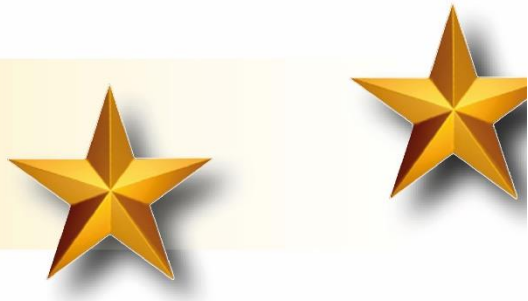
The Brexit Papers



Human Rights

Paper 27

Bar Council Brexit
Working Group
June 2017

Fourth
EDITION

Brexit Paper 27: Human Rights and Brexit

1. Summary

1.1. The impact of Brexit on human rights will be profound. Many human rights in the UK are underpinned by EU law (e.g. equality rights, data protection, migrant rights and environmental protection) and breaches of EU rights will no longer trump domestic legislation after Brexit takes effect. Directly effective EU law of course overrides national legislation and can be used to disapply legislation which contravenes EU protected rights. Furthermore, directly effective provisions of EU law may impose obligations on private parties, which is of specific importance when protecting social rights against private employers, as in the recent ruling of the Grand Chamber of the Court of Justice of the European Union (CJEU) in C-414/16 *Egenberger* EU:C:2018:257 in relation to religious discrimination and the Opinion of Advocate General Tanchev and the judgment of the CJEU in C-214/16 *King* EU:C:2017:914 in relation to the Working Time Directive.

1.2. Furthermore, and independently of direct effect, all of the rights and principles enshrined in the Charter are an aid to interpretation to all pertinent EU legislation, and in turn Member State laws implementing such measures (e.g. C-356/12 *Glatzel* EU:C:2014:350). This umbrella protection will also be lost once Brexit takes place.

1.3. In addition, the United Kingdom courts have always played an important role in ensuring that EU legislation complies with the Charter. It has played this role by sending references for preliminary rulings on the validity of EU measures (e.g. C-477/14 *Pillbox 68* EU:C:2016:324) made possible in part by our relatively liberal rules on standing in public law. We will no longer be able to perform this function, and substantive rights such as freedom to conduct a business, which has played a significant role in validity challenges, will no longer form part of UK law.

1.4. Brexit will, therefore, adversely affect human rights in several ways:

- The abolition of the Charter of Fundamental Rights and of general principles of EU law will reduce scope of human rights protection.
- The Human Rights Act 1998 is no substitute for EU human rights because rights under the European Convention of Human Rights are much more limited in scope and can be defeated by domestic legislation; and
- there is a risk that the UK Government dilute EU standards when negotiating and entering into new trade agreements with other countries.

2. The reduction of EU rights protection

2.1. A large number of rights under European Union law will cease when Brexit takes place.

2.2. The European Union's Charter of Fundamental Rights is a more modern rights instrument covering a wide range of social and economic rights as well as civil and political rights, but will no longer have effect after Brexit. Under the Charter Article 15 creates a right to work, Article 24 creates rights for the child, Article 28 creates a right to collective bargaining and includes a right to strike, Article 34 a right to social security and social assistance whereas Article 35 creates a right to health care. The importance of the rights of the child to ensure compliance by UK care authorities with the rule of law appears in the recent Opinion of Advocate General Kokott in C-325/18 and 375/18 PPU *Hampshire County Council* v. *CE and NE* EU:C:2018:654.

2.3. It also seems that general principles of EU law will no longer form the basis for a legal challenge. Under the EU (Withdrawal) Act 2018 provides that, from exit day onward, there will be no '*right of action in domestic law…based on a failure to comply with any of the general principles of EU law'.*

2.4. The EU also creates a number of specific rights which will be lost. For instance, the national law of the UK, unsupported by EU law, characterises the grant of a passport as a privilege of the prerogative governed in accordance with current policy rather than a right. By contrast Article 4 of the Citizens Directive 2004/38/EC requires States to issue its citizens with a valid identity card or passport in order to leave the country.

2.5. Another example of a loss of rights is the power to deprive a person of British citizenship for terrorist reasons- even if this would make them stateless. This power contravenes various unincorporated conventions against statelessness and are part of the international principles binding on the EU, making it arguable that until Brexit takes effect, a deprivation resulting in actual statelessness might be contrary to EU law. This change is significant because it

has been said that the UK has become a world leader in depriving people of nationality (usually when abroad and without an effective remedy).

2.6. The absence of international restraints on such deprivations can have important repercussions. Having a nationality has been described by the US Constitutional case law as '*the right to have rights*' (adopted by the Court of Appeal in the context of deprivation as persecution in *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809). Nationality is often the basis of universal jurisdiction under the ICC and the Torture Convention. Depriving terrorists of British nationality may mean that there is no duty to seek their trial and extradition in the UK, and a loss of the rights of the British victims of their crimes (an issue under consideration at present with respect to the activities of the remaining members of the so-called Beatles gang in Syria.

2.7. In contrast, EU citizenship is enshrined in the EU treaties (Articles 20 and 21 TFEU) and the case law of the CJEU routinely protects its citizens against the excesses of the state, including a citizen's own Member State (see eg recently C-673/16 *Coman* EU:C:2018:385). Moreover, Title V of the Charter is entitled "Citizen's rights" and guarantees its core elements, such as the right to vote, the right to stand as a candidate in certain elections, and freedom of movement to name only a few. All of this will be lost after the Brexit.

3. The Human Rights Act is no substitute for the loss of EU rights

3.1. The Human Rights Act is based on the European Convention on Human Rights which came into force in 1953. The Convention is confined to civil and political rights, does not cover social and economic rights and is old fashioned when compared with modern human rights legislation (like the South African Constitution Act 1996).

