Anthony Speaight

Any Role to Play in UK Law?

The EU Charter of Fundamental Rights

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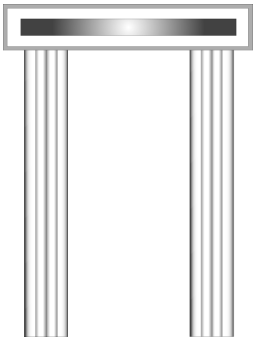

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I
Introduction

With the growing perception that the UK's EU membership is likely to end in the autumn, the search is on in some quarters to find a new way to retain the EU Charter of Fundamental Rights. A direct attempt to retain it was made by Labour and a few Conservative backbenchers with an amendment to the European Union (Withdrawal) Act 2018; that failed.

Last month the House of Lords EU Justice Sub-Committee wrote to the Lord Chancellor expressing concern that without the Charter the UK would lose some rights such as data privacy and equality before the law. These rights, they argued, are contained in the Charter, but, because they are not in the European Convention on Human Rights, are not protected by the Human Rights Act. Whether the UK will really lose such rights may be debatable. But if there is any such risk, the Charter is an unsuitable vehicle for retention by the UK.

Apart from the problems posed for the HRA spell out… and the uncertain meaning of the Charter which will be discussed in (**II**) and **(III)** below, there is the problem of the language of the Charter, for many rights in the Charter are expressed in language apt only to EU member states

The language of the EU – Applicable only for member states.
Whereas all the rights in the European Convention on Human Rights are expressed in universal terms, no fewer than 23 of the 50 rights articles in the Charter refer to "the Union", "citizens of the Union" and "Member States"[1].

Some rights are specifically expressed in terms of EU instruments: for example, the right to asylum is "in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union"[2].

[1] See Articles 12.2, 15.2, 15.3, 16, 18, 22, 25, 26, 27, 28, 30, 34.1, 34.2, 34.3, 35, 36, 37, 38, 39.1, 40, 41.1, 41.3, 42, 43, 44, 45.1, 45.2, 46, 47 and 50.
[2] Art 18 .

II

The Human Rights Act – Upsetting the Compromise

Lord Lester of Herne Hill QC, who campaigned for many years for the incorporation of the European Convention on Human Rights into British:-

> "The Human Rights Act is a well-drafted and subtle compromise respecting both Parliamentary sovereignty and the need for effective legal protection of fundamental rights....
>
> Unlike most other constitutional systems, the Human Rights Act prevents the unelected judiciary from nullifying Acts of Parliament that violate our basic constitutional rights. Instead it enables the courts to make declarations of incompatibility with Convention rights, leaving it to the Government and Parliament to decide whether to amend the offending statute or to await a ruling by the European Court of Human Rights. In that way it is a more democratic and less judge-based than in most countries."[3]

This balance has already been upset in British courts by the Charter.

The innocent origins of the Charter

The Charter began life as a response to concerns held by the German Federal Constitutional Court at the claim of EU law to supersede German law, in particular in respect of constitutional rights[4].

So it was proposed to codify principles which were to be found in ECJ judgments, e.g.

* right to an effective remedy before a court *Johnston* [1986] ECR 1651
* right to good administration *Burban* [1992] ECR I

This idea became transformed into the promulgation of a Charter, including

[3] "A Personal Explanatory Note" Lord Lester of Herne Hill QC in the report of the Lewis Commission at p.231, op cit

[4] *Solange I* [1974] 2 CMLR 540: The German Federal Constitutional Court holds that it will review whether EU acts accord with fundamental rights guaranteed by German Basic Law.

economic and social rights, at the 2000 Nice summit; and ultimately at Lisbon in 2007 by the Treaty on European Union art 6:-

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union .... which shall have the same legal value as the Treaties."

