



House of Commons  
House of Lords

Joint Committee on Human  
Rights

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# **The human rights implications of Brexit**

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**Fifth Report of Session 2016–17**





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*Report, together with formal minutes relating  
to the report*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

### Current membership

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[Ms Harriet Harman QC MP](#) (*Labour, Camberwell and Peckham*) (Chair)

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### Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

### Publication

Committee reports are published on the Committee's website at [www.parliament.uk/jchr](http://www.parliament.uk/jchr) by Order of the two Houses.

Evidence relating to this report is published on the [relevant inquiry page](#) of the Committee's website.

### Committee staff

The current staff of the Committee are Robin James (Commons Clerk), Donna Davidson (Lords Clerk), Murray Hunt (Legal Adviser), Alexander Horne (Deputy Legal Adviser), Penny McLean (Committee Specialist), and Miguel Boo Fraga (Senior Committee Assistant).

### Contacts

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# Contents

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<b>Summary</b>	<b>3</b>
<b>1 Introduction</b>	<b>8</b>
Background to our inquiry	8
The Government’s engagement with our inquiry	9
The nature of the rights in question	9
The EU Charter of Rights and other EU rights	10
The Government’s approach to Brexit and human rights	11
The scope of our Report	12
<b>2 Residence rights</b>	<b>13</b>
The legal framework	14
Residence rights and Article 8 of the European Convention on Human Rights	15
Implications of Brexit for the rights of British citizens elsewhere in the EU	17
Conclusions	18
<b>3 The Charter of Fundamental Rights and other EU rights and the ‘Great Repeal Bill’</b>	<b>20</b>
Background	20
The status of the Charter	21
An example of the additional rights provided by the Charter: Data rights and privacy	23
A brief comment on other EU law rights	24
The ‘Great Repeal Bill’	25
Parliamentary accountability	26
Rights post-Brexit	27
Rights in Scotland, Wales and Northern Ireland	28
Gibraltar	28
Conclusions	28
<b>4 Trade agreements</b>	<b>30</b>
Conclusions	32

<b>Conclusions and recommendations</b>	<b>33</b>
<b>Formal Minutes</b>	<b>35</b>
<b>Witnesses</b>	<b>36</b>
<b>Published written evidence</b>	<b>37</b>
<b>List of Reports from the Committee during the current Parliament</b>	<b>39</b>

## Summary

### *Why we decided to hold this inquiry*

The process of withdrawing from the European Union will have a significant impact on the legal framework that protects human rights in the United Kingdom. A complete withdrawal from the EU would mean that the UK would no longer have to comply with the human rights obligations contained within the EU Treaties, the General Principles of EU law, which include respect for fundamental rights, or EU directives and regulations protecting fundamental rights. The Charter of Fundamental Rights (the Charter) would not apply and the Court of Justice of the European Union (CJEU) would most probably cease to have jurisdiction over the UK.

Given the profound nature of these changes, we agreed to conduct a short inquiry into the potential impact of the United Kingdom's proposed withdrawal from the European Union on human rights.

### *Preliminary conclusions and next steps*

At the outset, we stress the fact that this is only our initial foray into the complex subject of the implications of Brexit for human rights in the UK. Following the publication of this short report, we intend to return to these (and other) Brexit-related issues in 2017. Nonetheless, we have reached a number of preliminary conclusions which are sufficiently urgent and important that we are drawing them to the immediate attention of the Government. We have also raised a series of further questions that will need to be explored in greater detail during the course of 2017.

### *Focus of the inquiry*

Our call for evidence was open-ended; however, we did highlight a number of matters including: the residence rights of UK and EU nationals; the impact of leaving the Charter on the overall legal framework of human rights protection in the UK; and the impact of withdrawal on a wide range of human rights (including workers' rights, disability rights and discrimination).

The EU rights in question are extensive. In this report, we have focused on:

- i) rights capable of replication in the law of the UK following Brexit;
- ii) rights enjoyed by UK nationals in other Member States of the EU which might be retained following negotiation with the remaining EU Member States;<sup>1</sup>
- iii) the extent to which individual rights currently protected under EU law are likely to be protected under the European Convention on Human Rights (ECHR);
- iv) questions about the human rights obligations which might be included in any new bilateral trade agreements post-Brexit.

<sup>1</sup> It is worth noting that there are also rights that could not be replicated in UK law upon withdrawal (such as the right to vote in elections for the European Parliament, or the right to seek to persuade the European Commission to take regulatory action in relation to a violation of EU environmental laws). We did not focus on these.

### *Residence rights: EU nationals in the UK and UK nationals in other EU countries*

One of the most immediate and pressing concerns arising from Brexit relates to the residence rights of EU nationals currently in the UK and UK nationals in the EU. It is estimated that there are currently 2.9 million EU nationals resident in the UK. Just under 1.2 million UK nationals are thought to live in the 27 other EU Member States. The Secretary of State for International Trade, Rt Hon Liam Fox MP, has reportedly described EU nationals in the UK as one of the “main cards” in Brexit negotiations and Minister of State for Human Rights Sir Oliver Heald told us that the Prime Minister was seeking an “early agreement” on the status of UK nationals in Europe and EU nationals in the UK. He confirmed that the Government’s view was that to agree a unilateral position on the issue would not be helpful.

### *Fundamental rights should not be used as a bargaining chip*

On this matter, we believe that it is not appropriate to treat individuals’ fundamental rights as a bargaining chip in negotiations with the remaining EU Member States, and indeed the Government will continue to have obligations under Article 8 of the ECHR, as we set out below. Moreover, irrespective of the moral issues raised by this approach, we also question the practicability of any policy for the mass deportation of EU nationals.

### *Position on residence rights is unclear for UK and other EU nationals*

The actual position of such individuals is legally complicated and will depend on length of residence and other factors. The picture for both UK and EU citizens remains far from clear at this stage. For example, the House of Lords EU Justice Sub-Committee has received compelling evidence to the effect that some EU nationals who have been in the UK for over five years will not currently meet the criteria for permanent residence in circumstances where they have not effectively been exercising their Treaty rights whilst resident in the UK.

### *The right to family life under ECHR Article 8 is not absolute*

The rights of EU and UK nationals may be protected under Article 8 of the ECHR, but these rights are in no way absolute and do not provide the same protections as offered by EU law. Notably, interferences with Article 8 rights can be justified in certain circumstances where they would not be under current EU law.

### *The court system could be overwhelmed by individual cases*

However, although ECHR rights can be restricted, it would not be possible for the UK Government to establish a bright-line rule that would allow the deportation of EU nationals merely on the grounds that they had only been resident for a fixed period of time. Other factors, such as family connections and the residence rights of any children, would certainly be relevant and each case would have to be considered on its own facts. In the unlikely event that the Government sought to deport EU nationals,

there could be the potential for significant, expensive and lengthy litigation leading to considerable legal uncertainty for a prolonged period of time. These cases would also have the potential to clog-up and overwhelm the court system.

### *Entitlement to benefits*

Should any UK citizen currently resident in the EU have to return to the UK post-Brexit, a further issue may arise as to their entitlement to benefits, including job seeker's allowance, housing benefit, universal credit and pension credit, (for example because of the 'habitual residence test').

### *The Government must address residency rights urgently to avoid distressing uncertainty*

In spite of being pressed to do so, the Government has, so far, refused to give an undertaking to protect the residence rights of EU nationals in the UK, arguing that it would potentially undermine its negotiating position with the other EU Member States. We note that the Government indicates that it is hopeful of an early agreement on this issue and is treating it as a priority. We recommend that the Government addresses the issue of residence rights urgently. This could be done by providing an undertaking to the effect that all of those legally resident at a reasonable cut-off date will be guaranteed permanent residence rights. The Government should also seek to safeguard the residence rights of UK nationals resident in other EU Member States at the outset of its Article 50 negotiations by way of a separate preliminary agreement. This ought to be done as soon as possible: if such action is not taken, individuals will be subject to continuing and distressing insecurity during at least two years of potentially protracted negotiations.

### *Future framework for protecting fundamental rights*

A second matter of immediate concern is the Government's approach to safeguarding individuals' fundamental rights, other than those protected under the ECHR, going forward. The Government seemed unacceptably reluctant to discuss this issue with the Committee. The Minister of State was unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU.

### *Domestic rights protection a matter for negotiation with other EU Member States?*

We were also surprised to be informed that the Government saw the question of domestic protection for fundamental rights as a matter for negotiation with the other EU Member States. Unless the Government wishes to diminish such protection significantly, it is difficult to see why this should be a matter for negotiation and how this would be negotiated reciprocally with the remaining EU Member States.

### *The ‘Great Repeal Bill’: which rights are under threat?*

The Government has said that it will introduce a ‘Great Repeal Bill’ in the next Parliamentary session.<sup>2</sup> This would repeal the European Communities Act 1972 and end the application of EU law following Brexit. EU law currently underpins a great many fundamental rights and yet it is unclear whether the Government intends to remove any rights which UK citizens currently possess under EU law (and, if so, which rights are under threat).

Although the Prime Minister has committed to guaranteeing existing workers’ rights, the rights protected under EU law are much more extensive than this and include (amongst other things) rights under the Charter (which safeguard, for example, privacy and data rights) and rights against discrimination. It is not clear to us why the rights of workers should be treated any differently to other fundamental rights.

### *Government should set out full list of fundamental rights guaranteed under EU law before triggering Article 50*

Given the lack of clarity in this area, we take the view that prior to publishing the Repeal Bill, and before triggering Article 50 of the Treaty on the European Union, the Government should set out a full and detailed list of all fundamental rights currently guaranteed under EU law and what approach it intends to take towards them.

### *The Government should publish the Repeal Bill in draft*

In addition, we also recommend that the Government commits to publishing its proposed Repeal Bill in draft, to ensure that it receives detailed and rigorous scrutiny, ideally by a pre-legislative joint scrutiny committee. As the Bill will not take effect until the UK exits the EU, there should be adequate time to take a measured and thorough approach to this legislation to ensure it receives adequate consideration by Parliament.

### *How to protect fundamental rights in future?*

Looking forward, even assuming that the Repeal Bill initially safeguards existing rights under EU law, this would not stop a future Government from repealing laws that it did not consider desirable. Without the underpinning of EU law, the rights preserved under the Repeal Bill would be subject to repeal or amendment. Under the UK constitution, aside from obligations under EU law, there is no way to entrench fundamental rights.

