

The European Union (Withdrawal) Bill House of Lords, Second Reading, Tuesday 30th January 2018

Charter of Fundamental Rights – a children's rights perspective

Background

The Charter of Fundamental Rights ('the Charter') sets out in a single document the fundamental rights protected in EU law and is of particular importance to the protection of children's rights. Whilst the general approach of the Withdrawal Bill is to incorporate EU law into domestic law, the Bill provides that the Charter will not be retained.¹ The UK Government's position is that abandoning the Charter "will not affect the substantive rights from which individuals already benefit in the UK".² The UK Government elaborated this position in its "right-by-right analysis" of the Charter published on 5th December 2017.³ In that report, the UK Government attempted to show how rights contained in the Charter would be protected after Brexit through domestic law, general principles or the UK's membership of other human rights treaties. The report concluded that Charter rights are already sufficiently protected elsewhere and, therefore, removing the Charter itself will not result in a reduction in rights. Subsequent analysis, however, casts doubt on this conclusion. A legal Opinion sought by the Equalities and Human Rights Commission ('EHRC') in response to the right-by-right analysis concluded that "a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK".⁴ This briefing addresses some of the concerns raised in the legal Opinion and supports its conclusion that the only way to ensure there is no reduction in the protection of children and young people's rights is for relevant parts of the Charter to be incorporated into the Withdrawal Bill.

How does the Charter of Fundamental Rights promote and protect children's rights?

Preserving Charter rights is particularly important in relation to children and young people. The Charter supports children and young people's rights in a number of ways: It enhances rights that already exist in the European Convention on Human Rights (ECHR) such as the right to education.⁵ It also includes key rights enshrined in the UN Convention on the Rights of the Child (UNCRC)⁶ These include the right to care and protection, to express views freely, in accordance with their age and maturity, the principle of best interests being a primary consideration and the right to know both parents.⁷ Children's rights enshrined into the Charter have been translated into practice through EU legislation, policy and case

¹ Clause 5(4)

² UK Government, Department for Exiting the European Union, [Charter Factsheet](#)

³ right by right analysis reference

⁴ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 2; see also para 44.

⁵ CFR Article 14: Right to Education

⁶ CFR Article 24: Rights of the Child.

⁷ These can be aligned with UNCRC Article 3 (best interests), Article 5 (the evolving capacities of the child), Article 6 (survival and development), Article 7 (to know and be cared for by both parents), Article 12 (to express views freely and have them taken into account).

law.⁸ This has included areas as diverse as legislation on child-friendly justice systems⁹ and ensuring the best interests of unaccompanied asylum seeking children¹⁰, through to policies designed to tackle high youth unemployment rates¹¹ and child obesity.¹²

Effect of removing the Charter on individual's rights

The UK Government's right-by-right analysis takes each Charter right and identifies whether the UK is party to other international treaties containing a similar right, whether domestic protection of the right exists, and whether the right forms part of the general principles of EU law.¹³ The UK Government's conclusion is that each of the Charter rights shall be protected post-Brexit based on some or all of these grounds. However, this is not the case for the following reasons:

1. Gaps in protection arising from loss of Charter

Charter has created new rights and extended scope of existing rights

The UK Government's right-by-right analysis is superficial and merely identifies where *aspects* of a Charter right shall be protected by other means after Brexit. However, this is not the same as these rights being protected in their entirety. This is particularly important given that the Charter has created new rights and extended certain existing rights.

The Charter contains certain provisions of great importance to children and young people which are not protected in domestic law at constitutional level.¹⁴ Additional rights under the Charter include a specific provision on the rights of the child¹⁵ and a freestanding right not to be discriminated against.¹⁶ In relation to both of these examples, the legal Opinion obtained by EHRC concludes that these rights will not be fully reflected in domestic law upon the loss of the Charter.¹⁷

In cases where certain rights are expressed in both the Charter and other international instruments, the scope of the Charter-based right is often broader. For example, whilst the right to a fair trial under Article 6 ECHR is limited to civil and criminal proceedings, Article 47 of the Charter is not. Accordingly, the Charter's protection is also available in administrative cases, such as immigration decisions.¹⁸ Other examples of the broader scope of particular rights can be found in the areas of data protection and migration law.

