



Ministry
of Justice

**Government response to the
House of Commons European
Scrutiny Committee Report
43rd Report, 2013–14, HC979,
The application of the EU Charter
of Fundamental Rights in the UK:
a state of confusion**

July 2014



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European Scrutiny Committee Report 43rd Report,
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Fundamental Rights in the UK: a state of confusion**

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2014



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Print ISBN 9781474109994

Web ISBN 9781474110006

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

ID 22071401 07/14

Printed on paper containing 75% recycled fibre content minimum.

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Introduction

The Coalition Government welcomes the European Scrutiny Committee's Inquiry into the application of the Charter in the UK and the detailed consideration the Committee has given this issue. The Government is clear that it is important to clarify outstanding areas of uncertainty about the legal effects of the Charter, as the Secretary of State for Justice set out in his evidence to the Committee during this Inquiry.

This paper sets out the Coalition Government's response to each of the Committee's conclusions and recommendations. The Committee's text is in bold, and the Government's response is in plain text.

What the Charter does and does not do

It applies in the UK – there is no opt out

141. Protocol 30 was designed for comfort rather than protection: it is in no sense an opt-out Protocol. This was the view of all of our witnesses based on their interpretation of the Protocol, and in the case of Lord Goldsmith, who had a hand in its drafting, based on the negotiating history as well. As a consequence we think the ECJ’s analysis of Protocol 30 in the NS judgment was correct.

142. We note that this was also the view of our predecessors, who reported in 2007 that: Since the Protocol is to operate subject to the UK’s obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK’s other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation.

143. Contradictory statements from the Government of the time about whether Protocol 30 was an opt-out have added to the seemingly widespread confusion about its purpose—among lawyers and non-lawyers alike. In addition, the current Government has done little to explain the effect of the Charter, despite the significant national impact it has.

The Government agrees with the Committee’s conclusion that the Charter applies in the UK. The Protocol is not, and never has been, an opt out from the Charter for the UK. The Government therefore agrees with the finding of the Court of Justice of the European Union (ECJ) in the *NS* case that ‘Protocol (No.30) does not call into question the applicability of the Charter in the United Kingdom.’ The Government has made clear its position, both in litigation and during debates in Parliament, that the Charter, as interpreted by the ECJ, applies in the UK when the UK is acting within the scope of EU law.

In addition, the Government will publish in due course a report on the balance of competence between the EU and the UK on fundamental rights and their impact on the national interest. This will explain the effect of fundamental rights in domestic law, and discuss outstanding uncertainties as regards their application.

Protocol 30 is an interpretative Protocol

144. Articles 1 and 2 of the Protocol place emphasis on provisions which already exist within the Charter, but they do not distinguish them. Article 1(2), for example, states that its existence is “for the avoidance of doubt”. We therefore conclude that Protocol 30 interprets the Charter as much for the benefit of other Member States as it does for the UK and Poland. We note this was the view of the Secretary of State for Justice and his legal adviser, as well as several of our expert witnesses.

If it is right that Article 1(2) and 2 of Protocol 30 may provide extra protection in the event that Charter provisions and Explanations are ignored, a point strongly made by Lord Goldsmith, David Anderson and Professor Craig, in our opinion Member States other than the UK and Poland could avail themselves of that protection too.

145. It follows that we disagree with Mostyn J's description of the effect of Protocol 30 in his judgement in AB on 7 November last year, and we note that our witnesses shared our view.

While the Protocol is drafted in terms that are specific to the UK and Poland, it clarifies certain aspects of how the Charter applies to all Member States. Article 1(1) of the Protocol is a straightforward consequence of the fact that the Charter does not extend either the circumstances in which rights and principles apply to Member States or the substance of those rights and principles. Article 1(2) reflects that nothing in Title IV by itself is a directly enforceable right going beyond national laws and practices. Article 2 reinforces the point – provided for in Article 52(6) of the Charter – that those provisions of the Charter that refer to national laws and practices only apply to the extent that the right or principle is recognised in national law.

