Beano No More: The EU Charter of Rights After Lisbon

Kieron Beal and Tom Hickman
Blackstone Chambers

A. Introduction

1. In October 2000, the then Minister for Europe, Keith Vaz MP, famously attempted to dampen fears in the United Kingdom that the newly proclaimed EU Charter of Fundamental Rights ("the Charter") was a "litigator's charter". He claimed that it had no more legal effect than a copy of the *Beano*.[1] The UK Government was reluctant until quite recently to accord the Charter a greater legal significance. At a European Council meeting in June 2007, the Prime Minister claimed that he had secured a legally binding "opt-out" from the EU Charter in the "Reform Treaty", through a joint UK and Polish Protocol to the Treaties.[2] "It is absolutely clear", stated Mr Blair in response to questions in Parliament, "that we have an opt-out from . . . the charter".[3] The Reform Treaty was subsequently signed by the Member States in Lisbon on 13 December 2007.[4]

2. Lawyers have long disputed that the so-called "opt-out" from the Charter is any such thing.[5] But it is only since the Lisbon Treaty entered into force on 1 December 2009 that the point has become a live one. Developments since then have been somewhat unexpected. In *R (Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) at [155][6] Cranston J held that, given the wording of "the Polish and United Kingdom Protocol",[7] the Charter "cannot be directly relied on as against the United Kingdom, although it is an indirect influence as an aid to interpretation". On appeal, the Secretary of State no longer sought to support such a finding. The Secretary of State's respondent's notice accepted that "in principle, . . . fundamental rights set out in the Charter can be relied upon against the United Kingdom, and submits that the Judge erred in holding otherwise . . . The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect".[8] The Court of

[1] "European summit Charter on rights 'no more binding than the *Beano*'", *Telegraph*, 14 October 2000.
[2] For press reporting, see, e.g.: "Historic EU deal, but at what price?", *Daily Mail*, 23 June 2007: "Mr Blair's final appearance on the European stage produced a clear negotiating success as Britain won a legally-binding opt-out from the controversial charter".
[3] *Hansard*, 25 June 2007, HC, cols 37 and 39. In his initial statement to Parliament the Prime Minister appeared to be more guarded in his comments than he was in response to questions from the floor of the House, simply referring to a legally binding protocol that would make clear that there could be no expansion of EU law: see ibid, cols 21 and 27.
[4] The Charter was found at OJ 2000 C364/8 in its original form. The version of the Charter considered as part of the ratification of the Lisbon Treaty is at OJ 2007 C303/1. The final, published version of the Charter is at OJ 2010 C83/389. An endnote states "the above text adapts the wording of the Charter proclaimed on 7 December 2000 and will replace it as from the date of entry into force of the Treaty of Lisbon". As at the date of publication (30 March 2010), the Lisbon Treaty was already in force (as from 1 December 2009).
[5] See, e.g. the evidence given to the Parliamentary Committee on the EU in the House of Lords European Union Committee, 10th Report of Session 2007–08: *The Treaty of Lisbon: an Impact Assessment*, vol. I: Report, 13 March 2008, HL Paper 62-I, summarised at paras 5.88–5.111.
[6] *Sub nom R (NS) v Secretary of State for the Home Department*.
[7] Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
[8] [2010] EWCA Civ 990 at [6] and [7], per Lord Neuberger MR.

Appeal recorded the concession in a judgment but itself made no express finding on the point.[9]

3. There can no longer be any real doubt that the Charter has legal effect in UK law and that it can be relied upon by litigants here as a source of human rights protection.[10] However, the question of the precise legal effect of the UK/Poland Protocol remains unresolved. This article considers the legal landscape post-Lisbon and the likely effect of the UK/Poland Protocol. Practitioners need to know what, if any, additional fire-power the Charter brings to bear in terms of human rights protection in the United Kingdom.

4. The starting point is that there are now four sources of *general* human rights protections in UK law, in addition to specific statutory protections such as in relation to discrimination law. First, there is domestic common law protection of "fundamental" or "constitutional" rights. This case law was developed by judges in the absence of any written bill of human rights in the United Kingdom.[11] Secondly, there is human rights law derived from the European Convention on Human Rights (ECHR) which was incorporated into UK law by the Human Rights Act 1998 (HRA 1998). The HRA 1998 did not however extinguish common law protections of human rights, which are expressly preserved[12] and which still exert influence where the Act does not apply. The third source of human rights law is derived from the "general principles" of EU law developed by the Court of Justice of the European Union ("ECJ") in part to fill the gap created by the absence of a bill of rights at an EU level. Finally, we now have an EU legislative panacea in the form of the Charter. Following the Treaty of Lisbon, this is now directly applicable in the United Kingdom. This preserves and sits alongside the EU case law on fundamental rights.

B. The Charter of Fundamental Rights

(i) History and original legal status

5. The Charter was "solemnly proclaimed" by the European Parliament, the Council of Ministers and the European Commission at Nice on 18 December 2000.[13] The Cologne European Council meeting in June 1999 had set out the main objective for a Charter, which was that "the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident".[14]

---

[9] The appeal itself was stayed pending a reference to the ECJ on a number of questions including on effect of the Protocol: the reference has been assigned as Case C-411/10 *NS v Secretary of State for the Home Department*. On 9 November 2010 the case was joined with the Irish Case C-493/10 *ME v Refugee Applications Commissioner*.

[10] See, e.g. *R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) in which the Charter was applied. The case is discussed below.

[11] Many of the rights so recognised are of ancient vintage. Recent re-statements include *R v Secretary of State for the Home Department ex p. Pierson* [1998] AC 539; *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532. For discussion see J Beatson, S Grosz, T Hickman and R Singh, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), [1-11]–[1-63], pp. 6–30.

[12] HRA 1998, s. 11.

[13] OJ 2000 C364/1.

[14] Presidency Conclusions of the Cologne European Council, 3–4 June 1999, Doc 150/99 REV 1, para. 44 and Annex IV; Commission Communication on the Charter of Fundamental Rights of the European Union, COM (2000) 559, para. 7; see also Parliamentary Questions, 23 January 2001, P-3997/2000; OJ C174E; Answer given by Mr Vitorino on behalf of the Commission.

6. The Preamble to the Charter refers to the need to "strengthen the protection of fundamental rights" by making them "more visible". However, the Charter project was not mere window dressing. It had a deeper constitutional significance. In a Commission paper published during the drafting process, the Commission described the Charter as "an indispensable instrument of political and moral legitimacy, both for the citizens of Europe in relation to politicians, administrations and national powers and for economic and social operators. It is an expression of the common values that are at the very core of our democratic societies".[15]

7. The Charter was nonetheless originally proclaimed as a political declaration and had no direct legal effect, although it had been drafted explicitly with an eye to future incorporation in the Treaties.[16] Opposition from certain Member States prevented its initial incorporation, but it was anticipated that the Charter would inform the ECJ's fundamental rights jurisprudence from the outset. It did not take long for Advocates-General,[17] the General Court,[18] and later the full Court[19] to start referring to rights recognised by the Charter. The Court even began to answer questions on the interpretation of the Charter referred to it by the national courts of the Member States.[20]

(ii) Adoption of the Charter

8. The Charter became Part II of the Constitutional Treaty agreed between Member States in June 2003.[21] The status of the Charter was reconsidered at the Brussels European Council in June 2007.[22] This led to it being recast in the way now adopted, prior to the signing of the Lisbon Treaty on 13 December 2007.

9. Article 6(1) of the Treaty on European Union (TEU) now provides that the Charter has the "same legal value as the Treaties". The second sub-paragraph of Art. 6(1) makes clear that the provisions of the Charter shall not, however, "extend in any way the competences of the Union as defined in the Treaties". Article 51(2) of the Charter similarly confirms 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 in the Treaties".[23]

---

[15] COM (2000) 559, ibid, para 8.

[16] The so-called "as if doctrine": COM (2000) 559, paras 32–37 and Communication from the Commission on the Legal nature of the Charter of Fundamental Rights of the European Union, COM (2000) 644, paras 7, 9 and 11.

[17] Case C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881 at [27]–[28], per Advocate General Tizzano, ECJ.

[18] Case T-54/99 *Max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313 at [48] and [57], GCEU.

[19] See, e.g. Case C-232/02P(R) *Commission v Technische Glaswerke Llmenau GmbH* [2002] ECR I-8977, ECJ; and Case C-540/03 *Parliament v Council* [2006] ECR I-5769 at [38], ECJ.

[20] See, e.g. Case C-275/06 *Productores de Música España (Promusicae)* [2008] ECR I-271, ECJ.

[21] The Laeken Declaration in 2001 relating to the process of agreeing an EU Constitution stated that thought would have to be given to whether the Charter of Fundamental Rights should be included in the Constitution. This was something of a subsidiary issue compared to the other Constitutional issues that were identified to be considered, but for many Member States the Charter was and remained important in making clear that the Union is not exclusively interested in economic matters. See the Laeken Declaration (Annexes to the Presidency conclusions–Laeken, 14 and 15 December 2001), SN 300/1/01 Rev 1, p. 24 and Jean-Claude Piris, *The Lisbon Treaty–A Legal and Political Analysis* (CUP, 2010), p. 150.

[22] See Paul Craig, *The Lisbon Treaty* (OUP, 2010), p. 199.