### *Parliamentary accountability*

We were warned by a number of witnesses that the immense task of Brexit law reform could give rise to a temptation to delegate large swathes of legislative power to the Government. This should not be done by passing a Repeal Bill which includes broadly drafted provisions delegating law-making powers to the Government by way of what are known as ‘Henry VIII’ clauses (essentially delegated powers that enable Ministers to make changes to primary legislation by way of secondary legislation). The Government must resist the temptation to allow laws relating to fundamental rights to be repealed

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<sup>2</sup> For more on this see pages 25-28.

by secondary legislation for reasons of expediency. If the rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes.

### *Future developments in EU law would no longer be automatically implemented into UK law*

During the course of our inquiry it also became clear that even if current EU laws are preserved by the Repeal Bill, this would not apply to new developments in the EU after the UK's departure. This would occur both in relation to future EU regulations and directives on rights and the future case law of the CJEU. EU law has been described as the engine that hauled the development of UK anti-discrimination law. Brexit will mean that any future developments would no longer be implemented automatically into UK law. The Minister of State gave us no commitment that the Government would monitor EU law developments.

### *Detailed statutory guidance is needed on the status of existing CJEU case law and future CJEU decisions*

The removal of the European Communities Act 1972 from the statute book will mean that the UK courts will no longer, after Brexit, give primacy to EU law. The domestic courts will not be obliged to follow the judgments of the CJEU, nor will they be able to refer questions of EU law to the CJEU. We recommend that the Government should issue detailed statutory guidance on the status of existing CJEU case law. It will also have to determine how it will approach the status of future CJEU decisions and ensure that it is not isolated from other developments emanating from the EU. The question of how fundamental rights will be enforced going forward will also be of central importance.

### *Scotland, Northern Ireland and Wales*

An important issue relating to the Repeal Bill is that legislating for Brexit will have significant implications for rights in Scotland, Northern Ireland and Wales. We have not yet had the opportunity to speak to representatives of the devolved Governments on this issue (which formed the basis of submissions in the case *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* currently before the Supreme Court). At this stage we merely flag the fact that the question of the impact of Brexit on the protection of human rights in the devolved jurisdictions is an issue that we are likely to revisit following the Supreme Court's judgment.

### *Trade Agreements*

We considered the question of Trade Agreements.<sup>3</sup> The European Union has included human rights clauses in its trade agreements for many years. In circumstances where the UK exits the EU, and has to enter into trade agreements with other states, the Government should, at the very least, ensure that the standards included in current agreements are maintained. Any dilution of standards would mean UK standards are lower than EU standards. That should be considered unacceptable and there is an argument to be made that if the UK enters into any new agreements, this is an opportunity to raise standards.

<sup>3</sup> This is a subject that we are also examining in detail as part of our inquiry into Human Rights and Business.

# 1 Introduction

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## Background to our inquiry

1. The process of withdrawing from the European Union ('Brexit') will have a significant impact on the legal framework that protects human rights in the United Kingdom. A complete withdrawal from the EU would mean that the UK would no longer have to comply with the human rights obligations contained within the EU Treaties, the General Principles of EU law (which include respect for fundamental rights), or EU directives and regulations protecting fundamental rights.<sup>4</sup> The Charter of Fundamental Rights (hereafter 'the Charter') would not apply and the Court of Justice of the European Union (CJEU) would most probably cease to have jurisdiction over the UK.

2. As is well recognised, withdrawing from the EU does not mean withdrawing from the separate European Convention on Human Rights (ECHR). Although the Government still indicates that it is planning a British Bill of Rights, the Prime Minister, Rt Hon Theresa May MP, has indicated that she does not intend to propose a UK withdrawal from the ECHR in this Parliament as there is not a majority for it in the House of Commons.<sup>5</sup> Nonetheless, the effects of Brexit may be at least as far-reaching on the UK's human rights framework as the reported proposals for a new Bill of Rights.

3. Given the profound nature of these changes, we agreed to conduct a short inquiry into the potential impact on human rights of the UK's proposed withdrawal from the European Union. At the outset, we stress the fact that this is only our initial foray into the complex subject of the implications of Brexit for human rights in the UK. Following the publication of this short report, we intend to return to these (and other) Brexit-related issues in early 2017.

4. Our call for evidence, which was published on 15 September 2016, was open-ended as it was apparent from the outset that this inquiry would raise a substantial number of weighty issues. However, we did highlight a number of matters including: the residence rights of UK and EU nationals; the impact of leaving the Charter on the overall legal framework of human rights protection in the UK; and the impact of withdrawal on a wide range of human rights (including employment rights, disability rights and discrimination).

5. In addition to these issues, we also asked what human rights obligations the UK Government should include in any new bilateral trade treaties which will replace EU Trade Treaties to which the UK is currently a party.

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4 The protection of fundamental rights was not explicitly included in the founding Treaties of the European Communities, which contained only a small number of articles that could have had a direct bearing on the protection of the rights of individuals. An explicit reference to fundamental rights at Treaty level appeared approximately 30 years later, with the entry into force of the Maastricht Treaty (1993). Since the entry into force of the Amsterdam Treaty (1999), and notably the Lisbon Treaty (2009), protecting fundamental rights is now a founding element of the European Union. Examples of fundamental rights included (but was not limited to) the right to protection of human dignity and personal integrity; expression, equality before the law, the principle of 'good administration', and environmental rights. The Charter of Fundamental Rights, which is divided into six titles organised to reflect the importance of EU principles (namely: Dignity; Freedoms; Equality; Solidarity; Citizens' Rights and Justice) was designed to consolidate the fundamental rights that already existed under EU law. For more detail, see: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS\\_IDA\(2015\)554168\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf)

5 See: e.g. [May takes aim at European Convention on Human Rights](#), Financial Times, 4 October 2016

6. We received 59 written submissions in response to our call for evidence. A list of those who contributed is included at the back of this Report and all written submissions can be found on our website.

7. We held two evidence sessions in October and November 2016, taking evidence from Marina Wheeler QC, Professor Colm O’Cinneide (University College London), Professor Sionaidh Douglas-Scott (Queen Mary University, London), and Professor Graham Gee, (University of Sheffield and Policy Exchange) on 26 October and Rt Hon Sir Oliver Heald QC MP (Minister of State for Courts and Justice, Ministry of Justice) on 23 November. We are grateful to all those individuals and organisations who have engaged with this inquiry and provided us with useful evidence.

## The Government’s engagement with our inquiry

8. In her initial letter of 12 October 2016, in response to our invitation to give evidence, the Lord Chancellor and Secretary of State for Justice, Rt Hon Elizabeth Truss MP, declined to attend and instead indicated that the Minister of State, Rt Hon Sir Oliver Heald MP QC, would appear in her place.<sup>6</sup> We are firmly of the view that the Secretary of State should have appeared. The fact that she chose not to is unacceptable. On 11 November 2016, almost two months after our initial correspondence<sup>7</sup> and call for evidence, we received a letter from the Secretary of State for International Trade, Rt Hon Liam Fox MP.<sup>8</sup> This provided an extremely limited response to our questions on international trade deals. Notably, the Government failed to provide us with any substantive written evidence.

9. **While it is plain that the Government feels that it is not able to give what it describes as a “running commentary” on Brexit negotiations, it is regrettable that it is has not been able to set out any clear vision as to how it expects Brexit will impact the UK’s human rights framework.** We expand on some of the issues that have caused us concern below and hope that the Government will respond positively and transparently to this Report.

## The nature of the rights in question

10. The rights in question are extensive and can be usefully subdivided into three categories (as they were by the Divisional Court in the case of *R (Miller) v Secretary of State for Exiting the European Union*).<sup>9</sup> These are: rights capable of replication in the law of the UK following Brexit (such as residence rights of EU nationals in the UK, the rights of workers, discrimination and equality rights); rights enjoyed by UK nationals in other Member States of the EU which might be retained following negotiation with the remaining EU Member States (such as the rights currently enjoyed pursuant to rights of free movement of persons, capital and establishment); and rights that could not be replicated in UK law

6 Letter from Rt Hon Elizabeth Truss MP, Lord Chancellor & Secretary of State for Justice, to the Chair of the Committee, [regarding the oral evidence session](#), dated 12 October 2016.

7 Letter from Rt Hon Harriet Harman MP, Chair of the Joint Committee on Human Rights, to the Secretary of State for International Trade, [regarding inquiry into the implications for human rights of the UK’s planned withdrawal from the European Union](#), dated 13 September 2016.

8 Letter from Rt Hon Liam Fox MP, Secretary of State for International Trade, to the Chair of the Committee, [regarding the announcement of a new inquiry into the implications for human rights of the UK’s planned withdrawal from the European Union](#), dated 11 November 2016.

9 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin)

upon withdrawal (such as the right to vote in elections for the European Parliament, or the right to seek to persuade the European Commission to take regulatory action in relation to a violation of EU environmental law).

11. We have focused on the first two categories of rights and we have also considered the extent to which individual rights currently protected in EU law, particularly those relating to residence, are likely to be protected under the ECHR.

12. The two most relevant rights that apply under the ECHR are the right to respect for private and family life under Article 8, and the right of peaceful enjoyment of possessions under Article 1 of the First Protocol to the ECHR. On the latter of these points, the Minister was unable to provide us with what he himself acknowledged was “a very clear picture” of the Government’s assessment of the impact of Brexit on persons currently exercising free movement rights in the EU. He promised to write to us on this point and we will publish any correspondence as soon as it is received.<sup>10</sup>

13. We note that the question of ‘acquired rights’ (including EU residency rights and other EU citizenship rights) has also been considered by the House of Lords EU Committee. Its report, *Brexit: acquired rights*, was published on 14 December. The House of Commons Women and Equalities Committee is currently undertaking a continuing inquiry into the implications of leaving the EU on equalities legislation and policy in the UK. We have not sought to duplicate this work in our Report.

## The EU Charter of Rights and other EU rights

14. The EU Charter is often confused with the ECHR, as the Court of Justice of the European Union (CJEU), based in Luxembourg, is with the European Court of Human Rights in Strasbourg (ECtHR). While both contain overlapping human rights provisions, they operate within separate legal frameworks. The Charter is an instrument of the EU. It is part of EU law and subject to the ultimate interpretation of the CJEU. The precise scope and application of the Charter has proved contentious and this issue is addressed in some detail in Chapter 3 of our Report.

