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Asylum, Migration, the Lisbon Charter and Brexit

Bernard McCloskey



European University Institute

**Robert Schuman Centre for Advanced Studies**

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## **Abstract**

The Charter of Fundamental Rights of the EU, if deployed to its full potential, should emerge as one of the most powerful instruments of human rights protection in the globe and will progressively expose the folly of Brexit. The aim of this paper is to examine the impact and potential of the EU Charter at the domestic level and to link it with the Brexit process.

## **Keywords**

EU law, EU Charter of Fundamental Rights, asylum, immigration, Brexit



## PART I

### 1. Introduction

I welcome gratefully the invitation to participate in the worthwhile and interesting e-NACT project.<sup>1</sup> I have been preaching for several years the gospel that the EU Charter of Fundamental Rights<sup>2</sup> lacks profile and visibility in the legal systems of the United Kingdom, Northern Ireland and Scotland. My interaction with judicial colleagues from other EU Member States suggests that the experience is similar in many other countries. This project is, therefore, both welcome and overdue.

The EU Charter represented the culmination of several decades work of the Court of Justice of the European Union<sup>3</sup> and its predecessor<sup>4</sup> during which active, imaginative and penetrating judicial interpretation and application of EU law had discovered and proclaimed fundamental rights. The Charter is a vindication of the tireless work of dedicated supranational Judges. This reflection on its own underlines the importance of the e-NACT project.

The judicial role, of course, continues and is, arguably, more important than ever before. The fundamental difference between the preceding era and the present era is that the rights of EU citizens are proclaimed visibly and unambiguously in a model which is transparent, unequivocal and dynamic. The rights enjoyed by citizens of the Union are more concrete, tangible and accessible than ever before. A new era in the EU legal order has dawned. The hallmarks of this new legal order include visibility, coherency, accessibility and transparency. The Charter represents both the vindication and the codification of the jurisprudence of the ECJ/CJEU, which developed the cornerstone principles of equal treatment, non-discrimination, transparency, legitimate expectations and the legal recognition and protection of other fundamental rights and freedoms.<sup>5</sup>

Article 6(3) TEU is to be viewed against the framework outlined above. It provides that fundamental rights **shall** constitute general principles of EU law. It proclaims that “*fundamental rights*” consist of those rights guaranteed by the European Convention of Human Rights and Fundamental Freedoms<sup>6</sup>, together with rights embedded in the constitutional traditions common to the Member States.

### 2. The Title Deeds of the EU Charter

It is trite that in order to assess the impact and scope of the Charter an understanding of its roots is essential. This exercise is particularly apposite at a stage in history when the European Union is overburdened by unprecedented doubts and challenges.

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<sup>1</sup> The e-learning National Active Charter Training (e-NACT) Project is a DG Justice supported project providing for a training methodology and training activities that, coupled with the expertise of the trainers involved, foster the emergence and consolidation of a common culture of fundamental rights. The e-NACT builds on previous Charter related projects developed by the CJCM such as ACTIONES. For more information visit the website of of the project <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/e-NACT/e-NACT> .

<sup>2</sup> The “EU Charter”.

<sup>3</sup> The “CJEU”.

<sup>4</sup> The ECJ.

<sup>5</sup> From the earliest days of the ECJ jurisprudence, see, for example, Stauder – Case 29/69 – “Fundamental Rights (are) enshrined in the general principles of Community law and protected by the Court”.

<sup>6</sup> “ECHR”

As is well known, the EU Charter had a lengthy period of gestation. It was an instrument of (mere) soft law following its initial adoption.<sup>7</sup> Following a sluggish, rather than meteoric, progression from the status of mere political statement, it was ultimately incarnated in the form of an international treaty of equal value with the TEU and the TFEU, a directly effective measure of EU primary law, entering into force in tandem with the Lisbon Treaty on 01 November 2009.<sup>8</sup> From any perspective, the Charter represents a landmark achievement for the Member States of the European Union. Standing proudly as one of the three dominant instruments of governance of the EU, it is, in effect, a legally binding bill of rights, resembling the catalogues of rights to be found in the constitutions of EU Member States.

The Preamble to the Charter reveals its diverse origins and sources of inspiration, as well as proclaiming its rationale and aims. It recalls the post-war resolution of the peoples of Europe “*to share a peaceful future based on common values*”. It draws on the “*spiritual and moral heritage of the Union*”, which is founded on the “*indivisible, universal values of human dignity, freedom, equality and solidarity*”. Its most important statement, arguably, is the reaffirmation that the Union is “*based on the principles of democracy and the rule of law*”.

The Preamble boldly proclaims that through the twin mechanisms of Union citizenship and the creation of an area of freedom, security and justice, the EU “*places the individual at the heart of its activities*”. It emphasises, on the one hand, the common values of the Member States and, on the other, the respect to be accorded to “*the diversity of the cultures and traditions of the peoples of Europe*”, their national identities and how they are governed at national, regional and local levels. Furthermore, the Preamble explicitly recognises the principle of subsidiarity.

Through the Preamble one learns that the EU Charter is not designed to be merely declaratory in nature and effect. Rather, it is based on the recognition that “... *it is necessary to strengthen the protection of fundamental rights*”.<sup>9</sup> What are the origins of these rights? They derive from –

“... the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights”.

From the judicial perspective, this lengthy list of sources is important, for at least two reasons. First, it provides an insight into the scope and potential of the Charter in practice. Second, it will be permissible for Judges to have resort to these sources in resolving issues concerning the interpretation and application of the Charter.

The manifest diversity, breadth and versatility of the Charter are amongst its hallmarks. These traits can be readily traced to the UN Declaration of Human Rights (1948), the Statute of the Council of Europe (1949) and the Treaty of Rome (1950) and, to a lesser extent, the Refugee Convention (1951) followed by and in tandem with the progressive jurisprudence of the CJEU and the increasingly influential case law of the ECtHR.

Drawing on all of these sources, the Preamble to the TEU enunciates the following:

“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which we have developed the universal values of the unviolate and inalienable rights of the human person, freedom, democracy, equality and the rule of law”.

This is to be juxtaposed with Article 1 TEU:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

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<sup>7</sup> By the European Parliament, the Council and the Commission on 07 December 2000.

<sup>8</sup> Per Article 6(1) TEU, the Charter “shall have the same legal value as the Treaties”.

<sup>9</sup> My emphasis.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.”

Harmonious with this provision, one of the EU’s stated aims in its relations with the wider world is the protection of human rights, in particular the rights of the child.<sup>10</sup> The following words, arguably, reflect the Charter’s most novel feature:

“[The Union] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

### **3. The Panorama of the EU Charter**

Panoramically, the Lisbon Reforms of 2009 effected a significant transformation of the EU landscape, with a greater emphasis on human rights protection than ever before. The human rights development in EU law was the product of evolution, not revolution: a gentle, orderly and judge led process which, viewed in retrospect, appears a natural progression. It is nonetheless remarkable given that human rights did not feature in the European Treaties in their original incarnation. There was no bill of rights and nothing equivalent thereto.

But the creation of the EEC did not occur in isolation. One cannot ignore the (more or less) simultaneous adoption of the Statute of the Council of Europe which, in common with its EEC counterpart, had as one of its aims the achievement of greater unity amongst European states in the midst of the devastation caused by the Second World War. Thus the Statute devised an elaborate human rights protection model, the ECHR, as its marquee mechanism. The resulting interaction and approximation between the two regimes – the EU and the Council of Europe – was, in hindsight, predictable, if not seamless. With the passage of time each would, inevitably, be influenced by the other and absorb the other to an appropriate extent.