The ECJ claims a new power to strike down to strike down EU legislation

Association Belge des consommateurs Test - Achats v Conseil des Ministres [2012] 1 WLR 1933

> In 2004 the Council adopted a Directive on equal treatment in the supply of goods and services. The relevant treaty article permitted only unanimous decisions. Some member states favoured including a blanket ban on the use of gender in the setting of insurance premiums. Other member states, which themselves permitted differential premiums, for instance for young female drivers, were unwilling to agree to such a blanket ban. In consequence the Directive, whilst enacting a ban, allowed an opt-out for states which by a specified date based a decision on relevant and accurate data. Belgium took such a decision.
>
> The Court held that the carve-out provision was invalid as infringing anti-discrimination and equality articles in the EU Charter of Fundamental Rights. The remainder of the Directive was to stand.
>
> Legal result – Belgium (and also UK) was subject to the blanket ban
>
> Practical result – Young female drivers have to pay higher motor insurance premiums.

Comment: Bearing in mind that there had never been any obligation on the Council to include insurance within the scope of the Directive, and that there would not have been the necessary unanimity without the opt-out, the outcome can appear as if the Court rewrote the legislation.

Digital Rights Ireland Ltd v Minister for Communications (2014) C-293/12, C-594/12

> In 2006 the Council and Parliament enacted the Data Retention Directive to require providers of electronic communication services to retain for 12 months certain traffic and location data: namely, who communicated,

with whom, when, and from where. The text of the communication was not covered. This is information which communications companies necessarily have when handling the communication, but would not otherwise necessarily retain for any length of time. Access to such information by governmental authorities was to be subject to some safeguards, although whether such involved sufficient independent oversight was much contested.

The Directive was challenged as incompatible with art.s 7 and 8 of the EU Charter:

> "7. Everyone has the right to respect for his or her private and family life, home and communications"
>
> 8(1) Everyone has the right to the protection of personal data concerning him or her.
>
> 8(2) Such data must be processed fairly for specified purposes and on ... some other legitimate basis laid down by law."

The CJEU held the entire Directive to be invalid and of no effect. The Court considered that the retention of data satisfied some objectives of general interest but that as a matter of proportionality the Directive went beyond what was appropriate to attain those objectives, and so beyond the discretion of the legislature.

British courts use the Charter to strike down UK legislation

Benkharbouche v Embassy of Sudan [2016] QB 347 CA; [2017] UKSC 62 Sup Crt

Claims by employees at foreign embassies in London against their employers of racial discrimination and harassment, and UK regulations which implemented EU measures. By virtue of s.16 State Immunity Act 1978 sovereign states are immune from the jurisdiction of UK courts in respect of claims by employees of their diplomatic missions.

Held: International law does not require so wide an immunity, and so because of 1978 Act UK has not properly implemented Directives. Therefore, court "disapplies" s.16 – i.e. holds it of no effect.

Comment: The general principle of EU law is that directives do not of themselves change the law of member states, that is they do not have direct effect. Instead, they create an obligation on a member state to achieve a result. If the state fails to achieve such a result, there is "state liability", i.e. the state is liable to pay compensatory damages to an individual who suffers from the failure: *Francovich*. So the result here ought to have been *Francovich* damages. Even without reference to Protocol 30 (which the courts did not mention), the Charter provided no legal basis for, in effect, striking down primary UK legislation.

Vidal-Hall v Google Inc [2015] 3 WLR 409 Court of Appeal:

> "Claimants alleged that Google had misused their private information as to internet usage and thereby breached s.13 Data Protection Act 1998. The 1998 Act implemented the EU's Data Protection Directive.
>
> The first question, on which there was no Luxembourg Court authority, was whether the Directive on its true interpretation required member states to provide compensation for non-pecuniary distress. The Court of Appeal relied on articles 7 and 8 of the Charter which proclaim rights of privacy and to protect personal data as an aid to interpreting the Directive as requiring compensation for non-material loss.
>
> Therefore, the 1998 Act had failed fully to implement the Directive.
>
> Then, CA held that in consequence s.13(2) of the 1998 Act must be "disapplied".

