

FAQ: Brexit and the EU Charter of Fundamental Rights

Part Two: The Charter and the EU (Withdrawal) Bill June 2018

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According to the EU (Withdrawal) Bill as introduced in the House of Lords on 18 January 2018, the Charter of Fundamental Rights will not form part of UK law after Brexit. This is an exception to the general approach taken in the Bill of continuity of EU law after Brexit. The loss of the Charter will lead to a reduction in rights protection for individuals and businesses.

This FAQ discusses:

- The provisions of the EU (Withdrawal) Bill relating to the exclusion of the EU Charter of Fundamental Rights
- The provisions relating to the general principles of EU law and how they will operate after Brexit
- The reasons given by the UK government for not retaining the Charter
- The impact of not retaining the Charter
- What might happen next in Parliament
- The wider implications of Brexit for human rights in the UK

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

Q: Will the EU Charter of Fundamental Rights form part of UK law after Brexit?

A: No, not according to the [EU \(Withdrawal\) Bill](#) as introduced in the House of Lords on 18 January 2018 (though see the discussion below about subsequent amendments in the Lords).¹

Clause 5(4) of the Withdrawal Bill provides that “The Charter of Fundamental Rights is not part of domestic law on or after exit day”. This is an exception to the general approach taken in the Bill of continuity of EU law after Brexit.

The next paragraph **Clause 5(5)** provides that this exception in “Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter”. Clause 5(5) also provides that “references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles”. The Bingham Centre for the Rule of Law has [commented](#):

“Exactly what fundamental rights and principles are preserved ... is not clear. The Charter itself, on the other hand, is a clear statement of articulated rights and principles. Indeed, this was the very purpose of drawing up the Charter, to provide a clear and accessible list of the rights and freedoms considered fundamental in the EU legal order” (at para 129).

The Bingham Centre has also noted:

“Another problem with the Government’s position is that it treats the Charter as if it only has interpretive significance in EU law. ... But the Charter currently has much more than mere interpretive status: it provides a free standing cause of action by which direct challenges can be made to laws and effective remedies obtained, including the setting aside of primary legislation” (at para 120).

In contrast, the Scottish government has expressed its intention (as set out in the [EU \(Legal Continuity\) \(Scotland\) Bill](#)) to retain the Charter in Scots Law following Brexit. This has been [welcomed](#) by equalities and human rights groups. However, they acknowledge that “The effect of the retention of the EU Charter is limited, given it would only apply in as far as devolved retained EU law is concerned; and where a Scottish authority is deemed to be implementing that devolved retained EU law” and that “For current standards of rights protection to be maintained, the Westminster Parliament would have to mirror Scotland’s approach and retain the Charter”.

Q: What reasons has the UK government given for not retaining the Charter?

A: According to the Bill's [Explanatory Notes](#):

"The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill. References to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights.

Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles" (at paras 103-104).

Indeed, the government has repeatedly stated that loss of the Charter will not impact on substantive rights. For example, a [Factsheet on the Charter](#) from the Department for Exiting the EU (DEEU) stated that "The Government's intention is that, in itself, not incorporating the Charter into domestic law should not affect the substantive rights that individuals already benefit from in the UK, as the Charter was never the source of those rights" (at p 2).

In December 2017, the government published a [Charter 'Right by Right' Analysis Paper](#) looking at the effect of the provisions of the Withdrawal Bill which relate to the Charter and in particular how fundamental rights that are currently protected by EU law will be protected following Brexit (at p 7).

However, the Bingham Centre has [commented](#):

"The Government claims that the underlying rights and principles are "preserved". This is demonstrably not correct. The JCHR's analysis of the Government's "right by right analysis" of the Charter has demonstrated that the Charter protect rights which do not have equivalent legal protections elsewhere in UK law" (at para 118).

It has also been commented that:

"... the overall superficiality of analysis in the paper in respect of most individual rights is profoundly concerning. Its heavy reliance on the HRA, ECHR and common law rights, many of which the Conservative leadership has previously promised to diminish or repeal, is also telling" ([C Gallagher, A Patrick and K O'Byrne 2018](#) at para 3.47).

Q: What would be the impact of not retaining the Charter?

A: As noted above, the EU Charter brings with it important procedural and substantive benefits, as compared to the ECHR / HRA.

In January 2018, the House of Lords Constitution Committee [concluded](#):

"The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day" (at para 119).

The same month, the Joint Committee on Human Rights [concluded](#): "The Government's intention is that substantive rights will not be weakened after exit from the EU. However, the exclusion of the Charter from domestic law results in a complex human rights landscape which is uncertain. Legal uncertainty is likely to undermine the protection of rights" (at para 130).

The Bingham Centre has also [commented](#):

“It is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses under EU law, in at least three ways. First, the Charter protects rights that do not otherwise enjoy clear legal protection, such as the right to protection of personal data. Second, the Charter provides a direct cause of action in respect of those rights including access to legal remedies. Third, as a matter of EU law those legal remedies currently include a power in the courts to disapply legislation” (at pp 7-8).

