



THE UNIVERSITY of EDINBURGH  
Edinburgh Law School



## Scottish Universities Legal Network on Europe

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### Human Rights and Brexit

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**1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

**For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

**Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).**

**a. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

The UK is bound by numerous human rights instruments both at the global and at the regional (European) level. The two key instruments that have effect in domestic law are the European Convention on Human Rights, which – as far as it is binding on the UK – is incorporated into UK law by the Human Rights Act 1998 (HRA); and the EU's Charter of Fundamental Rights (CFR), which is applicable in the domestic law of the UK by virtue of the European Communities Act 1972 and in Scotland by virtue of sections 29 and 57 of the Scotland Act 1998.

### **The European Convention on Human Rights**

The ECHR guarantees human rights subject to 'dynamic evolution' interpretation. These are principally, but not strictly, civil and political rights such as the right to life, the prohibition of torture, the right to liberty, fair trial, the right not to be punished without law, the right to respect for private and family life, freedom of religion, freedom of expression, freedom of assembly and association, the right to marry, the right not to be discriminated against,<sup>1</sup> the right to property, the right to education and the right to free elections.<sup>2</sup>

### **The EU Charter of Fundamental Rights**

By contrast, the Charter is broader. While it incorporates the ECHR,<sup>3</sup> it contains numerous updated versions of ECHR rights. For instance, the right to a fair trial is not restricted to civil rights and obligations and criminal charges (see Article 6 ECHR) but is guaranteed unrestricted (see Article 47 CFR). The same is true for the right to marry, which in the Charter is not confined to men and women, but allows for same sex marriages. The Charter also features an express right to data protection, which under the ECHR can only be protected as part of the right to private life.

In addition, the Charter contains important additional protections, in particular in the field of anti-discrimination law with its stand-alone anti-discrimination clause and in the area of social rights. It is not clear however, whether the social provisions contained in Title IV of the Charter are fully-fledged rights or mere 'principles'. The Charter contains a distinction to this effect<sup>4</sup>, which has not yet been clarified to a sufficient extent by the Court of Justice. The key difference between a right and a

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<sup>1</sup> Note that this right is not a free-standing anti-discrimination provision as it requires a connection with one of the freedom rights.

<sup>2</sup> Note that the HRA does not provide for the right to an effective remedy laid down in Article 13 ECHR.

<sup>3</sup> And must be interpreted in the same manner, see Article 52 (3) CFR.

<sup>4</sup> Article 52 (5) CFR.

principle appears to be that a principle cannot be invoked on its own, but only where it has been specifically implemented by the legislature.

#### **Where ECHR and EU Charter do not overlap:**

- The EU Charter is more extensive on bioethics, social rights and general protections on environment and consumer protections.<sup>5</sup>
- The Charter only applies where there is a link to EU law as the CJEU set out in the judgment in *Fransson*.<sup>6</sup> In contrast, the ECHR does not require domestic provisions to have an EU or ECHR link in order to be subject to rulings of the European Court of Human Rights.

#### **Legislative Hierarchy**

The HRA incorporates the ECHR into UK primary legislation and is binding on all acts of 'public authorities'.<sup>7</sup> Where an Act of Parliament (UK) is contrary to the provisions of the HRA, higher courts can make a 'declaration of incompatibility'. This leaves the Act of Parliament intact, but serves the purpose of pointing out that the legislation is problematic in human rights terms and gives Parliament the opportunity to rectify this. The HRA also provides for a fast track procedure to remove the incompatibility by way of a remedial (ministerial) order if there are compelling reasons for this.<sup>8</sup>

Where an Act of Parliament (Scotland) is contrary to the provisions of the HRA that legislation is considered to be invalid and not law.<sup>9</sup> The same applies to legislation from the other devolved parliaments.<sup>10</sup>

The situation is different where the EU Charter of Fundamental Rights is concerned. EU law takes primacy over conflicting domestic law including Acts of Parliament.<sup>11</sup> This does not mean that an Act of Parliament violating Charter rights is void. It means, however, that it is 'disapplied' in the concrete case.<sup>12</sup>

