



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis

First Report of Session 2017–19

*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.

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Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Penny McLean (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant), and Heather Fuller (Lords Committee Assistant).

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Report

1. The European Union (Withdrawal) Bill will receive its second reading in the House of Lords on 30 and 31 January. Since its introduction, as a result of pressure from Committees and from Commons debates on the Bill, the Government has gradually released more information relating to matters which will be affected by this legislation, such as employment rights.¹

2. The Committee is particularly concerned with the human rights implications of excluding the Charter of Fundamental Rights from retained EU law. Since the Committee was reconstituted, we have pressed the Government for the publication of its Memorandum on the European Convention on Human Rights and sought some further clarification regarding the human rights implications of the Bill. Correspondence relating to this matter can be found on the Committee's webpages.² On 5 December 2017 the Government published its 'Right by Right' analysis of the Charter of Fundamental Rights.³ A commentary on this, which demonstrates the complexity of the post-exit human rights landscape, has been produced for the Committee. We consider this document would assist further debate on the Bill, and we are publishing it as an Appendix to this Report.

1 See <https://www.gov.uk/government/publications/information-about-the-withdrawal-bill>

2 See www.parliament.uk/jchr

3 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#)

Appendix: Commentary on the Right by Right Analysis

Introduction

1) This Note follows the preliminary advice that was sent to the Committee on 31 October 2017 analysing the human rights implications of the EU (Withdrawal) Bill (*hereinafter* ‘the Bill’). As a result of the Committee’s correspondence with the Government, they have sought to clarify their interpretation of clauses 5(4) and 5(5) of the Bill. Clause 5(4) excludes the Charter of Fundamental Rights (*hereinafter* ‘the Charter’) from retention in domestic law after exit day. Clause 5(5) provides that the exclusion of the Charter does not affect the retention of “fundamental rights and principles” that exist irrespective of the Charter. In spite of the Government’s recent clarifications, these provisions may result in legal uncertainty and a diminution of rights and remedies.

2) In November 2017, the Committee sent two letters to the Secretary of State for Exiting the EU pressing for clarity on the implications of excluding the Charter from domestic law after exit day. The Secretary of State responded by publishing a document on 5 December setting out a ‘right by right’ analysis the Charter. The Chair also received a letter from the Secretary of State, dated 6 December, addressing our specific questions (*hereinafter* ‘the December Documents’).¹

3) This Note sets out:

- a) a summary of conclusions on the exclusion of the Charter and reliance on the sources of Charter rights (Section II);
- b) a summary of the December Documents and the Government’s general position on the Charter (Section III);
- c) a brief consideration of the Government’s ‘right by right’ analysis (Section IV).

4) This Note is provided to the Committee to assist its consideration of the Bill. It is not intended to provide an exhaustive analysis of all possible sources of law that may be relied upon in place of the Charter. It is simply a response to the Government’s ‘right by right’ analysis. It is intended to demonstrate the complexity of the post-exit human rights landscape and to provide a basis for assessing the impact on substantive rights protection.

Summary

5) The Government’s stated intention is that substantive rights protected by the Charter will not be weakened after exit from the EU.² However, the exclusion of the Charter from domestic law and the retention of underlying “fundamental rights and principles” results in an uncertain human rights landscape. There are various reasons why the protection of rights may be diminished owing to clauses 5(4) and 5(5) as currently drafted:

¹ All correspondence is published on the JCHR’s [website](#).

² Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 4

- a) Firstly, some of the rights will inevitably be lost as they derive from membership of the EU (i.e. Articles 39–45);
 - b) Secondly, Charter rights which are based wholly or largely on “general principles of EU law” will no longer confer an enforceable right. This means a loss of enforceable rights such as Article 1 (human dignity);
 - c) Thirdly, a number of the Charter rights derive from the European Convention on Human Rights (ECHR) which are incorporated into domestic law by virtue of the *Human Rights Act 1998* (HRA). Whilst these rights will continue to exist and confer an enforceable right on individuals, the standing is narrower and the remedies are weaker under the HRA compared to the Charter;
 - d) Fourthly, some of the Charter rights may be reflected in domestic statutes, but may not be as comprehensive as the Charter and may be subject to significant exemptions, for example, the rights to data protection in the Data Protection Bill (as currently drafted) vis-à-vis Article 8 of the Charter;
 - e) Fifthly, some of the Charter rights that are based on EU treaties may be retained by virtue of clause 4 of the Bill if they are directly effective, but it is not always clear whether these provisions are directly effective. The Government itself appears unsure. For example, they state that Article 15 of the Charter (right to engage in work) will be retained *if* it is directly effective;³
 - f) Sixthly, some of the Charter rights are based wholly or in part on provisions of the ECHR or other international treaties that have not been incorporated into domestic law, such as the *UN Convention on the Rights of the Child*.
- 6) Whilst the Government’s December Documents are helpful in clarifying their understanding of clause 5 of the Bill, the Government’s analysis has no legal status and a significant degree of legal uncertainty remains. Further, having published the Bill in July, the Government has retrospectively carried out its analysis of the human rights implications nearly five months late having been pressed for clarity by this Committee. This implies that the Government’s decision to exclude the Charter whilst retaining nearly all other EU law was taken without having done a comprehensive analysis of the implications for the protection of rights. The Government asserts that their “approach is to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy.”⁴ The effect of clauses 5(4) and 5(5) would appear to be contrary to the Government’s intent.

