

## ALBA/BEG - Strasbourg: the Luxembourg Dimension

*THE CHARTER OF FUNDAMENTAL RIGHTS: WHAT YOU NEED TO KNOW (NOW)*

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### The status of the Charter in EU law

1. The Charter was originally drafted and issued in 2000 as a political declaration which did not have legal status. Although it was occasionally cited and relied upon by the CJEU.
2. The Lisbon Treaty gave the Charter formal legal status. Article 6(1) TEU:  
  
“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”
3. But the application of the Charter in the UK (and Poland\_ was subject to Protocol No. 30 to the Treaty of Lisbon (see below).
4. The Charter must be read with together with the official “explanations” of its text. When originally drafted these had “no legal value” but they do now:
  - art. 6(1) TEU and CFR, art. 52(7): Charter to be interpreted “with due regard to the explanations”.
  - Protocol No. 30: Charter to be applied and interpreted by the courts of the UK and Poland “strictly in accordance with the explanations”.
  - CJEU: explanations “have to be taken into consideration for the interpretation of the Charter” (C-279/09, *DEB*, §32).

## What rights does the Charter confer?

5. Firstly, the Charter confers rights equivalent to the rights conferred by the ECHR. These include rights whose meaning and scope is said by the explanations to be the same as the corresponding ECHR rights: eg art. 4 (art. 3 ECHR), art. 11 (art. 10 ECHR) and art. 17 (art. 1 of the First Protocol to the ECHR). And rights where the meaning is the same as the corresponding ECHR articles but where the scope is wider: eg art. 47(2) and (3) correspond to art. 6(1) ECHR but are not restricted to situations involving the determination of civil rights or criminal charges; art. 14(1) corresponds to the right to education in art. 2 of Protocol No. 1 to the ECHR but includes access to vocational and continuing training.
6. Even where rights are equivalent to ECHR rights, there are drafting differences. In particular, art. 52(1) CFR contains a general provision permitting limitation/justification of restrictions on rights (compare art. 8(2), 9(2) etc. ECHR).

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

7. Secondly, the Charter confers rights derived from other international legal instruments eg art. 24 on the rights of the child (UN Convention on the Rights of the Child) and art. 3(2) on prohibition of reproductive cloning and eugenic practices (Statute of the International Criminal Court).
8. Thirdly, the Charter includes rights already set out in the Treaties eg equality between men and women (art. 23), right to vote and stand for election to the European Parliament (art. 39), freedom of movement (art. 45).

9. Fourthly, the Charter enhances the status of rights which are derived from EU secondary legislation and other EU instruments such as the EU Social Charter. Eg protection of personal data (art. 8), right of access to a free placement service (art. 29), workers' right to information and consultation (art. 27) and to maximum working hours and rest periods (art. 31).
10. The Charter contains not only rights (which must be "respected") but also principles (which must be "observed"): art. 51. But it is not easy to identify from the Charter itself what is a right and what is a principle. Principles are not labelled as such. One of two substantive provisions referring to a principle is art. 23, on equality, which is a right. The explanations are vital in this regard. But they refer on occasion to principles which are framed in the Charter itself as rights. Principles include: entitlement to social security benefits (art. 34), the "right" of access to preventive healthcare (art. 35) and a high level of environmental protection (art. 37).
11. Principles were apparently intended to have a lesser status than rights. But they are to be applied in most situations where Charter rights would be relevant. Article 52(5) provides:

"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."
12. The rights conferred by the Charter have effect against EU institutions and the Member States (art. 51). They do not have horizontal effect: *C-282/10 Dominguez*, Opinion of AG Trstenjak, §83.

Is the Luxembourg approach to the content of CFR rights the same as that of Strasbourg?

13. The Charter itself indicates that the ECHR-equivalent rights which it confers are to be interpreted in the same way as they would be interpreted by the ECtHR. Article 52(3) states:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

14. Debate has focused upon the second sentence of that provision: will the CJEU give an interpretation to CFR rights which goes beyond where the ECtHR has gone? There are certainly examples of the CJEU reaching a different conclusion on an issue which has already been considered by Strasbourg eg on Bulgarian legislation which prevents debtors from leaving the country (C-434/10 *Aladzhev cf Riener v Bulgaria*). But there is no sign of any enthusiasm for embracing a higher level of protection.

- In C-400/10 PPU *McB*, the CJEU stated (§53):

“Moreover, it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, ‘[e]veryone has the right to respect for his or her private and family life, home and communications’. The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression ‘correspondence’ instead of ‘communications’. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, §48).

- There are a number of other examples of Strasbourg case-law being taken as the CJEU's standard also. Eg C-411/10 *NS*, applying *MSS v Belgium* on return of asylum-seekers to Greece under Dublin II; AG Bot in C-300/11 *ZZ* (special advocate procedure in challenge to expulsion decision); and in C-399/11 *Melloni* (surrender of person tried *in absentia*).
- But also of the CJEU referring to Strasbourg case-law for applicable principles whilst stopping short of reaching the negative conclusion which the ECtHR would probably have reached: see C-279/09 *DEB* on the grant of legal aid to companies, proportionality assessment remitted to national court.

