

FAQ: Brexit and the EU Charter of Fundamental Rights

Part One: What is the Charter?

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The EU Charter of Fundamental Rights brings together in a single document the fundamental rights protected in the EU. It was proclaimed in 2000 and became legally binding in 2009. Although there is overlap between the EU Charter and the European Convention on Human Rights / the UK Human Rights Act, there are important procedural and substantive differences.

This FAQ discusses:

- The background to the EU Charter of Fundamental Rights
- When the Charter currently applies
- Whether the UK has an opt-out from the Charter
- The ECHR and its relationship to the EU Charter
- How the ECHR and the EU Charter differ

This FAQ is intended to provide a brief overview of some key issues, and is therefore not comprehensive.

Q: What is the EU Charter of Fundamental Rights?

A: At the Cologne European Council in June 1999, the European Council adopted a decision on the drawing up of a Charter of Fundamental Rights of the EU. That [decision](#) stated:

“There appears to be a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens”.

The [EU Charter of Fundamental Rights](#) (the Charter) brings together in a single document the fundamental rights protected in the EU. The Charter sets out rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, and Justice. The accompanying [Explanatory Notes](#) are “a valuable tool of interpretation intended to clarify the provisions of the Charter” and they set out the sources of the provisions in the Charter. However, legal experts have commented that, “The Charter is often described as a strand-tying document ... However, the characterisation of the Charter thus, as a tidying or strand-tying exercise only, tends to underplay its importance” ([C Gallagher, A Patrick and K O’Byrne 2018](#) at para 2.12).

The Charter was [proclaimed in Nice in 2000](#) and became legally binding across the EU with the entry into force of the [Treaty of Lisbon](#) in December 2009. The Charter has the same legal value as the other EU treaties (Article 6(1) of the [Treaty on European Union \(TEU\)](#)).

Q: When does the Charter apply?

A: The provisions of the Charter are addressed to the institutions and bodies of the EU, and to the Member States “only when they are implementing Union law” (Article 51(1) of the Charter).

“According to art.51(1) CFR it applies to Member States only “when they are implementing Union law”. The CJEU has interpreted this broadly to mean that they are bound to comply with Charter rights whenever they are acting in the scope of EU law. This is the case either where a Member State is acting in pursuance of an EU law obligation, e.g. transposing a directive into national law or applying a regulation, or when a Member State is derogating from one of the fundamental freedoms of the EU. Where this is not the case, the Charter does not apply”.¹

Q: Does the UK have an opt-out from the Charter?

A: There has been much debate about whether the UK has an opt-out from the Charter (see for example the discussion in [AB, R \(on the application of\) v Secretary of State for the Home Department \[2013\] EWHC 3453 \(Admin\)](#)). This has arisen from the text of [Protocol 30 to the Lisbon Treaty](#), which is intended to clarify the application of the Charter to the UK (and Poland).

It has been [explained](#) that Protocol 30 “emphasises that the Charter is not to be interpreted as imposing new obligations on the UK” (at para 3.21). This is already provided in Article 51(2) of the Charter: “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

As regards the UK’s rationale for adding Protocol 30, it has been commented that:

“While the Charter does not set out any new rights there was still considerable apprehension surrounding its proclamation. The United Kingdom and Poland both considered it necessary to add Protocol No 30, which concerns the specific application of the Charter in these countries. ...

It has been observed that Poland wanted a Protocol to guarantee its own vision of public morality, while the United Kingdom wanted the Protocol to guarantee its vision of social and labour rights. It was always likely that this Protocol carried more political than legal weight”.²

The Court of Justice of the EU (CJEU) has confirmed that the UK does not have an opt-out from the Charter (see [N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Joined Cases C-411/10 and C-493/10 \(21 December 2011\)](#) at paras 116-122). The UK government has also [clarified](#) that “the Protocol is not, and never has been, an opt out for the UK from the application of the Charter” (at para 3.6).

Q: What is the ECHR and what is its relationship to the EU Charter of Fundamental Rights?

A: [The European Convention on Human Rights](#) (ECHR) is an instrument of the Council of Europe, not the EU. All 47 Council of Europe Member States, including the UK, have [signed](#) the ECHR. It was opened for signature on 4 November 1950 and entered into force on 3 September 1953. [The Human Rights Act 1998](#) (HRA) incorporates the Convention rights into UK domestic law.

Article 52(3) of the Charter provides that where the Charter contains rights which correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention” and that this “shall not prevent Union law providing more extensive protection”. In this way, “The rights in the ECHR act as a floor but not a ceiling to the protection offered by the Charter” ([A Patrick 2016](#) at para 47).

The Treaty of Lisbon provided for accession by the EU itself to the ECHR (Article 6(2)). However, the CJEU ruled that the draft accession agreement was not compatible with EU law ([Opinion 2/13 \(18 December 2014\)](#)). Accession is currently stalled and a recent [briefing](#) noted:

“For the time being, no new accession agreement has been drafted, but both the Parliament and the Commission underline the need for EU accession. Scholars remain divided, some considering that accession would bring added value, whilst others express the view that accession would actually do more harm than good to EU citizens” (at p 1).

² M Horspool, M Humphreys and M Wells-Greco, ‘European Union Law’ (9th Edition, 2016), at para 6.79.

Q: How do the EU Charter and the ECHR differ?

A: Although there is overlap between the EU Charter and the ECHR / HRA, there are important procedural and substantive differences.³

(1) Who can make a claim?

Under the HRA, only an individual who is a “victim” of a rights violation can bring a claim, whereas anyone with “sufficient interest” can apply for judicial review based on the Charter (see this [briefing](#) at p 11).

(2) What remedies are available?