15. Some Charter rights mirror rights, including many civil and political rights, found in the ECHR; others go beyond the ECHR, including some economic and social rights not found in the ECHR. Charter rights which go beyond the ECHR include, for example: the right to fair and just working conditions, the right to preventive healthcare, the right to good administration, the right to access to documents and a more wide ranging right to privacy.

16. While the rights contained within the Charter may be more extensive, the scope of the Charter is more restricted as it applies only to public bodies making decisions within the scope of EU law. As the House of Lords EU Committee has recognised:

The application of the EU Charter is narrower than that of the European Convention on Human Rights for two main reasons: not all of its provisions have direct effect, and so they cannot be relied on directly by individuals in national courts; and it applies to Member States “only when they are implementing Union law”.<sup>11</sup>

17. Finally, the CJEU is responsible for interpreting all EU law, not just the EU Charter. Individuals have limited access to the CJEU. It is not, as such, a human rights court. However, judgments of the CJEU are legally binding on all 28 EU Member States, and carry more powerful enforcement mechanisms. Moreover, where a national court in the UK finds that national legislation cannot be interpreted as compatible with the Charter, under the European Communities Act 1972 it can disapply the law itself.<sup>12</sup>

### The Government’s approach to Brexit and human rights

18. We asked the Minister of State, Sir Oliver Heald MP, what the Government saw as the most significant human rights issues that were likely to arise upon Brexit. He responded that “the whole body of European legislation will be discussed in the negotiations and no doubt issues will arise.”<sup>13</sup>

19. When pressed on the fact that the UK’s human rights framework was not what was up for discussion as part of the negotiations with the remaining EU Member States (and informed that we were only asking him what he saw as the most significant human rights issues that will arise when Britain exits the EU), he said:

If you look at the overall body of law we are talking about, you have national, domestic laws that protect rights along with some European laws which have acquired rights within them, and then of course you have the ECHR with its own architecture. All of those have rights within them. In the course of the negotiations about Brexit, various European laws will no doubt be discussed and our negotiating position—which I cannot reveal today—will inform part of what we are asking for. But what remains of the rights set out in the body of European law will be determined by the negotiations.<sup>14</sup>

20. When questioned further on this point, he observed that:

Clearly, it is important that British citizens should have the rights that are needed and in so far as negotiations reveal that an area would require domestic legislation, obviously that is something the Government would have to consider.<sup>15</sup>

11 House of Lords, *The UK, the EU and a British Bill of Rights*, Twelfth Report of the European Union Committee, Session 2015–16, [HL Paper 139](#), para 71

12 See: e.g. *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33

13 [Q10](#)

14 [Q10](#)

15 [Q10](#)

21. **The Government seemed unacceptably reluctant to discuss the issue of human rights after Brexit. The Minister of State responsible for human rights was either unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU.**

22. **We were also surprised to be informed that the Government saw the question of domestic protection for fundamental rights as a matter for negotiation with the other EU Member States. Unless the Government is prepared to diminish such protections significantly, it is difficult to imagine why it considers that this should be a matter for negotiation and how this would be negotiated reciprocally with the remaining EU Member States.**

### **The scope of our Report**

23. The remainder of this report is in three parts. Chapter Two sets out our conclusions on residence rights of UK and EU nationals following Brexit. We also consider the protections that might be offered under Article 8 of the ECHR if no agreement can be reached.

24. Chapter Three explores some of the other human rights which the Government will have to address, most notably those that are currently protected by directives and regulations under EU law and under the Charter. We also consider the Government's proposed 'Great Repeal Bill' and the safeguards which may prove necessary to ensure that rights are not diluted post-Brexit without adequate parliamentary scrutiny.

25. Finally, Chapter Four sets out our preliminary views on the question of human rights contained in trade agreements after Brexit.

## 2 Residence rights

26. One of the most immediate and pressing concerns arising from Brexit relates to the residence rights of EU nationals currently in the UK and UK nationals in the EU. It is estimated that there are currently 2.9 million EU nationals resident in the UK. Just under 1.2 million UK nationals are thought to live in the 27 other EU Member States. Despite a number of appeals from politicians across the political spectrum for reassurances that the rights of those people will not be affected by Brexit,<sup>16</sup> the Prime Minister has only said that she hopes to guarantee the rights of EU citizens as long as the rights of UK citizens in the rest of the EU are protected.<sup>17</sup>

27. This response was repeated by the Secretary of State for Justice in her letter to us of 12 October.<sup>18</sup> The Secretary of State for International Trade has reportedly described EU nationals in the UK as one of the “main cards” in Brexit negotiations.<sup>19</sup> In spite of being pressed the Government has, so far, declined to give an undertaking on this issue, arguing that it would potentially undermine its negotiating position with the other EU Member States. We were told that the Government was hopeful of an early agreement on this issue and was treating it as a priority. In his oral evidence, Sir Oliver Heald told us:

You will be aware that the Prime Minister has been very clear that she sees this as a priority. She said [ ... ] that she wants an “early agreement” on the status of UK nationals in Europe and EU nationals here so that, as she said in her speech to the CBI, “you and they can plan with certainty”. This is an area where an early agreement would be most welcome. It is one of those issues where we have UK citizens living in the EU and we would like to feel that their position is settled, and equally, as you say and I accept, for EU nationals here [ ... ] But not to agree both sides of the issue and to agree unilateral positions is not helpful.<sup>20</sup>

28. We recognise that policies on migration have become extremely contentious in many EU Member States. Many of the individual submissions that we received over the course of our inquiry were from people who were anxious about residence rights post-Brexit. Concerns were voiced from people who feared the loss of EU citizenship, from those who had retired (or wished to retire) in another EU Member State, as well as those who might not qualify for permanent residency rights in the UK. We also received submissions which urged us to “consider the impact on the hundreds of thousands of couples, and especially families, where one partner is British and the other [is] from another EU country.”<sup>21</sup>

16 See: e.g. [Brexit: Nick Clegg to write letter to 500,000 people urging them to demand EU citizens' rights guarantee](#), Independent, 17 October 2016

17 See: e.g. [Theresa May defends refusal to guarantee EU citizens' rights in UK](#), The Guardian, 30 November 2016

18 Letter from Rt Hon Elizabeth Truss MP, Lord Chancellor & Secretary of State for Justice, to the Chair of the Committee, [regarding the oral evidence session](#), dated 12 October 2016.

19 [Liam Fox: EU nationals in UK one of 'main cards' in Brexit negotiations](#), The Guardian, 4 October 2016

20 [Q15](#)

21 See: e.g. Mr David Robertson ([HBR0002](#)), Mr Brian Robinson ([HBR0006](#)), Stephen Lawrence ([HBR0007](#)), Dr Simon Calcutt ([HBR0008](#)), Anonymous ([HBR0040](#)), and J G ([HBR0047](#)). An associated matter is the position of UK and EU students. Universities UK has called on the Government to provide assurances to students who wish to apply for courses starting in 2018–19; but has acknowledged that the longer term implications for such students will depend on the outcome of negotiations. (See: <http://www.universitiesuk.ac.uk/policy-and-analysis/brexit/Pages/brexit-faqs.aspx>)

## The legal framework

29. The actual position of such individuals is legally complicated and will depend on length of residence and other factors. The picture for both UK and EU citizens remains far from clear at this stage. The majority of relevant rights are currently set out in the 2004 Citizens' Directive,<sup>22</sup> which codified the EU legislation which deals with the free movement rights and residence rights of employed and self-employed people, students and economically inactive people.

30. Although Article 16 of the EU Citizenship Directive provides a right to permanent residence for those who have resided for a continuous period of five years in the host Member State, this is subject to the proviso that they have to have exercised their treaty rights during that time.

31. The House of Lords EU Justice Sub-Committee has received compelling evidence to the effect that some EU nationals who have been in the UK for over five years will not currently meet the criteria for permanent residence. The complexity of the rules in question has led witnesses to warn the EU Sub-Committee about the "myth" that has developed that residency could automatically be acquired after a five-year residency period.<sup>23</sup>

32. Examples where the House of Lords EU Justice Sub-Committee were told issues could arise, even if an individual had been resident for five years, include the case of an elderly parent (who is an EU citizen) who came to the UK to be near their children, but who was neither dependent on them nor who had worked for five years in the UK. Such a person would never acquire the right to permanent residency in the UK under EU law because they had not exercised their treaty rights. Another example brought to the attention of the Lords Committee was certain economically inactive individuals, such as students, who did not possess either medical insurance in their own country or private medical insurance in the UK.

33. Given that Member States are not obliged to issue residence cards to EU nationals, the simple fact of registering EU nationals and proving the exercise of "treaty rights" may prove problematic. Press reports have highlighted the fact that there has been a surge in applications for permanent residence, leading to backlogs. A recent press report in the *Guardian* suggests that "many EU citizens have been unable to pass the paperwork test despite their legal right of residence as EU citizens."<sup>24</sup>

34. The House of Lords European Union Committee noted in its report, *Brexit: acquired rights*, that there was "much speculation before the referendum that EU rights would somehow be protected as 'acquired rights', meaning that they would continue irrespective of the UK's withdrawal from the EU." However, it stated that the evidence it received

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22 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The Citizens Directive was implemented into UK law by the Immigration (European Economic Area) Regulations 2006.

23 See: Written evidence from Mr Gary Holland ([AQR0009](#)) and from Mr Stuart Whitehouse ([AQR0011](#)) to the EU Justice Sub-Committee's inquiry into Brexit: acquired rights.

24 See: e.g., [Registration for all EU residents in the UK will be a 'formidable' task](#), Daily Telegraph, 1 December 2016, and, [Brexit: 1m EU citizens in Britain 'could be at risk of deportation'](#), The Guardian, 1 December 2016

showed that this was not the case. It concluded that “the doctrine of acquired rights in international law is limited both in scope and enforceability, and is highly unlikely to provide meaningful protection against the loss of EU rights upon Brexit.”<sup>25</sup>

### ***Residence rights and Article 8 of the European Convention on Human Rights***

35. Should no comprehensive deal on residence rights be agreed following Brexit, the rights of some EU and UK nationals may be protected under Article 8 of the ECHR. Article 8 provides as follows:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

36. These rights are in no way absolute and do not provide the same protections as offered by EU law. Notably, interferences with Article 8 rights can be justified under Article 8(2) of the ECHR in circumstances where they are in accordance with the law, in pursuit of a legitimate aim and a proportionate means of achieving that aim.

