



The European Union (Withdrawal) Bill House of Commons consideration of Lords' amendments, Tuesday 12 and Wednesday 13 June 2018

Charter of Fundamental Rights – a children's rights perspective

Background

The UK Government's plan not to retain the EU Charter of Fundamental Rights (the Charter) through the EU (Withdrawal) Bill (the Bill) is a concern, particularly in relation to children.

The Charter enhances rights for children that already exist in the European Convention on Human Rights (ECHR) such as the right to education.ⁱ It also includes key rights enshrined in the UN Convention on the Rights of the Child (UNCRC)ⁱⁱ such as 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.ⁱⁱⁱ

The UK Government has stated that abandoning the Charter "*will not affect the substantive rights from which individuals already benefit in the UK*".^{iv} This is not the case. A Legal Opinion sought by the Equalities and Human Rights Commission (EHRC), concludes 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*".^v

Gaps in protection arising from loss of the Charter:

- The Charter has created new rights and extended existing rights: The UK Government's right-by-right analysis is superficial and merely identifies where aspects of a Charter right are protected domestically. This is not the same as these rights being protected in their entirety.
- The UK has not incorporated certain treaties into the domestic law, such as the UNCRC. It's misleading to imply that rights contained in unincorporated treaties would be adequately protected after Brexit as they would lack legal enforceability.

For examples of how the Charter has helped to promote and protect children's rights see below.

We urge MPS to support the Lord's amendment to retain the Charter of Fundamental Rights in the EU (Withdrawal) Bill, as below:

Charter of Fundamental Rights: the Charter of Fundamental Rights remains part of UK law after exit day (other than its preamble and Chapter V which concerns rights to participate in European elections). Lords amendment 15, agreed on division by 316 to 217

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.^{vi} It also includes key rights enshrined in the UN Convention on the Rights of the Child (UNCRC).^{vii} 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.^{viii}

Examples of the Charter promoting and protecting children's rights

Children's rights enshrined into the Charter have been translated into practice through EU legislation, policy and case law.^{ix} This has included areas as diverse as legislation on child-friendly justice systems^x and ensuring the best interests of unaccompanied asylum seeking children^{xi}, through to policies designed to tackle high youth unemployment rates^{xii} and child obesity.^{xiii}

For example, the Charter has strongly influenced the development of EU regulations in relation to cross-border family law. In 2016, 1 in 10 children born in the UK were to families with one parent from the UK and another from an EU member state. EU cross-border family law regulations (covering issues such as child custody, contact, child abduction and child maintenance^{xiv}) provide these families with certainty about their legal rights in difficult situations. If a family breaks down and disputes arise between UK/EU parents, the EU framework ensures child rights-based court proceedings that make a difficult situation slightly easier for a child to cope with. For example, regulations ensure children have the opportunity to have their opinion heard during court proceedings that determine if they are to be returned to a parent in another country.^{xv} Further Charter-based proposals are being agreed that will strengthen children's rights further, ensuring that the best interests of the child is a mediating principle^{xvi} and including additional safeguards to speed up proceedings^{xvii} and fast-track the enforcement of access rights^{xviii} to save time and costs for families.

The impact of the Charter in informing the development of child-rights focussed cross-border family law regulations cannot be underestimated. This is one of many examples that show the value of the Charter. The Charter's strength goes beyond solely creating enforceable rights for children: it acts as a guiding light from which legislation and policy can be developed that protects, respects and fulfils children's human rights.

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.^{xix} 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.¹ Additional rights under the Charter include a specific provision on the rights of the child² and a freestanding right not to be discriminated against.³ 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.^{xx}

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.^{xxi} Other examples of the broader scope of particular rights can be found in the areas of data protection and migration law.

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".^{xxii}

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.^{xxiii} 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".^{xxiv}

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).^{xxv} 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".^{xxvi} The recent *Benkharbouche*^{xxvii} decision is illustrative of the practical effects of this. In

¹ Contrast those rights which are included in the ECHR, which are given constitutional protection at UK domestic level through the Human Rights Act 1998.

² Article 24

³ 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)

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 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”.⁴

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

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- ⁱ CFR Article 14: Right to Education
- ⁱⁱ CFR Article 24: Rights of the Child.
- ⁱⁱⁱ 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).
- ^{iv} UK Government, Department for Exiting the European Union, [Charter Factsheet](#)
- ^v Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 2; see also para 44.
- ^{vi} CFR Article 14: Right to Education
- ^{vii} CFR Article 24: Rights of the Child.
- ^{viii} 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).
- ^{ix} Eurochild (2014) [Applying the EU Charter of Fundamental Rights to children’s rights in the EU](#)
- ^x [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
- ^{xi} COM (2014) 382 final
- ^{xii} [EU Work Plan for Youth \(2014 –2015\)](#)
- ^{xiii} [EU Action Plan on Childhood Obesity 2014-2020](#), 24 February 2014.
- ^{xiv} Procedural matters in relation to cross-border disputes across EU member states are dealt with under the Brussels II *bis* Regulation (“BIIR”).
- ^{xv} BIIR Article 11(2) . In abduction return proceedings, BIIR provides “it shall be ensured that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity”.
- ^{xvi} The proposed Recast recognises a greater linkage between the best interests of the child and ensuring the child has an opportunity to be heard (Recital 13).
- ^{xvii} Recast BIIR Proposal art 25(4)
- ^{xviii} 3 BIIR Article 41 which by abolishes the requirement of *exequatur* so access orders are directly enforceable in another Member State provided they are accompanied by the appropriate certificate.
- ^{xix} 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”)
- ^{xx} Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 38.
- ^{xxi} AZ [2017] EWCA Civ 35
- ^{xxii} Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 35.
- ^{xxiii} 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
- ^{xxiv} Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 39.
- ^{xxv} Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), paras 20-21
- ^{xxvi} HRA 1998 s.4
- ^{xxvii} *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62