More broadly, it has been stressed that “the main loss for the UK legal order might be found in the Charter’s yet unfulfilled potential” as the “sheer breadth of rights (and principles) offered in the Charter and their often broader formulation compared with corresponding rights contained in the ECHR, suggest a large potential for stronger human rights protection than currently available, from which the UK and the people living there are likely to be excluded” (T Lock, P.L. 2017 at p 126).

Q: Which other provisions of the EU (Withdrawal) Bill are relevant here?

A: Clause 6 of the [EU \(Withdrawal\) Bill](#) sets out how retained EU law is to be read and interpreted after Brexit. **Clause 6(3)** provides that “Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—(a) in accordance with any retained case law and any retained general principles of EU law”. The Bill’s [Explanatory Notes](#) explain that “Subsection (3) provides that any question as to the meaning of retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and general principles” (para 109).

It is important to note that the general principles of EU law include fundamental rights (Article 6(3) TEU). The government has [explained](#) that “This means that retained EU law will need to be read consistently with the general principles of EU law (including those that constitute fundamental rights) where it is possible to do so” (at para 18).

However, **Schedule 1, Para 2** limits the general principles that are retained. It provides that “No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day”.

Furthermore, **Schedule 1, Para 3** provides that “(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law”. It also provides that “(2) No court or tribunal or other public authority may, on or after exit day—(a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law”.

DExEU has [explained](#) that “It is the Government’s position that it cannot be right that the Charter of Fundamental Rights of the EU could be used in its own right, post-exit, to bring challenges against the UK Government to strike down UK legislation after the UK’s withdrawal from the EU” (at p 2). Furthermore, the government has [stated](#) that “Schedule 1 to the Bill sets out that after the UK has left the EU it will not be possible for someone to bring a challenge (whether against legislation or administrative action) on the specific grounds of a failure to comply with any of the general principles of EU law (including those that constitute fundamental rights), or for a court to disapply legislation on the basis that it is incompatible with those general principles” (at para 16). It has suggested that “There are many domestic routes of challenge which may be available depending on the circumstances” (at para 23).

However, legal experts have commented:

“There will be no freestanding right of action post-Brexit based on a failure to comply with any of general principles of EU law. The principles will only have such limited legal effect where they have been recognised by the CJEU before exit day. Since the Charter came into force in 2009, it is almost impossible to disentangle what is a freestanding general principle from those which are rights or

principles grounded in the Charter. This creates a significant problem of legal certainty. Finally, as retained EU law, it will be open to Ministers to amend such general principles such as are considered 'defective' or which otherwise fall within the broad powers in Clause 7 of the Bill" ([C Gallagher, A Patrick and K O'Byrne, 2018](#) at para 3.48(e)).²

Therefore, the Bingham Centre has [recommended](#) that "para 3 of Schedule 1 which provides that there is no right of action in domestic law after exit day for any breach of general principles of EU law, should be removed from the Bill" (at para 138).

We discuss below some subsequent amendments in the Lords which impact on these provisions.

Q: What might happen next?

A: (1) The exclusion of the EU Charter of Fundamental Rights

There have been calls for amendments to the Withdrawal Bill in relation to its exclusion of the Charter. For example, the Bingham Centre has [stated](#):

"The Rule of Law problems raised by the Bill's non-retention of the Charter cannot be solved merely by clarifying how the Bill deals with general principles. The Rule of Law issue of legal discontinuity must be confronted head on by amending the Bill to include the Charter as retained EU law. We recommend that, in order to be compatible with the Government's own Rule of Law objective of legal continuity, the Bill be amended to remove clauses 5(4) and (5) of the Bill" (at p 8).

In the House of Commons on [21 November 2017](#), **Amendment 46**, which sought to remove the exclusion of the Charter from retained EU law, was defeated by 311 to 301 votes.

As noted above, in December 2017, the government published its [Charter 'Right by Right' Analysis Paper](#) and in January 2018 DExEU published an [ECHR Memorandum](#) which addresses issues arising under the ECHR in relation to the Withdrawal Bill.

In January 2018, thirty cross-party MEPs signed an [open letter](#) to David Davis (Secretary of State for Exiting the EU) expressing concern at plans to abandon the EU Charter; and more than 20 organisations and human rights experts, including the UK's Equality and Human Rights Commission, signed an [open letter](#) warning that "Losing it creates a human rights hole because the charter provides some rights and judicial remedies that have no clear equivalents in UK law". They also argued that "For the Government to honour its promise of preserving existing rights it must retain the protections in the Charter".

In the House of Commons on [16 January 2018](#), **Amendment 4**, which sought to retain the Charter rights in UK law and give them the same level of protection as rights in the HRA, was defeated by 317 to 299 votes.