37. Richard Gordon QC and Rowena Moffatt (barristers who practise human rights law), set out the position clearly in a report, published by the Constitution Society, entitled *Brexit: The Immediate Legal Consequences*:

The family life limb of Article 8 may be relevant insofar as there is family life of the type protected by Article 8 between a person with former EU citizenship rights and persons who are citizens of the State in which residence is sought or who have leave to remain under domestic immigration law. Given that the EU citizen will often be able to prove prior lawful residence under EU law either as permanent residents or with a view to obtaining permanent residency, depending on the specific facts of each case, it is very likely that some EU citizens who might find themselves without a right to reside after a UK withdrawal would be able to rely successfully on Article 8 before domestic courts. Similar reasoning would apply to applications for leave to remain on the basis of Article 8 ECHR in respect of private life built up during a period of residence under the EU free movement rules. [ ... ]

Each case would turn on its own particular facts (clearly, long residence and strong family connections would have the best prospects of success) but it may be thought that at least some people no longer able to benefit from EU free movement law would succeed under Article 8.<sup>26</sup>

25 House of Lords, Brexit: acquired rights, Tenth Report of the European Union Committee, Session 2016–17, [HL Paper 82](#), page 4

26 The Constitution Society, [Brexit: The Immediate Legal Consequences](#), (2016), pp 62–3

38. Although the protections offered by Article 8 are qualified, it would not be possible for the UK Government to establish a bright-line rule<sup>27</sup> that would allow the deportation of EU nationals merely on the grounds that they had only been resident for a fixed period of time. As noted above, other factors, such as family connections and the residence rights of any children, would certainly be relevant and importantly each case would have to be considered on its own facts in order to judge the proportionality of a proposed deportation.<sup>28</sup>

39. Professor O’Cinneide put the matter very clearly in oral evidence. He said:

There is a clear strand of European Court of Human Rights case law that says if you have become embedded in a community—that you live there for an extended time, your children go to nursery, et cetera—state interference with that embeddedness through deportation for national security reasons or immigration control or other considerations has to reach more exacting standards of objective justification. This means that EU nationals who have come here under free movement rights and have become embedded in the UK, the more embedded they are, the greater their Article 8 rights, and the greater the objective justification that the Government will have to mobilise to justify the deportation.<sup>29</sup>

40. When asked whether the Government might be able to interfere with Article 8 rights on the grounds that they were negotiating with the remaining EU Member States, Professor Douglas-Scott told us:

It might be tried out. I am not sure that would pass muster. Perhaps more likely would be arguments based on economic wellbeing of the country, or the rights of those who voted in the referendum to exercise their democratic right to vote [ ... ] I think the bargaining chips argument probably would not cut very much ice with a court.<sup>30</sup>

41. The Government informed us that it had made no assessment of the number of people who may have the protection of Article 8 on the grounds that “we do not expect there to be legal proceedings of the sort that have been outlined [ ... ] We expect this to be a matter of speedy agreement.”<sup>31</sup>

42. It is plain that, in the unlikely event that the Government sought to deport EU nationals, there could be the potential for significant, expensive and lengthy litigation leading to considerable legal uncertainty for a prolonged period of time. Such claims could potentially overwhelm the courts and tribunals system.

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27 A bright-line rule is a legal rule that makes it possible to say that a given argument or set of facts falls on one side or the other rather than leaving the decision to the facts and circumstances of the case.

28 See: e.g. *Al-Nashif v Bulgaria* (App. 50963/99) (2003) 36 EHRR 655; *Bouchelkia v France* (App. No. 23078/93) (1998) 25 EHRR 686; *Boujlifa v France* (App.25404/94) (2000) 30 EHRR 419; *Maslov v Austria* (App. No. 1638/03) (23rd June 2008); *Onur v United Kingdom* (App. No. 27319/07) (2009) 49 EHRR 38; and *A W Khan v United Kingdom* (App. No. 47486/06) (2010) 50 EHRR 47; *Samsonnikov v Estonia* (App. No.52178/10) (3rd July 2012). See also the evidence of Dr Kirsty Hughes ([HBR0009](#)).

29 [Q2](#)

30 [Q2](#)

31 [Q16](#). It has been reported that Angela Merkel and Donald Tusk have sought to block attempts to fast-track a deal: see e.g. [Angela Merkel says ‘nein’ to Theresa May’s calls for early deal on rights of EU migrants and British ex-pats](#), The Telegraph, 29 November 2016

43. In their written evidence to us, the Immigration Law Practitioners Association (ILPA) has recommended that simple protections should be offered to those who have permanent residence at the date the UK leaves the EU:

One simple measure would be to provide that all those who have permanent residence at the cut-off date should retain the equivalent of their rights as permanent residents. Those who do not yet have permanent residence should, at the very minimum, be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law.<sup>32</sup>

44. Unless assurances are given the Home Office is likely soon to face a flood of applications from EU citizens resident in the UK seeking to establish their status.

45. The House of Lords European Union Committee has recommended that “the Government should change its policy and give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK post-Brexit.”<sup>33</sup>

### ***Implications of Brexit for the rights of British citizens elsewhere in the EU***

46. In addition to the rights of those EU nationals currently living in the UK, if the remaining EU Member States sought to deport UK nationals, similar questions would arise. Clearly UK nationals in other EU Member States would be able to rely on the ECHR: the protections of Article 8 would be mirrored in those EU Member States. This would make any form of mass deportation of people back to the UK implausible and impracticable.

47. ILPA has contended that the rights of UK citizens might be subject to greater legal protections than EEA nationals and their family members in the UK. They have indicated that:

There is much more certainty for British citizens and their family members living in other EU states than for other EEA nationals and their family members in the UK because of the EU common immigration policy.<sup>34</sup>

48. Yet the precise position of UK nationals in the EU is not certain.<sup>35</sup> And in addition to the remote risk of deportation, there are also more practical issues which are likely to arise. An example of this is that UK citizens currently benefit from a right to healthcare under

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32 Immigration Law Practitioners ([HBR0055](#)), para 19. ILPA go on to say that even were such a provision brought forward this would, however, leave certain persons needing to rely on Article 8: in particular, the economically inactive EEA partners of British citizens who do not have comprehensive sickness insurance and are thus not treated as exercising treaty rights as self-sufficient persons, but who have built lives and families here. For this group, and to avoid similar complications in other cases, they “strongly recommend that rights of access to the NHS be treated as comprehensive sickness insurance cover.”

33 House of Lords, Brexit: acquired rights, Tenth Report of the European Union Committee, Session 2016–17, [HL Paper 82](#), page 6

34 Immigration Law Practitioners ([HBR0055](#)), para 10

35 House of Lords, Brexit: acquired rights, Tenth Report of the European Union Committee, Session 2016–17, [HL Paper 82](#), paras 28–33

EU law.<sup>36</sup> If such benefits were withdrawn, post-Brexit, it is possible that great numbers of UK nationals, many of them pensioners, would need to return to the UK. This could raise further questions, such as their entitlement to benefits (including jobseeker's allowance, housing benefit, universal credit and pension credit) under the 'habitual residence test'.<sup>37</sup>

49. The Minister was not able to provide us with much detail or clarity on the question of UK nationals in the EU. He said:

As far as our citizens in the EU are concerned, at the moment they have the benefits of the ECHR, as we do here, and they also have the benefits of the Charter of Fundamental Rights and its application. Going forward, it is likely that the position will remain unchanged for British citizens in the EU, but we want to just make sure that that is the case and secure the deal.<sup>38</sup>

## Conclusions

50. **On the question of residence rights, we believe that it is not appropriate to treat individuals' fundamental rights as a bargaining chip. Notwithstanding the moral imperative to respect the rights of EU nationals, there is also a considerable practical impediment to treating such rights as negotiable. It is not realistic to imagine that the UK Government would be in a position to deport the large numbers of EU nationals currently in the United Kingdom. Under Article 8 of the ECHR, individuals are entitled for respect to their private and family life and home.**

51. **While these rights are in no way absolute, it would not be possible to establish a bright-line rule that would allow the deportation of EU nationals simply on the grounds that they had only been resident for a fixed period of time. Other factors would certainly be relevant and each case would have to be considered on its own facts. In such circumstances, there would be the potential for significant, expensive and lengthy litigation which could lead to considerable uncertainty for a prolonged period of time and could potentially overwhelm the UK courts and tribunals system.**

36 There are many different layers of EU law governing the very different degrees of access to the healthcare in a Member State depending on whether a national of another Member State is just visiting as a tourist or working/living there or specifically exercising the option to undergo medical treatment in another Member State. The House of Lords European Union Committee has noted concerns from UK nationals about this issue, highlighting the fact that: "UK nationals have asked if they would still be able to use a UK-issued European Health Insurance Card (EHIC) when travelling as a tourist to other EU States, and whether their EU country-issues EHIC would be valid in the UK on holiday. They have asked whether, as a worker in another EU country, they would still be entitled to an EHIC; and as a pensioner whether they would continue to be able to access free healthcare in their EU country of residence." House of Lords, Brexit: acquired rights, Tenth Report of the European Union Committee, Session 2016–17, [HL Paper 82](#), para 51.

37 The habitual residence test was introduced on 1 August 1994. The test is applied to all people (unless they fall into one of the exempt categories), including returning British nationals, who have recently arrived in the country and who claim certain means-tested social security benefits, or seek housing assistance from a local authority. Citizens Advice indicate that the habitual residence test now applies to claims for the following benefits: Income Support, Income-based Jobseeker's Allowance, Income-related Employment and Support Allowance, Pension Credit, Housing Benefit, Council Tax Reduction, Universal Credit. See: [What is the habitual residence test?](#), Citizens Advice Bureau.

38 [Q19](#). It is worth noting that Charter rights can also be subject to limitation. Article 52(1) of the Charter provides that: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of other."

52. These difficulties would be mirrored in the remaining 27 EU Member States, if they sought to deport UK nationals, since they have all ratified the ECHR. This reinforces our conclusion that there would be significant practical impediments to expelling individuals after Brexit.

