RIGHTS BEYOND THE HUMAN RIGHTS ACT

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Matrix Chambers
4 June 2015, Belfast

INTRODUCTION

In the context of the recent threats of a possible repeal of the Human Rights Act 1998, it is opportune to consider the alternative protections for fundamental human rights which are available and to which lawyers should properly have regard in pleading cases before the courts of England, Wales, Scotland and the North of Ireland. We consider two important parallel sources of fundamental rights protection, namely (I) the Charter of Fundamental Rights and Freedoms of the European Union and (II) the common law.

I. THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

Introduction – what is the Charter?

1.1. The Charter of Fundamental Rights and Freedoms of the European Union ("the Charter" or "EC") brings together in a single document all the personal, civil, political and individual rights deriving from the "*constitutional traditions and international obligations common to Member States*" (Preamble to the Charter) that formed an integral part of European Union ("EU") law (see, *e.g. A v B and others* C-112/13 at [51]). The Charter is an instrument of the EU: it forms part of EU law and is subject to the ultimate interpretation of the Court of Justice of the European Union ("CJEU") in Luxembourg. It is given effect in domestic law through the European Communities Act 1972. It is distinct from the more well-known and more often litigated European Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights ("ECHR"), which is an instrument of the Council of Europe, given effect in domestic law through the Human Rights Act 1998 ("HRA"), and subject to the ultimate interpretation of the European Court of Human Rights in Strasbourg ("ECHR"). However, there is considerable overlap in the rights protected under both instruments.

1.2. First agreed by EU Member States as a non-binding 'declaration' in Nice on 7 December 2000, the Charter became legally binding and directly effective in Member States with the entry into force of the Treaty of Lisbon, in December 2009, amending the Treaty on the European Union ("TEU"). It may be invoked by individuals before domestic courts in cases alleging breaches of fundamental rights, as an alternative to or in parallel addition to the HRA and/or the common law.

Rights protected under the Charter

1.3. The fundamental rights protected under the Charter are contained in 54 articles grouped under six "Titles", namely: "Dignity" (Title I, articles 1-5), "Freedoms" (Title II, articles 6-19), "Equality" (Title III, articles 20-26), "Solidarity" (Title IV, articles 27-38), "Citizens' Rights" (Title V, articles 39-46), and "Justice" (Title VI, articles 47-50). They include:

(1) **civil rights**, *e.g.*: the right to life (article 2), the prohibition on torture and inhuman and degrading treatment (article 4), the prohibition on slavery and servitude (article 5) and the right to liberty (article 6); the right to an effective remedy and to a fair trial (article 47) and the presumption of innocence (article 48);

(2) **political rights**, *e.g.*: freedom of thought, conscience and religion (article 10), freedom of expression and information (article 11), freedom of assembly and association (article 12), the right to vote (article 41) and the right to diplomatic and consular protection (article 46).

(3) **economic rights**, *e.g.*: the right to social security and social assistance (article 34) and the right to health care (article 35);

(4) **social and cultural rights**, *e.g.*: the freedom of the arts and sciences (article 13) and the right to cultural, religious and linguistic diversity (article 22);

(5) **workers' rights**, *e.g.*: the freedom to choose an occupation and the right to engage in work (article 15), the right of collective bargaining and action (article 28), protection in the event of unjustified dismissal (article 30) and the right to fair and just work conditions (article 31);

(6) **rights regarding non-discrimination**: *e.g.*: the prohibition on 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 (article 21); equality between men and women (article 23); the rights of the elderly (article 25); the right of integration of persons with disabilities (article 26) (n.b. non-discrimination under the Charter does not require the condition precedent of infringement of another fundamental right, as required under the ECHR); and

(7) **so-called 'new generation' rights**, ***e.g.*** environmental protection rights (article 37) and the right to good administration (Article 41).

