



HM Government

# Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights

## Evidence: NGOs and Other Organisations

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The Ministry of Justice issued a Call for Evidence for a [review on the balance of competences](#) between the UK and EU in relation to fundamental rights on 21 October 2013, with the deadline for submitting evidence being 13 January 2014.

The Fundamental Rights Review is part of a broader series of reports on EU competence taking place between 2012-14, aiming to deepen public and Parliamentary understanding of the nature of our EU membership, among other things.

### **The Call for Evidence**

#### ***1. What evidence is there that the impact of:***

- the Charter of Fundamental Rights of the European Union (“the Charter”);*
  - the EU’s broader framework of fundamental rights*
- having been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

The Review recognises that CJEU case-law means that Member States must respect fundamental rights when they implement EU law, when they derogate from EU law, and when they act within the scope of EU law, though the UK position is that acting within the scope of EU law encompasses the first two categories. ‘Acting within the scope of EU law’ was addressed in *Zagorski*, where the High Court found that decisions which failed to prevent the export of a drug to the United States which was to be used to anaesthetise prisoners before they received a lethal injection fell within the scope of implementing EU law.

The Review puts fundamental rights in a somewhat negative light, as a restriction on Member State action: on p10 it says “The key point is that EU fundamental rights constrain what the EU and, in certain circumstances, its Member States can do.” But that is not the key point of fundamental rights at all – the key point is protecting or guaranteeing rights for individuals, organisations etc, and the UK needs a coherent and strong policy in order to ensure that the rights of individuals and businesses within the UK are properly protected.

#### ***2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?***

The Charter of Fundamental Rights is the newest EU mechanism for fundamental rights protection, and, being a published Charter, is far easier to locate and understand than the ‘general principles’ doctrine the CJEU developed over many years. Indeed, making rights more accessible was the purpose of creating the Charter in 1999, though at that time it lacked binding effect.

The Charter predated the Lisbon Treaty, but its status changed with Lisbon: it gained equal Treaty status in Art 6(1) TEU. While this could potentially be seen as indicating that EU fundamental rights protection was to be more vigorous, the drafters were careful to limit the Charter’s scope in its Article 51 to instances in which Member States were implementing EU law, and stated that the Charter did not extend the scope of EU law in any way, or establish new powers.

Despite its clear status as on a par with the treaties, and above EU secondary legislation, the Charter’s current legal status and effect within Member States may not be fully appreciated within the UK – even amongst members of the UK judiciary – as demonstrated in the recently decided *AB case*. It is clear that the UK would benefit from a better understanding of the status of the Charter of Fundamental Rights, and that politicians and judges should agree upon both its status, which is equal to a Treaty – see Article 6(1) TEU – and its scope – (it is only applicable when Member States are implementing EU law Article 51(1) CFREU and does not extend the scope of application of EU law – see Article 51(2) CFREU and Protocol 30, Art 1).

The legal effect of Protocol 30 (OJ 2010 C 83, p. 313) requires clarification to promote consistency and develop understanding within the UK. Though it is often cited as an ‘opt out’ clause, both Houses of Parliament made clear that it was not an opt out but a further clarification/repetition of the Article 51(2) CFR indication that the Charter is not to extend EU competences, and was adopted for political rather than legal reasons. The Charter is in essence a codification of an amalgamation of the ECHR and the Council of Europe’s European Social Charter. The Protocol was, as is well known, primarily directed at Title IV (solidarity) and reflected the UK’s reluctance to adhere to any new European arrangements that enshrine social rights. The UK ratified the original Council of Europe Social Charter in 1962 and remains bound by it. It participated in the elaboration of the Council of Europe’s revised social charter and signed it in 1997 with all the international law implications that entails but has not ratified it. (Article 18 of the Vienna Convention on the law of treaties provides that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.)

The UK Government has long sought to play down the significance of the EU Charter of Fundamental Rights. In its negotiations around, and public presentation of, the substance of the Charter the position of the UK Government was that the Charter simply consolidated existing EU fundamental rights jurisprudence, contained no new rights and did not allow the courts any new powers. And when it was proposed that the Charter be incorporated into TEU by Treaty amendment, the UK sought an “opt-out” from certain of the Charter provisions, which is now contained in Protocol 30 to the Lisbon Treaty.

UK Governments over the past 20 years, of whatever political hue, have consistently shared a hostility to the idea of courts telling them what to do. Particular suspicion has focused, in this regard, on grand proclamations of fundamental rights contained in a variety of international instruments. In the past, our politicians were happy to sign up to these if they remained statements of teleological hope only. More recent experience has been, however, that (national and international) courts have tended to get their hands on these documents and, taking international law seriously, transformed them into catalogues of justiciable, individual rights. This transformation of aspiration into obligation is seen, from the political perspective, as a zero sum game: the increase in the jurisdiction of the courts to consider and adjudicate on these instruments has been perceived as a reduction in power for the politicians, giving them less room to manoeuvre. It is against this background that one can begin to understand the political context of the UK (subsequently joined by Poland) insistence on Protocol No 30 TEU.

Even before it became legally binding, provisions of the EU Charter of Fundamental Rights were being referred to and relied upon in the domestic courts of the UK: see, *R (Yogathas) v HS* [2003] 1 AC 920 per Lord Hope at 935, para 36; *Bellinger v Bellinger* [2003] 2 AC 467 per Lord Hope at 486, para 69; *Sepet & Anr v SSHD* [2003] 1 WLR 856 (HL) per Lord Bingham at 867–68, para 15 and Lord Hoffman at 879, para 51; *R (Robertson) v Wakefield Metropolitan District Council & Anr* [2002] QB 1052 per Maurice Kay J at para [38]. In *R (Howard League for Penal Reform) v SSHD* [2003] 1 FLR 484, Munby J noted (at 495, para 51) that:

*“The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter [of Fundamental Rights] is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, re-affirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.”*

The second and sixth preambles of Protocol 30 state, respectively, that “the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 TEU and Title VII of the Charter itself” and that “the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles” seek to explain the effect of the Charter. The first substantive provision is Article 1(1), which is in the following terms:

*“The Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”*

But as a derogation from the general principles of EU law this provision has to be read strictly and narrowly accordingly to its precise terms. According to *Honyvem Informazioni Commerciali Srl v Mariella De Zotti* (C-465/04) at para 24:

*“[A]ccording to settled case-law, the terms used to establish exceptions to a general principle laid down by EU law ... are to be interpreted strictly (Case C-150/99 Stockholm Lindöpark [2001] ECR I-493, paragraph 25). Applying this canon of construction Article 1(1) of Protocol No 30 TEU says only that the Charter cannot extend the ability of a court judicially to review national laws. But this power in the CJEU (and conferred on national courts in so far as acting within the field of EU law) is not conferred or extended by the Charter – it exists by virtue of the Court’s established jurisprudence noted above, and is already part of the *acquis communautaire*. If the Member States are operating in the field of EU law then they are subject to EU law review. This is not a matter of territorial or geographic jurisdiction, but one of the respective competence of the Member States and the Union institutions.”*

Article 1(2) of Protocol No 30 TEU says this:

*“(2) In particular, and for the avoidance of doubt, nothing in Title IV ‘Solidarity’ of the Charter creates justiciable rights applicable in Poland or in the United Kingdom except insofar as Poland or the United Kingdom has provided for such rights in its national law.”*

Lastly, Article 2 of Protocol No 30 TEU provides that:

*“To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”*

This is, however, arguably stating no more than the obvious, and should have no limiting effect on the interpretation and application of the Charter’s provisions.

Certainly the House of Commons Scrutiny Committee thought that Protocol 30 would have little effect. In its follow up report to the 2007 *European Union inter-governmental conference*, it concluded that Protocol No 30 TEU did not provide any guarantee that the Charter should have no effect on UK law. The Committee noted that nothing in Protocol No 30 TEU will excuse the United Kingdom authorities (including the courts) from the obligation to comply with interpretations handed down by the CJEU, even where these rulings are based on the terms of the Charter.

It may be noted, in this regard, that the last preamble to Protocol No 30 TEU states that “*this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally*”. This may be contrasted with the terms of Protocol No 32 TEU on the acquisition of property in Denmark, which states:

“*Notwithstanding the provisions of the Treaties, Denmark may maintain the existing legislation on the acquisition of second homes.*”

Contrast may also be drawn with the terms of Protocol No 35 TEU on Art 40.3.3 of the Constitution of Ireland, which states that

“*Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland [“the right to life of the unborn”].*”

The question of the precise effect (and effectiveness) of Protocol 30 was dealt with by the CJEU in *NS v Secretary of State for the Home Department C-411/10*. This concerned the scope of the Member State’s obligations to use Art 3(2) of the Dublin (EC) Regulation 343/2003 – which sets out criteria for determining which Member State is the responsible State for the purposes of the examination and determination of an asylum claim made within the territory of the EU, which is not necessarily the State in which the asylum claim was lodged – to process an individual’s asylum claim in circumstances where there is a real risk of breaches of fundamental rights protected by the CFR. The CJEU was asked by the Court of Appeal of England and Wales to rule on whether the duties of the UK under and in terms of this EU Regulation were qualified in any respect so as to take account of the Protocol 30, always assuming that any decision under the Council Regulation fell within the scope of EU law for the purposes of Art 6 TEU and/or Art 51 CFR. In making this Article 267 TFEU preliminary reference Lord Neuberger, MR noted (in *NS v Secretary of State for the Home Department* [2010] EWCA Civ 990 at paras 6-7:

*“6. There is one specific matter which we should mention in relation to one of the conclusions reached by Cranston J, from whom this appeal arises. In the course of his very clear and careful judgment he concluded, in paragraph 155, that the Secretary of State (the respondent) was not bound to act in accordance with the EU fundamental rights protected from the Charter when acting within the scope of the EU law. I refer to what he said in paragraph 155:*

*“155. Recital 15 of the Dublin Regulation records that it respects the fundamental rights and principles recognised in particular by the Charter of Fundamental Rights. Given the Polish and United Kingdom Protocol, the Charter cannot be directly relied on as against the United Kingdom although it is an indirect influence as an aid to interpretation. It will be recalled that Article 1 of the Charter makes human dignity inviolable. Article 18 provides that the right to asylum shall be guaranteed, and Article 19(2) provides that “no one may be removed to a State where there is a serious risk that he or she would be subjected to inhuman or degrading treatment”. None of these rights are directly enforceable against the Secretary of State. A transfer under the Dublin Regulation cannot be challenged on the basis that it is not compatible with the right to human dignity or the right to asylum, or will be in breach of Article 19(2).”*

7. *The reason we mention this point is that the Secretary of State no longer seeks to support that finding, as is clear from paragraph 8 of the respondent’s notice, which states:*

*“8. Contrary to the Judge’s holding, the Secretary of State accepts, in principle, that fundamental rights set out in the Charter can be relied on as against the United Kingdom, and submits that the Judge erred in holding otherwise (judgment, paragraphs 155 and 157, first sentence). The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect.”*

All parties to the NS litigation endorsed this view including the AIRE Centre who together with Amnesty International was an intervener in the proceedings. Indeed it would have been perverse to do otherwise as the NS case was joined to the case of ME from the Republic of Ireland (which had no part in any protocol in relation to the Charter except as indicated above, and the court was applying the same legal principles in both cases).

In light of the above acceptance by the Secretary of State in NS, the CJEU was able to reiterate at paragraph 120 that Protocol 30 “explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.”

In *Zagorski*, despite the court finding that the situation was one in which the UK was implementing EU law (paras 70 -71), the Charter was not found to confer any rights upon the Claimants (para 74) – it did not provide protection beyond those found in the ECHR, which were also not applicable. The CJEU has not attempted to extend the scope of EU law in order to make the Charter applicable, as the case of *Case C-617/10 Fransson* demonstrates. In *Fransson*, the CJEU stated that where “a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction” (para 22).

The application of Protocol 30 to title IV has not yet been explored by the CJEU, but it seems unlikely that the Protocol will have any effect on the question as to how the EU Charter will be interpreted and applied by the CJEU, or by national courts (in the UK or Poland) following and applying CJEU jurisprudence. . However, in accordance with Article 6(3) TEU the CJEU approaches fundamental rights as interpreted by the ECtHR as reflecting Member States’ constitutional traditions and thus constituting general principles of Union law. This is reflected in the *Kamberaj* decision at paragraphs 60-61, where the Court found that Article 6(3) TEU reflects settled case-law and fundamental rights “*form an integral part of the general principles of law the observance of which the Court ensures*” The *Kamberaj* case is a classic example of the articulation of an indisputable principle of EU law which is of general application across the EU even though it related to a case about an instrument (the Long Term Residents Directive 2003/109/EC) to which the UK is not a party and relied on Art 34 of the Charter which comes under Title IV. The CJEU may well adopt the approach taken by the EcHr in *Demir and Baykara v Turkey* (34503/97 12<sup>th</sup> November 2008) and to the same effect.

It is also hoped that the Review will lead to more widespread recognition that the UK has obligations under this Charter and that the Charter has effect when the UK is implementing EU law, rather than more as a freestanding source of rights to be called upon at a litigant’s whim.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The rights guaranteed in the Charter are not identical to those in the ECHR, though where there is overlap the Charter has been interpreted in line with the ECHR guarantees, as *Zagorski* demonstrates. Further guarantees for individuals' rights must be advantageous for them, and the Charter seems only to be applied within its delimited scope.

In the AIRE Centre's view the most important right to be expressly articulated in the Charter is found in Article 41- the right to good administration. This right is not new but its express articulation in the Charter is and its importance has yet to be explored. Since the charter applies not only to EU institutions but to national authorities actin within the scope of EU law, individuals whose situation falls within the scope of EU law have an EU law right to have their affairs dealt with in accordance with this provision and any failure in that respect is in principle subject to the usual availability of an action in damages under the Francovich principle ( joined cases 6/90 and 9/90).

This brings us to the next most important right, the right to an effective remedy enshrined in Art 47. Like Art 41 this is not a new rights but a new articulation of an existing right. The Charter Explanations make clear that despite the ruling of the ECHR in the case of *Maaouia v France* 2001 that art 6 ECHR does not apply to administrative litigation, where the litigation relates to a matter falling within the scope of EU law the full protection of Art 6 ECHR is accorded. This includes for ex ample the disclosure of information (Hercules Chemicals Case 51/92) the provision of legal aid ( see e.g. DEB case 279/09)

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

European Union Agency for Fundamental Rights (hereinafter the "FRA") was established in 2007 and commenced its work on 1 March 2007, marking a new era on the expansion of the EU policymaking scope on fundamental rights. The objective of the FRA is "*to provide the relevant institutions, bodies, offices and agencies of the Community and its member states when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competences to fully respect fundamental rights*"

The AIRE Centre believes that the FRA has filled the gap of monitoring fundamental rights through a variety of methods which have enabled it to pinpoint where fundamental rights violations occur, through its establishment of a reliable, systematic and sizable pool of data, as well as co-coordinating with civil society to raise awareness about fundamental rights so as to promote monitoring of compliance by ordinary citizens in a proactive manner. The FRA publishes professionally researched independent – and thus credible- assessments of the situations in Europe on which it focusses, as well as guides to various aspects of EU law, which are seen as an invaluable resource for policy makers and judicial bodies alike

The ECJ [now CJEU] has long required the Community to respect fundamental rights, and the European Council has emphasised many times the importance of respect for human rights. The applicants' relative success in staff and competition law cases challenging EU administrative acts for their violation of fundamental rights, such as the right to non-discrimination (Case C-404/92 *P X v. Commission* [1994] ECR 1-4737, and Case C-191/98 *P Tzoanos v Commission* [1999] ECR 1-8223), freedom of expression (Case 100/88 *Oyowe and Traore v Commission* [1989] ECR 4285) and freedom of religion,(Case 130/75 *Prais v Council* [1976] ECR 1589.18) etc are reflective of the ECJ's commitment to respect for fundamental rights.

However despite that relative success, the court has been rather less willing to strike down EU legislation when it is not compatible with fundamental rights. Although it seems that the ECJ has come to recognise the fundamental rights aspect of secondary law, especially in cases of Community legislation affecting economic rights,( See Case 4/73 *Nold v Commission* [1974] ECR 491; Case 44/79 *Hauer v Rheinland Pfalz* [1979] ECR 3727) rather than offering its unconditional protection the court has adopted a pragmatic approach in these cases by interpreting legislation as a proportional limitation, as opposed to a complete violation, of fundamental rights.( Case C-84/95 *Bosphorus v Minister for Transport* [1996] ECR I-3953) Accordingly, although the ECJ had developed its fundamental rights-related jurisprudence, before the Charter became fully justiciable it left a monitoring gap which has been partially, extrajudicially filled by FRA.

The FRA has therefore in this regard fulfilled an important role of co-operating with EU legislators in the form of drafting opinions on the situation of fundamental rights in the EU, and proposing appropriate recommendations on how best to form policies which respect fundamental rights rather than conflict with them. This approach has ensured that the FRA will proactively increase the awareness of the relevant institution within the EU, and prevented the conflicting of EU legislation and fundamental rights at a much earlier stage (on ex-ante political scrutiny and ex-post judicial control, see Kum,

*“Constitutionalising Subsidiarity in Integrated Markets”*, 12 ELJ (2006), 503, 525-30.22) thereby alleviating the need to hope for a favourable judgment from the ECJ. It has therefore promoted a system of pre-emptive monitoring, by sounding out to the EU legislators what could potentially lead to a violation of fundamental rights, so that the need for further monitoring down the line would not arise.

In addition by averting any potential conflict between EU legislation and fundamental rights at an early stage the FRA ensures that the ECJ is not faced with sensitive and controversial decisions such as the *Bosphorus* case, where the ECJ could only offer limited protection to fundamental rights.

Finally irrespective of how efficient the ECJ may be in its judicial protection of fundamental rights, it is not sufficient to rely on it as the sole protector of fundamental rights. Ignorance, lack of resources, ineffective representation, inadequate legal standing and insufficient remedies all have the capacity to thwart the judicial enforceability of fundamental rights (*P Alston, J H H Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights"*, in Alston (ed), *The EU and Human Rights*, OUP (1999)). This can create a gap in monitoring. In this regard, the FRA’s systematic monitoring of fundamental rights through its data gathering, data analysis, and its advisory and networking roles, acts as a protective net for those who may not have access to justice for the reasons mentioned above, thereby covering an important gap in judicial enforceability of the rights of those who may not have access to justice. This is most readily apparent in the field of social and economic rights, as contained in the EU Charter of Fundamental Rights, and which distinguishes it from other Conventions such as the ECHR. Through the monitoring of fundamental rights, the FRA ensures that that judicial protection of these rights is as good as the protection of civil and political rights.

One of the disadvantages of the FRA is that it has no legislative or regulatory powers, no quasi-judicial competences in the sense of an ombudsman, and no authority to adopt legally binding decisions with effect on third parties. Pursuant to article 3(3) of the Regulation, the FRA may only monitor fundamental rights issues in the EU and its member states when implementing Community law. In this regard, the FRA’s mandate is significantly narrower than that of the former Monitoring Centre, which had the ability to monitor the activities of the member states outside the European Union. The upshot of this provision is that the FRA is only able to act in respect of those activities which are governed by the EC Treaty or the EAEC Treaty. Therefore, the Regulation’s scope does not extend to activities in the areas of police and judicial co-operation in criminal matters, leaving a vacuum in its monitoring of a very important area which can be susceptible to human rights violations.

Although the Agency has an “advisory monitoring” mandate which is limited to collecting and analysing information and offering technical assistance, through its systematic, consistent and coherent data collection and analysis, it can still make a crucial contribution in setting out normative trends within its existing mandate. Indeed, the power of the Agency is based to a great extent on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues. The emergence of a European perception of fundamental rights will hopefully raise the expectations of civil society to receive a better standard of fundamental rights protection from their political institutions, and an acceptance on the part of those institutions to strive for such better standards of fundamental rights protection and promotion.

**5. *What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?***

One of the main tasks of the FRA as set out in article 4 of the regulation is “to develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights”. The FRA publishes thematic reports drawn from its analytical research and surveys, as well as developing its own communication strategy in an attempt to raise public awareness of fundamental rights issues. By raising public awareness, the FRA creates a new level of expectation of fundamental rights protection by civil society from its respective judiciary and elected representatives. By doing this, the FRA allows civil society to be more vigilant of fundamental rights violation, enabling people on the ground to monitor violations effectively. All its work is commissioned by competitive tender and contracts awarded on merit on a cost effective value for money basis in which the remuneration is often far less generous than that offered by comparable bodies

**6. *What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?***

**7. *What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?***

**8. *Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?***

**9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The maxim ubi ius , ibi remedium ((e where there is a right there must be a remedy ) is only valid if those whose rights are infringed have access to practical information about those rights and to the means to vindicate them . An importnat function of the fundamental Rights and Citizenship Programme effective is to ensure that individuals are able to now what their rights are receive practical assistance in asserting them.

Human rights protection in the UK relies upon a mix of sources, and the Human Rights Act 1998 gave further effect to the ECHR.

As the review recognises, national courts are not bound by decisions of the ECtHR, and only the HRA which gives the Convention domestic effect.

The EU and the ECHR co-exist, with the latter being a mechanism of the separate Council of Europe, rather than deriving from the EU. Furthermore, the Luxembourg and Strasbourg courts are not bound by each other's decisions. While the current UK government has discussed the possibility of repealing the HRA and even leaving the ECHR, the EU has pledged to accede to the ECHR in Article 6(2) TEU. The difficulty for the UK in “escaping” the reach of the ECHR is immediately apparent if it remains within the EU – given that when applying EU law or deciding on matters within its scope, UK courts have to follow the CJEU in relation to its longstanding incorporation of fundamental rights as general principles of EU law which include fundamental rights as guaranteed by the ECHR following Article 6(3) TEU.

The protection of the rights guaranteed by the ECHR can only be further strengthened within CJEU case-law following EU accession. The interconnected nature of fundamental rights protection in Europe makes it difficult to imagine the UK genuinely having the option to go against the tide of expanding the applicability of the ECHR and to reverse its domestic protection of fundamental rights. The reduced guarantees withdrawal would entail for UK nationals or third country nationals when the UK acts outside the scope of EU law makes withdrawal from the ECHR an unattractive prospect.

Once the CJEU is bound by the ECHR, its judgments in relation to ECHR fundamental rights will be binding upon Member States' national courts and would affect a UK intending to leave the ECHR.

In terms of the impact of EU accession to the ECHR and whether this would be advantageous/disadvantageous to individuals/others within the UK; EU accession to the ECHR should be

advantageous for the UK. The UK currently adheres to ECHR guarantees and EU accession removes the anomalous possibility of an EU institution breaching fundamental rights guarantees to which all Member States must subscribe. This should increase protection for individuals and others at an EU level.

The AIRE Centre has played a key role in Strasbourg in the elaboration of the draft agreement on accession and continues to play a key role in relations to the progress in this field which has now moved its focus to Brussels and Luxembourg.

**10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

**11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?**

**12. How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?**

The Review asks whether action in respect of fundamental rights could be taken differently at international or national or regional level– but without suggesting a bill of rights, etc and how this would affect the UK.

**13.** *Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?* The AIRE Centre is not aware of any indirect use of fundamental rights to expand the competence of the EU, which is perhaps unsurprising in light of the fact that, to the extent that the EU Charter falls within the competence of EU institutions, it does so in a clearly and carefully defined manner (see above). We note that, insofar as the fundamental rights contained within the Charter are there for the benefit of all EU citizens, including UK nationals, they are inherently advantageous to all individuals. In this regard, the AIRE Centre is not aware of any individual rights set-out within the EU Charter, or elsewhere within the instruments of the EU, which are considered by the UK Parliament to be objectionable or unreasonable.

**14.** Is there any other evidence in the field of EU fundamental rights which is relevant to this review?

## **Equality and Diversity Forum response to the consultation on the balance of competences in relation to fundamental rights**

### **Introduction**

The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation.<sup>1</sup> Further information about our work is available at [www.edf.org.uk](http://www.edf.org.uk).

Our members value EU provisions relating to fundamental rights. We regard them as providing a set of rights that are both important in and of themselves and necessary to underpin and support the common market.

We are responding to questions 1-5, 9 and 13.

#### **1. What evidence is there that the impact of:**

- the Charter of Fundamental Rights of the European Union (“the Charter”);**
- the EU’s broader framework of fundamental rights**

**has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

#### **The European Charter of Fundamental Rights as the best modern statement of fundamental rights**

The European Charter of Fundamental Rights complements the European Convention on Human Rights (ECHR). The ECHR covers civil and political rights, whereas the Charter incorporates the economic and social rights that are found in other fundamental rights documents. The Charter recognises property rights and business rights more clearly and it also recognises human dignity explicitly. This is advantageous to everyone. It is also easier to read and understand than most human rights instruments.

The European Commission commented in 2012–

*Three years after it became legally binding, the impact of the European Union’s Charter of Fundamental Rights is increasingly clear. It is becoming a point of reference not only for the EU institutions when drawing up legislation but also for the*

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<sup>1</sup> A list of EDF members is attached as annex 1.

*European and national courts, making fundamental rights a reality for citizens in Europe.*<sup>2</sup>

The Charter has influenced the development of improved measures at EU level, for example, in 2012 it led to the Commission proposing a major reform of the EU's rules on the protection of personal data<sup>3</sup> and taking a pro-active approach to accelerate progress towards a better gender balance on the corporate boards of the major European companies.<sup>4</sup> The EDF considers that these are developments that benefit individuals, business and the public sector in the UK.

Examples of recent cases where the Charter has been considered include the Commission's action contesting the early retirement of around 274 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62. The Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement is incompatible with EU equal treatment law (the Equal Treatment Directive and Article 21 of the Charter).<sup>5</sup>

### **The role of fundamental rights as the glue that holds Europe together**

Because the EU's single market is based on the principle that there should be free movement in goods, services, capital and labour, it is necessary that there is also a minimum level of social protection in all countries to protect against social dumping and to secure that there is an effective and positive civil society in all states.

If there were no minimum level of social protection operating across all member states then the state with the lowest level of social protection might have a competitive advantage through lower costs However, its citizens would suffer from experiencing less protection against poor treatment.

The common standards for the protection of maternity and pregnancy provide an excellent and simple example of this at work. A member state which did not offer financial and legal protection for pregnancy and maternity would appear to incur less costs and employers to make financial savings as a result. However, if women are dismissed for pregnancy or not paid during maternity not only do the women and their children suffer there will be greater turnover of staff as well as a loss of staff

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<sup>2</sup> <http://ec.europa.eu/justice/fundamental-rights/charter/application/>

<sup>3</sup> a) Communication on Safeguarding Privacy in a Connected World – A European Data Protection Framework for the 21st Century, COM (2012) 09 final. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0009:en:NOT> ;

b) Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM (2012) 11 final.

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:DOC>

c) Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM (2012) 10 final. Available at:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:DOC>

<sup>4</sup> Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF> .

<sup>5</sup> CJEU, Case C 286/12, *European Commission v. Hungary*, 6.11.2012

expertise. As Viviane Reding, the Vice-President of the European Commission and EU Justice Commissioner, commented -

*Greater gender equality and a more efficient use of everyone's skills is a part of the solution to the current crisis. Leaving women behind means not only forsaking the important contribution women make to the economy but also wasting years of investment in education of girls and young women.<sup>6</sup>*

Such common minimum standards of social protection can only be set at the European level, through the mechanisms of the European Union.

Moreover most European states have written constitutions that guarantee protection of human dignity and equality between all persons. Key member states, such as Germany and France, would be unwilling to work in a framework of a single market if other members of that market did not also subscribe to the same basic fundamental social rights.

This was all discussed many years ago in the leading German constitutional judgments in *Solange I* and *II*, and *Maastricht*.<sup>7</sup> In these cases the German Federal Constitutional Court (FCC) set out the principle that the democratic legitimacy of EU law depends on the observation of fundamental rights within the EU. In this series of cases the German FCC made it clear that Germany's acceptance of the supremacy of Community law was conditional on the EU's constitutional guarantee of fundamental rights.

If the UK were no longer to subscribe to these fundamental rights it would be not allowed to remain a signatory to the Lisbon Treaty. The UK's agreement to the Charter thus confers a great benefit on it as a result because it allows the UK and its citizens all the benefits of free movement of labour, capital and services with our European partners.

More widely, the UK's prosperity is closely connected to our relationship with EU member states with which the UK has substantial trading partnerships. The TUC observed recently –

*The EU is the world's biggest exporter and the second-biggest importer. In 2011, despite the crisis, its combined GDP was bigger than the US and trade with the rest of the world accounts for around 20% of global exports and imports. Access to a market of such proportions has undoubtedly economic benefits to any participating country. Indeed nearly 50% of UK goods are exported to the EU - but overall the UK accounts for only 22% of total EU exports, which could suggest that the British*

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<sup>6</sup> Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner: The binding EU Charter of Fundamental Rights: Key trends two years later, April 2012, at [http://ec.europa.eu/justice/fundamental-rights/files/viviane\\_reding\\_speech\\_16\\_04\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/viviane_reding_speech_16_04_2012_en.pdf)

<sup>7</sup> Maastricht, German Constitutional Court decision from 12 October 1993, BVerfGE 89, 155; Brunner v European Union Treaty CMLR [1994] 57.

*economy is much more dependent on the internal market than the EU is on the British economy.<sup>8</sup>*

This relationship is dependent on us adopting a similar approach to fundamental rights as our trading partners. This is not only to our economic advantage it also provides substantial advantages to the people of the UK by ensuring that their fundamental rights are respected.

**2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**

The Charter is being referred to frequently. A recent search of the Curia website showed that it had been cited in 1,501 documents and referred to in 623 judgments and opinions.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

See above – answer to question 1. We consider that the ECHR is fundamental to the working and joint agreements between the EU member states, it underpins the trading relationships by providing a common understanding of minimum human rights and ensuring that there is a level playing field within the internal market.

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

**5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?**

The work of the Fundamental Rights Agency (FRA) is helpful to policy makers across the UK. FRA collects and analyses data, prepares reports on key cross cutting themes which affect most member states, albeit in differing ways. Recent examples include-

- Roma Integration,
- political participation of persons with disabilities, and
- different types of hate crime.