15. Can Member States insist upon a higher level of rights protection than set out in EU legislation in reliance upon the Charter. Article 53 provides:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

16. In *Melloni*, AG Bot rejected an argument that the Spanish Courts could insist, in reliance upon art. 53, on a higher level of protection for EAW subjects who were tried *in absentia* than was provided for in the Framework Decision.

#### Does the Charter apply in full in the UK?

17. When negotiated, Protocol No. 30 was billed by the UK Government as an opt-out from the Charter. It provides:

“Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations

or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

#### Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

18. In *Saeedi* [2010 EWHC 705 (Admin)], Cranston J had ruled that Protocol No. 30 prevented direct reliance upon the Charter against the UK Government, although the Charter could be used as an aid to interpretation. The Government then conceded before the Court of Appeal that this was incorrect and that “in principle .. fundamental rights set out in the Charter can be relied upon against the United Kingdom”. When the case was referred to the CJEU, it confirmed that art. 1(1) of the Protocol did not prevent reliance upon the Charter against the UK:

“119. According to the wording of [Article 1(1)], as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the

Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.”

19. So art. 1(1) of the Protocol merely explains art. 51 CFR (presumably art. 51(2): “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”). The CJEU did not rule upon art. 1(2) of the Protocol as none of the Title IV rights were in issue (§121). But on the basis that the CFR “does not create new rights or principles”, there is a good chance that art. 1(2) of the Protocol will also be interpreted as merely stating the obvious and as not preventing reliance upon the provisions of the Title IV in the domestic courts. In *United Road Transport Union* [2012] EWHC 1909 (Admin), Hickinbottom J discussed and applied art. 31(2), the right to limitation of maximum working hours etc., which appears in Title IV, without reference to the Protocol.

#### The scope of application of the Charter

20. The *material* scope of the Charter is explained in art. 51(1):

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

21. So it applies to EU institutions in all of their activities, and applies to Member States when they are implementing EU law. According to the Explanations, the concept of implementing EU law was intended to codify existing CJEU case-law on when fundamental rights considerations applied (ie when exercising powers under EU secondary legislation, or derogating from EU law). In *Zagorski* [2010] EWHC 3110 (Admin), Lloyd Jones J held that the relevant question was whether, in taking a decision, the Secretary of State was “acting within the material scope of EU law”. The

field in question – the imposition of export restrictions – was one occupied by EU law, with a power of derogation afforded to Member States. In deciding whether or not to exercise the power of derogation the Secretary of State was implementing EU law in the sense of applying it or giving effect to it. This implied a broader scope of application for fundamental rights principles than had been taken in cases such as *First City Trading* [1997] 1 CMLR 250, where a distinction was drawn between Treaty-stated principles which applied within the scope of application of the Treaty (essentially, where there was an impact upon trade in the common market) and judge-made principles which required a closer connection.

22. In *NS*, the CJEU held that the exercise by the UK of a discretionary power under art. 3(2) of Regulation No. 343/2003 whether or not to determine an asylum claim which was not otherwise the UK's responsibility (in derogation from the general rule) was an implementation of EU law for Charter purposes (§68).
23. The Court's Advocate Generals appear keen to extend the concept of implementation of EU law, so as to create a "bright line rule" based on the material scope of the Treaty. In C-34/09 *Zambrano*, AG Sharpston held that "the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence" even where the competence had not yet been exercised (§163). In C-40/11 *Iida*, AG Trstenjak held there would be a sufficient connection with EU law, and that the Charter should apply, where a decision (refusal of a residence permit in that case) interferes in some way with the right to free movement (or presumably with any other fundamental right or freedom conferred by the Treaty).
24. In *Zagorski*, Lloyd Jones J held that the Charter also had a restricted *personal* scope, in that it would only apply to persons within the jurisdiction of the UK, and not to the claimants, who were prisoners on death row in Tennessee. He relied upon art. 52(3) – Charter rights to have the same meaning as equivalent ECHR rights – as the basis for



reading in to art. 2 and 4 of the Charter jurisdictional limitations equivalent to those in art. 1 ECHR.

25. As to the *temporal* scope of the Charter, AG Trstenjak held in *Dominguez* that the Charter could be relied upon in relation to claims which arose between 2005-07, before it was given legal force (§73).