Viewed retrospectively, it was inevitable that the EU Institutions, in particular the CJEU, would be alert not merely to the activities under the umbrella of the ECHR. The CJEU also found itself operating in an environment in which many of the Member States had written constitutions. It is, therefore, unsurprising that these constitutions – which are given explicit recognition in the Charter – have influenced the evolution of EU law, not least because of the composition of the CJEU, particularly in cases involving an interface between EU law and national constitutional law. It is clearly foreseeable that national constitutions will have some impact in cases involving the Charter.<sup>11</sup>

The Charter’s broad panorama and extensive reach are reflected in the post-Lisbon activities of both the CJEU and the Union legislative, executive and administrative bodies. In all of these contexts, issues of fundamental rights have centred on the Charter. In the activities of these organs, the Charter has, progressively, become a reference point. It operates as a compass, a benchmark, for the development of EU policies. In principle, the benefits which this should bring for EU citizens are stronger and more effective rights in the product resulting from each policy development and legislative process. Furthermore, the Charter’s prominence in the jurisprudence of the CJEU has steadily increased.

As appears from the background outlined above, the rationale for this state of affairs includes the following:

- (a) The Charter has enhanced legitimacy on account of its democratic origins, being preceded by two solemn conventions reflecting the deliberations of the governments of Member States, the European Parliament and the national parliaments of the Member States.
- (b) There are clearly identifiable constitutional elements in the two preceding conventions.

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<sup>10</sup> Per Article 2(3) TEU.

<sup>11</sup> See Kremzow v Austria [1997] ECR I – 2629.

- (c) The Charter draws heavily upon the ECHR and other human rights instruments which are binding on all EU Member States.
- (d) The Charter also relies on the constitutional traditions common to the Member States.
- (e) The Charter is a modern, visible, comprehensible and co-defying instrument.
- (f) The Charter is legally binding and, generally at least, has direct effect.
- (g) Finally, and fundamentally, the Charter is one of the constitutional instruments of governance of the EU and enjoys the same status as the others.

#### 4. The EU Charter in Practice

Judges have much to learn from each other in this respect. The e-NACT Project provides a valuable forum for indispensable judicial interaction and dialogue.

In the abstract, the operation of the EU Charter can be studied in the following separate juridical contexts:

- (a) CJEU.
- (b) The ECtHR.
- (c) In the Member State to which any given Judge belongs.
- (d) In other Member States.

In this context the most important provision of the Charter is Article 51, which limits its operation to cases and situations where Member States are “*implementing Union law*”. It is beyond the scope of this paper to dilate on how Article 51 has been interpreted and applied by the CJEU. It suffices to say that this issue has featured in several important decisions.<sup>12</sup> There has also been much academic discussion.<sup>13</sup> In the present context, I confine myself to the self-evident truism that fundamental Union Rights must be respected when Union law is engaged, in furtherance of the principle of uniform application and interpretation of Union law. In its jurisprudence, the CJEU has treated “*implementing*” and “*within the scope of*” as synonymous terms, reasoning that this accords with the Explanations to the Charter.<sup>14</sup>

#### *The CJEU*

The progressively increasing number of CJEU decisions in which the Charter features speaks for itself. It demonstrates the speed with which the Charter, post-Lisbon, has become the central source of reference as regards Union fundamental rights.<sup>15</sup> In some of the decisions, the Charter features only tangentially. In others, it occupies a position of prominence. It is, of course, true that in some cases the outcome would probably have been the same applying the pre-Lisbon fundamental rights as general principles of Union law.

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<sup>12</sup> See in particular Joined Cases C-411/10 and C-493/10 (NS and MS), at [116] – [112]; Case C-256/11 (Dereci) at [71] – [72]; and Case C-617/10, Akerberg Fransson, at [18].

<sup>13</sup> Much of which has involved Judge Allan Rosas, former President of the 10<sup>th</sup> Chamber of the CJEU. See, for example, “The Applicability of the EU Charter of Fundamental Rights at National Level”, 13 European Yearbook on Human Rights.

<sup>14</sup> Which, by virtue of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into account in its interpretation. See [2007] OJ C303/17, at 32.

<sup>15</sup> See the valuable collection of cases in the CJC/EUI Handbooks on the Techniques of Judicial Interaction in the Application of the EU Charter (Dr Madalina Moraru), available at <https://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.b-Module-2.pdf>.

The potency of the Charter is illustrated by the decisions in Volker and Schecke.<sup>16</sup> These combined cases concerned the validity of certain provisions of Council Regulation (EC) 1290/2005 on the financing of common agricultural policy, a subsequent amending regulation and an implementing regulation. The legal issues raised concerned the relationship between two of the Charter rights, namely the right to protection of personal data (Article 8) and the right to respect for private life (Article 7) and the principle of transparency. This latter principle is implicit in Articles 1, 2, 6 and 10 TEU and Article 15 TFEU. It forms part of principles of democracy and the rule of law itself.

The Court noted that the protection of personal data is not an absolute right but must be considered in relation to its function in society. Thus it was necessary to determine whether the Union institutions had properly balanced the interest in guaranteeing the transparency of its act and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and the protection of their personal data in particular.<sup>17</sup> The Court decided that the institutions had not carried out a proper balancing exercise as regards the publication of the names of natural persons. To this extent the legislative act was held to be invalid. The Court, however, was satisfied that the balancing exercise in respect of legal persons had been properly conducted.

In the field of immigration and asylum, the most important Charter decision of the CJEU is, by some measure, NS and ME.<sup>18</sup> The central issue raised in these combined Article 267 references was whether the mechanism contained in the Dublin Regulation<sup>19</sup> to refrain from sending an asylum applicant to the Member State which, under the Dublin Regulation criteria, is responsible for examining the application, may become a duty precluding such transfer where the responsible Member State does not respect EU Fundamental rights and/or the EU measures relating to asylum.

The Charter provision which featured most prominently is Article 4, which prohibits torture and inhuman or degrading treatment or punishment. The Court held that Article 4 precludes such a transfer in circumstances where the transferring Member State cannot be unaware that systemic deficiencies in the asylum procedures and reception conditions of the responsible Member State –

“... amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.”

The test is not that of alleged violations of fundamental rights or the EU asylum instruments. Rather, it concerns systemic and serious deficiencies in the procedures, arrangements and conditions in the responsible Member States.

In NS and ME, the decision under challenge entailed a proposal to return three asylum applicants from the United Kingdom and the Republic of Ireland to Greece. There was a heavy focus on the discretionary examination provision of Article 3(2) of Dublin II. The first question for the CJEU was whether a Member State’s decision under Article 3(2) falls within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter. The Court answered this question affirmatively.<sup>20</sup> The Court’s reasoning on the substantive issues drew on the Common European Asylum System, which is based on the full and inclusive application of the Geneva Convention and the guarantee that no person will be returned to a place where they risk being persecuted.

The Court also referred to Article 18 of the EU Charter. This provides, under the rubric “Right to Asylum”:

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<sup>16</sup> Joined Cases C-92/09 and C-93/09 [2010] ECR I-111063.

<sup>17</sup> See [48], [68] and [83] and [85]-[86].

<sup>18</sup> Joined cases C-411/10 and C-493/10.

<sup>19</sup> Council Regulation (EC) No 343/2003.

<sup>20</sup> See [69].

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

I interpose at this juncture the formal “Explanation”:

“The text of the Article is based on TEC Article 63 which requires the Union to respect the Geneva Convention on Refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland annexed to the Treaty of Amsterdam and to Denmark to determine the extent to which those Member States implement Community Law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the EC Treaty.”