The Committee disagrees with Mr Justice Mostyn's description of the effect of the Protocol in the case of *AB*. The Judge's comments on the effect of the Charter, which were without the benefit of argument and were not decisive of the case, do not reflect the Government's position. The Judge stated that the judgment of the ECJ in *NS* was contrary to his view 'that the effect of [Protocol No.30] is to prevent any new justiciable rights from being created'. However, that analysis seems to be based on a mistaken assumption that the Charter creates new rights applicable in the UK.

It is directly effective in the UK, with supremacy over inconsistent national law

146. With a legal status equal to the EU Treaties, the Charter is directly effective in the UK by virtue of Section 2(1) of the European Communities Act 1972. The rights it contains have supremacy over inconsistent national law or decisions of public authorities, by virtue of sections 2(4) and 3(1) of the same Act.

The Charter applies in the UK, and some of its provisions are directly effective. However not every provision in the Charter confers a directly enforceable right. The Charter distinguishes between rights and principles. A principle in the Charter is not justiciable in the absence of an implementing measure (see below). Moreover, several provisions in the Charter make reference to national laws and practices, of which full account is to be taken according to Article 52(6). Those provisions do not confer directly enforceable rights going beyond national laws and practices.

The case of *Association de Mediation Sociale* makes clear that not every provision of the Charter by itself confers a directly enforceable right. The Charter provision relied on in that case was Article 27, which provides that workers must be guaranteed information and consultation 'in the cases and under the conditions provided for by Union law and national laws and practices.' Noting that it is clear from the wording of Article 27 that it must be given more specific effect in EU or domestic law, the ECJ held that the 'article by itself is not sufficient to confer on individuals a right which they may invoke as such.'

Where national law or a decision of a public authority is inconsistent with a directly enforceable right in the Charter, domestic courts must interpret the law or decision consistently with that right or, where this is not possible, declare the decision invalid or disapply the relevant provision of national law.

It can therefore be used both to interpret and enforce EU law

147. The Charter can be used to interpret EU law and the national measures implementing EU law by the Court of Justice of the EU (ECJ) and by national courts, in cases where the meaning of a provision is unclear. It can also be used to enforce EU law:

- **by the ECJ in invalidating EU legislation, or decisions of EU institutions and bodies acting in accordance with EU legislation, which breach rights within the Charter; and**
- **by national courts, under the supervisory jurisdiction of the ECJ, in invalidating national legislation and decisions of national public authorities, including courts, which are within the scope of EU law. In this respect our expert witnesses agreed that if a legal challenge were possible under both the Human Rights Act and the Charter, the benefit of a challenge under the Charter would be that it would oblige the court to disapply an Act of Parliament that was inconsistent with a Charter right, in accordance with the principle of the primacy of EU law. Under the Human Rights Act (HRA) a court can only make a “declaration of incompatibility” if an Act of Parliament is inconsistent with a European Convention on Human Rights (ECHR) right. This does not affect the validity of the Act in question until and unless Parliament amends it.**

The Government agrees with the Committee’s conclusion that the Charter can be used by the ECJ and domestic courts to interpret EU law and domestic legislation implementing EU law.

The Government agrees with the Committee’s conclusion that the Charter can be used by the ECJ to declare void EU legislation or a decision of an EU institution or body.

As stated above, the Government agrees with the Committee’s conclusion that the Charter can sometimes be used by the domestic courts to declare invalid a decision of domestic public authorities, or to disapply national law, but only where it falls within the scope of EU law and breaches a directly enforceable right in the Charter. However, the precise effects of the Charter will depend on all the circumstances of the individual case. The Government would draw the Committee’s attention to the obiter comments of the Supreme Court in the case of *Chester and McGeoch*. Lord Mance, giving the only judgment on the points of EU law and with whom the other judges agreed, observed that had the general ban on prisoner voting been contrary to EU law, it would not have been possible either to read the domestic legislation compatibly with EU law or to disapply the offending provision. Noting that a ban on a very significant number of prisoners voting would be justified, the Supreme Court said that it could not itself devise an alternative scheme of voting eligibility, which was a matter for the UK Parliament.

The legal position set out above by the Government is also true of fundamental rights as general principles of EU law, and therefore was also the position prior to the Charter having legal effect. Moreover, the Government reiterates that not every provision in the Charter by itself confers a directly enforceable right.