FRA plays a vital role in supporting the activities of civil society organisations in the EU through the research, guidance and other materials it produces and disseminates. In the past year, the Equality and Diversity Forum has used FRA resources on at least ten occasions to raise awareness on issues ranging from health inequalities to anti-Semitism and Roma rights – disseminating these resources to our network of more than 4,000 individuals in the public, private and voluntary sectors. Such material is particularly valuable to small and poorly

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<sup>8</sup> TUC evidence to BIS on the EU internal market, February 2013 at <http://www.tuc.org.uk/international-issues/europe/ec-social-agenda/employment-and-social-policy/tuc-evidence-bis-eu>

resourced charities working on the ground to support the most marginalised members of society. And this mechanism for cascading information that has developed between FRA and EDF (and no doubt with other second tier organisations) is a cost-effective way of helping to ensure that service providers and community organisations are provided with the material they need to do their work.

It produces teaching modules such as the manual for fundamental rights-based police training. This could have been helpful if it had been used to help train the police who were involved in policing the 2009 G20 event in London, an international event where some police actions were clearly inappropriate and failed to respect the fundamental rights of the people exercising their lawful right to peaceful protest. In March 2009 the Joint Committee on Human Rights recommended –

*... that human rights training should be integrated into other training, rather than provided as a discrete component, and that it should be regular, relevant and up to date... good leadership from the top of the police down is vital to ensuring respect for human rights in any policing operations, including policing protests. This will also help to ensure consistent good practice across police forces.<sup>9</sup>*

Additionally, FRA holds regular conferences to bring together people from all member states to share both good practice and issues of common concern. We consider that the FRA has a vital role to play in combatting inequality and ensuring that minimum standards to ensure that people are treated with dignity are met across the EU.

An extensive evaluation of the work of FRA was carried out in 2012 and it concluded that –

*The evaluation findings show that the Agency is considered by European stakeholders to be a vital point of reference in the fundamental rights architecture in Europe, where it is seen as a unique provider of comparative, EU-wide reports and data in the field of fundamental rights, covering a need for objective and reliable information which was previously not catered for.<sup>10</sup>*

This comprehensive independent survey of the work of FRA since it was set up in 2007 makes a number of recommendations about ways that FRA can improve its operations but it certainly concludes that FRA does provide value for money.

## **9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The EU's accession to the ECHR is likely to lead to a more consistent set of rights applying across the EU it will also result in greater coherence between the judgments of the Court of Justice of the EU and the European Court of Human Rights which will be generally beneficial.

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<sup>9</sup> JCHR, Seventh Report, 2008/9, Demonstrating respect for rights? A human rights approach to policing protest, Conclusions and recommendations, paras 156 &162

<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4709.htm#a38>

<sup>10</sup> Evaluation of the European Agency for Fundamental Rights, Final report November 2012, para 4.1, p95 available at [http://fra.europa.eu/sites/default/files/fra-external\\_evaluation-final-report.pdf](http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf)

**13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

We do not believe this to be occurring. Fundamental rights operate only in relation to actions by EU institutions, or when Member States implement EU law. The Charter complements existing systems for the protection of fundamental rights, it does not replace them and therefore it cannot extend the competence of the EU.

**Equality and Diversity Forum, 13 January 2014**

## **Annex 1: Equality and Diversity Forum Members**

Action on Hearing Loss  
Age UK  
British Humanist Association  
British Institute of Human Rights  
Children's Rights Alliance for England (CRAE)  
Citizens Advice  
Disability Rights UK  
Discrimination Law Association  
End Violence Against Women Coalition  
Equality Challenge Unit  
EREN – The English Regions Equality and Human Rights Network  
Fawcett Society  
Friends, Families and Travellers  
Gender Identity Research and Education Society (GIRES)  
JUSTICE  
Law Centres Network  
Mind  
National AIDS Trust  
National Alliance of Women's Organisations (NAWO)  
Press for Change  
Race on the Agenda (ROTA)  
Refugee Council  
RNIB  
Runnymede Trust  
Scope  
Stonewall  
The Age and Employment Network (TAEN)  
Trades Union Congress (TUC)  
UKREN (UK Race in Europe Network)  
UNISON  
Women's Budget Group  
Women's Resource Centre

### **Other signatories**

Equanomics UK



## **Response of the Equality and Human Rights Commission to the Consultation:**

### **Consultation details**

Title:	Call For Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights
Source of consultation:	Ministry of Justice
Date:	January 2014

### **For more information please contact**

Name of EHRC contact providing response and their office address: XXXX, EHRC Legal Directorate, Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX
Telephone number: XXXX
Mobile number: XXXX
Email address: XXXX

## **Introduction**

The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence in response to the Ministry of Justice's call for evidence on the Review of the Balance of Competences between the United Kingdom and the European Union on Fundamental Rights.

In line with its remit, as a National Human Rights Institution and under s.9 Equality Act 2006, to encourage and support the development of a society based on human rights principles, the Commission has a role in supporting the understanding of fundamental rights principles and their sources.

The analysis below is based on our own experience and on legal research and attempts to address only those questions on which the Commission has evidence. It does not deal with all the questions in the consultation document some of which are either outside the Commission's statutory remit or are questions on which we do not have evidence to contribute.

However, the Commission notes that a full assessment of the effectiveness of the Charter of Fundamental Rights of the European Union ("the Charter") is difficult at this early stage. The effectiveness of the Charter is dependent upon states promoting it, as they are required to do by Article 51. There is currently widespread confusion in Parliament, and even in the courts, as to the meaning of the UK's Protocol. The general public are generally unaware of the Charter at all, and the confusion surrounding its status makes it difficult for most people to understand or to rely on it. As we know the Ministry is aware, there have been recent cases being argued in court where the government's own counsel have not been correctly briefed on the government's understanding of what the Protocol is (and is not) which further obfuscates, and leads to 'rogue' judgments (such as AB v Secretary of State for the Home Department [2013] EWHC 3453 (Admin)).

## **Questions**

### **1. What evidence is there that the impact of:**

- the Charter of Fundamental Rights of the European Union (“the Charter”);**
- the EU’s broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Charter contains rights beyond those found in the European Convention on Human Rights (“the ECHR”) as implemented in the Human Rights Act 1998 (“HRA”). For example, Article 8 provides a right to protection of personal data, Article 13 a freedom of the arts and sciences, Article 15 a freedom to choose an occupation and right to engage in work, Article 16 a freedom to conduct a business and Article 18 a right to asylum. Title IV ‘Solidarity’ contains socio-economic rights which go beyond those in the HRA covering social security and social assistance (Article 34), health care (Article 35) and consumer protection (Article 38). It should be noted however that Article 1(2) of the UK-Poland Protocol (Protocol No. 30) declares “for the avoidance of doubt” that nothing in Title IV creates justiciable rights applicable in the UK and Poland except insofar as is provided for in their national laws. It remains a matter of debate whether this is clarifying the general position (as a number of the rights within Title IV make reference to ‘national laws and practices’) or restricting the scope of the Charter in relation to the UK and Poland. However, Charter rights whether in Title IV or elsewhere only apply at all where EU law is already engaged.

Even in relation to rights covered by the ECHR, the Charter provisions differ. For example, the right to a fair trial is not qualified by reference to either civil rights or criminal charges. Article 49(1) provides that a heavier penalty shall not be imposed than that applicable at the time of the commission of a criminal offence but also that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that lighter penalty shall be applied. Interestingly, the European Court of Human Rights (“the ECtHR”) referred to Article 49 of the Charter in an apparent reversal of its previous position when it accepted the

application of the retrospective application of a more lenient penalty principle within Article 7 ECHR (Scoppola v Italy (no. 2) [2009] ECHR 10249/03).

Title III of the Charter specifically deals with rights of equality and provides that everyone is equal before the law (Article 20); requires respect for cultural, religious and linguistic diversity (Article 22); requires equality between women and men in all areas (but without preventing measures providing for specific advantages in favour of the under-represented sex) (Article 23); provides for the right of children to have such protection and care as is necessary for their well-being (Article 24); and provides for recognition of the rights of the elderly to lead a dignified and independent life and to persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in community life (Article 26). Article 21 prohibits discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality.

Although Article 14 of the ECHR also prohibits discrimination on similar terms (encompassing those not expressly mentioned by reference to “other status”), this is not a free-standing right, but can only be relied on in relation to one of the other ECHR rights.

As well as the rights provided for in the Charter and the ECHR, further fundamental rights exist in domestic law by virtue of EU law through secondary legislation of the EU.<sup>1</sup> These include the Equal Pay Directive (75/117/EEC) on equal pay for women and men, the Equal Treatment Directive (76/207/EEC) prohibiting discrimination on grounds of gender in access to employment, vocational training and promotion and working conditions and Directive 97/80/EC on the burden of proof in sex discrimination cases. These (together with four other directives relating

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<sup>1</sup> And further rights are in the pipeline, e.g. Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed on deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, requires Member State implementation by 27 November 2016: see art 15(1).

to gender) have now been consolidated and amended by Directive 2006/54/EC (the Recast Gender Directive). This provides for protection from both direct and indirect discrimination, harassment, sexual harassment and victimisation and requires Member States actively to take into account the objective of gender equality when formulating and implementing laws, regulations, administrative provisions, policies and activities in areas covered by the Directive. The Pregnant Workers Directive promotes the equality of pregnant women at work covering, among other things, maternity leave and prohibiting dismissal. Directive 2004/113/EC implements the principle of equal treatment between women and men in access to and supply of goods and services.

In the field of race discrimination, Directive 2000/43/EC provides protection from discrimination based on racial or ethnic origin prohibiting both direct and indirect discrimination, harassment and victimisation and covers not only the employment field, but also social protection including social security and healthcare, education and access to goods and services including housing.

Directive 2000/78/EC (the Framework Directive) provides for overarching protection from discrimination in employment and related areas on the basis of disability, religion or belief, sexual orientation and age.

Protection on the basis of the last three characteristics did not exist in domestic law at all prior to this Directive. In relation to disability discrimination in particular, employers are required to make reasonable adjustments to enable disabled persons to have access to and participate in or advance in training and employment subject to a proportionality test. Directive 2003/88/EC (the Working Time Directive) aims to protect workers against adverse effects on their health and safety that can be caused by excessively long working hours, inadequate rest or disruptive working patterns. It establishes in particular a minimum daily rest period of 11 consecutive hours a day, rest brakes, a maximum week of 48 hours including overtime and a right to four weeks paid annual leave. It also limits work for night workers to an average of eight hours per 24 hours. Directive 96/34/EC and Directive 97/75/EC lays down equal rights for men and women to parental leave on grounds of birth or adoption and for protection from dismissal as well as a right to return to the same or a similar job. Directive 97/81/EC (the

Part time workers Directive) requires that part-time workers shall not be treated less favourably than comparable full-time workers solely on the basis of their part time status unless such treatment is justified on objective grounds and wherever possible for employers to consider requests for transfer from full-time work to part-time work and vice versa.

Directive 95/46/EC (the Personal Data Directive) requires the protection of personal data and thus the right to privacy. Data must be collected fairly and lawfully, must not be kept for longer than necessary and the organisation collecting the data is under an obligation to ensure the confidentiality and security of their processing. This also provides for a general right for individuals to access data held on them.

Although it is these EU directives which brought about the most significant change and protection from discrimination in domestic law, it is important to note that the Equality Act 2010 also contains provisions that go beyond those required by EU secondary legislation. In particular, the public sector equality duty in section 149 of the Equality Act 2010 requires public sector decisions (i.e., decisions by those exercising public functions) to have due regard to the need to advance equality of opportunity and foster good relations in relation to those with 'protected characteristics' (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation and pregnancy and maternity).

In the recent case of Bull and another v Hall and another [2013] UKSC 73, it was a regulation made under the Equality Act 2006 (replaced by the Equality Act 2010) that was relied on in arguing that the refusal of a couple running a hotel to allow a couple in a civil partnership to use a double-bedded room on the basis of their religious belief in the sanctity of marriage was direct discrimination on grounds of sexual orientation. The Equality Act (Sexual Orientation) Regulations 2007 were said to have gone further than was required by EU law (paragraph 3). Lady Hale commented on the desirability nonetheless to interpret the Regulation consistently with EU law (paragraph 22). Before the Court of Appeal, it was the couple who ran the hotel who sought to rely on the Charter to argue that their right to freedom of thought, conscience and religion (Article 10) and their freedom to choose an occupation (Article 15) had to be given effect in the interpretation of the Regulation. The

Court of Appeal decided that the Charter did not provide greater rights than those in the ECHR that the couple also relied on. The Supreme Court held (by a majority) that there was direct discrimination contrary to the Regulation and, unanimously, that there was in any case unjustified indirect discrimination.

An instance of the impact of anti-discrimination secondary law of the EU can be seen in Case C-236/09 Association belge des Consommateurs Test-Achats ABL v Conseil des ministers (1 March 2011). In this case, the applicants sought annulment of the Belgian law transposing Directive 2004/113 whose purpose is ‘to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.’ The complaint was that Belgium had applied the derogation in Article 5(2) of the Directive permitting ‘proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’ and that this was contrary to the principle of equality between men and women found in the Directive and also the Charter.

The Court of Justice of the European Union (“the CJEU”) took the position that, as the Directive itself expressly referred to Articles 21 and 23 of the Charter, the validity of Article 5(2) had to be assessed in the light of those provisions. The CJEU noted that the use of actuarial factors relating to sex were widespread in the provision of insurance services at the time of the adoption of the Directive so that it was permissible for the principle of equality to be implemented gradually with appropriate transitional periods. However, the CJEU recognised that there was a danger that the derogation could be applied indefinitely and, in light of the premise on which the Directive was based that the respective situations of men and women with regard to insurance premiums and benefits were comparable, held that an exemption without temporal limitation was incompatible with the purpose of the Directive and Articles 21 and 23 of the Charter. The court decided that Article 5(2) must therefore be considered invalid on the expiry of an appropriate transitional period (paragraph 32).

The main limitation of the Charter is that its scope is restricted to cases of implementation of EU law. Although this has been given a broad interpretation by the UK courts (see response to Question 2 below and case law set out there), there will still be cases falling outside this. Further, the jurisdictional scope of the ECHR has been found also to apply to cases under the Charter (see further response to Question 2).

From the perspective of a victim claiming a violation of their fundamental rights, the main advantage of the Charter over the ECHR is that, where it is found to apply, conflicting domestic law needs to be disapplied. This is significantly different from the position in relation to the ECHR where domestic courts are limited to seeking to interpret domestic law so as to comply with the Convention where possible or to declare it incompatible with the ECHR.

This disapplication occurred in the recent case of Benkharbouche v Embassy of the Republic of Sudan; Janah v Libya [2013] IRLR 918 Judgment handed down on 4 October 2013. In that case, a cook at the Sudanese embassy and a member of the domestic staff of the Libyan embassy made claims asserting employment rights (including unfair dismissal, pay disputes and, in the case of Ms Janah, race discrimination and harassment) against Sudan and Libya respectively. The respondents successfully relied on State Immunity under the State Immunity Act of 1978 before the ET and the claimants appealed against the ET decisions to the EAT which heard the two cases together. The claimants argued that to deny them access to a court to enforce their employment rights breached Article 6 of the ECHR so that, pursuant to section 3 of the HRA, the court had an obligation to interpret the state immunity legislation to the fullest extent possible so as to comply with Articles 6 and Article 14. Where such an interpretation was not possible, the claimants argued that the legislation should be disapplied on the basis of Article 47 of the Charter. It was argued that the Charter rights were directly effective in the UK and were supreme so that incompatible domestic law had to yield to the Charter provisions. (However, see further the case of Chester below.)

The EAT held that there was a breach of Article 6 on the basis that, in light of the kind of work engaged in by the claimants, making their

disputes amenable to a court decision would not interfere with any public governmental function of the states concerned. It also took the view that the 1978 Act could not be interpreted in order to give effect to Article 6 rights as this would involve essentially reversing the effect of the Act in these cases. Nor did the EAT have the power to make a declaration of incompatibility. Nonetheless, the EAT accepted that the claims were employment claims ‘within the material scope of EU law’ so that the principle of effectiveness required the EAT to disapply provisions of domestic legislation conflicting with the fundamental right guaranteed by EU law in Article 47 of the Charter. The EAT did note previous limitations on horizontal direct effect which would suggest that EU law could not be relied on against a respondent who was not an emanation of the state. However, it relied on CJEU Case C-555/07 Kucukdeveci v Swedex GmbH to hold that although directives could only be relied on against emanations of the State, general principles of EU law which included fundamental rights could have horizontal direct effect as between private parties. The EAT rejected the argument that there could be no wider right to disapply domestic law in relation to Charter rights than there was in relation to the ECHR to the extent that the rights were coterminous and disapplied sections 16 and 4(2) of the 1978 Act. It also rejected the claim that Protocol 30 prevented the application of the Charter (see further Question 2 below). The EAT did however reject the view that all the employment disputes raised by the claimants could proceed on this basis, allowing only those which were based on EU legislation (i.e., those based on breaches of Working Time Regulations, racial harassment and discrimination but not unfair dismissal claims). Both parties in the case were given permission to appeal. In relation to the claimants, this was so that they could ask for a declaration of incompatibility in relation to domestic law that could not be disapplied on the basis of the EU Charter.

Below are other cases in which EU law and especially the Charter have been relied on particularly before the national courts by victims alleging a violation of their fundamental rights. The Charter articles that have been raised in argument have been Articles 1, 2, 3, 4, 7, 8, 11, 15, 17, 18, 19, 24, 34, 47, 51 and 52.

In ZZ v Secretary of State for the Home Department [2011] EWCA Civ 440, ZZ (who had dual Algerian and French nationality, was married to a British national with eight children and had lived in the UK from 1990 to 2005) had his permanent right of residence cancelled by the Secretary of State and was excluded from the UK on the ground that his presence was not conducive to the public good. When he tried to travel to the UK, he was refused admission and was removed to Algeria. He appealed against the decision, but his appeal was dismissed by SIAC on the basis that the decision was justified on imperative grounds of public security. SIAC stated in its judgment that ZZ had no right of appeal against the decision cancelling his right of residence. In the SIAC proceedings, the Secretary of State objected to the disclosure to ZZ of material on which the Secretary of State relied. SIAC held a hearing in private to determine the extent to which disclosure of ‘closed evidence’ to ZZ would be contrary to the public interest. SIAC dismissed ZZ’s appeal noting that little of the case against ZZ had been disclosed to him and the material disclosed did not concern the critical issues. SIAC was satisfied that ZZ was involved in the activities of the Armed Islamic Group network in terrorist activities and was satisfied that the personal conduct of ZZ represented a genuine present and sufficiently serious threat affecting a fundamental interest of society i.e. its public security and that this outweighed ZZ’s right and his family’s right to enjoy family life in the UK. ZZ appealed to the Court of Appeal arguing that he was entitled to an effective remedy pursuant to his rights in Article 47 of the Charter and that such a remedy entitled him to receive disclosure of at least “the gist” of the closed material against him. The Court of Appeal made a reference to the CJEU on whether it was permissible for SIAC not to disclose to ZZ the essence of the grounds against him in line with the principle of effective judicial protection set out in Article 30(2) of Directive 2004/38 read in light of Article 47 of the Charter. Article 30(2) provides that in relation to a decision refusing entry, the person concerned must be informed, precisely and in full, of the public policy, public security or public health grounds which constitute the basis of such a decision, unless this is contrary to the interests of State security.

The CJEU delivered its judgment on 4 June 2013 - Case C-300/11. The CJEU noted that the derogation in the interests of state security had to be interpreted strictly, but without depriving it of its effectiveness

(paragraph 49). The CJEU stated that the significance of the fundamental right guaranteed by Article 47 of the Charter had to be taken into account and that although Article 52(1) of the Charter allowed limitations on the exercise of Charter rights, these had to respect the essence of the fundamental right and be proportionate such that Article 30(2) of the Directive read in light of Article 47 of the Charter could not have the effect of failing to provide the level of protection guaranteed. Thus, the person concerned had to be able to ascertain the reasons on which the decision was based. The CJEU's answer to the question referred was that Articles 30(2) and 31 of the Directive read in light of Article 47 of the Charter had to be interpreted as requiring the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under the Directive is based and to disclose the related evidence to him is limited to that which is "strictly necessary" and that he is "informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence." (paragraph 69.)

In contrast, in the case of Home Office v Tariq [2011] UKSC 35, the Supreme Court held that, in a case in which an immigration officer of Pakistani origin had been suspended and his security clearance revoked on the basis that family members of his were suspected of involvement in terrorism, Mr Tariq was not entitled to know the gist of the evidence against him in the context of closed proceedings for reasons of national security. Mr Tariq sought to rely on the race discrimination directive (2000/43) and the Equal treatment directive (2000/78) as well as his Article 6 ECHR rights. The Supreme Court took the view that the principles of EU law were clear: there had to be effective legal protection of the rights not to be discriminated against and the guidance for what that requires was to be found in the ECHR and the case law of the ECtHR. It was held that sufficient protection was given to the Article 6 right and that the outcome of the balancing exercise to be carried out under that right could differ depending on the circumstances of the case and so could be different in a case such as Mr Tariq's where his liberty was not at stake. The claim that Mr Tariq was entitled to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal representatives so that those

allegations could be effectively challenged was rejected as an absolute requirement in favour of a balancing exercise with the court having regard to the nature of the allegations and of the national security interest in non-disclosure, the significance of such allegations to the Home Office's defence and the significance to Mr Tariq's claim of the disclosure or non-disclosure.

In R v L and other appeals [2013] EWCA Crim 991, the Court of Appeal considered a number of appeals against conviction by three Vietnamese nationals and a Ugandan woman who had been born in Portugal who were victims of human trafficking; in the case of the Vietnamese nationals they had been trafficked into the UK as children. Article 8 of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims provided that Member States shall take the necessary measures to ensure that national authorities were entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they had been compelled to commit. As noted by the court, recital 8 of the Directive required that the child's best interest must be of primary consideration in accordance with the Charter (Article 24). All the appeals were allowed.

In RT (Zimbabwe) v Secretary of State for the Home Department; KM (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38, the Supreme Court held that the principle in HJ (Iran) v Secretary of State [2010] UKSC 31 (recognising as a refugee a homosexual who, on return to his country of nationality, was obliged to live a 'discreet' life to avoid persecution), was applicable to other convention rights such as the right in this case to express political opinion openly. In considering whether this extended to a fear of persecution on the grounds of lack of political belief (on the basis that the risk on return to Zimbabwe was on account of imputed political opinion including for those who were unable to demonstrate positive support for the ruling party), the Supreme Court referred to Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and reference in the recital of that Directive to the Charter and to respect for human dignity and the right to asylum. The Supreme Court concluded that the principle in HJ (Iran) also applied to applicants who claimed

asylum on the grounds of a fear of persecution on the basis of lack of political belief, irrespective of how important (or unimportant) their lack of belief was to them.

R (on the application of Chester) v Secretary of State for Justice; McGeoch v The Lord President of the Council [2013] UKSC, 63 decided a few days after Benkharbouche on 16 October 2013, concerned prisoner voting rights by two persons convicted of murder and sentenced to life imprisonment. As Mr Chester's claim for judicial review was issued in December 2008, the Supreme Court stated that the Charter did not apply to him. However, Mr McGeoch's claim was issued in 2011 so that he could seek to rely on the Charter. The Supreme Court however held that in relation to such claims, which could at most relate to elections to the European Parliament and to municipal authorities, EU law did not incorporate any right to vote parallel to that recognised by the ECtHR. It was also held that, had EU law conferred a right, the only relief that could have been granted was a declaration that the legislative provisions governing eligibility to vote in European Parliamentary and municipal elections in the UK were inconsistent with EU law. It would not have been possible to read UK law compatibly with EU law and the general ban on voting in such elections could not have been disapplied as a whole; it was clear from ECtHR case law that a ban on eligibility would be justified in respect of a very significant number of convicted prisoners. It was said to be "improbable" that the ECHR rights would, even when viewed through "the prism of European Union law", require the granting of declarations in the abstract at the instance of claimants from whom the UK Parliament could legitimately and it seemed would under any amended legislative scheme still withhold the vote (paragraph 72). The Supreme Court it was said could not itself devise a scheme that would be appropriate as that was for Parliament. Further, it was held that neither claimant could have had any arguable claim for damages for breach of EU law.

## **2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**

Title VII (“General provisions governing the interpretation and application of the Charter”) contains provisions in accordance with which the rights, freedoms and principles of the Charter must be interpreted. On its face, Article 51(1) states that the Charter applies to Member States “only when they are implementing Union law”, but case law suggests that this covers also instances when Member States derogate from EU law or in relation to any measures that come within the scope of EU law (Case C-260/89 ERT [1991] ECR I-2925 paragraph 43 in relation to fundamental rights).

In Joined Case C-411/10 and C-493/10 NS v Secretary of State for the Home Department, ME v Refugee Applications Commissioners two asylum seekers came to the UK via Greece where they had been arrested for illegal entry and were to be returned there pursuant to Council Regulation 343/2003. The Court of Appeal made a reference to the CJEU for a preliminary ruling on certain questions on the interpretation of the Charter including rights under Article 1 (human dignity), Article 4 (prohibition of torture and inhuman and degrading treatment or punishment), Article 18 (right to asylum), Article 19(2) (protection in the event of removal, expulsion or extradition) and Article 47 (right to an effective remedy and to a fair trial). NS was an Afghan national who was arrested in Greece and ordered to leave but when he tried to do so was expelled to Turkey where he stated that he was detained in appalling conditions from which he escaped and travelled to the UK where he sought asylum. The Home Department made a request to Greece pursuant to Regulation 343/2003 to take charge of NS and Greece was deemed pursuant to the regulation to have accepted such responsibility for NS’s claim. NS’s complaint that his removal to Greece would violate his rights was certified to be unfounded as Greece was on the list of safe countries with the consequence that he did not have a right to lodge an immigration appeal in the UK. NS sought judicial review, but this was dismissed by the High Court and an appeal was brought to the Court of Appeal which made a reference to the CJEU.

The CJEU held that where a Member State decided on the basis of Regulation 343/2003 to examine a claim for asylum which was not its responsibility under the regulation, that decision fell within the scope of EU law for the purposes of Article 6 of the TEU and/or Article 51 of the

Charter and that Article 4 of the Charter had to be interpreted as meaning that Member States could not transfer an asylum seeker to the Member State responsible for him under the Regulation where they could not be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amounted to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within Article 4. Further, the CJEU confirmed that Articles 1, 18 and 47 of the Charter did not lead to a different answer. Importantly, and concurring with submissions made in the reference proceedings by the Commission as intervener in the domestic proceedings, in relation to the UK's position and the UK-Poland Protocol, the CJEU stated that Article 1(1) of the Protocol explains Article 41 of the Charter with regard to its scope and does not intend to exempt the UK (or Poland) from the obligation to comply with the provisions of the Charter or to prevent a court in those Member States from ensuring such compliance. The CJEU expressly declined to rule on the interpretation of Article 1(2) of the Protocol in relation to Title IV of the Charter as the issue did not arise in the proceedings before it.

The High Court has ruled that a Member State is acting within the scope of Union law for the purposes of the applicability of the Charter even when it is exercising a power of derogation. In R (Zagorski) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (paragraphs 66-71), two US prisoners held on death row to be executed by lethal injection asked the UK Secretary of State to impose a ban on the export to the US of sodium thiopental, one of the three drugs needed for the lethal injection. They argued that in light of the time they had spent on death row, execution would be in breach of their human rights and that permitting the export would facilitate that breach. They specifically sought to rely on the Charter because ECHR rights have to be secured under Article 1 only to those within the jurisdiction of contracting states and thus would not cover US prisoners. The Secretary of State refused to ban the export of what was a legitimate anaesthetic drug also available from other markets and the claimants sought judicial review of that decision. It was argued for the Secretary of State that he was not 'implementing EU law' so that the Charter was not engaged.

On the question of the scope of the Charter's reference to 'implementing EU law' in Article 51(1), the High Court held that the power to issue export bans was a derogated power arising from EU law and so in deciding whether to impose a ban, the Secretary of State was acting within the material scope of EU law and implementing EU law within the meaning of Article 51(1). However, this did not in the end help the claimants as the High Court also held that, in relation to the question of the jurisdictional limitation of the Charter, as with the ECHR's Articles 2 and 3, Articles 2 and 4 of the Charter did not confer any rights on those outside the jurisdiction and so did not cover the claimants. Reliance was placed on Article 52(3) of the Charter regarding its interpretation, which states that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR (paragraphs 72-74).

In R (GI (Sudan)) v Secretary of State for the Home Department [2012] EWCA Civ 867, the Claimant who had been born in Sudan but became a naturalised British citizen was arrested and charged with a public order offence but left the UK for Sudan before he was required to surrender to his bail. The Secretary of State made an order depriving him of his citizenship and excluding him from the UK. He brought an appeal before SIAC as well as a judicial review against the exclusion in which he argued that he lacked the right to an effective remedy guaranteed by EU law. It was argued that the appellant had suffered discrimination by being prevented from attending his statutory SIAC appeal in contrast to an alien appealing against the revocation of his leave to remain who would be entitled to be present in reliance on Article 18 of the Treaty on the Functioning of the European Union ("the TFEU") and Article 21 of the Charter (within the scope of application of the Treaty establishing the European Community and the TEU, prohibiting discrimination on grounds of nationality). It was argued that EU law applied because the loss of UK citizenship entailed the loss of EU citizenship. However, the Court of Appeal noted that the "distribution of national citizenship is not within the competence of the EU" (paragraph 38) so that there was no basis for the grant or withdrawal of citizenship to be qualified by an obligation to 'have due regard' to EU law. The Court of Appeal noted that Article 51(2) of the Charter stated that it did not establish any new power or task for the EU to conclude that, as Article 21(2) was to apply only

within the scope of application of the Treaties, there was no EU competence on the question of citizenship. ZZ in the Court of Appeal was cited for the principle that in areas in which the Treaties claim no rule-making competence, but acknowledge the exclusive competence of Member States, the “Charter does not and cannot...give birth to rights, freedoms and principles”. The ECHR argument was rejected on the basis that Article 14 could be engaged were Article 8 engaged but that the appellant’s case did not concern Article 8 even if he might deploy such arguments in the course of his substantive appeal.

In Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation) [2012] UKSC 55, the Rugby Football Union (“the RFU”), an organisation that distributed tickets to rugby matches and had a strict policy that these were not to be sold above face value, sought a Norwich Pharmacal order against Viagogo to disclose the identity of those who had advertised on its website for sale of their tickets anonymously for amounts well above the face value. Viagogo relied on Article 8 of the Charter which guarantees the protection of personal data to argue that disclosure should not be ordered.

The Supreme Court noted that the Charter has direct effect and binds Member States when “implementing EU law” on the basis of Article 51(1), but, endorsing the approach in the Zagorski case, noted that this was to be interpreted broadly and in effect means “acting within the material scope of EU law” (paragraph 28). As regards the interpretation and application of the Charter right, the case is also interesting because it involved two competing rights – the right to property of the RFU and the right to protection of personal data of those seeking to sell their tickets on Viagogo’s website. The Supreme Court noted that Article 52(1) of the Charter sets out the circumstances in which an interference with the rights expressed in the Charter may be justified: that the interference be provided for by law and respect the essence of the rights and freedoms; that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others, subject to the principle of proportionality. Viagogo sought to argue that the question for the judge considering making an order should involve balancing the

rights of the individual against the rights of the RFU in each particular instance so that, for example, the fact that obtaining the information might deter others from selling tickets was an irrelevant consideration. Lord Kerr giving the leading judgment rejected the notion that the overall aim of the RFU in seeking the information was to be ignored as 'unrealistic'. He accepted as a correct statement of the approach to be taken that given by Arnold J in the case of Goldeneye (International) Ltd v Telefonica UK Ltd [2012] EWHC 723 (Ch) as follows:

"In my judgment the correct approach to considering proportionality can be summarised in the following propositions. First, the Claimants' copyrights are property rights protected by Article 1 of the First Protocol to the ECHR and intellectual property rights within Article 17(2) of the Charter. Secondly, the right to privacy under Article 8(1) ECHR/Article 7 of the Charter and the right to the protection of personal data under Article 8 of the Charter are engaged by the present claim. Thirdly, the Claimants' copyrights are 'rights of others' within Article 8(2) ECHR/Article 52(1) of the Charter. Fourthly, the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in In re S [2004] UKHL 47, [2005] 1 AC 593 para 17 is also applicable where a balance falls to be struck between Article 1 of the First Protocol/Article 17(2) of the Charter on the one hand and Article 8 ECHR/Article 7 of the Charter and Article 8 of the Charter on the other hand. That approach is as follows:

- (i) neither Article as such has precedence over the other;
- (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary;
- (iii) the justifications for interfering with or restricting each right must be taken into account;
- (iv) finally, the proportionality test – or 'ultimate balancing test' – must be applied to each."

The Supreme Court held that applying this test led to the conclusion that it was right to grant the order to disclose the information sought by the RFU. It was said that the grant of the order would not mean the individuals were unfairly or oppressively treated but only that the identify will be revealed of those who had, apparently, engaged in the sale and

purchase of tickets in stark breach of the terms on which those tickets have been supplied to them and in furtherance of the RFU's "entirely worthy motive" to promote the sport in the interests of all those members of the public who wish to avail themselves of the chance to attend international rugby matches.

In R (on the application of Sandiford) v Secretary of State for Commonwealth Affairs [2013] EWCA 581, a UK national suffering from physical and mental health problems and sentenced to death by firing squad in Indonesia for drug trafficking offences sought to rely on the Charter in order to ask for a mandatory order from the High Court that the Secretary of State provide funding for her legal fees. She sought to rely on Article 1 (providing that human dignity is inviolable and must be respected and protected); Article 2 (right to life and that no one shall be condemned to the death penalty); and Article 47 (right to a fair and public hearing before an independent and impartial tribunal and shall have the possibility of being advised, defended and represented and legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice).

However, in order to try to satisfy Article 51(1) that the rights are to be respected by Member States when implementing EU law, the claimant sought to argue that her case came within the scope of EU law by relying on the Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. Despite its being common ground between the parties that the Framework Decision applied to offences committed outside the EU, a unanimous Court of Appeal took the position that this was not the case (paragraphs 17-19). However, the Court did not decide the case on this basis, but instead assumed that the Framework Decision did apply to offences outside the EU. In reliance on CJEU case law and the decision in Zagorski, the Court of Appeal endorsed the position that even when a Member State exercises a power of derogation from a provision of EU law, it is implementing EU law for the purposes of Article 51(1) of the Charter (paragraphs 20-22).

Article 8(1) of the Framework Decision required Member States to take the necessary measures to establish its jurisdiction over the drug

trafficking offences covered by the Decision, but Article 8(2) provided for a derogation where offences were committed outside a Member State's territory. It was argued that the UK, by not seeking the Claimant's extradition, was exercising this derogation. The Court of Appeal rejected this argument. It accepted that a decision not to take measures to establish jurisdiction over the offences fell within Article 51(1) of the Charter. However, it held that, because there was no extradition treaty between the UK and Indonesia and any such treaty would require bilateral agreement and could not depend on the decision of the UK alone, it could not be said that the Secretary of State was 'deciding' not to establish jurisdiction (paragraph 27). Indeed, the Court of Appeal stated that it would be remarkable if the Member States had agreed by means of a framework decision to commit themselves to securing the Article 47 rights of the Charter including the provision of legal aid in such cases (paragraph 28). The claimant's attempt to rely on the ECHR also failed on the basis that the UK could not be said to be exercising control and authority sufficient to engage the jurisdiction under Article 1 in a case where the individual was completely under the control of a foreign state with the UK providing only diplomatic and consular assistance.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

There is no evidence that ECHR case law has been interpreted differently in the context of the EU's fundamental rights framework as outside that context. As noted above in relation to the cases of Home Office v Tariq and the Rugby Football Union the court has adopted the ECHR analysis of balancing rights where necessary even in the EU context. As shown in the case of Benkharbouche however, engaging EU law is a more powerful way to assert fundamental rights than through the HRA alone and can lead to the disapplication of domestic law.

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Commission welcomes the research carried out by the FRA and recognises it as being carried out under difficult circumstances, that is across a number of countries with different cultures and contexts. We would value some form of research steering group to be established by the FRA that would allow countries to discuss the design and implementation of research at a very early stage. Such a group would share experiences of carrying out particular research within the country context and allow for a more nuanced approach within countries if possible.

**13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

As shown in the Sandiford case above, attempts have been made to give a sufficiently wide interpretation to EU secondary legislation in order to bring a case within the material scope of EU law, but unsuccessfully. The domestic courts have also been clear that the jurisdictional scope of the ECHR applies also to Charter rights (see e.g. Zagorski above).

In the case of R (on the application of HC) v Secretary of State for Work and Pensions, Secretary of State for Communities and Local Government, HMRC, Oldham Metropolitan Borough Council [2013] EWHC 3874, decided on 6 Dec 2013, arguments were put forward on the basis of the Charter, the ECHR and the public sector equality duty under the Equality Act 2010 on behalf of an Algerian national with two British born children seeking financial assistance from Oldham County Council. The claimant challenged the legality of three domestic regulations which had the effect of denying her access to mainstream welfare benefits and housing provisions on the basis that these were incompatible with EU law or unlawfully discriminatory. HC's right to reside and work in the UK were claimed to derive from her children's right based on their EU citizenship, but those in her alleged position (so called 'Zambrano' carers after Case C-34/09 Zambrano in which the CJEU upheld these derivative rights) were deprived of access to welfare and housing benefits by the domestic regulations. The claimant relied in particular on Articles 18 and 20 of the TFEU, Articles 21 (on

discrimination), Article 24 (the rights of the child) and Article 34 (social security and social assistance), Articles 1 Protocol 1, 8 and 14 of the ECHR and section 149(1) of the Equality Act 2010. Articles 1, 3, 7 and 15 of the Charter were also raised but were shortly dismissed (paragraph 71).

The High Court held that there was no inconsistency between domestic and EU law and ECHR case law and that HC did not have the wide rights she sought. On the basis that Article 21(2) of the Charter made clear that it applied only within the scope of application of the Treaties, it was found that Article 21 could not provide the basis of a challenge beyond that in Article 18 of the TFEU and Article 18 failed as HC was not herself an EU citizen. It was said that, as the Charter applied only where Member States were implementing EU law, it did not enable litigants to expand the content of any freestanding EU law right such as the Zambrano right to residence and to work. Any indirect discrimination was found to be justified as the regulations were said to “represent a proportionate means of furthering the legitimate aim of protecting scarce resources, including from individuals who move to, or remain in, the UK in order to take advantage of its welfare system” (paragraph 59). In relation to Article 34 of the Charter, the court did not refer to Protocol 30, but instead relied on the qualifying words in that article to rights “in accordance with the rules laid down by Community law and national laws and practices” to conclude that Article 34 did not create any general entitlement to social security or welfare benefits (paragraph 70). The challenge based on the public sector equality duty also failed on the basis of the equality analysis carried out by the Defendants.

## **About the Equality and Human Rights Commission**

The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act. It gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.

The Commission has a statutory duty under the Equality Act 2006<sup>2</sup> to encourage and support the development of a society in which: people's ability to achieve their potential is not limited by prejudice or discrimination, there is respect for and protection of each individual's human rights, there is respect for the dignity and worth of each individual, each individual has an equal opportunity to participate in society, and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The Commission is responsible for monitoring the effectiveness of the equality and human rights enactments and advising on the effectiveness of enactments, as well as the likely effect of a proposed change of law.<sup>3</sup>

As a UN accredited National Human Rights Institution, the Commission is required to 'promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party'.<sup>3</sup> This includes the European Convention on Human Rights, incorporated in the Human Rights Act 1998.

Find out more about the Commission's work at:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

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<sup>2</sup> Equality Act 2006, section 11

<sup>3</sup> Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993.

## **Gender Identity Research and Education Society**

At an evidence gathering session held at the MoJ, I outlined the issue below concerning the apparent failure of the UK to follow well established EU law. I was asked to summarise in writing and submit as written evidence and this is given below.

XXXX

### **Inappropriate balance being taken between UK and EU law.**

**Issue:** Apparent failure of the Department of Work and Pensions (DWP) and the Tribunal System to implement EU law in matters of social security. For transsexual people, in matters of shared competence, rulings of the Court of Justice of the European Union (CJEU) are not being followed consistently. For transsexual people, the UK appears to have set aside superior CJEU case law. The claim is that rulings of the CJEU are being applied in an inconsistent manner and the consequence is a denial of justice to a vulnerable minority group.

**Background:** The CJEU ruling in Richards directed that women who have become women as a result of gender reassignment must be treated as women for social security purposes (Directive 79/7).

**Basis for ruling:** The Advocate General (AG) Opinion in Richards can only be derived from the interpretation of Article 4(1) of Directive 79/7. The AG determined that a gender reassigned woman must be treated as a woman registered as such at birth as to do otherwise would amount to a discrimination on the ground of sex directly and that is forbidden under Article 4(1) on a ‘whatsoever’ basis.

The AG Opinion (para 43) - *The alleged discrimination accordingly lies in the United Kingdom's failure to recognise a transsexual person in their acquired gender on **equal terms** with persons recorded as of that gender at birth, precisely the issue in KB.*

This was carried forward by the CJEU and its ruling makes it absolutely clear that it would be discrimination to require gender reassigned women to additionally have legal recognition before being treated as women for social security purposes.

The ruling in Richards was:

1. Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the

*ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.*

**2. There is no need to limit the temporal effects of this judgment.**

As the UK had not implemented Directive 79/7 in the time prescribed, it then had direct effect for transsexual people in the UK from the date it should have been implemented.

DWP's policy post GRA appears based on its unreferenced Equality Impact Assessment. In that assessment it claims that the discrimination in Richards was the lack of a mechanism for legal recognition that the GRA now addresses. This is clearly not supported by the AG Opinion. If the application of the 1995 Pension Act was discriminatory in Richards under Article 4(1) then the application of the GRA must also be discriminatory to claims made under Directive 79/7 as both award a pension on the basis of legal sex.

Claiming that the discrimination in Richards was a failure to provide a mechanism for legal recognition is therefore outrageous but this is the basis for DWP setting aside an EU provision that has direct effect in the UK due to the failure of the UK to implement the Directive in the time allowed. In setting aside the temporal limitation of the ruling in Richards, the UK has not followed the provisions of Article 44 of the Statute of the CJEU (the 10 year rule).

Notwithstanding the above, the principles of superior EU law in what is a matter of shared competency are not being implemented by Tribunal Judges (with one notable exception where a pension was awarded, post GRA, on the basis of gender reassignment surgery).

**The entitlement of direct effect has been removed post GRA:** It is very well established CJEU case law that direct effect **always** applies and can never be exhausted by national legislation (statute or case law) that introduces more onerous burdens than in the Directive specifically for transsexual women:

- requiring legal recognition;
- spending 2 years living as a woman;
- paying a fee to make application for a GRC;
- possibly requiring a divorce ( required for legal recognition).

DWP, supported by some Tribunals, take the position that the GRA can, in effect, exhaust the direct effect of Directive 79/7 even though the GRA introduces more onerous conditions than in the Directive AND is fundamentally incompatible with Article 4.1 (requiring legal recognition and / or divorce before acquiring legal recognition). Clearly, given that the GRA can never satisfy the requirements of Directive 79/7, the DWP position is that the direct effect ceases to apply post GRA. Again, this is an outrageous position to take in denying a fundamental right of directly applicable EU law on a citizen.

The apparent failure of the Tribunal system (with the one notable exception) to apply well established principles of EU law may be due to the lack of specialism at this level. As it is financially punitive to appeal lower court decisions at a higher level, justice is not in the reach of already disadvantaged transsexual claimants. The only recourse appears to be to raise the matter direct with the EU Commission. Transsexual people have suffered from bad national law and are not particularly surprised that law that does favour them is being set aside.

Note that the GRA (to get a GRC and an award of a pension under Schedule 5 of the GRA) does not require gender reassignment. The GRA has nothing to do with gender reassignment as the MoJ well knows. It is not a test of gender reassignment. The GRA did not purport to implement Directive 79/7 as it was a response to the Goodwin case at the ECHR.

## **Response to MoJ Consultation**

### **'Fundamental Rights'**

**13<sup>th</sup> January 2014**

#### **About the HRCS**

The Human Rights Consortium Scotland (HRCS) is now a network of over 70 organisations and individuals. The HRCS was established in January 2010 to address the gap in knowledge of human rights within NGOs and to build capacity on applying human rights principles and standards to the delivery of publicly funded services. The HRCS was borne out of an unmet need and in response to specific problems. It has relied on volunteers to progress its agenda until October 2013, when it received a grant of £25,000 from the Thomas Paine Initiative to carry out four specific areas of work.

Members have a wide variety of concerns such as the impact of poverty and discrimination on the equal enjoyment of human rights; the need for the UN Convention on the Rights of People with Disabilities to be better enforced across the UK such as complying with the right to live independently at local level and public sector organisations proactively gathering data under Article 31 to evidence compliance; the need for UK freedom of information laws to keep pace with jurisprudence at the European Court of Human Rights<sup>1</sup>; and for those bodies covered by the Human Rights Act 1998 to understand that they are covered by the European Convention on Human Rights eg our 10,000+ public bodies in Scotland.

HRCS work to date includes ....

- Producing Manifestos for Holyrood and UK General Election (2011 & 2010)
- Call for the creation of a Human Rights Committee at the Scottish Parliament similar to the Joint Committee on Human Rights at the UK Parliament. (2011)
- Participation in the global conference at the Scottish Parliament on 'Business and Human Rights' (2010).
- Participation in the UN's Universal Periodic Review (UPR) of the UK's compliance with its duty to deliver human rights in the UK (2012)
- Arranging for training eg on UPR in Scotland for NGOs in 2013 and on FoI January 2014.
- Hosting meetings and inviting speakers to build capacity and knowledge eg EDF and NIHRC.
- Participating in the Scottish Constitutional Futures Forum initiatives over constitutional change in Scotland and the potential for human rights in 2013.
- Consulting on an 'oath' for public servants in Scotland – published January 2014.
- Draw members' attention to events, consultations and publications.
- Meet colleagues across UK to share knowledge and co-operate on activities.

<sup>1</sup> See briefing from Campaign for Freedom of Information in Scotland  
<http://www.cfoi.org.uk/pdf/foisahumanrightsbrief.pdf>

## **Human Rights Attitudes and Practical Application**

The potential of human rights, whether coming from the EU or the Council of Europe has not yet been realised and the objective should be to inform people more – the public, public servants and business too.

The gap in knowledge about human rights and their practical applications has been a source of repeated concern by the UN over decades and includes:

- The UN Committee on Economic, Social and Cultural Rights complained in 2009 that “all levels are not sufficiently aware of the State party’s Covenant obligations” in respect of the UN Convention on Economic, Social and Cultural Rights. “The Committee recommends that the State party undertake training programmes for doctors and health-care professionals about the State party’s Covenant obligations, as well as with regard to the prevention and treatment of dementia and Alzheimer’s diseases...”<sup>2</sup>
- The UN Committee on the Rights of the Child considered the UK’s compliance with the UN Convention on the Rights of the Child in 2008 and recommended training on the UN Convention on the Rights of the Child including “the reinforcement of adequate and systematic training of all professional groups working for and with children, in particular law enforcement officials, immigration officials, media, teachers, health personnel, social workers and personnel of childcare institutions.”<sup>3</sup>

## **General Comments on Consultation**

- Unhelpful to have such a short consultation on the ‘Balance of Competencies Review on Fundamental Rights’ – less than 3 months over the seasonal holiday period and about an issue which is controversial with views often ill informed by facts and practical experience.
- Appreciated UK civil servants coming to Scotland to meet with a range of organisations and talk through our experiences.
- Remind UK Government that it should ensure that we can all exercise our rights under Article 10 of the ECHR on a daily basis. If we are to inform our opinion on the EU and on the Council of Europe then the Government has a duty to ensure that anything it says is factually correct and analysis is informed by facts, knowledge and experience.
- Very useful consultation document which we will use to inform members.
- The EU has been responsible for the addition of significant rights to people in the UK such as on ‘equal pay for work of equal value’, data protection and accessing environmental information. It is therefore logical that rights are codified, that rights are embedded in the operational framework of the EU and

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<sup>2</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories pub 12<sup>th</sup> June 2008 para 34

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f5&Lang=en)

<sup>3</sup> Third and fourth periodic report of the United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/4) para 21 pub in October 2008  
<http://www.togetherscotland.org.uk/pdfs/3rd%20and%204th%20Concluding%20Observations%202008.pdf>

that EU institutions are accountable under established human rights law ie ECHR.

- Rights belong to human beings equally and should not be regarded as a threat. Respecting human rights improves the design, delivery and funding of public services.
- The HRCS has received a grant from TPI and one of the four tasks is to develop a long term funding strategy for the HRCS and we will now consider applying to the Fundamental Rights and Citizenship Programme for the UK.
- We believe that the Fundamental Rights Agency is under-used by organisations in Scotland and we are now looking at ways whereby its material, data and analysis can be better accessed by our members.

## **Further Points on Context**

The HRCS believes the context of fundamental rights in Scotland is different from the UK and is not necessarily properly reflected within the consultation document.

### **1. The legal context**

- The Scotland Act 1998 makes provision for human rights compliance under S29 in respect of the Scottish Parliament where there is a duty for laws to be compliant with both ECHR and EU Law. Legislation which is not competent can be struck down by the Courts in Scotland.
- S57 of the Scotland Act places a positive duty on Scottish Government Ministers to comply with the ECHR which is stronger than elsewhere in the UK.
- The Scotland Act ensures that Scottish Ministers understand their responsibility for observing and implementing international obligations, defined not simply by reference to the specific Convention rights defined in the Human Rights Act, but in terms of all international obligations Schedule 5 7 (2) (a) and S126(10). If Scottish Ministers fail to meet these obligations they may be subject to enforcement action against them on the part of the Secretary of State by virtue of section 58 of the Scotland Act 1998.

### **2. Defining human rights**

When the Scottish Parliament exercises its devolved authority to define human rights it has consistently gone beyond the ECHR:

- A Scottish Commissioner for Human Rights Act 2006 requires the SHRC to promote and encourage best practice in relation to human rights which are defined as ECHR as well as other human rights contained in a ratified, international treaty<sup>4</sup> e.g. UN Convention on Civil and Political Rights (ICCPR)
- The Commissioner for Children and Young People (Scotland) Act 2003 gave specific responsibilities to have regard to the UN Convention on the Rights of the Child<sup>5</sup>

### **3. Distinctive Government Approach**

We agree with the Scottish Government that it has chosen to adopt a distinctive policy on human rights:

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<sup>4</sup> Scottish Human Rights Commission Act 2006 Section 2(2) (b)

<sup>5</sup> Section 5

"The Scottish Government wishes to see Scotland reflected as a modern, responsible nation, with a commitment to protecting, respecting and realising human rights. Within the UK, Scotland takes a distinctive approach realising international human rights standards, and securing recognition at the UN level of this diversity is important."<sup>6</sup>

This is manifested in a variety of ways including a decision to include in the oath of Scotland's new National Police Force, a commitment to uphold "human rights" and not just those defined by the European Convention on Human Rights (ECHR):

"I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental human rights and accord equal respect to all people, according to law."<sup>7</sup>

There are also sector initiatives which mainstream human rights eg 'Common Core of Skills, Knowledge & Understanding and Values for the "Children's Workforce" In Scotland' produced by the Scottish Government.<sup>8</sup>

#### **4. Effectiveness of SNAP**

The Scottish Human Rights Commission's 'National Action Plan on Human Rights' (SNAP) which has been prompted by the need for "a more systematic approach to assure - and not assume - the realisation of human rights in our day to day lives."<sup>9</sup> SNAP was published in December 2013 and we look forward to it making a significant impact on the everyday lives of people.

#### **Conclusion**

The HRCS welcomes the "information on the EU's competence and action in the field of fundamental rights" and hopes that one outcome will be more informed debate on fundamental rights. Currently, there is a disturbing level of very poorly informed debate and analysis which damages the reputation of fundamental rights as a way to achieve fairness in our society.

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<sup>6</sup> Letter from Roseanna Cunningham to Lord McNally 29<sup>th</sup> August 2012

<http://www.togetherscotland.org.uk/pdfs/Scottish%20Government%20UPR%20response%2029-08-2012.pdf>

<sup>7</sup> Police and Fire Reform (Scotland) Act 2012: Section 10: Constable's Declaration

<sup>8</sup> <http://www.scotland.gov.uk/Resource/0039/00395179.pdf>

<sup>9</sup> <http://www.scottishhumanrights.com/actionplan>

**Contribution of ILGA-Europe to the Call for evidence on the review of the balance of competences between the United Kingdom and the European Union – Fundamental rights and non-discrimination, January 2013.**

The Charter of Fundamental Rights and the EU fundamental rights framework

- The Charter has served as a basis for fundamental rights monitoring (EC annual reports on its implementation) and for a fundamental rights review of legislative proposals within the Commission (Fundamental Rights and Rights of the Child Unit within DG JUST).
- We do not consider these elements as sufficient because there were not implemented seriously enough. The monitoring in particular made no real use of NGO information. The Charter has been interpreted and applied in a very careful way, too careful in fact and not even reaching the potential allowed by Title VII.
- However, the fundamental rights monitoring could be a first step in the development of useful processes, allowing to methodically identify fundamental rights violations and the corrective actions needed.
- The human rights expert, Olivier De Schutter, prepared for ILGA-Europe in 2011, a report exploring all the potential of the EU's fundamental rights framework: [Exploring the Lisbon Treaty, September 2011](#)

The European Court of Human Rights:

- On LGBTI people's rights, ECHR case law is likely to have a real effect in the coming years, but this has not been visible enough so far. One area of progress is family, where since 2010 the ECtHR made clear that same-sex relationships and their families fall under the definition of family life. In the longer term, this should have consequences on the application of EU pieces of legislation such as free movement of citizens, mutual recognition of civil statuses, family reunification of third country nationals. At the moment, in all those areas, Member States often feel free not to recognise LGBTI families, even legally recognised in another jurisdiction, when they settle in their territory.

- The UK, by being one of the most advanced countries in these matters, potentially sees its citizens discriminated against when they settle in other European countries, while other Europeans living in the UK fully enjoy the protection of the British law with their families. As a result, the UK would benefit from EU accession to the ECHR and in general of a better incorporation of ECHR case-law in EU law.

The Fundamental Rights Agency:

- The recent LGBT Survey (May 2013) gave evidence of very high levels of discrimination and victimisation of LGBT people in all EU Member States. This is an extremely useful piece of evidence. The findings of the survey can be explored here: <http://fra.europa.eu/DVS/DVT/lgbt.php>
- The UK has the best reporting system in use for this type of incidents. As a result, official statistics show a higher “visible” number of discrimination and violence cases in the UK compared to the other European countries. The FRA study shows a better picture of the situation and proves that the same problems happen everywhere; it also demonstrates that UK policies in the areas are a best practice in terms of addressing the problems.

EU funding:

- ILGA-Europe and/or its members have participated to various projects funded by Fundamental Rights and Citizenship. Areas covered include combating hate crimes<sup>1</sup>, education<sup>2</sup> and the development of anti-discrimination good practices by local authorities<sup>3</sup>. What was learnt from these projects represent a considerable experience, with policy innovations that were further disseminated thanks to the participation of different public bodies and authorities (e.g. local authorities, police forces or training academies...). For example, this explains how the Latvian police college now trains all police officers on homophobic and transphobic crimes.
- ILGA-Europe's member organisations from UK were invited to share best practices in the frame of such projects, and did also learn from practices invented in other countries.
- An area of improvement is that the Commission should capitalise on the learnings of such projects, for example by publishing collections of good practices on the areas supported by the programme.

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<sup>1</sup> [http://www.ilga-europe.org/home/issues/hate\\_crime\\_hate\\_speech/projects/dihr](http://www.ilga-europe.org/home/issues/hate_crime_hate_speech/projects/dihr)

<sup>2</sup> <http://www.ittakesallkinds.eu/>

<sup>3</sup> <http://ahead-bcn.org/img/langform/LGBTmay2011eng.pdf>

### EU Directives:

- In the Free Movement directive<sup>4</sup>, UK same-sex couples who wish to travel within the EU have the benefit of the definition of family member, to the extent that it applies Article 2b: “the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State”. The UK government has recognised this as an important subject: in its paper *Working for Lesbian, Gay, Bisexual and Transgender Equality June 2010*<sup>5</sup>, it said: “We will update the list of overseas same-sex partnerships automatically recognised by the UK as equivalent to UK civil partnerships (Schedule 20 to the Civil Partnership Act 2004). We will also work bilaterally with other European countries to overcome the legislative or policy barriers which prevent UK civil partnerships being recognised abroad”.
- Prior to the Employment Directive<sup>6</sup>, there was no law in the UK protecting LGB people from sexual orientation discrimination in the workplace. In addition, the Employment Directive also has benefits for LGBT UK citizens working in other EU countries.

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<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85483/lgbt-work-plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85483/lgbt-work-plan.pdf)

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>



## **Review of the Balance of Competences between the UK and the EU**

### **Fundamental Rights**

### **Response**

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## **Introduction**

Established in 1957, JUSTICE is an independent law reform and human rights organisation. It is the United Kingdom section of the International Commission of Jurists. JUSTICE has been working on the role of the European Union with regards to fundamental rights in the UK for over a decade, both in relation to the role of the Charter of Fundamental Rights and with a particular focus on criminal justice. Our answers relate to our knowledge of and application of EU fundamental rights principles in our work.

### **1. What evidence is there that the impact of the Charter / the EU's broader framework of fundamental rights has been advantageous or disadvantageous in the UK?**

#### *EU fundamental rights*

1. We agree with the Call for Evidence that fundamental rights have been recognised and upheld by the Court of Justice of the European Union since the 1960s, which has since been reflected in the treaty arrangements of the European Union, expressly in 1993 by way of the Maastricht Treaty. The Lisbon Treaty now provides in article 2 that the Union is founded on the value of respect for human rights, with a description of other values comprising such rights to include freedom and equality. Article 3(3) provides competence for specific activities within this sphere:

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child.

2. As to where the CJEU's legal basis for importing fundamental rights as general principles of EU law prior to express treaty provisions arose, the reliance on these claims logically came from the applicant's submissions before the Court. In *Nold*<sup>1</sup>, the German applicant relied upon the fundamental rights enshrined in the German Constitution which it argued have been 'received' into Community law. The Court agreed that the claim must be examined in light of fundamental rights principles, drawn from the member states and international law:

As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible

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<sup>1</sup> Case 4/73 *Nold v Commission* [1974] ECR 491.

with fundamental rights recognized and protected by the Constitutions of those States.<sup>2</sup>

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

3. This approach has been followed in a substantial body of cases, on wide ranging areas of EU competence.<sup>3</sup> The Court has also endorsed and followed the jurisprudence of the European Court of Human Rights for many years,<sup>4</sup> and stated that the Convention has special significance.<sup>5</sup>
4. The advantage to applicants of relying upon fundamental rights is that where the Court draws guidance from an international convention or national constitutional law principle and incorporates this into its reasoning, the principle becomes Union law, making its fulfilment a condition of the lawfulness of the EU act. If the act does not adhere to the fundamental right, the act must be read so as to conform, or be struck down:

Where national legislation falls within the field of application of EU law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of EU law.<sup>6</sup>

5. The fact that the Court has been so ready to adopt fundamental rights principles has enabled many applicants to receive the direct benefit of international human rights principles through the prism of EU law, with the equal consequence of primacy of EU law, that would not

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<sup>2</sup> At [13].

<sup>3</sup> See A. O'Neill, *EU Law for UK Lawyers* (Hart Publishing: Oxford, 2011), Chapter 6 for a detailed discussion of these.

<sup>4</sup> See in particular Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 where the Court stated that measures are not acceptable in the Community which are incompatible with observance of the human rights recognised and guaranteed by the European Convention on Human Rights.

<sup>5</sup> Case C-260/89 *ERT v DEP* [1991] ECR I-2925 at [41].

<sup>6</sup> Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan and Others* [1991] ECR I-04685 at [31], amongst others. See also Opinion 2/94 *Re Accession by the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759 at [34]: Respect for human rights is therefore a condition of the lawfulness of Community acts.

necessarily otherwise be available through the respective measures themselves, unless given such effect by way of national law.