Finally, the Court highlighted the principle of mutual trust among EU Member States. The Court concluded:

- (a) There can be no conclusive presumption that the responsible Member State observes the fundamental rights of the EU.
- (b) The transfer by a Member State to the responsible Member State is unlawful where the former is aware of systemic deficiencies in the asylum procedure and reception conditions of the second State such as to amount to substantial grounds for believing that the claimant would face a real risk of inhuman or degrading treatment. This would be unlawful as **contrary to Article 4 of the EU Charter**.<sup>21</sup>
- (c) Articles 1 (the right to human dignity), 18 and 47 (the right to an effective remedy and a fair trial) of the Charter do not require a different answer to the questions raised.

Finally, the Grand Chamber declined to construe the joint UK/Polish protocol as conferring any exemption on either of these Member States from the fundamental obligation to comply with the Charter.<sup>22</sup> What had once been triumphantly paraded by the United Kingdom as an “opt out” clause, a landmark victory in the constant battle against the tide of EU legislation, dissolved, aided by a UK concession, into a veritable damp squib.

### ***The ECtHR***

Taking into account the ever evolving relationship between the ECtHR and the CJEU, coupled with the proposed accession of the EU to the ECHR, a brief survey of the impact of the EU Charter in the jurisprudence of the ECtHR is instructive. In this way one discovers that the ECtHR has developed an assumption that those responsible for formulating EU law intend it to be compatible with the ECHR. See, for example, Bosphorus Turzim v Ireland.<sup>23</sup> This assumption seems unremarkable, having regard to the history of the Charter outlined above.

One finds references to the EU Charter in a small number of cases only. These include Goodwin v United Kingdom<sup>24</sup> which concerned the rights of transsexuals to marry. While these proceedings placed the focus on Articles 8 and 12 ECHR, the Court, in its judgment, highlighted the different wording of Article 9 of the Charter in support of its conclusion that there had been major changes, particularly social, in the approach to transsexuality and marriage since the adoption of the ECHR half a century previously.

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<sup>21</sup> Paragraphs [94] and [106].

<sup>22</sup> At [120].

<sup>23</sup> No 45036/98. At [73] especially.

<sup>24</sup> No 28957/95.

In Vallianatos v Greece<sup>25</sup> the ECtHR, in holding that a Greek law permitting civil unions only between adults of different sex infringed Articles 8 and 14 ECHR, invoked several provisions of the EU Charter – Articles 7, 9 and 21, together with the 2006 Commentary prepared by the EU network of independent experts on fundamental rights.

There are two decisions of the ECtHR which have an important bearing on the subject of the e-NACT Project. The first is MSS v Belgium and Greece<sup>26</sup>, where the complaint was that the Greek procedures for the reception of asylum claimants and the processing of their claims were so inadequate that they constituted ill treatment contrary to Article 3 ECtHR. This particular litigation prompts the observation that the ECHR does not contain any right to asylum. When it was being developed, the prevailing thinking was that individual states should, harmonious with one of the ancient rights enjoyed by all states, be left to decide for themselves whom they would permit to cross their borders. Those drafting the ECHR were also aware that a major instrument under the auspices of the United Nations was in gestation. This contrasts with Article 18 of the EU Charter.<sup>27</sup>

In holding that Greece was in violation of Article 3 ECHR regarding both detention and living conditions and that Belgium was similarly in violation of Article 3 ECHR for transferring asylum claimants to Greece, thereby exposing them to the risk of such ill treatment, the Strasbourg Court relied more on the concept of “fundamental rights” than the EU Charter. This is understandable, given that from 01 December 2009 the TEU had provided not only that the EU “... *recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights*”, but also that –

“Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”<sup>28</sup>

In a similarly landmark decision, Hirsi Jamaa v Italy<sup>29</sup>, the question for the ECtHR was whether Italy had violated Article 3 ECHR by intercepting a boat replete with potential asylum applicants in the Mediterranean Ocean and forcing their return to Libya. Notably, the Strasbourg Court’s deliberations included Article 19 of the EU Charter, which provides:

- “(1) Collective expulsions are prohibited.
- (2) No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

The Court’s approach was that Article 19 reinforced the principle of *non-refoulement* which it has long espoused and lent support to its conclusion that Article 3 ECHR had been infringed.

The following summary seems appropriate. The ECtHR is prepared to draw on the EU Charter as a source of influence, or guidance, in its interpretation and application of the ECHR. However, the Charter has not been accorded any special status. Rather, it has been treated by the ECtHR on a par with other sources of international law. The Charter’s influence has been most noticeable in relation to Article 6 ECHR. It has also had some influence in Article 3 cases involving asylum claimants. Clearly, the Charter cannot be a source of law which in some way usurps the ECHR itself. In principle, the CJEU may interpret provisions of the Charter comparable to/overlapping with ECHR provisions more generously than the ECtHR has done to date. Equally, in principle, the ECtHR may seek to maintain its more restrictive, conservative interpretation of such provisions. In reality, the more likely scenario appears to be that the CJEU will take its lead from the ECtHR. The full potential of the Charter in the realm of the ECHR has not yet been fulfilled.

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<sup>25</sup> No 29381/09.

<sup>26</sup> App No 30696/09.

<sup>27</sup> See paragraph 3.5 *supra*.

<sup>28</sup> Article 6(3)

<sup>29</sup> Number 27765/09.

I suggest that the following proposition is tenable: in the realm of protection of human rights involving the 28 Member States of the EU and the 47 States parties of the Council of Europe, a two way street is discernible – the ECtHR can have resort to the EU Charter as a source of rights, while (and to a rather greater extent) the CJEU can, similarly, invoke the ECHR. A further source common to each of these supranational regimes is, of course, the constitutional traditions common to the Member States.

### *United Kingdom Cases*

The United Kingdom, though (uniquely) having no written constitution, is a single constitutional entity, consisting of England, Scotland and Northern Ireland. However, for reasons of history, tradition and devolution, each of these three countries operates a legal system differing from the others. The exercise of considering the operation and influence of the Charter in these three countries is not a difficult one. Furthermore, it is instructive to consider how the Charter has fared in the Republic of Ireland.

It is no understatement to suggest that the impact of the EU Charter in the United Kingdom has been far from dramatic. An understanding of why is not easy. Some of the reasons undoubtedly include the following:

- (a) The distracting and somewhat confusing UK/Poland Protocol.
- (b) The relative moratorium generated by the combined UK/ROI Article 267 references in NS and ME.<sup>30</sup>
- (c) The intrinsic limitations of the Charter flowing from Article 51(1).
- (d) The unique and challenging architecture of the Charter: rights, freedoms, principles and “Explanations”.
- (e) Debates about direct effect.
- (f) The prominence of the ECHR in this jurisdiction consequent upon the Human Rights Act 1998.

In the specific field of immigration and asylum, it must also be borne in mind that there is already extensive prescription of rights and duties. This flows not only from the Refugee Convention and its Protocol but also the series of EU legislative measures under the umbrella of the CEAS and the corresponding UK domestic law implementing/transposing measures. As a result, the EU Charter is rarely pleaded in immigration/asylum cases in the United Kingdom. Being a common law jurisdiction and having regard to the duty of courts and tribunals under Article 10 TEU, the absence of any such pleading does not, of course, preclude Judges from proactively raising Charter issues. However, the reality of life for immigration and asylum Judges in the United Kingdom is that the Charter features very rarely indeed.

An exception to this is found in the decision of the United Kingdom Upper Tribunal (Immigration and Asylum Chamber)<sup>31</sup> in Abdul (Section 55 – Article 24(3) Charter)<sup>32</sup>. This case concerned a national of Nigeria, aged 41, who had been continuously resident in the United Kingdom for 25 years and was the father of two daughters, aged 13 and 11 respectively, both British citizens. The father acquired a residence card *qua* family member of an EEA national. However, he was also a convicted offender and, following the imposition of a sentence of 4 ½ years imprisonment, the Secretary of State decided to order his deportation from the United Kingdom.