3.2. The loss of EU rights has important implications because Convention rights are often much more limited in scope than EU rights. Secondly, where a Convention right is breached, the Courts can grant only very limited remedies compared to EU rights.

3.3. A vivid example of the limited scope of Convention rights is the decision in Case C-131/12 *Google Spain v Agencia Española* EU:C:2013:424 EU:C:2014:317 where Advocate General Jaaskinen surveyed all of the relevant Strasbourg case law under Article 8 and concluded that the right to be forgotten on the internet does not exist under the European Convention of Human Rights. However, the CJEU then decided that the right to be forgotten does exist under EU law. Similarly, EU rights in relation to family unity are much broader than the right

of respect for family life under Article 8 of the Convention. The case law from the CJEU has for many years stated that where a British works abroad and returns to the UK, the spouses' admission and right of residence is governed by EU law and not national law (see *R v IAT ex p Surinder Singh* [1992] ECR-1-4265). The CJEU has (in contrast to domestic law) concluded that denial of admission to a genuine spouse is an interference with the citizen/worker's right of residence, and that an EU citizen child cannot be removed from the EU when a non-national parent is deported, at least absent compelling reasons of the public interests consistent with the rights of the child. The domestic case law on respect for the family is much more fragile and deferential to government policy, Brexit will make the position of many close family members of British nationals resident in the UK much more precarious.

3.4. Furthermore, and importantly, remedies for breach of EU rights are much stronger than those available under the Human Rights Act (HRA). Whereas EU rights prevail over domestic legislation, section 3 of the HRA requires the Court so far as possible to read domestic legislation compatibly with Convention rights, and if this is not possible, may grant a declaration of incompatibility under s 4 of the HRA. In other words, domestic legislation may defeat human rights claims under the HRA.

3.5. Difficult questions may arise about whether it is appropriate to grant a declaration of incompatibility (as in eg *R(Nicklinson) v Ministry o*f Justice [2015] A.C. 65), and the Supreme Court appears to have accepted in *In Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 that questions of standing may defeat the possibility of the Court granting a declaration of incompatibility.

3.6. Where a declaration of incompatibility is made in an HRA case, the Government has a discretion under s 10 to make remedial orders, although, in practice, Convention rights breaches have invariably been remedied. From 2 October 2000 (when the HRA came into force) until 30 July 2017, 37 declarations of incompatibility have been made. Of these 25 have become final (in whole or in part) and are not subject to further appeal and 11 have been remedied by later primary or secondary legislation; 5 related to provisions that had already been remedied by primary legislation at the time of the declaration; 3 have been remedied by a remedial order under s 10; 1 the Government has notified Parliament that it is proposing to remedy by a remedial order; and 5 are under consideration as to how to remedy the incompatibility.

3.7. By contrast, the remedial case law of the CJEU is vast, rich and firm. It requires effective and proportionate remedies at Member State level and obliges

Member State judges to do everything in their power to ensure the enforcement of rights protected by EU law including, for example, an obligation to develop Member State case law so as to secure the enforcement of EU rights (C-441/14 *DI* EU:C:2016:278). This type of rights protection too will be lost from UK law-once the Brexit takes place.

4. The impact on trade agreements

4.1. Many EU trade agreements contain human rights instruments which comprise an '*essential elements*' clause referring to basic human rights and democracy standards democracy standards, and a '*non-execution*' clause that provides for a mechanism for applying '*appropriate measur*es' (such as sanctions) if the other party violates an 'essential elements' clause. This obligation is applied across the board to all of the EU's trading partners, including those with an unblemished record of respect for democracy (see eg Article 2 of the Framework cooperation agreement with Australia of 2017).

4.2. Such clauses have been used by the EU when there has been a coup d'état, for instance, in which case the EU has suspended financial aid. Actions of this kind have been a powerful tool for ensuring that prevention and cure of egregious human rights violations are not sacrificed under the imperative of trade. The EU commitment to linking trade with human rights has also assisted oppressed groups who wish to call the EU to account when its activities impact on their fundamental rights. See for example the action brought by Canadian Aboriginals in C-398/13 P *Inuit Tapiriit Kanatami* EU:C:2015:535, in which an effective judicial remedy was sought against a EU restrictions on the import and marketing of seal products which were threatening their way of life.

4.3. Although the position is not entirely clear, there is a danger that the UK Government may be tempted to dilute EU standards when negotiating and entering into new trade agreements with other countries. At present, the UK as a Member State of the EU, is precluded from sacrificing international fundamental rights norms to the end of expanding trade. The Government will have a free hand to do this post-Brexit.

5. Conclusion

5.1. The upshot of Brexit is that human rights protection within the UK and in relation to UK trade agreements will diminish, as many commentators have pointed out. The most striking loss is the literal "disappearance" of extensive case law that have ensured the effective enforcement of fundamental rights in the United Kingdom for decades.

5.2. It is worth emphasising that that it was a reference from a Northern Irish employment tribunal in *Johnston v. RUC* that created the pan-European obligation on Member States judges to secure the effective judicial protection of fundamental rights. The barrier to securing equal treatment in Member State law that was imposed by Northern Irish legislation was disapplied in C-222/84 *Johnston* EU:C:1986:206 under the weight of the ruling of the CJEU. Such legislative barriers will prevail once the Brexit is effected- since they cannot be set aside under the HRA.

Brexit Working Group
November 2018

For further information please contact:
Philip Robertson, Director of Policy or
Luke Robins-Grace, Senior Public Affairs and Communications Adviser
The General Council of the Bar of England and Wales
289-293 High Holborn
London WC1V 7HZ
Direct line: 020 7242 0082
Email: PRobertson@BarCouncil.org.uk
LRobins-Grace@BarCouncil.org.uk