[23] The point is re-emphasised in the Declaration Concerning the Charter of Fundamental Rights of the European Union attached to the Lisbon Treaty. The Declaration states: "The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States. The Charter does not extend the field of application of Union

10. The express legal effect given to the Charter and the recognition given to the general principles of law is of practical significance. First, the provisions give a clear and direct route to EU human rights principles, without the need for citation of the ECJ's case law in support. Secondly, there is a more solid and legitimate legal basis for invoking such rights. Thirdly, all of the rights set out in the Charter are afforded equivalent constitutional status, regardless of their provenance or nature. Finally, the Lisbon Treaty (building on the Treaty of Nice) has expressly endorsed the development of the Court's case law. It has removed the criticism that the development lacks democratic legitimacy (at least from the viewpoint of EU law).

11. Article 6(2) TEU provides further that the Union shall accede to the ECHR. This may take some time to achieve. Article 6(3) TEU now states that:

> "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

12. This provides a firm and continuing legal basis for the ECJ's fundamental rights jurisprudence, in particular that drawing on the ECHR, running in parallel to the operation of the Charter. It is an approach broadly reminiscent of the survival of the common law protection of fundamental rights alongside the HRA 1998.

(iii) Content of the Charter

13. The Preamble to the Charter states that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and is based on the principles of democracy and the rule of law. This is expressly set alongside the Union's objective "to promote balanced and sustainable development" and ensure the economic freedoms – free movement of persons, goods, services and capital, and the freedom of establishment.

14. The Charter consists of 54 numbered articles which were initially grouped under "Chapters" when first issued in 2000. The "reissued" Charter in 2007 grouped the rights under seven "Titles"[24] headed as follows: Dignity (Title I); Freedoms (Title II); Equality (Title III); Solidarity (Title IV); Citizens' Rights (Title V); Justice (Title VI); and General Provisions (Title VII).

15. The Charter is wide in coverage.[25] The rights protected by it range from the respect for certain principles in the field of biomedicine, such as the prohibition of eugenic practices (Art. 3), the right to protection of personal data (Art. 8), the freedom to choose an occupation and engage in work (Art. 15), the right to asylum (Art. 18), cultural, religious and linguistic diversity (Art. 22), rights of the child (Art. 24) and the elderly (Art. 25), healthcare (Art. 35) and environmental protection (Art. 37).

16. The Charter cannot safely be read without having a second document alongside: the Explanations. These were originally drafted by the Praesidium of the Convention

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".

[24] The change in nomenclature doubtless reflects the Treaty base for the Charter, but effects no substantive change.

[25] There are 54 articles in the Charter, of which 50 are substantive, compared with 24 articles in the ECHR, of which 14 are substantive.

which drafted the Charter. The Explanations state that they do not have the status of law but are a "valuable tool of interpretation". In fact, both the Charter and the TEU require "due regard" to be had to the Explanations in interpreting the Charter.[26] The Explanations set out not only the source of the rights in the Charter but, in some cases, other legal provisions relevant to their interpretation. The Explanations were updated and published prior to the conclusion of the Lisbon Treaty.[27] We have included at the end of this article a table setting out the sources for each of the Charter rights as stated in the Explanations,[28] with additions and alterations to the Explanations marked.[29]

17. Article 52(1) of the Charter provides a general limitation clause permitting interferences with or restrictions on Charter rights.[30] This reflects the model favoured by the drafters of the Canadian Charter of Rights and Freedoms 1982[31] and differs from the approach taken in the ECHR which has right-specific limitation provisions. This difference appears to have been introduced for simplicity, to enable the rights in the Charter to be stated simply, in clear terms and unencumbered by caveats.

18. Article 54 prohibits abuse of rights. It is likely to impact primarily on cases involving free speech and freedom of association, where governments of the Member States may seek to curb organisations with extremist views.[32] It is however notable that the Preamble to the Charter suggests a potential for broader application, stating that the enjoyment of the rights in the Charter "entails responsibilities and duties with regard to other persons, to the human community and to future generations".

(iv) Interrelationship with Convention rights under the ECHR

19. The Explanations are of particular importance in relation to rights derived from the ECHR. Article 52(3) of the Charter states that insofar as rights "correspond" to those rights guaranteed by the ECHR the "meaning and scope of those rights shall be the same". This rather circular statement poses some conceptual problems.

20. First, none of the articles in the Charter are drafted in the same terms as those under the ECHR. One suspects that practitioners will seek to find significance in the different terminology adopted (that is, after all, what lawyers do), not least because Art. 52(3) goes on to state: "this provision shall not prevent Union law providing more extensive protection".

21. Secondly, the Charter rights are, generally speaking, drafted far more emphatically and with fewer inherent qualifications than Convention rights. For example, Art. 2

---

[26] Article 6(1) of the TEU; and the Preamble to and Art. 52(7) of the Charter.
[27] The Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) can be found at OJ 2007 C303/17.
[28] The table does not set out all of the detail of the relevant provisions referred to in the Explanations and therefore reference should be made to the Explanations for detailed guidance on particular articles.
[29] We are grateful to Shane Sibbel for his assistance with this table.
[30] The case law of the ECJ also recognised that restrictions might have to be imposed on the exercise of certain rights on public interest grounds. See Case 5/88 *Wachauf* [1989] ECR 2609 at [18], ECJ; and Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737 at [45], ECJ.
[31] Section 1 of the Canadian Charter states that the rights and freedoms protected are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
[32] See Art. 17 of the ECHR and, for example, Decision No. 13828/04 *Kalifatstaat v Germany* (11 December 2006), ECtHR.

states simply, "Everyone has the right to life" and leaves it at that. Article 6 states, in full: "Everyone has the right to liberty and security of the person". By contrast, the ECHR sets out important qualifications to both the right to life (Art. 2) and liberty (Art. 5) within the terms of the articles themselves. On the other hand, under the ECHR certain rights are inviolable, even on public interest grounds (for example, Art. 3 relating to freedom from torture and inhuman or degrading treatment). There is no such recognition in the specific terms of Art. 52(1), which in principle appears to apply to all Charter rights. Happily, the Explanations go some way to bridging any gap, by making clear (in almost all instances) whether a Charter provision is intended to have the same meaning and scope as an equivalent article in the ECHR notwithstanding its wording. This has been set out in our table below. This shows that for 12 of the rights protected by the Charter, both their meaning and scope are intended to be the same as the corresponding articles in the ECHR. In relation to these articles it seems that more extensive protection will therefore not be provided.[33]

22. Thirdly, numerous provisions in the Charter in fact go well beyond the ECHR and thus go beyond the domestic protection of rights contained in the HRA 1998. Many of the rights are intended directly to mirror rights contained in other EU legislative instruments, such as the Data Protection Directive and the EU Social Charter. The sources for a number of other rights are drawn from various international instruments and the case law of the ECJ. To this extent, those rights have been now been "upgraded" and given the same status as the Treaty protections of the economic freedoms. Other provisions of the Charter are based on economic rights already contained in the EU Treaties. Such rights are to be exercised under the conditions and within the limits defined by those Treaties.[34]

23. Fourthly, certain rights in the Charter reflecting rights embodied in the ECHR and its protocols go beyond the Convention rights ratified by the United Kingdom. Article 19(1), for example, prohibits collective expulsions. This is based on Art. 4 of the Fourth Protocol to the ECHR, which has not been ratified by the United Kingdom and is not covered by the HRA 1998.

24. Fifthly, there are a number of articles where the *meaning* is the same as the corresponding articles of the ECHR but the *scope* is accepted to be wider. For example:

- Article 9 of the Charter (right to marry and found a family) covers the same field as Art. 12 of the ECHR, but its scope may be extended to other forms of marriage (including same-sex marriages) if these are established by national legislation. Article 14 of the Charter (right to education) corresponds to Art. 2 of the First Protocol to the ECHR, but is extended to cover access to vocational and continuing training.
- Article 47(1) of the Charter confers a right to an effective remedy equivalent to Article 13 ECHR, but extends it to a right before a court or tribunal rather than merely before a national authority.
- Article 47(2) corresponds to the right in Art. 6(1) of the ECHR to a fair trial but is not limited to the determination of civil rights and obligations. This could potentially be

[33] See also COM (2000) 644, para 9.
[34] See the Charter, Art. 52(2).

of real significance in practice,[35] most obviously in the immigration context, where individuals facing deportation have been held not to benefit from the fair trial protections under Article 6.[36]

25. One other important but less surprising departure from the ECHR is that the limitations provided for by Art. 16 of the ECHR as regards the rights of aliens do not apply under the Charter to Union citizens, who must not be considered as aliens in the scope of the application of EU law.[37]

C. The impact of the changes brought about by the Treaty of Lisbon

(i) Charter "principles": partially justiciable provisions

26. Although, as we have seen, the Charter now has direct legal effect, not all of the rights and freedoms protected have equivalent legal effect. Article 52(5) was not originally included in the Charter. It was added at the insistence of countries, such as the United Kingdom, as a condition to the Charter being given legal effect. It states that the provisions of the Charter that "contain principles" may be implemented by legislative and executive acts taken by EU bodies and Member States when they are implementing EU law. The second sentence of the provision then states: "They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

27. There have been difficulties in determining how this provision might be applied in practice.[38] However, based on the reasoning set out in the Explanations, the provision appears intended to limit the justiciability of the "principles" found in the Charter to certain, limited situations. The Explanations given in respect of Art. 52(5) of the Charter cross-refer back to Art. 51(1).[39] This provision requires that Charter "rights" are respected, while Charter "principles" are to be observed. The "principles" are to be observed by EU institutions when they are implemented through legislative or executive acts; and by Member States when they implement EU law. The Explanations accept that they "become significant for Courts only when such acts are interpreted or reviewed". It would follow that practitioners may seek to rely upon Charter principles in so far as they are challenging EU legislative or executive acts,[40] or the activities of Member States in implementing them. But they do not give rise to free-standing claims for positive action on the part of the EU institutions or Member States. This approach is said to reflect the previous case law of the ECJ;[41] and "the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law".[42]

---

[35] One of the questions which the ECJ has been asked to address in the reference to the ECJ in Case C-411/10 *NS* is whether the Charter, including Art. 47(2), provides greater scope of protection to a person affected by a decision of a Member State under Council Regulation No. 343/2003 concerning whether to examine a claim for asylum, than under the ECHR.