In challenging this decision the Appellant relied on, *inter alia*, Article 24 of the EU Charter. Under the banner of “The Rights of the Child”, this provides:

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<sup>30</sup> Supra.

<sup>31</sup> “UTIAC”.

<sup>32</sup> [2016] UKUT 106 (IAC).

- “(1) Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.
- (3) **Every** child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless this is contrary to his or her interests.”

[Emphasis added.]

The Appellant relied particularly on Article 24(3).

In deciding the appeal, the Upper Tribunal held, firstly, that the gateway provisions of Article 51 were satisfied. Next, it considered the decisions of the CJEU in Deticek v Sgueglia<sup>33</sup> where the Court gave consideration to the interpretation of Council Regulation (EC) 2201/2003, which concerns jurisdiction and the recognition and enforcement of Judgments in matrimonial matters. The Court, reasoning that Article 24 enshrines a “*fundamental*” right, concluded that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right.<sup>34</sup>

The Upper Tribunal also considered a later decision of the CJEU, MCB v ELE<sup>35</sup>, a case which had a Hague Convention context involving the disputed return of a child from the United Kingdom to the Republic of Ireland. Having regard to the reasoning of the CJEU<sup>36</sup> the Upper Tribunal held that the Court was suggesting that Article 24(3) adds nothing of substance to Article 24(2). The kernel of the Tribunal’s decision is contained in [30]:

“I am of the opinion that Article 24(3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete “best interests” right and, on this analysis, is a development, or elaboration, of Article 24(2). Furthermore, given the exception formulated in the final clause of Article 24(3), the nexus with Article 24(2) is unmistakable. However, I consider it clear that Article 24(3) was designed to create a discrete right, an analysis which is harmonious with general principles of EU law. These include the well-known principle that every part of a measure of EU law is presumed to have a separate and individual effect and impact. Article 24(3) may also be viewed through the prism of the principle that where one has an amalgam of specific and general provisions, the former should normally be considered in advance of the latter. This construction is further fortified by the Commentary of the Charter of Fundamental Rights of the European Union (published by the EU Network of Independent Experts on Fundamental Rights), at p207:

“..... Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them.”

The Upper Tribunal has also ruled in a case in which the Applicant placed direct reliance on Article 18 of the Charter. In R (Hagos) v Secretary of State for the Home Department (Dublin Returns – Malta) IJR [2015] UKUT 0271 (IAC) the Applicant, a young male adult in good physical health, though suffering from mental health problems and asserting a risk of suicide, contended that his enforced return from the United Kingdom to Malta would violate his rights under Articles 18 and 47 of the Charter, Article 3 ECHR, Article 33 of the Refugee Convention and the Qualification Directive. The Applicant’s case was based on extensive evidence pointing to significant shortcomings in the Maltese processes and procedures for the consideration and determination of asylum claims, together with deficiencies in the arrangements and facilities for the treatment of asylum claimants with psychiatric problems.

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<sup>33</sup> [2009] EUECJ C-403/09.

<sup>34</sup> See [54] – [59].

<sup>35</sup> [2010] EUECJ C-400/10.

<sup>36</sup> At [60] especially.

The Upper Tribunal accepted, without deciding, that Article 18 of the Charter creates an individual, enforceable right to asylum, subject of course to the claimant satisfying the qualifying conditions.<sup>37</sup> The Tribunal stated:

“... [The Applicant] ... was disposed to accept the Tribunal’s suggestion that any right to asylum established by Article 18 can only amount to a right to be granted asylum where the relevant qualifying conditions under the Refugee Convention and Protocol are satisfied. Given this, together with the clear nexus .... between Article 18 and the Geneva Convention and Protocols, it is far from clear that the former confers any new or additional right ...

However, without deciding this issue conclusively, for present purposes we are disposed to accept the Applicant’s contention that he has a right to have his asylum claim assessed in accordance with fair and efficient procedures which include the provision of appropriate information and legal advice and an effective remedy ...”<sup>38</sup>

The Upper Tribunal noted that this was the contention of UNHCR in its intervention before the CJEU in Halaf v Bulgarian State Agency for Refugees.<sup>39</sup>

Bearing in mind that all asylum cases require of the court or tribunal concerned an assessment of future events, one of the questions which will have to be decided is the legal test to be applied, within the framework of Article 18 of the Charter, in making this judicial assessment. Is the focus on future possibilities or future probabilities? Alternatively phrased, how real must the risk of adverse future events be? Furthermore, in another case, the argument of the Secretary of State was that only a breach of either Article 4 or Article 19 of the Charter can prevent the removal of the Applicants to the country concerned (Malta). Even if the Upper Tribunal were persuaded that there is a real risk that such removal will (in particular) infringe their various procedural/process rights under Article 18, it was contended that this will not preclude their removal. This argument was based on the contention that the current jurisprudence of the CJEU does not recognise anything other than a real risk of a breach of Article 4 of the Charter. Judgment was expected in the summer of 2016.<sup>40</sup> In the event, the appeal did not proceed.

At this juncture, and in passing, it is instructive to note that in MCB the CJEU adopted a conservative approach to Article 7 of the Charter. It reasoned that given the almost identical phraseology of Article 8 ECHR and Article 7, the latter should be given the same meaning and scope as the former (with the addition of the important qualification) “*as interpreted by the case law of the European Court of Human Rights*”. While it may be said that in this instance the CJEU effectively sought refuge in Article 8 ECHR, one apprehends the advent of future cases in which this will be neither desirable nor legally viable. This may well arise, for example, in cases involving family reunification issues. One recalls that the EU Family Reunification Directive was adopted via Article 63(3)(a)(e)(c)<sup>41</sup> which provides that for the purpose of developing a common immigration policy, the European Parliament and the Council shall adopt measures on, *inter alia*, the conditions of entry and residence and standards on the issue by Member States of long term visas and residence permits, which may include the purpose of family reunification.

### ***The EU Charter in the ECtHR and the CJEU***

In cases involving Charter rights which are comparable to those enshrined in the ECHR, one of the options available to any court is simply to mirror the Strasbourg jurisprudence. In Benkharbouche v

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<sup>37</sup> At [29] and [51].

<sup>38</sup> At [51].

<sup>39</sup> Case C-52811.

<sup>40</sup> R (Garada and Hassan) v Secretary of State for the Home Department [JR/4896/2014 and JR/11942/2014].

<sup>41</sup> Now Article 79(2)(a) TFEU.

Embassy of Sudan<sup>42</sup> employees of the Sudan Embassy in London brought claims alleging that they had been subjected to trafficking, discrimination, unlawful conditions of employment, harassment and discrimination. The claimants relied on, *inter alia*, Article 47 of the Charter, asserting their rights to an effective remedy and fair trial. This involved the question of whether Article 47 applies not only to EU institutions but also horizontally in cases where the gateway provision of Article 51 is satisfied. Both the High Court and the Court of Appeal answered this question affirmatively.<sup>43</sup> The Court of Appeal reasoned that the right to an effective remedy guaranteed by Article 47 of the Charter is a general principle of EU law and, therefore, has horizontal direct effect, subject to the exceptions found in the ECtHR jurisprudence and subject to any contrary provision of EU law. In thus deciding the Court of Appeal applied, without modification, the relevant ECHR jurisprudence.

Notably, the CJEU has held that in cases where EU law requires it to do so it must go beyond simply mirroring Strasbourg jurisprudence. See in particular Byankov v Glaven (ETC).<sup>44</sup> This constitutes a progressive construction of Article 52(3) of the Charter.

In passing, it is worth noting that while the results in Google Spain<sup>45</sup> and Defi SA v Estonia<sup>46</sup> are similar, the process of reasoning of the two supranational Courts is notably different.