But the Charter does not apply to all areas of national law or action, only those that fall within the scope of EU law.

148. The Charter does not apply to all areas of national law where human rights are engaged, as, by contrast, the ECHR does through the HRA: the Charter only applies domestically where State action and/or national law falls “within the scope of EU law”. Before a Charter right can be invoked in national proceedings, therefore, a question of jurisdiction has to be determined, namely whether the act complained of is within the scope of EU law. It should be noted, however, that the ECJ in the case of *Fransson* set a low threshold for this test to be met; and that, where it is met, the Charter is without exception applicable and in cases of uncertainty is to be ultimately interpreted by the ECJ (see further below).

149. Our analysis above should be compared to the Secretary of State for Justice’s evidence on the domestic effect of the Charter. He draws what we consider is a false distinction between EU law and law in the UK: “Where the Charter does have a role—not in UK law, but in law in the UK, and there is an important difference—is where EU law is applied in the British courts.” This, we think, is a case of wishful thinking, which entirely misunderstands the impact of *Fransson*: the Swedish Public Prosecutor no doubt thought his decision to prosecute Mr Fransson for VAT fraud was based on Swedish policy and legislation, but it was held to be within the scope of EU law because it was ultimately derived from the VAT Directive, and VAT collected in Member States contributes to the EU budget. There should be no doubt in the Minister’s mind that the Charter applies to all UK law, or indeed law in the UK, which is within the scope of EU law. It seems to us that this and the past Government indulge in wishful thinking about the true impact of the Charter in the UK. The consequence is, as we note in the first chapter of this Report, that the public can be misled.

The Secretary of State for Justice explained at the Committee’s evidence session on 29 January 2014 that the Charter can apply to law in the UK, but only when it is within the scope of EU law. On the meaning of ‘implementing Union law’ in Article 51(1) of the Charter, see the Government’s response to paragraphs 160 to 162 below.

It does not include new rights

150. None of the Articles of the Charter creates new rights or principles, with the possible exception of Article 13 on the freedom of the arts and sciences. The evidence we received on the negotiating history of the Charter, together with an analysis of the Explanations, amply demonstrate the desire particularly on the part of the UK to tie back each right or principle of the Charter to its source.

The Government agrees that the Charter does not create any new rights. It simply reaffirms rights and principles already recognised in EU law. This is reflected in the Preamble to the Charter, Article 51(2) of the Charter, Article 6(1) of the Treaty on European Union (TEU) as well as the Preamble to, and Article 1 of, the Protocol. Article 52(2) to (4) and the Explanations are crucial to a proper understanding of the Charter, since they set out the sources and limits of the rights and principles it contains.

In so far as Article 13 of the Charter contains a directly enforceable right, the explanations show that it is limited to the right to freedom of expression – as guaranteed by Article 10 of

the European Convention on Human Rights – in the context of the arts and scientific research.

It does not include new economic and social rights

151. According to the evidence we received and the Explanations of the Charter, principles are not free-standing in the Charter, and so cannot be relied upon alone to invalidate EU or Member State acts or omissions. They require more specific expression in EU or national law before they can become justiciable. According to the Explanation of Article 52(5) they “become significant” for courts only when legislation implementing them is being reviewed.

152. Title IV of the Charter contains the economic and social rights that the UK was most concerned at the time of the Charter negotiations should not become justiciable in national courts. To the extent that Title IV contains rights as well as principles—our witnesses all agreed that a lack of clarity in the Charter and the Explanations makes this distinction difficult to draw, if not impossible—Article 1(2) of Protocol 30 clarifies that rights too in Title IV are not justiciable (see paragraph 156) unless given effect in national legislation. We therefore conclude that the rights and principles in Title IV of the Charter are not justiciable unless and until they have been given effect in national legislation.

The Government agrees with the Committee that the principles in the Charter are not justiciable in the absence of an implementing measure. This is clear from Article 52(5) of the Charter, which provides that ‘principles may be implemented by legislative and executive acts’ taken by the EU institutions and Member States when implementing EU law, and are ‘judicially cognisable only in the interpretation of such acts and in ruling on their legality.’

