

BREXIT AND HUMAN RIGHTS

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Rights protection in the UK is multi-faceted and multi-layered. *Multi-faceted* because our rights derive from several sources: from the European Convention on Human Rights (the ECHR or the Convention); from the general principles of EU law or from its Charter of Fundamental Rights (the EU Charter), as well as from the common law. These sources overlap in various ways: the rights protected by the EU Charter draw heavily from the Convention rights, and the latter, arguably, reflect protections already found in the common law.¹ However, there are also significant points of divergence: what registers as a common law right depends upon the cases that come before the courts (so, common law rights are well developed in relation to access to justice and procedural fairness, but less so in other areas), whilst the Charter is simultaneously less expansive than the Convention in its scope (being applicable only to action taken in the sphere of EU law), yet more expansive than the Convention in its coverage (with greater protections for certain social, economic and equality rights as well as for so called “third generation” rights such as those relating to data protection, bio-ethics and good administration). *Multi-layered* because the level and scope of rights protection varies significantly according to the distribution of power across the UK’s territorial constitution. Action taken at the level of the EU might engage and be limited by the general principles or by Charter rights; UK-level action might engage and be limited by the Charter rights (where that action takes place within the sphere of EU law), the Convention rights (given domestic effect by the Human Rights Act 1998 (HRA)) or common law rights; action by the devolved institutions might engage Charter rights and/or Convention rights *directly* by their incorporation into the devolution statutes,² as well as the Convention rights by virtue too of the HRA, or common law rights.

Here, I will tentatively sketch what might be at stake for fundamental rights in Scots law where one layer of protection is removed (part C) after first outlining the ways in which those rights are protected in EU law (part A) and the effect on those protections of the European Union (Withdrawal) Bill 2017-19, as introduced (part B).

A. THE EU AND FUNDAMENTAL RIGHTS

There was no explicit reference to fundamental rights in the European Communities’ founding treaties. Nevertheless, protection of fundamental rights as a general principle of EU law began to emerge in the European Court of Justice’s (ECJ) jurisprudence during the 1970s. Initially the ECJ had been resistant to arguments from fundamental rights, concerned that the unique quality of the European project as set out in *Van Gend en Loos*³ and in *Costa*⁴ would be threatened by the invalidation by domestic courts of Community law on the basis of incompatibility with indigenous constitutional norms.⁵ However, the ECJ was alive to a second threat: that domestic courts would be reluctant to embrace the supremacy of EU law on the basis that stronger protections existed for

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¹ *R (Daly) v SSHD* [2001] UKHL 26, [2001] AC 532 at para 30 per Lord Cooke of Thorndon.

² Scotland Act 1998 s 29.

³ Case 26/2 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1964] CMLR 423.

⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁵ M Hunt, *Using Human Rights Law in English Courts* (1997) 263-264.

fundamental rights at the domestic compared with the supra-national level.⁶ So, in *Stauder*,⁷ the ECJ responded to the concerns of the German Constitutional Court with the reassurance that Community law would be interpreted so as not to “jeopardise the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”⁸ This line was developed in *Internationale Handelsgesellschaft*⁹ in which the ECJ asserted the supremacy of Community law even over the rights protected by the constitutional laws of the Member States with the concession that “respect for fundamental rights”, drawing upon the “constitutional traditions common to the Member States”, and in later cases drawing too upon international treaties to which the Member States are signatories, with a special status for the ECHR,¹⁰ “forms an integral part of the general principles of Community law protected by the Court of Justice.”¹¹

Whereas fundamental rights as general principles of EU law were developed by the ECJ in order to defend the supremacy principle, the EU Charter was a consciously-devised instrument drafted by a specially-convened body at the behest of the Member States. Across seven chapters and 54 articles the Charter purports merely to consolidate the rights found in the ECJ’s case law, in the ECHR, in the common traditions of the Member States, as well as in other international instruments to which the Member States are signatories.¹² With regard to the Convention, whilst there is significant overlap, several Charter provisions expand upon the corresponding Convention right (either by including additional categories, e.g. a right to legal aid as an aspect of a fair trial in article 47, or by excluding limitations in the Convention, e.g. those relating to discrimination in article 14 ECHR), that only ambiguously overlap with the corresponding Convention right (e.g. the right to physical and mental integrity in article 3 that might fall within the scope of article 8 ECHR) or for which there is no ECHR analogue (e.g. the freedom of arts and sciences in article 13). Moreover, article 52(3) of the Charter is explicit that, whilst the ECHR provides a floor for the protection of human rights, EU law may provide more expansive protection.

The EU Charter was first “proclaimed” by the European Council at Nice in 2000 and referenced by the ECJ in 2006 before being afforded equal status with the EU treaties in article 6 of the Lisbon Treaty in 2009. It therefore now has full legal force: it is unlawful for EU institutions legislate or otherwise to act incompatibly with Charter rights, as it is for Member States so to legislate or otherwise to act when implementing EU law. So, in *ZZ* the ECJ applied article 47 of the Charter to deportation hearings, extending its scope beyond that of article 6 ECHR, and in so doing reminded the UK that national security does not justify ignoring the procedural protections afforded by the Charter.¹³ Domestic courts have also been willing to disapply Acts of Parliament that they

⁶ Ibid 264-265.