I have suggested above<sup>47</sup> the most likely reasons to explain the minimal impact of the EU Charter in the United Kingdom. Further research on this would be welcome.

The tepid impact of the EU Charter in the United Kingdom is mirrored in Scotland. Commentators in both jurisdictions have expressed surprise at this, given in particular that the Charter ventures significantly beyond those ECHR rights incorporated by the Human Rights Act 1998. While many (like me) have attributed this to a lack of knowledge and familiarity, I consider that, at this remove, this explanation has significantly reduced purchase. The decisions in the Scottish cases of McGeoch v Scottish Legal Aid Board<sup>48</sup> (which concerned the availability of legal aid for a legal challenge to prisoner's voting rights) and Walton v Scottish Ministers OH<sup>49</sup> (which also concerned the availability of legal aid – in this instance for public planning enquiries) are indicative of a conservative approach. Notwithstanding, more may be expected and a less restrictive, more imaginable approach is clearly conceivable.

The Republic of Ireland, in marked contrast with the other countries of the British islands, provides, in its case law, evidence of a positively dynamic and flourishing Charter. In this relatively remote EU Member State with a population of less than 5 million, why is this so? The operation of the Charter in this Member State is probably worthy of further study.<sup>50</sup> While the jurisprudence of this country contains numerous examples, in the present context I confine myself to highlighting MN v Minister for Justice<sup>51</sup>: Article 47 – the right to be heard in the determination of applications for subsidiary protection and asylum; D v Refugee Appeals Tribunal<sup>52</sup>: a beguiling mix of Article 14 of the Charter, Article 2 of

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<sup>42</sup> [2015] EWCA Civ 33 (under appeal to the Supreme Court).

<sup>43</sup> See [73] – [81] especially.

<sup>44</sup> [2013] QB423 at 433 – 434 especially.

<sup>45</sup> Case C-131-12.

<sup>46</sup> Application number 64569/09 (10 October 2013).

<sup>47</sup> In paragraph 4.21.

<sup>48</sup> (2013) SLT 183.

<sup>49</sup> [2011] CSOH 131 and [2012] UKSC 44.

<sup>50</sup> It lies beyond the limited aspirations of this paper to venture further.

<sup>51</sup> [2013] IEHC 9.

<sup>52</sup> [2012] IEHC.

Protocol Number 1 ECHR, and Article 42 of the Constitution of Ireland; MCB<sup>53</sup>: Article 7 of the Charter/the Brussels II Regulation and the Irish Law requirement for agreement or a Court Order as a pre-requisite to the acquisition of child custody rights by an unmarried father; and Smith v Minister for Justice<sup>54</sup>: Article 7 of the Charter/Article 8 ECHR and the deportation of a family member.

## 5. EU Charter: Quo Vadis?

I presume to borrow a famous judicial pronouncement:

“The first and foremost point is that the Treaty concerns only those matters which have a European element, that is to say matters which affect people and property in the 9 countries of the Common Market besides ourselves. The Treaty does not touch any of the matters which concern solely the mainland of England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the river. It cannot be held back ....”<sup>55</sup>

The author of this statement is none other than Lord Denning. The developments during the intervening 40 years demonstrate the correctness of this prediction. But does it hold good for the EU Charter? Only time will tell. Meantime, exercises such as the e-NACT Project will continue to make a vital contribution to the comprehension, influence and fortification of EU law.

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<sup>53</sup> Case C – 400/10.

<sup>54</sup> [2012] IEHC 113.

<sup>55</sup> Bulmer v Bollinger [1974] CH 401 at 418.

## PART II

### 6. The EU Charter and Brexit

The withdrawal of the United Kingdom (“UK”), constitutionally a single Member State which comprises England, Scotland, Wales and Northern Ireland from the European Union (“EU”) is increasingly embroiled in controversy, acrimony and uncertainty at times bordering on confusion. This process has become popularly known as “BREXIT”.

Brexit has the following main legal components: the primary legislation which made provision for the UK national referendum in June 2016; the referendum itself; the ensuing further primary legislation seeking to give effect to the referendum result – the EU (Withdrawal) Act 2018<sup>56</sup> - and, on the international plain, the draft Withdrawal Agreement and Political Declaration.<sup>57</sup> Thus the Brexit mechanisms, not less than complicated, are a mixture of domestic legislation and international treaty.

- (a) While the June 2016 referendum “leave” vote represented a seminal event in the shared history of the UK and the EU, regarded in the eyes of many UK sectors and international audiences as retrograde and myopic, there are certain aspects of the situation of UK citizens living in Northern Ireland worthy of note:
- (b) By virtue of the statutory devolution arrangements which govern Northern Ireland constitutionally within the United Kingdom, the Northern Ireland legislature and executive<sup>58</sup> are legally powerless regarding the final Brexit arrangements. The final international treaty, the parties where to will be the UK and the EU, will, constitutionally, be an act of the executive ie the UK government. The population of Northern Ireland is 1.8 million, a mere 2.9% of the overall UK population. The role of this region of the United Kingdom has been relegated to one of political manoeuvring and lobbying.
- (c) All citizens of Northern Ireland are British nationals. Those who wish to do so can also obtain the nationality of the Republic of Ireland, an EU Member State. Many Northern Ireland citizens already possessed this dual nationality and many more have acquired, or will acquire, it. The members of this cohort are (or will be) EU citizens, with all of the associated rights and benefits.
- (d) There is one further measure of international law which could yet exert significant influence in the final Brexit arrangements. This is the Belfast Agreement (or so-called “Good Friday Agreement”) of 1998. This is an international treaty the parties where to are the governments of the United Kingdom and the Republic of Ireland. It does not bind either the EU *en bloc* or any other EU Member State in any way. However, the issue which is currently pending in judicial review proceedings in the UK is that of whether the much debated *soi-disant* “backstop” mechanism, currently a part of the draft Withdrawal Agreement/Political Declaration, infringes this treaty. The outcome of these proceedings (if completed) could have a significant impact on the state of play as at midnight on 31 March 2019. If the English courts were to endorse this argument, this could push strongly in the direction of a “no deal” outcome.
- (e) The draft Withdrawal Agreement makes separate and particular provision for Ireland/Northern Ireland in a specially designed Protocol.<sup>59</sup>

In the spheres of immigration/asylum/EU citizens’ freedom of movement Brexit will have obvious and lasting consequences. It is appropriate to begin with some mundane and sobering reflections. I refer firstly to the recent publication of a joint undertaking comprising law academics and human rights

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<sup>56</sup> The “Withdrawal Act”.

<sup>57</sup> Both still unexecuted at the time of writing [25/02/19].

<sup>58</sup> Both voluntarily suspended and inactive, since March 2017, at the time of writing.

<sup>59</sup> The Northern Ireland and Ireland Protocol

experts in Northern Ireland, “Brexit Law NI”.<sup>60</sup> This report makes pessimistic predictions: a threat to the peace process; diminished international oversight of the protection of fundamental human rights and freedoms; a possible resulting conflict between communities which remain far from reconciled; and the growth of racism in both communities and, possibly, immigration enforcement action by public authorities.