Inter-relationship between the rights protected under the Charter and the ECHR

1.4. Many of the fundamental rights contained in the Charter reflect or build upon the rights protected under the ECHR. They include:

(1) **rights that broadly mirror ECHR protections**, *e.g.*: the right to life (article 2 EC/article 2 ECHR); the prohibition on torture and inhuman and degrading treatment (article 4 EC/article 3 ECHR); the prohibition on slavery and servitude (article 5 EC/article 4 ECHR), the right to liberty (article 6/article 5 ECHR); and the right to family life (article 7 EC/article 8 ECHR);

(2) **rights that expand on ECHR protections**, *e.g.*: the right to an effective remedy and to a fair trial, which is not limited to cases involving civil rights or criminal charges, and which including an express right to legal aid (article 47 EC/article 6 ECHR);

(3) **rights that have some overlap with ECHR protections**, *e.g.*: the right to physical and mental integrity (article 3) and the protection of personal data (article 8), which have some overlap with the right to family life under article 8 ECHR.

1.5. However, the scope of the rights protected under the Charter is considerably broader than the scope of rights protected under the ECHR, reflecting the fact that the Charter rights are drawn not only from the ECHR and its case law, but also from the Social Charters adopted by the EU and the Council of Europe, the case law of the CJEU and the *"constitutional traditions and international obligations common to the Member States"* (Preamble to the Charter), *e.g.*, the right to asylum, in accordance with the United Nations Refugee Convention (article 18) and the rights of children, in accordance with the United Nations Convention on the Rights of the Child (article 24).

Interpreting the Charter

1.6. The TEU and the preamble to the Charter provide that in interpreting the Charter, *"due regard"* must be had to the *Official Explanations relating to the Charter of Fundamental Rights* (see article 6(1) TEU and article 52(7) of the Charter). The Explanations consist of set of commentaries corresponding to each of the Charter articles, which explains the sources and limits of each of the fundamental rights. As the Explanations state:

> "Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter."

1.7. The "Explanation" for Article 9 – the right to marry and the right to found a family – is set out below by way of example. Other "explanations" are considerably more detailed.

> "This Article is based on Article 12 of the ECHR, which reads as follows: *"Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right."* The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides."

1.8. Article 52(3) of the Charter further provides as follows in relation to the interpretation of rights which are protected under both the Charter and the ECHR:

> "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." (emphasis added).

1.9. This makes clear that, although the decisions of the ECtHR are not directly binding on the CJEU (until such time (if at all) as the EU accedes to the ECHR), ECHR law – including the text of the Convention *and* the corresponding jurisprudence of the ECtHR (see *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* Case C-279/09) – represents a baseline protection of the rights common to both texts, below which EU law cannot fall (see *e.g.*, *McB v E* (C-400/10) [2011] Fam 364 at [53]). While EU law can enhance and extend the protections provided under ECHR law, the protections afforded under the Charter can never be lower than those afforded under the ECHR.

Direct effect of the Charter in EU Member States

1.10. Between 2000 and 2009, the Charter functioned as a non-binding declaration of rights available under EU law – some of which were legally binding on States as general principles of EU law (*e.g.* the right to an effective remedy and the prohibition on discrimination). The Charter itself became legally binding and directly effective in Member States with the entry into force of the Treaty of Lisbon, in December 2009, which amended article 6 TEU. Amended article 6 TEU provides:

> "(1) 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.**
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties […]
> (3) **Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they result from the constitutional traditions common to the Member States, **shall** constitute **general principles of the Union's law**."

1.11. This means that individuals in Member States can rely on the Charter before their national courts and that the national courts of Member States are in turn obliged, as far as possible, to interpret national law in conformity with the directly effective Charter. If it is not possible to interpret national law in conformity with directly effective EU law, the national law must be disapplied by the Courts (*Åklagaren v Hans Åkerberg Fransson* C-617/10 ("*Fransson*") at [48]). From the perspective of a victim claiming a violation of their fundamental rights, this is the main advantage of the Charter over the ECHR: in relation to the ECHR, domestic courts are limited to seeking to interpret domestic law so as to comply with the ECHR where possible or to declare it incompatible with the ECHR (other than in relation to devolved legislation which courts can strike down for incompatibility with the HRA). Charter rights give the Courts considerably more power.