[36] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 [2010] 2 AC 110, HL; *Maaouia v France* (2000) 33 EHRR 1037, ECtHR.

[37] Explanations, p. 34.

[38] See *The Treaty of Lisbon: an Impact Assessment* (n. 5 above), paras 5.15–5.22.

[39] See Explanations, p. 35.

[40] An example is provided in Case C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881 in which Advocate-General Tizzano relied upon Art. 31(2) of the Charter when interpreting the Working Time Directive.

[41] The Explanations refer to the jurisprudence on, for example, the precautionary principle under Art. 191(2) TFEU (ex Art. 174 EC), which is a legitimate basis for community action on the environment and must be taken into account when EU policy is implemented. See, e.g. Case T-13/99 *Pfizer v Council* [2002] ECR II-3305 at [114], GCEU.

[42] Explanations, p. 35.

28. Drawing a clear dividing line may be difficult,[43] not least because the Explanations themselves recognise that in some cases an article of the Charter may contain both elements of a right and a principle.[44] The UK Government (through Lord Goldsmith QC, who was a representative of the UK Government on the post-Laeken European Convention) has suggested not only that principles are not justiciable at all, but has proposed a very broad definition of what a principle is. He has stated that the Charter was designed to distinguish between rights which are enforceable and principles which are mere "aspirations". Accordingly, the social and economic rights, by contrast with civil and political rights, are aspirational only and would not be justiciable. This would include most of the rights in Title IV, Solidarity.[45] The UK/Poland Protocol[46] puts the position more starkly still. It states that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far as Poland or the UK has provided for such rights in its national law".[47]

29. The issue is not resolved by the Explanations. Both Arts 33 and 34 are indentified by the Explanations as containing rights as well as principles and yet both are within Title IV. Similarly, Art. 28 on collective bargaining, which is within Title IV, is referred to in both the text of the Charter and in the Explanations as a "right". Article 35 on health care (also within Title IV) states emphatically that "[e]veryone has the right of access to preventative health care and the right to benefit from medical treatment under conditions established by national laws and practices". But the Explanations refer to Art. 35 as setting out "principles".[48]

30. One potential way of cutting through the confusion in terminology is to emphasise the references in the articles of the Charter to national laws and practices. In other words, certain "rights" are not free-standing but are justiciable only through the prism of domestic law and practice which recognises the principle in question. This would also be consistent with the ostensible purpose of Art. 52(5), which is to prevent the articulation of positive legal duties on Member States to protect social and economic rights and confer social benefits.

(ii) Convergence rather than divergence between the Charter and the ECHR will be the norm

31. The Explanations to the Charter and Art. 52(3) of the Charter itself are designed to bring about a measure of convergence between the ECHR and the Charter rights.[49] It will only be in relatively rare cases that the legal outcome of the application of the

---

[43] See also Piris (n. 21 above), pp. 154–155.

[44] The examples given are Arts 23 (equality between men and women), 33 (social protection for the family) and 34 (social security).

[45] Lord Goldsmith, "A Charter of Rights, Freedoms and Principles" (2001) 38 CML Rev 1201, address to the Heinrich Böll Stiftung, 24 February 2001; "The Charter of Rights – a brake not an accelerator" [2004] EHRLR 473, address to the Justice Conference on Human Rights in the EU. See also the discussion in House of Lords European Union Committee, 10th Report of Session 2007–08 (n. 5 above), paras 5.15–5.22, discussing Lord Goldsmith's statements.

[46] Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ 2008 C115/313.

[47] See para. 1(2) of Protocol 30, discussed further below.

[48] For a contrary example, see Art. 49, which is stated to confer a "principle" of legality, but which is plainly to be regarded as a right.

[49] See the discussion of the ECJ in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (unreported) 22 December 2010 at [30]–[37].

provisions found in the ECHR or in the Charter will give rise to divergent results where the same fundamental right is in play.

32. In the recent case of *R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) the claimants attempted to rely on the Charter to avoid the jurisdictional limitations on ECHR rights which provided no protection to US citizens in custody "on death row" in the United States. The claimants challenged a decision of the UK Government not to impose an export ban on a drug used in administering a lethal injection. The claimants abandoned reliance on Arts 2 and 3 of the ECHR, in recognition of their limited extraterritorial application, but sought to rely instead on the equivalent articles of the Charter, Arts 2 and 4. Lloyd Jones J (para. 73) rejected the claim on the basis that those rights corresponded to Arts 2 and 3 of the ECHR and accordingly their scope was intended to be identical, applying Art. 52(3) of the Charter. The learned judge noted that it would be "most surprising" and "very radical indeed" if the Charter recognised Convention rights without the jurisdictional limitations recognised by Art. 1 of the ECHR and the ECtHR. He rejected the contention that the Charter would confer such rights on anyone, anywhere in the world, regardless of whether they have any connection with the EU.

33. The Strasbourg Court has also taken steps towards convergence between EU fundamental rights principles and those recognised by the Charter. Two recent extensions of the protection afforded by the ECHR have been explicitly influenced by the wider rights available under the Charter. These are: (i) the narrowing of the exclusion from Art. 6 of public service disputes in *Eskelinen v Finland* (2007) 45 EHRR 43, ECtHR; and (ii) the recognition of *lex mitior* protection under Art. 7 in *Scoppola v Italy* (2010) 51 EHRR 12, ECtHR.

34. Nonetheless, there naturally remains scope for a divergent approach to develop between Strasbourg and Luxembourg.[50] For example, Art. 6(3)(c) of the ECHR confers a right to communicate with a lawyer out of hearing of a third party. In *S v Switzerland* (1991) 14 EHRR 670 at [48] the ECtHR endorsed the recognition in various international human rights instruments of the right to correspond and communicate freely and privately with a lawyer qualified in the appropriate territory. In contrast in Case C-550/7P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Limited v European Commission* [2010] 5 CMLR 19,[51] the ECJ confirmed that legal professional privilege in EU law does not extend to confidential communications passing between in-house legal advisers and their clients, even if the in-house legal adviser is a practising member of a legal regulatory body.

35. The EU's accession to the ECHR, when it occurs, will make the ECtHR competent to review acts of the EU institutions for compatibility with the ECHR. The relevant EU

[50] Contrast the approach adopted by Strasbourg to the privilege against self-incrimination in *Saunders v United Kingdom* (1997) 23 EHRR 313; *Murray v United Kingdom (Right to Silence)* (1996) 22 EHRR 29; and *Ozturk v Germany* (Series A/73) (1984) 6 EHRR 409; with that adopted by the ECJ in Case 374/87 *Orkem v Commission* [1989] ECR 3283; Joined Cases C-204, 205, 211, 213, 217 and 219/00P *Aalborg Portland and others v Commission* [2004] ECR I-123 at [61]–[65]. See also Case T–112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECR II–729 at [65]–[67], where the GCEU found that recognition of a full right to silence would constitute 'an unjustified hindrance' on the Commission's powers of investigation of competition infringements; Joined Cases C-65 and 73/02P *ThyssenKrupp v Commission* [2005] ECR I-6773 at [49]; and Case C-407/04 *Dalmine SpA v Commission* [2007] ECR I-829 at [34] and [35].

[51] Confirming the approach taken in Case 155/79 *A M & S Europe Ltd v Commission* [1982] ECR 1575, ECJ.

institutions will include the ECJ. This will undoubtedly give rise to the difficult question of judicial supremacy, which the Courts will need to resolve between themselves under the terms of the accession of the EU.[52] If a right of individual petition is also conferred on EU citizens as EU citizens rather than as citizens of the individual Member States, then it also raises the prospect of individual applications before Strasbourg in respect of complaints against the EU institutions, including the ECJ.[53] This might mean that individuals could seek before Strasbourg a review of the compliance of EU law principles with the ECHR. Certainly the publicly stated intention is that the Strasbourg Court will become the supreme final arbiter of the EU's compatibility with ECHR rights.[54]

36. This will be a significant development, especially in the light of the ECtHR's traditional (and understandable) reluctance to review too closely the compliance of the EU with the principles espoused in the ECHR. In *Bosphorus v Ireland* (2006) 42 EHRR 1, for example, the ECtHR accepted that the mere fact that Ireland was obliged to give effect to an EU regulation (as construed by the ECJ) did not prevent the Court from examining the substance of the complaint, since membership of the EU did not absolve Ireland of its responsibilities under the ECHR. But the Strasbourg Court also took into account the extent to which the EU itself, as a supranational organisation, gave substantive guarantees for the protection of fundamental rights. The Court therefore presumed that compliance with legal obligations imposed by a human rights-compliant organisation (such as the EU) would constitute compliance with the Convention, except where the circumstances of the case showed that the protection afforded by the EU was "manifestly deficient" (para. 156).[55] The ECtHR found (para. 165) that the protection afforded by EU law to fundamental rights at the material time was equivalent to that conferred by the Convention. The applicant had not therefore rebutted the presumption that Ireland's compliance with the EU regulation was also compliant with the Convention. In other words, there was no detailed review of the substantive merits of the complaint.

