Effects of the EU Charter of Rights in the UK

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The status of the EU *Charter of Fundamental Rights* in EU law and its effects in UK law have been a matter of debate since the Charter was given legal status by the 2007 *Treaty of Lisbon*. The UK Government had negotiated a Treaty Protocol with a view to clarifying its effect in the UK, but many believed this Protocol represented an exemption or opt-out from the Charter.

In December 2011 the EU Court of Justice ruled in *ME* and others that the UK Protocol "on the application of the Charter of Fundamental Rights to the UK and Poland" does not intend to exempt the UK from the obligation to comply with the provisions of the Charter or to prevent a UK court from ensuring compliance with Charter provisions.

In a High Court ruling on an asylum case on 7 November 2013, *AB v Secretary of State for the Home Department*, the claimant maintained that the Government had breached Article 7 of the *EU Charter* by causing private information to be disclosed to the authorities in Country A; and had failed to protect personal data in breach of Article 8 of the Charter.

Dismissing all the claims, Justice Mostyn was "surprised" by AB's reliance on the Charter, as he believed the UK Government had secured an opt-out from the incorporation of the Charter into EU law and thereby via operation of the *European Communities Act 1972* directly into UK domestic law. Justice Mostyn emphasised the constitutional significance of the 2011 decision that the UK Protocol is little more than a guide to the interpretation of the Charter.

This Note presents views on the nature of the Protocol and what the 2011 ruling might mean with regard to the effects of the Charter in the UK.

Contents

1 The Charter's status and the UK Protocol

The EU Charter of Fundamental Rights was proclaimed in 2000 but was not given legal status until 2007 in the *Treaty of Lisbon*, which stated that it had equal legal status with the EU Treaties.[1] Its rights now constitute general principles of EU law. However, even before the Lisbon Treaty came into force, the Charter had been relied upon in a number of cases by the European Court of Justice (ECJ)[2] and British courts had also already referred to the Charter in identifying the scope of fundamental rights.[3]

One of the issues during the negotiations on the then reform treaty was the status of the Charter in relation to EU and domestic law, and whether competence could be accrued through its application ("competence creep"). The then Labour Government was particularly anxious that the Charter should not be able to overturn national law, and it negotiated a Protocol with a view to limiting its effect in the UK. Protocol No. 30 on the application of the Charter of Fundamental Rights to the UK and Poland[4] is as follows:

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1 For earlier information on the Charter and its implementation, see Standard Note 3681 EU human rights matters: the Charter of Rights, the Human Rights Strategy and the Human Rights Special Representative 9 July 2012, and Standard Note 5963 The European Charter of Fundamental Rights: the Commission's Strategy for Implementation 16 May 2011

2 E.g. case C-540/03, *European Parliament v Council of the European Union* [[2006] ECR I-5769;Case C-377/98 *Netherlands v European Parliament and Council*

3 E.g. *R v East Sussex County Council and the Disability Rights Commission ex parte A, B, X & Y* [2003] EHC 167 (Admin) per Munby J at paragraph 73

4 The former Czech government of Václav Klaus secured agreement from other EU Member States in 2009 to amend the UK/Poland protocol to include the Czech Republic at the time of the next accession treaty. A draft amendment to this effect was proposed by the European Council in September 2011, but the following month the Czech Senate passed a resolution opposing accession to the protocol. The Croatia Treaty of Accession was not combined with the Czech protocol amendment, and the Czech Senate continued to oppose it during the parliamentary ratification of the Croatia accession bill. Presidential and parliamentary elections in 2013 brought in a new government, and in January 2014 the new Czech Human Rights Minister, Jiří Dienstbier, said that he would try to withdraw the Czech protocol request. The Prime Minister, Bohuslav Sobotka, formally withdrew it on 20 February 2014.

WHEREAS in Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union;

WHEREAS the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself;

WHEREAS the aforementioned Article 6 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;

WHEREAS the Charter contains both rights and principles;

WHEREAS the Charter contains both provisions which are civil and political in character and those which are economic and social in character;

WHEREAS 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;

RECALLING the obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally;

NOTING the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter;

DESIROUS therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom;

REAFFIRMING that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter;

REAFFIRMING that this Protocol is without prejudice to the application of the Charter to other Member States;

REAFFIRMING that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

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.

Article 6(1) of the *Treaty on European Union*, as amended by the Lisbon Treaty specifies that the Charter "shall not extend in any way the competences of the Union as defined in the Treaties". A Declaration annexed to the Final Act of the Intergovernmental Conference (IGC) which adopted the Lisbon Treaty specifies the scope of application of the Charter and its relationship with the *European Convention on Human Rights*. The Declaration confirms Article 51 of the Charter itself, emphasising that it 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 by the Treaties".

