit. Charter rights are truly fundamental. They cannot be repealed, expressly or impliedly, and domestic legislation and governmental action, past or future, which is contrary to Charter rights must be struck down.
  
19. The Government relies upon the corpus of EU legislation, some already incorporated and some to be incorporated by the Bill, as providing substantive rights which are merely recognised or reaffirmed by the Charter, and argues that it is therefore unnecessary to retain the Charter itself. That, however, is to ignore the special, fundamental status of Charter rights. The Bill would permit the Government to repeal swathes of retained EU law by secondary legislation. Although the precise extent of Parliamentary involvement in repealing retained EU law is currently subject to fierce debate, there is no suggestion that rights conferred by retained EU law, which are supposed to stand instead of Charter rights, will be entrenched or protected from repeal by the appropriate means, as Charter rights are currently protected.
  
20. On the current drafting of the Bill, individuals will no longer be able to bring legal claims to strike down domestic legislation or administrative action as being contrary to Charter rights. The remedies offered by alternative means of human rights protection are significantly weaker. That proposition is well-illustrated by a single, recent judgment of the Supreme Court, *Benkharbouche v Embassy of the Republic of Sudan* [2017] 3 WLR 999. The claimants, who had been employed as domestic staff in the embassies of Sudan and Libya, brought employment claims against the governments of those countries which were barred by state immunity, pursuant to ss. 1, 4 and 16 of the State Immunity Act 1978. The Supreme Court held that those provisions were incompatible with Article 6 ECHR, as protected by the HRA, and with Article 47 of the Charter, conferring the right to an effective remedy, to the extent that the claims were based on employment rights conferred by EU law. The Charter required that the domestic legislation creating state immunity be set aside and that the relevant claims, of discrimination and breach of the Working Time Regulations, be determined on their merits. But in relation to claims based purely on domestic law, such as for unfair dismissal, breach of minimum wage legislation and unlawful deductions from wages, the HRA permitted only that a s. 4 HRA declaration of incompatibility be made. Such a declaration has no effect between the parties to the proceedings, which meant that the claims

remained barred and it fell to the Government to decide what, if anything, to do about making amendments to the offending domestic legislation for application in the future (see §79 of the judgment of Lord Sumption). In other words, the Charter permitted the claimants to proceed in the face of domestic legislation which was incompatible with their human rights, but the HRA did not. The Charter offered a far more powerful remedy. Following Brexit, on the approach taken in the Bill, all of the claims brought by the claimants in *Benkharbouche* would be struck-out.

21. The limited effect of a declaration of incompatibility is not the only aspect of the remedies available under the HRA which is different from, and potentially inferior to, those available in relation to the Charter. The “victim” test of standing to challenge under the HRA (s. 7(1)) is more restrictive than that which would apply to a claim for judicial review for breach of Charter rights. The one year HRA time limit (s. 7(5)) will in some instances be less favourable than that applicable to a Charter claim. And damages may in some instances be more easily available for breach of Charter rights than for breach of Convention rights (although the picture is mixed).
22. The loss of status of Charter rights under the Bill is confirmed by the proposed treatment of general principles of EU law, which overlap to some extent with rights conferred by the Charter. General principles of EU law, including, for example, protection of certain fundamental rights, proportionality, transparency and legal certainty, may currently be relied upon in order to mount a freestanding challenge to domestic legislation and administrative action. But under §3 of Schedule 1 to the Bill, there will no longer be any such right of action and “*no court or tribunal .. may disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law*”. General principles of EU law may only be invoked in order to interpret retained EU law, so far as it is possible to do so (clause 6(3) of the Bill).
23. None of this is disputed by the Government. The *Right by Right Analysis* adopts the approach simply of indicating where, in the Government’s view, a Charter right will continue to be protected in the UK, for example by virtue of the HRA, but without drawing attention to how that protection will operate, in comparison to the protection currently offered by the Charter.

**(2) The Charter has created new rights and/or extended existing rights**

24. It is a cornerstone of the Government’s justification for not retaining the Charter that the Charter did not create new rights or principles but only reaffirmed those already recognised within the

EU. That was stated in the recitals to Protocol No. 30 to the Treaty of Lisbon and repeated by the Court of Justice of the European Union (“CJEU”) in *C-411/10 R (NS) v Secretary of State for the Home Department* [2013] QB 102, §119.