(iii) The UK/Poland Protocol

37. Protocol 30 of the Treaty relates to the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. We have seen that it was represented as an "opt out" at the time of the conclusion of the Lisbon Treaty. As observed above, the UK Government no longer stands by this description of the Protocol. But that leaves the question as to what purpose the UK/Poland Protocol actually serves. Its stated purpose (in recital 8) is to clarify certain aspects of the application of the Charter.

38. On the basis that it does have some legal significance, logically there are at least three ways that the effect of the Protocol could be understood. The first is that it is effective to curtail the application of the Charter to the United Kingdom and Poland in accordance with its terms, in so far as the Charter is given a wider general meaning by the ECJ

[52] See also the Eighth Protocol to the TFEU.
[53] See, e.g. the Press Release from the Commission on the proposed negotiation directives for accession, IP/10/291, 17 March 2010.
[54] See COM (2000) 644 (n. 16 above), para 9.
[55] Contrast *Matthews v United Kingdom* (1999) 28 EHRR 361 in which the ECtHR found a violation of the right to vote guaranteed by Art. 3 of the First Protocol to the ECHR in relation to European Parliament elections.

in subsequent case law. This would create differential effect for the Charter within the European Union, between the United Kingdom and Poland, on the one hand, and the other 25 Member States, on the other. Secondly, it could be regarded as controlling the interpretation of the Charter more generally. The Protocol would then govern the interpretation of the Charter as it applies to all Member States, notwithstanding the expressed, limited geographical scope of its application. The third way that the Protocol could be given effect would be as a persuasive aid to interpretation. In this way it could be referred to where it is consistent with an interpretation of the Charter's effect reached by reference to other considerations, as tending to confirm that interpretation, and also as a "tie-break" where all other considerations are equal.[56] This approach is premised on treating the Protocol as an expression by two of the parties to the Charter as to its intended meaning and effect.[57] However, by contrast with the second approach set out above, the Protocol would not govern the meaning of the Charter and would have a limited persuasive force.

39. The Protocol consists of two articles and a lengthy preamble. Article 1(1) of the Protocol provides 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."

40. Since it is now accepted (by the United Kingdom at least) that the Protocol does not create an opt-out from the Charter, this provision appears to be essentially declaratory in meaning and effect.[58] The focus of this provision is on the jurisdiction of the ECJ and domestic courts in applying EU law. It states that the Charter does not "extend the ability" of those courts to make findings that UK legal measures or administrative practices are contrary to fundamental rights. Since the ECJ and national courts had jurisdiction in relation to fundamental rights jurisprudence before the entry into force of the Charter, Art. 1(1) is effectively declaratory. Indeed, Art. 1(1) seems to concede as much in accepting that the Charter "reaffirms" fundamental rights, freedoms and principles. Had the Protocol wished to state that national measures could only be challenged on the basis of rights already expressly recognised as general principles of law under existing EU case law, it could – and should – have said so. Any standstill provision should have been expressed in clear terms.

41. Article 1(2) states:

> "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter [i.e. the solidarity provisions] creates justiciable rights applicable to Poland or the United Kingdom except in so far the United Kingdom has provided for such rights in its national law."

---

[56] See, by analogy, the circumstances in which delegated legislation can be referred to as an aid to interpreting a parent act, where regulations "which are consistent with a certain interpretation of the Act tend to confirm that interpretation": *Hanlon v The Law Society* [1981] AC 124 at 194, per Lord Lowry.

[57] The fourth possible way that the Protocol could be understood is that it could be regarded as legally meaningless and ignored in any process of interpretation. However, the Protocol does have legal status as an agreed Protocol to the Treaties, and common sense (not to say orthodox legal analysis) suggests that it should be presumed to have some effect unless this is impossible to achieve.

[58] The fact that in the following subparagraph (Art. 1(2)) an express provision is made for the rights conferred by Title IV suggests that Art. 1(1) could not be construed as a general "opt out" from the Charter. Otherwise, Art. 1(2) would be otiose and senseless.

42. It is in this provision that the tensions and inconsistencies in the Protocol are at their most pronounced. Article 1(2) on its face appears to restrict the application of the Charter in the United Kingdom and Poland. It therefore provides the strongest textual support for the first approach set out above, namely that the effect of the Protocol is to give the Charter different legal effect in the United Kingdom and Poland from its effect in other Member States.

43. Article 2 then states:

> "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."

44. This is also a difficult provision to understand. The Charter refers to national laws infrequently. It cannot, consistently with the principle of subsidiarity, have much to say on the subject. In Art. 9, for example, the right to marry in accordance with national laws is protected. For Art. 2 of the Protocol to state that the Charter's reference to national law in Art. 9 should be taken to apply only to rights or principles recognised in UK law is circular. If there were no applicable UK law, for example, no right to marriage at all, then the right recognised by Art. 9 would itself be devoid of content. In contrast, where the Charter confers a free-standing right, no reference is made to national laws. It is difficult to see where this provision goes.

45. The terms of the lengthy Preamble to the Protocol do not readily assist in dealing with these ambiguities. For example, notwithstanding what Art. 1(2) says about the solidarity provisions (which conflicts with what is said about those provisions in the Explanations), the Preamble states that the Charter must be interpreted "strictly in accordance" with the Explanations. This goes further than Art. 6(1)(3) TEU which merely states that "due regard" should be had to the Explanations.

46. Given the lack of clarity in the terms of the Protocol, it seems likely that courts will be reluctant to interpret it as limiting the UK's EU obligations or as providing any strong support for a restrictive reading of the Charter. Moreover, the Preamble states that the Protocol is intended as a means for the UK and Polish Governments to "clarify certain aspects of the application of the Charter". This makes reasonably clear that the purpose of the Protocol is *interpretative*, and an aid to the general meaning and effect of the Charter. In other words, the Protocol is not intended to create a different Charter regime in the United Kingdom and Poland.[59]

47. Such an approach is also consistent with the trite principle of EU law that provisions of EU law cannot depend for their content upon the terms of national law. There can be only one autonomous meaning of EU law. This applies equally to provisions of the Treaties and the Charter. The nature and extent of that autonomous meaning is ultimately a matter for the ECJ to determine. The stated purpose of the Protocol is to seek to clarify what that meaning is: see, for example, recital (8) of the Preamble to the

[59] Moreover, the Protocol does not therefore represent a reservation to the TEU since, irrespective of whether a reservation could be valid, a reservation is a statement that "purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State": Vienna Convention on the Law of Treaties, Art. 2(1)(d). On the validity of reservation see Arts 19–23; and I Brownlie, *Principles of Public International law*, 7th edn (OUP, 2008), pp. 612–615.

Protocol. While it is true that recital (9) goes on to state that the United Kingdom and Poland are "desirous" of clarifying the Charter's application to the "laws and administrative action of Poland and the United Kingdom" and its "justiciability within those countries", that is an odd statement. The Charter can have no direct impact on the extent to which it might be justiciable as a matter of the domestic law of the United Kingdom or Poland. That is a matter for the national legislatures in both countries. From the perspective of EU law, the focus must accordingly remain on clarification of an autonomous EU meaning.

48. If this were not the correct approach, then the Protocol would, in any event, contain a "Trojan horse". Recital (12) provides that the Protocol is without prejudice to other obligations devolving on the United Kingdom and Poland under the Treaties and under Union law generally. The courts and other public bodies in the United Kingdom are obliged to comply with ECJ and General Court judgments when considering issues of EU law, by virtue of s. 3(1) of the European Communities Act 1972. Such judgments will give rulings on the meaning and effect of the Charter. The UK's obligations under EU law include Art. 6 TEU giving the Charter legal effect. For good measure, the Preamble to Protocol 30 itself confirms that the Charter is "to be applied in strict accordance with" Art. 6 TEU and Title VII of the Charter itself. The fundamental rights jurisprudence of the ECJ is preserved by the TEU. If, therefore, a right referred to in Title IV is stated by the ECJ to reflect fundamental rights recognised as a general principle of EU law, UK courts would be obliged to give effect to it, the terms of the UK/Poland Protocol notwithstanding.

49. Two further considerations are also relevant and support this analysis. The European Communities Act 1972 has not been amended to qualify the application of EU law by reference to the terms of the UK/Poland Protocol despite Parliament having had a recent opportunity to do so if it wished.[60] Furthermore, it also significant that the UK Government's position in *Saeedi* (above) is that the Protocol seeks to "explain the effect" of the Charter (para. 7), and not to confer a geographical or temporal "opt-out" from the terms of the Charter.