The December Documents and the sources of Charter rights

7) The December Documents set out the Government’s position on the Charter and the implications of its exclusion from domestic law. The Government affirms its position that the Charter does not contain “new rights” and that its intention is to preserve the rights and principles underlying the Charter by virtue of their original sources. The Government then sets out a ‘right by right’ analysis explaining the fate of each Charter provision after exit day. Each of these rights will be examined in brief below.

3 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 34

4 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 5

8) Consequently, the status of each Charter right after exit day will depend upon its original source. Each of the Charter provisions reflect rights and/or principles contained within other sources. These sources include:

- a) the European Convention on Human Rights (ECHR);
- b) general principles of EU law;
- c) EU legislation;
- d) international conventions; and
- e) national constitutions.⁵

ECHR and the Human Rights Act

9) Charter rights contained within the ECHR will be retained by virtue of the *Human Rights Act 1998* (HRA), although the scope may be narrower under the ECHR compared to the Charter. However, there may be a diminution in two respects: (i) the standing of individuals to enforce their rights and (ii) the remedies available.

10) Firstly, although the applicability of the Charter is limited in the sense that it only applies to Member States when they are acting within the scope of EU law, anyone with “sufficient interest” can bring a case under the Charter. Conversely, under the HRA, only “victims” (i.e. persons directly affected) of violations can bring a claim.⁶

11) Secondly, under the HRA, where primary legislation cannot be read compatibly with Convention rights,⁷ the domestic courts are limited to making a declaration of incompatibility.⁸ Conversely, given the supremacy of EU law, the courts currently have the power to disapply primary or quash secondary legislation that is incompatible with the Charter. Following the repeal of the ECA 1972 (clause 1), and the cessation of the supremacy of EU law (clause 5(1)), it will no longer be possible to challenge post-exit primary legislation in domestic courts on the basis of non-compliance with the Charter.

12) Further, paragraph 19 of Schedule 8 to the Bill provides that for the purposes of the HRA, any retained *direct* EU legislation⁹ is to be treated as primary legislation and not subordinate or secondary legislation. Consequently, any transposed EU regulations, decisions, or tertiary legislation that are incompatible with Convention rights can only be declared incompatible and not disapplied or quashed.

General principles of EU law

13) Some of the Charter provisions are based wholly or partially on general principles of EU law. The Committee will recall that general principles of EU law are principles deemed fundamental to the EU legal order, such as legal certainty and proportionality. They have supremacy over other categories of EU law, enjoying the same status as EU treaties. The Explanatory Notes to the Bill state that “[t]he Charter of Fundamental Rights

5 Explanations relating to the Charter of Fundamental Rights, Art 52

6 Section 7(1), [Human Rights Act 1998](#)

7 Section 3, [Human Rights Act 1998](#)

8 Section 4, [Human Rights Act 1998](#)

9 Defined in clause 3(2), [EU \(Withdrawal\) Bill](#)

sets out ‘EU fundamental rights’, which are general principles of EU law that have been recognised over time through the case law of the CJEU and which have been codified in the Charter.”¹⁰ Some Charter provisions have explicitly been recognised as “general principles” by the CJEU. Further, the rights contained within the ECHR are deemed to be “general principles” by virtue of Article 6(3) TEU.¹¹

14) The Bill currently provides that “general principles”, recognised as such by the CJEU, will be retained in domestic law after exit day, however, they will lose their status of supremacy and justiciability.¹² After exit, it will not be possible for individuals to bring a free-standing claim, or for the courts to quash an administrative action or to disapply legislation on the basis that it breaches a general principle of EU law. Instead, “general principles” are retained merely for interpretive purposes.