25. However, it does not follow from the proposition that the Charter reaffirmed existing rights that the full effect of the Charter was already reflected in the EU law which existed before it came into force (or that which was added subsequently). Even a cursory examination of the subsequent application of the Charter will demonstrate that significant developments in human rights protection have resulted from Charter rights. Again, one example will suffice. In *Google Spain (C-131/12 Google Spain SL v Agencia Espanola de Proteccion de Datos* [2014] QB 1022), the CJEU relied upon Articles 7 and 8 of the Charter, the rights to respect for private and family life and to protection of personal data, as the basis for a newly recognised “right to be forgotten” (which, in that case, enabled a complainant to prevent certain historic material concerning him from appearing in the results of internet searches). This was undeniably a new right, albeit one which was based on existing rights to private life and data protection.

26. It is perhaps a matter of semantics whether one regards the right to be forgotten as a new right which arose by virtue of the Charter or as the extension of existing rights to a new situation. The point of substance is that the Charter has in practice operated as a dynamic source of rights, and a dynamic means of human rights protection, rather than one which merely codified other EU law, and was, in effect, frozen in time at the point of its enactment. It is therefore a category error to proceed, as the Government does, on the basis that the full effect of the Charter can be captured by incorporating into domestic law the corpus of EU legislation as it exists at any particular point in time. What is lost on that approach is the potential for Charter rights to develop and evolve with changes in society and for new rights to be recognised, thereby enabling human rights protection to be updated over time.

### **(3) The Charter ensures human rights protection through EU legislation**

27. The Charter is directed not only at Member State action but at the actions of the EU institutions, including its legislature, and the Charter currently plays a valuable role in ensuring that EU legislation is compatible with human rights and that it is interpreted in a manner which serves to advance human rights protection. This has a direct impact on Member State law and administrative action, which must give effect to EU legislation.

28. In *Test-Achats* (C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2012] 1 WLR 1933), for example, the CJEU relied upon Articles 21 and 23 of the Charter, enshrining a principle of equal treatment of men and women, in order to strike down provisions of Directive 2004/113/EC which permitted Member States to maintain sex-based differences in insurance premiums and benefits. As is now commonplace, the preamble to the Directive had itself referred to relevant Charter rights and the CJEU proceeded to test the substantive provisions of the Directive against the rights which it purported to respect.
29. This important constraint on the content of EU legislation will no longer exist on the approach adopted in the Bill, as the Charter will not be received into domestic law alongside the EU legislation which refers to it. There will be some scope for interpreting retained EU law in accordance with Charter rights, where that interpretation is apparent from pre-exit case-law (see clause 6(3) of the Bill). But this is quite different from, and far weaker than, the protection apparent from *Test-Achats*. The perhaps surprising consequence is that the UK will have bound itself to comply with the substantive provisions of EU legislation, even if they are incompatible with Charter rights which they were intended to respect, and even though the remaining EU Member States are liable to be relieved of the burden of complying with such incompatible provisions.
30. Another example of the Charter playing an important role in promoting human rights protection through EU legislation is the judicial review claim originally brought by the Secretary of State for Exiting the European Union, David Davis MP, amongst others, in order to challenge data retention obligations created by s. 1 of the Data Retention and Investigatory Powers Act 2014 as contrary to Articles 7 and 8 of the Charter: *R (Davis) v Secretary of State for the Home Department* [2016] 1 CMLR 13. When the proceedings reached the CJEU, it applied Articles 7 and 8 of the Charter in order to arrive at a narrow, privacy-friendly interpretation of relevant EU legislation, and thereby invalidate the impugned provisions of domestic law: *C-203/15 Tele2 Sverige AB v Post- och telestyrelsen* [2017] QB 771. Were analogous litigation to arise after Brexit, Charter rights would not exist in domestic law as a point of reference for the interpretation of retained EU law and there may or may not be retained case law which can be relied upon to similar effect as Charter rights.
31. In short, the Bill will preserve the effect of an extensive corpus of EU legislation but without the important safeguard and interpretative tool which the Charter currently offers in relation to that legislation.