The Government also agrees with the Committee that nothing in Title IV by itself is a directly enforceable right going beyond national laws and practices. This is reflected in Article 1(2) of the Protocol.

This view is supported by the ECJ’s judgment in *Association de Mediation Sociale*, described above, where it held that Article 27 of the Charter did not in itself confer rights on individuals.

It does not give the EU new competence

153. None of the Articles of the Charter provides the EU with new competence to act where hitherto it could not act.

The Government agrees with the Committee’s conclusion that the Charter does not provide the EU with new competences. This is clear from Article 6(1) of the TEU and Article 51(2) of the Charter.

Nonetheless, it will affect how pre existing EU fundamental rights and principles are applied

154. The conclusions in the preceding paragraphs are subject to an important caveat, however. Whilst it may be technically correct to say that the Charter is “declaratory” of, or “reaffirms”, pre-existing rights with the intention of making them more visible, the act of cementing disparate and sometimes obscure rights from different legal sources, with different legal statuses, many of which had not been considered by the ECJ, into a legally binding EU Charter is, we think, very significant indeed. Professor Craig described it as giving these pre-existing rights “a degree or peremptory force that they would not otherwise have had”. It is possible that it will broaden the ambit of EU law (as interpreted by the ECJ in cases where national courts are uncertain, of which we think there will be many) to reflect several, if not many, of the rights or principles in the Charter. As a consequence it could also affect the way in which existing EU competences are exercised. Whilst Lord Goldsmith was not convinced this would be the case, and several witnesses referred to the number of cases where the ECJ has rejected Charter-based actions, other witnesses were convinced, including the Secretary of State for Justice. Again, we note the prescience of our predecessors on this point:

Given the open texture of the drafting of the Charter (which is by no means unusual with human rights instruments) we doubt if it is possible to guarantee that it will not be developed and amplified by the ECJ. We equally doubt if it is possible to guarantee that the ECJ will not draw on the Charter as a new source for interpreting measures of Union law such as Directives.

As reflected in its Preamble, the Charter seeks to strengthen the protection of fundamental rights by making those rights more visible. However, the Charter reaffirms rights and principles recognised in EU law; it did not, and should not, alter their legal effect. The Government is monitoring litigation on the Charter and will intervene to argue against an overly expansive interpretation of its provisions.

Article 6(1) of the TEU and Article 51(2) of the Charter make clear that the Charter cannot be used to broaden the scope of EU law. The Government is not aware of any instances where the Charter has been relied on to this effect. The ECJ has refused to consider preliminary references where the connection between the national legislation in question and EU law is too tenuous. Nevertheless, the Government appreciates that whether Member State action falls within the scope of EU law will not always be clear. We will continue to carefully monitor case law on this issue and argue that fundamental rights only apply to Member States where the act in question has a specific connection with EU law.

As the Explanation to Article 51(1) acknowledges, the Charter applies primarily to the institutions and bodies of the EU. Those bodies and institutions accordingly have to respect the rights in the Charter when exercising their competences. This is also true of fundamental rights as general principles of EU law, and so was the position prior to the Charter.

Impact of the Charter on human rights litigation in the UK

155. Many of the witnesses agreed that the Charter would lead to growth in claims against the EU institutions and EU Member States based on Charter rights, particularly in the Justice and Home Affairs competences of the EU. Professor Craig put the point clearly:

There is an analogy here between the position in the UK pre the HRA and the position in the EU prior to the [Charter]. The courts had already developed the idea that fundamental rights were recognised and embedded in the common law, so they existed prior to the HRA. Nonetheless, when the HRA was enacted and the rights were then laid down definitively in an act of parliament, there was a transformation of judicial review in the United Kingdom. You have rights-based arguments pleaded in a great many cases in a way that you did not in the 1990s and 1980s.