The following are allied with the foregoing:

- (a) There is a broad consensus that public perceptions (many of them misconceived) relating to immigration and asylum were one of the major forces in the “leave” vote. Pro-Brexit politicians and others campaigned forcefully on (*inter alia*) a “taking back our borders” platform. There has been progressive hostility to, and uncertainty for, the citizens of other EU Member States in the UK.
- (b) All of the signs are that, in its new domestic law arrangements, the UK will embrace more restrictive and less liberal immigration/asylum policies and arrangements.
- (c) Pre-referendum the environment and culture already had a hostile disposition towards non-British nationals. One of the clearest illustrations is the treatment of third country unaccompanied children. This is regarded by many, both within the UK and beyond, as unacceptable bordering on the inhumane.
- (d) Successive UK governments had already made clear their intention to reduce the numbers of non-British nationals in the UK. Allied to this was the adoption of policies with acutely negative impacts on the dignity and rights of asylum claimants, predominantly in the areas of accommodation, employment and the most basic of financial support for survival.
- (e) Immigration and asylum law in the UK has long been criticised for its sheer volume and sometimes near impenetrable complexity.<sup>61</sup>
- (f) There is a long history of serious administrative failings in the immigration/asylum sphere in the UK: a bureaucratic system which has not been fit for purpose for a long time, dysfunctional computer systems, excessive delays, the loss of key records *et al.*
- (g) One of the entrenched UK government policies has, for some time, to legislate so as to drastically reduce the scope for appeals to the courts against adverse immigration/asylum decisions, while simultaneously increasing the range of so-called “out-of-country” appeals, strongly criticised judicially.<sup>62</sup> The most senior immigration/asylum court in the UK has been driven to the lengths of trenchant criticism of the conduct of cases by the Government Legal Department.<sup>63</sup>

In the midst of the swirling doubts and questions surrounding the final Brexit arrangements, there is one indelible certainty: from the first draft of the Withdrawal Act to its final incarnation, it has been stated – unambiguously, loudly and at times triumphantly – that the EU Charter will be repelled in its totality. This legislative policy is traceable to the “leave” vote campaign as noted above. It is put into effect by a relatively simple legislative mechanism.

The Withdrawal Act repeals the European Communities Act 1972<sup>64</sup>, preserves laws which were made in the UK for the purpose of implementing EU obligations and, thirdly, converts existing EU law into domestic law, subject to specified exceptions. The EU Charter is one of the most striking of these

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<sup>60</sup> <https://brexitlawni.org>

<sup>61</sup> Thankfully the Law Commission has now embarked upon a long overdue project which, at least, has the potential to give rise to much needed improvements and reforms.

<sup>62</sup> See, for example, my decision in R (Mohibullah) v SSHD [2016] UKUT (IAC) 561, endorsed by the Supreme Court in R (Kiariie and Byndloss) v SSHD [2018] UKSC 67.

<sup>63</sup> See for example R (Saha) v Secretary of State for the Home Department (IJR) [2017] UKUT 17 (IAC) at [45] – [51] and R (AM) v SSHD [2017] UKUT 262 (IAC) at [91] – [92].

<sup>64</sup> The measure of primary legislation whereby the UK acceded to the EU.

exceptions. Thus it will cease to form part of domestic UK law after “exit day”<sup>65</sup>. This statutory measure is a clear implementation of those aspects of the “leave” movement which quickly found a popular (and populist?) target in the shape of a visionary and progressive instrument of EU law which (via the narrow UK mindset) confers a series of legally enforceable rights and benefits on the citizens of other European countries. The unassailable juridical reality that it confers precisely the same rights and benefits on all citizens of the UK exercising, or wishing to exercise, free movement rights in other EU countries has been diluted and ignored to the point of virtual submergence. *Ditto* the incontrovertible factual reality of the progressive, and enduring, reliance of the UK economy on the citizens of other EU Member States exercising their free movement rights – and doing so strictly in accordance with the relevant legal rules.

The EU Charter, of course, applies only when a Member State is acting within EU law.<sup>66</sup> However, ambiguity and inconsistency are immediately identifiable: the Charter codifies certain existing rights which under the Withdrawal Act will be retained in UK domestic law. By section 5(5) of the Act, furthermore, any fundamental rights or principles under EU law which exists irrespective of the Charter will be retained in domestic law. There will also be “*retained EU law*” and “*retained EU case law*”.

It is important to add at once, however, that no element of so-called “*retained EU law*” has any guaranteed future existence in the United Kingdom. Given the doctrine of the supremacy of Parliament, which will be reinvigorated by the recovery of the partial loss of sovereignty which membership of the EU entails for all Member States, democratically made legislation will be capable of eliminating or diluting any measure of retained EU law at any time. Parliament will be accountable to the UK electorate.

The elimination of the EU Charter from the UK legal system will have a series of currently imponderable consequences. One of these is the extent to which human rights protection in the UK becomes diminished by the absence of the Charter. This will be an interesting test of just how efficacious a measure of fundamental rights protection the Charter actually is.

This review and analysis will, inevitably, entail juxtaposing the EU Charter with the ECHR. The latter (most of it) will, for a period at least, continue to be a major source of directly effective human rights protection in the UK. While previously, and unlike in many other Member States, the ECHR did not form part of domestic UK law by virtue of the “dualist” constitutional doctrine, whereby unincorporated international treaties and conventions form no part of municipal law, most of the ECHR rights became directly effective in UK law via a measure of primary legislation namely the Human Rights Act 1998.<sup>67</sup> The ECHR belongs to the realm of the Council of Europe, which remains an organisation separate from the EU governed by its own rules, norms, systems and procedures. Continued UK membership of the Council of Europe is not at present under threat. Furthermore, the Human Rights Act, being pure domestic law, will remain in force.

However, the EU Charter being of demonstrably greater reach than the ECHR, UK citizens will no longer have the protection of the Charter’s additional rights, the *soi – disant* “added value”: the specific rights of the child; the array of social protections contained in Title IV; freedom to conduct a business; the strong anti-discrimination provisions; freedom of the arts and sciences; a right of conscientious objection; freedom to choose an occupation; a right to asylum and against *refoulement*; a right to data protection; the prohibition against human trafficking; a right to marry not restricted to different-sex couples; the right to physical and mental integrity; and a guarantee of human dignity. This is an impressive list indeed.

Some of the EU Charter’s additional rights and protections are recognised in certain measures of UK domestic law (eg data protection and protection from human trafficking) or in the ECHR jurisprudence

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<sup>65</sup> 31 March 2019, midnight.

<sup>66</sup> Per Article 51, as interpreted in a series of important decisions of the CJEU.

<sup>67</sup> Largely effective from 02 October 2000.

(eg certain types of physical and mental integrity), others will simply evaporate overnight, a particular and worrying – illustration being the more expansive rights of the child. Furthermore, ensuring “parallel” rights in UK domestic law may not benefit from the expansion and fortification which, historically, has emerged from the progressive interpretation of the CJEU. *Ditto* as regards future EU legislative measures of expansion and fortification.

The EU Charter provides visible, accessible and comprehensive protection of a broad range of individual rights and freedoms. It’s potency derives in particular from the position which it occupies at the apex of the international legal order to which it belongs. This will disappear overnight on Brexit day. Thereafter, subject to interim and other special arrangements, EU citizens living and working in the UK will no longer have the protection of EU law. They will, rather, be exclusively subject to domestic UK law, with whatever international influences – the most notable continuing to be the ECHR – this may contain.

In the first iteration of this paper I described the impact of the EU law on domestic UK law as relatively tepid.<sup>68</sup> This was followed by the publication of some interesting data to the end of 2017. As of then:

- The EU courts addressed the Charter in 719 judgments.
- Of these, 48 cases originated in the UK.
- On closer analysis, the figure of 48 is exaggerated, and is in fact closer to 30.
- In contrast, 103 cases originated from Germany, 75 from Italy, 55 from Spain and 45 from France.

