

European Union (Withdrawal) Bill
House of Lords
Committee Stage, 21 February 2018

Supplementary note on the impact of the loss of the EU Charter
of Fundamental Rights

Introduction

The Commission has proposed and supports amendments to the EU (Withdrawal) Bill (the Bill) to make sure the Bill 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 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 focuses specifically on the potential impact of the loss of the Charter.

The impact of the loss of the Charter

The Government has pledged that removal of the Charter will not lead to a reduction in the rights we enjoy in the UK. Ministers have also said that the Charter does not create new rights, and that the rights it contains are

found elsewhere in domestic law, international law and retained EU law – as set out in the Government’s ‘Right-by-right analysis’¹ of the Charter.

However, we consider that significant concerns arise from the loss of the Charter, and are supported in this view by the legal advice we have received from Jason Coppel QC.² The concerns can be grouped into three categories: **a reduction in substantive rights and principles; a reduction in domestic protection mechanisms; and the creation of legal uncertainty.** These are discussed in more detail below.

Reduction in substantive rights and principles

The Government has pledged that Brexit will not reduce the rights we enjoy. Yet a number of rights contained in the Charter do not have equivalent protection in existing domestic law, or have significantly broader scope than those found elsewhere such as in the European Convention on Human Rights (ECHR). Charter rights without equivalents include, among others, specific rights relating to children, the free standing right to non-discrimination including on the grounds of sexual orientation, the freedom to conduct a business, the right to protection of personal data, the right to physical and mental integrity, and a guarantee of human dignity.

The following examples illustrate some of the ways in which the Charter has had a positive impact so far in its short life (despite the constraints on its application), and some of the ways in which its removal might impact adversely on the rights of people in the UK.

Children’s rights: The Charter provides specific rights for children which are not replicated elsewhere in justiciable UK-wide human rights law. For example, the Charter requires that the **child’s best interests** must be a primary consideration in all actions relating to children, that **children’s views may be expressed and shall be taken into consideration**, and that children have a **right to maintain a personal relationships with both their parents** unless contrary to their interests (Article 24). The latter right was used in a case relating to two British

¹ Available at: http://data.parliament.uk/DepositedPapers/Files/DEP2017-0757/Analysis_of_the_Charter_of_Fundamental_Rights_of_the_European_Union.pdf

² The legal advice is published with a summary on the EHRC website at <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0>

children of a Nigerian national father. The father's deportation was successfully challenged, with legal arguments focusing on the major negative impact on the children of loss of contact with a parent [Adebayo Abdul v. Secretary of State for the Home Department, [2016] UKUT 106 (IAC)]. Cases of this kind might become more common after Brexit, with EU nationals losing the automatic right to reside in the UK and the consequent risk of family separation where one parent is British and the other an EU national. The Charter also provides a positive **right to education** (Article 14), including vocational and continuing training, free compulsory education, and freedom to found educational institutions and to provide education in accordance with the parents' convictions. This is a more extensive provision than the ECHR right not to be denied an education. The Charter also contains a **prohibition on child labour** (Article 32) which is not replicated elsewhere in justiciable human rights law.

Data protection and privacy: The Charter provides extensive **protection of personal data** in Article 8, which is greater than that provided elsewhere in domestic or justiciable international human rights law. This was relied on by senior UK politicians in their successful challenge of the Home Office over the general and indiscriminate retention of emails [Davis & Watson v Home Secretary]. The Charter (Articles 7 and 8) has also been found to provide a '**right to be forgotten**' [Google Spain v AEPD] which did not previously exist elsewhere.

Bioethics: The Charter (Article 3) contains particular protections relating to **consent, eugenics, cloning** and **making the body a source of financial gain**, to ensure that, as technology advances, people retain control over how their bodies are used in medicine and science. These protections are not replicated elsewhere in human rights law.

