

## The Charter of Fundamental Rights and Freedoms

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Matrix

1. The Charter of Fundamental Rights and Freedoms of the European Union ('the Charter') was agreed by member states on 7 December 2000 in Nice.
2. The origin of the Charter is the principles of fundamental rights that form an integral part of European Union ('EU') law (e.g. *A v B and others* C-112/13 at [51]).
3. Since 1 December 2009, when the Treaty of Lisbon came into force, article 6 of the Treaty on European Union ('the TEU') provides, among other matters, that:
  - (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.*  
*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII [arts 51–54] of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions ...*
  - (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*
4. Prior to 1 December 2009, the Charter did not have direct effect (e.g. *R (Chester) v Secretary of State* [2014] AC 271 at [44]).
5. Protocol 30 of the Charter provides that:

*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.*

6. In R (*NS (Afghanistan)*) v Secretary of State [2013] QB 102 the Court of Justice of the European Union (‘the CJEU’) held that the protocol did not exempt the United Kingdom from applying the Charter. It merely explained article 51 of the Charter [120].

7. Article 51 of the Charter provides that:

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.*

8. The approach of the CJEU in *NS (Afghanistan)* contrasts with that of Mostyn J in R (*AB*) v Secretary of State [2013] EWHC 3453 (Admin). He commented that:

*Although the language of this protocol reveals a certain amount of political haggling, to my mind it is absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our domestic courts. [12]*

Mostyn J then considered *NS (Afghanistan)* and stated that:

*The constitutional significance of this decision can hardly be overstated. ... 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.* [14]

10. The judgment in *AB* has created significant political debate. On 19 November 2013 the Lord Chancellor informed Parliament that the Government intended to find a case in which to challenge the analysis that the Charter had given rise to new rights (HC Hansard col 1087).
11. In any event, the terms of article 51 of the Charter make it clear that there must be an EU law issue for the Charter to be applicable. However, EU law is wide ranging. For example, EU law applies:
  - 11.1 Where free-movement is in issue (*ZZ v Secretary of State* [2013] QB 1136).
  - 11.2 Where refugee determination is in issue (*NS*).
  - 11.3 In an employment case where discrimination is in issue (*Tariq v Home Office* [2012] 1 AC 452).
  - 11.4 Where there is a dispute about jurisdiction requiring consideration of Council Regulation (EC) No 44/2001 (e.g. *A v B and others*).
  - 11.5 Where date protection is in issue ((*R (Lord) v Secretary of State* [2003] EWHC 2073 (Admin)).
  - 11.6 Where there are issues of consumer protection where EU directives apply (e.g. *Morcillo and García v Banco Bilbao Vizcaya Argentaria* C-169/14)
12. The CJEU is alert to the possibility that a state may seek 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. In such cases the CJEU requires domestic courts to review the arguments of states with care (*ZZ*).

13. The Charter consists of 54 articles that identify a considerable number of rights. These include:
- 13.1 Rights that reflect those contained in the European Convention on Human Rights ('the ECHR'). These include: article 2 (the right to life); article 4 (no one shall be subjected to torture); article 6 (the right to liberty); and, article 7 (the right to family life);
  - 13.2 Some of the rights that reflect rights contained within the ECHR but include additional rights (e.g. the right to legal aid contained within article 47);
  - 13.3 Rights that do not directly reflect those contained in the ECHR (even though they may be some overlap). These include: article 3 (the right to physical and mental integrity (which might fall within article 8 of the ECHR)); article 8 (the protection of personal data (which again might fall within article 8 of the ECHR));
  - 13.4 Some rights have no obvious relationship with the ECHR. These include: article 13 (the freedom of arts and sciences), article 25 (the rights of the elderly);
  - 13.5 There are rights that are based on other human rights instruments. In particular the right to refugee status (in accordance with the Refugee Convention) is expressly contained within the Charter (article 18);
  - 13.6 There are wide ranging provisions regarding discrimination that are not subject to the restrictions inherent within article 14 of the ECHR (article 20 onwards);
  - 13.7 There are also wide ranging provisions regarding workers' rights that do not reflect the ECHR (article 27 onwards); and
  - 13.8 Some of the rights appear to be directed at EU institutions. For example, article 41 appears to be directed at providing a right to good administration by EU institutions. However, that apparent restriction is not as significant as it appears as article 41 reflects principles of EU law generally (e.g. *HN v Minister of Justice* C-604/12 at [49]).

14. A series of explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter. Article 6 of the TEU expressly states that they should be taken into account when interpreting the Charter. The explanations state that:

*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.*
15. Article 52(3) of the Charter provides that:

*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.*
16. In practice, the interpretation of the Charter is now often conducted without reference to the case law of the European Court of Human Rights (e.g. *A v B and others* and *ZZ v Secretary of State* [2014] 2 WLR 791 at [33]). That is consistent with the principle that its origins are fundamental EU rights. That suggests that the Charter must be interpreted independently of the ECHR.
17. ECHR law remains a floor which EU law cannot fall below (*McB v E* (C-400/10) [2011] Fam 364 at [53])
18. Article 52(1) of the Charter permits the restriction of rights. It provides that:

*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*
19. In *R (Wilson) v Wychavon District Council* [2007] QB 801, Richards LJ recognised at [61] that the proportionality test may be different in ECHR (specifically Article 14) and EU law in the sense that under the former, the existence of a less

restrictive alternative may not necessarily take the measure outside the state's margin of appreciation.

20. In *R (Countryside Alliance) v Attorney General* [2007] QB 305, the Court of Appeal saw force in the submission that:

*The notion of proportionality is narrower in Community jurisprudence than it is in Convention jurisprudence. In particular, where there are alternative means of achieving a legitimate end, recourse must be had to the least onerous of them.* [159]

21. When the case went to the House of Lords ([2008] 1 AC 719), the approach of Lord Bingham, Lord Hope and Lady Hale was to recognise that measures which restrict the freedom to provide services on public policy grounds are proportionate under EU law only in so far as the objectives cannot be attained by less restrictive measures. On the facts, no less far-reaching measure could have achieved the end sought. (Lord Bingham [46] and [49], Lord Hope [79] and [87], and Lady Hale [131]).

22. *Countryside Alliance* and *Wilson* demonstrate that a particularly powerful justification is required for an interference with EU rights. That is consistent with the language of article 52(1) of the Charter. It is also consistent with the case law of the CJEU (*ZZ v Secretary of State* [2013] QB 1136 at [64]).

23. National courts are obliged, as far as possible, to interpret national law in conformity with directly effective EU law. If it is not possible to interpret national law in conformity with directly effective EU law, the national law must be disapplied (*Marleasing SA v La Comercial Internacional de Alimentación SA* (C-106/89) [1990] ECR I-4135 at [8]; *R (Factortame Ltd) v Secretary of State for Transport (No. 2)* [1991] 1 AC 603, per Lord Bridge at 659A-C; *Thoburn v Sunderland City Council* [2003] QB 151 at [69]). Applying this principle, the CJEU held in *Åklagaren v Hans Åkerberg Fransson* C-617/10 that:

*It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national*

*court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter. [48]*