For David Anderson Q.C. and Cian C. Murphy the word "extend" is crucial:

> The key term here is "extend". Article 1(1) makes it clear that the Charter cannot of itself afford a new competence to the courts of Poland, the UK or the Union. However, it does not limit their existing competences. Since national and EU courts have long possessed the competence to measure national law within the scope of EU law against the yardstick of EU fundamental rights, freedoms and principles, and since those rights freedoms and principles are said only to be re-affirmed by the Charter, it will no doubt be argued – with some force – that the Article 1(1) prohibition on the extension of powers has little if any practical effect.[5]

1.1 Concerns about the Protocol

Some analysts thought the 'protective' effect of the Protocol was questionable. The *Daily Telegraph* reported on 12 July 2007 that senior EU officials thought the Protocol was not worth the paper it was written on. The report cited Margot Wallström, then a Commission Vice President, who thought the EU Charter would apply to huge swathes of UK law, and that all EU citizens would be able to claim before the courts the rights enshrined in the Charter. When the European Scrutiny Committee (ESC) questioned Wallström about her assertions, she rejected the interpretation adopted by the media that the Protocol was "worthless" and suggested it might have been her "bad English".[6]

There were concerns as to how the Court of Justice of the EU (CJEU) would interpret measures which applied in some but not all Member States. It would be difficult to validly or legally waive human rights issues in some States, and the possibility of the Court doing this could undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire*.[7] It was suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the Court ruled on Charter-related issues in

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5 EUI Working Paper LAW 2011/08, The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe.

6 See Oral Evidence, 4 July and 12 July 2007, HC 862-i-ii, 8 October 2007 pp.13-14

7 EU law, the Treaties and the case-law of the European Court of Justice. See Standard Note 5944, The EU's Acquis Communautaire, 26 April 2011, for information on the *Acquis Communautaire*

other EU Member States.[8] There were also questions about whether citizens of other Member States living and working in the UK jurisdiction could claim legal protection under the Charter. The Commission's Opinion on the IGC Mandate in July 2007 failed to clarify how the legally binding nature of the Charter could be combined with the obligation to apply EU law uniformly in all Member States. It stated:

> The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves, bringing together civil, political, economic and social rights which the Union's action must respect. Its provisions will also apply in full to acts of implementation of Union law, even if not in all Member States.[9]

The former Prime Minister, Tony Blair, told the Commons on 25 June 2007: "It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs" (c 37). However, the then Europe Minister, Jim Murphy, wrote to ESC on 31 July 2007 in reply to questions about possible inconsistencies between the requirements of the Protocol and the EU Treaty, making clear that the Protocol did not represent an opt-out from the Charter, but a clarification of its effects in the UK:

> The UK Protocol confirms that nothing in the Charter extends the ability of any court to strike down UK law. In particular, the social and economic provisions of Title IV give people no greater rights than are given in UK law. Any Charter rights referring to national law and practice will have the same limitations as those rights in national law. The Protocol confirms that since the Charter creates no rights, or circumstances in which those rights can be relied on before the courts, it does not change the status quo.[10]

The ESC was concerned about the possibility that, following a reference to the CJEU from a Member State, the Court might find that in the light of the Charter, a derogation from a Directive allowing waivers would have to be interpreted more restrictively than before the Charter had legal effect.[11] The ESC also referred to Article II-81 of the Charter, prohibiting discrimination "on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation", commenting:

> We would be concerned that, following a reference to the ECJ from some other Member State, the Court might find that a measure adopted at EU level (such as Council Directive 200/43/EC) had to be given an extended interpretation in the light of the wide grounds[12] for prohibiting discrimination under the Charter.
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> 60. If the Member States have indeed agreed in the IGC Mandate that a ruling from the ECJ in such cases should have no effect in the UK, then this ought to be made clear. In our view, there is here at least an ambiguity which should be resolved and the UK's safeguards made firmer in the course of the IGC if the results claimed by the Government are to be secured. We would wish the Government to show how they have secured the UK from such interpretations

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8 *EUObserver* 27 June 2007

9 COM (2007) 412, "Reforming Europe for the 21st Century". See Commission press release, 10 July 2007

10 ESC 35th Report 2006-07 para. 57, October 2007.

11 Ibid para. 58: The Committee gave the example of the Working Time Directive, which contains provisions limiting the weekly hours of a worker to 48 hours per week, but with the possibility of agreements to waive those limits.

12 FN 47: The grounds of social origin, language, political or any other opinion, property and birth are not mentioned in Article 13 EC.

> and ask that they secure the phrasing "notwithstanding other provisions in the Treaties or Union law generally" in the text of the Protocol.[13]

The then Foreign Secretary, David Miliband, assured the ESC on 16 October 2007 that the Charter would not "extend the reach of European courts into British law", that it "only records existing rights under domestic and international law" and does not create new ones.[14] The FCO Legal Adviser, Mike Thomas, set out to clarify the position, insisting on a holistic approach rather than a simple "will it or won't it" question in the abstract.[15] Bill Cash thought the UK would nevertheless be "in the position where, despite what you put in by way of a protocol, there will still be a requirement for the national judges and an opportunity for them to, effectively, give effect to this Charter as part of English law?" Mr Thomas's view was that nothing had changed: "the Charter is sourced in the existing rights and principles, so the content has not grown" and "as to content, I think the ability of the European Court to interpret laws is effectively unchanged".[16]

1.2 An opt-out from the Charter?

The Government has pointed out on several occasions that the Protocol **does not** represent an 'opt-out' from the Charter of Rights, but a clarification of its effects in the UK.