6. The corollary is that the Member States may argue that they find national law overruled by the indirect application of principles obtained from agreements made outside of the EU, not intended to have that effect when they became contracting parties, or in respect of some measures, such as protocols to the ECHR, that they have not even signed. Despite this, as the Call for Evidence acknowledges, a Joint Declaration of the European Parliament, Council and Commission, 'Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms,'<sup>7</sup> stressed the 'prime importance' and respect that the Institutions attach to the protection of fundamental rights, as derived from the constitutions of the member states and the ECHR. In particular, the Declaration acknowledged in its preamble that the Community was based on the principle of respect for the rule of law, and,

[A]s the Court of Justice has recognized, that law comprises, *over and above* the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based. (emphasis added)

7. Moreover, by agreeing the content of the EU Charter of Fundamental Rights, and by way of the Lisbon Treaty, affording it equal status with the Treaties, the Member States endorsed the primacy of fundamental rights in the EU legal order.

#### *The Charter of Fundamental Rights*

8. The Charter (CFR) is, therefore, a binding set of principles 'bringing together in one place all of the personal, civic, political, economic and social rights enjoyed by people within the EU'<sup>8</sup> aimed at protection of the individual against actions of the state. It is a free standing instrument that derives its authority from Article 6(1) Treaty on the European Union (TEU):

*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

Its scope is, however, circumscribed by the subsequent part of Article 6(1):

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

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<sup>7</sup> OJ C 103 (27<sup>th</sup> April 1977), p 1.

<sup>8</sup> See the European Commission website [http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm)

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

9. As intended by its drafters, the Charter operates to consolidate the fundamental rights applicable in the EU and make them more visible.<sup>9</sup> As commentators have observed,

[S]trong protection of individual rights, whatever its political or constitutional motivations, serves both as a compass for the formulation of policy and a necessary judicial safeguard for the individual against the growing legislative and administrative power of the Union.<sup>10</sup>

The Charter gives potential applicants the opportunity to see which rights are already protected by the EU legal order, codified in one place, without having to trawl through the Treaties or case law to find them. Moreover, the Explanations to the Charter provide guidance on the origins of the right in the Treaties, jurisprudence of the CJEU or international law to aid applicants in understanding the scope of each right.

10. The Charter is significant since, despite not creating new rights, it is the first constitutional rights document to apply to the EU Institutions and their operations. To this end, the Institutions have each adopted measures to ensure that they are complying with the Charter when legislating: The Commission *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* in 2010, which includes the Fundamental Rights Checklist<sup>11</sup> and *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*;<sup>12</sup> Parliament Rules of Procedure;<sup>13</sup> and Council Guidelines

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<sup>9</sup> Cologne European Council Conclusions, 3 and 4 June 1999, para 44, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/kolnen.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm); Preamble to the Charter of Fundamental Rights of the European Union (2010/C 83/02) OJ C (30.03.2010) 83, p389 at 391.

<sup>10</sup> D. Anderson and C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, EUI Working Papers, Law 2011/08, p1.

<sup>11</sup> COM(2010) 573 final (Brussels, 19.10.2010).

<sup>12</sup> SEC(2011) 567 final (Brussels, 6..05.2011).

<sup>13</sup> European Parliament, rules of procedure, rule 126 ('requests to European agencies'). <http://www.europarl.europa.eu/sides/getDoc.do?type=RULES-EP&reference=20121023&secondRef=RULE-036&format=XML&language=EN>. Rule 36(1)) introduced at the end of 2009 further requires Parliament to fully respect fundamental rights as laid down in the Charter in all its activities, as well as the rights and principles enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union. Rule 36(2) allows the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to include an additional procedure for *ex ante* fundamental rights scrutiny. This allows a committee responsible for a subject matter, a political group, or at least 40 Members of Parliament, to refer a matter to 'the committee responsible for the interpretation of the Charter'

*on Methodological Steps to be taken to Check Fundamental Rights Compatibility at the Council's Preparatory Bodies.*<sup>14</sup> By applying these procedures, the assessment of fundamental rights compliance is more ingrained and transparent than in pre-Charter procedures. For possible claims of fundamental rights infringement, the adoption of these processes makes holding the Institutions to account more achievable.<sup>15</sup>

11. As with the pre-Charter application of fundamental rights principles, the Charter is binding upon the Institutions and Member States in a way that other international and regional human rights conventions are not. Where those rights are imported into the Charter, their application through EU law and the jurisprudence of the CJEU create primary rights that take precedence over national rights. With respect to the ECHR in particular, although the UK must only take account of the jurisprudence of the ECtHR, read national legislation to give effect to Convention rights so far as it is possible, or make a declaration of incompatibility,<sup>16</sup> the replicated rights in the Charter, which pursuant to article 52(3) should be interpreted in the same way as the Convention, have binding effect so as to require a conforming interpretation of national law.<sup>17</sup> Therefore, where EU law is in scope, persons who seek to argue that their Convention rights have been violated have a far greater prospect of obtaining effective redress by claiming infringement of the Charter rather than the Convention, since the court

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(LIBE), where it considers that a proposal for a legislative act or parts of it do not comply with the rights enshrined in the Charter.

<sup>14</sup> Council, 10140/11 (Brussels 18.05.2011).

<sup>15</sup> See Joined Cases C-92/09 and C-93/09 *Schecke and Eifert v Land Hessen* [2010] ECR I-11063 for the approach of the Court prior to the procedures being implemented. A preliminary reference from the Verwaltungsgericht Wiesbaden (Germany) resulted in the CJEU declaring invalid provisions of Regulation No. 1290/2005 and Regulation No. 259/2008 obliging member states to make publicly available the names of recipients of EU agricultural subsidies. While recognising the principle of transparency, the Court considered that the contested provisions disproportionately interfered with the right to protection of personal data and to private life, pursuant to articles 7 and 8 CFR. In particular the Court criticised the Council and the Commission for failing to consider whether the measure went beyond what was necessary for achieving the legitimate policy of increasing transparency in the management of EU agricultural funds. The Court suggested that the institutions ought to have considered limiting publication by name the beneficiaries of aid but there was no indication that this was done.

<sup>16</sup> Pursuant to sections 2, 3, and 4 of the Human Rights Act 1998 (HRA).

<sup>17</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Grand Chamber (unreported 26<sup>th</sup> February 2013), at [45]: 'As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means', as applied domestically in the Employment Appeals Tribunal in *Benkharbouche v Embassy of the Republic of Sudan*, [2013] IRLR 918.

must read the national law in conformity with the right, as opposed to making a s3 HRA declaration of incompatibility.

12. The Charter also provides for expansion upon the rights contained in the ECHR, both in substance and with the potential for wider jurisprudential development pursuant to article 52(3) (which allows for Union law to provide more extensive protection). Some Convention rights have been incorporated to encompass the evolved interpretation provided by the ECtHR, thereby making its jurisprudence, which may not necessarily be followed in the UK (due to the requirement for a clear and cogent line of authority from the ECtHR where there is a departure from UK law<sup>18</sup>), binding law. For example, article 8 ECHR (the right to privacy), as elaborated by the ECtHR, is separated into three rights in the Charter – article 3 (integrity of the person), article 7 (respect for private and family life) and article 8 (protection of personal data). Further, article 47 CFR incorporates the right to a fair trial, but as is clearly stated in the Explanations, is not limited to disputes relating to civil rights and obligations or criminal charges. This is particularly significant in the sphere of immigration and asylum, where article 6 ECHR has provided limited assistance.<sup>19</sup> Perhaps of most significance is the provision against discrimination in article 21 CFR, which is not only free standing, and therefore contains no condition precedent that another substantive right be infringed as is required by article 14 ECHR, but also incorporates very broad characteristics that go further than Protocol 12 to the ECHR to include genetic features, disability, age and sexual orientation.<sup>20</sup>

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<sup>18</sup> See R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 at [26].

<sup>19</sup> See Case C-300/11 ZZ v SSHD (4<sup>th</sup> June 2013, unreported), with regard to the right to an effective remedy and the need for parties to be able to examine the facts and documents upon which a decision is based. Where exceptionally qualified by State security needs, such processes must themselves be subject to judicial review, and still enable an effective defence to be put forward, whereby the person must be informed of the essence of the grounds constituting the decision against them. We intervened in SS (*Libya*) v SSHD EWCA Civ 1547 (unreported, 19<sup>th</sup> December 2011) to make a similar argument with respect to the application of the Qualifications Directive while ZZ was pending, but the appeal was successful on other grounds and as such, the Court declined to seek a preliminary reference. See also Case C-69/10 *Diouf v Ministre du Travail* [2011] ECR I-0000; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. The CJEU has consistently applied fair trial principles in its case law, see Case C-294/83 *Les Verts v European Parliament* [1986] ECR 1339.

<sup>20</sup> We intervened in the case of *HH v Deputy Public Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 with respect to the rights of dependent children in the assessment of whether a requested person should be surrendered under an European arrest warrant (EAW). One of our submissions was that article 24 CFR clearly sets out the obligation to consider the best interests of the child. Though the ECtHR had reached this position through its case law, under the auspices of article 8 ECHR, the UK Supreme Court had to apply the right contained in the Charter. See paras 21, 98, and 155 of the judgment.

13. There is also some indication that the ECtHR is finding the Charter useful to its consideration as to the scope of Convention rights as persuasive authority.<sup>21</sup> This would indicate that the CJEU and the ECtHR are engaging in helpful dialogue rather than advancing fundamental rights in diverging ways.
  
14. As to scope, the obligation to comply with EU law has been interpreted through successive cases to apply to any implementing legislation,<sup>22</sup> irrespective of when it was past, even pre-existing if it gives effect to the EU obligation,<sup>23</sup> even when the Member State is derogating from EU law,<sup>24</sup> and with potential horizontal effect<sup>25</sup> – another advantage over the ECHR provisions.

#### *Disadvantages*

15. Using the Charter is not simple, however. Pursuant to article 51 CFR, the Institutions and Members States are obliged to respect the rights, observe the principles and promote the application of the Charter. There are two difficulties in doing this.
  
16. First, the distinction between rights and principles is not set out clearly. Article 52 attempts to draw a distinction, explaining that rights are to be interpreted in accordance with the originating right they are derived from,<sup>26</sup> whereas principles need to be included in EU legislative acts to be judicially cognisable. However, there is no clear delineation between Charter provisions as to which are rights and which are principles. Assistance can be gained from the Explanations, but not all specify the distinction clearly.<sup>27</sup> Of more confusion is that

<sup>21</sup> See the discussion in D. Anderson and C. Murphy, note 10 above.

<sup>22</sup> Case 5/88 [1989] ECR 2609 *Wachauf*.

<sup>23</sup> *Fransson, op cit.*

<sup>24</sup> *ERT, op cit* and *R (on the application of Zagorski and Base) v Sec State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) at [70]. For a detailed discussion of the case law up until 2010, see D. Denman, 'The Charter of Fundamental Rights' [2010] EHRLR 349 at 352.

<sup>25</sup> Case C-555/07 *Küçükdeveci v Swedex GmbH* [2010] ECR I-00365 (in reliance upon article 21 CFR to prohibit age discrimination in an employment dispute); Case C-400/10 *PPU Deticek v Sgueglia* [2010] ECR I-08965 (in reliance upon article 24 to consider the best interests of the child) where the Court relied on the Charter as expressing general principles of EU law, which accordingly could be applied, despite the claims being between private individuals.

<sup>26</sup> The limitations differ dependent upon the originating text – 'within the limits' where the Treaties provide the right; 'the same' where the right derives from the ECHR, though the Union may provide more extensive protection; or 'in harmony' where they result from the constitutional traditions of the Member States.

<sup>27</sup> The House of Lords, European Union Committee, The Treaty of Lisbon: an impact assessment, (10<sup>th</sup> Report of Session 2007-08), HL Paper 62-I, <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf> took some useful evidence on this, in particular from Lord

article 49, described as ‘principles of legality and proportionality, confers clearly justiciable rights, whereas other clear principles are described as rights, such that the Charter descriptions themselves do not afford much assistance.<sup>28</sup> Some articles contain elements of both rights and principles.<sup>29</sup> Applicants must therefore be able to establish whether the article they rely on is judicially cognisable in order to rely upon it to obtain redress, though principles will still provide persuasive authority.

17. Second, given that the Member States must comply with the Charter when implementing EU law, there is a lack of information dissemination to or by the Member States to aid people in the EU in using the Charter. When the Human Rights Act was enacted in the UK, it was made clear that public authorities would be obliged to comply in order to ensure that the rights of individuals were fulfilled. By comparison, there has been so little information provided about the Charter that a Flash Eurobarometer survey in 2012 found that in the UK, only 10% of people had heard of the Charter and knew what it was. Of these, 46% had heard of it but weren’t sure what it was, and 44% had never heard of it.<sup>30</sup> However, two-thirds of respondents across the EU were interested in learning more about their rights as enshrined by the Charter (66%), where to go if they feel that these rights have been violated (65%) and when the Charter applies and when it does not (60%). The e-justice portal has a dedicated page on the Charter to explain what it is and how EU citizens can enforce their rights. It currently has information about how to do this domestically for twelve of the member states. The UK has provided information about going to court, accessing legal aid, the Equality and Human Rights Commission, the various ombudsmen and links to information services which might be helpful, such as the CAB and Community Legal Service.<sup>31</sup> This may be useful in explaining the legal system in the UK, but does not assist people here with how to use the Charter, since these bodies are unlikely to be familiar with it.
18. Moreover, there appears to be a lack of knowledge amongst the professions and the judiciary. The *obiter* comments of Mr Justice Mostyn, an experienced and well respected judge in the High Court, in *AB v SSHD [2013] EWHC 3453 (Admin)*, expressing surprise at the reliance upon the Charter, which he thought the UK had opted out of, demonstrates the clear need for training amongst the judiciary on the nature and scope of the Charter, which may well be

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Goldsmith who sat on the Convention that drafted the Charter, as to the possible distinction between civil liberties and socio-economic rights, at paras 5.15- 5.23.

<sup>28</sup> See article 27 ‘Workers’ right to information and consultation within the undertaking’ and article 30 ‘Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.’

<sup>29</sup> Such as articles 23, 33 and 34 according to the Explanations.

<sup>30</sup> Flash Eurobarometer, 340, *The Charter of Fundamental Rights of the European Union*, (April 2012), available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_340\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_340_en.pdf)

<sup>31</sup> See [https://e-justice.europa.eu/content\\_fundamental\\_rights-176-en.do](https://e-justice.europa.eu/content_fundamental_rights-176-en.do)

required for the legal profession as a whole. JUSTICE has conducted three training seminars on the Charter and intends to continue an update programme. Two of these were held in London and Glasgow in 2012 as introductions to the Charter and its use, with an update in 2013, as well as a breakout session in the last two of our Annual Human Rights Conferences. The European Academy of Law has held a number of conferences on the Charter for practitioners and judges across Europe, with a focus on particular areas of practice. However, we readily acknowledge that these fragmented efforts can barely touch the surface of ensuring profession-wide understanding amongst lawyers. Training programmes run by national organisations are required to ensure that practitioners, in private practice as well as employed by public bodies, and judges are suitably familiar with the Charter.

19. The UK Parliament has not adopted similar legislative scrutiny measures to the EU Institutions or the s19 HRA compatibility obligation to ensure that proposed EU legislation or implementing national law complies with the Charter. Without this, the UK may not be taking sufficient steps to ensure compliance.

## **2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**

20. In our view, the CJEU is consistently interpreting the Charter in line with the general provisions.
21. The Court has repeatedly refused applications for preliminary references where there is no EU law in operation,<sup>32</sup> in line with pre-Charter requests for the application of fundamental rights,<sup>33</sup> despite cases where it would have been helpful to have clarification of general application.<sup>34</sup>

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<sup>32</sup> See D. Denman, note 24 above, at 352 for a discussion of relevant cases; Case C-27/11 *Vinkov* (unreported, 7<sup>th</sup> June 2012) concerning whether a Member State had to provide an appeal from the administrative imposition of penalty points for a driving offence. This was outside the scope of EU law because thus far, the EU has only legislated for the mutual recognition of judgments in driving matters, not the procedures to be adopted.

<sup>33</sup> See Case C-249/96 *Grant* [1998] ECR I-621, at [45] that rules against discrimination on grounds of sex in employment did not extend to discrimination on grounds of sexuality because the Treaty provision was not intended to concern this.

<sup>34</sup> Case C-396/11 *Corte de Apel Constanța (Romania) v Radu*, Grand Chamber (unreported, 29<sup>th</sup> January 2013) was a particular opportunity to clarify that fundamental rights could act as a bar to surrender under a European arrest warrant (EAW), under the principles established in Joined Cases C-411/10 and C-493/10 [2011] NS v *Belgium* (21<sup>st</sup> December 2011, unreported). However, the Court focused on the factual circumstances complained of, such that articles 47 and 48 CFR do not provide for a warrant to be refused on the ground that the requested person was not heard by the issuing judicial authority before its issue. The Court held such an approach would lead to the failure of the very system of surrender established by the EAW framework

22. The CJEU has also provided a qualified interpretation to article 53 CFR in *Melloni*.<sup>35</sup> The Spanish Constitutional Court sought a preliminary reference concerning the guarantees that must be given in relation to a trial having taken place *in absentia* on a request for a conviction EAW. Under Spanish constitutional law it has been decided, though not unanimously, that the right to a fair trial is absolute and a person must be able to attend their trial. The question, amongst others was whether article 53 CFR could be relied upon to give primacy to the Spanish Constitutional law. The Court observed that the interpretation envisaged by the national court would give general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. This interpretation could not be accepted as it would undermine the primacy of EU law in as much as it would allow member states to disregard EU legal rules that are fully in compliance with the rights set out in the Charter. The Court considered it a settled principle of EU law that national rules cannot undermine the effectiveness of EU law on the territory of that state.<sup>36</sup> The Court held:

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*<sup>37</sup>

23. In this case, since detailed EU law applied to the question of whether a trial *in absentia* could be fair, the Court determined that the EU Member States had agreed the confines of the principle applicable to the context of mutual recognition procedures, which ought not to be undermined by national law.

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decision. The Court did not consider the question of whether article 1(3) of the Framework Decision (the general fundamental rights override) and/or the Charter or Convention could otherwise provide grounds of refusal. The decision would have been helpful to clarify that executing states are obliged to consider the human rights of the requested person prior to their surrender. While this process is expressly required by s21 of the Extradition Act 2003, many Member States do not entertain such arguments, due to a rigid application of the principle of mutual recognition, as critically observed by the European Commission: Report from the Commission to the European Parliament and the Council, *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final (Brussels, 11.04.2011).

<sup>35</sup> Case 399/11 *Stefano Melloni v Ministerio Fisca*, Grand Chamber / (unreported 26<sup>th</sup> February 2013), followed in *Fransson, op cit.*

<sup>36</sup> Considering Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 amongst others.

<sup>37</sup> At [60].

24. The decision can be contrasted with *Jeremy F*<sup>38</sup>. While the Court did not expressly consider article 53 CFR, it held that the fundamental right to an appeal in France on the application of the speciality procedure post surrender on an EAW had not been contemplated by the framework decision, and therefore it was free to apply national fundamental rights principles. Of equal significance, the Court, in reviewing the procedures provided by the framework decision could have extended the application of the right to an effective remedy under article 47 CFR to include the right to review of surrender decisions in EAW cases. However, it looked at the procedure and ECHR case law and concluded that the judicial scrutiny provided was sufficient to comply with article 47 CFR. The decision also provides another example that the Court is not attempting to expand the application of the Charter.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous in the UK?**

25. Considered above in question 1.

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous in the UK?**

26. We are not able to identify generally where the FRA has been of assistance in the UK. However, we are a member of the Fundamental Rights Platform, set up by the FRA and comprising a network of some 300 civil society organisations.<sup>39</sup> The Platform sends regular email newsletters sharing updates on FRA projects and reports, inviting observations and discussions amongst the Platform members. The FRA also seeks the involvement of Platform members as experts during projects to evaluate the methodology and results. The Platform is useful to us through notifying FRA projects that may be relevant to our work and provide helpful reference material. Since the FRA conducts projects across the EU, it has the capacity to collect information from all the EU Member States. It is very difficult for other organisations carrying out research projects to obtain so wide a reach<sup>40</sup>. Its results can therefore helpfully supplement, or provide the impetus and justification for more detailed research in a given area.

27. The legislative scrutiny powers held by the FRA have also been useful in our law reform work briefing the EU Institutions and UK scrutiny committees on proposed legislation. Recent

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<sup>38</sup> Case C-168/13 PPU *Jeremy F v Premier Ministre* (unreported 30<sup>th</sup> May 2013).

<sup>39</sup> For further information see <http://fra.europa.eu/en/cooperation/civil-society>

<sup>40</sup> Even with a consortium of other NGOs and academic institutions, the widest reach across the EU we have managed in our research projects is ten Member States: J. Blackstock, *European arrest warrants: ensuring an effective defence* (JUSTICE, 2012); E. Cape et al, *Effective Criminal Defence in Europe* (Intersentia, 2010).

examples have been, in its contribution to monitoring of implementation: Opinion on Racism and Xenophobia, with special attention to the rights of victims of crime<sup>41</sup> which was provided upon request of the Council of the EU; and Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives,<sup>42</sup> to assist with the European Commission follow up report on the Directives. With regard to opinions during the legislative process:<sup>43</sup> Opinion on the Confiscation of proceeds of crime,<sup>44</sup> following a request of the European Parliament, and Opinion on the proposed data protection reform package,<sup>45</sup> also upon request of the European Parliament. Given its prominence as the EU fundamental rights advisory body, we have found that opinions of the FRA can be persuasive authority in discussions with law makers.<sup>46</sup>

28. The FRA has also responded to the growing influence, and since 2009 binding value, of the Charter by producing a website dedicated to its interpretation – Charterpedia<sup>47</sup> along with a mobile phone friendly application ‘Charter for mobile’.<sup>48</sup> The website follows the titles of the Charter, providing jurisprudence from the CJEU, international courts, national courts and academic material relating to each Charter article. It is a very useful starting point for any person seeking to understand the application of the Charter. However, while it has been advertised widely at EU level events, little has been done, as far as we are aware, in the UK to promote its existence.<sup>49</sup> Much more could be done to promote the website as a useful tool in the UK.

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<sup>41</sup> FRA Opinion – 02/2013 Framework Decision on Racism and Xenophobia, Vienna, 15 October 2013.

<sup>42</sup> FRA Opinion – 1/2013 [EU equality directives] Vienna, 1 October 2013.

<sup>43</sup> Pursuant to Recital 13 of Council Regulation 168/2007, according to which ‘the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned.’

<sup>44</sup> FRA Opinion – 03/2012 Confiscation of proceeds of crime, Vienna, 4 December 2012.

<sup>45</sup> FRA Opinion – 2/2012, Data protection reform package, Vienna, 1 October 2012.

<sup>46</sup> The Opinion on the draft directive regarding the European Investigation Order (Vienna, 14<sup>th</sup> February 2011) was particularly helpful since the Member State initiative contained very little procedural safeguards for people who may be affected by the proposed directive and the FRA identified the need to provide measures that would comply with fair trial rights in articles 47 and 48 CFR and privacy and data protection in articles 7 and 8 CFR, as well as a fundamental rights base refusal ground. These measures have since been included during negotiations of the proposal.

<sup>47</sup> [http://infoportal.fra.europa.eu/InfoPortal/infobaseFrontEndCountryHome.do?btnCountryLinkHome\\_1](http://infoportal.fra.europa.eu/InfoPortal/infobaseFrontEndCountryHome.do?btnCountryLinkHome_1)

<sup>48</sup> <http://fra.europa.eu/charter4mobile/>

<sup>49</sup> Certainly when we have mentioned it at events where we have spoken about the Charter, delegates have been unfamiliar with it.

29. More generally, the independent evaluation of the FRA conducted in 2012<sup>50</sup> (the Evaluation Report) provides a useful EU-wide survey of its effectiveness. We would agree generally with its findings, which are:

Overall, the evaluation findings point towards a clearly favourable assessment in terms of the timeliness and adequacy of the FRA's assistance and expertise relating to fundamental rights, in particular among the EU level institutions. At the level of Member States the picture is more mixed, both in terms of content of the research and also logistical barriers, such as language and dissemination. While EU-wide comparative studies are highly relevant for European policy makers, the national policy process requires more in-depth and contextual information, which cannot be provided by the FRA. The FRA has however gradually begun to explore and develop new modes of cooperation with key national actors at the Member State level.<sup>51</sup>

30. While the FRA may be well known and relied upon at an EU level, its application in the Member States, and in particular in the UK, is less effective. It appears to be making efforts to provide helpful material that can be used by individuals in the Member States. The evaluation report concludes:

While it is difficult to assess the impact of CSO cooperation in terms of raised awareness among the general public, the Agency is actively using electronic and social media to reach the general population as well as stakeholders, such as electronic newsletters, awareness-raising material targeting youth (S'cool agenda) and Facebook. Specific project results are generally promoted and disseminated to a wider public, through European and national media. As an example the recent comparative survey on Roma integration was cited in several European media, such as the BBC News and the Economist.<sup>52</sup>

and:

In terms of the extent to which the FRA publications on project results have been taken into account by relevant EU, national and local actors on fundamental rights issues, the evaluation shows a mixed result. While contribution was assessed high at the EU-level, the results were much less positive at the national and local level. The case studies did, however, show a more positive picture also concerning the use of the publications by national level stakeholders. Among the civil society

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<sup>50</sup> Ramboll, Denmark, November 2012 [http://fra.europa.eu/sites/default/files/fra-external\\_evaluation-final-report.pdf](http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf)

<sup>51</sup> P III.

<sup>52</sup> Ibid.

representatives, in particular the EU/international level NGOs are using the work of the FRA, but it does not seem that the results are disseminated actively enough towards the local level.<sup>53</sup>

31. A particular disadvantage that we see, and has been reflected in the Evaluation Report, is that the FRA does not have a specific role in the legislative process, where it could provide a regular scrutiny check as to the fundamental rights compliance of proposed acts. Moreover, the FRA does not have a mandate in police and judicial cooperation under its Multi-Annual Framework and cannot therefore provide thematic reports specifically on matters arising in this area. However, the FRA has conducted research which has touched upon criminal justice issues and seems able to provide opinions in this field upon request, such as those set out above. It is disappointing that, given the volume of criminal justice measures agreed in the EU over the past decade, that the FRA's jurisdiction continues to be excluded from this area.

## **5. What evidence is there of whether the FRA demonstrates value for money?**

### **6-8 The Fundamental Rights and Citizenship Programme**

32. We are not in a position to observe the funding arrangements of the FRA, or the operation of the Fundamental Rights and Citizenship Programme since we have not applied for funding from this programme previously. However, the Evaluation Report does observe:

The FRA is considered to be in a unique role as a provider of comparative, EU-wide studies. The Agency is acknowledged for concentrating on topics that are not covered by other similar actors, and their position as an independent EU Agency gives their work additional backing. The evaluation does not provide sufficient evidence to conclude that the effects in the field of fundamental rights have been achieved at lower cost because of the Agency's intervention. There is some evidence concerning the lack of duplication of efforts, where the work of the FRA has been used by the stakeholders. On the one hand, without the work of the Agency such research would not exist (meaning that there is little risk for duplication of efforts) but on the other hand the work of the FRA in these fields is seen to be of relevance to developing effective policies, which could be cost-saving for those using the FRA's work in these fields.<sup>54</sup>

33. We would agree that if the FRA is conducting EU-wide research, this would limit the need for expenditure of the same type under the Commission funding programme. The role of the FRA

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<sup>53</sup> Id.

<sup>54</sup> Id.

is especially important in this regard if the UK and other Member States limit their funding of future Commission programmes.

**9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous...in the UK?**

34. It is not yet clear what advantages or disadvantages EU accession to the ECHR might bring, as the Draft Accession Agreement will be subject to significant further scrutiny and revision prior to being finalised. From the perspective of the individual applicant, it has the potential to enable wider protection of human rights against bodies and agencies of the EU which do not currently have to adhere to Convention principles, yet may still operate in the Member States of the EU, such as FRONTEX and Europol. This would be both in protecting against infringement of individual rights by those bodies, and in enabling positive obligations to prevent infringements, as well as investigate allegations of infringements. It also has the potential to provide a more effective remedy through the individual petition procedure to the ECtHR against EU Institutions than the application procedure to the CJEU.

**10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous...in the UK?**

35. The Funding programme will be of benefit to groups that apply to carry out research or training under its terms. In our experience, the Commission programme conditions are rigorous ensuring that projects provide value for money, relevance to the project call proposals, and added value to the area of application. The wider benefits of projects funded by the Commission are potentially significant, but hard to measure. Where research leads to recommendations that may improve conditions for individuals, and these changes occur, there are clear advantages. Likewise, where gaps in understanding are identified, programme funding often provides for training and materials to be disseminated amongst relevant groups. JUSTICE intends to apply for funding under the current Programme call to provide training on the EU Charter to UK practitioners. Effective training programmes are disseminated much more widely through the application of the principles learned by the delegates, in the courts, in advice to individuals, decision makers, and in law reform. If organisations like our own secure funding from the Commission under this programme, we will be able to generate further understanding of the potential application of the Charter in the UK. In the context of EU competence, the Commission provides the best opportunity for funding EU related activity that we have found amongst the pool of funders for work that we are likely to undertake. Without such funding the opportunities for understanding EU law, and in this context, the application of the Charter amongst UK individuals is much more limited.

36. The general disadvantage to all EU Commission funding programmes is the requirement for matched funding, requiring organisations to find a significant percentage of the cost of the project through other sources. This can prevent organisations with limited resources that may be able to undertake valuable and significant work with Commission funding from being able to do so. Moreover, in order to ensure the programmes provide value for money, they are replete with bureaucracy that can put organisations without experienced administrative staff off undertaking the commitments required of a grant.
- 11. What future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?**
37. The development of the Charter, advancement of the ECHR and accession to the ECHR will all be relevant to the UK. Ensuring that individuals and practitioners in the UK are familiar with EU fundamental rights law is the key challenge and opportunity that we see for the immediate future.
- 12. How could action in respect of fundamental rights be taken differently and how would this affect the UK?**
38. As mentioned above, we consider it necessary to educate society and professionals as to the existence and potential application of EU fundamental rights in the UK, so as to provide alternative or complementary rights protection to the ECHR. This could affect the UK through litigation where the Courts interpret national legislation as requiring conformity with EU law, particularly to the extent that national law need be disapplied. By doing so, this would not only ensure greater familiarity with EU law but also that UK legislation complies with obligations under EU fundamental rights law, thereby ensuring greater protection for UK citizens and better conformity with our EU obligations.
39. We also consider the scrutiny of proposed EU legislation and implementing national legislation for Charter compliance in the UK Parliament necessary to ensure Charter compliance of legislation from the outset. These measures may prevent adverse scrutiny by the Commission and the potential for proceedings against the UK in the CJEU.
- 13. Is there evidence of fundamental rights being used indirectly to expand the competence of the EU?**
40. We do not believe this is occurring. First, because the fundamental rights set out in the Charter are derived from existing areas of EU competence or fundamental rights principles of EU jurisprudence that have been endorsed by the Member States, thereby comprising EU competence. Proposed EU legislative acts must be founded in a legal basis under EU law.