10 Explanatory Notes to the EU (Withdrawal) Bill, [para 52](#)

11 Please note, Art 6(3) TEU is not a directly effective treaty provision and is not therefore retained EU law, although all treaty provisions may still be used as an aid to interpretation.

12 Schedule 1, paragraph 3, [EU \(Withdrawal\) Bill](#)

EU Legislation

15) Rights contained in EU treaties, directives, and regulations may be retained by virtue of clauses 2, 3, or 4 of the Bill:

- a) Rights contained within EU treaties or directives that have already been incorporated into domestic law will be preserved by virtue of clause 2(1);
- b) Rights contained in direct EU legislation will be incorporated into domestic law by virtue of clause 3(1);
- c) EU treaty rights that have not been incorporated into domestic law will be converted into domestic law by virtue of clause 4(1) if they are directly effective. However, it is often unclear which treaty provisions are directly effective. Some rights may have been explicitly recognised by the courts as directly effective, but others may not have been litigated upon and therefore have not been identified as directly effective by the courts. The Explanatory Notes to the Bill set out illustrative (but not exhaustive) examples of directly effective treaty rights that would form part of retained EU law under clause 4(1). Those with relevance to human rights protection include:
 - i) Article 18 TFEU: non-discrimination on ground of nationality;
 - ii) Article 20 (except 20(2)(c)): citizenship rights;
 - iii) Article 21(1): rights of movement and residence deriving from EU citizenship;
 - iv) Article 45(1)(2) and (3): free movement of workers;
 - v) Article 157: equal pay.¹³
- d) Rights contained within directives that have been recognised (before exit day) by the CJEU or domestic courts as directly effective would also be converted into domestic law by virtue of Clause 4(2)(b).¹⁴

International treaties, domestic statutes and common law

16) Rights already contained within international treaties, domestic statutes (not derived from EU legislation) or at common law would be unaffected by the Bill. However, they may not confer an enforceable right upon individuals outside of the Charter, for example, if the relevant international treaty has not been incorporated into domestic law.

Right by Right Analysis

17) The Government's analysis sets out the fate of each of the Charter provisions after exit day and how the Government considers fundamental rights will be protected after the UK's exit from the EU. It is provided merely as guidance.¹⁵ Their analysis has no legal status. As a preliminary point, the extent to which any clarity has been provided by this document ultimately does not remedy the opaque drafting of the Bill itself.

13 Schedule 1 paragraph 3, *EU (Withdrawal) Bill*, [para 89](#)

14 Schedule 1 paragraph 3, *EU (Withdrawal) Bill*, [para 92](#)

15 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 7, para 2

18) Although the Government states that “the Charter itself is not divisible” and that “Charter rights should not be applied in isolation”,¹⁶ the Government’s piecemeal approach would seem to result in the division of the Charter with the retention of certain underlying rights and the potential loss of others. An explanation of the fate of each right is set out below.

Article 1

19) Article 1 of the Charter sets out the right to human dignity. The Government recognises the source of this right is twofold:

- a) The first is the *Universal Declaration of Human Rights 1948*. This is not a legally binding treaty and therefore does not confer enforceable rights upon individuals.
- b) This second source is the “general principles of EU law” which, as currently drafted, will not provide a right of action as per Schedule 3 paragraph 1 of the Bill.¹⁷

20) The Government also notes that human dignity underpins the ECHR. However, it is not a distinct right set out in the ECHR. The sources of Article 1 would not therefore confer an enforceable right upon individuals after exit day.

Article 2

21) Article 2 of the Charter sets out the right to life. The Government recognises the source of this right is the ECHR (Article 2 ECHR and Article 1 of Protocol 6 to the ECHR on the abolition of the death penalty). The Government also states that this right is protected at common law and in domestic statutes.¹⁸

22) Article 2 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998* (although Article 1 of Protocol 6 to the ECHR on the abolition of the death penalty is not). The scope of Article 2 ECHR is the same as Article 2 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available will be reduced (see paragraphs 9–11).

Article 3

23) Article 3 of the Charter sets out the right to integrity of person. The Government states that the sources of this right are:

- a) “general principles of EU law”; and
- b) Article 8 ECHR (the right to private and family life).¹⁹

24) As discussed at paragraphs 12–13 above, “general principles of EU law” will no longer confer a right upon individuals under the Bill as currently drafted.