In January 2008[17] Lord Goldsmith, UK Attorney General when the Charter was being negotiated, maintained the Protocol did not provide the UK with a Charter opt-out, but was "an explicit confirmation that in relation to the UK and UK law, the limitations and constraints on what it is and what it will do will be strictly observed". Lord Goldsmith went on to say that, were the Courts to "seek to conjure new or extended rights out of the Charter, than the UK's Protocol would indeed have teeth"; on which Anderson and Murphy (see page 4 above) commented:

> This may be correct. However, it is not easy to see how Article 1(1) of the Protocol could prevent the Court of Justice from identifying "new or extended rights" as aspects of the general principles of law whose continuance is assured by Article 6(3) of the TEU. That is an ability that the Court of Justice has always possessed, and that the Charter cannot therefore be accused of extending.

The then Labour Government was confident that the Protocol would protect the UK against unwanted interference from the Charter and would exempt the UK from all its chapters.[18] The White Paper on the Government's approach to the IGC stated that the Protocol was "legally binding and sets out clearly that the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law".[19]

Murphy maintained it was "clear from a plain reading of the Protocol that it is not an "opt-out" from the Charter but rather a clarification of its application in the UK". He outlined the aims of the Protocol during its drafting at the IGC:

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13 ESC 35th Report para. 60
14 Uncorrected evidence 16 October 2007
15 ESC Uncorrected Evidence Q110
16 Ibid, Q131 and Q112
17 Speech to British Institute of International and Comparative Law
18 HC Deb 11 July 2007 c 483 WH
19 "The Reform Treaty: the British Approach to the European Union Intergovernmental Conference", July 2007

> The principal aim of the UK Protocol was to limit the effect of the economic and social rights in the Charter in the British legal system. During the drafting of the Charter, it was the UK that argued for such rights to be limited by reference to "national laws and practices". This limitation is contained in Articles 27, 28, 30 (worker's rights and collective bargaining); Article 34 (social security); Article 35 (health care); Article 36 (access to services of general economic interest); and Article 52 (a general provision referring to the use of the clause in the Charter). The Court of Appeal's decision does not mean that those economic and social rights in the Charter have suddenly been extended in scope. The limitations inherent in the text of the above articles and in the horizontal clauses (which state that the Charter only applies when Member States are implementing EU law) still apply. However, the decision does mean that the Protocol provides no special exemption for the UK from the terms of the Charter.
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> More broadly, Article 1(1) of the protocol notes that the Charter does not
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> *extend the ability of the Court of Justice of the European Union, or any court or tribunal… of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of … the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
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> The key term here is "extend". It is clear that the Protocol ensures that the Charter cannot of itself afford a competence to the UK or EU courts that they did not already possess. However, it is also clear that the terms of this clause do not limit any existing competences of the UK or EU courts. Further evidence for this claim may be found in the eighth and ninth recitals to the Preamble of the Protocol which describe the Protocol as "clarifying" the application of the Charter to the United Kingdom. Thus, the Protocol does not alter the relationship between UK law and EU law nor the powers of the courts to review that law. Rather it restates the limitations already contained in the Charter.[20]

1.3 Commons European Committee debate

Many of these issues were revisited when European Committee B debated the Commission's strategy for implementing the Charter on 14 March 2011. Penny Mourdant asked the Government to:

- confirm the understanding that the UK's protocol is not an opt-out from the charter;
- say whether the Charter rights are existing principles of EU law and therefore binding on the UK, irrespective of the charter and protocol;
- say, with respect to the Commission's three practical examples about when it would take enforcement action against any Member State, whether Protocol 30 would prevent the Commission from taking such action against the UK if similar circumstances arose in the UK.

The then Justice Secretary, Ken Clarke, confirmed that the Protocol was "not an opt-out but a clarification of the position" (C 5):

> It clarifies it in a most important way. It sets out the boundaries around the charter by confirming that it neither creates nor extends any rights to EU citizens outside those that had existed pre-Lisbon, and it emphasises that

[20] *Human Rights in Ireland*, Saeedi: The UK & the EU Charter of Fundamental Rights, 14 July 2010

> member states are required to comply only when giving effect to EU law. It makes it quite clear that it does not apply any new rights or have any impact on existing UK or Polish law. So I would describe the protocol as a belt-and-braces approach to the underlying principles of the charter of fundamental rights. I have explained what the Government believe the charter of fundamental rights does, which is to restate existing principles.

On the second point he said the Charter was based on fundamental rights that existed pre-Lisbon, which were now "codified in the charter". The Government's position was that "the whole thing is a codification of the pre-existing situation and makes absolutely no difference either to the fundamental rights of citizens or to the obligations of member states under EU law.

On the third point, Mr Clarke reminded the Committee that the Protocol "states in the clearest possible terms that it can confer no new rights or have any new impact on UK law over and above that which existing European law applies".

Helen Goodman asked whether Poland and the UK would be in a different situation from the other Member States, to which he replied: "If some sudden surprising judgment were made, I have no doubt that the British and Polish Governments would rely strongly on the protocol ... So far the European Court has not produced any unexpected or startling judgments, and I do not expect it to" (C 8).

On the question of how the Charter applied to pre-existing EU law, Mr Clarke said that "all existing legislation, including that which pre-dates Lisbon, should comply with the fundamental rights and principles that have guided the European Union", continuing:

> If legislation has survived so far, it presumably has either not been challenged on the grounds of any breach of fundamental rights or it has survived the challenge. If anybody wanted to have another go at any pre-existing law, I have no doubt they would now invoke the charter, as well as go back to the Strasbourg court or judgment, or convention on human rights ruling on which

In Clarke's view, the Protocol gave the UK "an added protection, in case the Court should try to go in that direction in the future". He did not think the Court would go in that direction, but acknowledged the fears of those who feared the Court was "constantly trying to enlarge its jurisdiction and the competence of the Union". He was confident that such a move "would be flatly defying the charter itself and not only the British and Polish protocol" (C 11). He insisted the Charter the charter made no difference to the UK obligations under the European Convention on Human Rights and other human rights instruments, that the Charter rights "have been accepted by the British for years and years" (C 14).