Without further treaty provisions, wider legislative acts would be unlawful. Second, with regards to general actions or programmes of the Commission related to fundamental rights as set out in its annual reports on the application of the Charter, these all pertain to existing Treaty bases.<sup>55</sup> Third, as set out above, the jurisprudence of the CJEU has consistently demonstrated that the Court will not entertain preliminary references pursuant to the Charter unless the action is within the scope of EU law.

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JUSTICE  
15<sup>th</sup> January 2014

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<sup>55</sup> For the 2012 Report see <http://ec.europa.eu/justice/fundamental-rights/report/2012/index.html>

## **Migration Yorkshire**

### **What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?**

Migration Yorkshire (based in Leeds City Council) manages the largest grant given out by DG Justice, under the FRAC. The current project Roma MATRIX, (following on from the previous Roma SOURCE project) is managed by Migration Yorkshire with 20 partners across 10 countries.

The FRAC has been advantageous to the UK through these projects in helping the UK to prepare for, understand and manage the integration of Roma, the largest and most discriminated against minority in Europe. This is enabling the UK to learn from elsewhere in Europe to ensure this group is integrated to the advantage of Roma and also all citizens in the UK. Roma MATRIX is the largest project of its kind across Europe, and the project alongside the accompanying strategic development is enabling the UK to have further influence across Europe on this issue through the project, through sharing and encouraging better practice across Europe and in working at the most senior policy level to impact change. Improving the integration of Roma across Europe will benefit the UK.

In the UK this has led to the first and only strategic approach to Roma regionally and nationally. These projects have funded the creation of the National Roma Network, led by Local Government with key national government departments participating, Roma groups and academics. This national approach to Roma has in turn led to linked projects including the recent national Roma research estimating the size of population and key challenges for local authorities.

The funding has enabled Migration Yorkshire to produce guidance and briefings on Roma issues in the UK for Local Government, MPs and other key parties to improve strategic responses and access funding, which includes a number of Local Enterprise Partnerships including Roma within plans for European Structural Funds. The FRAC through Migration Yorkshire has also enabled a learning programme for senior people in local authorities to understand the context that Roma have arrived from in Central and Eastern Europe.

Locally Roma MATRIX and Roma SOURCE have delivered projects directly improving integration for Roma such as health mediator projects (over 50 Roma individuals trained across Yorkshire as mediators), working in schools with Roma and non-Roma children and parents, helping Roma to understand rights and responsibilities in the UK including citizenship booklets and workshops on racism and community mediation.

Locally, regionally, nationally and at European level these projects have also enabled sharing of experiences of best practice which would otherwise not have happened. To date there has been no other funding available within the

UK which would have funded any of this level of work around the new Roma community.

**What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?**

The FRAC through Roma MATRIX and Roma SOURCE has provided value for money, as this work on integrating Roma will have large long-term savings. There is clear evidence from across Europe that not integrating Roma is of a huge cost to the economies of member states as well as huge personal cost to Roma and others. Roma are a new community to the UK with specific challenges, and this intervention at this moment will lead to large long-term savings as it allows a unique opportunity to integrate in the UK before the entrenched exclusion suffered across the rest of Europe.

These projects have brought organisations across Yorkshire and the UK together to prepare for and integrate Roma, learning what works and doesn't and funding small projects locally to target key areas and demonstrate what works locally. An example of the cost saving is the health mediator project.

The Roma trained through this project will disseminate the information out and support their communities' understanding of health and the UK health system reaching at least hundreds of people. This in turn improves individual's health and also ensures appropriate access to the health system. The impact on one individual alone could potentially more than pay for the whole health mediator project in savings.



For better  
mental health

## **Ministry of Justice consultation: *Balance of Competences Fundamental Rights Review***

### **Response from Mind**

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#### **Who we are**

Mind is the leading mental health charity in England and Wales.

We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

We work in partnership with over 160 independent local Minds to provide a range of services tailored to the needs of their local community. Services on offer include supported housing, crisis help lines, drop-in centres, counselling, befriending, advocacy, and employment and training schemes. Last year our network provided direct support to over 285,000 people.

Mind wants to ensure that people with mental health problems have their voices heard, and are treated fairly, positively and with respect.

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#### **Introduction**

Mind welcomes the opportunity to respond to this consultation as it relates to important issues which have a significant impact on the lives of the people we represent - anyone experiencing a mental health problem.

#### **Mind's expertise**

As the leading mental health charity in England and Wales, Mind represents thousands of people with mental health problems (both in and out of work) and provides a range of support services – including back to work, job retention and mediation support – through our network of over 160 local Minds.

Mind also runs a Legal Advice Service via telephone and email for people based in England and Wales, which processes around 5,000 enquiries about

legal rights each year on a range of issues, including employment and discrimination.

We have provided general answers that focus upon issues of particular concern to people with mental health problems, drawn from the calls to our help lines and information from our members and beneficiaries.

### **Questions 1 – 3**

**1. What evidence is there that the impact of:**

- the Charter;
  - the EU's broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**
- 3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Charter provides a very clear and accessible summary of the civil and political rights that are found in the European Convention on Human Rights as well as summarising existing economic and social rights. It therefore serves to promote and publicise protections that are vital to people with mental health problems.

To give one example, the Charter ( Article 8) has provided impetus for protecting personal data. This is a key priority for people with mental health problems as they tell us that they are particularly concerned to protect their sensitive personal health information and their privacy. The Charter specifically refers to the right to physical and mental integrity and this is particularly welcome.

Additionally, a new Directive establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012. This Directive focuses on the support and protection of victims who are vulnerable to secondary or repeat victimisation or intimidation during criminal proceedings. These vulnerable groups include children and victims of gender-based violence, violence in a close-relationship, sexual violence or exploitation, hate crime and victims with disabilities.

In the UK, this has been implemented by way of the new victims' code of practice.

Mind conducted research in collaboration with Victim Support into victimisation and engagement with the criminal justice system among people with mental health problems.

A report “At risk, yet dismissed”<sup>1</sup> published in 2013 revealed that people with mental health problems are:

- three times more likely to be a victim of crime than the general population
- five times more likely to be a victim of assault and this figure rises to 10 times more likely if you are a woman
- more likely to be a repeat victim of crime
- far less likely to be satisfied with the service they receive.

The report made a number of recommendations in light of the findings. Mind welcomes the Charter’s values to address and to minimise these issues.

As well as safeguarding fundamental rights, the Charter has been a useful tool in ensuring a minimum level of social protection. It promotes coherence across the EU. It serves to remind Member States of the spirit of the rights and puts them into the context of European law.

Both the Charter and the broader framework provide protection against discrimination for people that travel within the EU as well as within the UK. In particular, Article 26 of the Charter sets out the right to “integration of persons with disabilities”. This incorporates both social and economic provisions to enable people with mental health problems to integrate and thrive in society.

We regularly hear from people who have been bullied, demoted, or dismissed from the workplace because of mental health problems. Mind’s Infoline<sup>2</sup> advisers have seen an increase of 100 per cent in calls about both personal finances and employment.

From this wide-ranging engagement and support we know that workplace conflict is all too often the reality for many people with mental health problems in employment. Largely, this is driven by stigma and misunderstanding about the nature of mental ill health and its impact on performance.

We also know that the lines between mental ill health and poor performance are frequently blurred – it is wrongly assumed that all mental health problems lead to underperformance, while health needs are often not explored when an employee is underperforming.

Given fewer than four in ten employers would knowingly employ someone with a mental health problem<sup>3</sup> and 40 per cent view workers with mental health problems as a ‘significant risk’<sup>4</sup>, it is no wonder that Mind hears regularly of people experiencing conflict – often once their mental health problems have come to light at work.

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<sup>1</sup>[http://www.victimsupport.org.uk/~/media/Files/Publications/ResearchReports/1390\\_MHJR\\_final\\_lores.ashx](http://www.victimsupport.org.uk/~/media/Files/Publications/ResearchReports/1390_MHJR_final_lores.ashx)

<sup>2</sup> The Mind Infoline received 40,000 calls in 2011-12

<sup>3</sup> DWP (2001) *One Evaluation*.

<sup>4</sup> Shaw Trust (2010) *Mental Health: Still the Last Workplace Taboo?*

These damaging employer attitudes mean that people with mental health problems have the lowest employment rate among disabled people, at 14 per cent compared to 46 per cent for disabled people as a whole.<sup>5</sup> And yet most really want to work – people with mental health problems have the highest ‘want to work’ rate among benefit claimants.<sup>6</sup> It is in this context that both the Charter and EU Directives are imperative to provide protection in the workplace and to tackle discrimination.

#### **Question 4 - 5**

- 4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**
- 5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?**

The FRA helps to ensure the transparency, awareness and understanding and compliance of Member States with the Charter’s Articles by providing statistics, research and legal analysis that can help shape national policy. These are also helpful to NGOs like Mind. We benefit from the research and projects that it undertakes and being able to look at comparative data from other countries.

For example the FRA coordinates a research project in relation to “Fundamental rights of persons with intellectual disabilities and persons with mental health problems”.<sup>7</sup> This has led to useful information and materials being collated and distributed such as the publication of a report in July 2013 on the legal capacity of persons with intellectual disabilities and persons with mental health problems. We also welcome the FRA’s work on different kinds of hate crime and the promotion of the political participation of people with disabilities across the EU.

#### **Questions 9 – 14**

- 9. What evidence is there that the impact of the EU’s accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**
- 10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**
- 11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?**

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<sup>5</sup> People with disabilities in the labour market - 2011: supporting data, (December 2011), ONS, retrieved from <http://www.ons.gov.uk/ons/rel/lmac/people-with-disabilities-in-the-labour-market/2011/people-with-disabilities-in-the-labour-market--supporting-data.xls>

<sup>6</sup> Perkins R, Farmer P, Litchfield P (2009). *Realising ambitions: better employment support for people with a mental health condition*. London: Department for Work and Pensions.

<sup>7</sup> <http://fra.europa.eu/en/project/2009/fundamental-rights-persons-intellectual-disabilities-and-persons-mental-health-problems>

**12.** *How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?*

**13.** *Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

**14.** *Is there any other evidence in the field of EU fundamental rights which is relevant to this review?*

Mind considers that the EU's accession to the ECHR is important to ensure that there is coherence in the rights available for individuals in each Member State. It is also important to ensure that rights are applied consistently..

Mind is of the view that any legislation that upholds non-discrimination and promotes respect and dignity is positive and should be maintained.

We do not believe that the fundamental rights are being used to expand the competence of the EU. Case law has increasingly referred to the Charter but this is used to complement not to extend existing EU provisions.

13 January 2013.



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

XXXX

20 January 2014

Dear XXXX

**RE: The Ministry of Justice Review of the Balance of Competences between the UK and the EU**

The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The Commission bases its position on those international human rights standards ratified by the United Kingdom, including the European Convention on Human Rights incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations systems.

I refer to the recent call for evidence on the topic of fundamental rights. The Commission notes that the Equality and Human Rights Commission submitted a detailed response to the call for evidence. I am writing to broadly endorse this submission and to reiterate a number of points made to Ministry of Justice officials in Belfast on 16<sup>th</sup> December 2013.

The Commission considers that a full assessment of the effectiveness of the Charter of Fundamental Rights of the European Union (EU) is difficult at this early stage. The effectiveness of the Charter is dependent upon states promoting the treaty, as they are required to do by Article 51 thereof. The Commission would therefore advise that the United Kingdom Government consider if it is doing all it can to promote the Charter throughout its jurisdiction.

The consultation document asked a number of questions concerning the Fundamental Rights Agency (FRA). The Commission considers that the FRA provides a focal point for all human rights work within the European

Union. The work of the FRA has made a valuable contribution towards the promotion and protection of human rights. For instance, the legal analysis provided in the report of the FRA ‘Legal capacity of persons with intellectual disabilities and persons with mental health problems’ has made a valuable contribution to awareness of the legal implications of Article 12 of the UNCRPD for member states.

The Commission acknowledges that the standing of the FRA and the value of its research and analysis could be enhanced through stronger co-operation with National Human Rights Institutions (NHRIs) throughout the European Union. This is a point of particular relevance to the United Kingdom in which there are three ‘A’ status NHRIs. The United Kingdom Government may wish to consider how it can best support future co-operation and partnership between the UK NHRIs and the FRA.

The consultation document further invited views on the ratification of the ECHR by the EU. The Commission considers that this development will assist in ensuring greater legal certainty to both individuals and businesses. Furthermore it will ensure that the jurisprudence of the European Court of Justice and the European Court of Human Rights are complimentary, avoiding the confusion that would emerge through the development of two separate legal orders.

I have presented here the initial views of the Commission and would welcome the opportunity to engage further with the Ministry as it brings forward the review.

Yours sincerely

XXXX  
Interim Chair

# **Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights**

## **Submission by the Open Society European Policy Institute**

Submission prepared by XXXX, Senior Policy Officer on Fundamental Rights, Justice and Home Affairs at the Open Society European Policy Institute. XXXX.

### **Background**

The Open Society European Policy Institute is the EU policy arm of the Open Society Foundations. We work to foster open societies inside and outside Europe by leveraging the EU's policies, legislation, funding, and political influence.

The institute brings into EU policy debates evidence, argument, and recommendations drawn from the work of the Open Society Foundations in more than 100 countries. The foundations' priorities include human rights, justice, and accountability pursued through a wide range of policy areas including health, media, information, youth, and education.

The European Union is capable of effectively promoting democracy, human rights, and conflict management abroad, but this requires a robust approach to defending human rights, civil liberties, and justice at home. The Open Society European Policy Institute's role is to propose positive measures that will sustain those values within policies and widen the political constituency that supports them.

### **General Points**

#### The framing of the questionnaire

The formulation of questions in this review appears to stem from a fundamental misunderstanding of the way that fundamental rights operate within the EU's legal order. The EU's fundamental rights framework operates primarily as a brake on EU powers. EU legislation and policies and the way these are implemented must comply with the standards set out in the EU's Charter of Fundamental Rights. The primary function of fundamental rights at EU level is to prevent the EU from acting, or mandating the member-states to act, in a manner that is inconsistent with human rights protection in place at national and international level. The EU fundamental rights regime – even if it has considerable room for optimisation – is therefore inherently beneficial for all sectors in the UK.

#### Background on the EU's fundamental rights framework

The rights contained in the Charter of Fundamental Rights mostly replicate the obligations contained in the human rights treaties that all EU member-states have already joined, such as the European Convention on Human Rights of the Council of Europe, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights of the United Nations.

The development of fundamental rights as part of the EU's internal legal order serves two purposes. First, as noted, it ensures that EU law is consistent with member-states' existing international human rights commitments and national human rights standards. Because

human rights treaties have traditionally only been open to states to join, the EU was not bound by these standards. This created the risk that the EU could violate, or mandate its member-states to act in a way that breached the human rights treaties that its member-states had already joined. The EU developed its own internal standards, modelled on existing international agreements in part to prevent this anomaly. Second, internal EU fundamental rights standards were developed by the Court of Justice of the EU (CJEU) to ensure that national courts enforce the principle of the supremacy of EU law over national law.

Fundamental rights were introduced into the EU's legal framework by the CJEU in the 1960s. This was a response to objections from certain national courts, which threatened not to apply EU law that conflicted with human rights standards within their national constitutions. The CJEU developed the doctrine that fundamental rights formed an inherent part of the 'general principles' of EU law. In deciding which rights formed part of these 'general principles' the CJEU would examine, on a case by case basis, national constitutions and treaties to which the member-states are party.<sup>1</sup>

It should also be noted that because fundamental rights were already part of the EU's legal order before the Charter acquired legally binding status, the Charter did not produce a radical change in the relationship between EU law and human rights standards. Furthermore, all of the rights contained in the Charter already formed part of the general principles of EU law that the CJEU had been developing over the preceding forty years. Even if not all of them had been expressly recognised by the CJEU, the conditions for recognising a general principle were the same as the conditions applied by governments to decide which rights to include in the Charter – that they are either contained in national constitutions or international treaties that already bind all the EU's member-states. The biggest change brought about by the Charter is one of visibility: it is no longer necessary to be a lawyer to work out the list of rights that the EU recognises because they are all clearly listed in one document. This greater visibility appears to have prompted the EU institutions to adopt their own internal procedures, to ensure that EU institutions make a conscious effort to check proposals for EU law and policy with the Charter before these are adopted.

Although termed 'fundamental rights' by the EU, 'fundamental rights' are the same as 'human rights'. The EU institutions use international and national human rights law, and the interpretation given to these by United Nations and Council of Europe bodies, to ensure that the EU's standards are in line with the international agreements created by these bodies.

## Questions

### The Charter and the EU's Fundamental Rights Framework

*Q. 1. What evidence is there that the impact of:*

- the Charter of Fundamental Rights of the European Union ("the Charter");*
  - the EU's broader framework of fundamental rights*
- has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

### The impact of the Charter<sup>2</sup>

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<sup>1</sup> For further information see: Butler and Ahmed, 'The European Union and Human Rights: An International Law Perspective', European Journal of International Law, Vol. 17 no. 4, 771.

<sup>2</sup> See further, Butler, 'The EU Charter of Fundamental Rights: What can it do?', 2013, OSEPI, <http://www.opensocietyfoundations.org/sites/default/files/eu-charter-fundamental-rights-20130221.pdf>.

The EU is under an obligation to respect fundamental rights as guaranteed in the Charter of Fundamental Rights in all its activities. The Charter also applies to the activities of national authorities in certain circumstances. Although EU Law is created by the EU institutions, in practice it is given effect mostly by the national legislature (when it transposes EU rules into national law), national authorities (when they implement these rules) and national courts (when they interpret these rules). Because of this, national authorities are also under an obligation to respect the Charter, when they are applying EU legislation. However, the Charter does not cover issues that fall outside the scope of EU law.

Protocol 30 to the Lisbon Treaty has been interpreted by some as an ‘opt-out’ by the UK to the Charter. The Protocol asserts that the Charter does not “extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” However, the Charter was never intended to apply at national level to situations outside the application of EU law, which is confirmed by Article 51 of the Charter itself. As such, the Protocol does not affect the Charter’s scope and merely declares the *status quo*. This position was confirmed by the Court of Justice of the EU in the *N.S. v. Secretary of State for the Home Department*.<sup>3</sup>

The EU’s activities cover situations that affect individuals, businesses and the public sector. This means that the Charter protects all real and legal persons (including public and private bodies) in the UK. The actual impact of the Charter in the UK is difficult to quantify for two reasons.

First, at national level, the courts already had a practice of checking compliance of national law with human rights standards contained in other international agreements, such as the European Convention on Human Rights particularly since its adoption into UK law through the Human Rights Act. In terms of legislative scrutiny, the EU Select Committee and its Sub-Committees appear to have already had a practice of verifying that EU legislative proposals were compliant with fundamental rights before the Charter became legally binding.<sup>4</sup>

Second, at EU level, adoption of the Charter has prompted the legislative institutions to be more pro-active about verifying compliance of legislative proposals with the Charter before these are adopted. Without systematic assessment of Commission impact assessments and Council and Parliament negotiations, it is difficult to quantify the impact of the Charter. At a general level, the Charter helps to ensure that rights already protected under British law are respected by the EU.

By way of illustration, three recent cases at the Court of Justice of the EU are summarised below. These illustrate how the Charter has been used to protect the rights of British citizens and businesses, but also to show that the rights in the Charter cannot be used to trump the British public interest.

*Commission v Pilkington Group*.<sup>5</sup> The Commission had found that Pilkington Group, a company established in the UK, had breached EU competition rules. Pilkington Group brought a case contesting the Commission’s decision to publish information that was

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<sup>3</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department*, 21/12/2011.

<sup>4</sup> House of Lords, European Select Committee, 15 Report of Session 2007-08, The Passenger Name Record (PNR) Framework Decision, 2008, HL Paper 106.

<sup>5</sup> Case C-278/13 P(R), *Commission v Pilkington Group*, 10/09/2013.

considered to be commercially sensitive to Pilkington. It also brought a case for interim measures to prevent publication from taking place while the main case was being heard. The request for interim measures preventing publication was granted by the CJEU, and subsequently upheld on appeal. The Court's decision to prevent publication was based, in part, on the need to protect the right to professional secrecy and the right to effective judicial protection guaranteed by Articles 8 and 47 of the Charter.

*Edwards and Pallikaropoulos.*<sup>6</sup> Two individuals had challenged a decision of the UK Environment Agency to approve a new cement works in Rugby on the grounds that the agency had failed to conduct an environmental impact assessment. All EU member-states have joined an international agreement (the Aarhus Convention) which gives individuals the right to take national authorities to court to challenge decisions that have an impact on the environment if these decisions have not been subject to public consultation. The rights in this Convention were later made part of EU law through a directive. The Convention and the directive required that legal proceedings should not be "prohibitively expensive". This is designed to ensure that individuals would not be dissuaded from taking a case to court just because of excessively high legal costs. The UK Supreme Court requested the CJEU to explain how the criteria of "prohibitively expensive" should be calculated. The Court of Justice set out these criteria in part based on the right to an effective remedy protected by Article 47 of the Charter.

*UEFA v Commission.*<sup>7</sup> As an exception to rules on free competition, EU legislation allows national authorities to decide that events of major importance should be made available to the general public via free television channels. UEFA challenged the Commission's endorsement of the UK's decision to designate the European Championship as an event that should be broadcast over channels available for free to the public. The CJEU found that although the decision amounted to an interference with the property rights of UEFA, protected by Article 17 of the Charter, the interference was justified because it protected the right to information and ensured wide access by the public to television coverage of an event of major importance.

### The impact of the EU's general fundamental rights framework

The EU has the best developed fundamental rights framework of any international organisation. However, it remains fragmentary and only partially implemented. The framework has two dimensions. First, rules to ensure that the EU itself complies with fundamental rights standards:

- a) *Ex ante* checks on EU legislation.<sup>8</sup> Each of the three EU institutions involved in law-making have introduced procedures to allow legislative proposals to be scrutinised for compliance with the Charter. However, the Commission is the only institution which, in practice, systematically includes a compliance check with fundamental rights as part of its impact assessments for legislative proposals. Nevertheless, a lack of expertise on, and awareness of, fundamental rights among Commission officials can render this process superficial. Although there are procedures in place to allow the Council and the Parliament to carry out similar compliance checks, amendments to Commission proposals put forward by these institutions are not systematically

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<sup>6</sup> Case C-260/11, *Edwards and Pallikaropoulos* 11/04/2013.

<sup>7</sup> Case C-201/11 P, *UEFA v Commission*, 18/07/2013.

<sup>8</sup> See further, Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission', *European Law Review*, Issue 4, 2012, 397.

screened. This is not to say that fundamental rights issues are absent from negotiations. Rather, fundamental rights are often viewed as a political question, instead of a neutral set of criteria with which proposals should comply in order to be legally valid.

- b) Judicial oversight of EU legislation and practice, and member-state implementation of EU law. The CJEU can verify compliance with fundamental rights standards by the EU, and by national authorities when these implement EU law. However, rules of standing make access to the Court relatively limited. Direct access to the court – in a similar way to the European Court of Human Rights – is impossible unless the complainant has been specifically singled out by the decision or legislation they wish to question.<sup>9</sup> Indirect access to the Court through the preliminary reference procedure relies on the national courts being willing to pause a case and make a request for clarification from the Court of Justice. This leaves a gap in the protection of fundamental rights which can have a potentially negative impact on individuals in any EU member-state. This gap would be filled by EU accession to the ECHR (see response to question 9).

The second dimension to the EU's fundamental rights framework is oversight as to how fundamental rights are being implemented at national level.

- a) Monitoring of member-states. Currently there is very limited monitoring of how national authorities are performing against human rights standards. The European Parliament has developed a practice of drawing up a report every one to two years detailing human rights problems in the EU. However, to date there is no practice of examining specific countries. This report is adopted by a non-binding resolution.<sup>10</sup> More recently the European Parliament has examined fundamental rights implementation in one country in particular: Hungary.<sup>11</sup> It is not clear if this practice will become more systematic.
- b) Data collection. Research on fundamental rights in the EU is conducted primarily by the Fundamental Rights Agency, discussed below.

Insofar as the EU's fundamental rights framework keeps the EU itself in check, this is clearly beneficial for individuals, public and private entities and the government of the UK. The cases cited above illustrate how oversight of compliance with the Charter by the CJEU can benefit the UK. While there are deficiencies in the process of screening legislative proposals, when the UK has concerns over the compatibility of proposals with fundamental rights standards, it can raise this issue during negotiations in the Council. The absence of systematic checks in the Council suggests that ensuring fundamental rights compatibility is not a particular preoccupation of any EU member-state.

The current monitoring practice of the European Parliament through its report on fundamental rights in the EU is unlikely to have a significant impact on the UK, since it is non-binding and does not name particular member-states. If the European Parliament builds on its examination of Hungary and begins examining other member-states, there is potential

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<sup>9</sup> Butler, 'The European Union and International Human Rights Law', OHCHR, 2011, 26-28, [http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf).

<sup>10</sup> European Parliament Resolution, 'Fundamental rights in the European Union (2010-2011)' 12/12/2013.

<sup>11</sup> European Parliament Resolution, 'Situation of fundamental rights: standards and practices in Hungary', 3/7/2013.

for this to have an indirectly beneficial effect on the UK. For instance, where judicial independence is threatened in another member-state, this can have a negative impact on British businesses operating in this jurisdiction wishing to use the courts for dispute settlement, or on British citizens to be transferred to the police authorities in that country under the European Arrest Warrant. Greater oversight by EU institutions of fundamental rights implementation at national level could potentially serve UK interests.

*Q. 2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?*

The CJEU maintains a relatively strict interpretation of when the Charter can apply, as demonstrated by a recent case.

*Vinkov*.<sup>12</sup> A driver who had committed a traffic offence, and consequently had his licence confiscated for accumulating too many points, argued that the absence of a right of appeal violated the right to a fair trial under Article 47 of the Charter. The CJEU found that although EU law regulated questions relating to mutual recognition of driving penalties between different jurisdictions, the facts of the case related to a purely internal situation. This placed the matter outside the scope of EU law, and consequently outside the scope of the Charter. The CJEU reiterated past case law: “In the present case, it is not apparent from the order for reference that the national legislation constitutes a measure implementing EU law or that it is connected in any other way with EU law. Accordingly, the jurisdiction of the Court to rule on the reference for a preliminary ruling in so far as it relates to the fundamental right to an effective remedy is not established”.

*Q. 3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

The case law of the ECHR is used by the CJEU when interpreting the Charter to ensure that the standards in the two systems are interpreted consistently. However, the CJEU has no jurisdiction to rule on questions of compatibility between national law and the European Convention. This was recently reaffirmed by the CJEU.

*Åklagaren*.<sup>13</sup> The claimant alleged that Sweden had breached the principle of *ne bis in idem* since he was punished twice for the same tax offence. The national court requested clarification from the CJEU as to whether it should ignore national legislation that conflicts with the *ne bis in idem* principle guaranteed under Article 50 of the Charter and Article 4 of Protocol 7 to the European Convention on Human Rights. The CJEU reiterated the position in Article 52(3) of the Charter that “rights contained in the Charter which correspond to rights guaranteed by the ECHR [must]... be given the same meaning and scope as those laid down by the ECHR”. The CJEU also found that it was outside its jurisdiction to give an opinion on whether EU law or national law is compatible with the Convention.

To the extent that the case law of the ECHR informs the meaning of rights in the Charter, the Convention is directly beneficial to individuals, business, the public sector and other groups in the UK. This is because consistent interpretation ensures that the EU is prevented from violating rights guaranteed under UK law by the Human Rights Act, which incorporates the standards of the the European Convention into national law.

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<sup>12</sup> Case C-27/11, *Vinkov*, 7/7/2012.

<sup>13</sup> Case C-617/10, *Åklagaren*, 26/2/2013.

*Q. 4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

There is no evidence that the impact of the FRA has been disadvantageous to individuals, business or the public sector in the UK. The FRA's main activities include research, networking and awareness-raising of rights issues.

The FRA reports on the level of enjoyment of fundamental rights across the EU. It may only examine fundamental rights in the context of EU competence – thus the FRA does not examine rights implementation in areas falling within purely national authority. The FRA predominantly adopts a comparative approach to reporting. This means that it tends to examine challenges in rights implementation across the EU as a whole, rather than in individual countries.

The FRA collects and analyses data to give policy-makers a picture of the extent to which particular rights are being implemented in practice and identifies obstacles to proper implementation. This allows the EU and its member-states to better tailor legislation and policy to deal with particular problems.

As part of its research, the agency collects examples of good practice and makes its own recommendations on how to improve implementation. Many good practice examples are taken from the UK, which effectively increases the influence of the UK on policy formulation in other EU member-states. Similarly, the UK is able to draw on successful policies developed by other EU members. As part of its networking activities, the agency brings national institutions (which can include law enforcement, statistical and human rights bodies) and civil society organisations from all over the EU so these can share their expertise and successful policy solutions. Again, this can allow the UK both to influence and learn from its European partners.

*Q. 5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?*

The FRA fulfils a role that is not performed by any other body in the EU, particularly in its data collection activities. There is no other organisation in Europe that is able to collect and analyse data on rights implementation on this scale. This data is used by the EU institutions and civil society organisations to increase the quality of law and policy-making by ensuring that initiatives are tailored to the nature and scale of existing problems. The FRA's work is also used by the Council of Europe, the UN, and the OSCE to inform their research and standard-setting activities.<sup>14</sup> The agency's budget is relatively modest, standing at around 20 million euros per annum (around 4 euros cents per head of the EU population).<sup>15</sup> The agency clearly demonstrates value for money given the importance and relevance of its activities.