My strong suspicion in the EU is that we are going to see the same thing. In the EU we had fundamental rights developed as general principles of law for many years, and they were used and pleaded. Nonetheless, in the post-Charter world, we are going to see very many more rights-based claims, both against EU institutions and Member States when they act in the scope of EU law. In particular, because of the point that was mentioned by David Anderson, which is that in the post-Lisbon world, the area of freedom, security and justice has been rolled into the main treaty, many of the regulations and Directives passed in relation to immigration, asylum and that kind of thing—criminal procedure—are contentious. They naturally give rise to rights-based claims. The combination of concretising rights in the Charter on the one hand and then including new areas within the court's full jurisdiction is likely to lead to a very significant growth in rights-based claims.

References to the Charter have increased in both domestic and ECJ proceedings since the Treaty of Lisbon came into force, and this is largely due to the reasons identified by Professor Paul Craig. However, the Charter is intended to reaffirm rights and principles already recognised in EU law.

Domestic claims based on fundamental rights, whether by reference to general principles of EU law or to the Charter, will not necessarily result in a different outcome from relying on Convention rights. However, two notable differences between fundamental rights and Convention rights are that some fundamental rights have a wider scope of application than the corresponding ECHR rights (such as Article 47(2) and (3) of the Charter compared to Article 6(1) of the ECHR) and the ability of the courts to disapply primary legislation that is inconsistent with fundamental rights (as explained above, and as again follows from the ECJ's earlier case law).

Areas of legal uncertainty

156. As a general conclusion under this heading, we think that, whilst the Charter may have made EU fundamental rights more visible, it has complicated their application. The Charter and Explanations are difficult documents to navigate, even for experts. We understand that the art of international negotiations is in part to disguise where disagreements lie, but several of the mechanisms employed to achieve this—for example the distinction between rights and principles—are convoluted and will be inscrutable to members of the public who are not experts. We were struck by Lord Goldsmith’s concerns about the lack of precision of the language of the Charter adopted in 2000, were it to have become a legally binding document. We are not confident that the change in status of the Explanations, the amendments to the horizontal Articles and to Article 6 TEU, and the addition of Protocol 30, overcome this concern. If they do so, it is certainly at the expense of clarity.

As the evidence to the Committee demonstrates, there is not complete certainty as to the effect of some of the provisions in the Charter. Moreover, the Charter is open to misinterpretation if taken at face value because it must be interpreted and applied in line with the horizontal provisions, the Explanations, the Treaties and Protocol 30. Nevertheless, the Government considers that these tools are essential to understanding how the rights and principles in the Charter are to be interpreted and applied. They act as a constraint on how the ECJ can interpret the provisions of the Charter and reflect how the ECJ has developed fundamental rights as general principles of EU law. For example, the Explanations are crucial to a proper understanding of the Charter, since they set out the sources and limits of the rights and principles in the Charter. To date the ECJ has respected the limits on the application of the Charter, although the Government will continue to monitor developments closely and intervene in cases as appropriate.

Rights and Principles

157. All witnesses agreed that the distinction between rights and principles was unclear. This was evident from the questions we put to them on Article 29 of the Charter, the right to access to a free placement service, and Article 33(1) of the Charter, family and professional life. Professor Craig commented on the latter that “it would probably be regarded as a principle. But until it is adjudicated upon by the European Court of Justice, we will not know”. David Anderson thought the distinction was entirely confusing.

158. We agree with his conclusion.

As the evidence referred to in the Committee’s conclusion demonstrates, there is a degree of confusion as to whether certain provisions in the Charter reaffirm rights, principles or both. The horizontal provisions in Title VII and Explanations go some way to clarifying this, but there are provisions which have yet to be judicially considered in detail. However, decisions such as *Association de Mediation Sociale* (referred to above) are consistent with the Government’s understanding of the limited effects of the social and economic provisions in the Charter. The Government remains vigilant in respect of those provisions, monitoring proceedings in both the UK and Luxembourg, and will intervene when appropriate.

Pre-existing Rights

159. One of the complexities of this aspect of EU law is that Article 6(3) TEU states that the pre-existing general principles of EU law still apply, notwithstanding the advent of the Charter. So although the Charter was said to be necessary to make these pre-existing rights more visible, it does not replace them. The consequences of this require some intellectual conjuring. For example, notwithstanding Article 1(2) of Protocol 30 and the attention paid to its effect on economic and social rights, EU law on the justiciability of economic and social rights is just as it was had the Charter and Protocol 30 never been included in the EU Treaties. David Anderson shared our concern on this.