Bill Cash raised further concerns about the role of the CJEU, the consequences of implementation of the Commission's Strategy and its effect on the courts' application of the Charter provisions (Cs 17-20). In spite of the many assurances that the Charter would not lead to an extension of EU competence, Mr Cash thought the Court of Justice would "use the powers in its usual fashion and extend, despite the apparent restriction or prohibition on doing so" (C 19). He did not dispute the Charter's inability to extend the competencies of the Union; the issue, in his opinion, was the Court, which "has a tendency to, and a track record of enlarging its previous interpretations of provisions"(C 21). Ken Clarke confirmed that the Charter "is of more political and public presentation importance than it is of deep significance,

because it does not actually change anything", concluding that the Commission's strategy was not "of deep political significance or any threat to our constitution" (C 22).

1.4 Lords EU Committee report

In its 10th Report of 2007-08, *The Treaty of Lisbon: an impact assessment*,[21] the House of Lords EU Committee noted the Government's assurance that the Charter only reaffirmed existing rights (para 5.42), and concluded that the effect of declaring the Charter to have the same legal value as the Treaties was "likely to preclude any argument that the rights and principles 'reaffirmed' did not already exist as fundamental rights and principles in the area of EU law" (para. 5.72). It followed then that if the CJEU stated that a Charter right constituted a general principle which would exist under EU law irrespective of the Charter, there would be no protection for the UK under the Protocol.

The Lords Report summarised witnesses' views on the nature of the UK Protocol, in particular, whether it was an opt-out or an interpretive tool:

> **i. A Charter opt-out?**
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> 5.85. Some witnesses seemed to consider that the Protocol effectively constituted an opt-out from the Charter (pp E148, E156). However, Professor Dashwood considered the Protocol to play a role in assisting interpretation of the Charter only: "The Protocol is not an opt-out for the United Kingdom; it is an interpretative protocol" (Q E332). This was a view echoed by Dr Sariyiannidou: "[The Protocol] does not say that the Charter is not binding in the UK and in this respect it does not amount to an 'opt-out'" (p G36). The ETUC referred to "opt out" as "inaccurate terminology" (p G29).
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> 5.86. The Government also viewed the Protocol as an interpretation guide rather than an opt-out. The DWP said categorically, "The UK Protocol does not constitute an 'opt-out'. It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law" (p G27). The DIUS and the DCSF referred to Articles 51 and 52 of the Charter and the Protocol as providing "some useful clarification of the effect of the Charter rights" (p G25). Professor Shaw suggested that in fact, the Protocol was a "Declaration masquerading as a Protocol" (Q E70). Indeed, she considered it extraordinary that the Member States should purport to instruct British courts as to how they were supposed to interpret the Charter (Q E73).
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> 5.87. **The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol.**

The report summarised views on the effects of the Protocol:

> **iii. The effect of the Protocol**
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> 5.91. As outlined above, the Charter itself contains articles concerning the scope and interpretation of the rights it contains. The question of whether the Protocol intends to depart from these articles and set out a different interpretation to be applied specifically in the UK and Poland has created some confusion.

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[21] HL Paper 62-I, 13 March 2008

5.92. Professor Guild pointed to the lack of clarity in the Protocol, saying "it is not entirely clear exactly what the objective of the Protocol is beyond some kind of statement about fundamental rights and their application in the UK and Poland". She considered a variety of interpretations to be possible (QQ E178-179). The Law Society of Scotland also pointed to the lack of clarity as to what would be the position in the UK and commented on the "unfortunate lack of legal certainty" that would result (p E165). Dr Sariyiannidou concluded that the Protocol was "a matter of presentation rather than content or substance" (p G37).

5.93. Given the lack of clarity as to the aim of the Protocol, witnesses found it difficult to judge what the Protocol's effects might be. Martin Howe QC noted: "one has to ask whether [the Protocol] is simply declaratory of the consequences of the Charter across the whole European Union or whether, alternatively, it is intended to create some different legal effect of the Charter inside the United Kingdom and Poland, as compared with the other Member States". He concluded that the Protocol might have no substantive legal effect and might simply be a reassertion of Article 51(1) of the Charter itself (QQ E283 & E285). As Professor Shaw highlighted, the recitals of the Protocol appear to indicate that there is no change intended to the status quo (Q E71).

5.94. In seeking to identify what would be the effect of the United Kingdom and Polish Protocol, the important question, according to Professor Peers, was the extent to which the rights in the Charter differed from the general principles of Union law: if the ECJ ruled that the Charter rights and the general principles were one and the same, then, in Professor Peers' view, "the distinction between the Charter and the general principles is irrelevant and therefore the British Protocol is meaningless".[93] However, if there was some scope for discussion as to whether the Charter and the general principles encompassed the same rights, then Professor Peers considered that the Charter might have some impact and the Protocol could be important. He concluded that even if the Charter and the general principles were to some extent different, the Protocol would not exclude the Charter entirely for the UK. It would simply prevent national courts and the ECJ from criticising national law in light of the Charter. However, as the recitals to the Protocol reaffirmed, the Protocol did not limit obligations incumbent on the UK as a result of Union law generally and those rules would continue to apply (Q E106). Andrew Duff MEP suggested that even if the Charter was not identical to the general principles at present, over time the case-law would develop in this direction (p E137).