Under Section 4 of the HRA, where a provision of primary legislation is found to be incompatible with a Convention right, a court may make a “declaration of incompatibility”. However, the law continues in force until Parliament decides whether to address the incompatibility and, if so, how. In contrast, the Charter may provide a stronger remedy.

It has been [explained](#) that:

“These declarations of incompatibility do not quash legislation, or render it unlawful. Legislation declared incompatible with Convention rights continues to apply and have legal effect. However, the declaration sends a political signal to the Government and the legislature that an Act of Parliament is incompatible with Convention rights, providing an opportunity for Parliament to consider whether the legislation should be changed. In EU law, a stronger remedy is available. Both the Charter and general principles of EU law can – but need not always – be used to disapply legislation. This means that the legislative provision which harms human rights does not have legal effect. The rights of the individual before the court can be protected as the legislation harming those rights is not applied to them”.⁴

This was demonstrated in [Benkharbouche & Anor v Embassy of the Republic of Sudan \(Rev 1\) \[2015\] EWCA Civ 33 \(05 February 2015\)](#). In that case, the Sudanese and Libyan embassies in London sought to claim state immunity under the State Immunity Act 1978 (SIA) in response to claims by two former members of domestic staff. The Court of Appeal found that, as applied to the present claims, certain provisions of the SIA infringed Articles 6 and 14 of the ECHR, and made a declaration of incompatibility under the HRA. Furthermore, the claims – relating to working time, racial discrimination and harassment – fell within the scope of EU law. The Court of Appeal found that certain provisions of the SIA, as applied to those parts of the claims which fell within the scope of EU law, infringed Article 47 of the EU Charter. The Court therefore disapplied the provisions of the SIA to the extent necessary to allow the claims falling within the scope of EU law to proceed. Without the Charter, the outcome for the claimants would have been very different.

(3) When is there recourse to the regional court?

Under the HRA / ECHR, a claimant must exhaust all domestic remedies before they can bring a case to the European Court of Human Rights in Strasbourg (Article 35 of the ECHR); whereas any UK court or tribunal can involve the EU’s regional court, the CJEU, by way of the preliminary reference procedure (Article 267 of the [Treaty on the Functioning of the EU \(TFEU\)](#)).

(4) What are the substantive differences?

The Charter is of narrower application – as noted above, it applies to the Member States only when they are implementing EU law. However, legal experts have [emphasised](#) that “the Charter contains a number of novel rights which have no counterpart in the ECHR or the HRA” (for example, media plurality in Article 11, freedom to choose an occupation and engage in work in Article 15, and freedom to conduct a business in Article 16) and that “the Charter also provides more extensive rights protection than the ECHR / HRA in many respects” (at para 3.48). We consider some examples here.

³ We consider some of the key differences here. For further discussion, see e.g., this [briefing](#) at pp 9-11, [A Patrick 2016](#) at paras 55-60 and T Lock, Public Law 2017 (above) at pp 122-127.

⁴ As regards the development of the principle of supremacy of EU law, see e.g., [Costa v ENEL, Case C-6/64 \(15 July 1964\)](#).

The right to the protection of personal data

The EU Charter contains an express right to the protection of personal data in Article 8 whereas there is no equivalent in the ECHR. This was noted by the CJEU in [Tele2 Sverige AB v Post-och telestyrelsen, and Secretary of State for the Home Department v Tom Watson and Others, Joined Cases C-203/15 and C-698/15 \(21 December 2016\)](#): “It should be added, finally, that Article 8 of the Charter concerns a fundamental right which is distinct from that enshrined in Article 7 of the Charter and which has no equivalent in the ECHR” (at para 129).

Personal data is protected by the right to respect for private and family life in Article 8 of the ECHR, though this is implied. See for example [S and Marper v UK \(Application Nos. 30562/04 and 30566/04\) \(Grand Chamber, 4 December 2008\)](#) where the European Court of Human Rights stated that “The protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention” (at para 103).

The right to be forgotten

The CJEU’s approach to data protection is also seen as more progressive. For example, in [Google Spain SL v Agencia Española de Protección de Datos \(AEPD\), Case C-131/12 \(13 May 2014\)](#), the CJEU “extended arts 7 and 8 of the Charter to include a “right to be forgotten”” (T Lock, P.L. 2017 at p 123). It has been commented that:

“The “right to be forgotten” is currently unique to the [Charter]. Its future in UK law depends on whether the UK courts—or the ECtHR for as long as its decisions still enjoy authority in the UK—will be willing to interpret the right to private and family life as providing similar protection. If they do not, this right will disappear from UK law together with the Charter once Brexit takes effect” (T Lock, P.L. 2017 at p 124).

The right to a fair trial

Article 47 of the EU Charter provides stronger protection for the right to a fair trial than Article 6 of the ECHR. The scope of Article 6 of the ECHR is narrower. It provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Administrative cases for example are therefore not afforded protection by Article 6 of the ECHR.

We see this for example in [Maaouia v France \(Application No. 39652/98\) \(Grand Chamber, 5 October 2000\)](#) in which the European Court of Human Rights held that the proceedings in question did not fall within the protection of Article 6 of the ECHR. It stated: “The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention” and that “Consequently, Article 6 § 1 is not applicable in the instant case” (at paras 40-41).

In contrast, in [ZZ v Secretary of State for the Home Department, Case C 300/11 \(4 June 2013\)](#), Article 47 of the EU Charter did extend to the immigration proceedings in issue. The CJEU ruled:

“In the light of the foregoing considerations, the answer to the question referred is that Articles 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, must be interpreted as requiring the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence” (at para 69).

Equality and prohibition of discrimination

Articles 20 and 21 of the EU Charter provide a freestanding guarantee on equality and prohibition of discrimination, unlike the prohibition of discrimination in Article 14 of the ECHR, which applies only if the facts in the case fall within the scope of another right or freedom of the ECHR.