50. In the light of this, it is difficult to see how the first interpretation of the meaning of the UK/Poland Protocol could be effective. If, on its proper interpretation, the Charter contains provisions in Title IV which are justiciable, then any suggestion to the contrary found in Art. 1 or 2 of the UK/Poland Protocol must give way. The second way of interpreting the Protocol outlined above is also unsatisfactory. The views of two Member States cannot govern the autonomous meaning of EU law. Recital (11) to the Preamble in any event states that the Protocol does not prejudice the application of the Charter to other Member States.

51. It follows that the better view must be that the Protocol can be used as an aid to the interpretation of the Charter, but its persuasive force is relatively weak. It does not govern the meaning of the Charter and it does not, in fact, create a two-track system with the Charter applying differently in the United Kingdom and Poland. This is effectively the way that the Protocol was used in *Zagorski* (above) (paras 75–76), namely as confirming the interpretation of the Charter which the Court had reached by reference to other considerations.

[60] The matter has not been clarified by the European Union (Amendment) Act 2008.

D. Litigation advantages to human rights protections in EU law

52. In terms of utility, a substantive right conferred by EU law is undoubtedly the "sledgehammer' in the practitioner's "toolkit". We suggest there are six principal, tactical advantages to relying upon EU law.[61]

53. 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.[62] 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.[63] By contrast, s. 3(2)(b) and (c) of the HRA 1998 provide that the validity, continuing operation or enforcement of primary legislation (and of subordinate legislation where primary legislation prevents the removal of the incompatibility), which cannot be read or given effect in a way which is compatible with the Convention, is not affected. Section 4 allows courts simply to make a declaration of the incompatibility of primary legislation with a Convention right, but this is of minimal practical use to the applicant.[64] The Strasbourg Court has held that it is not an effective remedy.[65] Indeed, defendants may attempt to defend claims by seeking refuge in a declaration of incompatibility.[66]

54. 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.[67] An increasingly liberal approach to standing has been developed by the courts. Claims are often made by public interest groups

---

[61] Nonetheless, the possibility that claims under the HRA 1998 might have advantages over EU claims should not be overlooked. For example, in *Al Hassan-Daniel v Revenue and Customs Commissioners* [2010] EWCA Civ 1443 [2011] 2 WLR 488, the Court of Appeal refused to recognise a defence of criminality in respect of a claim brought under the HRA 1998 notwithstanding its potential availability under EU law. Sedley LJ, giving the judgment of the Court, stated, at para. 21 that: "We do not consider, secondly, that it is permissible simply to read across from Community law to Convention law. It is one thing to discountenance the manipulative use of a Community right for a purpose for which it was not meant; it is another to create a gateway to human rights which only the virtuous may enter. In our judgment there are perceptible and sound policy reasons why the criminality defence does not form part of the Strasbourg jurisprudence . . .".

[62] See *R v Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1 at 26E–27F.

[63] In so far as that person is able to rely upon directly enforceable EU law rights. See *ICI v Colmer (No. 2)* [1999] 1 WLR 2035, HL; and *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685 [2002] 1 CMLR 20 at [44], per Arden LJ.

[64] See s. 4(6)(a) of the HRA 1998. An example of the potential advantage of relying on EU law in this respect is provided by the *Countryside Alliance* case in which the claimants argued that the ban on hunting with hounds engaged EU law in an attempt to obtain a remedy that they could not obtain under the HRA, namely the disapplication of the statute: see *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

[65] *Burden and Burden v United Kingdom* (2008) 47 EHRR 38 at [40], where the ECtHR reiterated that a declaration of incompatibility did not provide an effective remedy (for the purposes of Art. 35(1) and the requirement to exhaust domestic remedies) because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation.

[66] See, e.g. *Global Knafaim Leasing Ltd v Civil Aviation Authority* [2010] EWHC 1348 (Admin) [2011] 1 Lloyd's Rep 324, where it was claimed that detaining an aircraft until the owner had paid off all of the unpaid air navigation charges incurred by its insolvent lessee, across the lessee's entire fleet, was contrary to the owner's property rights under EU law or the HRA 1998 and the money had to be repaid. The Civil Aviation Authority claimed that its actions were not within the scope of EU law and since, it argued, it was acting pursuant to clear statutory authority, a declaration of incompatibility would have been the only available remedy. That would have defeated the restitutionary claim. Collins J dismissed the domestic and EU claims on the facts.

[67] Senior Courts Act 1981, s. 31(3).

established to campaign on particular issues or to represent specific interests.[68] By contrast, s. 7(1) of the HRA establishes a narrower "victim" test.

55. Thirdly, under EU law a complaint can be made about a failure to introduce primary legislation,[69] whereas this is expressly excluded under the HRA 1998 regime by s. 6(6)(b).

56. Fourthly, the remedies available under EU law have more bite even where they do not have more teeth. Article 4(3) TEU obliges national courts to ensure the legal protection of rights which individuals derive from EU law.[70] Such protection by national courts in accordance with national procedural rules[71] is subject to two overriding principles. First, national rules that apply to EU law actions must not be discriminatory or less favourable than those governing analogous domestic actions (the principle of equivalence). Secondly, national rules must not make practically impossible the exercise of EU law rights which must be accorded effective protection (the principle of effective protection).

57. Fifthly, there is the related issue of damages. Under the *Francovich* test laid down by the ECJ and applied by the national courts, a claimant may claim damages against a Member State in respect of serious breaches of EU law.[72] Therefore, a claimant who has suffered damage as a result of the United Kingdom implementing EU legislation in a manner which is in breach of fundamental principles, including the ECHR, may be able to sustain a damages claim if the breach is sufficiently serious. The ECJ has held that a breach will be sufficiently serious where a Member State had manifestly and gravely disregarded the limits on its legislative powers. Furthermore, where a Member State was not called upon to make any legislative choices and had only a considerably reduced (or even no) discretion, the mere existence of an infringement of EU law may establish a sufficiently serious breach.[73] 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 HRA 1998. Under s. 8, an award of damages is discretionary and, following the lead of the Strasbourg Court, exceptional. Where they are made, the amounts awarded are low.[74]

58. Sixthly, as we have seen, the coverage and the sources of the rights contained in the Charter are wider and more extensive under EU law. EU law draws not only on the ECHR as a source of fundamental rights but also on other international treaties for the protection of human rights of which the Member States are signatories or on which

---

[68] See N Plemming, "The Contribution of Public Interest Litigation to the Jurisprudence of Judicial Review" [1998] JR 63; and the judgment of Maurice Kay J in *R v Secretary of State for Trade and Industry ex p. Greenpeace Ltd (No. 2)* [2000] EuLR 196.

[69] For example, in the context of a claim for *Francovich* damages. See Case C-48/93 *Factortame and Brasserie du Pêcheur* [1996] ECR I-1029, ECJ.

[70] This was already reflected in the case law. See Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 at [5], ECJ; Case C-2/88 *Zwartveld* [1990] ECR I-3365 at [18], ECJ; and Case C-312/93 *Peterbroeck v Belgium* [1995] ECR I-4599 at [12], ECJ.

[71] Joined Cases C-430/93 and C-431/93 *Van Schijndel v SPF* [1995] ECR I-4705 per the Opinion of Advocate General Jacobs at [29].

[72] See Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, ECJ; Case C-392/93 *R v HM Treasury ex p. British Telecommunications plc* [1996] ECR I-1631 at [38]; and Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531 at [106] and [107].

[73] See *Norbrook* (ibid) at para. 109.

[74] See Beatson, Grosz, Hickman and Singh (n. 11 above), [7-129]–[7-190], pp. 669–697.

they have collaborated, in addition to the Treaties themselves.[75] The ECJ has referred to a number of international human rights instruments including the European Social Charter of 18 November 1961,[76] Convention No. 111 of the International Labour Organisation,[77] and the International Covenant on Civil and Political Rights of 19 December 1966.[78] This is reflected in the sources for the rights, freedoms and principles set out in the Charter, as one can see from the table below.

E. The limits of EU human rights protection: "the scope of EU law"

59. Neither the general principles of law, nor the Charter, are applicable in domestic legal systems in all circumstances. In order to be applicable, the subject matter of the dispute must fall within the "scope" of EU law. The question of what is within the scope of EU law has raised difficult issues for the application of the general principles of EU law and the Charter alike.[79]

(i) General principles of law

60. General principles of law can only be relied upon where EU law is engaged. The question whether EU law is engaged is notoriously difficult to answer and is the subject of developing case law both before the ECJ and the English courts. In Case 5/88 *Wachauf v Germany* [1989] ECR 2609[80] the ECJ held that the fundamental rights recognised by the Court were binding on the Member States when they *implement* EU rules. In contrast, a domestic law or practice that deals with a "purely internal situation" does not give rise to enforceable EU law rights. Similarly, a purely hypothetical prospect of exercising an EU right does not establish a sufficient connection with EU law to justify the application of EU provisions.[81]

61. However, there are well-known examples where fundamental rights have been held to be engaged even where a Member State is not implementing EU law in the strict sense. In Case C-260/89 *ERT* [1991] ECR I-2925 at [42] the ECJ stated that national rules "fall within the scope of Community law" where a Member State is relying upon a derogation from the fundamental EU freedoms based on a public policy justification. In Joined Cases C-922 and 326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and others* [1993] ECR I-5145 at [27] the ECJ held that the principle of non-discrimination on

---

[75] Case 4/73 *Nold v Commission* [1974] ECR 491 at [12]–[14], ECJ; Case C-260/89 *ERT* [1991] ECR I-2925 at [41]–[45], ECJ; Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125 at [3]–[4], ECJ.