1.12. The CJEU has made clear that certain Charter rights may have not only vertical effect between a private party and a Member State body, but may also have horizontal effect between private parties. This means national courts can be required to disapply inconsistent national law in proceedings between private parties, not just in proceedings against State bodies (see, e.g., *Mangold* C-144/04; *Kucukdeveci v. Swedex GmbH & Co. KG* C-555/07 [2010]; *HK Danmark v. Experian A/S* C-476/11 [2013] *Association de Mediation Sociale* ('*AMS*') Case C-176/12 *("AMS")*).

Direct effect of the Charter in the United Kingdom

1.13. EU law is enforced in the United Kingdom by way of the European Communities Act 1972 ("ECA") which stipulates that all rights, powers, liabilities, obligations and restrictions arising by or under the European Treaties *"are without further enactment to be given legal effect or used in"* the UK. The ECA is deemed to be a 'constitutional statute', which cannot be impliedly repealed by a subsequent inconsistent statute (*Thoburn v. Sunderland CC (the 'Metric Martyrs' case)* [2002] EWHC 195.

1.14. Within the EU legal order, the Charter has a legal status equal to that of the EU Treaties. However, much confusion has reigned as its status in UK legislation. That confusion was arises primarily from then Prime Minister Tony Blair's now infamous declaration – in the face of particular concerns regarding the rights conferred under Title IV of the Charter ("Solidarity") – that he had secured for the UK, by way of the Protocol 30 of the Charter, an "*opt-out*" from the Charter. Protocol 30 provides as follows:

> "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."

1.15. The CJEU has refuted Tony Blair's 'spin' on the text of Protocol 30, as have subsequent governments, legal experts and indeed domestic courts. In *NS (Afghanistan)) v Secretary of State* C-411/10 (concerning the removal of an Afghan refugee to Greece, where he was at risk of inhuman and degrading treatment), the CJEU confirmed the concession made by the UK Government to the High Court in the case that Protocol 30 did not exempt the UK from applying the Charter; it merely explained the effect of article 51 of the Charter and its application (*NS (Afghanistan)) v Secretary of State* [2013] QB 102 [120] ("*NS"*) or or *R (Saeedi) v. Secretary of State* [2010] EWCA Civ 990) both within the UK and Poland and in

other Member States. The CJEU held that the Protocol "*does not call into question the applicability of the Charter in the United Kingdom*" (at [119]).

1.16. Later that year, in R *(AB) v Secretary of State* [2013] EWHC 3453 (Admin) Mostyn J expressed some puzzlement as to the ruling in *NS*, stating that he *"was sure that the British government had secured… an opt-out from the incorporation of the Charter into EU law and thereby… into our domestic law"*. However, in light of the *NS* case he was forced to conclude that:

> "[n]otwithstanding 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**." [14]

1.17. As the above cases make clear, the Charter – with a legal status equal to the EU Treaties – is directly effective in the UK by virtue of section 2(1) ECA. Therefore, the rights contained in the Charter have supremacy over inconsistent national law, including statutory law, and over decisions of public authorities, by virtue of sections 2(4) and 3(1) ECA: where it is impossible for national courts or tribunals to interpret primary legislation consistently with a right enforceable under the Charter, they must disapply the non-compliant provision.

1.18. This is exactly what the Employment Appeals Tribunal and the Court of Appeal for England and Wales have done in the recent case of *Benkharbouche v. Sudan* [2015] EWCA Civ 33. The English Court of Appeal ruled that the right of access to a court guaranteed (horizontally) by article 47 of the Charter had to be given priority over conflicting provisions of the State Immunity Act 1978 ("SIA"), which grant immunity in employment cases involving Embassy domestic staff. It therefore disapplied the provisions of the SIA that were incompatible with the Charter. The importance of the case cannot be understated. It marks the first time that a court in the UK has disapplied provisions of an act of Parliament on the basis of their incompatibility with fundamental rights.