53. We recommend that the Government addresses the issue of residence rights urgently. This could be done by providing an undertaking to the effect that all of those legally resident at a reasonable cut-off date would be guaranteed permanent residence rights. The Government should also seek to safeguard the residence rights of UK nationals resident in other EU member states at the outset of its Article 50 negotiations by way of a separate preliminary agreement. This ought to be done as soon as possible: if such action is not taken, individuals will be subject to continuing and distressing insecurity during two years of potentially protracted negotiations.

### 3 The Charter of Fundamental Rights and other EU rights and the 'Great Repeal Bill'

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#### Background

54. The EU Charter of Fundamental Rights was proclaimed in 2000, but was not given legal status until 2007, by the Treaty of Lisbon.<sup>39</sup> This stated that it had equal legal status with the EU Treaties. The Charter became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. Its rights now constitute general principles of EU law. The Charter consolidates fundamental rights that already existed under EU law and was incorporated into our national law through the European Communities Act 1972.

55. The status of the Charter in EU law and its effects in UK law have been a matter of debate since it was given legal status. The UK Government had negotiated a Treaty Protocol (Protocol 30) with a view to clarifying its effect in the UK, but many believed initially that this Protocol represented an exemption or opt-out from the Charter.

56. The Charter's field of application is limited. It applies to (i) all actions of the EU institutions and its agencies, and (ii) to Member States when they "implement" EU law.<sup>40</sup>

57. By contrast with the European Court of Human Rights, where individuals have the rights to bring cases to it concerning the ECHR, the CJEU is not a court of individual petition. This restricts the right of access by individuals. Equally, while all the rights contained in the ECHR may be enforced against the UK Government by individuals in national courts via the Human Rights Act 1998, some of the rights in the Charter are defined as 'principles'. This includes certain economic and social rights which are not directly enforceable by individuals in national courts.

58. In addition to the rights contained in the Charter, new rights may also be introduced by way of EU directives and regulations. The primacy of EU law means that domestic laws implementing EU rights-enhancing directives cannot be removed whilst the UK remains bound by EU law. As the Equality and Human Rights Commission (EHRC) has noted:

There is also a substantial body of directly applicable EU law including rights under the Treaties, Regulations and the Charter which have not been incorporated into British law. Currently these laws [ ... ] are a significant source of directly enforceable human rights law which the courts can apply when considering a matter within the scope of EU law, such as some aspects of workers' rights.<sup>41</sup>

59. Judgments of the CJEU are legally binding on all 28 EU Member States. Due to the supremacy of EU law, they carry more powerful enforcement mechanisms. Moreover, where a national court in the UK finds that national legislation cannot be interpreted

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39 For further background, see: [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm)

40 [Article 51, EU Charter](#)

41 [Equality and Human Rights Commission \(HBRE0058\)](#)

compatibly with the Charter, under the European Communities Act 1972 it can disapply the law itself. An example of this can be found in the case of *Benkharbouche v Embassy of the Republic of Sudan*<sup>42</sup> where the Court of Appeal disapplied the law on state immunity, which prevented the claimants from accessing the courts to enforce their employment rights, breaching fair trial rights under the Charter.

60. While rights under the Charter have stronger enforcement mechanisms, it is also worth acknowledging that they have a narrower reach than the ECHR. Professor Gordon Anthony, Professor of Public Law at Queen's University Belfast, was recently quoted in the European Union Committee's report *The UK, the EU and a British Bill of Rights* on this issue. He said:

The primary strength of the ECHR under the Human Rights Act is that it has a much broader reach than the EU Charter. Under Section 6 of the Human Rights Act [and Section 24 of the Northern Ireland Act] whenever public bodies make any decision they are bound by the provisions of the Convention. That is not the case with the Charter. The Charter applies only whenever public bodies make decisions within the realm of EU law.<sup>43</sup>

### ***The status of the Charter***

61. It is broadly accepted that the UK signed up to the Charter on the basis that it created no new rights that were not already protected by existing EU and UK law, and that it was a political declaration of such existing rights rather than a justiciable set of rights capable of judicial enforcement.<sup>44</sup> However, Lord Goldsmith QC, the Attorney General when the Charter was being negotiated, maintained the Protocol did not provide the UK with a Charter opt-out, but was “an explicit confirmation that in relation to the UK and UK law, the limitations and constraints on what it is and what it will do will be strictly observed”.<sup>45</sup>

62. Concerns have subsequently arisen about the Charter becoming justiciable in both the CJEU and UK courts, the growing scope for its interpretive development by judges and its legal enforcement. The Grand Chamber of the CJEU gave judgment in the cases of *Saeedi/NS and ME*<sup>46</sup> (relating to the transfer of asylum seekers under the Dublin Convention) on 21 December 2011. It concluded that the UK was not exempted from complying with Charter provisions. The relevant section of the judgment stated:

119) [ ... ] Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations

42 *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33. For a summary of the case see: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/benkarbouche-summary.pdf>

43 House of Lords, *The UK, the EU and a British Bill of Rights*, Twelfth Report of the European Union Committee, Session 2015–16, [HL Paper 139](#), page 17

44 For further details, see, e.g., European Scrutiny Committee, Forty-Third Report of Session 2013–14, [The application of the EU Charter of fundamental rights: a state of confusion](#), HC 979, and House of Lords, *The Treaty of Lisbon: an impact assessment*, Tenth Report of the European Union Committee, Session 2007–8, [HL Paper 62-1](#)

45 Speech to British Institute of International and Comparative Law, 15 January 2008

46 *NS (European Union law)* [2011] EUECJ C-411/10 ([21 December 2011](#))

referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120) In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.<sup>47</sup>

63. In spite of this, Marina Wheeler QC has argued that the EU Charter is “being used to fashion new rights” and that this was “objectionable” for a variety of reasons:

The ECHR already provides a comprehensive, justiciable body of rights developed by case law. To create a new, parallel body of rights is incoherent, excessively onerous and a recipe for legal uncertainty. Given the direct effect of EU law and the principle of supremacy which allows inconsistent national law to be set aside, judgments of the CJEU have profound and immediate effects on the domestic legal order: unlike Strasbourg judgments. While the Court in Strasbourg is arguably showing greater restraint—granting signatory states a margin of appreciation—Luxembourg appears to be moving in the opposite direction. Its apparent institutional rivalry with Strasbourg might, if unchecked, herald an era of competitive judicial law-making.<sup>48</sup>

64. Doubts about the Charter were also expressed by eight senior academics who submitted a joint paper on behalf of Policy Exchange’s Judicial Power Project. They contended that:

Brexit will end the application of the EU Charter of Fundamental Rights in the UK. This is a welcome development. As the history of its haphazard drafting and eventual adoption makes clear, the Charter was not at first envisaged as forming a set of justiciable standards. The UK accepted its transformation into such, despite significant misgivings, with the ratification of the Lisbon Treaty including Protocol 30 which was ostensibly designed to secure the UK’s understanding of the Charter’s limited reach. That protocol has been a dead letter since inception, rendering hollow the Government’s assurances to Parliament about the Charter’s significance. Predictably, the Charter has not been confined to constraining action on the part of the organs of the EU, but has been invoked as a wider licence for the extension of judicial authority, especially that of the CJEU, over political authorities. Charter adjudication is, like much international human rights law, largely inimical both to the rule of law and to democratic self-government.<sup>49</sup>

65. The academics also questioned the necessity for supra-national rights more generally. They argued that the assumption that supra-national limits are required “fails to grasp

47 *NS (European Union law)* [2011] EUECJ C-411/10 (21 December 2011). For more on this issue, see: e.g. Piet Eeckhout, [The Real Record of the EU Charter of Fundamental Rights](#), UK Constitutional Law Association, 6 May 2016.

48 Marina Wheeler, [Cavalier with our Constitution: a Charter too far](#), UK Human Rights Blog, 9 February 2016

49 Judicial Power Project Policy Exchange ([HBR0037](#)), para 9

the capacity of British parliamentary democracy to make suitable provision for rights protection [ ... ] in an open, fair and reasoned way.” They gave the examples of Australia, Canada and New Zealand as Westminster style democracies which “arguably protect rights at least as effectively as any member state of the EU.”<sup>50</sup>

66. Proponents of the Charter have argued that in practice the Charter has provided new remedies and stronger protection of human rights guaranteed by EU law. The Human Rights Centre at the University of Essex stated:

Brexit would eliminate the power of UK Courts to disapply UK legislation that contravene the Charter and as such is incompatible with EU law. It could also expose rights that had enjoyed greater protection by virtue of EU law to a weakening political commitment to such standards.<sup>51</sup>

### ***An example of the additional rights provided by the Charter: Data rights and privacy***

67. At this point, it is worth highlighting of the sort of issue that could arise post-Brexit to demonstrate why this is important. The case of data protection rights and privacy is a good example of the sort of additional rights which might be lost if EU law were no longer applicable. We have received evidence on this issue from the EHRC, the Information Commissioner’s Office and Amnesty International UK. The EHRC noted that:

Recent EU case law has led to increased protection of human rights in the context of data protection and state surveillance. For example, in *Schrems*,<sup>52</sup> the CJEU held that an earlier EU Commission decision, that the US provided an adequate level of protection of personal data transferred to it, was invalid. In *Google Spain*<sup>53</sup> the CJEU held that Google must consider requests by an individual to remove links to web pages resulting from a search on their name. In the domestic courts, the Court of Appeal recently applied the EU Charter to overrule a provision of the DPA which was held to be incompatible with EU law.<sup>54</sup> In that case, Google had collected private information about the Claimants’ internet usage which enabled it to offer information to advertisers. The Court of Appeal ruled that the Claimants could recover damages for nonmaterial loss and a provision of the DPA which prevented them from doing so was to be dis-applied.