[76] Case 149/77 *Defrenne v Sabena* [1978] ECR 1365 at [25]–[28], ECJ.

[77] Ibid.

[78] Case 374/87 *Orkem v Commission* [1989] ECR 3283 at [18] and [31], ECJ; Case C-168/91 *Konstantinidis* [1993] ECR I-1191, per the Opinion of Advocate-General Jacobs.

[79] See Professor JHH Weiler and NJS Lockhart, "Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence" (1995) 32 CML Rev 51 at 63, who state that "notions of 'the field of application' or 'the scope of' or 'the field of' Community law are, like the 'duty of care', say, in Scots law, open-textured and their parameters, as a matter of positive law and/or legal realism (what the law is, what we predict the Court will do) can only be stated by taking into account judicial praxis as well".

[80] But see the conclusion of the ECJ in Case C-2/92 *R v Ministry of Agriculture, Fisheries and Food ex p. Dennis Clifford Bostock* [1994] ECR I-955, ECJ, which is not easy to reconcile with *Wachauf* in all respects.

[81] See Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493 at [24], ECJ (refusal of permission to plant a commercial orchard was outside Community law although it affected the organisation of agriculture market); and Case C-299/95 *Kremzow* [1997] ECR I-2629 at [16]–[18], ECJ (unlawful term of imprisonment was not within field of application of EU law although it would hypothetically have impeded freedom of movement between Member States).

grounds of nationality[82] applied to German copyright law, even though that domestic law was not implementing any EU law. Phil Collins (a British national) was entitled to have recourse to a national law protecting copyright which was afforded to German citizens. The rationale for that finding was that copyright and related rights have "particular of their effects on intra-Community trade in goods and services" and was thus within the "scope of application" of the Treaty. In the more recent Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2003] QB 416 at [39] the ECJ held that the deportation of the wife of a British citizen whose business involved travel between Member States would be "detrimental . . . to the conditions under which Mr Carpenter exercises a fundamental freedom" and thus had to be consistent with Art. 8 of the ECHR.

62. In an important recent Opinion in Case C 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* (judgment handed down on 8 March 2011, unreported) at [163] and [177] Advocate-General Sharpston proposed that the case law should be further developed. She suggested that "in the long run", the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether a right of free movement had been exercised, but rather on the existence and scope of a material EU competence. She suggested that "the rule would be that, provided the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*". In a highly significant judgment on 8 March 2011, the ECJ endorsed the Advocate-General's conclusions on the EU rights derived from citizenship under Art. 20 TFEU, but did not address the other aspects of the Advocate-General's reasoning concerning the definition of "the scope" of EU law.

63. The question of whether or not a national provision falls within the "scope of EU law" has also given rise to a line of domestic authority. In *R v Ministry of Agriculture, Fisheries and Food ex p. Hamble Fisheries* [1995] 2 All ER 714 at 724–725 the measure under consideration was a licensing policy adopted by the Ministry for Agriculture, Fisheries and Food (MAFF) in relation to the fishing quota system adopted under the common fisheries policy of the Community. The claimant argued that a change in that policy had frustrated its legitimate expectations and caused it loss. The Government argued that the relevant law was entirely domestic. Sedley J rejected that submission as "unreal". He added:

> "It may no doubt be said that the immediate exercise is the formulation of policy within a discretion conferred entirely by domestic legislation. But the purpose of legislation and policy alike is to permit the respondent under the principle of subsidiarity to exercise its powers for the purpose of implementing the common agricultural policy of the European Community. If each Member State were governed in carrying out its part of this joint exercise by no jurisprudence but its own domestic law, a major objective of the policy would be frustrated. The availability of eventual recourse to the Court of Justice from and against all the Member States in relation to the carrying out of the common agricultural policy must require domestic courts to have full regard to the jurisprudence of the Court of Justice."

64. A narrower approach was adopted in *R v Ministry of Agriculture, Fisheries and Food ex p. First City Trading Limited* [1997] 1 CMLR 250, QBD. The domestic measure in issue was a MAFF aid package for beef exporters who were also slaughterers or cutters adopted

[82] Then contained in Art. 7 EEC; now Art. 18 TFEU.

in the aftermath of the BSE crisis and the Commission's ban on the export of beef from the United Kingdom. Exporters who were not slaughterers or cutters challenged their exclusion from the aid on the basis that it was contrary to the EU law principle of equal treatment. The issue for the court was whether such general principles of EU law fell to be applied. Laws J drew a distinction between two different types of situation, which would determine whether general principles of EU law were applicable (para. 39):

> "On the one hand, a Member State may take measures solely by virtue of its domestic law. On the other a Community institution or Member State may take measures which it is authorised or obliged to take by force of the law of the Community. In the former situation I contemplate a measure which is neither required of the Member State nor permitted to it by virtue of Community Treaty provisions. It is purely a domestic measure. Even so, it may affect the operation of the Common Market and accordingly be held to be 'within the scope of application' of the Treaty. This was the *Phil Collins* case. It is of the first importance to notice that its falling within the Treaty's scope is by no means the same thing as it being done under powers or duties conferred or imposed by Community law. The second situation primarily includes (so far as Member States are concerned) measures which Community law requires, such as, for example, law which is made to give effect to a Directive. It includes also an act or decision done or taken by a Member State in reliance on a derogation or permission granted by Community law: as where for instance a restriction on imports or exports is sought to be justified by reference to Article 36 of the Treaty. In the first situation, the measure is in no sense a function of the law of Europe, although its legality may be constrained by it. In the second, the measure is necessarily a creature of the law of Europe. Community law alone either demands it, or permits it."

65. Laws J reasoned that even on the assumption that the scheme in question fell within the state aid provisions of the Treaty (it had been notified to the Commission as a state aid but was found not in fact to be a state aid) the situation was within the first category. Laws J then distinguished the *Phil Collins* case by drawing a distinction between Treaty obligations such as the prohibition on nationality discrimination at issue in that case and judge-made law. He reasoned that the EU fundamental rights jurisprudence was a form of "common law"[83] and could not be applied to action taken by Member States that is not authorised or required by EU law and could not have been applied in the *Phil Collins* case. He said: "The power of the ECJ, as it seems to me, to apply . . . principles of public law which it had itself evolved cannot be deployed in a case where the measure in question, taken by a member state, is not a function of Community law at all" (para. 42). Otherwise, his Lordship reasoned, the ECJ would have expanded the scope of the Treaties, effectively because Art. 18 TFEU would be rewritten to prohibit breach of all fundamental human rights and principles.

66. The approach in *First City Trading* was approved by the Divisional Court in *R v HM Customs and Excise ex p. Lunn Poly* [1998] EuLR 438 at 444–446. The claimants challenged a decision made by HM Revenue and Customs to impose differential insurance premium tax rates on various suppliers of insurance, depending on the nature of the goods and services supplied with it. They sought a declaration that the statutory provisions giving effect to the differential tax rates were contrary to the general EU principles of non-discrimination and proportionality. Counsel for the applicants identified four circumstances where national measures fell to be tested against such principles: (1) where national authorities implement EU law by fulfilling an obligation to act, for example implementing a directive; (2) where national authorities implement EU law

[83] The reliance on the distinction between judge-made law and Treaty law given by the learned judge will now need to be reconsidered in the light of the adoption of the Charter as part of the Treaties.

by acting within the scope of an EU enabling provision or authorisation; (3) where national authorities rely upon an EU derogation to justify a measure which restricts one of the fundamental freedoms protected by the TFEU; (4) where there is otherwise a sufficient Union context for the general principles to apply.

67. Maurice Kay J considered the judgment of Laws J in *First City Trading*. He concluded with approval that Laws J had accepted categories (1), (2) and (3), eliding (2) and (3) but rejected category (4). On the facts, the applicants failed to show any specific enabling provision of EU law upon which the insurance premium tax had been based. They consequently failed to come within categories (1) to (3). He also rejected an attempt to apply fundamental rights under category (4). That, in his judgment, would be "a wholly unwarranted encroachment on sovereign powers". There was accordingly no basis for applying the prohibition of non-discrimination to the facts of the case.

68. That, however, is not the end of the story. In *R v Ministry of Agriculture, Fisheries and Food ex p. British Pig Industry Support Group and Ward* [2000] EuLR 724 at 745H–747E a further challenge was mounted to certain financial assistance given in an agricultural sector governed in part by a common organisation of the market ("COM"). This time the BSE support measures had been granted to the beef and sheep industries and pig farmers claimed that they had not received equal treatment by comparison. The applicants contended that the state aids granted in the present case fell within the second situation envisaged by Laws J in *First City Trading*. That argument was rejected on the facts. The alternative submission, that *First City Trading* was wrongly decided, met with greater success before Richards J. It was suggested that where the adoption of national measures was circumscribed by a COM and dependent upon authorisation from the Commission, a Member State was acting within the scope of EU law and was obliged to comply with the fundamental principles recognised by the ECJ. It was also said that Laws J's distinction between Treaty law and judge-made law was not a valid one, citing Case 201/85 *Kipgen (nee Klensche) v Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1986] ECR 3477.