Applicability of the Charter

1.19. As the above paragraphs make clear, the possible impact of the Charter on the domestic protection of fundamental rights and on the litigation of breaches of such rights before national courts is significant. That being said – importantly – the Charter does not function as the EU's Bill of Rights: while the rights protected under the Charter are broader than those under the ECHR, and while it is capable – unlike the HRA – of requiring

incompatible primary legislation to be disapplied, its applicability within Member States is subject to a fundamental limitation, severely curtailing its scope of applicability in proceedings seeking to enforce fundamental rights. This limitation is set out in article 51 of the Charter, which provides:

> "1. The **provisions of this Charter are addressed to the institutions and bodies 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.
> 2. **This Charter does not establish any new power or task for the Community or the Union,** or modify powers and tasks defined by the Treaties."

1.20. Article 51 makes clear that, in relation to Member States, the Charter does not create free-standing rights. It does not apply to all areas of national law where fundamental rights are engaged, in a manner akin to the ECHR through the operation of the HRA. Rather, it applies exclusively in cases where States are implementing EU law. Before a Charter right can be invoked in national proceedings, a preliminary question of jurisdiction must be determined, *i.e.*, whether the act or matter complained of is a matter of EU law.

1.21. That undoubtedly places a significant limitation on the circumstances and cases in which the Charter is applicable before the courts in England, Wales, Scotland and the North of Ireland. For example, whereas the Charter has the scope to impact significantly in cases concerning discrimination in employment – matters which are within the competence of EU law – it would not be applicable in relation, for example in most cases challenging police conduct, as police powers and conduct are not an area of EU competence.

1.22. Nevertheless, the limitation contained in article 51 is not as restrictive as might first appear. The scope of EU laws is in fact rather broad-ranging, encompassing *inter alia* all the following areas of law, in relation to which the Charter would be engaged:

(1) refugee status determination (*e.g., NS, supra*);

(2) human trafficking (*e.g.*, *R v L and other appeals* [2013] EWCA Crim 991);

(3) asylum claims (*e.g., RT (Zimbabwe) v Secretary of State for the Home Department; KM (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38* and *HJ (Iran) v Secretary of State* [2010] UKSC 31);

(4) discrimination (*e.g.*, *Tariq v Home Office* [2012] 1 AC 452);

(5) data protection (*e.g., R (Lord) v Secretary of State* [2003] EWHC 2073 (Admin); and *Digital Rights Ireland* C-293/12);

(6) consumer protection (*e.g., Morcillo and García v Banco Bilbao Vizcaya Argentaria* C-169/14);

(7) environmental protection (*e.g., Edwards and Pallikaropoulos* Case C-260/11);

(8) protection of property (*e.g., Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)* [2012] UKSC 55);

(9) free movement of people (*e.g., ZZ v Secretary of State* [2013] QB 1136;C-300/11); and

(10) export bans / free movement of goods (*e.g., R (Zagorski) v. Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 [66]-[71]).

1.23. Further, the CJEU has set a low threshold for article 51(1) of the Charter, determining – in accordance with the *Explanation* for article 51(1) – that the test to be applied is whether Member State action and/or national law falls "*within the scope*" of EU law (*Fransson*). This means that if the power being exercised by the Member State is derived ultimately from EU law or touches upon it, it is deemed to fall within its "*scope*". The test under *Fransson* is an objective one: there is no requirement for the national legislation or the act of the Member State to be intended to implement or relate to an EU obligation. This confirms the earlier decision of the Supreme Court that article 51(1) had to be "*interpreted broadly*" and "*means whenever a Member State is acting "within the material scope of EU law"*" (*Rugby Football Union v. CIS Ltd* [2012] UKSC 55 at [28]).

1.24. In the more recent case of *Cruciano Siragusa v. Regione Sicilia* C-206/13, the ECJ has taken a seemingly more limited approach to the "*scope*" of the Charter, underscoring that the concept of "*implementing Union law*" under article 51(1) requires a greater connection than Member State action and EU law simply being closely related or one having an indirect impact on the other (at [24]). It made clear that fundamental rights do not apply to national legislation where EU law does not impose any obligation on Member States with regard to the matter at issue (at [25]). However, the CJEU is live to the prospect of Member States seeking to argue that the subject matter of a dispute is outside the scope of EU law in order to avoid the application of the Charter. It therefore requires domestic courts to review any such arguments with care and to assume sole responsibility for the analysis of whether the matter is properly within the scope of EU law (see *e.g., ZZ supra* at [36]-[37]).