State surveillance is a particularly intrusive interference in the right to privacy and is an area in which the case law of both the CJEU has had a significant impact. In *Digital Rights Ireland*,<sup>55</sup> the CJEU held that EU data retention Directive 2006/24, which required telecommunications service providers to retain communications data in order to combat crime, was not compatible with Articles 7 and 8 of the Charter. The court noted it applied to all means of electronic communication, thereby affecting the fundamental

50 Judicial Power Project Policy Exchange ([HBR0037](#)), paras 3 and 7

51 The Human Rights Centre, University of Essex ([HBR0034](#))

52 *Schrems v Data Protection Commissioner*, [case C-362/14](#)

53 *Google Spain SL v AEPD*, [case C-131/12](#)

54 *Google Inc. v Judith Vidal-Hall, Robert Hann, Marc Bradshaw* [2015] EWCA Civ 311

55 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others*, [case C-293/12](#)

rights of practically the entire European population, and it was not limited to what was strictly necessary. The court held that where personal data is collected in order to prevent or detect crime, strict safeguards are required to protect individual rights.<sup>56</sup>

68. The Information Commissioner, Elizabeth Denham, has said that a specific articulated right to data protection will be lost if the Charter is no longer taken into account, and has stated that she considers “that it is important that the specific rights of individuals in any future data protection legislation are linked to, and based on fundamental human rights to privacy.” She argued that:

It would not be helpful if the effect of removing Charter rights was a weakening of the linkage to human rights. Following withdrawal from the EU the UK will continue to require a progressive and robust data protection regime which safeguards individuals’ fundamental rights while facilitating the increasingly sophisticated use of personal data by business and government as well as cross-border data flows.<sup>57</sup>

69. This point was reiterated by Amnesty International. They argued that the “most obvious way in which EU law has helped protect rights domestically is perhaps the added protection which the EU Charter of Fundamental Rights gives over and above the safety net provided by the European Convention of Human Rights.”<sup>58</sup>

70. In his oral evidence, Professor Colm O’Cinneide noted that the Charter had “had a considerable impact” on the law relating to data protection. He said that this was “controversial and disputed”, but could continue to shape UK law in the future as he took the view that data processors were likely to wish to comply with CJEU jurisprudence.<sup>59</sup> Amnesty International warned that “it is very difficult to predict what would happen in the case of any future conflict between UK and European law should there be a move apart on privacy and data protection standards post-Brexit.”<sup>60</sup>

71. A new Data Protection Regulation is due to come into force in 2018 and the UK is currently bound to implement the new EU Data Protection Directive in 2018 and so data protection and privacy rights may well prove an early test of the UK’s approach to rights protection post-Brexit.

## A brief comment on other EU law rights

72. This short report has only engaged in detail with a small number of the rights protected under EU law. While we will no doubt return to these questions in 2017, it is important to highlight the fact that many other fundamental rights are likely to be in question. To take just one example, in the field of equality law, Professor O’Cinneide has described EU law as “the engine that has hauled the development of UK anti-discrimination law along in its wake”. He has argued that, without its influence, “British legal standards would be much

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56 Equality and Human Rights Commission ([HBR0058](#))

57 Information Commissioner ([HBR0054](#))

58 Amnesty International UK ([HBR0059](#))

59 [Q4](#)

60 Amnesty International UK ([HBR0059](#))

weaker than they currently are.”<sup>61</sup> We expect that the Women and Equalities Committee may well highlight further concerns in this area during its inquiry into ‘Ensuring strong equalities legislation after EU exit’.<sup>62</sup>

73. Other examples that were brought to our attention include trafficking in human beings, environmental protections<sup>63</sup> and improved accessibility and safety standards for disabled people.<sup>64</sup>

## The ‘Great Repeal Bill’

74. As one of its few substantive public announcements on its policy on Brexit, the Government has indicated that it proposes to introduce a Bill in the 2017–18 Parliamentary session which would repeal the European Communities Act 1972 and end the authority of EU law at the date of Brexit. The Secretary of State for Exiting the EU has said that:

The Great Repeal Act will convert existing EU law into domestic law, wherever practical. That will provide for a calm and orderly exit and give as much certainty as possible to employers, investors, consumers and workers. And we have been clear, UK employment law already goes further than EU law in many areas - and this Government will do nothing to undermine those rights in the workplace.<sup>65</sup>

75. As we have already seen, EU law currently underpins a great many fundamental rights. It is not clear whether, following the passage of the Repeal Bill, the Government intends to remove any fundamental rights which UK citizens currently possess under EU law. This is plainly a question of central importance to our inquiry.

76. The Prime Minister appears to have committed to guarantee existing workers’ rights<sup>66</sup>; but she has not made the same commitment in respect of other rights protected under EU law. **It is not clear to us why the rights of workers should be treated any differently to other fundamental rights.** We pursued this question with the Minister. He was far from clear that even workers’ rights under EU law would be protected, noting only that:

If you are a person in work and you have a contract, you have rights that the trade union movement has been keen to uphold for a century or more. They cannot be taken away from someone. They are contractual rights. Workers’ rights are workers’ rights.<sup>67</sup>

61 Colm O’Cinneide, [Equality rights in a post-Brexit United Kingdom](#), 29 July 2016

62 House of Commons, Women and Equalities Committee, [Ensuring strong equalities legislation after EU exit inquiry](#)

63 See also: Environmental Audit Committee, Third Report of Session 2015–16, EU and UK environmental policy, [HC 537](#)

64 See: e.g. Equality and Human Rights Commission (HBRE0058) and Angela Patrick, [Mapping the Great Repeal: European Union Law and the Protection of Human Rights](#), The Thomas Paine Initiative, October 2016

65 HC Deb, 10 October 2016, [col 40WS](#)

66 See: e.g. Speech at Conservative Party Conference, [5 October 2016](#)

67 [Q20](#)

77. When pressed on what this meant (and whether it implied that only those already in work would have their rights guaranteed), he responded:

Nobody is going to lose any of the rights they have [ ... ] I am not aware of any suggestion that workers' rights are going to be affected. Certainly under our law you cannot take rights away from workers.<sup>68</sup>

### ***Parliamentary accountability***

78. The Bingham Centre for the Rule of Law raised with us a concern that the potentially “enormous task of Brexit law reform” would give rise to a

temptation to delegate large swathes of legislative power to the Executive by passing skeletal primary legislation that includes broadly drafted provisions that delegate law making to the Executive, sometimes using Henry VIII clauses.<sup>69</sup>

79. Henry VIII clauses take their name from the Statute of Proclamations 1539 which gave King Henry VIII power to legislate by proclamation. The House of Lords Constitution Committee has considered the issue of Henry VIII powers in a number of reports and has argued that they should be limited so that they cannot be used to alter constitutional arrangements, should be framed as narrowly as possible and that where they relate to a constitutionally sensitive subject-matter should use a ‘super-affirmative’ parliamentary procedure.<sup>70</sup> That Committee has also contended that delegated legislation should not be used to create regulations that will have a major impact on the individual’s right to respect for private life.<sup>71</sup>

80. Professor Douglas-Scott has argued that the use of a Henry VIII clause in these circumstances would be extremely problematic. She has suggested that:

Unfortunately, Henry VIII clauses are becoming a too familiar part of UK legislation generally. Yet such a measure would be a profoundly un-parliamentary and undemocratic way to repeal or amend former EU law, and hardly a means for Parliament to ‘take back control,’ given that Parliament has a fairly minimal role in secondary legislation [ ... ] The use of Henry VIII clauses to repeal EU law is particularly repugnant, given that EU law has created vast networks of rights and obligations, whose subject

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68 [Q20](#). See also: HC Deb 7, December 2016, [col 237](#)

69 Bingham Centre for the Rule of Law ([HBR0035](#)), para 35. A distinguishing feature of Henry VIII clauses is that they give the Executive power to make delegated legislation that includes provisions amending or repealing primary legislation.

70 The Super Affirmative Procedure has been implemented in enactments where an exceptionally high degree of scrutiny is thought appropriate for any secondary legislation relative to normal secondary legislation, for instance, for scrutiny of certain items of delegated legislation made or proposed to be made under Henry VIII powers. It provides both Houses with opportunities to comment on proposals for secondary legislation and to recommend amendments before orders for affirmative approval are brought forward in their final form. However, though use of a ‘super-affirmative’ procedure may require the Government to explain or justify a provision, following scrutiny the instrument is then subject to an affirmative procedure (and unamendable at this stage). For more see: Erskine May, *Parliamentary Practice*, 24th Edition, (Lexis Nexis, 2011), pp 677–8.

71 J. Simson Caird, D. Oliver and R. Hazell, *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, 2nd Edition, The Constitution Unit and the Constitution Society, 2015, pp 7–8.

matter—e.g. social policy, discrimination law, or fundamental rights—covers many matters central to individual liberty, and their repeal or amendment, even by means of primary legislation, would be highly controversial.<sup>72</sup>

81. This argument was reiterated in oral evidence. Professor Graham Gee noted the temptation for Ministers to include very wide Henry VIII clauses and argued “that is a temptation that should be resisted. Overly wide Henry VIII clauses in skeletal legislation would give Ministers too much power.”<sup>73</sup> The Secretary of State for Exiting the EU has, thus far, only given a commitment that the Repeal Bill will be presented to the House during the two-year period after Article 50 has been triggered and that

there will be a series of consequential legislative measures, some primary, some secondary, and on every measure the House will have a vote and say.<sup>74</sup>

82. There is also further, practical, reason that the Government should avoid the use of secondary legislation to interfere with fundamental rights: unlike primary legislation, secondary legislation can be quashed or disapplied by the courts on a number of grounds including *vires* and compatibility with the ECHR.

### **Rights post-Brexit**

83. Even if current EU laws are preserved by the Repeal Bill, this would not apply to developments in the EU after the UK’s departure. This would apply both in relation to future EU directives and regulations, but also the existing and future case law of the CJEU. Professor Gee described the question of the force of the jurisprudence of the Luxembourg court post-Brexit as a “key issue that will have to be addressed up front.”<sup>75</sup> Professor O’Cinneide expanded on this point. He told us that:

UK courts will, I presume, post withdrawal be taking the final decision as to the status of Charter judgments or other decisions of the Court of Justice, but it will be interesting to see what they make of established precedent and obiter, perhaps influential persuasive judgments still coming from Luxembourg in relation to some of the originating instruments of key elements of UK law.<sup>76</sup>

84. It is clear that the removal of the European Communities Act 1972 from the statute book will mean that, post-Brexit, the UK courts will not be obliged to follow the judgments of the CJEU, nor will they be able to refer questions of law to the CJEU. The EHRC advised us that the Government should issue “statutory guidance on the status of existing case law and future CJEU decisions for domestic legal concepts which are derived from, or reflect similar concepts in, EU law.”<sup>77</sup> It warned that if this were not done, it could lead to the re-litigation of settled principles of EU law.