69. Richards J accepted (para. 61) that a challenge based on fundamental rights could theoretically have been lodged against Community support measures specifically adopted under the relevant COMs. He went on to find that the COM context was as relevant in the *First City Trading* case as it was here, so that it could not simply be distinguished. Richards J accepted that the distinction between the two situations described by Laws J was not an easy one to apply. The court held that a state aid notified to the Commission had features of both situations. Any state aid was prohibited by EU law unless it was notified to and approved by the Commission. Its validity was therefore ultimately dependent upon a specific permission under EU law. Richards J expressed "real doubts" (para. 61) about the correctness of *First City Trading* and *Lunn Poly* and concluded that:

> "Thus, although the grant of state aid cannot in my view be said to amount to 'implementation' of the COM or to be done 'pursuant' to Community law, I think it is well arguable that the grant of aid by a Member State falls within the scope of Community law to the extent that the fundamental principles of Community law apply to it. I also see some substance in Miss Sharpston's challenge to the validity of the distinction drawn in First City Trading between Treaty law and the fundamental principles of Community law as developed in the case law of the ECJ."

70. Since he found against the claimants on the facts the issue was not finally determined.

71. The most recent case in this line is *Zagorski*, the facts of which have been summarised above. The Government sought to distinguish the *ERT* case on the ground that no export ban had been imposed and therefore there was no derogation from, or interference with, free movement of goods. Lloyd Jones J reasoned that the "field in question", namely the imposition of export restrictions, is "occupied" by EU law and that it would be "surprising if the answer to the question whether the Defendant was acting within the material scope of EU law depended on which way his decision went". His Lordship held that in deciding whether to exercise a derogation from EU rights the Secretary of State was acting within the scope of EU law (para. 70).

72. *Zagorski* marks a further erosion of the approach adopted in *First City Trading*, since the decision not to impose an export ban was not a decision the UK Government was obliged or permitted to reach by force of EU law and it did not derogate from EU law. The domestic authorities do not speak with one voice. Nor has the ECJ grasped the opportunity afforded by *Zambrano* to provide a bright line test. Indeed, it may be that the search for a bright line test is unrealistic whilst different types of case continue to arise before the courts.

(ii) The scope of application of the Charter

73. Article 51 makes clear that the field of application of the Charter is also limited. It states that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity "and to Member States only when they are implementing Union law".

74. This provision purports to limit the scope of the Charter to the acts and omissions of Member States in circumstances which are narrower on their face than the definition of "scope of EU law" recognised in the case law. The Explanations are particularly important here. They indicate that no such divergence with the case law of the ECJ is intended. The expression "implementing" is used in a broad sense to mean "within the scope of EU law". The Explanations state (p. 32):

> "As regards the [application of the Charter to] Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules . . .' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds).[84] Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law."

75. The meaning of the expression "only when they are implementing Union law" was considered recently by Lloyd Jones J in *Zagorski* (para. 70). He held that the Charter applied to a decision not to impose an export ban because "the Defendant is implementing EU law in the sense of applying it or giving effect to it". The learned judge refused to draw a distinction between the application of the Charter and the application of fundamental

[84] Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737 at [37], ECJ.

rights principles developed by the ECJ (para. 70). It is respectfully submitted that in accordance with the discussion above, this is the right approach. The Lisbon Treaty has endorsed the ECJ's fundamental rights jurisprudence without restricting its application.

F. Conclusion

76. The Lisbon Treaty has advanced the protection of human rights under EU law through the substantive content of the Charter and through improved legitimacy. On any view, whether or not it creates stronger legal protection, the Charter has undoubtedly moved from the wings to the centre stage of EU law. From a practical perspective, it is now the first point of reference on many human rights issues. There nonetheless remain a number of ambiguities and complexities, which will need to be resolved by both the EU and domestic courts. The case law highlights the difficulty of seeking to adopt a bright-line test for what is and is not "within the material scope" of EU law. Whether or not the search for a workable, practicable test is achievable or represents a latter-day quest for the Holy Grail may be determined by the ECJ itself in the context of the reference in *R (NS) v Secretary of State for the Home Department* [2010] EWCA Civ 990.[85]

ANNEX

Table on the sources of Charter Rights, Principles and Freedoms[86]

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
TITLE I: DIGNITY		
Article 1 dignity	UDHR; Case C-377/98 Netherlands v European Parliament and Council [2001] ECR I-7079	No
Article 2(1) right to life	ECHR Article 1 right to life	Yes
Article 2(2) prohibition on the death penalty	ECHR Article 1 of Protocol No 6	Yes
Article 3(1) Right to physical and mental integrity	Case C-377/98 Netherlands v European Parliament and Council [2001] ECR-I 7079[87]	No

[85] In *NS v Secretary of State for the Home Department* one of the questions referred to the ECJ is whether a decision made by a Member State under Art. 3(2) of Council Regulation No. 343/2003 (namely, whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation, because the individual first entered the EU in another Member State) falls within the scope of EU law. The Government's position is that the decision is not within the scope of EU law (para. 8). This issue will probably turn on a close analysis of the Regulation, but it may provide an opportunity for the ECJ to consider the issue of the "scope of EU law" more generally.

[86] The Table shows by underline and strikethrough the differences between the 2007 Explanations and the original 2000 document produced by the Praesidium.

[87] Although not specified in the Explanations, a right to physical integrity is implied in Art. 8 of the ECHR: see, e.g. *X and Y v Netherlands* (1986) 8 EHRR 235 at [22]; *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61] and [63]; *YF v Turkey* (2004) 39 EHRR 715 at [33]; and *MAK v United Kingdom* (2010) 51 EHRR 14 at [75].

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 3(2) (i) informed consent in medicine and biology, (ii) prohibition of eugenic practices, (iii) prohibition on sale of body parts, (iv) prohibition on reproductive cloning	Convention on Human Rights and Biomedicine; Statute of the International Criminal Court 1998 Article 7(1)(g)	No
Article 4 prohibition on torture	ECHR Article 3	Yes
Articles 5(1) and (2) prohibition of slavery and forced labour	ECHR Article 5	Yes
Article 5(3) prohibition on human trafficking	Influenced by Annex to Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Political Office (Europol Convention) (OJ 316 27.11.1995), and Chapter VI of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ 239 22.09.2000); Council framework decision concerning trafficking in human beings (OJ 203, 1.8.2002) Article 1	No
TITLE II: FREEDOMS		
Article 6 right to liberty and security	ECHR Article 5	Yes
Article 7 respect for private and family life	ECHR Article 8	Yes
Article 8 protection of personal data	EC Treaty Article 286 (now Articles 16 TFEU and 39 TEU); the Data Protection Directive 95/46/EC; ECHR Article 8; CoE Convention of 28 January 1981 for the Protection of Individuals with regard to automatic processing of personal data; Regulation 45/2001 on processing personal data	No

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 9 right to marry and found a family	ECHR Article 12	Explanations say it may be wider in scope of protection when national legislation so provides
Article 10(1) freedom of thought, conscience and religion	ECHR Article 9	Yes
Article 10(2) right to conscientious objection	National constitutional traditions and to the development of national legislation	No
Article 11(1) freedom of expression and information	ECHR Article 10	Yes
Article 11(2) freedom and pluralism of the media	ECHR Article 10; Case C-288/89 Stichting Collective Antennevoorziening Gouda [1991] ECR I-4007; Protocol on System of public broadcasting Annexed to EC Treaty; Council Directive 89/552/EC	Yes. Explanations say it spells out implications of Article 10 in the context of the media. This is stated to be without prejudice to restrictions which Union law may place on Member States' rights to introduce licensing arrangements
Article 12(1) freedom of assembly and association	ECHR Article 11; Community Charter of the Fundamental Social Rights of Workers 1989 ("CCFRW") Article 11 (covering association but not assembly)	Meaning is the same but scope is wider because it applies to all levels including EU level
Article 12(2) recognition of importance of political parties at EU level in expressing will of EU citizens	ECHR Article 11; ~~Article 191 EC Treaty;~~ Article 10(4) TEU	No
Article 13 freedom of the arts and sciences	Primarily ECHR Article 10	No
Article 14(1) and (2) right to education and vocational training including free compulsory education	Common constitutional traditions of Member States; ECHR Protocol No 1 Article 1; CCFRW point 15; European Social Charter 1961 ("ESC") Article 10	Meaning the same but scope wider as it is extended to cover access to vocational and continuing training

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 14(3) freedom to found educational establishments and right of parents with respect to education of their children	As above. Article 14(3) is also in part an aspect of freedom to conduct a business	Meaning corresponds to Article 1 of the First Protocol's protection of parental rights insofar as it protects such rights
Article 15(1) freedom to choose and occupation and engage in work	Case 4/73 Nold [1974] ECR 491, Case 44/79 Hauer [1979] 3727, Case 234/85 Keller [1986] ECR 2897; ESC Article 1(2); CCFSRW point 4	No
Article 15(2) freedom to seek employment and work and provide services in any Member State	Treaty freedoms of movement for workers, establishment and services (TFEU Articles 26, 45, 49 and 56)	No
Article 15(3) entitlement of equivalent working conditions for EC workers	EC Treaty Article 137(3) (now 153(1)(g) TFEU); Article 19(4) of the European Social Charter 1961	No
Article 16 freedom to conduct a business	Case 4/73 Nold [1974] ECR 491, Case 230-78 SPA Eridiana [1979] ECR 2749, Case 151/78 Sukkerfabriken Nykøbing [1979] ECR 1, Case C-240/97 Spain v Commission; EC Treaty Article 4(1) and (2) (now Article 119 TFEU)	No
Article 17 right to property including intellectual property	ECHR Protocol 1 Article 1	Yes
Article 18 right of asylum	TEC Article 63 and Geneva Convention on Refugees of 28 July 1951	No
Article 19(1) prohibition on collective expulsion	ECHR Protocol No. 4 Article 4. Note that the UK signed Protocol No. 4 on 16 September 1963 but has yet to ratify it. Article 4 of Protocol No. 4 is not given effect by the HRA 1998 and is not included in the list of incorporated 'Convention rights' in section 1 of HRA 1998	Yes