Comment: Again this was horizontal legislation between private individuals. If the 1998 Act had failed to provide an element of compensation found to be required by a Directive, the remedy was state liability compensate those who suffered. Again the Charter provided no proper basis striking down primary UK legislation.

(a) Contrary to its language, it has been held by the ECJ to apply even when EU law is not being implemented

Charter Art 51.1:

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... and to Member States only when they are implementing Union law."
> (emphasis added)

The apparent clarity may, or may not, be assisted by the accompanying Explanations:

> "As regards the Member States it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on Member States when they act in the scope of Union law"
> (Emphasis added)

You might not detect a difference in meaning. But look at how courts have interpreted it:-

Åklagaren v Åkerberg Fransson [2013] 2 CMLR 46

> The case concerned the imposition in Sweden of both an administrative penalty and a criminal penalty on a trader for VAT fraud. He claimed that the latter penalty infringed his right under the Charter not to be prosecuted twice for the same offence. The penalties were part of the general Swedish tax code. They were not enacted in order to transpose into domestic law the EU requirement of VAT. Therefore, several member states, the European Commission and the Advocate-General all argued that the penalties did not represent implementation of EU law. Nonetheless, the Court held that the Charter did apply.

Comment by the President of the German Constitutional Court who described

the case as a "bone of contention"[5]:-

> "The prospect of a European guardian of fundamental rights may seem attractive to an EU Member State with a weak constitutional jurisdiction or a low standard of fundamental rights; for a country such as Germany, which enjoys a very high standard of fundamental rights that is appreciated throughout the world, it most certainly does not."

R (NS) v Home Secretary [2013] QB 102

An Afghan national arrived in the United Kingdom via Greece and then claimed asylum. In accordance with the Dublin procedures the Home Secretary called upon Greece to consider his application: Greece would normally have been responsible. The relevant EU Regulation, having established the normal procedures, went on to provide that "by way of derogation" from them, any member state could consider an application for asylum. The applicant asked the Home Secretary to consider his application on the ground that his Charter rights would be at risk of infringement if he were returned to Greece. She declined to do so. He sought judicial review of her decision. The Court of Appeal referred questions to the Luxembourg Court.

The CJEU, having held that Protocol 30 did not create a general opt-out for the UK, went on to hold that the above article of the regulation created a discretionary power, that this was part of the whole mechanism for determining asylum applications, and that, therefore, a state exercising the discretionary power "must be considered as implementing EU law".

Comment: So the UK was held to be implementing EU law even though its decision was not to exercise it.

R (Zagorski) v Secretary of State for Business [2010] EWHC 3110 at [66] to [70] per Lloyd Jones J.

[5] "European Integration and the Bundesverfassungsgericht" Prof Dr Andreas Voßkuhle, Sir Thomas More lecture, Lincoln's Inn 31st October 2013

> Application by judicial review challenging the Minister's failure to impose an export ban on the sale of an anaesthetic, which had a range of possible uses, to US states who planned to use it in a cocktail of lethal injection drugs for executions. Preliminary question of whether the Minister's decision was one taken when implementing EU law. The relevant EU Regulations, which in general strongly favoured free trade, allowed a discretion to member states whether to impose bans on various grounds of public policy. It was in exercise of that discretion that the British Minister decided not to impose an export ban. The imposition of prohibitions on exports was held by the judge to be "an area subject to close and detailed regulation by the EU". However, so far as EU Regulations were concerned, the Minister was free to choose to ban, or not to ban, export to the USA of this anaesthetic. Despite that, the judge held that in his failure to impose a ban the Minister was implementing EU law.

Comment: it seems curious that when the EU says something is <u>not</u> being dealt with by the EU but rather being left to member states, the states are held by courts to be implementing EU law.

Rugby Football Union v Consolidated Information [2012] 1 WLR 3333 at [28] Lord Kerr of Tonaghmore in the UK Supreme Court said:-

> "The rubric "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law': see eg *R v (Zagorski)* ..."