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72 Sionaidh Douglas-Scott, [The ‘Great Repeal Bill’: Constitutional Chaos and Constitutional Crisis?](#), UK Constitutional Law Association, 10 October 2016

73 [Q5](#)

74 HC Deb, 7 December 2016, [col 226](#)

75 [Q7](#)

76 [Q7](#)

77 Equality and Human Rights Commission ([HBRE0058](#)). We assume such guidance would be issued under the proposed Repeal Act

85. A further issue is the extent to which the UK will implement any future human rights legislation which would have applied in the UK had it not voted to leave the EU,<sup>78</sup> but may not be introduced into domestic law in the UK following Brexit. The EHRC provided us with examples of several relevant initiatives. In addition to the proposed Data Protection Regulation, it also noted a current consultation on strengthening provisions relating to parental leave and a proposed European Accessibility Act which would benefit disabled people by providing common rules on accessibility.<sup>79</sup>

86. It is evident from the examples above that, as EU law develops, UK law on fundamental rights could diverge from it. The Minister gave us no commitment that the Government would monitor or take account of EU law developments.<sup>80</sup>

87. This may prove significant: in terms of historical legal developments Professor O’Cinneide told us that there were “key elements in anti-discrimination law, such as the legislative prohibition on religious discrimination, sexual orientation discrimination, and discrimination on the basis of age in employment, which were only introduced in this jurisdiction because of the requirements of an EU directive.”<sup>81</sup>

## Rights in Scotland, Wales and Northern Ireland

88. A further, important, issue relating to the Repeal Bill is that legislating for Brexit will have significant implications for rights in Scotland, Northern Ireland and Wales. We have not yet had the opportunity to seek the views of representatives of the devolved Governments on this issue, which has formed the basis of submissions before the Supreme Court in the case of *R (on the application of Miller & Dos Santos) v Secretary of State for Exiting the European Union*.<sup>82</sup>

89. At this stage we merely flag the fact that the question of the impact of Brexit on the protection of human rights in the devolved jurisdictions is an issue that we are likely to revisit following the Supreme Court’s judgment.

## Gibraltar

90. A final issue is the question of rights in a major British Overseas Territory which is currently in the EU: Gibraltar. This matter falls outside our direct remit. We note that the House of Lords European Union Committee is conducting an inquiry into the implications of Brexit for Gibraltar. We hope that the European Union Committee (and the Foreign Affairs and Exiting the European Union Committee in the House of Commons) will address the situation.

## Conclusions

**91. We recommend that the Government commit to publishing its proposed ‘Great Repeal Bill’ in draft, to ensure that it receives adequate consideration in Parliament,**

78 Currently, under the European Communities Act 1972, EU Regulations are directly applicable in national law without the need for domestic implementing legislation. The UK must draw up legislation in order to conform with EU Directives within a specified time in order for them to be transposed into national law.

79 Equality and Human Rights Commission ([HBRE0058](#))

80 [Q18](#)

81 [Q7](#)

82 See also *McCord’s Application* [\[2016\] NIQB 85](#)

preferably by a Joint Committee. We also take the view that prior to publishing the draft legislation, and before triggering Article 50 of the Treaty on the European Union, that the Government should set out in detail what approach it expects to take in respect of all fundamental rights currently guaranteed under EU law.

92. Assuming that the Repeal Bill safeguards existing rights under EU law, this would not stop a future Parliament from repealing laws that it did not consider desirable. Without the underpinning of EU law, the rights preserved under the Repeal Bill would be subject to amendment. Under the UK constitution, outside the auspices of EU law, there is no way to entrench fundamental rights. However, the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes.

93. We also note that even if current EU laws are preserved by the Repeal Bill, this would not allow for new developments in EU law to be implemented automatically. This would apply both in relation to future EU regulations and directives on rights and case law of the Court of Justice of the European Union. The Government should issue detailed statutory guidance on the status of existing case law. It will also have to determine how it will approach the status of future EU law and CJEU decisions to ensure that it is not isolated from developments emanating from the EU. The question of how fundamental rights will be enforced going forward will also be of central importance.

## 4 Trade agreements

94. As part of our continuing concern about business and human rights, we have been considering both the treatment of workers under EU law and various trade agreements which contain what have been described as ‘human rights clauses’. The EU includes such clauses in its international trade agreements with non-EU countries although the nature of the clause may vary from one agreement to another.

95. A standard human rights clause may comprise an ‘essential elements’ clause referring to basic human rights and democracy standards, and a ‘non-execution’ clause that provides for a mechanism for applying ‘appropriate measures’ (such as sanctions) if the other party violates an ‘essential elements’ clause. 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.<sup>83</sup> If one of the parties does not comply with this human rights commitment, the trade agreement or parts of it can, as a last resort, be suspended. The Cotonou Agreement, which is the most comprehensive partnership agreement between the EU and developing countries, has formed the basis for the EU’s relations with 79 developing countries.<sup>84</sup>

96. In her letter of 12 October 2016, the Lord Chancellor and Secretary of State for Justice, Rt Hon Elizabeth Truss MP, suggested that leaving the EU offers the UK “an opportunity to forge a new role for itself in the world: to negotiate its own trade agreements, and to be a positive and powerful force for free trade.”<sup>85</sup>

97. We also received correspondence from the Secretary of State for International Trade, Liam Fox MP. He noted that the UK “has long supported the promotion of our values globally, including via our trade policy initiatives” and acknowledged that “Britain’s exit from the EU provides us with an opportunity to explore how best we can use FTAs to uphold these values”; however, this statement was subject to the caveat that the Government’s policy would need to recognise “the need for a balanced and proportionate approach”.<sup>86</sup>

98. In oral evidence, Professor O’Cinneide stressed the fact that the Government might find itself under pressure to water down human rights clauses. He said:

As you know, the EU has many important human rights clauses in its trade agreements which are periodically activated. These are not empty vessels; they become legally important. The question for the UK going forward in negotiating its own non-EU integrated trade agreements is whether it is going to carry over those EU frameworks, whether it will improve them by adding more detail, more substance, or whether it will dilute them or ditch them [ ... ] There will be pressure to dilute human rights clauses. No one likes them, so there will be substantial pressure. A government negotiating

83 For historic examples, see: e.g. [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA\\_ET\(2008\)406991\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf)

84 European Commission, [ACP - The Cotonou Agreement](#)

85 Letter from Rt Hon Elizabeth Truss MP, Lord Chancellor & Secretary of State for Justice, to the Chair of the Committee, [regarding the oral evidence session](#), dated 12 October 2016.

86 Letter from Rt Hon Liam Fox MP, Secretary of State for International Trade, to the Chair of the Committee, [regarding the announcement of a new inquiry into the implications for human rights of the UK’s planned withdrawal from the European Union](#), dated 11 November 2016.

under pressure to achieve quick free trade clauses will find itself tempted to dilute. That will then give rise to imbalance between the EU standards and the UK standards, and that will certainly prove controversial.<sup>87</sup>

99. The Northern Ireland Human Rights Commission (NIHRC) provided us with written evidence noting that when negotiating trade agreements with third countries the European Commission routinely conducts sustainability impact assessments (SIA). These assessments analyse the potential economic, social, human rights and environmental impacts of trade negotiations. However the NIHRC has stated that although “there are opportunities for civil society to be involved in the assessment”, nonetheless, “the robustness of the SIA process has been questioned insofar as it relates to human rights.” It has suggested that:

In circumstances where the UK negotiates and enters into free trade agreements with other states it would be in accordance with the UK’s international human rights obligations [ ... ] to conduct human rights impact assessments and there are positive examples of state practices throughout the Commonwealth.<sup>88</sup>

100. In a similar vein, Amnesty International UK suggested that Brexit gives a clear opportunity for the UK to carry out the commitments in its National Action Plan on Business and Human Rights.<sup>89</sup>

101. Any increase in trade with developing countries, post-Brexit, may result in increased economic development in those nations. This, of itself, would potentially have the benefit of increasing standards of living.

102. Marina Wheeler QC questioned the currency of “human rights clauses”, suggesting that they had already been superseded by other arrangements. She argued that:

My understanding is that although the EU has used human rights clauses in its trade agreements for many decades, in 2009 the Council changed the policy to no longer include them in new trade agreements but to have human rights clauses in the side, co-operation agreements, and no longer called them human rights clauses but political clauses. As I understand it, that was in part because the view was taken that in reality they are more political than human rights, and it is very difficult to try to enforce them. As I understand it, there have only been a handful of cases where the EU has sought to enforce a clause, and it has done so where there has been, say, flawed elections in a country where there is a trade agreement, or perhaps a coup d’état, and the result has been that development aid has been shifted from the government to, say, civil society as a result. That is how in practice they seem to be used. The question is, is that a valuable mechanism? Should it be in a trade agreement, or is there some other way of exercising that sort of governance leverage?<sup>90</sup>

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87 [Q8](#)

88 Northern Ireland Human Rights Commission ([HBR0030](#))

89 Amnesty International UK ([HBR0059](#))

90 [Q8](#)

103. The question of trade agreements may also raise issues in the devolved nations. Professor Douglas-Scott told us that the devolved nations “have concerns”; adding that while they have no trading rights independently it is, nonetheless, “something they are investigating”.<sup>91</sup>

104. In his oral evidence to us, the Minister was equivocal on this issue. He was clear that he thought the Government would not seek to water down what he referred to as “sustainability clauses”, but equally, he acknowledged that “the size of the EU means almost inevitably that it has teeth compared with other countries.”<sup>92</sup> He observed that the UK “has this strong history” in this area, pointing out that “we were there with a national action plan for the implementation of the UN guiding principles on business and human rights—I think we were the first.”<sup>93</sup> He added:

Over the years, we have had the transparency in supply chains provisions in the Modern Slavery Act, and we do really press on human rights issues. As far as the future is concerned, he made the point that we would want to continue to express our values. I would not have thought there was any risk of that not happening. Of course, there are different ways of dealing with the issue of sustainability clauses, and it may be that the wording would not be exactly the same as the European ones, but I would still think that we would want to express our values and ensure that human rights are right at the centre of our thinking.<sup>94</sup>

## Conclusions

**105. The EU has included human rights clauses in trade agreements for many years. In circumstances where the UK exits the EU, if it has to negotiate and enter into trade agreements with other states, the Government should, at the very least, ensure that the standards included in current agreements are maintained.**