⁷ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

⁸ Ibid at para 7.

⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁰ Case 4/73 *Nold KG v Commission* [1975] ECR 985.

¹¹ Ibid at para 4.

¹² Charter of Fundamental Rights of the European Union article 51.

¹³ Case 300/11 *ZZ (France) v SSHD* [2013] QB 1136.

deem to be incompatible with Charter rights, including the State Immunity Act 1978,¹⁴ the Data Protection Act 1998¹⁵ and the Investigatory Powers Act 2014.¹⁶

B. THE EU (WITHDRAWAL) BILL AND FUNDAMENTAL RIGHTS

One of the few substantive exceptions to the continuity of EU law rights and obligations in the Withdrawal Bill is the exclusion of the Charter from the category of retained EU law.¹⁷ The UK's objections to the Charter are long standing, having secured (with Poland) a protocol to the Lisbon Treaty which sought both to preclude the Charter from extending the ability of EU and domestic courts to invalidate domestic legislation on the basis of its incompatibility with the Charter (article 1(1)) and to deny the justiciability of the Charter's economic and social rights absent further enabling domestic legislation (article 1(2)). Whilst this has been described by ministers as an "opt-out" from the Charter,¹⁸ the ECJ has stripped the protocol of practical significance, holding that the duty placed on domestic courts to review national laws in accordance with standards of EU law flows from the general principles of EU law and is merely *restated* by the Charter.¹⁹

In omitting the Charter from the category of retained EU law it is notable that the UK government has turned on its head the ECJ's justification for ignoring the "opt-out": defending its exclusion on the basis that the Charter did not establish new rights but instead codified already existing rights and principles of EU law.²⁰ The Bill makes explicit that such rights as exist independently of the Charter are to be retained.²¹ This point is reinforced by an interpretative duty placed on domestic courts, "so far as necessary", to interpret references to the Charter in EU or domestic case law *as if* they make reference to any corresponding fundamental right or principle.²² However, the continuity afforded here is limited in at least three senses. First, whilst the general principles are a *source* of Charter rights the latter have in certain areas outpaced the former in relation to their content – the right to education, for example, has been extended by the text of article 23 of the Charter to include vocational and continuing training - and in relation to their remedial bite. So, in *Google v Vidal Hall* it was argued that the Charter right gave rise to a firmer requirement of financial compensation for a breach of privacy not amounting to pecuniary harm than would have been required by recourse to the general principles. Second, the content of the retained general principles is limited to those principles that have been recognised as such by the ECJ in cases decided before exit day,²³ making their continued effect in domestic law contingent upon two arbitrary factors: the case load that has come before the Court and the timing of that litigation. Third, there will no longer be a right of action in domestic law based on a failure to comply with the general principles of EU law.²⁴ Accordingly, whilst EU law rights may be used by domestic

¹⁴ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

¹⁵ *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003.

¹⁶ *R (on application of Davis) v SSHD* [2015] EWCA Civ 1185, [2017] 1 All ER 62.

¹⁷ Withdrawal Bill clause 5(4).

¹⁸ See M Wheeler, "Cavalier With Our Constitution: A Charter Too Far" (Feb 9 2016) UK Human Rights Blog, available at <https://ukhumanrightsblog.com/2016/02/09/cavalier-with-our-constitution-a-charter-too-far/>.

¹⁹ Case 465/04 *Honyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-2879 at para 24.

²⁰ Explanatory notes paras 99-100.

²¹ Withdrawal Bill clause 5(5).

²² *Ibid.*

²³ Withdrawal Bill schedule 1 para 2.

²⁴ Withdrawal Bill schedule 1 para 3.

courts as an aid to the *interpretation* of retained EU law it will not be possible to *disapply* post-exit legislation on the basis of its incompatibility with EU law rights.²⁵

C. FUNDAMENTAL RIGHTS PROTECTION IN SCOTS LAW AFTER BREXIT

What, then, is at stake for the protection of fundamental rights in Scots law in light of Brexit? On one reading the answer might be: not much at all. First, because (as outlined above) the underlying rights and principles codified by the Charter *will* form a part of retained EU law. Second, because the *locus* of Charter rights – applicable to action taken in the sphere of EU law – will necessarily (if not immediately or wholly) dissipate as a result of withdrawal. Third, because there is a significant overlap between the Charter and Convention and common law rights, particularly with regard to so-called “first generation” civil and political rights. Fourth, because fundamental rights cases constitute a tiny (though marginally increasing) proportion of those cases in which Scottish courts have been asked to apply EU law since 1973.²⁶ However, there is reason to believe that the loss of the Charter will be more keenly felt than such a reading might admit.