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 19(2) prohibition of removal where there is a serious risk of torture, death penalty, torture or other inhuman or degrading treatment	ECHR Articles 2 and 3 as interpreted in Application A/161 Soering v United Kingdom (1989) 11 EHRR 439 at [88]; and Application 25964/94 Ahmed v Austria (1997) 24 EHRR 278 at [39]	Corresponds to "the relevant case-law from the ECtHR" on Articles 2 and 3[88] (despite reference to "serious" rather than "real" risk)
TITLE III: EQUALITY		
Article 20 everyone is equal before the law	Constitutional law of Member States; Case 283/83 Racke [1984] ECR 3791; Case 15/95 EARL [1997] I-1961; Case 292/97 Karlsson [2000] ECR 2737	No
Article 21(1) prohibition of discrimination on ground such as sex, race, colour, ethnic or social origin, genetic features (etc)	EC Treaty Article 13 (now Article 19 TFEU); ECHR Article 14; Convention on Human Rights and Biomedicine as regards genetic heritage Article 11	No. But Explanations state that in so far as its application corresponds with Article 14 it must be applied in the same way
Article 21(2) prohibition of nationality discrimination	EC Treaty Article 12 (now Article 18 TFEU)	No
Article 22 respect for cultural, religious and linguistic diversity	Article 6 TFEU; EC Treaty Article 151(1) and (4) (now Article 167(1) and (4) TFEU); Amsterdam Treaty on the status of churches and non-confessional organisations, declaration 11 of Final Act (now Article 17 TFEU). Respect for cultural and linguistic diversity is also now laid down in Article 3(3) TEU	No
Article 23(1) equality between men and women including in employment and pay	EC Treaty Articles 2, 3(2) and 141(3) (now Articles 3 and 8 and 157 TFEU); revised ESC Article 20; CCSRW point 16; Council Directive 76/207/EEC on equal treatment in employment and working conditions	No

[88] Note however that Art. 19 itself does not apply to removals that would violate other articles such as Art. 6 or 8 of the ECHR.

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 23(2) permissibility of positive discrimination	EC Treaty Article 141(3) (now Article 157(4) TFEU)	No
Article 24 on the rights of the child	New York Convention on the Rights of the Child 1989	No
Article 25 respecting the rights of the elderly to lead dignified and independent social life and participate in social and cultural life	Revised ESC Articles 23; CCFSRW points 24 and 25	No
Article 26 on integration of persons with disabilities	ESC Article 15; revised ESC Article 23; CCFSRW point 26	No
TITLE IV: SOLIDARITY		
Article 27 workers' right to information and consultation	Revised ESC Article 21; CCFSRW points 17 and 18. There is a considerable Union *acquis* in this field: EC Treaty Articles 138–139 (now Articles 154–155 TFEU); Directives 2002/14/EC (general framework for informing and consulting employees), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (works councils)	No
Article 28 right of collective bargaining and action	ESC Article 6; CCFSRW points 12–14; ECHR Article 11	Yes
Article 29 right of access to free placement services	ESC Article 1(3); CCFSRW point 13	Yes
Article 30 right not to be unjustifiably dismissed	Revised ESC Article 24; Directive ~~77/187/EEC~~ 2001/23/EC on transfer of undertakings; Directive 80/987/EEC on insolvency protection (as amended by Directive 2002/74/EC)	Yes
Article 31(1) right to fair and just working conditions	Directive 89/391/EEC on health and safety at work; ESC Article 3; CCFSRW point 19; revised ESC Article 26	No

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 31(2) right to limit on maximum working hours and rest periods	Directive 93/104/EC on working time; ESC Article 2; CCFSRW point 8.	No
Article 32 prohibition on child labour	Directive 94/33/EC on protection of young people at work; ESC Article 7; CCFSRW points 20–23	No
Article 33(1) legal, economic and social protection of the family	ESC Article 16	No
Article 33(2) maternity rights	Directive 92/85/EEC on safety and health of pregnant workers; Directive 96/34/EC on parental leave; ESC Article 8	No
Article 34 entitlement to social security and social assistance	EC Treaty Articles 137 and 140 (now Articles 153, 156 TFEU); ESC Articles 12, 13(4); CCFSRW points 2 and 10; Regulations 1408/71 and 1612/68; revised ESC Articles 30–31	No
Article 35 health care	EC Treaty Article 152 (now Article 168 TFEU); ESC Article 11	No
Article 36 on access to services of general economic interest	EC Treaty Article 16 (now TFEU Article 14)	No
Article 37 environmental protection	EC Treaty Articles 2, 6 and 174 (now Article 3 TEU, Articles 11, 191 TFEU); also draws on some national constitutions	No
Article 38 consumer protection	EC Treaty Article 153 (now Article 169 TFEU)	No
TITLE V: CITIZENS' RIGHTS		
Article 39(1) right to vote and stand for election to European Parliament	EC Treaty Article 19(2) (now Article 20(2) TFEU)	No
Article 39(2) Parliament shall be elected by universal suffrage in free and secret ballot	EC Treaty 190(1) (now Article 14(3) TEU); basic principles of the electoral system in a democratic state	No

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 40 on right to vote and stand for a candidate in municipal election	EC Treaty Article 19(1) (now Article 22(1) TFEU); Article 20(2) TFEU	No
Article 41(1) and (2) right to have affairs handled impartially, fairly and within a reasonable time by institutions of the Union	ECJ case law on EU administrative law	No
Article 41(3) right to have Community make good damage caused by its servants	EC Treaty Article 288 (now Article 340 TFEU): Charter Article 47	No
Article 41(4) right to correspond with institutions in any Community language	EC Treaty Article 21 (now Articles 20(2)(d) TFEU); Article 25 TFEU	No
Article 42 right of access to documents	EC Treaty Article 255 (now Article 15(3) TFEU); Regulation 1049/2001	No
Article 43 right to refer complaints to Ombudsman	EC Treaty Articles 21 and 195 (now Articles 20 and 228 TFEU)	No
Article 44 right to petition European Parliament	EC Treaty Articles 21 and 194 (now Articles 20(2)(a) and 227 TFEU)	No
Article 45 freedom of movement and residence	EC Treaty Article 18 (now Article 22(2)(a) TFEU)	No
Article 46 right to diplomatic protection of non-home Member State	EC Treaty Article 20 (now Article 23 TFEU); Article 20(2)(c)	No
CHAPTER VI: JUSTICE		
Article 47(1) right to effective remedy	ECHR Article 13	No. Goes further than Strasbourg in requiring effective remedy before a court
Article 47(2) right to a fair and public hearing within a reasonable time by an independent and impartial tribunal	ECHR Article 6(1)	Meaning the same but scope of application wider: importantly is not limited to determinations of civil rights and obligations or criminal charges

Articles of EU Charter	**Source/interpretive aid**	**Whether provision has same scope and meaning as ECHR**
Article 47(2) right to legal aid to ensure effective access to justice	ECHR Article 6(1)	As above
Article 48 presumption of innocence and right of defence	ECHR Article 6(2) and (3)	Yes
Article 49(1) and (2) right not to be found guilty of offence which did not exist at time committed and *lex mitior* principle	Principle of non-retroactivity; International Covenant on Civil and Political Rights of 16 December 1966 Article 15; ECHR Article 7	Yes (including *lex mitior* principle following Scoppola v Italy (2010) 51 EHRR 12)
Article 49(3) proportionality of criminal penalties	Common constitutional traditions of Member States and case law of ECJ	No
Article 50 double jeopardy	ECHR Protocol No 7 Article 4; "non bis in idem" principle under Community law (e.g. Joined Cases 18/65 and 35/65 Gutman v Commission [1966] ECR 103, Joined Cases T-305/94 and others, Limbergse Vinyl Maatschappij NV v Commission [1990] ECR II-931)	Meaning is the same but scope is wider and level between courts of the Member States

- *Postscript*: In *ZZ v Secretary of State for the Home Department* [2011] EWCA Civ 440 the Court of Appeal (Maurice Kay, Carnwath and Moses LJJ) held that procedures before the SIAC, which were given a "clean bill of health" by the House of Lords in *RB (Algeria)* [2009] UKHL 10 [2010] 2 AC 110, did not breach Art. 47 of the Charter where the individual concerned was an EU national because, *inter alia*, SIAC procedure is not "implementing" Union law and national security is in an area within the "sole responsibility" of Member States. A reference was nonetheless made on the question whether the procedures breached the principle of effective judicial protection under the Citizenship Directive 2004/38/EC, the resolution of which is likely to require consideration of the Charter.