*Q. 6. What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?*

See response to question 10.

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<sup>14</sup> Fundamental Rights Agency, 'How our work is used', <http://fra.europa.eu/en/about-fra/how-we-do-it/how-our-work-is-used>.

<sup>15</sup> Fundamental Rights Agency, 'Statement of revenue and expenditure of the European Union Agency for Fundamental Rights for the financial year 2013', 2013, [http://fra.europa.eu/sites/default/files/2013\\_statement\\_of\\_revenue\\_and\\_expenditure\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/2013_statement_of_revenue_and_expenditure_en_0.pdf).

*Q. 9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

Accession to the ECHR by the EU will be particularly advantageous to individuals and business in the UK because it will close a gap in accountability. Although the EU is bound to respect the rights in the Charter, it is currently very difficult in practice for individuals to hold the EU to account where it violates fundamental rights because the rules of standing before the CJEU are particularly restrictive.

Currently individuals and businesses cannot challenge the EU directly before the European Court of Human Rights because the EU is not party to the Convention. There have been cases where individuals and businesses have attempted to challenge EU action before the European Court of Human Rights by proceeding against EU member-states individually or collectively. In this situation the Court has adopted a restrictive approach to reviewing EU action, by applying a doctrine of 'equivalent' protection. According to this approach the Court applies a presumption that, because the EU has its own internal fundamental rights standards, the act or legislation being challenged does not violate Convention standards. This doctrine was established by the Court in the *Bosphorous* case which concerned planes on lease to the former Yugoslavia that were impounded by the Irish government pursuant to EU law.<sup>16</sup> Accession by the EU to the ECHR would close this gap in protection by allowing individuals and businesses to defend their rights directly before the European Court of Human Rights.

*Q. 10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

One of the functions of the Rights, Citizenship and Equality Programme will be to fund the activities of non-governmental organisations, both in particular member-states (which will be of benefit to NGOs in the UK), and at EU level. One of the roles of this programme (which replaces existing programmes such as Fundamental Rights and Citizenship Programme) is to provide funding at EU level to 'network' NGOs.<sup>17</sup> These are umbrella organisations that network NGOs on particular thematic issues (such as poverty or racial discrimination) in the EU member-states through Brussels-based organisations. These network-level NGOs play an important role in the law and policy-making process by voicing the concerns of the groups they represent. For example, the European Disability Forum played a pivotal role in ensuring that EU legislation relating to air travel for persons with disabilities covers all persons with reduced mobility and has wide coverage in terms of the size of airports that need to comply with its requirements.<sup>18</sup> This has undoubtedly been beneficial to the lives of persons with disability in the UK.

*Q. 11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?*

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<sup>16</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, No. 45036/98, 30/6/06; Butler, 'The European Union and International Human Rights Law', OHCHR, 2011, 26-28,  
[http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf).

<sup>17</sup> Butler, 'Non-governmental Organisation Participation in the EU Law-making Process: The Example of Social Non-governmental Organisations at the Commission, Parliament and Council', European Law Journal, Vol. 14, No. 5, September 2008, 558.

<sup>18</sup> *ibid.*

In response to damaging reforms in Hungary, in March 2013, the foreign ministers of Germany, the Netherlands, Finland and Denmark called on the European Commission to establish a “new and more effective mechanism to safeguard” the EU’s “fundamental values”.<sup>19</sup> These include the rule of law, democracy and fundamental rights. Such a mechanism is needed to ensure that member-states continue to conform to these values, which is a condition of EU membership, after joining the EU. Article 7 of the Treaty on European Union, which allows for sanction of member-states that commit serious violations of these values, is not a suitable tool because of the high degree of political will required to set it in motion.

At the request of the Council, the European Commission will deliver its recommendations on a possible new mechanism in spring 2014. It is expected that the Commission will recommend that a new mechanism will require reform of the treaties, and will be limited in scope to a narrow interpretation of the rule of law.

The last treaty reform process lasted approximately eight years.<sup>20</sup> And the EU may well not even initiate treaty reform because governments are divided on whether it is feasible given public scepticism towards the EU and different member-state attitudes towards the treaties.<sup>21</sup>

Following the publication of the Commission’s recommendations the UK has the opportunity to work with its partners to ensure that the Commission takes action in the short term to ensure that its member-states continue to uphold values that are important to the UK. This could include reintroducing country monitoring, which was carried out before the creation of the Fundamental Rights Agency, and prioritising infringement proceedings on EU law matters that have an indirectly beneficial effect on fundamental rights.<sup>22</sup> Failure to take credible action to protect these values not only weakens the ability of the EU and its member-states to promote human rights in foreign relations, but can also interfere with the operation of the internal market (such as in cases of access to independent courts for businesses) and the area of freedom security and justice (such as in cases of transfer of British suspects to other EU member-states).

A further opportunity of the UK is the possible revision of the FRA’s mandate. Currently, the FRA may not work on criminal justice matters without a specific request from one of the EU’s institutions. Given increasing EU legislation in this area, such as the European Arrest Warrant and the legislative package on the rights of suspects in criminal proceedings, data from the FRA on this policy area would be particularly valuable to inform policy makers.<sup>23</sup>

*Q. 13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

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<sup>19</sup> Hayden, ‘EU Is Urged to Set Up Mechanism to Protect Basic Values’, Bloomberg News, 8 March 2013, <http://www.bloomberg.com/news/2013-03-08/eu-is-urged-to-set-up-mechanism-to-protect-basic-values.html>.

<sup>20</sup> Mahoney, ‘EU’s Lisbon Treaty comes into force’, EU Observer, 1 December 2009. Available on: <http://euobserver.com/news/29073>.

<sup>21</sup> Grant, ‘Germany’s plans for treaty change – and what they mean for Britain’, Centre for European Reform, 28 March 2013. Available on: <http://centreforeuropeanreform.blogspot.be/2013/03/germanys-plans-for-treaty-change-and.html>.

<sup>22</sup> For further detail see: Butler, ‘How to Monitor the Rule of Law, Democracy, and Fundamental Rights in the EU’, OSEPI, 2013, <http://www.opensocietyfoundations.org/sites/default/files/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf>.

<sup>23</sup> See Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Official Journal of the European Union, C 295/1, 4/12/2009.

There is no evidence that fundamental rights are being used to expand EU competence. Fundamental rights are a limitation on how far the EU can go in exercising its authority. As such, they come into play only once the EU is using its powers. At this stage, fundamental rights function as a set of standards that the EU is not supposed to breach.

Although there is no general legislative competence on fundamental rights, certain competence areas do relate to specific fundamental rights, for example on non-discrimination and data protection. However, the EU's fundamental rights framework does not include authority to legislate on fundamental rights more generally.

The European Commission has yet to mainstream fundamental rights into its policy and legislative process beyond merely ensuring that its proposals do not violate the Charter. That is, the Commission has not systematically identified how particular areas of competence could be used to promote fundamental rights. For instance, particular problems have been identified with media freedom and pluralism across the EU.<sup>24</sup> The EU could consider promoting freedom of expression through its legislative competence on free movement of services. Different degrees of governmental regulation of the media and rules on media ownership across the EU arguably distort the EU's media market. Having minimum standards relating, for instance, to the need for media content regulators to be independent,<sup>25</sup> could help to establish a level playing field for business while promoting media freedom.

Fundamental rights standards embody the values of dignity, respect, fairness and equality. Mainstreaming fundamental rights into law and policy formulation at EU level would ensure that improving the well-being of individuals becomes the guiding principle behind the EU. This would undoubtedly have a beneficial impact on individuals, businesses and the public sector in the UK.

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<sup>24</sup> Open Society Media Programme, 'Mapping digital media in the European Union', 2013,

[http://www.opensocietyfoundations.org/sites/default/files/Mapping\\_Digital\\_Media\\_EU\\_20121217\\_0.pdf](http://www.opensocietyfoundations.org/sites/default/files/Mapping_Digital_Media_EU_20121217_0.pdf).

<sup>25</sup> Centre for Media Pluralism and Media Freedom, 'European Union competences in respect of media pluralism and media freedom', 2013, <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>.

## Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights

Submission by Policy Exchange

### **About Policy Exchange**

1. Policy Exchange is the UK's leading think tank. As an educational charity, our mission is to develop and promote new policy ideas which deliver better public services, a stronger society and a more dynamic economy. The authority and credibility of our research is our greatest asset. Our research is independent and evidence-based and we share our ideas with policy makers from all sides of the political spectrum. Our research is strictly empirical and we do not take commissions. This allows us to be completely independent and make workable policy recommendations. We attract the highest calibre of speaker from across the political spectrum, both nationally and internationally. There are numerous examples of where our policy ideas have been taken forward by government.

2. In 2012, Policy Exchange initiated [a](#) constitution project with Dr Michael Pinto-Duschinsky as its senior consultant. The rule of law is one of the three main themes of Policy Exchange. Among its influential publications in this area are *Bringing Rights Back Home: making human rights compatible with parliamentary democracy in the UK*, by Michael Pinto-Duschinsky, and *The Fog of Law: An introduction to the legal erosion of British fighting power*, by Thomas Tugendhat and Laura Croft. Policy Exchange has given evidence to several parliamentary committees, including the Joint Committee on Human Rights, the European Scrutiny Committee of the House of Commons, the Political and Constitutional Reform Committee and the Liaison Committee.

### **General argument**

3. The concept of human rights is critically important. But so too is parliamentary democracy. In protecting human rights, it is essential to avoid undermining UK democracy. The danger to democracy arises from the facts that "rights" are subject to wide differences of interpretation, that these differences of interpretation are often politically loaded, and that they are made by judges. Jurisdiction over "rights" [can therefore](#) too easily draw judges into the political arena and, without effective checks and balances, undermine parliamentary sovereignty.

In the case of decisions by the UK Supreme Court about the meaning of particular rights in the Human Rights Act of 1998, these decisions do not automatically require the elected House of Commons to change laws in response to them.

By contrast, decisions by the European Court of Human Rights in Strasbourg are not subject to democratic override by the House of Commons. Though there is no formal requirement for the House of Commons to alter the law in response to such decisions, a change is necessary in practice because failure to make it will result in judgements against the UK in all similar cases in the future. As Professor Anthony Bradley has pointed out, the provision for democratic override in the Human Rights Act of 1998 is therefore ineffective in practice. As he puts it, parliamentary sovereignty is "mortally

wounded" by the provisions introduced in 1998 - namely, the combination of the Human Rights Act and UK ratification of a protocol (No 11) of the European Convention on Human Rights giving the European Court of Human Rights at Strasbourg a permanent right to adjudicate cases brought before it by individuals in the UK.

As regards decisions by the Court of Justice of the European Union relating to the Charter of Fundamental Rights, the impact on parliamentary sovereignty is even more severe. The Luxembourg Court's interpretations of the Charter are binding on UK judges. Where they run counter to existing UK law, they automatically take precedence. As set out in the Ministry of Justice's *Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights*, the remedy to a decision by the Luxembourg Court based on the Charter of Fundamental Rights may entail

"sometimes disapplying a provision of an Act of Parliament." (Paragraph 19)

Accordingly, the legal status afforded to the Charter of Fundamental Rights of the European Union since the Lisbon Treaty came into effect in 2009 has created the potential for far-reaching incursions into the powers of the UK's elected representatives in the House of Commons. Some may, of course, argue that this is no bad thing. Overt advocates of a United States of Europe, such as Commission Vice-President Vivian Reding, look to the European Parliament as the principal representative body of the projected European super-state. However, for supporters of Westminster democracy, the undermining of the power of the House of Commons is an extremely serious matter. This is especially the case because past assurances about the narrow scope of the Luxembourg Court's powers are unconvincing (see Section 9 below and Appendix 2, Sections 5-10) and because the wording of parts of the Charter is so vague that it provides exceptionally broad scope for judicial interpretation,

It is against constitutional practice within the UK for legislation to be framed so broadly that it provides undue room for administrative or judicial interpretation. By passing laws in such a vague and extensive form, the legislature is effectively handing over its power. Yet, the Charter of Fundamental Rights is a prime example of a document that includes imprecise wording thereby giving leeway for the Luxembourg judges. As Policy Exchange has stated to the European Scrutiny Committee of the House of Commons, the Charter gives the final say to the Luxembourg Court on the meaning of unbounded terms such as "human dignity" or on what constitutes a "high level" of protection in various fields or "reasonable" action by public authorities in others. (Appendix 2, Section 14.)

4. Policy Exchange endorses the warning given by the Minister of Justice in his article of 13 November in the London Evening Standard. In an article titled "It's time to reign in the power of international courts", he wrote:

The problem with vaguely worded international treaties, like the Charter of Fundamental Rights is that they put huge power in the hands of European courts. They have freedom to challenge our laws, and our parliament is powerless to stop them unless the Treaties themselves are rewritten.

We now face a fundamental question about who governs Britain. And the two European courts [the Court of Justice of the European Union at Luxembourg and the European Court of Human Rights at Strasbourg] seem to have complete freedom to decide where and when they can take decisions. ...

I think it's time for all of this to change. We cannot go on seeing crucial decisions about our society and our system of justice and government being taken by unaccountable international courts. ...

We want to renegotiate our membership of the European Union, of which the European Court of Justice is part. And we will shortly publish a strategy document which will lead to wholesale changes in our human rights laws and the curtailing of the role of the other European Court, of human rights, in the UK.

British people want decisions about things that are crucial to their security and their rights to be taken in this country. Like me they are frustrated by what is happening now, and they want change.

#### ***Conceptual and definitional points***

5. The wording of the consultation document to which this submission is a response uses terminology that is itself unclear and contested. Questions for consultation ask for "evidence" about UK "interests" and refer to a "balance" of competencies between the UK and the European Union. All three terms are subject to misunderstanding, especially since the consultation omits to include questions about democracy and sovereignty which, in the view of many, are the most essential.

##### **(a) *What are national "interests"?***

Interests are of different sorts and exist at different levels. Two kinds of **these** "interests" are **certainly** economic and security interests. But these are not the only ones. For many in the UK, democracy and the independence needed to assure democracy are vital national interests. In other words, the argument in favour of British democracy is not primarily that it is good for economic growth but that it is good in itself. Similarly, the case against allowing torture is - for many people - a matter of morality rather than "interest". The question of whether a ban on **torture for example** benefits UK security and saves lives does not depend on a utilitarian "felicific calculus".

It follows that a discussion of "interests" in the context of human rights is different from a discussion about, say, trade policy. The latter is amenable to economic arguments but the former probably is not.

Policy Exchange believes in the moral imperatives of both human rights and democracy. The only way these can be achieved at the same time is **through** a system which restrains the powers of international courts over human rights involving the UK and which provides the House of Commons with a power of last resort to override them.

##### **(b) *Problems of "evidence"***

Problems of direct "evidence" arise, in the case of the Charter of Fundamental Rights, for two reasons detailed below. However, it may reasonably be argued that there is strong indirect "evidence" that the Charter of Fundamental rights is bound to be most damaging to the powers of the Westminster Parliament and thus, to all but believers in a United States of Europe, against essential British interests.

First, it is unreasonable to ask for "evidence" about the effects of the legal status given to the Charter of Fundamental Rights since this happened only four years ago. For this reason, it is of relatively little use to discuss some of the initial case law. Regarding the accession of the EU to the ECHR, this has not yet happened and the conditions have not been agreed.

Second, evidence about the effects of the legal status given to the Charter of Fundamental rights is very hard to provide since, as yet, they are so unclear. This has been argued forcefully by the legal academic Professor Douglas-Scott. (See Appendix 2, Section 4.)

Nevertheless, there is compelling indirect evidence that the post 2009 system will greatly diminish UK sovereignty and UK democracy unless appropriate steps are taken by the UK to renegotiate parts of the Lisbon Treaty. This evidence is summarised in Sections 6, 7 and 8.

*(c) Is "balance" between the constitutional powers of the UK Parliament and the European Union possible?*

The language of "balance of competencies" used in the series of Foreign and Commonwealth Office-led consultations, of which the present consultation is part, arguably is misleading. It implies a *modus vivendi* between the UK and the EU that many feel is difficult. Individual "competences" may indeed be divided and shared. But basic constitutional prerogatives are arguably indivisible. According to this view, sovereignty may only be shared if the UK retains the "power of the final say" and if the doctrine that a British parliament may not bind its successors remains realistic and not mere legal fiction. Thus, irreversible transfers of competence are not compatible with parliamentary sovereignty.

*(d) Dealing with risk*

As the current President of the UK Supreme Court, Lord Neuberger, stated in 2008 with reference to the projected UK Supreme Court,

"[t]he only rule which my experience suggests is infallibly reliable is the law of unintended consequences."

In the area of constitutional reform, it may reasonably be argued that there is a need for caution and that lack of clarity and lack of "evidence" should lead to support for the traditionally established structures.

***Why the legal status given to the Charter of Fundamental Rights threatens to undermine UK sovereignty and democracy: three forms of indirect "evidence":***

6. Prominent litigators have been quick to point out the opportunities provided by the legal status accorded to the Charter **to constrain** the UK Parliament and Government. Kieron Beal QC and Tom Hickman of Blackstone Chambers have cited six reasons why "[i]n terms of utility, a substantive right conferred by EU law is undoubtedly the "sledge-hammer" in the practitioner's "toolkit"." (Beal and Hickman, 2011, 126-28). Given the strength of this legal "tool-kit", it is virtually inevitable that it will be used to great effect.

It is worth giving a precis of the reasons given by Beal and Hickman.

First, the supremacy of EU law means that primary and subordinate national legislation which is declared incompatible with a directly effective EU law right, and therefore invalid, must be disapplied by national courts. Fundamental rights are directly effective. Primary or subordinate domestic legislation that contravenes those rights protected by EU law must therefore be disapplied by national courts in respect of the person relying upon them.

Secondly, there are also advantages to proceeding under EU law in terms of the *locus standi* of applicants. A challenge to a legislative or administrative act alleging infringement of EU law rights is often brought by judicial review, provided a claimant has a sufficient interest in the matter. An increasingly liberal approach to standing has been developed by the courts. Claims are often made by public interest groups established to campaign on particular issues or to represent specific interests. By contrast, the Human Rights Act establishes a narrower "victim" test.

Thirdly, under EU law, a complaint can be made about a failure to introduce primary legislation.

Fourthly, the remedies available under EU law obliges national courts to ensure the legal protection of rights which individuals derive from EU law.

Fifthly, damages awarded under EU law must constitute an effective remedy and provide adequate compensation. This is to be contrasted with the limited availability of damages under the Human Rights Act.

Sixthly, the coverage and the sources of the rights contained in the Charter are wider and more extensive under EU law.

7. The past experiences of the introduction of bills of rights in other countries and of the granting of powers to courts indicate they they lead to courts using their new powers, albeit after a delay to establish themselves and to assure their legitimacy. This was the experience of the United States of America with the gradual accretion of the power of judicial review by the Supreme Court following the minor case of *Marbury*

*v Madison.* This process is described with reference to constitutional courts in the USA and France by Professor Vernon Bogdanor in his modern classic *The New British Constitution* (2009) and by Dr Pinto-Duschinsky and Lynne Middleton in their written evidence in May 2013 to the parliamentary The Joint Committee on the draft Voting Eligibility (Prisoners) Bill  
(<http://www.policyexchange.org.uk/images/pdfs/policy%20exchange%20memorandum%20of%20evidence%20on%20draft%20voting%20eligibility%20prisoners%20bill.pdf>)

As European Commissioner for Justice Reding said in 2012,  
To all those who are not satisfied with the current state of Union law as regards fundamental rights, I thus say: Be patient. It has only been two years since the Charter came into force! We should give it time to develop ... (31 May 2012.[http://europa.eu/rapid/press-release SPEECH-12-403\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-403_en.htm))

Nevertheless, she cited a series of examples of the use of the Charter in combating policies of member states such as Bulgaria and Hungary. She was confident that the Charter would be a "powerful tool" and would lead to laws that European member states would be obliged to obey, including possibly gender quotas on the boards of private companies. She cited too the use of the gender equality provision of the Charter to ban differential insurance premiums for male and female motorists (even if female motorists present a lower risk to insurers) as a foretaste of things to come.

8. A third form of indirect evidence about the probable effects of the legalisation of the Charter on the powers of the UK legislature comes from the declarations of the European Commissioner for Justice, Viviane Reding. She is Vice-President of the Commission with responsibility for constitutional affairs and fundamental rights. She has made the intended direction of travel very clear in a recent succession of speeches:

We need a true political union. To me, this means that we need to build a United States of Europe with the Commission as government and two chambers – the European Parliament and a "Senate" of Member States. (7 January 2014.[http://europa.eu/rapid/press-release SPEECH-14-1\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-1_en.htm))

European Parliament elections are more important than national elections. (13 December 2013. [http://europa.eu/rapid/press-release SPEECH-13-1077\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-1077_en.htm))

Towards a federal Europe: ... integration in economic and fiscal policy has reached an unprecedented level. This has culminated a few weeks ago with the European Commission presenting its analysis of Euro-countries' draft budgetary plans and issuing its recommendations even before national Parliaments vote on these. This is a huge step taken. A step that would have been unthinkable even a few years ago. (3 December 2013. [http://europa.eu/rapid/press-release SPEECH-13-1007\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-13-1007_en.htm?locale=en))

EU citizenship ... more and more decisions that affect people's lives directly are taken at European level (2 December 2013.[http://europa.eu/rapid/press-release\\_SPEECH-13-1003\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-1003_en.htm))

### ***Misleading assurances***

9. From the late 1990s, there have been attempts to calm fears within the UK that a Charter of Fundamental Rights is somehow part of a planned intrusion into the prerogatives of member states of the European Union. The arguments (together with reasons why they have provided misleading assurances) are summarised in Appendix 2, Sections 5-10. The record of past assurances that have proved shaky (combined with current rhetoric from the European Commission) provide grounds for concern about the impact of the Charter for those interested in the preservation of parliamentary powers in the UK.

It is worth adding some remarks about the argument that the Charter applied only to European Union law and that it thus restricts the EU rather than its member states. This is disingenuous for the reasons given in Appendix 2, Section 7. There are also further causes for concern. First, the Charter encourages the European Union to bring forward legislation that goes well beyond commercial, single market laws. For example, the proposal for an EU law imposing gender quotas for directors of private companies becomes more likely to be accepted by the Strasbourg Court following the provision for gender equality in the Charter. (It is not intended here to express a view for or against such quotas but rather to point out the EU's entitlement to bring forward such a measure). If accepted by the Luxembourg Court, it would then be binding on the Westminster Parliament. Thus, the Charter itself increases the scope of EU law.

Second, the assurance in Article 51 of the Charter that "[t]he provisions of this Charter are addressed to the institutions and bodies of the Union ... and to the Member States only when they are implementing Union law" is of uncertain effect since it is for the Luxembourg judges to decide its meaning. As Commissioner Reding remarked in her speech of 31 May 2012

I personally have some trust in the Court of Justice [of the European Union] that it would not accept such a restriction easily, even though the drafters of the Charter clearly intended it.

In other words, the Luxembourg judges can be expected to permit the European Union to evade the restriction on the scope of the Charter set out in Article 51.

But even this is not the end of the story of expanding EU aims. On 4 September, Commissioner Reding announced a two-prong strategy. She proposed a more aggressive use of existing EU powers "to exploit the potential offered already by the existing treaties" by the Commission's giving a "formal notice" to a member state where the Commission believes there has been a systematic rule of law infringement. In addition, a "second step could be to anchor a strong basis for a more far-reaching rule of law mechanism, which would include more detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty." ([http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm))

### ***Accession of the European Union to the ECHR***

10. There is room for concern about this development too. The UK is in the process of renegotiating its European Union ties with the aim of protecting itself from further constitutional, legal and economic entanglement. The sheer complexity of the EU accession to the ECHR makes it undesirable since it would further complicate UK disentanglement. Moreover, the form of accession may reasonably be seen as a Euro-federalist move insofar as the EU would become a collective "member" of the Strasbourg Court and would become entitled to appoint a judge to represent the EU on the Strasbourg Court as well as a delegation of the European Parliament to the Parliamentary Assembly of the Council of Europe for the purpose of selecting judges to the Strasbourg Court.

EU accession to the Strasbourg Court requires agreement of all member countries of the Council of Europe including the UK. Accession of the EU to the ECHR was agreed in the Lisbon Treaty but the terms of such accession were not. It is recommended by Policy Exchange in its recent evidence to the European Scrutiny Committee of the House of Commons that the UK should not agree to this accession until the outstanding issues relating to the supremacy of the UK Supreme Court over matters relating to the EU Charter and the equally important matter of a UK democratic override of decisions by the Strasbourg Court have been resolved. (Appendix 2, Section 15)

### ***Fundamental Rights Agency***

11. The basic issue about the Fundamental Rights Agency relates to its political approach and strategic intent. If its objective is to use issues relating to rights as a means to promote the objective of a United States of Europe, it follows that attitudes to its work will vary according to whether or not this is a desirable end. In view of differences between the senior partner in the UK's Coalition Government and Commissioner Reding about this, it is hardly surprising that there have been clashes over the programme of the Agency. Commissioner Reding's severe criticisms of the UK in her speech about the matter delivered on 6 December 2012 highlighted the divergent positions. She stated:

I find the UK's recent position on fundamental rights, as reflected in the British decision not to let the Fundamental Rights Agency do its work, more than unfortunate. **The European Union is not a free trade area and not only an internal market.** (Bold lettering in speech draft.) ([http://europa.eu/rapid/press-release\\_SPEECH-12-918\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-918_en.htm?locale=en))

The large gap between the concepts of European union held by the senior party in the UK Government and the European Commission makes disagreements over the role and value of the Fundamental Rights Agency hard to avoid. It also makes consideration of whether or not it is cost-efficient (as asked in Question 5 of the consultation document) of secondary significance.

### ***Assessing the case for supra-national adjudication of human rights***

12. With regard to the European Convention on Human Rights, supporters of the jurisdiction of the Strasbourg Court have given great emphasis to what might be called the "Russia argument". If the UK fails to respect the jurisdiction of the

Strasbourg Court on the ground that the Westminster Parliament should exercise a power of democratic override - so the argument goes - this will provide an ideal excuse for other governments to disrespect human rights on the same ground. This includes governments with dubious records such as Russia, Turkey and Ukraine. Moreover, disregard for the Strasbourg Court will damage the UK's international reputation.

It may be noted that a similar argument is less persuasive for the Charter of Fundamental Rights because the signatories to the Charter are the member countries of the EU and these do not include the outlying member states of the Council of Europe such as Russia, Turkey and Ukraine.

Moreover, the "Russia argument" is open to question on four other grounds:

1. National sovereignty parliamentary democracy are such basic UK interests, that they cannot reasonably be traded for human rights in other countries, even if it could be shown that human rights in other countries would substantially benefit from such a sacrifice.
2. If improvement of human rights in other countries is an important national aim (which it is on moral grounds), this must include improvement in all countries and especially those with the worst records. These countries tend to be members neither of the European Union nor of the Council of Europe.
3. There has been a notable shortage of evidence about the effects of Strasbourg decisions about human rights in countries such as Russia, Turkey and Ukraine. Leading human rights lobbies questioned by Dr Pinto-Duschinsky during the enquiries of the Bill of Rights Commission failed to supply evidence for the "Russia argument". Preliminary enquiries from democracy promotion bodies dealing with the former Soviet Union brought the response that cases before the Strasbourg Court produced limited effects because the very governments that needed most to respect human rights were the least likely to comply with decisions of the Strasbourg Court. Only with regard to Turkey did qualified observers suggest that Strasbourg Court decisions had been of significant benefit.
4. Human rights in foreign countries may be promoted in alternative, more effective ways than unquestioning acceptance by the UK Parliament of the supremacy of the Strasbourg Court. The armoury of soft power includes diplomatic pressures, aid conditionality, legal aid to victims to assist them before national courts, observation of court proceedings by UK diplomats as a warning that unfair conduct of trials will not pass unnoticed, financial aid to local human rights organisations and other forms of action.

Policy Exchange intends to expand these points in a future publication.

It may be open to question whether the international promotion of rights is the only aim of advocates of the jurisdiction of the international courts at Strasbourg and Luxembourg. For proponents of global government or of a United States of Europe, the core objective is to create international courts with jurisdiction over national governments as the first step.

#### ***Conclusion: the need for renegotiation***

13. The current situation arising from the inclusion of the Charter of Fundamental Rights in the Lisbon Treaty as a legally-binding rather than as an aspirational

document is wholly unsatisfactory for the large numbers of Britons who resist the notion of a United States of Europe. Opponents of such a super-state include some who advocate exit from the EU and others who prefer to renegotiate the terms of UK membership.

Such a negotiation cannot merely be about a restricted number of economic matters such as disputed fishing rights. It must centre on issues of sovereignty and democracy. In particular, "legal law-making" by judges in the course of decisions about the interpretation of the meaning of particular human rights must be subject to a last-resort power of override by the elected UK legislature. The jurisdiction of international courts over human rights cases should be conditional upon such a right of override. What was advertised as a UK opt-out from the Charter provisions in the Lisbon Treaty must be made a reality in such renegotiations on lines suggested in Appendix 2, Section 16.

14. Policy Exchange is concerned that some governmental consultations relating to rights attract a disproportionate percentage of replies both from lobby groups and from lawyers who have made their careers in the field of human rights litigation. This was seen clearly in the responses to consultations by the Commission on a Bill of Rights. Policy Exchange is concerned also that those typically consulted as "experts" are drawn excessively from the same ranks. By contrast, the views of Members of Parliament tend to be absent. Policy Exchange will shortly be publishing a report on the matter.

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## Appendix 1

### ***Summary of Policy Exchange replies to consultation questions***

1. *What evidence is there that the impact of: - the Charter of Fundamental Rights of the European Union ("the Charter"); - the EU's broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

See Sections 3, 4 5(a) and 5(d). For supporters of a United States of Europe, the legal status given to the Charter by the Lisbon Treaty is advantageous. For supporters of UK democracy and parliamentary sovereignty, it has been highly disadvantageous.

2. *What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?*

It is still early days. In the medium and long term, it is almost inevitable that the Luxembourg Court will use its powers of interpreting the Charter expansively.