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<sup>5</sup> *Article 3*: Right to the integrity of the person; *Article 8*: Protection of personal data; *Article 13*: Freedom of the arts and sciences; *Article 15*: Freedom to choose an occupation and right to engage in work; *Article 16*: Freedom to conduct a business; *Article 18*: Right to asylum (distinct right rather than assumed as under Article 3 ECHR); *Article 21* on non-discrimination is stand-alone and therefore distinct from ECHR Article 14 which can only be used in conjunction with other convention rights; *Articles 27-33*: More extensive work-related rights; *Article 34*: Social security and social assistance; *Article 35*: Health care; *Article 41*: Right to good administration; *Articles 37 and 38*: General protections on environment and consumer protections (respectively).

<sup>6</sup> See also Article 51 (1) of the Charter.

<sup>7</sup> Section 6 HRA.

<sup>8</sup> See s. 10 HRA.

<sup>9</sup> See s. 29 Scotland Act 1998

<sup>10</sup> See s. 6 Northern Ireland Act 1998; s. 94 Government of Wales Act 2006.

<sup>11</sup> First established by the Court of Justice of the EU in { 1964 #1501} and accepted for UK law by the House of Lords in { 1990 #1608} (per Lord Bridge); the Charter also has direct effect, which means that it is not necessary to pass a specific Act of Parliament allowing for the applicability of the Charter. Due to direct effect individuals can rely on Charter rights directly before the domestic courts, see { 1963 #1732}.

<sup>12</sup> An example for the differing effects of the HRA and the EU Charter is the case of *Benkharbouche and Janah* discussed below.

However, the Charter states that it is only binding on the Member States 'when they are implementing Union law'.<sup>13</sup> A Member State is deemed to implement EU law when it acts within the scope of EU law. This is typically the case in two types of situations. First, situations where a Member State acts on the basis of EU law; and second cases where Member States derogate from European Union free movement law.

- b. For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

'Human rights' are not, in terms, reserved under the Scotland Act. Consequently it was within the competence of the Scottish Parliament to legislate to establish the Scottish Human Rights Commission.

On the other hand the Scotland Act does exclude from Parliament's competence the power to legislate on equal opportunities and the UK-level Equality and Human Rights Commission has correctly been given powers in those areas by the UK Parliament. That Commission is expressly prohibited from straying into areas within the SHRC's own remit.<sup>14</sup>

- c. Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).**

**Acts of Parliament:**

EC Act  
Human Rights Act  
Scotland Act

**EU legal sources:**

EU Charter  
ECHR

- 2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.**

- a. Impact**

**Stricter standard of review:**

Human rights have had an overall positive impact in UK law. They have opened up new areas for judicial review and the review conducted is much more thoroughly than would be the case under traditional common law principles. Under the common law, courts are restricted to reviewing acts of public authorities as to their unreasonableness, which is a comparatively low standard of review.<sup>15</sup> Unreasonableness has traditionally been understood to mean a decision that is 'so outrageous in its

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<sup>13</sup> See Article 51 (1) of the Charter.

<sup>14</sup> See further Himsworth, Chris (2011) Devolved Human Rights University of Edinburgh, School of Law, Working Paper Series, No 2011/22

<sup>15</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.<sup>16</sup>

By contrast, where a human right is engaged, the courts can review the proportionality of an act, which requires them not only to ask whether it suitably pursues a legitimate aim, but also whether the authority could have acted in a manner that would have restricted the human right to a lesser extent and whether it has struck the correct balance between human rights protection and the aim pursued (e.g. protection of the public from harm, etc).