16 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 8, para 8

17 Schedule 1, para 3

18 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 18

19 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), pp 19–20

25) Article 8 ECHR is not recognised as a source of this right in the Explanations to the Charter. In any event, Article 8 ECHR is not equivalent to Article 3 of the Charter which protects physical and mental integrity and provides a number of medical and bioethics guarantees.

26) Neither of these sources will confer an enforceable right upon individuals equivalent to Article 3.

27) The Explanations to the Charter set out two additional sources to those identified by the Government. The first is the *Council of Europe Convention on Human Rights and Biomedicine*. This has not been signed or ratified by the UK and therefore provides no rights in domestic law. The second is Article 7(1)(g) of the Statute of the International Criminal Court. This has been incorporated into domestic law (*ICC Act 2001*), but does not confer enforceable rights upon individuals, rather it criminalises conduct such as certain eugenic practices.

28) The Government further states that elements of Article 3 are protected in statute, such as the *Human Fertilisation and Embryology Act 1990*, which prohibits reproductive cloning and restricts testing and selection of embryos. They also cite the *Human Tissue Act 2004* which prohibits commercial dealings in human material for transplantation. Even if domestic law provides equivalent protection to Article 3, it is not clear that these statutes would confer an enforceable right (as opposed to a prohibition of conduct). Further, the courts would not be able to disapply or quash legislation incompatible with Article 3 on the basis of these statutes.

Article 4

29) Article 4 of the Charter sets out the prohibition of torture and inhuman or degrading treatment or punishment. The Government states that the source of this right is Article 3 ECHR and notes that section 134 of the *Criminal Justice Act 1988* criminalises torture.²⁰

30) Article 3 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 3 ECHR is the same as Article 4 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished (see paragraphs 9–11).

Article 5

31) Article 5 of the Charter sets out the prohibition of slavery and forced labour. The Government states that the sources of this right are:

- a) Article 4 ECHR;
- b) Decision 2009/371/JHA (establishing Europol);
- c) Chapter VI of the Convention implementing the Schengen Agreement; and
- d) Framework Decision and Directive 2011/36/EU on preventing and combatting trafficking in human beings.²¹

20 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 21

21 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 22

32) Article 4 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 4 ECHR is the same as Article 5 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished (see paragraphs 9–11).

33) Further, various domestic statutes have implemented provisions to tackle human trafficking (e.g. the *Modern Slavery Act 2015*). For the most part, these are statutes focused on criminalising certain conduct rather than conferring rights. The Government also points to its ratification of the International Labour Organisation (ILO) Fundamental Conventions, although these are not incorporated into domestic law and therefore do not confer enforceable rights.

Article 6

34) Article 6 of the Charter sets out the right to liberty and security. The Government states that the source of this right is Article 5 ECHR and notes that the right to liberty is protected in domestic law e.g. through writ of habeas corpus and the *Police and Criminal Evidence Act 1984*.²²

35) Article 5 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 5 ECHR is the same as Article 6 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. See paragraphs 9–11 above.

Article 7

36) Article 7 of the Charter sets out the right to private and family life. The Government states that the source of this right is Article 8 ECHR and the “general principles of EU law.”²³

37) As currently drafted “general principles of EU law” will not confer an enforceable right upon individuals.

38) Article 8 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 8 ECHR is the same as Article 7 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 8–10).

Article 8

39) Article 8 of the Charter sets out the right to protection of personal data. The Government states that the sources of this right are the “general principles of EU law” and Article 8 of the ECHR.²⁴

22 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 22

23 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 24

24 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 25

40) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

41) To some extent, Article 7 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. However, the scope of Article 8 ECHR is narrower than Article 7 of the Charter. The Government acknowledges that the right in the ECHR is not equivalent to the Charter.

42) The Government therefore relies heavily in its analysis on the *General Data Protection Regulation* (GDPR) and the Data Protection Bill as a means of incorporating Article 8 of the Charter into domestic law. The GDPR and the Data Protection Bill contain numerous rights for data subjects. However, the Bill does not explicitly incorporate Article 8 of the Charter. Given the vast number of exemptions and derogations from these rights provided for in the Bill, there is a question as to whether the Bill offers protection that is equivalent to Article 8 of the Charter.²⁵

Article 9

43) Article 9 of the Charter sets out the right to marry and found a family. The Government states that the source of this right is Article 12 ECHR. The Government also points to various statutes protecting rights in marriage and divorce such as the *Matrimonial Causes Act 1973* and *Civil Partnership Act 2004*.²⁶

44) Article 12 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 12 ECHR is the same as Article 9 of the Charter, with the caveat that its scope may extend to other forms of marriage (e.g. same sex marriage) in accordance with national law. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11).