3. *What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

Insofar as the Charter provides what Beal and Hickman call a "sledge-hammer" in the litigator's tool-kit, it is of advantage to litigators and to the lobby groups they frequently represent. It is advantageous for those supporting a United States of Europe. It is against the interest of parliamentary sovereignty.

4. *What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

See Section 10

5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?

Relative to fundamental interests in parliamentary sovereignty, this appears to be a minor consideration and is not addressed in this submission.

6. *What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?*

Relative to fundamental interests in parliamentary sovereignty, this appears to be a minor consideration and is not addressed in this submission.

7. *What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?*

Relative to fundamental interests in parliamentary sovereignty, this appears to be a minor consideration and is not addressed in this submission.

8. *Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?*

Relative to fundamental interests in parliamentary sovereignty, this appears to be a minor consideration and is not addressed in this submission.

9. *What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

See Section 8

10. *What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

Relative to fundamental interests in parliamentary sovereignty, this appears to be a minor consideration and is not addressed in this submission.

*11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?*

The main future challenge is to renegotiate parts of the Lisbon Treaty to gain a meaningful and comprehensive UK opt-out from legal obligations under the Charter.

*12. How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?*

Policy Exchange supports active cooperation between the UK and continent-wide and global bodies in assuring human rights but is wary of international legal agreements that bind the House of Commons, especially if they are adopted without full debate on the floor of the House and without approval in a vote.

*13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

See Sections 8 and 11.

*14. Is there any other evidence in the field of EU fundamental rights which is relevant to this review?*

Policy Exchange is committed to making human rights compatible with parliamentary democracy in the UK. The key issue, therefore, is whether or not the legal status afforded to the Charter of Fundamental Rights is consistent with this objective. Policy Exchange doubts whether it is. Therefore, the submission concentrates mainly on the underlying question of the effect of the Charter on parliamentary sovereignty and UK democracy.

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*Appendix 2*

***Evidence submitted by Michael Pinto-Duschinsky to the European Scrutiny Committee of the House of Commons, 6 January 2014***

European Union Charter of Fundamental Rights

Memorandum to the European Scrutiny Committee

By

Michael Pinto-Duschinsky

Senior consultant on constitutional affairs to Policy Exchange

6 January 2014

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1. The implementation of the EU Charter of Fundamental Rights raises fundamental and disturbing questions. These questions are only partly about the enumerated rights themselves. The main problem is that adjudication of these rights by an international court - the Court of Justice of the European Union at Luxembourg - seems bound to extend the powers of that court greatly and without any obvious recourse by the people and elected Parliament of the United Kingdom.

The main objective of this memorandum is to explore how the UK needs to negotiate if it is to safeguard the sovereignty of Parliament and UK democracy while remaining a member state of the EU.

***The main problem is not with human rights themselves but with the system of jurisdiction over them***

2. The author of this memorandum supports the notion of "human rights" and the noble ideals often incorporated in them. His report, *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*, published in 2011 by Policy Exchange, made clear that the core rights embodied in the European Convention on Human Rights and then incorporated into UK law in 1998 were not in question. (Pinto-Duschinsky, 2011, 59) Were the UK to withdraw from the jurisdiction of the European Court of Human Rights in Strasbourg, those rights should continue to be incorporated in British law.

However, advocacy of rights has been misused as a way to create undemocratic, supra-national institutions.

3. The Charter of Fundamental Rights is more extensive than the European Convention on Human Rights. It controversially includes social and economic rights, whose implementation would be costly and would unduly constrain the budgetary options and policies of elected British governments. Moreover, given its numerous sections and the inclusion of very vague wording in some places and specific commitments in others, the full text of the Charter seems bound to involve problems that have not yet become clear. For this reason, the author supports the view that it would have been advisable for the UK to have withheld its support for giving the Charter legal status under the terms of the Lisbon Treaty. With the European Convention already in existence and with its key articles incorporated into UK law, there was no need for a further European bill of rights.

Nevertheless, the contents of the Charter are not the only or the main reasons for concern.

### ***Unacceptable complexity and lack of clarity of jurisdiction over human rights in the European Union***

4. The first reason for criticism of the system of rights implementation in the UK following the Lisbon Treaty is its notable complexity and lack of clarity. This makes it fertile ground for litigators but not for justice or for accountability. The advice to purchasers of financial investments not to buy any that are too complex to understand applies with even greater force to constitutional "products" such as those in the Lisbon Treaty.

The legal force given to the Charter by the Lisbon Treaty means that there are now three separate and therefore competing constitutional courts for the UK: the Supreme Court in London, the European Court of Human Rights in Strasbourg, and now the Court of Justice of the European Union in Luxembourg with inevitably increased scope resulting from its right since 2009 to interpret vaguely worded provisions of the Charter.

As if this were not enough, there are at least three added wrinkles. First, according to the Lisbon Treaty, the EU itself is to become a federal "member" of the European Court of Human Rights under terms yet to be agreed by the existing member states of the Council of Europe.

Second, the implications of what has been called an "opt-out" of the Charter by the UK are also unclear.

Third, the Charter includes both "rights" and "principles", which are apparently different things since, as reported by Kieron Beal QC and Tom Hickman of Blackstone Chambers, "Charter rights" are to be *respected*, while "Charter principles" are to be *observed*. (Beal and Hickman, 2011, paragraph 27) While the distinction between being respected and being observed may be clear to lawyers, it is not obviously apparent to others. Moreover, Beal and Hickman acknowledge that drawing a clear dividing line between "rights" and "principles" may be difficult, not least because in some cases an article of the Charter may contain both elements of a "right" and a "principle" (Paragraph 28)

In the words of a leading legal academic, Sionaidh Douglas-Scott, "the most appropriate conclusion to draw on the Lisbon Treaty human rights provisions, and recent Court of Justice [of the European Union] case law might be that it is complexity, rather than human rights protection itself, which has increased most." (Douglas-Scott, 2011, 682)

In another recent publication, Douglas-Scott suggests that the confusion of legal competences is so great that it requires metaphors and even pictorial illustrations to attempt to explain it.

"Within the EU, there exists a pluralism of orders, consisting of state legal orders but also of the EU itself, in which no order may be identified as ultimately controlling the legal space overall, whatever that legal order's insiders, such as judges and lawyers, may claim from an internal point of view. In this context, the courts have become particularly important, in that they are often seized with boundary conflicts. . . in which both courts have on occasions claimed for themselves the role of the ultimate guardian of fundamental rights. It is impossible to categorize such complex legal landscapes by a neat, self-contained conception of law. . .

One recent theorist has characterized it as ‘a rugged mountainous terrain, and another describes its primary characteristics as ‘imprecision, uncertainty, and instability or...the fuzzy and the soft’.<sup>9</sup>

Rather than interpreting the legal landscape as a rugged mountainous terrain, I believe it may be more usefully captured by the image of the Carina Nebula. . . . The Carina Nebula is a vast complex of dust, stars, gas, forces, and energy ... " (Douglas-Scott, 2012, 85-86).

It is reasonable to comment that no one attempting to sell a pension scheme, a motor car or any other product would dream of answering the question of how it was structured and what its risks were by explaining that its primary characteristics were "imprecision, uncertainty and instability" or that it was like a vast complex of gas. It is unreasonable to expect UK electors to buy into such a mess when it comes to our constitution.

***Three questionable arguments used to disguise loss of national sovereignty stemming from the recently-created legal status of the Fundamental Charter of Human Rights of the European Union***

5. Whatever the aim of the authors of the Lisbon Treaty, all the "dust", "gas", and fuzziness of the new system has a simple function - to undermine national sovereignty in a manner sufficiently confused as to escape public understanding and popular concern.

Three dubious arguments have been used to assuage objections and to calm fears. It is suggested that

- the Charter does no more than set out in a single document rights already existing within previously agreed EU treaties,

- Charter rights apply only to matters within the existing competence of the EU (for example, the single market),

- the UK gained an "opt out" from the Charter.

6. First, there is the claim that the Charter is no more than an exercise in gathering together already existing European Union powers in a convenient document. As reported by Vaughne Miller of the House of Commons Library,

"Article 6(1) of the *Treaty on European Union*, as amended by the Lisbon Treaty specifies that the Charter “shall not extend in any way the competences of the Union as defined in the Treaties”. A Declaration annexed to the Final Act of the Intergovernmental Conference (IGC) which adopted the Lisbon Treaty specifies the scope of application of the Charter and its relationship with the *European Convention on Human Rights*. The Declaration confirms Article 51 of the Charter itself, emphasising that it does “not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties”." (Miller, 2013, 3)

Miller recalls that the then Foreign Secretary, David Miliband, "assured the ESC on 16 October 2007 that the Charter would not “extend the reach of European courts into British law”, that it “only records existing rights under domestic and international law” and does not create new ones." (Miller, 2013, 5-6)

Yet, reliance cannot be placed upon such assurances especially in light of the more cautionary words of the then Foreign and Commonwealth Office Legal Adviser. He

insisted "on a holistic approach rather than a simple "will it or won't it" question in the abstract." Such language should raise an immediate alarm since the matter is by no means "abstract" and requires a straightforward reply.

If nothing had changed as a consequence of giving legal force to the Charter, why were the proponents of the Lisbon Treaty so keen to give it this status? If the Charter was meant to have no more than symbolic significance, there would have been no point in the European Commission's stating that "The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves." (Miller, 2013, 5) And why was the famous assurance given by the Minister for Europe in 2000 that the Charter would have no more legal effect than the comic *Beano* subsequently abandoned? Beal and Hickman, 2011, paragraph 1)

It stands to reason that the introduction into the European Union treaties of such broadly worded rights with a legal force to be decided by the Luxembourg judges of the Court of Justice of the European Union must ultimately expand the jurisprudence of that court.

To make matters worse, decisions of the Luxembourg Court are even more destructive of national sovereignty than those of the European Court of Human Rights for reasons compellingly set out by Beal and Hickman, who give six reasons why litigation under European human rights laws are "undoubtedly the 'sledge-hammer'" in the practitioner's "toolkit". (Paragraph 52.)

7. A second argument is that the Charter is not to be feared since it will apply only to matters that already fall under the competence of the European Union. Even if this view is accepted, a bill of rights such as the Charter is likely to be used by the Luxembourg judges to extend the reach of European Union jurisdiction well beyond the straightforward meaning of commercial provisions in the European Union treaties.

This is illustrated by the experience of the United States. In the USA, "interstate commerce" is a federal responsibility under the Constitution. The Interstate Commerce Clause was used in a good cause during the epic battle for civil rights as a lever to achieve the racial integration of motels and for related purposes only indirectly related to interstate commerce.

However, the use of a commerce clause by the top federal court to overrule state legislatures within the USA may be used also for more controversial purposes. Concerning the European Union, the adoption of the Charter encourages a broadening of the scope of decisions by the judges in Luxembourg. That court decided on grounds of gender equality under the terms of the Charter that insurance company can no longer base motor insurance premiums on commercial considerations. Irrespective of the fact that male drivers are more accident prone than female ones, premiums

cannot reflect this. The judgement is an example is the potential for mission creep under the terms of the Charter.

8. Third, British fears of the effects of the Charter were assuaged by the so-called "opt out" negotiated by the then UK Labour Government as a condition of its agreement to the Lisbon Treaty. Yet it turns out that the supposed "opt out" was no such thing but merely "a clarification of its effects in the UK." (Miller, 2013, 6)

9. It is in the nature of justiciable bills of rights to remove powers from legislatures and executives and to transfer them to judges. The loss of democratic accountability inherent in systems of rights may be justified if they have been introduced by a process of full public debate and preferably by a super-majority, if they are sparing in the rights selected, and if they are subject to legislative checks and balances. These provisos apply to rights subject to adjudication by national supreme courts.

Where bills of rights are subject to adjudication by international courts (a new situation), no credible form of democratic accountability or of checks and balances has yet been devised.

10. Apart from what David Heathcoat-Amory called the "wafer-thin" character of the so-called UK "opt out" from the Charter and the highly questionable nature of the assurances that the Charter has not added to the European Union powers, two additional causes for concern are the federalist inclinations of the Luxembourg court and of the new EU Fundamental Rights Agency.

#### ***How to tackle the problem of loss of UK sovereignty stemming from the legal incorporation of the Charter of Fundamental Rights in the Lisbon Treaty***

11. Before a remedial strategy can be formulated, it is necessary acknowledge that a serious problem exists. Ever more complex legal reasoning, philosophising, and citations of cases should not be permitted to obfuscate.

Justice Minister Chris Grayling was right to warn in November 2013  
"The problem with vaguely worded international treaties, like the Charter of Fundamental Rights is that they put huge power in the hands of European courts. They have freedom to challenge our laws, and our parliament is powerless to stop them unless the Treaties themselves are rewritten."

We now face a fundamental question about who governs Britain. And the two European courts seem to have complete freedom to decide where and when they can take decisions." (Grayling, 2013)

12. For those who support the idea of a United States of Europe and for those who favour a UK exit from the European Union, there is no problem. But for those who support continued UK membership of the EU together with maintaining the Westminster Model of parliamentary democracy, the issues are basic and troubling.

The main recommendation of this memorandum is that **the primacy of the UK Supreme Court in determining the application of "rights" must be asserted and that such determination needs to be subject to democratic override by the House of Commons**. In other words, there needs to be a proper "opt-out" for the UK from a legal commitment to the Charter of Fundamental rights, though the UK should continue to subscribe on a non-binding basis to its ideals.

13. The precise ways in which the supremacy of the UK Supreme Court is to be achieved requires careful study and any effective proposals will undoubtedly be resisted by the Brussels institutions. **What is needed now is a robust declaration by the UK Government that the supremacy of the UK Supreme Court in matters concerning the Charter of Fundamental Rights will be a primary and essential feature of any renegotiation of the UK's relationship with the European Union.** If the junior partner in the Government is unprepared to agree to this, by the Conservatives, who are the senior partner, must state this on its own behalf.

Suggestions by politicians such as Foreign Minister Sikorski of Poland that the content of the UK's renegotiations will be limited to relatively minor matters such as the details of fishing rights are mischievous and wide of the mark.

14. Implicit in this position is that developments concerning European Union affairs cannot be a one-way street toward a federal United States of Europe. The "ever closer" union envisaged in the treaties must be seen not as a commitment to an eventual federation but to ever closer friendship. There is a legitimate and realistic view that this is more likely to be achieved by respecting national sovereignty and by safeguarding and promoting democratic institutions in the individual member countries rather than by an attempt to create a dominant super-state based in Brussels.

14. Thankfully, increasing concerns have been expressed by senior politicians, judges and commentators in the UK about the expansive interpretations of international courts of vaguely worded bills of rights the state by the Minister of Justice cited above in Paragraph 11. . These criticisms have been directed mainly at the European Court of Human Rights in Strasbourg but apply with even greater force to the Luxembourg Court. Policy Exchange has repeatedly raised the alarm.

It needs to be stressed that criticism of the Strasbourg and Luxembourg courts is not based only on their jurisprudence. The core issue is that these courts (unlike the UK Supreme Court) are unaccountable and are simply inconsistent with elective democracy.

Under the Westminster Model of democracy, decisions of judges of the UK Supreme Court may not invalidate legislation. If the Supreme Court finds that a law is inconsistent with rights set out in the Human Rights Act of 1998, it may issue a "declaration of incompatibility" but it is then for elected legislators to decide whether or not to change to law in question in response to the Supreme Court. If the legislature does not wish to do so, it is the legislature that prevails. There is a similar system in Canada. The problem is that there is no similar safeguard against judicial lawmaking by the Strasbourg and Luxembourg courts.

Concerning the European Union, it may credibly be argued that the Westminster Parliament agreed to give a power of judgement to the court in Luxembourg about the mainly commercial matters involved in creating a single economic market. However, this limited handover did not stretch to giving the final say to this court on the meaning of unbounded terms such as "human dignity" or on what constitutes a "high level" of protection in various fields or "reasonable" action by public authorities in others.

The effect of such imprecise wording is to remove power from elected national governments and to make it a plaything of lawyers in cases before the Luxembourg judges. Without recourse by the legislature, this is undemocratic.

15. Under the terms of the Lisbon Treaty, the European Union is itself to accede to the European Convention on Human Rights as a non-state party. The precise conditions of accession are under negotiation and are subject to agreement by the UK. It seems reasonable to argue that **the UK should not agree to this accession until the outstanding issues relating to the supremacy of the UK Supreme Court over matters relating to the EU Charter and the equally important matter of a UK democratic override of decisions by the Strasbourg Court have been resolved.**

16. While this memorandum does not set out to resolve the highly complex legal technicalities involved in negotiating a meaningful and robust UK opt-out of the EU Charter of Fundamental Rights, a tentative suggestion is put forward for discussion. Where UK litigants bring forward cases to the Luxembourg court relating to matters within the competence of the EU, **a UK opt-out should mean that such cases should be argued without reference to the Charter** and entirely on the basis of normal EU law and. Moreover, the UK courts and UK governments should be free from any obligation to follow any Luxembourg decisions made on the basis of Charter rights. In the case of driving insurance premiums, this would mean that the ban on differentiation of premiums for men and women would not apply in the UK since it was based on an interpretation of gender equality provisions in the Charter.

17. A motivation for many senior UK officials to resist any attempt to disentangle the UK from aspects of the system of European Union Law is that they have become used to it and feel that disentanglement would be a complex task. The protection of UK democracy is too important to allow this to be a significant consideration. "Judicial creep" and progressive loss of competencies by UK national governments have created a simmering crisis.

18. This memorandum is submitted on behalf of Policy Exchange.

#### **Biographical note:**

Dr Michael Pinto-Duschinsky, senior adviser on constitutional affairs to Policy Exchange, was a member of the UK Commission on a Bill of Rights, a consultant to the Policy Planning Staff of the Foreign & Commonwealth Office on policy

concerning democracy promotion, and to the policy branch of the Canadian International Development Agency on human rights and democratic development. He has advised the Council of Europe, European Union Phare Programme, Commonwealth Secretariat, United Nations, World Bank and recently the Organisation for Economic Cooperation and Development. He was a founder governor of the Westminster Foundation for Democracy and a director of the international Foundation for electoral Systems. He is president of the International Political Science Association's research committee on political finance and political corruption.

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## Review of the Balance of Competencies: Fundamental Rights

The British Association of Social Workers represents 15000 social workers in the United Kingdom. It welcomes the opportunity to comment on the issues raised in the consultation paper as human rights issues are central to social work practice nationally and internationally. The International Federation of Social Workers definition of social work states:

“Principles of human rights and social justice are fundamental to social work.”<sup>1</sup>

Further, social work’s professional association’s Code of Ethics states that,

“Social workers have a duty to:

- a. Respect basic human rights as expressed in The United Nations Universal Declaration of Human Rights and other international conventions derived from that Declaration...”<sup>2</sup>

Social work is a human rights profession committed to humanitarian ideals about the inherent dignity of each human being. We see human rights as universal, inalienable and indivisible based on the Universal declaration of Human Rights.

The European Convention on Human Rights is a creation of the Council of Europe. It focuses on the human rights preoccupations of Europe. It can be contrasted with the Universal Declaration which preceded it by two years, in that the European Convention lays great emphasis on liberties and freedoms – largely, the right to be left alone by the State; while the Universal Declaration gives equal prominence to social and cultural rights, expressly including rights such as

“...the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>3</sup>

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<sup>1</sup> International Federation of Social Workers, see <http://www.ifsw.org/f38000138.html>

<sup>2</sup> British Association of Social Workers, Code of Ethics for Social Workers, 2002, see <http://www.celticknot.org.uk/links/baswcode.html>

<sup>3</sup> Universal Declaration of Human Rights, Article 25

Social Work, by its international character and its Code of Ethics, is committed to this wider understanding of human rights.

It is important to differentiate between the Universal Declaration with its universal standards and various Conventions flowing from it, the Council of Europe with its standards in the European Convention on Human rights and the European Union with its fundamental rights embodied in the charter of Fundamental Rights.

BASW would wish to make two important observations about the links between these three bodies.

First the Charter of Fundamental Rights embodies economic social and cultural rights as well as civil and political rights. It is therefore closer to the Universal Declaration than the European Convention and therefore better reflects the broader view of rights to which social work is committed.

Second, as social work plays an important part in the promotion of EU fundamental rights we do not see this as a matter which is exclusively a legal matter. We wish to see the promotion of rights outside the context of litigation and beyond those rights which are legally enforceable. In this respect we endorse the principles set out in Articles 52 and 53 of the EU Charter of Fundamental Rights which emphasis that the rights exceed those which are legally enforceable.

We note that while para 28 of the consultation document refers to the impact of devolution it gives insufficient weight to the degree to which the EU's fundamental rights framework may affect the other countries of the United Kingdom.

The Scotland Act 1998 reinstated the Scottish Parliament and the Scottish Executive, now called the Scottish Government. The issue of Human Rights was addressed within this legislation and they limited the power of Westminster to amend or repeal this legislation. This includes the [Human Rights Act 1998](#) and many provisions of the Scotland Act itself. Furthermore the Act constrains the powers of the Parliament by inhibiting it from acting in a manner incompatible with the [European Convention on Human Rights](#) or [European Community](#) law. The same constraints apply to acts of the Scottish Government.

In the last 14 years the political and cultural variation across the UK has shaped, through devolved law making, different priorities at governance level within the four jurisdictions of the UK. This has been in response to the priorities set by the democratic processes in each jurisdiction, often influenced by the cultural and environmental complexion of that population. Some examples illustrate that diversity:

1. The different approach to migration in England and Scotland, where depopulation in the latter has been a cause of concern.
2. Different approaches to dealing with health inequalities in the four countries.

3. Different approaches to how education is delivered within the four countries.
4. Further variation can be evidenced through the different ways children are protected through legal intervention and the commentaries made to the respective governments from the UN Committee on the Rights of the Child in England, Scotland, Northern Ireland and Wales. An example is the Children's Hearing system in Scotland.

The Scottish Human Rights Commission has recently (10.12.13) published SNAP (Scottish National Action Plan) which details some of the areas that Scotland needs to address in meeting international human rights standards. This has been welcomed by the Scottish Government.

We set out answers below to the questions posed.

- 1. What evidence is there that the impact of the Charter of Fundamental Rights of the EU and the EU's broader framework of fundamental rights- has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

As BASW is committed to the broader view of human rights reflected in the Universal Declaration we have welcomed the development of fundamental rights in the EU and see these as offering significant advantages to individuals and to the public sector. Social work services are geared to the protection of the vulnerable. Fundamental rights arise because of our common humanity, not because of a democratic mandate. Certain vulnerable persons' interests may require additional protection. We note:

- Asylum seekers and other disenfranchised migrants;
- Those who aspire to alternative and counter-cultural lifestyles, including travellers;
- Those who have offended against criminal standards of behaviour.

Measures which entrench and protect minority rights are therefore helpful to social work and social care.

- 2. What evidence is there on whether the charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**

We have no specific evidence on this question. We note however that the provisions most relied upon in the application of the Charter are respect for private and family life, right to asylum, rights of the child, right to good administration and right to an effective remedy and a fair trial. These are all areas of concern to social workers.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The extension of ECHR case law has been the result of judicial decision making. Unfortunately this has sometimes been presented by elements in the press as the responsibility of 'EU bureaucrats' rather than the application of judicial principles. We welcome the wider application of the Charter as the six themes –dignity, freedoms, equality, solidarity, citizens rights and justice- are the values and principles which social workers seek to apply in their daily practice.

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

BASW is an active member of the International Federation of Social Workers (IFSW) and makes a substantial contribution to the international development of social services. The Federation's European Region, IFSW Europe e.V, is a member of the European Social and EU Fundamental Platforms and represents the social work profession in the Council of Europe. We are therefore well placed to comment on the important work FRA undertakes.

Social workers in the UK have a statutory duty to identify and protect all citizens at risk of or suffering from any form of abuse, particularly children and vulnerable adults. We are acutely aware of the avoidable distress and lifelong damage that can arise for individuals, their families and the wider community as a consequence of fundamental rights not being upheld.

In most cases including hate crimes the abuse of human rights stems from ignorance and prejudice perpetuated by a lack of objective independent information. We therefore consider that there is a pressing need both at National and European levels for far greater investment in agencies that promote human rights, monitor the impact of policies and the actions of public and other bodies, publish unbiased information about the experiences of particular groups and sectors of society and analyse and objectively compare the progress being made by individual countries to secure fundamental rights compliance.

FRA was only established in 2007 and has a daunting set of responsibilities. The independent evaluation<sup>4</sup> of their performance in their first 5 years was objective and thorough and concur with the conclusions adopted by the Justice and Home Affairs Council of the EU on 6<sup>th</sup> December that the Agency is effectively fulfilling its mandate to collect, record and analyse relevant, objective, reliable and comparable information and data relating to fundamental rights issues in the European Union and its Member States.

Breaches of the fundamental rights of young people continue to be all too common and we believe that FRA could promote greater recognition of the right of all children to belong and contribute, to be listened to and to live without fear. This should include the right to know your origins in the context of assisted reproduction and adoption and to enjoy protection in law from physical punishment and other forms of demeaning treatment in all settings.

The data that FRA publishes about variances in asylum and immigration policy is extremely helpful. FRA could helpfully focus on issues such as the stance that should be taken by professionals who are committed to upholding people's rights when faced with arrangements that clearly compromise these. Such situations occur when children are inappropriately held in immigration detention or subject to repatriation policies that will expose them to further abuse.

We are concerned that the very valuable information that FRA publishes is largely targeted at those institutions and individuals who are already relatively well aware of and committed to fundamental rights. Additional investment is required to effectively disseminate the information that FRA produces to the community at large to maximize its impact.

FRA fulfils a very important function which is advantageous to all European citizens and must be retained..

## **5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?**

We acknowledge that the value of FRA's activities is less clear at Member State level than at a European level and that not all the fundamental rights included in the EU Charter on Fundamental Rights are covered by their mandate.

However we firmly support the conclusion of the independent evaluation of FRA's performance previously referred to that the Agency is effectively fulfilling its mandate to address the need for full respect of fundamental rights in the framework of European Union law in relation to relevant institutions, bodies, offices and agencies of the Union and has contributed to a greater knowledge base concerning fundamental rights issues amongst policy/decision-makers and other stakeholders in the European Union.

The evaluation indicated that policy-makers are familiar with the Agency's outputs and activities and consider FRA's evidence base to be an objective and reliable input to the policy process. We are therefore satisfied that the Fundamental Rights Agency constitutes value for money.

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<sup>4</sup> <http://fra.europa.eu/sites/default/files/fra-external-evaluation-final-report.pdf>

- 6. What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, or individuals within the UK?**
- 7. What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?**
- 8. Do the programmes funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?**

We have no direct evidence of the effectiveness and value for money of the programme although we are aware of and value the work undertaken by many of the organisations identified in para 46. As the intention of the Commission is to consolidate the programme into the Rights Equality and Citizenship programme we question the utility of concentrating on the Fundamental Rights and citizenship Programme at this stage. We support the suggestion that the new programme should focus on anti discrimination, the rights of the child and violence against women. As set out in the preamble we note that each of these issues is a critical issue for social workers. We would therefore be hostile to any attempt to dilute the impact of this programme.

- 9. What evidence is there the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The BASW believes that it would be advantageous to individuals and to the public sector for the EU to accede to the ECHR. First it would serve to resolve the areas of uncertainty about the application of EU fundamental rights which at present apply only when acting within the scope of EU law. Secondly it would resolve the ambiguity about circumstances where there is conflict between a EU fundamental right and an Act of Parliament through a clear declaration of incompatibility. Third individuals will be able to bring complaints to the European Court of Human rights and would thus be in a stronger position to challenge any breach.

- 10. . What evidence is there that the impact of the Rights, Citizenship and Equality programme has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

While we regret the reduced budget of the Rights, Citizenship and Equalities Programme we believe that the proposed work on anti discrimination, the rights of the child and violence against women will be advantageous to individuals in the UK. The areas are those confronted by social workers in their daily practice. The climate of xenophobia being generated by the tabloid press in relation to the free movement of citizens from Rumania and Bulgaria makes anti discrimination work even more important as elements within the UK would not wish these new arrivals to be treated as equal citizens.

The rights of the child are central to child care practice. While the pendulum swings between concepts of rescue and rehabilitation, a continuing focus on child rights is a sound basis for decision making. Violence against women is closely linked to the issue of childrens rights for it is prevalent both in youth gangs and in domestic situations where it is damaging to the development of children.

We can see no way in which the proposed work programme would be disadvantageous to any interest group in the UK.

**11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?**

As we have stressed throughout these responses we are wholly supportive of fundamental rights. We believe that there are many areas which would benefit from scrutiny from a human rights perspective. We believe that the existence of gross health inequalities is being worsened by the measures which have been taken to cut social security expenditure. The gap between rich and poor is widening. Child poverty is increasing in clear breach of the legislative obligation of the Government. We note too that children continue to be detained in penal establishments despite the Coalition agreement to the contrary.

We would be sympathetic to individuals and organisations seeking to use the framework of EU fundamental rights to challenge these policies.

**12. How could action in respect of fundamental rights be taken differently- including nationally, regionally or by other international organisations- and how would this affect the UK?**

We referred above to the differing legislative frameworks throughout the UK. We believe that this strengthens the case for a supranational entrenchment of rights. We see these powers as an essential protection for individual citizens against abuse of power by the State. For example the recent revelations about surveillance of individual communications and emails indicate contravention of articles 7 and 8. Citizens need protection against an over mighty State which can best be provided at European level. .

**13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so is this advantageous or disadvantageous to individuals, business, the public sector and any other groups in the UK?**

We accept that the application of fundamental rights since the Maastricht Treaty has expanded the competence of the EU. We welcome this to serve as a bulwark for individual citizens against the powers of the State and therefore see this as advantageous for citizens.

**14. Is there any other evidence in the field of EU fundamental rights which is relevant to this review?**

We have nothing to add.

**Bridget Robb**

**Chief Executive**

**The British Association of Social Workers**

**January 2014**

# Balance of Competences Review: Fundamental Rights

The Freedom Association\*

January 13, 2014

## Abstract

A response from the Freedom Association to the Call for Evidence  
on the Review of the Balance of Competences between the United  
Kingdom and the European Union on Fundamental Rights

## Overview

Fundamental rights concern the most serious aspects of lawmaking and engage very strong feelings. These include rights which are the modern embodiment of ancient liberties and essential to the maintainance of free and democratic society. The interaction of the United Kingdom's legal system with that of the European Union and the European Convention on Human Rights has enhanced some freedoms and damaged others. The existence of three systems of fundamental rights, each slightly different, is not reconcilable with the importance to each individual of the protection of these rights.