<u>(b) It has even been used by the ECJ to extend EU competences beyond the scope of the Treaties</u>

ZZ v Home Secretary [2013] 1136, CJEU

> ZZ had French nationality. He married a British woman. Whilst he was out of the UK the Home Secretary decided that his presence in the UK was not conducive to the public good and cancelled his right of residence. ZZ challenged the decision in the Special Immigration Appeals

Commission. SIAC found that on grounds of national security the case was made out for use of the closed procedure, in which his interests would be looked after by a special advocate. Having received closed evidence SIAC then found that ZZ had been involved in terrorist activities of an Islamist group and posed a present and serious threat to public security.

ZZ appealed all the way to the CJEU which, differing from the advice of its Advocate-General, held that, by reason of art 47 of EU Charter, which guarantees the right to a fair trial, the Citizenship Directive was to be read as if the gist of the Government's case had to be disclosed.

Comments: (1) The Citizenship Directive says nothing as to the provision of a gist. Its general rule is that a person should be informed in full of the grounds of an adverse decision, but this does not apply if "this is contrary to the interests of state security". So the Court's requirement for a gist in every case was an invention for which there was no support in the wording of the Directive.

(2) By art 6 of the Charter it is stated that the Charter does not extend the competences of the Union. National security is expressly outside the competence of EU law: TEU art 4.2. That is reinforced by art 346 TFEU which provides: "No member state is obliged to supply information disclosure of which it considers contrary to the essential interests of its security." And yet here is the Charter being used in the very area of national security to invalidate a UK legal procedure.

Tele2 Sverige v Post-och Telestyrelsen, Tom Watson v Home Secretary 21st December 2016 joined cases C-203/15 and C-698/15.

Prior to the *Digital Rights Ireland* decision, the UK has used the EU Directive as the legal basis for requiring communications companies to retain communications data. Following the decision, Parliament hastily enacted the Data Retention and Investigatory Powers Act 2014 to restore the same provisions as the EU Directive had had.

Tom Watson MP and Dave Davis MP brought proceedings to have the 2014 Act declared of no effect and disapplied on the grounds of

incompatibility with the EU Charter, broadly on the ground that the safeguards for access to the data involved insufficient independent oversight.

The Divisional Court disapplied the Act.

The CA referred questions to the Luxembourg Court as to the effect of the *Digital Rights Ireland* decision.

CJEU held, differing from the advice of its Advocate-General, that any legislation requiring blanket retention of data, irrespective of how independent and judicial might be the power to grant access infringes the EU Charter, and, therefore, cannot be enacted by a member state. It also held that any data seen by a government through a more targeted regime must not be transferred outside the EU

Comment by Sir Michael Burton delivering the judgment of the Investigatory Powers Tribunal in *Privacy International v Foreign Secretary*[6]*:* "If the *Watson* requirements do apply to measures taken to safeguard national security, in particular the [bulk communications data] regime, they would frustrate them and put the national security of the UK and, it may be, other Member States, at risk."

[6] UKIPTrib IPT_15_110_CH, 8th September 2017

IV
The Way Forward

The Charter, Brexit and the ECHR

One of the fundamental problems with the charter is that it erodes both national sovereignty and legal sovereignty.

Marina Wheeler QC, 6th May 2016:

"... the reach of the Court of Justice of the European Union (CJEU) in Luxembourg has extended to a point where the status quo is untenable. Aside from eroding national sovereignty, which it does, the current situation also undermines legal certainty, which in turn undermines good governance.

.... political assurances that the Charter merely re-stated existing rights, were misplaced. The Charter is being used to fashion new rights."

A British Bill of Rights

The obvious answer is the replacement of the Human Rights Act by a British Bill of Rights.

Most advocates of such a new Bill of Rights are ready to see the inclusion of rights which do not feature in the European Convention on Human Rights. Thus, a British Bill of Rights is the logical conclusion of the pained regrets at loss being currently voiced by enthusiasts in the rights lobby. To date most of the rights lobby has vociferously opposed a British Bill of Rights. Is it too much to hope that part of a post-Brexit national coming together might now include a new Bill of Rights?

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