#### **(4) Gaps in substantive rights protection**

32. Next, contrary to the impression which the *Right by Right Analysis* seeks to create, the rights currently conferred by the Charter will not be comprehensively reflected in domestic law if the Charter itself is not retained. I can make that point without actively disagreeing with any of the specifics of the Government's analysis. The document is carefully worded, emphasising areas where protection can reasonably be said to be continue whilst glossing over other areas where no such claim can be made, and it requires careful reading.
33. There are general points to be made against the Government's analysis. First, the Government's case that protection of Charter rights will continue relies substantially on the proposition that many Charter rights are also general principles of EU law, which will continue to be applied after Brexit (see, for example, the analysis of Article 1, on human dignity). But it must not be forgotten that the legal force of the general principles of EU law is to be substantially reduced by clause 6(3) and Schedule 1, §3. They will remain only as a point of reference for interpretation of retained EU law and cannot be relied upon to impugn the validity of legislation or governmental action, or indeed the validity of any future domestic legislation in their current field of application. They may be amended or repealed after Brexit.
34. Second, the Government's case for the continued force of Charter rights relies heavily on the protection of Convention rights via the HRA, since most of the rights in Titles I and II of the Charter have a direct equivalent in the ECHR. But this reliance must be read subject to the limitations of the HRA as compared with current Charter protections, in particular its very limited effect in relation to incompatible primary legislation. It is to be noted that the Bill treats all "direct EU legislation" retained by clause 3 – including vast swathes of directly applicable EU regulations – as primary legislation for the purposes of the HRA, which can therefore only be made subject to a declaration of incompatibility in the event that it is held to be incompatible with Convention rights (Schedule 8, §19).
35. Third, in §2.25 of the White Paper, and subsequently, the Government has relied upon international agreements to which the UK is party as providing continuing protection for certain Charter rights after Brexit. That reliance was controversial because, although the domestic courts are increasingly willing to examine unincorporated international treaties, such treaties have force in domestic law only in limited circumstances and to limited effect (principally, to inform the

interpretation of ambiguous legislation and to contribute to the analysis of proportionality in contexts where the CJEU or European Court of Human Rights have previously referred to them) . The introductory commentary in the Right by Right Analysis places significantly less weight upon this argument, no doubt because of the difficulties I have mentioned (see, in particular, §12 of the Introduction), but there are multiple references to unincorporated international treaties in the analysis of individual rights and principles (see, for example, Article 19 on removal, expulsion and extradition, Article 22 on cultural, religious and linguistic diversity and Article 24 on the rights of the child). Those references should be viewed with caution and in the light of the Government’s recognition that such treaties “*are not part of the law of the UK*” (§12 of the Introduction).

36. Fourth, the Government’s stated intention to ensure that Charter protection is not weakened even without retention of the Charter itself apparently refers only to the substantive rights conferred by the Charter and not to Charter “principles”. Although in most cases it is relatively clear from the Explanations which accompany the Charter which provisions encompass only principles, the Government has rightly recognised that the Charter itself does not provide any simple catalogue or other point of reference for distinguishing between rights and principles (see, for example, p. 2 of the letter of 20 November 2017 from the Secretary of State, David Davis MP to Harriet Harman MP). And the Government’s analysis of which Charter provisions contain rights and which principles is questionable in certain respects: for example, it regards Article 29, which refers to “*a right of access to placement services*” as expressing a principle rather than a right. In the absence of definitive rulings by the CJEU, there can be no certainty that the Government’s catalogue of the Charter rights which will continue to be protected is correct.

37. Fifth, the Government has reached a number of conclusions to the effect that certain Charter rights are not directly enforceable, and so do not need continuing protection, based on questionable evidence. For example, it relies upon C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* [2014] ICR 411, in which the CJEU held that Article 27 of the Charter on consultation of workers or their representatives did not confer an enforceable right on individuals, as deciding also that the potentially far more significant Charter rights to protection in the event of unjustified dismissal and to fair and just working conditions (Articles 30-31) also do not confer enforceable rights. I cannot detect any basis in the CJEU’s judgment for those broader conclusions.

38. As for gaps in protection which are specific to particular Charter rights, this Opinion is not the occasion for a detailed exposition and comparison of substantive law which may replicate Charter rights after Brexit. However, it is important to mention a few examples, if only to highlight that the *Right by Right Analysis* does, on careful reading, confirm that the Charter rights will not be replicated in their entirety in domestic law after Brexit:

- (1) The Article 8 Charter right to protection of personal data will be given substantial force by domestic legislation implementing the EU General Data Protection Regulation 2016/679/EU, but the Charter right remains necessary to ensure full protection. The GDPR falls into the category of EU legislation which references and purports to implement Charter rights, and where, on the Bill's approach, the Charter will no longer operate so as to ensure that it does so effectively. Examination of past EU law practice in the field of data protection, including *Google Spain*, demonstrates that underlying human rights instruments will play a significant role in the application of GDPR, but this will not be possible in the UK.
- (2) The Charter right to education, in Article 14, is wider than its ECHR equivalent, in Article 3 of Protocol No. 1 to the ECHR, in that it covers "*access to vocational and continuing training*".
- (3) Although domestic discrimination law is extensive and powerful, and will remain so, there is no domestic equivalent of the freestanding rights to equality of treatment in Articles 20 and 21 of the Charter. The Equality Act 2010 sets out various specific anti-discrimination rights in particular contexts whilst Article 14 ECHR is limited in its application to situations which fall within the ambit of a Convention right.
- (4) The rights of the child conferred by Article 24 of the Charter will not be fully reflected in domestic law. Specific aspects of children's rights have been recognised as general principles of EU law but litigants relying upon the primacy of the child's best interests, reflected in Article 24(2), very often have to do so with reference to Article 3 of the UN Convention on the Rights of the Child, which is unincorporated international law.
- (5) As the Supreme Court acknowledged in *Benkharbouche*, the scope of the critical Article 47 Charter right to an effective remedy is not the same as that of the Article 6 ECHR right to a fair hearing in the determination of civil rights and obligations. For example, significant areas of public law, including immigration, do not fall within Article 6. The right to an effective remedy may encompass procedural obstacles, such as restrictions upon the availability of

