

# The non-opt-out opt-out: The UK and Protocol 30

Catherine Barnard  
Trinity College  
Cambridge

## Lisbon Treaty

- Art. 6(1) TEU incorporates Charter which has 'same legal value as the Treaties'
- Art. 6(2) TEU: the Union to accede to the ECHR
- Art. 6(3) TEU fundamental principles are general principles of the Union's law

## Lisbon Treaty: Protocol and Declarations

- UK/Poland 'opt out' in Protocol 30
  - Czech promise of an amendment to the UK/Poland Protocol, agreed at Brussels European Council 29/30 October 2009, at next accession Treaty
- Czech (No. 53) declaration on the Charter (on competence)
  - *The Charter's provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.*
- Polish declaration No. 61 on the Charter
  - *The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.*

## Art. 1(1): compatibility

*The Charter **does not extend the ability** of the [CJEU], or any court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms*

## Article 1(1): different readings

- Most natural reading:
  - Charter is codification of pre-existing law and so does not 'extend' any rights
  - Preamble: *Whereas the Charter reaffirms the rights freedoms and principles recognised by the Union and makes those rights more visible, but does not create new rights or principles.*
  - Charter does not apply to purely internal situations;
    - Art. 51(2): Charter applies to the Member States but only when they are implementing Union law;
    - Czech Declaration (No.53)
- What if the Charter rights do go further than pre-existing law (eg Arts 8, 13)?

## Art. 1(2) no justiciable rights in Title IV (Solidarity)

- *In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far as Poland or the UK has provided for such rights in its national law.*
- rights v principles dichotomy

## Rights and Principles

- Are principles directly effective? No
  - Art. 52(5) (UK behind this change): principles can be implemented by legislative and executive acts of the Union and MS when implementing Union law. Such provisions judicially cognisable only in the interpretation of such acts and in ruling on their legality
- What is a principle?
  - Principles: Art 25 ('rights of the elderly') and Art 26 ('Integration of persons with disabilities')
  - Rights and principles: Art. 34 'The Union *recognises and respects* the entitlement to social security benefits'

### But.... Case C-438/05 Viking Line

- 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of [Union] law the observance of which the Court ensures.'
- Reference to Art.28 Charter



## Article 1(2) opt-out?

- belt and braces job
- genuine opt-out?
- Polish declaration no. 62 on the Protocol
  - *Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.*

## Article 1(2) and general principles of law

- Even if Art. 1(2) is an opt-out, general principles of law will still apply
  - Art. 6(3) TEU: fundamental rights are general principles of law
  - *Viking*: right to strike is a general principle of law
  - Preamble to Charter:
    - *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*

## Broader scope of GPs: Case C-555/07 *Kücükdeveci*

- It is ‘for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle’ (para. 51)
- Horizontal application so long as matter falls within scope of EU law (cf Article 153(5) TFEU)

## Art. 1(2): tantalising prospect?

- *In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far as Poland or the UK has provided for such rights in its national law.*
- Statutory immunity from industrial action in the UK provided ballots and notice provision – subject to proportionality principle under Art. 52(1) Charter?

## Art. 2: reference to national law and practices

- *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 30
  - ‘Every worker has the right to protection against unjustified dismissal, *in accordance with Union law and national laws and practices*
  - National laws and practices remain

## UK's view on the Charter

- *News of the World*: ‘EU chiefs have agreed to give Britain an opt-out on the Charter ... which could bring in new laws which would destroy jobs’
- DWP: ‘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’

## *Saeedi*

- Cranston J: 'The Charter could not be directly relied on as against the UK' by virtue of Protocol 30
- [2010] EWCA Civ 990: 'On appeal to the CA, the Secretary of State has accepted that "the fundamental rights set out in the Charter can be relied on as against the UK and ... that [Cranston J] erred in holding otherwise", because the Charter simply restates rights that already formed part of EU law, and does not create any new rights' .

## Case C-411/10 *Saaedi (NS)* reference

- '... Are the answers to the [previous] questions qualified in any respect so as to take account of the Protocol (No.30)'...
- Joined with Case C-493/10 *ME* from Ireland (Protocol 30 does not apply)
- See also *Zagorski* [2010] EWHC 3110