#### How does the CJEU use the Charter?

26. The CJEU frequently refers to the Charter (40 judgments in 2011, 34 to date in 2012). Fundamental rights have become more visible.
27. The Charter is used as an aid to interpretation of EU secondary legislation:
  - In *McB*, the CJEU arrived at an interpretation of Regulation No 2201/2003 to the effect that the removal of a child from the jurisdiction would be wrongful if in breach of whatever rights of custody had been conferred by the relevant national law. It then asked whether that interpretation was consistent with art. 7 of the Charter (right to respect for family life). Applying Strasbourg case-law, it was consistent.
  - In *C-483/09 Gueye*, the CJEU again, conventionally, asked itself whether its preferred interpretation of the Framework Decision on the standing of victims in criminal proceedings was consistent with CFR art. 7. It was.
  - In *Iida*, the AG noted that where legislation was open to two interpretations, one in conflict with fundamental rights and one not, the latter should be preferred (§53).
  - In *C-70/10 Scarlet Extended*, the CJEU held contrary to various directives an injunction which required an ISP to install a filtering system which prevented its customers from exchanging music using peer-to-peer software. The injunction did

not strike a fair balance between the right to intellectual property in art. 17(2), the freedom of ISPs to conduct a business (art. 16) and the rights of customers to protection of personal data and to receive and impart information (arts. 8 and 11).

28. These cases are consistent with our domestic courts' approach to sympathetic interpretation, both under EU law and under the Human Rights Act (see *Poplar Housing v Donoghue* [2002] QB 48, 72). But the CJEU has also used a more radical approach, of seeking to arrive at an interpretation of secondary legislation which gives greater weight to Charter rights (even if the contrary interpretation would not breach any Charter rights).

- In C-510/10 *DR & TV2*, the CJEU had to resolve a conflict between different language versions of Directive 2001/29/EC, on harmonisation of copyright. The Directive permitted broadcasting organisations to make "ephemeral recordings" themselves or using third parties who were acting on their behalf and/or acting under their responsibility. Some language versions said "and", others said "or". The CJEU preferred "or" on the grounds that either would suffice to fulfil the purposes of the relevant exception. It continued (§57): "This approach finds support in the fact that it ensures that broadcasting organisations have a greater enjoyment of the freedom to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright". Although it could equally have adopted the other interpretation on the grounds that this provided greater support to the right to protection of intellectual property in art. 17(2) CFR, without unduly hampering the freedom to conduct a business.

- A similar technique was used in C-571/10 *Kamberaj*. The CJEU considered the right of equal treatment of third country nationals afforded by Directive 2003/109. In relation to social security benefits, equal treatment could be restricted to "core benefits", a term which was not exhaustively defined, and the issue arose whether housing benefit was a core benefit in respect of which equal treatment had to be afforded. The decisive consideration was art. 34(3) of the Charter under which "the

Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources". From the Explanations, this appears to be a "principle" to be respected rather than a right. The CJEU held that it followed from art. 34(3) that if Italian housing benefit fulfilled the purpose set out in art. 34(3), it must be considered to be a "core benefit" and subject to an equal treatment rule. No attempt was made to investigate whether the Italian authorities would have been in breach of art. 34(3) (read with the limitations permitted by art. 51) if housing benefit was not granted to the claimant.

29. EU secondary legislation which cannot be interpreted consistently with the Charter may be declared invalid.

- In C-1/11 *Interseroh*, the CJEU held that Regulation No. 1013/2006 on shipments of waste required an intermediary dealer to disclose the name of the producer of waste to the consignee of a shipment. It then turned to consider whether that state of affairs was contrary to art. 15(1) CFR (right to engage in work), 16 (freedom to conduct a business) or 17 (right to property). Without answering that question, it noted that the CFR "could not have the consequence of restricting the scope of a provision of secondary law that is clear and unconditional" (§44). But since the German Court had not enquired about validity of the Regulation and there was insufficient evidence on that point, the CJEU took the issue no further.
- In C-92/09 *Volker*, however, the CJEU did annul provisions of a CAP regulation which required the publication on an internet site of the names of all recipients of aid and the amounts they had received. This was held to be contrary to the right to protection of personal data in art. 8 CFR. There was no evidence to show that the legislature had consciously balanced the arts. 7 and 8 rights against the public interest in publication and sought to devise a less intrusive publication requirement (§81).

30. As for the Member States:

- National legislation must be interpreted compatibly with the Charter or be given effect subject to the Charter (*NS*, §77). The criteria for affording direct effect to provisions of EU secondary legislation do not apply to Charter rights.
- Administrative decisions “covered by EU law” can be challenged as being contrary to the Charter (eg *C-256/11 Dereci*, §72).

### Does the Charter matter?

31. There has undoubtedly been a revolution in rights discourse in EU law. Debates about fundamental rights now arise directly and immediately with reference to the Charter.
32. It is less clear whether the new discourse makes a real difference to the outcome of cases. Where the Charter is relied upon to interpret EU secondary legislation, would the CJEU have reached the same conclusion anyway? Either without reference to fundamental rights at all, or by referring to general principles of EU law. In virtually every case, probably. But the framing of the debate in CFR terms may have an influence.
33. In one sense, an up-front debate about the protection of fundamental rights is an improvement in the transparency of CJEU decision-making. But there is a danger that the CFR could lead to less transparent decision-making due to the failure of the Court to provide reasoning as to why it considers that an outcome is required by the Charter. The approaches adopted by the CJEU in *DR & TV2* and *Kamberaj* are to be deprecated.

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