compensation, which are not within the ambit of the rights conferred by Article 6; indeed, the ECHR equivalent of the Article 47 right to an effective remedy, which is Article 13 ECHR, is not one of the Convention rights which is protected by the HRA. The common law may have a powerful role to play in enforcing fair access to the courts, as illustrated by the recent successful challenge to the introduction of fees for Employment Tribunal litigation (*R (Unison) v Lord Chancellor* [2017] 3 WLR 409). However, there is no common law right to an effective remedy as such and, as *Benkharbouche* demonstrates, the common law is ineffective against clearly-worded primary legislation.

39. Those are, as I have stated, examples of Charter rights which will not have substantive equivalence in domestic law after Brexit on the approach currently adopted by the Bill. However, focus on particular rights should not distract from the more general points made in §§33-37 above, in particular that in §33. A wide range of Charter rights, from the most basic human right to dignity in Article 1 to the freedom to conduct a business in Article 16 do not have a direct equivalent in domestic law, and on the Government's own analysis will live on only by virtue of their status as general principles of EU law. As such, they will no longer have fundamental status and can no longer be used to found a claim of breach of human rights. This is a real and significant devaluation in human rights protection.

#### **(5) Loss of effect of Charter principles**

40. My analysis thus far has focused upon the rights conferred by the Charter and not on the broad range of principles which it also recognises. Many of these principles are highly significant in their aspirations if not in their legal effect: see, for example, the right of access to preventative health care in Article 35 and the entitlement to social security benefits and social services recognised in Article 34. As I have noted, the Government does not express any intention to ensure that Charter principles are incorporated within domestic law, although some of them will have some effect by virtue of being reflected in Treaty provisions and provisions of secondary legislation which becomes retained EU law.

41. What is not recognised in the Government's position is that Charter principles have been given real and practical legal effect by the CJEU when analysing the content of Charter rights and construing and validating EU legislation which impacts upon Charter rights. For example, in *C-547/14 R (Philip Morris Brands Sarl) v Secretary of State for Health* [2017] QB 327, the CJEU relied

upon the principle in Article 35 of the Charter than there be a “*high level of human health protection*” in rejecting a claim that EU law restrictions on tobacco labelling and packaging contravened freedom of expression in Article 11 of the Charter. The Article 35 principle was a highly significant aspect of the CJEU’s analysis of proportionality. The exclusion of the Charter from domestic law after Brexit will prevent Charter principles from being given indirect, but significant, effect in this and other ways.

#### **(6) Uncertainty and confusion**

42. I entirely agree with the EHRC’s previously stated position that the preservation of legal certainty and consistency is a powerful reason in favour of preserving the effect of the Charter in domestic law following Brexit. It should be apparent from my analysis above that the exclusion of the Charter from retained EU law will inevitably give rise to extensive litigation which seeks to establish whether and to what extent particular Charter rights continue to have effect in domestic law and to what extent they may be protected by the legal mechanisms which exist post-Brexit. The Government’s *Right by Right Analysis*, and other assurances it has given, will be pored over and relied upon by Claimants before the domestic courts as justifying a broad measure of protection for current Charter rights. The Government will, no doubt, take a somewhat harder line at that stage than it has taken thus far in its attempts to assure Parliament that express preservation of Charter rights is unnecessary.

43. The point is not only that such litigation could be avoided if relevant parts of the Charter were retained but also that the need for litigation to establish basic parameters of human rights protection following Brexit will itself compromise protection of fundamental rights. Given the well-documented restrictions on availability of legal aid and other obstacles to the pursuit of legal claims, some claimants will inevitably be deterred from relying upon, and seeking to vindicate, their rights.

#### **Conclusions**

44. In summary, therefore, my principal conclusion is that the approach currently taken in the Bill does not achieve the Government’s stated intention that the protection of substantive rights conferred by the Charter will not be weakened. That intention can only be achieved by

incorporating relevant provisions of the Charter in the corpus of EU law which is retained after Brexit.

45. If I can be of any further assistance, my Instructing Solicitor should not hesitate to contact me.

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