There is undoubtedly a significant overlap between Convention and Charter rights. In *Christian Institute v Lord Advocate*²⁷ the Supreme Court considered in detail the (ultimately successful) argument that the Scottish Government’s Named Person scheme was incompatible with article 8 ECHR on the basis that there were insufficient safeguards to protect against the unlawful sharing of a child or young person’s personal data, but said only of the parallel arguments made under article 7 (respect for private and family life) and article 8 (protection of personal data) of the Charter that “there is no additional incompatibility with EU law beyond that which we have found in relation to article 8 of the ECHR.”²⁸ However, in those areas where the Charter extends beyond the Convention (such as to “third generation” rights) or where the protections offered by the Charter are more extensive than the corresponding Convention rights (such as we have seen with the extension of fair trial rights to cover deportation hearings, or the inclusion therein of a right to legal aid) there will undoubtedly be a narrowing of the opportunities to challenge the exercise of executive and legislative power.

In addition, there are important differences between the Charter and the Convention in terms of its remedial force and depth of reach into domestic law *vis-à-vis* incompatible primary legislation. In relation to primary legislation made by the UK Parliament, the higher courts may issue a declaration of incompatibility where it is not “possible”²⁹ to read legislation compatibly with a Convention right.³⁰ But where an Act of the UK Parliament is incompatible with Charter rights *any* court or tribunal may *disapply* the offending domestic law, thus offering a more direct and tangible remedy to the affected litigant. The loss of the greater remedial force and depth of the Charter with regard to post-exit legislation is less significant in relation to the devolved legislatures, which are

²⁵ On the future of disapplication after Brexit see A Young, “Benkharbouche and the Future of Disapplication” (October 24 2017) UK Const L Blog, available at <https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/>.

²⁶ B Rodger, “The Application of EU Law by the Scottish Courts” (2017) 2 Jur Rev 59.

²⁷ *The Christian Institute and Ors v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29.

²⁸ *Ibid* para 104.

²⁹ Human Rights Act 1998 s 3.

³⁰ See, for example, *Smith v Scott* [2007] CSIH 9, 2007 SC 345 in relation to the UK’s blanket ban on prisoner voting.

more tightly constrained by the Convention than is the UK Parliament, albeit here too the range and the depth of the protected rights will be less.

We can address two further claims more quickly albeit their significance should not be underplayed. First, the claim made by the UK government that the Charter rights will no longer be relevant after exit day is weakened by the model of withdrawal that the UK government has adopted. Given the absence of specific human rights safeguards on the face of the Withdrawal Bill there is some force in the argument that Charter rights should continue to have bite in relation to the field of retained EU law generally and to its unpicking using the extraordinarily broad Henry VIII powers conferred upon ministers by the Bill. Second, though EU law rights might be a negligible feature of the Scottish courts' engagement with EU law, we should note both the increased (and successful) use of Charter rights in England and Wales which we might expect to have a knock on effect in this jurisdiction as well as the steps that governments might take during the *legislative* stage of rights review³¹ in order to *pre-empt* later legislative and judicial challenges³² before rushing to downplay their impact (actual and potential) in Scots law.

A final point is more speculative: that whilst the Withdrawal Bill precludes any right of action arising from the incompatibility of retained EU law with general principles, a separate right of action *might* be available arising out of the devolution statutes where those principles form part of the hard legal boundary (with retained EU law replacing the existing EU law boundary) around devolved competence.

D. CONCLUSION

The impact of Brexit on fundamental rights protection in the UK will depend upon the skill with which this particular piece is removed from a complex puzzle. The overall structure might remain more or less intact, supported by the twin pillars of an evolving Convention and common law rights jurisprudence.³³ Or, the effect of Brexit might be to bring that structure crashing down – emboldening the government to pursue its policy of HRA repeal and possibly withdrawal from the Convention and to limit the interpretative scope of common law rights. We might be left with a significantly weakened rights regime that leaves exposed those who depend upon the broader scope or remedial depth of Charter rights. Alternatively, release from the tension in EU law between the protection of fundamental rights and the operation of the internal market³⁴ might liberate UK and devolved institutions differently to determine how and which rights are to be protected and where the appropriate balance lies between fundamental rights protection and the public interest. What is certain is that many legislative and judicial battles remain to be fought before the status of EU law rights in the post-Brexit constitution is settled.

³¹ HRA s 19; Scotland Act ss 31 and 33.

³² See P Cowley and M Russell, "The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence" (2016) 29(1) *Governance* 121; J Hiebert, "Governing Like Judges", in T Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (2011); C McCorkindale and J Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21(3) *Edin LR* 319.

³³ See the discussion on the primary role of domestic law (here vis-à-vis the Convention) in the protection of rights in *Osborne v Parole Board* [2013] UKSC 61, [2014] AC 1115 at paras 54-63 per Lord Reed.

³⁴ See NJ de Boer, "Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms?" (2013) 9(1) *Utrecht Law Review* 148.