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\*The Freedom Association (TFA) was founded in 1975 and is a non-partisan, centre-right, libertarian pressure group. We believe in the freedom of the individual in all aspects of life, including economic, to the greatest extent possible. As such, The Freedom Association seeks to challenge all erosion of civil liberties and campaigns in support of individual liberty, free market economics and freedom of expression.

## Fundamental rights

Effectively, the EU exercises a competence over fundamental rights; the Call For Evidence is understandably ambivalent and self-contradictory over the status of this competence.

The fundamental rights humans possess necessarily come into conflict with each other: it is not possible to have absolute freedom of the press and absolute privacy for celebrities, nor can a woman's right to choose to have an abortion be "balanced" against the right to life of an unborn child. These are matters of the utmost seriousness, on which reasonable people sincerely disagree. Different countries (and parts of countries<sup>1</sup>) will attempt strike a different balance between these sometimes *conflicting* interests. Each of the UK, the EU and the ECHR strikes a different balance.

Fundamental rights (particularly to property and due process) impinged so strongly on the EU's project of regulatory harmonisation that they required to be incorporated in EU law; many of these rights are protected in entrenched provisions of national constitutions, such as Germany's. EU Internal Market regulation, to the extent that it required uniformity across the EU, therefore also required that the differing balances struck in member states (*e.g.*, on property or abortion) be ironed out insofar as they conflicted with EU law<sup>2</sup>. As fundamental rights must be traded off against each other, and against other societal interest and values such as the commercial efficiency of single market access, the EU has had to arrogate to itself partial responsibility for striking these balances.

The outcome of this logic and process has been the EU's *de facto* competence (on whatever definition) over fundamental rights, even as against national constitutions. In some areas (such as privacy) this may have been beneficial, but it quite distasteful in others: the legal status of abortion in the Republic of Ireland was in part determined by the court in Luxembourg, on the basis of the commercial freedoms of medical service providers and advertisers<sup>3</sup>. This case took place only a few years after the Irish people voted to amend their Constitution further to protect the right

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<sup>1</sup>the people of Northern Ireland tend to have different view on abortion from the people of Great Britain

<sup>2</sup>indeed damage to the human rights should be accounted as a cost of the Single Market regulations

<sup>3</sup>*The Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan* [1989] IR 753 at 765, [1990] ILRM 350

to life. If a constitutional amendment referendum on the right to life can be overridden by the CJEU, then *a fortiori* it is implausible that *any* democratic constraints whatsoever on the EU's competence-expanding judicial can operate at Member State level.

## Responses to Questions in Call For Evidence

We have decided to concentrate on the effect of EU law (treaties and case law) rather than executive and legislative action (such as the Fundamental Rights Agency); Questions 1 and 3 have been answered together.

*Q1. What evidence is there that the impact of the Charter of Fundamental Rights of the European Union [and/or] the EU's broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK? Q3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

ECHR case law can affect the UK indirectly through the EU by its influence on the EU's own case law; until the incorporation of ECHR in UK law by the Human Rights Act 1998, EU case law had a much stronger effect on the UK's legal system and executive action than the ECHR did in its own right, as EU law was directly applicable in the UK from British accession in 1973.

Of the core rights enshrined in ECHR, the one least protected by English common law was that of privacy; that the ECHR as a whole is largely the work of English lawyers is now a cliché, but a line of media cases since the 1990s has led to the rapid development of protections for personal privacy, which would not and could not have happened but for the interaction of the UK's legal system with the EU and ECHR fundamental rights jurisprudence. This has left UK citizens and business in a considerably better position given the extreme increase in the importance of personal privacy in the Internet and Big Data age.

To a great extent, much of the force of European fundamental rights jurisprudence is in empowering the individual as against organs of the state, rather than in rights which can be relied on by private parties *inter se*. Many of the most important rights (freedom of speech, freedom of as-

sociation, personal privacy) concern citizens in their capacity as potential democratic actors, and safeguard the autonomy of citizens when acting in a broadly construed “public space”. Social and technological change (particularly the adoption of the Internet as many citizens’ sole source of news) has entailed that much democratic activity now involves communication over widely-accessible but *private* communications networks in which rights to freedom of speech, exercisable most easily as against the state, no longer suffice.

One criticism we would therefore make of the European fundamental rights systems is that, in the areas where they are desirable, they are *insufficiently effective*. Some of this may result from the judicial or regulatory capture of European officials, or from their lack of familiarity with the diversity of legal systems and traditions across Europe, and with emerging technology.

In 2010, a CJEU ruling<sup>4</sup> on agricultural subsidies severely compromised the right to access information, on the basis of an interpretation of the privacy rights of individual recipients of Common Agricultural Policy payments. At stake was the ability of journalists and the general public to use data on subsidies to perform analysis. The CJEU held that the privacy interests of landowners entailed that convenient electronic access to subsidy data (European governments were operating a system similar to the UK’s revolutionary spending transparency system) must be withdrawn.

*Q2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?*

Title VII provides *inter alia* that limitations on fundamental rights must be for the protection of the rights of others, analogous to similar language in ECHR. It suffers from the same problem: there is no specification of the set of rights which might be invoked to limit a particular right.

The case law of the CJEU has made it clear that EU law standards of protection for fundamental rights will not fall below the standards of ECHR, this ECHR minimum standard is relevant. Title VII lacks the ECHR’s language that limitations must be “necessary in a democratic society”, which itself is something of a dead letter: the United States is a democratic society but European fundamental rights jurisprudence has not succeeded in removing from EU member state laws such restrictions on, say,

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<sup>4</sup>Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*

freedom of expression as are unknown in that country. Q9. *What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

The accession of the EU to the ECHR would lead to even greater delays in both ECHR and EU -related litigation, and complicate the process of withdrawing the UK from either or both jurisdictions.

The European Court of Human Rights (in Strasbourg) hears cases from an even broader group of countries than the CJEU in Luxembourg. This group includes former Soviet republics such as Russia; the Strasbourg court is effectively the court of final appeal for cases from Russia and other countries where political opposition leads to incarceration considerably more frequently than in the UK.

To the extent that UK participation within the ECHR system is detrimental to the cause of freedom, and indeed to the exercise by individuals of rights legitimately interfering with that freedom under the law, the further entanglement of the EU's legal system with the ECHR system will commensurately harm the interests of individuals in the UK. However, the EU and ECHR human rights régimes differ primarily in *detail* and not at all in *spirit*, and commendable efforts have been made by many parties to ensure they remain on convergent evolutionary paths. Reducing by one the number of human rights systems applicable in the UK is at least a good start.

The duplication of fundamental rights régimes compromises the rhetorical force of the claimed universality of human rights, to say nothing of legal certainty.

When considering the ultimate form of human rights adjudication for the UK, regard should be had to recent research on the long-term effect of specialised courts. If it is true in general that specialised courts (e.g., for patents or constitutional law) tend to promote their specialism at the expense of other ways of solving social problems, then a specialised human rights court such as ECtHR may not be ideal.

Q12. *How could action in respect of fundamental rights be taken differently—including nationally, regionally, or by other international organisations—and how would this affect the United Kingdom?*

The belief in freedom is under great threat in the United Kingdom, and

nowhere is it weaker than in the general public's attitude towards human rights.

The case law of the ECHR in particular<sup>5</sup> has undermined public trust in human rights. The UK lacks the political consensus which has cemented support for fundamental rights instruments in countries with otherwise similar constitutional traditions: the Human Rights Act was introduced as an electoral commitment and has always been seen as slightly partisan. The Europeanisation of UK politics has led to an unexpectedly great degree of judicialisation of politics, and this, the "inflation" of the language of rights, and the association of human rights with "Europe" has as it were tarnished the brand.

There is no credible means of policing EU competence creep without leaving the EU entirely. In the event of British withdrawal from the EU and the Council of Europe, it would be open to the UK to adopt a meaningful contemporary Bill of Rights via statute, or the UK could revert to the protection of fundamental rights via culture, common law and uncodified statute.

In the event of UK withdrawal from one but not both of the EU and the Council of Europe, the same fundamental rights jurisprudence would continue to have effect in UK law by virtue of the European Communities Act 1972 (which incorporates EU law in UK law, and EU law is strongly influenced by ECHR) or the Human Rights Act 1998 (which incorporates ECHR in UK law). This is no, whether or not the EU accedes to ECHR under the provisions of the Treaty of Lisbon.

If remaining within both the EU and the ECHR régimes, the UK could adopt clearer statutory authorisation for judges to apply UK interpretations of fundamental rights jurisprudence where there was a conflict between EU and UK standards; theoretically this is implied by HRA 1998 already, but is too political a measure for judges to take on their own.

*Q13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

The very idea of a "competence", which derives from German law, is that a body has the legal power to do something, implying that someone<sup>6</sup> has the power to tell a body what powers it has. For a meaningful division

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<sup>5</sup>eg on prisoner voting

<sup>6</sup>possessing the *Kompetenz-kompetenz*

of powers between the EU and its Member States, there has to be a mechanism for enforcing this division: one has to be able to go to the courts and have legislation declared invalid on grounds that it was enacted at the wrong level of government. And that implies that courts have a power to declare legislation invalid at all.

The EU is unusual within Europe for being a polity effectively lacking *ex post* judicial review of legislation<sup>7</sup>, like the UK and France, but unlike most other European states. The UK, France<sup>8</sup>, and the EU do not, in practice, have courts which decline to enforce legislation on grounds of its constitutional validity. There have been almost<sup>9</sup> no instances of European legislation being “struck down” by the Court on grounds that the EU lacked the competence to do something (as opposed to numerous instances of a *particular* EU body such as the Council overstepping its own powers); this is similar to practice in the UK, where it is almost unheard-of for laws to be “struck down” as they regularly are in the United States. Professor Damian Chalmers has gone so far as to advocate replacing the CJEU with a database<sup>10</sup>.

Professor Chalmers’ work reflects wider academic distrust of the CJEU as the body responsible for policing competence boundaries; the matter is now even attracting attention from political parties such as Germany’s Christian Social Union (the sister party of Angela Merkel’s Christian Democratic Union) who have proposed an additional court, separate from the CJEU and ECtHR, to perform this function.

There are many incentives for legislators and others at EU-level to adopt legislation calculated to facilitate the gradual extension of EU responsibility—this is just another form of rent-seeking as jurisdictional arbitrage. The absence of a functioning mechanism for policing the boundaries of EU competences *vis-à-vis* the Member States entails that EU will increase its powers indefinitely, and certainly beyond what is democratically acceptable, let alone what is formally negotiated and adopted in the Treaties.

In the *ERT*<sup>11</sup> line of cases, the CJEU has used fundamental rights to limit the ability of EU member states to invoke exceptions to the free move-

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<sup>7</sup>as opposed to executive action

<sup>8</sup>The French Constitution changed in 2010 permitting some judicial review of legislation

<sup>9</sup>but see contra *Factortame*

<sup>10</sup><http://blogs.lse.ac.uk/europblog/2012/03/08/ecj-rubber-stamp-replacement/>

<sup>11</sup>Case C-260/89 *ERT v DEB* [1991] ECR I-2925

ment of goods and persons. This is another mechanism of *effective* competence extension: any measures member states adopt on national security or public health grounds which restrict the free movement of goods must themselves be weighed against the EU's standards of fundamental rights, not the member states' own.



## The Traveller Movement

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# Ministry of Justice Balance of Competences Fundamental Rights Review

## Traveller Movement Response

10<sup>th</sup> January 2014

**About TM:** The Traveller Movement (TM) was established in 1999 and is a leading national policy and voice charity, working to raise the capacity and social inclusion of the Traveller communities in Britain. TM act as a bridge builder bringing the Traveller communities, service providers and policy makers together, stimulating debate and promoting forward-looking strategies to promote increased race equality, civic engagement, inclusion, service provision and community cohesion. For further information about TM visit [www.irishtraveller.org.uk](http://www.irishtraveller.org.uk)

### **Question's 1-3 (Impact of Charter, EU's broader framework of fundamental rights and ECHR):**

The Traveller Movement (TM) believe that the Charter and the EU's broader framework of fundamental rights has been advantageous to Roma, Gypsies and Travellers in promoting greater awareness and challenging incidents of discrimination against these groups across Europe.

A good example of this was on 9th September 2010 when the European Parliament called for the immediate cessation of the expulsions of Roma from France. The Parliament stated that:

*"mass expulsions are prohibited by the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms and that such measures are in violation of the Treaties and law of the European Union, since they amount to discrimination on the basis of race and ethnicity".<sup>1</sup>*

In 2010 it was also argued by numerous NGO's that targeting an ethnic group in operations for the dismantling of illegal camps was an infringement of the Charter of Fundamental Rights, which establishes among such rights human dignity (Article 1), equality before the law (Article 20) and non-discrimination (Article 21). Likewise, Article 2 of the Treaty of Lisbon recognises that human dignity is one of the values on which the European Union is founded and that it includes the rights of persons belonging to minorities.

Similarly in the UK context the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, in 2011 argued that the UK Government should do more to ensure the fulfillment of Gypsies' and Travellers' Article 8 rights under the ECHR and Article 16 rights under the Charter:

*'Gypsies and Travellers are also at present seriously disadvantaged throughout the United Kingdom. However, a number of serious shortcomings have been highlighted in the field of guaranteeing the right to adequate housing for this part of the country's population. Although the Strasbourg Court found that Article 8 of the European Convention on Human Rights imposed a positive obligation on the United Kingdom to "facilitate the Gypsy way of life", access to culturally acceptable accommodation is still out of reach for a considerable number of Gypsies and Travellers. The January 2012 Conclusions of the Committee of Social Rights, which found that the situation in the United Kingdom was not in line with Article 16 of the Charter (Right of the family to social, legal and economic protection) on the ground that the right of Gypsy and Traveller families to housing was not effectively guaranteed, also point to a pressing need to make progress in this area.'<sup>2</sup>*

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<sup>1</sup> 2010, European Parliament, motion on a resolution for the expulsion of Roma from France  
<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0503&language=EN>

<sup>2</sup> 2011, letter from COE Human Rights Commissioner to The Rt Hon Eric PICKLES, Secretary of State for Communities and Local Government  
<https://wcd.coe.int/ViewDoc.jsp?id=1919233&Site=COE>

TM would argue that the Charter, the EU's wider framework of fundamental rights and the influence of case law from the ECHR play a key role in counteracting the discrimination Gypsies, Roma and Travellers (GRT) all too often face in the UK and Europe. We would also argue that the EU Charter plays a critical role in promoting the integration of all minorities in Europe, including GRT in the UK.

The impact of the Charter on the integration of GRT in the UK and wider Europe is explicitly made by the Vice President of the European Commission, Viviane Reding in the context of the requirement of member states to introduce National Roma Integration Strategies:

*'Since the beginning of my mandate, I have been fighting for the integration of the 10 to 12 million Roma people living in the EU. Roma integration is of key importance in improving the respect of fundamental rights for a large number of EU citizens and bringing about greater social cohesion, whilst also holding out considerable economic benefits. In April 2010 I put a [Communication on the economic and social integration of the Roma in Europe](#) on the table to address the issue. With no real progress being made by the Member States, I then issued [in April 2011 a Communication on an EU Framework for National Roma Integration Strategies by 2020](#), urging Member States to present concrete proposals and structures to tackle the issue of Roma integration in education, housing, health and employment. In 2012 the Commission [evaluated these national Roma strategies](#). I also presented a proposal for a Council Recommendation in June 2013 so that Member States take on their responsibilities and use specific actions, including positive action if necessary to improve the situation of Roma people.*

*All these proposals have been accompanied by infringement procedures every time EU law was breached.<sup>3</sup>*

#### **Question's 4-5 (Impact of EU Fundamental Rights Agency):**

The EU promotes respect for fundamental rights through the work of the Fundamental Rights Agency (FRA). Excellent work has been done by the FRA in, amongst many other things, promoting and protecting the fundamental rights of Gypsies, Travellers and Roma (referred to collectively in EU documents as 'Roma') throughout Europe by producing important data and research which demonstrates the inequalities and discrimination that they face as vulnerable members of society.<sup>4</sup>

A good example of this is the FRA's 'multi annual Roma programme:

<http://fra.europa.eu/en/project/2013/multi-annual-roma-programme>

Without research and data such as that produced by the FRA we would not have had the April 2011 Communication from the Commission to the EU Parliament 'An

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<sup>3</sup> 2013, Viviane Reding, Fundamental Rights in the EU

[http://ec.europa.eu/commission\\_2010-2014/reding/fundamental\\_rights/index\\_en.htm#charter](http://ec.europa.eu/commission_2010-2014/reding/fundamental_rights/index_en.htm#charter)

<sup>4</sup> Excellent work is also, of course, done by the FRA in many other areas – see for example their 2013 Annual Work Programme

[http://fra.europa.eu/sites/default/files/awp-2013\\_en.pdf](http://fra.europa.eu/sites/default/files/awp-2013_en.pdf)

*'EU Framework for National Roma Integration Strategies up to 2020'* which sets goals for Roma inclusion in education, employment, health and housing across the EU.

To that end, EU member states were asked to adopt National Roma Integration Strategies ('NRIS'), which specify how they would contribute to the achievement of the goals and the FRA was given the important role in monitoring and assisting EU-wide efforts to implement the EU's plan for Roma integration.

Unfortunately, the UK Government's response to the EU's requirement that it adopt a NRIS has been disappointing. Rather than adopt a NRIS in name it published a Progress Report in April 2012 which included 28 'commitments'. However, many of those commitments seem to fall well short of the explicit measures that would need to be adopted in order to prevent and compensate for the disadvantages that Gypsies, Travellers and Roma face within our society.

**Question's 11-12 (future challenges and opportunities of fundamental rights and different approaches):**

TM believe that it is essential that the UK Government respects fundamental rights when it implements EU law and that the FRA continues to be given the support and funding it needs so that it can promote the rights of Gypsies, Travellers and Roma and help eradicate the discrimination and social exclusion that they face as some of the most marginalised and vulnerable members of our society.

As previously highlighted by the COE in this submission, Gypsies and Travellers in the UK continue to experience acute inequality in accessing appropriate accommodation. Future challenges for fundamental rights will be the fulfillment of GRT Article 8 rights under the ECHR and Article 16 rights under the Charter. Crucial to the fulfillment of these and other rights relating to education, health and employment will be the UK Government's effective implementation of a National Roma Integration Strategy (NRIS). Instead the UK Government has chosen to introduce sets of policy measures which do not conform to the NRIS model outlined by the European Commission and lack a strategic targeted approach which can be monitored and evaluated.



## Review of UK and EU balance of competences: call for evidence on fundamental rights - Evidence from members of UKREN

The UK Race and Europe Network (UKREN) is a network of 160 local and national organisations across Great Britain and Northern Ireland that work to combat race discrimination within a European context. They were consulted on the impact of the EU's fundamental rights on their work. A few organisations gave examples, which are incorporated in this submission of evidence under five questions that UKREN believes are the key areas from the longer list of questions in the Balance of Competences review itself.

### How has the UK's Equality Act or the EU's framework of fundamental rights been advantageous (or not) to individuals and families you work with?

UKREN's view is that the Equality Act and the EU fundamental rights sets an essential framework that NGOs can use in their race equality work. Members of UKREN commented:

Although we have the UK Equality Act 2010 and Public Sector Equality Duty but to hold the local authorities to account is difficult. Black Minority and Ethnic voluntary organisations and communities do not have the capacity to challenge institutional discrimination. Public sector organisations are no longer obliged to conduct Equality Impact Analysis therefore they do not engage effectively with marginalised or under-represented groups in their decision making processes. The Government has limited the powers of the Equality and Human Rights Commission and ordinary people left in cold to continue to suffer in silence.

20/12/2013

The Act has been a useful tool to use to remind employers about their duty. From a policy development point of view it has allowed me to bring race matters to the table.

18/12/2013

The Equality Act, Human Rights Act (and the EU Framework of Fundamental Rights) provide the legal framework that can be referred to when trying to resolve individual's and families' difficulties in access to education, employment, healthcare, housing and social benefits.

10/1/2014

### How, if at all, have you used any judgments made by the European Court of Human Rights in your work?

UKREN's view is that relevant judgments made by the European Court of Human Rights can be very useful in influencing a race equality issue at a local level. Members of UKREN commented:

The right for self expression and hence dress code has been useful

18/12/2013

N/A

20/12/2013

D.H. and others v. the Czech Republic, in which the ECtHR found indirect discrimination in the education of Roma children, has been pivotal in helping teachers in the UK understand the education needs of Roma children who moved to the UK with their parents.

10/1/2014

**How have you used the right to not be discriminated against because of ethnicity, race, religion or belief in your work?**

UKREN believes that non-discrimination law is essential. Members of UKREN commented:

Yes in obtaining prayer space for muslim students and staff

12/18/2013

Yes

12/20/2013

Used to highlight the legal framework in support of claims by individual's or families who have been discriminated against.

10/1/2014

**How have you used the right to equal pay and treatment in employment because of ethnicity, race, religion or belief in your work?**

UKREN believes that the right to equal pay and treatment in employment law is essential. Members of UKREN commented:

Yes, but it is enormously difficult for a migrant worker to seek equal pay and rights.

12/20/2013

Yes, an equal pay audit has been carried out and action plan created

12/18/2013

**How, if at all, have you used the research by the EU Fundamental Rights Agency ([//fra.europa.eu](http://fra.europa.eu)) in your work?**

UKREN's view is that the EU Fundamental Rights Agency provide high quality research in areas where data is often not collected or published by governments. Members of UKREN commented:

We use EU Fundamental Rights Agency research and country reports to back up our argument in our public policy advocacy work to challenge local government institutional racism and discriminatory practices as well as their lack of engagement with minority ethnic communities.

12/20/2013

I have not used this

12/18/2013

I read and publicise on my organisation's website, all FRA research and reports on Roma issues

10/1/2014

Evidence collated by:

XXXX

Co-ordinator, UK Race and Europe Network

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**Unite submission to the Ministry of Justice Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights**

To: [fundamentalrightsBoC@justice.gsi.gov.uk](mailto:fundamentalrightsBoC@justice.gsi.gov.uk) by 13 January 2014

This submission is submitted by Unite the Union. Unite is the UK's largest trade union with 1.4 million members across the private and public sectors. The union's members work in a range of industries including all the manufacturing and transport sectors, financial services, print, media, construction, local government, education, health and not for profit sectors.

**Introduction**

- Unite wishes to focus its evidence in this paper to labour and collective rights, where the union has particular competence.
- Historically over decades and increasingly so, UK governments have demonstrably lacked respect for *fundamental* and *human rights*. See below.
- Unite has a clear policy that the UK should retain its membership of the EU, whilst being painfully aware that its social dimension is far too weak.
- Effective collective rights are undoubtedly a force for positive social progress, enhancing equality, reducing poverty and improving democracy.<sup>1</sup>

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<sup>1</sup> You do not need to take Unite's word for this, see, for example, the conclusion of the decision of the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, which recognised that "collective bargaining

**1. What evidence is there that the impact of: - the Charter of Fundamental Rights of the European Union (“the Charter”); - the EU’s broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Charter has been poorly applied to promote or support the Fundamental Rights of EU citizens when contrasted with the rights of business within the EU.

The decisions of the ECJ in the cases of “*Viking*”<sup>2</sup> and “*Laval*”<sup>3</sup>, demonstrate this in the context labour and collective rights. Those cases make what would otherwise be legitimate industrial action (complying, for example, with the UK’s overly restrictive laws) impossible, being subject to a test of proportionality and taken only as a last resort.

Rather than repeat the details of the cases and their consequences here, we submit instead the opinion of the UN’s International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations (CEACR). In 2010 on application by BALPA (the British Airline Pilots Association) the Committee said: “*The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services... The Committee observes with serious concern the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention [87] cannot be exercised.*”

It is now a matter for speculation and argument whether the ECJ (or CJEU as it is now known) will attempt to maintain the position articulated in *Viking* and *Laval* in the light of

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reflected the values of human dignity, equality, respect for personal autonomy and enhancement of democracy” [2007] 2 SCR 391 para. 80. See also “**Just deserts? Poverty and income inequality: can workplace democracy make a difference?** Smith Institute publication July 2013 <http://www.smith-institute.org.uk/file/Just%20Deserts.pdf>

<sup>2</sup> Case C-438/05, *ITF v Viking Line ABP*, 11 December 2007

<sup>3</sup> Case C-341/05, *Laval un Partneri v v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, 18 December 2007

these finding by the Committee of Experts and the impact of the Lisbon treaty signed the year after those cases and the decisions of the European Court of Human Rights in “Demir and Baykara”<sup>4</sup> and other cases that followed.

It is relevant to this response and in this context to refer to the general position of the UK’s restrictive laws as they apply to fundamental rights for trade unions, collective bargaining and the right to strike. The UK has been criticised for serious breaches of international law consistently over many years by all the bodies responsible for the implementation of fundamental rights. Indeed the rights such as those relating to the right to organise (Convention 87) and for collective bargaining (Convention 98) are part of the ILO’s Fundamental Principles, such that mere membership obliges countries to apply them, although the UK ratified the relevant Conventions in 1950.

One such example of criticism came in 2006 from the European Committee on Social Rights of the Council of Europe in the context of the European Social Charter 1961, when (having to repeat itself) concluded: “*The Committee concludes that the situation in the United Kingdom is not in conformity with Article 6 (4) of the Charter on the following grounds:*

- *the scope for workers to defend their interests through lawful collective action is excessively circumscribed;*
- *the requirement to give notice to an employer of a ballot on industrial action is excessive;*
- *the protection of workers against dismissal when taking industrial action is insufficient.”*<sup>5</sup>

It is a matter of shame for the UK that there are many other such criticisms.

This is relevant in the context of this call for evidence, as the premise that the Charter of

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<sup>4</sup> Demir and Baykara v Turkey (Application 34503/97) – Judgement of Grand Chamber 12 November 2008

<sup>5</sup> Article 6 (4) reads: “*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake[to] recognise; 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreement previously entered into.”*

Fundamental Rights of the European Union can be looked at in isolation is fundamentally flawed. They must be considered as inexorably bound up with the other rights, freedoms and obligations for the benefit of humankind as referred to in this response. Indeed Unite notes the current Treaty of the EU in Article 2 refers to being “founded on the values of respect for human dignity, freedom, democracy, the rule of law, human rights...” We also note the provisions of Title X of the Treaty on the Functioning of the EU on Social Policy.

Nevertheless, we have to reiterate the point that the EU and the UK government have grossly inadequate respect for the rule of law when it comes to fundamental rights and freedoms. Further evidence of this is the existence of Protocol No. 30 to the Lisbon Treaties. However, this disgraceful attempt to dis-apply the Charter to the UK and Poland was flawed, has been seen to fail (as in the case of “NS” referred to on page 26 of the call for evidence paper) and upon the accession of the EU to the ECHR becomes even more irrelevant.

The UK should instead embrace the Charter and other fundamental rights for the benefit of its citizens and people throughout the world.

**2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?**

Please see above. It is a false premise to interpret or apply the Charter in isolation. This also applies to the General Provisions. Unite notes that Article 52.1 refers to “Any limitation on the exercise of the rights and freedoms...Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” However the interpretation of such a clause, as in Viking and Laval should only be seen properly in the context of the weight of all other treaties and conventions and emerging jurisprudence. We refer above to our comments on proportionality in relation to Viking and Laval.

**3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or**

**disadvantageous to individuals, business, the public sector or any other groups in the UK?**

Unite refers to comments above and in particular the case of Demir and Baykal and related cases, being decisions of the ECtHR, which have yet to impact effectively on the EU or the UK. Unite has no doubt that the recognition of the obligation on governments to promote collective bargaining and of the right to strike are very positive developments for the citizens of the world.

**4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Fundamental Rights Agency must be retained and its efficacy enhanced. It cannot limit its focus to the specific competencies of the EU for the reasons set out above. It must inevitably liaise with the Council of Europe, as now, and with other international agencies.

**5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?**

Unite refers to its response to question 4 above, but has no specific evidence on value for money.

**6. What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?**

Unite favours the promotion of education for all as to their rights and responsibilities as citizens. This should include the promotion of collective rights, such as collective bargaining, as required under the various treaties referred to above. It follows that the role of the Fundamental Rights and Citizenship Programme amounts to a step in the right direction. Currently its scope and application is too limited

**7. What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?**

Unite refers to its response to question 6 above, but has no specific evidence on value for money.

**8. Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?**

Unite refers to its response to question 6 above, and in particular please note that the scope and application of the Programme are too limited to meet its stated objectives.

**9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

Unite believes that the EU's accession to the ECHR is likely to assist the citizens of the EU in the longer term and with the EU and member states' compliance with their international obligations. Please see answer to question 1 above.

**10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

Unite favours the promotion of education for all as to their rights and responsibilities as citizens and with regard to equalities. This should include the promotion of collective rights, such as collective bargaining, as required under the various treaties referred to above. It follows that the role of the Rights, Citizenship and Equality Programme amounts to a step in the right direction. Currently its scope and application is too limited

**11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?**

Unite believes that now there is a good opportunity for the UK to embrace fundamental

rights relevant to all the citizens of the world, including the UK. This can begin with pushing forward for accession to the ECHR and promotion of social Europe. Unite has no illusions, however, that the government will do that, but will have to be led – kicking and screaming – to do what is right.

**12. How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?**

Unite has referred above to the issue of the interrelationship of all fundamental rights throughout Europe and the world. That is the point – these are not regional rights, they are rights fundamental to all. By respecting such rights and promoting them we can raise standards for all, but the very privileged.

**13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

There is no evidence of this. There is evidence (see in relation to question 1 above) that the EU Treaties have been used to attempt to restrict fundamental rights.

**14. Is there any other evidence in the field of EU fundamental rights, which is relevant to this review?**

Please refer back to Unite's answer to question 1 above.

**13/01/2014**

This response is submitted by:

**XXXX**

**Director of Legal, Affiliated Services & Membership, Unite the Union**

For further information and clarifications please contact:

**XXXX**