Conclusion

1.25. Evidence collected by the British Government indicates that the Charter has to date had a limited impact on domestic law.[1] This may be due to a lack of awareness about the Charter and the confusion regarding its status in domestic law. The Scottish Faculty of Advocates noted in 2014 that reliance on the Charter in Scotland is rare: they were unaware of any reported case in the jurisdiction in which the Charter had made any difference to the outcome.[2] No similar research has been published in relation to the North of Ireland, although the Northern Ireland Human Rights Commission has called on the UK to *"consider if it is doing all it can to promote the Charter throughout its jurisdiction"*,[3] suggesting that awareness of the Charter may be similarly limited here. That is regrettable. As the *Benkharbouche* case demonstrates, the Charter has a critical role to play in the protection of rights before domestic courts, whether or not the HRA survives the current Westminster government. If upheld on appeal, the ruling will have consequences that extend far beyond the rather esoteric area of the immunity of diplomatic missions which the case involved. The case makes clear that, despite the focus on human rights law, EU law is in fact considerably more robust in its protection of fundamental rights, given the ability of courts to strike down primary legislation incompatible with them. The ruling makes clear that the Charter should not be overlooked by lawyers litigating matters capable of raising issues "*within the scope*" of EU law. Indeed, in cases raising matters of EU law, it could be a trump card.

II. THE COMMON LAW

Introduction

2.1. While lawyers – and courts – over the past 15 years have tended to focus on the HRA and the ECHR rights it imported as the primary source of rights and remedies, the UK Supreme Court, in a number of recent judgments, has sought to assert the primacy of the common law in the protection of fundamental rights. In a number of recent judgments, the Supreme Court has emphasised the power and primacy of common law rights by underscoring that *"[c]onventions, institutions, bills of rights and the like… recognis[e] rather than*

[1] HM Government, *Review of the Balance of the Competences between the United Kingdom and the European Union Fundamental Rights* (Summer 2014) at [4.20]
[2] *Ibid* at [4.22].
[3] Northern Ireland Human Rights Commission, *Letter Regarding the Ministry of Justice Review of the Balance of Competences between the UK and the EU* (20 January 2014).

creat[e]"[4] protections that are inherent in and fundamental to democratic society. The judgments emphasise the common law as the first port of call in claims for breaches of fundamental rights, emphasising that its development was not halted by the incorporation of the ECHR into domestic law. As stated by Lord Toulson in *Kennedy v. The Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, at [133]:

> "it was not the purpose of the Human Rights Act 1998 that the common law should become an ossuary".

Rights arising under the common law

2.2. There is no prescriptive list of rights protected by the common law. Blackstone identified three primary rights, namely the right to personal security, the right to personal liberty and the right of private property, together with auxiliary rights relating thereto, including – importantly – access to justice to enforce those rights.[5] *Habeus corpus*, or the freedom from arbitrary arrest, the right to a fair trial and the presumption of innocence have also long been recognised as rights protected under the common law. However, the fact that the common law does not offer a prescriptive list of rights does not mean that it is not in fact and practice a rich source of rights and values. In fact, as recognised by the Courts in recent years, rights recognised by the common law include many of those protected under the ECHR – and the Charter – including:

(1) the right to life (R *(Amin) v Secretary of State* [2004] 1 AC 653 at [30]);

(2) the prohibition on torture (*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221);

(3) the right to humanity (R *Secretary of State for Social Security ex p JCWI* [1997] 1 WLR 275 at 292 f));

(4) the right to liberty (*A v Secretary of State* [2005] 2 AC 68 at [36]);

(5) the right to property (*HM Treasury v. Ahmed* [2010] UKSC 2, [2010] 2 AC 534);

(6) the right to citizenship (*Pham v Secretary of State* [2015] 1 WLR 1591 at [60];

(7) the right of access to justice (R *(Medical Justice) v Secretary of State* [2011] EWCA Civ 1710 at [5]); and

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[4] R *(Daly) v Secretary of State for the Home Department* [2001] UKHL 16, [2001] 2 AC 532 at [30]

[5] 'Of the Absolute Rights of Individuals', Blackstone's *Commentaries on the Laws of England* (1765-1769).