## b. What are the public benefits of these rights?

### Specific examples from case law from the EU Charter:

- **Discrimination by association:** In *Coleman v Attridge Law* (2008) direct discrimination was defined to cover discrimination by association. – Later incorporated into the Equality Act 2010.
- **Digital privacy:** In *Digital Rights Ireland* (2014) the ECJ held that the electronic retention of some kinds of personal data affected the Charter rights guaranteed in Article 7 (right to private life) and Article 8 (right to protection of personal data). Further, in *Vidal-Hall v Google Inc* (2015), the Court of Appeal held that the Data Protection Act 1996 (which limited the circumstances in which damages could be awarded for distress suffered because of a breach of that Act) conflicted with privacy rights under Articles 7 and 8 of the Charter and must be disapplied.
- **Protection from discrimination for trans people:** *P v S and Cornwall County Council* (1996) led to amendments to the Sex Discrimination Act to provide protection from discrimination on grounds of gender reassignment in employment.
- **Sex discrimination and equal pay:** ECJ case law has led to greater protection in domestic law in a number of areas. These include extending equal pay to include all forms of pay including pensions; giving women special protection against discrimination during pregnancy without the need for comparison with, for example, a sick man; extending the protection against harassment; and ensuring full compensation for discrimination.<sup>17</sup>
- **Reduced state immunity:** In *Benkharbouche v Embassy of the Republic of Sudan* (2015), the Court of Appeal held that the law on state immunity, which prevented the claimants from accessing the courts to enforce their employment rights, breached fair trial rights under the Charter.

### Specific examples from case law of the ECHR:

- **Rights of homosexuals and transsexuals:** *Dudgeon v UK* (1981), the criminalisation of homosexuality in Northern Ireland was illegal. Also, *Goodwin v UK* (2002), the right to full legal recognition of the post-operative sex of a male to female transsexual.<sup>18</sup>

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<sup>16</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 per Lord Diplock.

<sup>17</sup> See further Equality and Human Rights Commission online summaries. Available at: <https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights>

<sup>18</sup> For a list of UK cases before the European Court of Human Rights between 1975-2016 see House of Commons Briefing Paper Number 05611, 12 May 2016, 'UK cases at the European Court of Human Rights since 1975'. Available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05611#fullreport>

- **Protection of journalist sources and freedom of expression:** Financial Times Ltd and Others v. the UK (2009); Goodwin v UK (1996); Observer and Guardian v. the UK (1991); Sunday Times v UK (1979).
- **Freedom of Religion:** Eweida and Others v. the UK (2013), concerning the right to wear Christian cross at work.
- **Children:** Z and Others v. the UK (2001), state has positive obligation to protect. Also A. v. the UK (1998).
- **Right to life:** McCann and Others v. the UK (1995), restrictions on lawful interference with right to life; McKerr v. the UK and Hugh Jordan v. the UK (2001), obligation to undertake full and public investigation in respect of police shootings.
- **Freedom of Association and trade unions:** Redfearn v. the UK (2012); Wilson and the National Union of Journalists and Others v. the UK (2002); Young, James and Webster v. the UK (1981).
- **Limits to police powers, surveillance and data protection:** R.E. v. the United Kingdom (2015) covert surveillance of legal consultations breached right to respect for private life; Gillan & Quinton v UK (2010), limiting police powers to stop and search individuals without reasonable suspicion of wrongdoing; Liberty and Other Organisations v. the UK (2008), surveillance of external communications of human rights lawyers breached right to respect for private life; Malone v. the UK (1984), police powers to intercept telephone calls and the lack of any legislation to regulate this breached right to respect for private life.

### 3. What are the reasonably anticipated developments in this area of rights?

#### a. At the EU and / or Council of Europe?

##### At the EU:

##### - *ESC rights and Migration:*

In the EU priorities adopted for the 71st session of the UN General Assembly in July 2016, the EU has also signalled that it will “*seek opportunities to promote the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights*”.<sup>19</sup> Human rights were also highlighted as a priority in dealing with the refugee crisis: “*The EU we will continue to work towards ensuring human rights-compliant solutions to the migration and refugee crisis.*”<sup>20</sup>

Also, the accession of the EU to the Council of Europe is a constitutional change of significance.