5.95. Professor Chalmers thought that the Protocol was not worth a great deal (Q S31). However, this view was not shared by Professor Dashwood. He saw the Protocol as part of the belt-and-braces approach of the Government. In his view the Charter did not create new rights and did not enlarge the possibility of acts of Member States or EU institutions being challenged on fundamental grounds and the Protocol provided additional, but unnecessary, protection for the United Kingdom in this regard. For those who took the opposite view and considered that, to some extent at least, the Charter did create new rights, then for Professor Dashwood, the Protocol provided that as far as the United Kingdom was concerned the Charter must be interpreted as not creating new rights (Q E332). Jane Golding also emphasised that, in her view, the Protocol was secured by the United Kingdom in order to provide certainty that "it had covered all the angles" (Q E474).

5.96. Mr Straw was quite frank about the intention behind the Protocol and its likely effect: in his view, the Protocol was intended to reflect the terms of the

Charter's horizontal articles themselves. He told us "[the Protocol] puts beyond doubt what should have been obvious from other provisions" (Q E541).

5.97. Professor Jacqueline Dutheil de la Rochère, of the University Paris II (Panthéon-Assas), did not consider that the Protocol would lead to any great change in the way the Charter was applied, given the careful drafting of the horizontal articles of the Charter itself. She concluded that although the Protocol would probably provoke a significant amount of discussion and debate among lawyers, it might in the end produce little in the way of case-law (p E141).

5.98. Some witnesses who welcomed the Charter were concerned about the operation of the Protocol. The Trades Union Congress (TUC) raised two issues. First, they were concerned that the Protocol might hinder the use of the ECJ to ensure access to existing EU-based workers' rights. They pointed to the recent practice of the Court to draw on the Charter when interpreting EU employment directives and considered that it would be "unacceptable" for the Protocol to restrict the Court's power to do so in future. Second, they expressed a concern that the Protocol would restrict the right of UK citizens to claim rights through the ECJ and that this would lead to a widening difference between rights for UK and other EU citizens over time (pp G39-40). The ETUC, however, noted that the Protocol did not allow the United Kingdom to evade its obligations under EU law (p G30).[94]

5.99. Witnesses who expressed concerns at the introduction of a legally binding Charter did not appear to be reassured by the existence of the Protocol. David Heathcoat-Amory MP complained that the Protocol was "wafer thin" and Neil O'Brien feared that the Court would interpret the Protocol however it liked (QQ S94-95). Sally DeBono was also dubious that the Government's "red line" would hold (p S131).

5.100. The Chartered Institute of Personnel and Development was concerned that the protection afforded by Article 1 of the Protocol in respect of the Title IV Solidarity provisions of the Charter might be traded at some future point in return for concessions in other areas, a worry shared by Professor Shackleton (pp G18, G38).

5.101. Dr Sariyiannidou suggested that the ECJ's obligation to ensure the uniform application of EU law would trump the UK Protocol. This could be relevant if the Court were to be asked to interpret, for example, UK implementation of EU labour and social legislation. She considered that the United Kingdom would have more success in resisting the Charter through insisting on a rigorous application of the principle of subsidiarity in Article 51(1) (pp G36-37).

5.102. The recitals make several references to the desire of Member States to "clarify"—not prescribe—the application of the Charter. Lord Goldsmith, who was to a large extent responsible for drafting the horizontal provisions of the Charter in his role as Government representative on the Convention and who also drafted the Protocol, emphasised this point in a recent paper to the British Institute of International and Comparative Law: "The negotiations at the June European Council and subsequent Intergovernmental Conference provided Government with the opportunity to bolster existing safeguards and set in stone how the Charter will operate in the UK, as in all Member States".[95]

The Committee concluded that the broad legal effects of the Protocol were as follows (para. 5.103):

> **(a) Article 1(1) reflects the fact that the Charter does not create new rights—if a national law is inconsistent with a provision of the Charter then it is also inconsistent with an EU or international norm. This also reflects Article 51 of the Charter.**
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> **(b) Article 1(2) is in line with the frequent references in the Title IV rights to national laws and practices and also with Article 52(5) of the Charter which sets out the approach which should be taken to "principles" in the Charter. But it also brings some welcome clarity to Title IV. Article 52(5) read in the light of the Explanations could have led to a conclusion that some Title IV "rights", such as Article 33, represent enforceable rights which could be relied upon directly before British courts. The Protocol appears to put beyond doubt that this would not be possible. In these circumstances it must be regarded as very unlikely that the ECJ would, in interpreting the Charter, hold that Title IV involved justiciable rights in relation to any Member State, but Article 1 paragraph 2 of the Protocol would in our view preclude it making such a ruling in relation to the United Kingdom. However, Title IV reflects principles which could, we think, still bear on the interpretation, or even the validity, of legislative and executive acts under Union law, as provided by the last sentence of Charter Article 52(5), and so indirectly affect individual rights. We have also noted above that, to the extent that the Union legislates in areas which are within its competence quite apart from the Charter, national legislators and courts will anyway be subject to that legislation.**
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> **(c) Article 2 reflects a common-sense interpretation of those articles in the Charter which refer to national laws and practices and of Article 52(6) of the Charter, which stipulates that "full account" is to be taken of national laws and practices where there is a reference to them. But it is a useful clarification of what might otherwise have been open to argument. Again, however, we think it unlikely that Article 2 of the Protocol precludes the use in relation to the United Kingdom and Poland of any relevant Charter articles in the way contemplated by the last sentence of Charter Article 52(5), when interpreting or ruling on the validity of legislative or executive acts taking place under Union law on the basis of a Union competence not connected with the Charter.**
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> **(d) The Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States. But to the extent that the Explanations leave some ambiguity as to the scope and interpretation of the Charter rights, and as to the justiciability of the Title IV rights especially, the Protocol provides helpful clarification. We would not be surprised if, in considering the scope of the Charter in future, EU and domestic courts had regard to the terms of this Protocol in order to assist interpretation of the Charter's horizontal articles, even in cases where the United Kingdom and Poland were not involved. Indeed, given that, despite media reports, it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States.**