(8) the right to confidential communication with a lawyer (R (Daly) v Secretary of State for the Home Department [2001] UKHL 26).

2.3. Indeed, as the above cases make clear, many of the successful challenges in recent years to the interference with fundamental rights in recent years have been based in substantial part on the common law.

Relationship between the common law protection of fundamental rights and the HRA/ECHR/Charter

2.4. The question of the interrelationship between common law rights protections and protections guaranteed under the HRA/ECHR was considered in four recent cases in the Supreme Court. In all four cases, the claimants had based their claims on rights arising under the HRA/ECHR, notwithstanding the fact that the rights asserted were rights to freedom of speech, to a fair trial and to open justice – all of which are core rights under common law. The Supreme Court made clear its view that the natural starting point in disputes before domestic courts should be the common law – not the HRA/ECHR. Thereafter, as a second step, the HRA/ECHR may be used as a 'check' or 'fall-back' to ascertain whether further development of the common law is required to keep apace with the protections afforded therein.

2.5. The four cases considered by the Supreme Court were *R (Osborn) v Parole Board* [2014] AC 1115, *Kennedy v the Charity Commission* [2014] 2 WLR 808, *A v British Broadcasting Corporation* [2014] 2 WLR 1243 and *Pham v Secretary of State* [2015] 1 WLR 1591, each of which are considered in turn.

Osborn v. Parole Board

2.6. In *Osborn v. Parole Board*, the Supreme Court determined that the failure by the Parole Board to afford prisoners an oral hearing when determining whether to continue to detain them and/or to recall them to prison constituted a breach of common law standards of procedural fairness. Lord Reed decried the focus of the claim on a breach of article 5(4) ECHR rather than of the common law, asserting that such approach did not reflect the relationship between domestic law and ECHR rights, guaranteed in domestic law through the Convention. He underscored that the HRA:

> "does not supersede the protection of human rights under the common law or state, or create, a discrete body of law based upon the judgments of the European court.

> Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Human Rights Act when appropriate". [57]

Kennedy v. the Charity Commission

2.7. *Kennedy v. the Charity Commission* concerned a challenge brought by a journalist – under article 10 ECHR – to the Charity Commission's refusal to disclose information to him, on the ground that the information fell within one of the absolute exemptions under the Freedom of Information Act 2000 ("FOIA").

2.8. The majority of the Court were critical of the fact that the request for disclosure had been based solely on FOIA, with Lord Toulson decrying the "*baleful and unnecessary tendency to overlook the common law*" (at [133]). Lord Mance seized the opportunity to reassert the proper relationship between the common law and Convention rights, echoing Lord Reed in *Osborn* (*supra*). He stated at [46]:

> "Since the passing of the Human Rights Act 1998 there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially **in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally, even if not always, to reflect and find their homologue in the common or domestic statute law**. … **In some areas the common law may go further than the Convention, and some contexts it may also be inspired by the Convention rights and jurisprudence** (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the **natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights without surveying the wider common law scene**." (emphasis added)

2.9. The Supreme Court expressed real doubt as to the extent to which common law required a different approach to that required by article 10 ECHR ([55]-[56]).

A v. British Broadcasting Corporation

2.10. In *A v. BBC* the question before the Supreme Court was whether it had been lawful for the lower court to direct that the claimant, a convicted child sex offender, should be referred to by his initials in judicial review proceedings to challenge his deportation, in order to avoid the risk on his return of ill treatment contrary to article 2 and 3 ECHR. His anonymity had been challenged by the BBC on the basis that it interfered with article 10 ECHR rights.