Healthcare: The Charter was decisive in ensuring that bans on tobacco advertising were permitted. The CJEU [C-477/14 Pillbox 38] weighed up the advertising restrictions in the Tobacco Products Directive (Directive 2014/40/EU), which prevented businesses from promoting their products (an interference in their Article 16 freedom to conduct a business), against the principle in Article 35 of the Charter (that '**a high level of human health protection** shall be ensured in the definition and

implementation of all Union policies and activities’), and concluded that the restrictions were appropriate and necessary. The loss of the Charter would mean the removal of the legal framework of fundamental rights against which the body of EU law can be tested, and which enabled a case such as this to be decided clearly and fairly. It would therefore add a measure of doubt to a future UK case of this nature based on retained EU law.

Gender equality: Without the Charter, insurance companies could have continued to charge people more for their insurance premiums because of their gender. The Test-Achats case (Case C-236/09) ruled that this was incompatible with the principle of sex equality, enshrined in Articles 21 and 23 of the Charter.

LGB rights: The Charter is the only justiciable human rights instrument with effect in the UK which explicitly prohibits discrimination on grounds of sexual orientation.

Disability: Disabled people would no longer be able to use the Charter (Article 26) to support their **right to independence, integration and participation in the community**. This interpretive tool in the Charter goes further than the non-discrimination provisions in the Equality Act 2010 or ECHR.

Business and property rights: If the Charter is lost, people running small businesses (and others), particularly in sectors heavily affected by Brexit such as farming and fishing, would lose the protection of rights such as the **freedom to conduct a business** (Article 16). The **right to property** (Article 17) in the Charter includes the right to own, use, dispose of and bequeath one’s possessions, and also protects intellectual property, making it more extensive than the ECHR right to peaceful enjoyment of possessions.

Reduction in domestic protection mechanisms

The Charter gives explicit effect to the rights it contains in a way that is not matched elsewhere. Charter rights have their origins in the United Nations treaties and the constitutional laws and traditions of EU member states. But the UK has not incorporated the UN human rights treaties into its domestic law, so they do not have direct effect and do not

provide equivalent protection to that currently provided by the Charter. The Bill means that, after Brexit, there will be no right of action in domestic law based on a failure to comply with any of the General Principles of EU law. The Charter rights would be unenforceable in UK courts.

The case of *Benkharbouche* illustrates how the Charter can provide a legal remedy not otherwise available in the UK. The Charter's Article 47 **right to an effective remedy** and guarantee of a fair trial applies to laws which derive from the EU. Without this, the workers in a foreign embassy in London who complained of unlawful discrimination and a breach of working time regulations would have been denied a remedy [Benkharbouche & Anor v Embassy of the Republic of Sudan] because of the UK's state immunity laws. Furthermore the ECHR right to a fair trial is limited to civil and criminal proceedings, whereas Article 47 of the Charter also applies to administrative cases (e.g. on tax and immigration).

Legal uncertainty

The process of leaving the EU is already extremely complex and unpredictable, and the removal of the Charter risks creating an additional level of unnecessary legal uncertainty and instability.

The Charter rights form part of the General Principles of EU law and inform everyday judicial and administrative decisions in the UK, whenever our courts and executive are operating within the scope of EU legislation. Transposing the wide and complex body of EU law while disapplying the fundamental rights that underpin them would create significant uncertainty about the meaning of retained EU law. The Government's 'right by right analysis' seeks to identify alternative sources of Charter rights which are scattered throughout domestic law, case law and international law. This is a recipe for costly and time-consuming litigation as the courts seek to establish how far the rights in the Charter continue to apply after Brexit.

It would add a further measure of instability to what is already a very uncertain time for our government, our Parliament and our civil service. But this can be avoided by simply ensuring that the Charter continues to apply to retained EU law.

Conclusion

The loss of the Charter means that the Government risks failing to fulfil the general international responsibility it has signed up to (and which it appears to accept implicitly in its claim that the Bill will not lead to any reduction in rights) to avoid regression in human rights protections. This is contained for example in the duty to achieve the 'progressive realisation' of economic, social and cultural rights in the International Covenant on Economic, Social and Cultural Rights. The Charter's removal also means people in the UK losing the potential additional protections that may arise from future interpretation of the Charter rights by the courts in response to changing social and economic circumstances.

Removal of the Charter without a like-for-like replacement would, prima facie, amount to a reduction in legal certainty, legal rights and, in particular, domestic remedies, and the Government has not done enough to show how this will be avoided.

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

For more information, please contact:

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