##### At the Council of Europe /European Court of Human Rights:

##### - **ESC rights and Migration:**

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<sup>19</sup> EU priorities at the United Nations and the 71st United Nations General Assembly September 2016 – September 2017, Council of the European Union 11201/16, Brussels, 18 July 2016. Available at: <http://data.consilium.europa.eu/doc/document/ST-11201-2016-INIT/en/pdf>

<sup>20</sup> Ibid at page 12.

See growing admissibility of cases concerning pensions, taxation and benefits, not always resulting in the finding of violations: British Gurkha Welfare Society and Others v. the UK (2016); Fazia Ali v. the UK (2015); S.S. v. the UK and F.A. and Others v. the UK (2015); McDonald v. the UK (2014).

**b. How might this be found out and explored further (contacts in Brussels/Strasbourg?)**

Mainly developments in case law, on the Charter and also at the CoE level both in the ECtHR and in the European Social Committee.

Possible contact from the European Social Committee is [Redacted]

From the Council of Europe: [Redacted]

From the ECtHR: [Redacted]

**4. What is the sectorial potential for Scotland to progress/lead in this area of social protections /rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)**

**a. Current devolved position:**

Human rights as such are not a reserved power. Schedule 4 of the Scotland Act merely protects the HRA from being modified by an Act of the Scottish Parliament. But this does not mean that Scotland could not adopt its own human rights bill so long as it is compliant with the HRA (or a British Bill of Rights). Hence if Scotland intended to protect certain rights better than the overall UK regime it could do so within the powers of the devolution settlement. There may be certain limits where social rights are concerned, however, given that employment relations are a reserved matter. Thus at least as far as private employment law relationships are concerned, Scotland cannot legislate.

See further above at s.1. on devolved position.

**b. With further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader):**

- The fact that employment relations are a reserved matter would seem to put limitations on what Scotland can do.
- Moreover, if Scotland intended to sign up to international conventions/treaties in its own name it would need to be given these powers as foreign affairs are currently reserved. One could envisage a model like in Belgium where the regions and communities (six altogether) have external powers mirroring their internal powers (*in foro interno in foro externo*).

The following areas are currently reserved, with further devolution in this area Scotland would have potential to progress in this area of social protection and rights:

- *Immigration and nationality*
- *National security, interception of communications, official secrets and terrorism*
- *Emergency powers*
- *Extradition*
- Transport (also has implications for right to healthy environment).
- *Social Security*
- *Health and Medicines*

- *Media and Culture*
- *Equal opportunities*
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**c. As an independent nation:**

- There would be no limitations.

**5. What will Brexit change?**

As explained in the introduction, the Charter only applies where an EU Member State acts within the scope of EU law. Obviously, once the UK has formally left the EU, the Charter will cease to be binding on the UK and to have effect in its domestic law. The rights contained in the Charter will therefore no longer protect individuals in the UK. Given that the Charter protects a greater number of rights than the ECHR and given its greater effectiveness, this will lead to a tangible lowering of human rights protection.

The HRA is indirectly affected by Brexit. The removal of membership of the EU further reduces incentives to comply with ECHR decisions and the Prime Minister has regularly advocated repeal of the Human Rights Act.

Brexit weakens the overall human rights framework. Apart from the loss of the Charter, it removes any constraints on ECHR withdrawal which are placed on EU Member States. Moreover, the Charter fulfils a consolidating and supporting function in the UK's (and Scotland's) human rights landscape. Any attempt to water down the human rights contained in the HRA by e.g. introducing a British Bill of Rights would be hampered by the existence of the Charter. This is because the Charter would continue to be interpreted in light of the ECHR so that in cases where a UK public body was acting within the scope of EU law the stronger (ECHR-CFR) protection would apply; and where it was acting outside that scope the weaker (British Bill of Rights) protection would apply. Hence the Charter has the effect of entrenching human rights in the constitutional law of the UK to a certain extent. This in turn made radical human rights reform difficult, not only because it would have placed certain limits affecting such reform, but also because one could have reasonably asked what the point of reforming the HRA was in light of the continued existence of the Charter.

Brexit will therefore free up the UK's legal system for far-reaching human rights reform, and may make it more likely that the HRA will be repealed, severing remaining ties to the ECHR.