As the Committee identifies, it is clear from Article 6(3) of the TEU that the Charter does not replace fundamental rights as general principles of EU law, and that the ECJ's previous case law about the existence and effects of general principles of EU law will continue to apply. The horizontal provisions on the interpretation and application of the Charter reflect how the ECJ has developed fundamental rights as general principles of EU law. The Government's position, therefore, is that the rights in the Charter have the same meaning and scope as the general principles they reaffirm; they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretation.

Field of application

160. We agree with David Anderson that the significance of *Fransson* is not so much in the ECJ's conclusion that the test to be applied under Article 51(1) of the Charter is whether Member State action is "within the scope of" EU law: as much is made plain by the Explanations and by the ECJ's case law, and by the Supreme Court in the *Viagogo* case, despite the use of "implement" in Article 51(1). It is much more in its conclusions on when Member State action comes within the scope of EU law. The ECJ specifically excludes the need for EU law to play a determinative role in the exercise of public authority in the Member State in question: all that is required is that "the situation is governed by EU law". This, in effect, means that if the power being exercised by the Member States is ultimately derived from EU law, it falls within the scope of EU law. The test is an objective one: there is no requirement for the national legislation in question to be intended to implement an EU obligation.

161. This being so, the results of the Government's Balance of Competences review become increasingly significant: in any national area of policy which is derived from EU law, compliance with fundamental rights will fall under the purview of the Charter as ultimately interpreted by the ECJ.

162. It may also have consequences for principles and certain rights in the Charter which are only justiciable when given effect in national law. Following *Fransson*, the test for whether EU law is implemented is not whether national legislation intends to implement an EU obligation, but whether it is ultimately governed by EU law. The meaning of "recognised" in Article 2 of Protocol 30 may become important in this regard.

The Government is clear that whether a Member State is acting within the scope of EU law requires a fact specific assessment. As mentioned above, fundamental rights only apply to Member States where the act in question has a specific connection with EU law. The finding in *Akerberg Fransson* that the Charter applies to Member States when they are acting within the scope of EU law is consistent with the Government's position. As the Committee identifies, that finding reflects the explanation to Article 51(1) of the Charter and earlier conclusions of the UK Supreme Court in the *Viagogo* case.

As the Justice Secretary indicated in his evidence to the Committee, the Government considers that the Swedish civil penalties and criminal proceedings for tax evasion in the *Akerberg Fransson* case constituted the implementation of EU law in accordance with well-understood principles in the ECJ's earlier case law. Council Directive 2006/112/EC requires every Member State to take measures appropriate for ensuring the collection of VAT and for preventing evasion. Moreover, Article 325 of the Treaty on the Functioning of the European Union obliges Member States to counter fraud affecting the financial interests of the EU through effective deterrent measures. Pre-existing domestic legislation has long been used to meet obligations arising from EU law. If the intention behind national legislation when enacted was the determining factor as to whether it implemented EU law, this would result in the scope of EU law varying between Member States.

Since the Committee received its written and oral evidence, the ECJ has delivered its judgment in the case of *Siragusa* (Case C-206/13). Referring to its previous case law, the ECJ confirmed that the concept of implementing EU law requires a greater connection than Member State action and EU law being closely related or one having an indirect impact on the other. The ECJ then set out a non-exhaustive list of points that the ECJ in that case considered to be relevant to whether national legislation is within the scope of EU law, such as whether the legislation pursues objectives other than those covered by EU law. In particular, the ECJ reiterated that fundamental rights do not apply to national legislation where EU law does not impose any obligation on Member States with regard to the situation at issue.

While the Government is acutely aware of the need to stay vigilant of case law on when the Charter applies to Member States, it takes some comfort from the ECJ's approach in *Siragusa*, since the ECJ has attempted to provide greater clarity on when the Charter applies to Member States.

The Balance of Competences review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges.