**106. Any dilution of standards would give rise to a potential imbalance between UK standards and EU standards which would be extremely undesirable. There is, in principle, an argument to be made that if the UK enters into any new agreements, this is an opportunity to raise standards. This is a subject to which we will return to in our inquiry on Human Rights and Business in 2017.**

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91 [Q8](#)  
 92 [Q18](#)  
 93 [Q18](#)  
 94 [Q18](#)

# Conclusions and recommendations

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## Introduction

1. While it is plain that the Government feels that it is not able to give what it describes as a “running commentary” on Brexit negotiations, it is regrettable that it is has not been able to set out any clear vision as to how it expects Brexit will impact the UK’s human rights framework. (Paragraph 9)
2. The Government seemed unacceptably reluctant to discuss the issue of human rights after Brexit. The Minister of State responsible for human rights was either unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU. (Paragraph 21)
3. We were also surprised to be informed that the Government saw the question of domestic protection for fundamental rights as a matter for negotiation with the other EU Member States. Unless the Government is prepared to diminish such protections significantly, it is difficult to imagine why it considers that this should be a matter for negotiation and how this would be negotiated reciprocally with the remaining EU Member States. (Paragraph 22)

## Residence rights

4. On the question of residence rights, we believe that it is not appropriate to treat individuals’ fundamental rights as a bargaining chip. Notwithstanding the moral imperative to respect the rights of EU nationals, there is also a considerable practical impediment to treating such rights as negotiable. It is not realistic to imagine that the UK Government would be in a position to deport the large numbers of EU nationals currently in the United Kingdom. Under Article 8 of the ECHR, individuals are entitled for respect to their private and family life and home. (Paragraph 50)
5. While these rights are in no way absolute, it would not be possible to establish a bright-line rule that would allow the deportation of EU nationals simply on the grounds that they had only been resident for a fixed period of time. Other factors would certainly be relevant and each case would have to be considered on its own facts. In such circumstances, there would be the potential for significant, expensive and lengthy litigation which could lead to considerable uncertainty for a prolonged period of time and could potentially overwhelm the UK courts and tribunals system. (Paragraph 51)
6. These difficulties would be mirrored in the remaining 27 EU Member States, if they sought to deport UK nationals, since they have all ratified the ECHR. This reinforces our conclusion that there would be significant practical impediments to expelling individuals after Brexit. (Paragraph 52)
7. We recommend that the Government addresses the issue of residence rights urgently. This could be done by providing an undertaking to the effect that all of those legally resident at a reasonable cut-off date would be guaranteed permanent residence rights. The Government should also seek to safeguard the residence rights of UK nationals resident in other EU member states at the outset of its Article 50

negotiations by way of a separate preliminary agreement. This ought to be done as soon as possible: if such action is not taken, individuals will be subject to continuing and distressing insecurity during two years of potentially protracted negotiations. (Paragraph 53)

### The Charter of Fundamental Rights and other EU rights and the 'Great Repeal Bill'

8. It is not clear to us why the rights of workers should be treated any differently to other fundamental rights. (Paragraph 76)
9. We recommend that the Government commit to publishing its proposed 'Great Repeal Bill' in draft, to ensure that it receives adequate consideration in Parliament, preferably by a Joint Committee. We also take the view that prior to publishing the draft legislation, and before triggering Article 50 of the Treaty on the European Union, that the Government should set out in detail what approach it expects to take in respect of all fundamental rights currently guaranteed under EU law. (Paragraph 91)
10. Assuming that the Repeal Bill safeguards existing rights under EU law, this would not stop a future Parliament from repealing laws that it did not consider desirable. Without the underpinning of EU law, the rights preserved under the Repeal Bill would be subject to amendment. Under the UK constitution, outside the auspices of EU law, there is no way to entrench fundamental rights. However, the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes. (Paragraph 92)
11. We also note that even if current EU laws are preserved by the Repeal Bill, this would not allow for new developments in EU law to be implemented automatically. This would apply both in relation to future EU regulations and directives on rights and case law of the Court of Justice of the European Union. The Government should issue detailed statutory guidance on the status of existing case law. It will also have to determine how it will approach the status of future EU law and CJEU decisions to ensure that it is not isolated from developments emanating from the EU. The question of how fundamental rights will be enforced going forward will also be of central importance. (Paragraph 93)

### Trade agreements

12. The EU has included human rights clauses in trade agreements for many years. In circumstances where the UK exits the EU, if it has to negotiate and enter into trade agreements with other states, the Government should, at the very least, ensure that the standards included in current agreements are maintained. (Paragraph 105)
13. Any dilution of standards would give rise to a potential imbalance between UK standards and EU standards which would be extremely undesirable. There is, in principle, an argument to be made that if the UK enters into any new agreements, this is an opportunity to raise standards. This is a subject to which we will return to in our inquiry on Human Rights and Business in 2017. (Paragraph 106)

# Formal Minutes

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**Wednesday 14 December 2016**

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Baroness Lawrence of Clarendon
Jeremy Lefroy MP	Baroness Prosser
	Lord Trimble
	Lord Woolf

Draft Report (*The human rights implications of Brexit*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 106 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to each House.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of House of Commons Standing Order No. 134.

[The Committee adjourned.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 26 October 2016

*Question number*

**Professor Sionaidh Douglas-Scott**, Anniversary Chair in Law, Queen Mary, University of London; **Professor Colm O'Cinneide**, Professor of Constitutional and Human Rights Law, University College London; **Professor Graham Gee**, University of Sheffield and Policy Exchange; **Ms Marina Wheeler QC**, 1 Crown Office Row

[Q1–8](#)

### Wednesday 23 November 2016

**Rt Hon Sir Oliver Heald MP**, Minister for Human Rights, Ministry of Justice

[Q9–21](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

HBR numbers are generated by the evidence processing system and so may not be complete.

- 1 Amnesty International UK ([HBR0059](#))
- 2 Anti Trafficking and Labour Exploitation Unit ([HBR0039](#))
- 3 Baron Dr Antonio Massa ([HBR0005](#))
- 4 Bingham Centre for the Rule of Law ([HBR0035](#))
- 5 British Humanist Association ([HBR0027](#))
- 6 CAJ ([HBR0050](#))
- 7 Cloisters ([HBR0026](#))
- 8 Coram Children's Legal Centre ([HBR0044](#))
- 9 Deborah Stowe ([HBR0045](#))
- 10 Disability Rights UK ([HBR0032](#))
- 11 Dr Katie Boyle, Senior Lecturer in Law ([HBR0042](#))
- 12 Dr Kirsty Hughes ([HBR0009](#))
- 13 Dr Simon Collcutt ([HBR0008](#))
- 14 Dr Tobias Lock ([HBR0015](#))
- 15 Ekklesia ([HBR0046](#))
- 16 Equality and Human Rights Commission ([HBR0058](#))
- 17 Equality Rights Group ([HBR0012](#))
- 18 European Children's Rights Unit ([HBR0041](#))
- 19 Freedom from Torture ([HBR0016](#))
- 20 Human Rights Centre, University of Essex ([HBR0034](#))
- 21 Human Rights Consortium ([HBR0036](#))
- 22 Human Rights Watch ([HBR0053](#))
- 23 ILPA ([HBR0055](#))
- 24 Information Commissioner's Office ([HBR0054](#))
- 25 J G ([HBR0047](#))
- 26 Jessica Giles, the Open University ([HBR0028](#))
- 27 Judicial Power Project, Policy Exchange ([HBR0037](#))
- 28 Liberty ([HBR0056](#))
- 29 Liverpool Law School, the University of Liverpool ([HBR0033](#))
- 30 Mr Andrew Shaw ([HBR0013](#))
- 31 Mr Brian Robinson ([HBR0006](#))
- 32 Mr Ciaran White ([HBR0048](#))
- 33 Mr David Robertson ([HBR0002](#))

- 34 Mr Sandeep Shenoy ([HBR0021](#))
- 35 Mrs Lisa Pissochet ([HBR0003](#))
- 36 Ms Satya Bhat ([HBR0022](#))
- 37 Ms Susan Harvey ([HBR0001](#))
- 38 Northern Ireland Human Rights Commission ([HBR0030](#))
- 39 Oxford Human Rights Hub ([HBR0018](#))
- 40 Privacy International ([HBR0038](#))
- 41 Professor Chris Hilson ([HBR0004](#))
- 42 Professor Nicola Countouris, Professor Piet Eeckhout, Professor Jeff King, Dr Virginia Mantouvalou, Dr Ronan McCrea and Professor Colm O’Cinneide ([HBR0025](#))
- 43 Reader in Human Rights Law Merris Amos ([HBR0029](#))
- 44 René Cassin ([HBR0020](#))
- 45 Richard Shaw ([HBR0014](#))
- 46 Rosemary Cantwell ([HBR0049](#))
- 47 Stephen Lawrence ([HBR0007](#))
- 48 Submitter a ([HBR0010](#))
- 49 Submitter b ([HBR0040](#))
- 50 Susie Alegre, Caoilfhionn Gallagher and Katie O’Byrne ([HBR0043](#))
- 51 The Law Society of Scotland ([HBR0051](#))
- 52 The Vegan Society and The International Vegan Rights Alliance ([HBR0019](#))
- 53 Thompsons Solicitors ([HBR0052](#))
- 54 Thompsons Solicitors ([HBR0057](#))
- 55 Together (Scottish Alliance for Children’s Rights) ([HBR0024](#))
- 56 University of Sussex ([HBR0031](#))
- 57 Welsh Churches’ Working Party on Wales and Europe ([HBR0017](#))
- 58 Young Lawyers Brexit Action Group ([HBR0023](#))

# List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website.

## Session 2015–16

First Report	Legislative Scrutiny: Trade Union Bill	HL Paper 92/HC 630
Second Report	The Government's policy on the use of drones for targeted killing	HL Paper 141/HC 574
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 145/HC 648

## Session 2016–17

First Report	Legislative Scrutiny: Investigatory Powers Bill	HL Paper 6/HC 104
Second Report	Counter-Extremism	HL Paper 39/HC 105
Third Report	Legislative Scrutiny: (1) Children and Social Work Bill; (2) Policing and Crime Bill; (3) Cultural Property (Armed Conflict) Bill	HL Paper 48/HC 739
Fourth Report	The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015–16	HL Paper 49/HC 747
First Special Report	Counter-Extremism: Government Response to the Committee's Second Report of Session 2016–17	HC 756