2 UK and EU case law

2.1 UK consideration of the Dublin Regulation

The Saeedi/NS and ME cases related to the transfer of asylum seekers under the 2003 Dublin Regulation, which aims to identify as quickly as possible the Member State responsible for examining an asylum application, and to prevent abuse of asylum procedures, notwithstanding the likelihood of ill-treatment there.

In the High Court on 31 March 2010 Justice Cranston ruled in *Saeedi*, in which the applicant relied on rights under the EU Charter.[22] Justice Cranston considered *inter alia* the effects of the EU Charter in UK law. He noted that although the Protocol meant the Charter could not be "directly relied on", it was "an indirect influence as an aid to interpretation" and the Government had to take account of human rights in that interpretation:

> It will be recalled that Article 1 of the Charter makes human dignity inviolable, Article 18 provides that the right to asylum shall be guaranteed, and Article 19(2) provides that "no one may be removed to a State where there is a serious risk that he or she would be subjected to inhuman or degrading treatment". None of these rights are directly enforceable against the Secretary of State. A transfer under the Dublin Regulation cannot be challenged on the basis that it is not compatible with the right to human dignity or the right to asylum, or will be in breach of Article 19(2).
>
> In my view, however, the Secretary of State must exercise his discretion under Article 3(2) of the Dublin Regulation taking into account these rights. That follows because the rights have a binding, interpretive quality through their recognition in the recitals. The Secretary of State must ask himself whether, on the available evidence, there is a risk that Greece will not respect the human dignity of the claimant or not examine his right to asylum effectively: Articles 1, 18 of the Charter. In practice the considerations relevant to Article 19(2) will have already been factored into the consideration of Article 3 of the Convention. Having taken these matters into account the Secretary of State, confronted with an asylum application, may need to apply Article 3(2) to examine it himself. That is the case even though he does not bear responsibility under the criteria laid down in the Dublin Regulation. Only then will the United Kingdom act fully in accordance with its obligations under European Union law.
>
> None of this would breach in my view the Protocol by enforcing the Charter of Fundamental Rights in the United Kingdom. Nor does it equate to a Member State, in addition to complying with its express obligations under the Dublin Regulation and the other instruments of the Common European Asylum System, having to police the compliance of other Member States with their obligations under these instruments. Such an approach would cut across a clear purpose of these instruments, which is that there should be consistency between Member States. It would also be inconsistent with one of the aims of the Dublin Regulation, which is that the responsibility of a Member State for dealing with an asylum application should be established quickly. And it would be contrary to the approach in Nasseri [2010] 1 AC 1 and KRS v United

[22] The case concerned an Afghan asylum seeker who arrived in the EU via Greece and then sought asylum in the UK. The UK tried to return Saeedi to Greece, but he challenged the transfer, claiming that Greece was unable to process his case and that return would violate his fundamental rights. See also NS and ME and others at the CJEU in Joined Cases C-411/10 and C-493/10. see also CJEU at http://www.bailii.org/eu/cases/EUECJ/2011/C41110.html

> Kingdom, both of which, for reasons of curial propriety, I must apply. Serious and consistent breaches of the Common European Asylum System by a Member State, so claimants do not have access to an effective and lawful procedure and the guarantee of a right to asylum, is a matter at a European institutional level between that Member State and the Commission. Unlike the instant proceedings the Member State would be present and have the opportunity to answer the allegations.

To summarise, Justice Cranston said EU Charter rights were not directly enforceable against the UK and that the Charter was an aid to interpretation only.

However, just before a Court of Appeal hearing on 12 July 2010, the Home Secretary, while continuing to dispute the scope of protection provided by the UK Protocol, conceded that Cranston J had erred in holding that the Charter could not be directly relied upon in the UK.

The Court of Appeal referred the matter to the Court of Justice for consideration of the scope and applicability of Charter Articles 1 (human dignity), 18 (asylum) and 47 (fair hearing) amongst others. The final question referred was whether the answer to the preceding questions were "qualified in any respect" by the Protocol. The CJEU was therefore asked to offer a definitive opinion on the status of the Protocol in EU law.