Consistency with the European Convention on Human Rights

163. The Charter includes many of the civil and political rights contained in the European Convention of Human Rights. We were told that in the negotiation of the Charter there was particular concern that ECHR rights in the Charter were interpreted as being identical to how the same rights in the ECHR had been interpreted by the ECtHR. It is not clear that Article 52(3) achieves this, given that its stipulation that the meaning of Charter rights corresponding to ECHR rights be the same as those ECHR rights is qualified by its provision that EU law can provide more extensive entitlements (see the following paragraph). The Explanations of

Article 52(3) are also unclear, saying, for instance, that the meaning of rights under the ECHR is determined in part by the ECJ. In addition the imperative of consistency is far from helped by the fact that some ECHR Articles in the Charter have been “updated”, and so are drafted differently. Were the Charter still to be a political declaration, this may not matter; where it is a legally binding document, it risks causing possible confusion.

164. Article 52(3) also permits EU legislation to go further than ECHR rights. Recent Commission proposals in the field of legal aid and the presumption of innocence have done so. As a consequence of the latter proposal, juries in the UK may no longer be able to draw an inference from a suspect’s non-cooperation or silence during criminal proceedings, although both have been held by the ECtHR to be consistent with the right to a fair trial under Article 6 of the ECHR. The result might be that there would be two standards for the presumption of innocence in Europe: one under EU and one under ECHR law. Whilst some think it desirable that the EU strengthens ECHR rights where it has the competence to do so (and its competence to do so under Title V TFEU is broad) we think it adds possible confusion and amounts to an unwarranted intervention in matters of pre-eminent significance in terms of the constitutional settlement of the UK, and where the existing balance between ECHR and national prerogatives has been hard fought.

Article 52(3) makes clear that a right in the Charter corresponding to a right guaranteed by the ECHR, has the same *meaning* as the ECHR right. As the explanations say, some Charter rights have a wider *scope* than corresponding ECHR rights, reflecting the ECJ’s earlier case law. An example is Article 47(2) and (3) which guarantees the right to a fair hearing. In contrast to the corresponding right in Article 6(1) of the ECHR, the EU fundamental right is not limited to cases which determine civil rights and obligations or criminal charges. The explanation to Article 47 confirms that this is also true of the right to a fair hearing as a general principle of EU law. However, the right is otherwise identical to the right in Article 6 of the ECHR. The explanation of Article 52(3) gives a complete list of the respects in which certain rights in the Charter go further than the corresponding rights in the ECHR.

The Secretary of State for Justice noted, when giving evidence to the Committee, that certain Charter provisions that correspond to ECHR rights are worded differently to the corresponding ECHR rights. Those Charter rights, nevertheless, have the same meaning as the corresponding ECHR rights. This position is in accordance with Article 52(3) of the Charter and the Explanations, and the ECJ’s case law has confirmed that Charter rights derived from the ECHR are to be interpreted in the same way.

The Committee concludes that the final sentence of Article 52(3) of the Charter permits EU legislation to ‘go further than ECHR rights’. It then refers to recent Commission proposals in the fields of legal aid and the presumption of innocence. However, those proposals have a legal base in the EU Treaties, and can be adopted by the EU under the relevant legislative procedure. The same would be true even if the Charter did not exist. Article 6(1) of the TEU makes clear that the Charter does not extend in any way the competences of the EU. Furthermore, even when EU legislation creates rights going beyond those in the ECHR, the EU must have competence in the Treaties to do so and it does not mean that the fundamental rights recognised in EU law are similarly extended.

Horizontal Rights

165. We recognise that indirect horizontal application of the Charter within the UK is possible given that we agree with several of our experts that UK courts are under a legal obligation to respect the Charter, but we are concerned, again, by the legal uncertainty that surrounds this principle. Private individuals and bodies (including employers and their employees) may as a consequence find it difficult to predict whether they may assert a legal right or be vulnerable to legal liability because of the Charter's application. This seems paradoxical given that one of the objectives of codifying pre-existing EU fundamental rights in the form of the Charter was to increase their visibility and applicability. The importance of the principle of legal certainty was emphasised by Lords Neuberger and Mance in the *HS2* case, where they cited with approval the decision of the ECJ in the *Intertanko* case, in which it commented:

The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.

