

**European Union (Withdrawal) Bill**  
**House of Lords**  
**Committee Stage, 26 February 2018**

Supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit

**Introduction**

The Commission has proposed and supports amendments to the European Union (Withdrawal) Bill (the Bill) to make sure it realises the Government's stated intention to safeguard certainty and continuity of the law, including in relation to equality and human rights. We have sought to address any potential gaps in protection arising from the process of transposing and amending the body of European Union (EU) legislation, and continuing to apply retained EU law.

The Government's plan not to retain the EU Charter of Fundamental Rights (the Charter) is a concern. Removal of the Charter will affect substantive rights and legal protections for individuals in the UK, and therefore the Bill as it stands on this point does not give effect to the Government's commitment to protect existing rights.

This note specifically addresses how the Charter will apply after Brexit. It explains why there is no reason courts should not be able to continue to apply the rights in the Charter to retained EU law, and to actions of UK public bodies which fall within the scope of retained EU law, in the same way as they do at present. To do so will promote legal consistency and certainty, and ensure there is no weakening of human rights protection as we leave the EU.

## How the Charter works now

The Charter contains rights and principles which apply to Member States when they are implementing EU law. The European Communities Act 1972 applies the Charter in UK law.

As a result UK legislation and government decisions which fall within the scope of EU law will be unlawful if they contravene the rights set out in the Charter.<sup>1</sup> The Charter is applied by UK courts. Examples are given in the case studies below.

### Case study 1

The Court of Appeal in *Google v Vidal-Hall* [2015] EWCA Civ 31 held Charter rights meant the Claimants in that case should be able to claim compensation for distress caused by Google giving information to third parties about their internet usage without their knowledge or consent. The court held that section 13(2) of the Data Protection Act 1998 which would have prevented a claim for compensation for distress alone, must be disapplied as incompatible with rights to an effective remedy under the Charter, so the Claimants could go ahead with their claim.

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<sup>1</sup> Domestic legislative and government actions falling within the scope of EU law are those which give effect in the UK to the EU Treaties and EU legislation, or which make exceptions to EU law rights. UK domestic courts are required by EU law principles of supremacy and direct effect to disapply domestic primary legislation, and quash secondary legislation and administrative action which is found to be in breach of Charter rights. "Disapply" in this context means that the EU law takes precedence over incompatible UK law.

## **Case study 2**

In *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62 the Supreme Court held that Charter rights meant that the Claimants, who had been employed as domestic staff in the embassies of Sudan and Libya, should be able to claim compensation for discrimination and breach of the Working Time Regulations. The State Immunity Act 1978, which would have prevented the claims, should be disapplied, so again the Claimants could go ahead with their claims.

## **How the Charter rights would work after Brexit**

The EHRC recommends the Bill should be amended to retain the Charter as part of EU retained law and to provide that it has the same effect after exit day, in relation to the interpretation and application of EU law that is retained by the Bill, as it had immediately before exit day.

This means Charter rights and principles will continue to apply to retained EU law and to government decisions which fall within the scope of retained EU law, as that term is defined in the Bill.

If these recommendations are adopted it would be expected that the UK Courts would reach the same decision in both case studies referred to above if the cases were brought after exit day. In the Google case the relevant provision of the Data Protection Act 1998 (unless by that time repealed) would be part of retained EU law and would be subject to disapplication in line with retained Charter rights in the same way. In the Benkharbouche case the claims for discrimination and breach of the Working Time Regulations would be based on retained EU law and the Charter right to an effective remedy would be applied in the same way to disapply the State Immunity Act 1978.

Certain adjustments will have to be made to Charter rights in order to reflect the changed legal environment after exit. For example:

- (1) The rights conferred by Articles 39 and 41-44 of the Charter are concerned with access to the EU institutions, such as the European Parliament, and there will be no scope for these to operate in the UK following exit.
- (2) Articles 15(2) and 45 of the Charter contain rights of free movement of persons and services for EU citizens and will need to reflect the final terms agreed between the UK and the other Member States.

The need for such adjustments is no different to the position with many other provisions of retained EU law. Technical changes which do not affect substantive rights could be made under delegated powers.<sup>2</sup> However the Bill is not the appropriate place to make adjustments to Charter rights which are dependent upon the outcome of negotiations between the UK and the other Member States or which have significant policy implications. If such changes are needed and considered appropriate by Parliament they should be made by subsequent primary legislation at the appropriate time.

### **Further information**

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work at: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

For more information, please contact:

### **Parliamentary leads**

Denise Morrisroe (Monday, Tuesday, Friday)  
[Denise.Morrisroe@equalityhumanrights.com](mailto:Denise.Morrisroe@equalityhumanrights.com)  
Tel: 0161 829 8109

Katherine Perks (Tuesday, Wednesday, Thursday)  
[Katherine.Perks@equalityhumanrights.com](mailto:Katherine.Perks@equalityhumanrights.com)  
Tel: 020 7832 7813

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<sup>2</sup> For example the language will need to be adjusted to replace references to "law of the Union" with "retained EU law."

## **Legal lead**

Stephen Lodge

Stephen.Lodge@equalityhumanrights.com

Tel: 020 7832 7851