2.2 European Court consideration

Advocate General's Opinion in NS

Following a request for a preliminary ruling on the Dublin Regulation in NS,[23] CJEU Advocate General Trstenjak considered in detail the field of application of the Charter and whether or to what extent Protocol 30 could be regarded as an opt-out from the Charter.

On the first matter she concluded that, when determining whether to examine an asylum application for which a Member State is not responsible under the terms of the Dublin Regulation, that Member State is required to have regard for the provisions of the Charter of Fundamental Rights. In her view, such a determination constitutes implementation by a Member State of a provision of EU law (Within the terms of Article 51(1) of the Charter) in which the Member States are required to have regard for Charter rights.

She did not think the Protocol amounted to an opt-out, based on an analysis of its wording, in particular its recitals:

> 168. Under Article 1(1) of Protocol No 30, 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.
>
> 169. According to its wording, Article 1(1) of Protocol No 30 therefore makes clear that the Charter of Fundamental Rights does not have the effect of either shifting powers at the expense of the United Kingdom or Poland or of extending the field of application of EU law beyond the powers of the European Union as established in the Treaties. Article 1(1) of Protocol No 30 thus merely reaffirms the normative content of Article 51 of the Charter of Fundamental Rights, which seeks to prevent precisely such an extension of EU powers or of the field of

[23] Opinion of Advocate General Trstenjak, 22 September 2011, Case C-411/10, N. S. v Secretary of State for the Home Department

application of EU law. (79) Article 1(1) of the Protocol does not therefore, in principle, call into question the validity of the Charter of Fundamental Rights for the United Kingdom and for Poland.(80)

170. This view is confirmed in the recitals in the preamble to the Protocol, which confirms, in several places, the fundamental validity of the Charter of Fundamental Rights in the Polish and the English legal orders.(81) For example, the third recital states that under Article 6 TEU the Charter is 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. Reference is made in the eighth and ninth recitals to the wish of Poland and the United Kingdom to clarify *certain aspects of the application of the Charter* and the *application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom*.

171. Whilst Article 1(1) of Protocol No 30 does not call into question the validity of the Charter of Fundamental Rights, but should merely be regarded as an express confirmation of the normative content of Article 51 of the Charter of Fundamental Rights, Article 1(2) of Protocol No 30 appears to seek to clarify the validity of individual provisions of the Charter in the legal orders of the United Kingdom and Poland. Under Article 1(2) of Protocol No 30, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as such rights are provided for in their respective national laws.

172. Article 1(2) of Protocol No 30 relates to the social fundamental rights and principles grouped together under Title IV of the Charter of Fundamental Rights (Article 27 to 38). That title, entitled 'Solidarity', is regarded as one of the most controversial areas in the evolution of the Charter. There was dispute not only over the fundamental question whether social rights and principles should be incorporated into the Charter, but also how many social rights should be included, how they should be organised in detail, what binding force they should have, and whether they should be classified as fundamental rights or as principles.(82)

173. With the statement that Title IV of the Charter of Fundamental Rights does not create justiciable rights applicable to Poland or the United Kingdom, Article 1(2) of Protocol No 30 first reaffirms the principle, set out in Article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals. However, Article 1(2) of Protocol No 30 also appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland.(83)

174. Because the contested fundamental rights in the present case are not among the social fundamental rights and principles set out in Title IV of the Charter of Fundamental Rights, however, there is no need to examine in any greater detail here the question of the precise validity and scope of Article 1(2) of Protocol No 30. It is sufficient to refer to the 10th recital in the preamble to Protocol No 30, according to which references in that protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter.

175. Article 2 of Protocol No 30 provides, lastly, that where a provision of the Charter refers to national laws and practices, it only applies 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.
>
> 176. In the light of the abovementioned recitals, it is not possible to infer from Article 2 of Protocol No 30 a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland. Moreover, Article 2 of Protocol No 30 applies solely to provisions of the Charter of Fundamental Rights which make reference to national laws and practices.(84) That is not the case with the provisions of the Charter which are relevant in the present case.
>
> 177. In the light of the foregoing, the seventh question must be answered to the effect that the interpretation of Protocol No 30 has not produced any findings which could call into question the validity for the United Kingdom of the provisions of the Charter of Fundamental Rights which are relevant in the present case.

The Advocate General concluded that the interpretation of Protocol 30 "has not produced any findings which could call into question the validity for the United Kingdom of the provisions of the Charter of Fundamental Rights which are relevant in the present case". Trstenjak said Mr Saeedi should not be returned to Greece. Her conclusion was supported by the earlier decision of the European Court of Human Rights in *MSS v Belgium and Greece* in January 2011 that returning the applicant to Greece was a violation of the right to be free from inhuman or degrading treatment (Article 3 of the Convention).

Saeedi/NS and ME Grand Chamber judgment

The CJEU Grand Chamber ruled on *Saeedi/NS and ME* on 21 December 2011, concluding that the UK and Poland were not exempted from complying with Charter provisions:

> 119) ... 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.[24]

Barristers at Doughty Street Chambers (who represented Saeedi/NS) described this as a "landmark case" which decided "fundamental questions about Member States' obligations under the EU Charter of Fundamental Rights and whether the Charter binds the UK".[25]

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[24] For summary of judgment, see Court of Justice press release, 21 December 2011.

[25] See Doughty Street Chambers, European Court of Justice holds that EU Charter of Fundamental Rights binding on UK, 23 December 2011. For further comment on the Opinion, see the UK Human Rights blog, 26 September 2011.