166. We agree. We acknowledge that the uncertainty of horizontal application of human rights may be a common feature of human rights frameworks in general, such as the ECHR as enforced in the UK by the Human Rights Act. We think the problem for private individuals and companies is aggravated in Europe because of the additional uncertainty introduced by the Charter.

Domestic courts must, as far as possible, interpret national law compatibly with EU law including fundamental rights. That is true both in proceedings between a public authority and a private party and in proceedings between private parties. The same can also be said of Convention rights.

Article 51(1) states that the Charter applies to the institutions and bodies of the EU as well as the Member States when implementing EU law. However, the general principle of non-discrimination on grounds of age has been relied upon in proceedings between private parties both prior to the Charter having legal effect and since (see *Mangold*, *Kucukdeveci* and *HK Danmark*). The Government shares the Committee's concern about the uncertainty as to which general principles of EU law have horizontal direct effect.

However, the Government would note that the ECJ's judgment in *Association de Mediation Sociale*, described above, makes clear that not every provision in the Charter by itself can have horizontal direct effect.

Division of competence between the ECJ and national courts

167. We question the legitimacy of the ECJ's approach in *Fransson*, and so agree with the German Constitutional Court and Mr Howe and disagree with some of the expert evidence we took on this point, particularly from Professor Craig. We, like Advocate General Cruz Villalón, think there has to be a sufficient reason why the ECJ should take over the responsibility, which is more appropriately vested national courts, for interpreting fundamental rights as they apply to the exercise of *national* power. On the facts of *Fransson* the applicability of the *ne bis in idem* principle did not bear upon the implementation of an EU obligation; the ECJ was acting purely as a human rights court.

See the Government's response to paragraphs 160 to 162 above.

Recommendations

169. We note that the Government did not intervene before the ECJ in the case of *Fransson*; it could have done so had it wished to join the Commission and five other Member States in contesting the application of the Charter. But the Minister indicated that he thought the decision was correct. We urge the Government to think again, and to intervene in future ECJ cases on the Charter in support of a higher threshold—a determinative link—for the test for when Member State action comes within the scope of EU law, as a consequence of which any human rights aspects fall under the Charter, as interpreted by the ECJ rather than national courts.

The Government's position on the circumstances in which the Charter applies to the action of Member States is set in our response to paragraphs 160 to 162 above.

The Government will continue to monitor proceedings, both in the ECJ and in the domestic courts, on when the Charter applies to Member States and will intervene when appropriate.

170. As we say above, we recommend that the current state of uncertainty about the Charter in the UK should end. The inference we draw from the Secretary of State for Justice's evidence is that he too is not content with the *status quo*, but it was not clear what the Government intends to do about it, beyond bringing a test case. We ask him to make this clear.

171. In the light of this, it is clear that the situation cannot remain as it is. The Government has indicated that, to clarify the Charter's application in the UK, it is looking for the right case to argue a number of "blurred" points that we have highlighted. However, we are far from convinced that, for the reasons we set out in this Report, a legal challenge will resolve the issue: it is much more likely to reaffirm the applicability of the Charter to the United Kingdom.

The Government is clear that the Charter should not be interpreted to create new rights and that its application to the UK should be limited to situations where the UK is acting within the scope of EU law. The Government will continue to monitor both ECJ and domestic proceedings on the interpretation of Charter rights and on the boundaries of the Charter's scope of application to Member States, and will intervene in cases where appropriate.

172. Given what we say in these conclusions, in particular in relation to the field of application, and the certainty that the jurisdiction of the ECJ will range across an even wider field with increasingly unintended consequences, we recommend that primary legislation is introduced by way of amendment to the European Communities Act 1972 to exclude, at the least, the applicability of the Charter in the UK. This is what most people thought was the effect of Protocol 30. They were wrong. It is not an opt out, but for the sake of clarity and for the avoidance of doubt we urge the Government to amend the European Communities Act 1972, as we propose.

The Government has an overarching duty to comply with the law, including international law and treaty obligations. As long as the UK is a member of the European Union, it has a duty to implement all EU law that applies to it. Any decision to unilaterally disapply legislation, including the Charter which has the same status as the Treaties, would no doubt have political, legal and diplomatic consequences.

ISBN 978-1-4741-0999-4



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