Some of the UK Charter cases were of undeniable importance:

- (a) NS decided that the UK may not transfer an asylum claimant to another Member State where there are substantial grounds for believing that the person would be exposed to a real risk of inhuman or degrading treatment flowing from systemic deficiencies in the asylum procedure and reception conditions in that country.<sup>69</sup>
- (b) The case of Kadi II concerned the freezing of assets of a person suspected of involvement in terrorist activities and the balance to be struck between the rights of the defence and the right to effective judicial protection (on the one hand) and security considerations (on the other).<sup>70</sup>
- (c) In Tele 2 Sverige and Watson, the CJEU ruled that national legislation authorising the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication was prohibited by Directive 2002/58 (on privacy and electronic communications) interpreted in the light of Articles 7, 8 and 11 of the Charter.<sup>71</sup>

It is instructive to reflect on a concrete case illustration. The case of ZZ<sup>72</sup> threw into sharp relief that the fair trial protections enshrined in Article 47 of the Charter exceed those of Article 6 ECHR, the former extending beyond the narrowly drawn category of a person’s “*determination of his civil rights and obligations or of any criminal charge against him*”. Article 47 extends to administrative proceedings, for example relating to tax. As ZZ demonstrates, the reach of Article 47 also extends to immigration proceedings. The person concerned, a dual French and Algerian national, was refused admission to the United Kingdom which purported to invoke the permitted restriction on the free movement of EU citizens on the grounds of public policy, public security or public health.<sup>73</sup> The appeal lay to the

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<sup>68</sup> Part I, at paragraphs 4.21 & 4.34.above.

<sup>69</sup> Reported at *inter alia* [2013] QB 102.

<sup>70</sup> [2014] 1 CMLR 24.

<sup>71</sup> Case C-203/15 and C-698/15 [2017] QB 771. Note the commentary in [2018] PL 10.

<sup>72</sup> Case C-300/11, reported at *inter alia* [2013] QB 1136.

<sup>73</sup> Per Article 27 of the Citizens Rights Directive: 2004/38.

judicialised tribunal known as “SIAC”<sup>74</sup> which, in accordance with its procedural arrangements, conduct both “open” and “closed” hearings. The outcome was an affirmation of the executive’s decision, based substantially on so-called “closed” materials viz evidence not disclosed to the subject. The CJEU emphasised the following: the onus rests on the relevant national authority to prove that state security would be compromised by full disclosure of relevant evidence to the subject; and, where this is demonstrated, the national procedure must ensure compliance with the adversarial principle to the greatest extent possible, entailing the maximum disclosure possible to the subject.<sup>75</sup>

The enhanced fair trial protections which the EU citizen in ZZ was able to invoke depended on the Charter and, hence, will not be expressly available post-Brexit. Another illustration belonging to the immigration sphere of reduced protections post-Brexit is provided by Carpenter<sup>76</sup> where EU law family life rights were successfully invoked in the context of a UK citizen exercising free movement rights and operating to prevent the removal from the United Kingdom of that person’s spouse illegally present there. Article 8 ECHR would not have afforded this level of protection.

Yet another sobering reflection arises out of the broad consensus that the true potential of the EU Charter remains unfulfilled. Thus the predictable flourishing of the Charter via the jurisprudence of the CJEU will have no direct influence on the UK legal system. Furthermore, and independently, as the doctrine of the supremacy of EU law will disappear from the UK legal system, UK courts will no longer be subject to the obligation to disapply national legal rules conflicting with directly applicable or effective EU law.<sup>77</sup> As already highlighted, much of the ECHR, via the Human Rights Act, will continue to form part of domestic UK law. However, the “disapplication” duty of the UK judge, just noted, contrasts sharply with the most intrusive of the human rights remedies available under domestic law, namely a (mere) declaration that a specified provision of parliamentary legislation is incompatible with one of the protected ECHR rights<sup>78</sup>.

Also gone forever – again subject to interim and special arrangements – will be the ability of any person living in the UK to challenge acts and decisions of the executive or UK legislation said to be incompatible with fundamental EU rights, the Charter or, for that matter, any measure of EU law which is not “*retained*” in domestic UK law. Such a challenge will not be possible before the UK courts. Furthermore, the invaluable mechanism whereby the UK courts could seek preliminary rulings from the CJEU will be eliminated.

This significant *lacuna* will not be remedied by the continuing existence of the Agreement on the European Economic Area (“EEA”) to which the UK will remain a party. By virtue of the EEA principle of homogeneity, new EU legislation is routinely transformed into the body of EEA law. The mechanism for this is the simple one of annexing such legislation to the EEA agreement.<sup>79</sup>

Collectively, the adoption of the EU Charter, the Citizenship Directive and a series of detailed measures in the field of asylum are arguably the most progressive and impressive EU legislative achievements. While imperfections and shortcomings have been exposed in the CEAS, the Dublin Regulation in particular, the EU, in common with the best democratic institutions throughout the world, has demonstrated its capacity for review, revision and improvement.<sup>80</sup> In the promotion of the Treaty values of freedom, justice and security, an elaborate European Arrest Warrant Scheme has also been painstakingly devised. All of the foregoing measures, subject only to time limited interim arrangements

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<sup>74</sup> The Special Immigration Appeals Commission.

<sup>75</sup> See [2013] QB 1136 at [65] and [68].

<sup>76</sup> Case C-60/00 [2003] QB 416.

<sup>77</sup> See *inter alia* Costa v ENEL [1964] CMLR 425.

<sup>78</sup> See Section 3 of the Human Rights Act 1998.

<sup>79</sup> See Article 102, EEA Agreement.

<sup>80</sup> The current version of the Dublin Regulation and its most recent modifications provide a clear example.

and the intrinsically precarious device of “*retained EU law*”, will fade from the UK legal system in the post-Brexit era.

Brexit, with all of its implications, is unlikely to occur in isolation. There has been a concerted political campaign, vociferous and at times aggressive, espousing the repeal of the Human Rights Act 1998. If this were to eventuate the UK’s separation from the democratic states of Europe would become accentuated, with correspondingly enhanced isolationism. This retrograde step would result in the ECHR being banished once again to the distant plane of international law, excised from UK domestic law. Those living and working in the UK would no longer be able to invoke its protections before the courts. This would be supremely ironic in a country where imaginative and progressive lawyers and judges relentlessly developed the status and influence of this international treaty in the UK during a period of some two decades preceding the seminal Human Rights Act. The cumbersome, slow, expensive and uncertain process of individually petitioning the ECtHR – and this only after exhausting all domestic remedies – would return. It is difficult to describe this as other than profoundly retrograde.

Some of those campaigning for the repeal of the Human Rights Act have claimed that this will be counter balanced by the adoption of a “purely British” Bill of Rights. There are, of course, many imponderables. However, at this remove, given particularly the antipathy to the Human Rights Act, it seems far from probable that any Bill of Rights would mirror the protections of the ECHR. What is even more predictable is that such a measure would not replicate the EU Charter.

It follows from the above that the continuing operation of (much of) the ECHR in the UK legal system will provide but a limited counter balance to the negative effects identified. The limitations of Article 8 ECHR in protecting migrants will be exposed. There will be increasing awareness of the orientation of the ECtHR jurisprudence, which has entailed much deference to state sovereignty in the sphere of migration. Successful resistance of deportation based on Article 8 ECHR has been relatively infrequent. Family life has been narrowly defined and private life is routinely disregarded<sup>81</sup>.

The heavy balancing of the scales in favour of the State, based on the sovereign right to control the movement of persons across international borders emerges most clearly in the landmark decision of Abdulaziz v United Kingdom [App No 9214/80]. This sovereign right to control the entry of non-nationals extends to control of their residence and expulsion<sup>82</sup>. This trend in the Strasbourg jurisprudence has prevailed notwithstanding that, in the context of a human rights protection instrument, it gives precedence to the principle of state control, namely a provocative that neither affirms human rights nor is contained in the text of the ECHR.