2.3 UK High Court ruling in *AB v Home Department*

In the High Court ruling on an asylum case on 7 November 2013, *AB v Secretary of State for the Home Department*, the claimant maintained that the Government had:

> i) acted in breach of her public law duty not to place the claimant at real risk of being tortured;
>
> ii) acted in breach of article 3 of the European Convention On Human Rights by placing the claimant at real risk of being tortured;
>
> iii) acted in breach of her duty of confidentiality to the claimant by causing or permitting the disclosure of confidential information to the authorities in Country A;
>
> iv) unlawfully interfered with the claimant's rights under article 8 of the European Convention On Human Rights and **article 7 of the Charter of Fundamental Rights** of the European Union by causing private information to be disclosed to the authorities in Country A; and
>
> v) failed to protect the claimant's personal data in **breach of article 8 of the Charter of Fundamental Rights** of the European Union.

Dismissing all the claims, Justice Mostyn confessed to being "surprised" by AB's reliance on the Charter of Fundamental Rights, as he "was sure that the British government (along with the Polish government) had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law".

Justice Mostyn considered the "constitutional significance" of the EUCJ judgment in ME and others in December 2011 that Article 1(1) of the Protocol "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 obligations 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". He continued:

> 14. The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.
>
> 15. This may be illustrated by the claim in this very case. As I have explained above the claimant asserts that his right to privacy under article 8 of the European Convention on Human Rights has been violated. Article 8(1) provides *"everyone has the right to respect for his private and family life, his home and his correspondence"*. But the claimant also says that his right to privacy under article 7 of the Charter of Fundamental Rights of the European Union has been violated. This provides *"everyone has the right to respect for his or her private and family life, home and communications"*. Apart from expanding the concept of correspondence into communications it can be seen that this is exactly the same. So it can be seen that even if the Human Rights

> Act were to be repealed, with the result that article 8 of the European Convention on Human Rights was no longer directly incorporated into domestic law, an identical right would continue to exist under the Charter of Fundamental Rights of the European Union, and this right is, according to the Court in Luxembourg, enforceable domestically.

16. Further, as I have explained above the claimant here asserts a violation of article 8 of the Charter of Fundamental Rights of the European Union. This provides:

> **Protection of personal data**
>
> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

> This right to protection of personal data is not part of the European Convention on Human rights, and has therefore not been incorporated into our domestic law by the Human Rights Act. But by virtue of the decision of the court in Luxembourg, and notwithstanding the terms of the opt-out, the claimant is entitled, as Mr Westgate QC correctly says, surprising though it may seem, to assert a violation of it in these domestic proceedings before me.

Rosalind English commented on the UK human rights blog, 8 November 2013 that "if the Protocol is of no effect, that means that the Charter introduces into domestic law all those parts of the [European Convention on Human Rights] that were deliberately missed out by Parliament when passing the Human Rights Act 1988, plus "a great deal more", consisting mainly of social and economic rights with unpredictable budgetary consequences and problems in enforceability"; and:

> If Mostyn J is correct – and there is no reason to believe that he isn't – all talk of revoking the ECHR and producing a domestic bill of rights is rendered nugatory. The Convention will continue to rule from the grave, via the Charter and Section 72 of the European Communities Act. And that is the least of it – because – and this case demonstrates the potency of the Charter, albeit with unmeritorious facts – the Charter contains so much more by way of governmental obligations than the ECHR. In additional to the normal privacy rights under Art 8 of the Convention and Art 7 of the Charter, the claimant also ran an argument under Article 8 of the Charter, which entitles everyone to the right to the protection of personal data pertaining to them. Perhaps there were good reasons that this right was never formulated in the ECHR, and therefore has not been incorporated into our domestic law by the Human Rights Act. Nevertheless, by virtue of the decision in ME, and notwithstanding the terms of the opt-out, the claimant was entitled, "surprising though it may seem", to assert a violation of it in these domestic proceedings.

Tobias Lock, EU Law Lecturer at the University of Edinburgh, thought Justice Mostyn was incorrect in paragraph 15:

> The Charter only applies when the Member State is acting when 'implementing' EU law (Art 51(1)), which has been interpreted to mean 'within the scope of EU law' (Case C-617/10 Akerberg Fransson). It doesn't apply in purely domestic situations. Of course, the big question is how to distinguish between the two. Plenty of room for academic discussion and many more references to Luxembourg.[26]

3 Further reading

AB Judicial Review judgment, 15 November 2012

Lords debate on *European Union (Amendment) Bill* (Lisbon Treaty), HL Deb 9 June 2008 c 411 onwards

UK Human Rights blog, Application of EU Rights Charter – Advocate General's Opinion, Rosalind English, 26 September 2011; The ECJ on Asylum, Greece; the UK Protocol on the EU Charter, Dr Cian Murphy, 28 December 2011

European University Institute (EUI) Working Papers, Law 2011/08, The Charter of Fundamental Rights: History and prospects in post-Lisbon Europe, David Anderson Q.C. & Cian C. Murphy

C Barnard, "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?" Conference Paper 11-12 April 2010, pp 12–15.

The Reach of EU Fundamental Rights on Member State Action after Lisbon, Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 2013

[26] *Public Law for Everyone blog*, 15 November 2013. See also his UK Human Rights blog post, 13 November 2013.