⁸ Eurochild (2014) [Applying the EU Charter of Fundamental Rights to children's rights in the EU](#)

⁹ [Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings](#), 2013/0408 (COD). [Directive establishing minimum standards on the rights, support and protection of victims of crime, and on-going FRA research on forms of child participation in criminal and civil judicial proceedings](#), 2012/29/EU

¹⁰ COM (2014) 382 final

¹¹ [EU Work Plan for Youth \(2014 –2015\)](#)

¹² [EU Action Plan on Childhood Obesity 2014-2020](#), 24 February 2014.

¹³ note, however no right of action based on the general principles of EU law - EU(W)B Schedule 1 para 3 (no right of action in relation to breach of "general principles of EU law")

¹⁴ Contrast those rights which are included in the ECHR, which are given constitutional protection at UK domestic level through the Human Rights Act 1998.

¹⁵ Article 24

¹⁶ Contrast the right to non-discrimination under the Article 14 ECHR which is "parasitic" upon another ECHR right being engaged. Whilst the ECHR does have a stand-alone right to non-discrimination under Protocol 12, the UK has not ratified this, the UK Government having considered that to ratify it would make its "potential application...too wide" see UK Parliament, ["Joint Committee on Human Rights: Seventeenth Report"](#) (23 March 2005)

¹⁷ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 38.

¹⁸ AZ [2017] EWCA Civ 35

The UK has not fully incorporated certain UN human rights treaties

The UK Government is correct in stating that certain Charter rights are also contained in UN treaties which the UK has ratified. However, as no action has been taken to incorporate these treaties, including the UN Convention on the Rights of the Child, the rights they contain do not have direct effect in domestic law. Accordingly, it is misleading for the UK Government to imply, as it does in its right-by-right analysis, that rights contained in *unincorporated* treaties will be adequately protected after Brexit. The legal Opinion states that such references by the UK Government to unincorporated human rights treaties “should be viewed with caution”.¹⁹

No right of action based on general principles of EU law

Furthermore, much of the UK Government’s argument that rights will not be affected by the removal of the Charter relies on its assertion that many Charter rights also form general principles of EU law. However, such general principles shall lose much of their legal force given that the Withdrawal Bill provides they may only be used in aiding the interpretation of retained EU law, and may not be used as the basis for any legal challenge.²⁰ Such general principles shall, accordingly, be unenforceable in UK Courts. The legal Opinion obtained by EHRC concludes that this is “a real and significant devaluation in human rights protection”.²¹

2. Loss of Charter remedies

Losing the Charter means losing the remedies it provides to individuals. In certain cases, the Charter provides a stronger way of enforcing human rights than the Human Rights Act 1998 (incorporating the ECHR).²² This is because under the Charter, the conflicting national legislation is “disapplied”, whereas under the Human Rights Act, conflicting legislation is merely subject to a “declaration of incompatibility”.²³ The recent *Benkharbouche*²⁴ decision is illustrative of the practical effects of this. In this case, a violation was established under both the Charter and the Human Rights Act. However, an effective remedy was only available under the Charter.

Concerns and Conclusion

The UK Government argues that removing the Charter shall not result in a reduction in rights as Charter rights are already sufficiently protected elsewhere, for example in domestic law and international treaties. However, the UK Government’s right-by-right analysis published on 5th December 2017 is superficial and fails to address gaps in protection which will arise if relevant Charter rights are not preserved. The approach of the Withdrawal Bill, as currently drafted, accordingly does not achieve the UK Government’s stated intention that rights shall not be weakened. This will have a particular impact

¹⁹ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 35.

²⁰ Clause 6(3) and Schedule 1, para 3; see also Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 33

²¹ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 39.

²² Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), paras 20-21

²³ HRA 1998 s.4

²⁴ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62

on children and young people’s rights protections. The only way to ensure that the Government remains true to its intention, is for the Charter to be incorporated as part of “retained EU law”.²⁵

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²⁵ see Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 44