On [17 January 2018](#), the Withdrawal Bill passed through the House of Commons with a narrow majority of 324 to 295 votes.

The Bill, still with the provision excluding the Charter, then moved to the House of Lords where peers recently supported an amendment in favour of retaining the Charter. [On 23 April 2018](#), Amendment 15 was passed by 316 to 245 votes in the House of Lords. As Lord Pannick explained:

"**Amendment 15** seeks to include the European Charter of Fundamental Rights as part of retained EU law, with the exception of the preamble and Chapter V. The preamble contains no substantive provisions and Chapter V confers rights such as the rights to vote and to stand as a candidate in elections to the European Parliament, which plainly will have no application once the United Kingdom leaves the European Union" (at Col 1344).

² Many have expressed concern about the use of delegated powers in the Withdrawal Bill. As regards fundamental rights, it has been stated, for example, that "Importantly, rights in retained EU law could be amended or repealed by regulations under Clauses 7, 8 and 9 of the Bill, as these clauses currently have only limited human rights safeguards" (see this [briefing](#) at p 16).

The Bill's Third Reading in the Lords is [scheduled](#) for 16 May 2018. The Bill will then be sent back to the House of Commons for consideration of the Lords amendments. Both Houses must agree on the final wording of the Bill before it can receive Royal Assent and become an Act of Parliament. So it is possible that this amendment will be overturned in the House of Commons.³

(2) The general principles of EU law and how they will operate after Brexit

In December 2017, in response to concerns raised about the Bill's provisions regarding the general principles of EU law and how they will operate after Brexit, the government [committed](#) to look again at this issue: "Specifically, we will look at whether and how some challenges based on the general principles might continue after exit, in a way which best fits with our longstanding constitutional traditions and which minimises uncertainty for businesses and individuals" (at p 5).

A government amendment was made in the House of Commons – "**Amendments 37 and 38** amended paragraph 27(5) of schedule 8 to create a time-limited exception to the restrictions on bringing a legal challenge on the basis of general principles of EU law (paragraphs 2 and 3 of schedule 1)" (see this [briefing](#) at p 65). However, Paul Blomfield (Shadow Minister for Exiting the EU) [commented](#) on this three-month time limit and stated that "We accept that Government Amendments 37 and 38 improve the Bill, but we fear that they do not go anywhere near far enough on legal challenges based on the general principles of EU law" (at Col 742).

The government subsequently tabled further amendments "which would allow for such challenges to continue for up to two years after exit day, subject of course to standard limitation periods" (see 11 April 2018 [response](#) to the Lords Constitution Committee report at p 8). However, this issue was addressed on [23 April 2018](#) when **Amendment 19** (tabled by Lord Pannick) was passed by 280 to 223 votes in the House of Lords. Lord Pannick explained this "would remove the provision in Schedule 1, paragraph 3, which says that although the general principles of EU law are to be part of retained EU law they cannot provide a cause of action" (Cols 1393-1395).

Q: What are the wider implications of Brexit for human rights in the UK?

A: Crucially, Brexit may remove a key barrier to ECHR withdrawal. The government's White Paper '[Legislating for the United Kingdom's withdrawal from the European Union](#)' stated that "The ECHR is an instrument of the Council of Europe, not of the EU. The UK's withdrawal from the EU will not change the UK's participation in the ECHR and there are no plans to withdraw from the ECHR" (at para 2.22).

However, Brexit may make ECHR withdrawal easier for the UK. As one commentator explains:

"...Article 2 TEU names respect for human rights and the rule of law as one of the founding principles of the EU, which every state applying to accede to the EU must respect. Compliance with these principles by accession states is monitored by the EU Commission, which places a great emphasis on ECHR conformity in its progress reports on each country. There is therefore a good argument to be made that present EU Member States must continue to adhere to these founding values which presupposes ECHR membership. Yet this consideration will no longer apply to the UK after Brexit, so that leaving the ECHR will have become easier" ([T Lock, E-International Relations 2017](#)).

Others however, have noted the importance of shared human rights standards for the future EU-UK relationship:

"At a minimum, the negotiation of a continuing, constructive relationship with the EU appears inconsistent with the Prime Minister's previously stated goal of removing the UK from the ECHR and the jurisdiction of the Strasbourg Court. On past precedent, it appears unlikely to be in the interests of the EU to concede to any continuing arrangement where the UK is free to depart from its commitment to those minimum standards in the Convention" ([C Gallagher, A Patrick and K O'Byrne 2018 at para 4.41](#)).

³ On proposals to retain the Charter and possible alternative solutions see discussion in e.g., [C Gallagher, A Patrick and K O'Byrne, 2018](#) at para 4.13 and e.g., [M Elliott, S Tierney and A Young, 'Human Rights Post-Brexit: The Need for Legislation?' Public Law for Everyone \(8 February 2018\)](#). See also discussion in [Bingham Centre 2018](#) at paras 124 – 135.