2.11. Here again Lord Reed emphasised that the starting point in any analysis of fundamental rights should be the common law rather than the ECHR. He was of the view that the common law principle of open justice, and the qualifications permitted thereto, would in most cases match the requirements of the ECHR, *"given the extent to which the Convention and our domestic law in this area walk in step and bearing in mind the capacity of the common law to develop"* (at [57]).

Pham v. Secretary of State

2.12. The Supreme Court in *Pham v. Secretary of State* was concerned with whether it was unlawful for the Home Secretary to make an order depriving the appellant of his British citizenship in circumstances where to do so would ultimately render him stateless – in circumstances where the Vietnamese authorities had subsequently made clear that they were revoking his Vietnamese nationality.

2.13. The appellant's had sought to establish the applicability of EU law to the case on the understanding that such applicability would require the courts to undertake a form of judicial review – *i.e.* a review on proportionality grounds – that would otherwise be unavailable at common law. The Supreme Court, however, questioned the merit of this assumption, querying whether the common law could require a lesser standard of review than the ECHR/HRA, in cases involving the deprivation of fundamental rights (at [93] onwards). Lord Carnwath at [59], and Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed) at [98], both referred to the flexible, context-dependent approach to judicial review under domestic law endorsed in *Kennedy v Charity Commission supra*. Both thought that a particularly strict standard of review – akin to that available in cases raising questions of EU/ECHR law – would be appropriate in a case involving the removal of a status as fundamental as citizenship. Lord Mance queried whether the nature, strictness or outcome of such a review should differ according to whether it was conducted under EU, ECHR or domestic law. Lord Sumption also questioned whether a review under ordinary public law principles would necessarily produce a different result from a proportionality review and suggested that the lower court (the Special Immigration Appeals Commisison) should:

> "...take the common law test as its starting point and then say in what respects (if any) its conclusions are different applying article 8 of the Human Rights Convention or EU law. It may well turn out that in the light of the context and the facts, the juridical source of the right made no difference." ([110])

2.14. The above cases reflect not only an increasing emphasis placed by the Supreme Court on the common law as a key mechanism for the protection of fundamental rights in domestic courts, but also a developing understanding that the content of common law should be seen as marching apace with the ECHR and that it can often be interpreted as providing equivalent protection.

Common law v. statute

2.15. However, notwithstanding the above analysis, where the common law does undoubtedly offer less protection than the HRA/ECHR or the Charter is when it is confronted with rights-infringing statutory law: the common law does not – as yet – permit the broad approach to statutory interpretation permitted under the HRA, nor does it allow courts to make declarations of incompatibility between a rights-breaching statute and the common law, much less to disapply inconsistent statutory provisions, as required under the Charter. Rights under the common law, therefore, have an inherently precarious status. Although they are protected to some extent by the common law principle of legality, which allows courts to give the common law great weight in the face of statutory provisions that would otherwise appear to permit infringements of fundamental rights (e.g. *R v Secretary of State ex p Simms* [2000] 2 AC 115 at 131E-G), that does not preclude the fact that they may be overridden or rebutted by a clear contrary Parliamentary intention, set out in a subsequent Statute. Consequently, while lawyers should take their lead from the Supreme Court and redress the "*tendency to overlook the common law*" in their pleadings, breaches of the HRA/ECHR and the Charter should always be pleaded, for the clear substantive and procedural protections that they afford.

CONCLUSION

As this paper has underscored, the enforcement of rights before national courts neither begins nor ends with the HRA. Whether the common law should be seen as having primacy over the HRA/ECHR in devolved jurisdictions, given the prominence given to ECHR rights and the HRA in devolution settlements, is a matter for further debate. However, recent jurisprudence as set out above serves as a clear indication to litigants and litigators alike that they should look both to the common law and to EU law as powerful additional sources of rights and protections in cases before national courts alleging violations of rights. As recently pondered by Lady Hale,

> "Whether this trend is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public,

> whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten, I leave it to you and to the academics to decide."[6]

Whatever the motivation for the developing trend, lawyers would do well to pay it heed and respond accordingly in the presentation of their cases.

[6] Lady Hale, *UK Constitutionalism on the March? Keynote Address to the Constitutional and Administrative Law Bar Association Conference* (12 July 2014).