The potential of Article 8 ECHR to provide a vehicle for family reunification is equally limited. Family reunification, in this context, entails the entry of non-nationals, most frequently nationals of non-EU countries, for the purpose of family life with a family member or members already lawfully present on the territory of the state concerned. The best known of the ECtHR decisions in this respect are Sen v Netherlands<sup>83</sup> and Mayeka v – Belgium<sup>84</sup>. In the UK, a series of judicial decisions giving effect to this discrete stream of Strasbourg jurisprudence began with R (ZAT) v Secretary of State for the Home Department<sup>85</sup>. As these decisions demonstrate, where Article 8 can be invoked it is capable of providing the most practical and expeditious remedial mechanism available for family reunification purposes.

In the search for factors which may provide a counter balance to the foreseeable post-Brexit human rights protection backward slide, attention turns to the increasing alignment of the CJEU and the

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<sup>81</sup> Illustrated in Senchishak v Finland [5049/12], unreported 18 November 2014.

<sup>82</sup> See for example Moustaquim v Belgium [App No 12313/86].

<sup>83</sup> [2003] 36 EHRR 7.

<sup>84</sup> [2008] 46 EHRR 23.

<sup>85</sup> IJR [2016] UKUT 61 (IAC).

ECTHR. This belongs to a context where the EU *en bloc* is to accede to the ECHR<sup>86</sup>. There has been a progressively discernible jurisprudential dialogue between these two national courts. This has evolved almost imperceptibly in the absence of any coercive legal obligation to this effect. The “*constitutional traditions common to the Member States*”, a familiar phrase, has increasing resonance in this context. This “cross-pollination” seems merely logical given the strong association between ECHR rights and the general principles of EU law. This is readily identifiable in CJEU decisions such as NS v SSHD<sup>87</sup> and MSS v Belgium and Greece<sup>88</sup>. Examples can be readily multiplied.

Thus, post-Brexit, it is foreseeable that both the EU Charter and the general principles of EU law, particularly insofar as these have been absorbed within the ECHR and the Strasbourg jurisprudence, will have indirect influence in the UK legal system. This will occur in a context where it is the declared philosophy of the ECTHR to treat the ECHR as a living instrument.

I consider it appropriate to comment briefly on the Council of Europe (“COE”) and its organs. Post – Brexit there will, I apprehend, be increased public awareness in the UK of the work of the COE and its achievements to date. While public debate has, predictably, been focused on (a) the influence and implications of EU law in the UK and, to a lesser extent, external EU policy and international relations and (b) the much maligned ECHR, it being frequently (conveniently?) overlooked that this finds expression in the UK legal system in a measure of primary legislation adopted by a democratically elected legislature, namely the Human Rights Act, I would expect attention to turn to some of the other COE Conventions which, for a variety of reasons, have had limited visibility and exposure.

Politicians, academics, lawyers and other professionals may well wake up to the reality that this organisation, which was born in 1949 with ten subscribing states (including the UK), has sought to achieve one of its aims, namely the protection and promotion of the rule of law and the fostering of legal co-operation among States Parties, by the adoption of some 200 conventions and treaties addressing an impressively broad range of topics with a human rights emphasis:

- The Convention on action against trafficking in human beings.
- The Convention on the protection of children against sexual exploitation and sexual abuse.
- The Convention on preventing and combating violence against women and domestic violence.
- The European Charter for Regional or Minority Languages.
- The European Social Charter.
- The Framework Convention for the Protection of National Minorities.
- The Anti-Doping Convention.

One of the COE organs, the European Committee for the Prevention of Torture, has been particularly and visibly active during several decades. Others with an increasing profile include the European Commission for the Efficiency of Justice (CEPEJ), the Venice Commission, the European Directorate for the Quality of Medicines, the European Pharmacopoeia and the European Commission against Racism and Intolerance. Furthermore, it is not difficult to foresee a re-awakening of awareness of the institutions of the COE: the Council of Ministers, the Parliamentary Assembly, the COE Secretariat, the Secretary General and the Permanent representatives and ambassadors who are accredited by each of the 47 States Parties. To this list one adds the Congress of the Council of Europe which was established in 1994 and comprises political representatives of local and regional authorities of all States parties. See also the European Charter of Local Self-Government (1985).

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<sup>86</sup> A process that is suspended following Opinion 2/13 which held that accession would be incompatible with the existing Treaties.

<sup>87</sup> [2012] 2 CMLR 9.

<sup>88</sup> [2011] 53 EHRR 2.

The close association between the Statute of the Council of Europe and the admittedly more elaborate and intricate constitutional instruments establishing and governing the modern EU is striking. By Article 1(a) of the Statute:

“The aim of the Council of Europe is to establish a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”

Acceding states must affirm their commitment to harmony, co-operation, good governance and human rights, the principle of the rule of law and the guarantee of democracy, fundamental human rights and freedoms (sound familiar?)

### **The Brexit Act**

Finally, for information, I have prepared a separate Schedule (appended) outlining briefly some of the more important provisions of the European Union (Withdrawal) Act 2018.

## European Union (Withdrawal) Act 2018

### Some Stand Out Provisions

1. “Exit day” was initially specified as 29 March 2019, at 11.00pm: **section 20(2)** (more recently amended, in the withdrawal debacle)
2. **Member State** “does not include the United Kingdom”: ditto.
3. “EU-derived domestic legislation ... continues to have effect in domestic law on and after exit day”: **section 2(1)**.
4. “Direct EU legislation .... forms part of domestic law on and after exit day”: **section 3(1)**.
5. “Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day –
  - (a) Are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
  - (b) Are enforced, allowed and followed accordinglyContinue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)”: **section 4(1)**.
6. “The principle of the supremacy of EU law does not apply to any enactment or rule of law past or made after exit day”: **section 5(1)**.
7. “Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law past or made before exit day”: **section 5(2)**.
8. “The Charter of Fundamental Rights is not part of domestic law on or after exit day”: **section 5(4)**.
9. Fundamental rights or principles which exist “irrespective of the Charter” remain part of UK domestic law: **section 5(5)**.
10. “A court or tribunal (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court and (b) cannot refer any matter to the European Court on or after exit day”: **section 6(1)**.
11. A court or tribunal “... may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal”: **section 6(2)**.
12. “Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it –
  - (a) In accordance with any retained case law and any retained general principles of EU law, and
  - (b) Having regard (among other things) to the limits, immediately before exit day, of EU competences”: **section 6(3)**.
13. The UK Supreme Court “is not bound by any retained EU case law”: **section 6(4)**.
14. **Section 6(7)**: definitions of “retained case law”, “retained domestic case law”, “retained EU case law”, “retained EU law” and “retained general principles of EU law”. The latter is defined as:

“The general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –
  - (a) Relate to anything to which section 2, 3 or 4 applies, and
  - (b) Are not excluded by section 5 or Schedule 1.”
15. The legislative mechanisms for modifying retained EU law: **section 7**.
16. The controversial fall-back provision, “**dealing with deficiencies arising from withdrawal**”:

*“A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate –*  
*(a) Any failure of retained EU law to operate effectively, or*  
*(b) Any other deficiency in retained EU law*  
*arising from the withdrawal of the United Kingdom from the EU”*: **section 8(1)**. And see the elaborate outworkings of the concept of “deficiencies” in **section 8(2) – (9)**.

17. Some special provisions for Northern Ireland: **section 10**.

18. The withdrawal agreement can be ratified by the executive only if:

- (a) It is approved by a resolution of the House of Commons;
- (b) The HOC motion has been debated by the House of Lords; and
- (c) An Act of Parliament containing provision for the implementation of the withdrawal agreement has been made.

See section 13(1).

19. **21 January 2019**: the beginning of a five day time period during which a Minister of the Crown must make a statement setting out how the government proposes to proceed regarding the withdrawal agreement: **section 12(11)**.

20. Notably, special provision is made for environmental protection: **section 16**.

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