Article 10

45) Article 10 of the Charter sets out the right to freedom of thought, conscience, and religion. The Government states that the sources of this right are Article 9 ECHR and constitutional traditions common to Member States. The Government also points to various domestic statutes such as the *Public Order Act 1986* (dealing with acts intended or likely to stir up religious hatred) and the *Criminal Justice and Immigration Act 2008* which abolished the common law offence of blasphemy.²⁷

46) Article 9 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 9 ECHR is the same as Article 10 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11 above).

25 See [Note](#) from Deputy Counsel on the Human Rights Implications of the Data Protection Bill.

26 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 27

27 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 28

Article 11

47) Article 11 of the Charter sets out the right to freedom of expression and information. The Government states that the sources of this right are Article 10 ECHR and the “general principles of EU law.” The Government also points to various domestic laws which respect these rights such as the *Contempt of Court Act 1981*, the *Education (No.2) Act 1986*, and the common law.²⁸

48) As currently drafted “general principles of EU law” will not confer an enforceable right upon individuals.

49) Article 10 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 10 ECHR is the same as Article 11 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11).

Article 12

50) Article 12 of the Charter sets out the right to freedom of assembly and association. The Government states that the sources of this right are Article 11 ECHR and the “general principles of EU law.” The Government also points to various domestic laws which respect these rights such as the *Public Order Act 1986* and various *Trade Union Acts*.²⁹

51) As currently drafted “general principles of EU law” will not confer an enforceable right upon individuals.

52) Article 11 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*, however, the scope of Article 12 of the Charter is wider than Article 11 ECHR as it applies to European institutions as well as at the national level. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 8–10).

Article 13

53) Article 13 of the Charter sets out the right to freedom of the arts and sciences. The Government states that this is one aspect of Article 10 ECHR.³⁰ Article 10 is incorporated into domestic law by virtue of the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11).

Article 14

54) Article 14 of the Charter sets out the right to education. The Government states that the source of this right is Article 2 of Protocol 1 to the ECHR. The Government also points to various domestic laws which respect these rights such as the *Education Acts*.³¹

28 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 29

29 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 30

30 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 31

31 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 32

55) Article 2 Protocol 1 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*, however, the scope of Article 14 of the Charter is wider than this as it covers access to vocational and continuing training, and the principle of free compulsory education. The substance of the right will therefore be retained in a narrower form in domestic law under the *Human Rights Act 1998*. The enforceability of the right and the remedies available would also be diminished. (See paragraphs 9–11 above).

Article 15

56) Article 15 sets out the freedom to choose an occupation and the right to engage in work. The Government states that the sources of this right are the “general principles of EU law” and various EU treaty provisions.³²

57) As currently drafted “general principles of EU law” will not confer an enforceable right upon individuals.

58) With regard to the EU treaty provisions, some of these may be retained in domestic law by virtue of clause 4 of the Bill. However, the Government does not clearly identify whether the provisions underlying Article 15 will be retained. Their analysis document states that they will be retained “insofar as the Treaty provisions on which Article 15 have been held to contain directly effective rights”.³³ The Government therefore appears to be unsure as to whether this right will be transposed by the Bill, and if so, to what extent. This demonstrates the problematic approach currently set out in the Bill.

Article 16

59) Article 16 of the Charter sets out the freedom to conduct a business. The Government states that the sources of this right are CJEU case law and the “general principles of EU law.” The Government also points to the UK’s “facilitative framework” for business and the *Companies Acts*.³⁴

60) The UK courts are instructed to do no more than “have regard” to the CJEU case law pre-exit day (clause 6). This does not guarantee enforceable rights for individuals.

61) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

62) The freedom to conduct business is therefore only protected to the extent that it is guaranteed by existing domestic statutes.

Article 17

63) Article 17 of the Charter sets out the right to property. The Government states that the source of this right is Article 1 of Protocol 1 to the ECHR and the “general principles of EU law”. The Government also points to various domestic statutes such as the *Theft Act 1968*.³⁵

32 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 34

33 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 34

34 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 35

35 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 36

64) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

65) However, Article 1 Protocol 1 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 17 of the Charter is the same as the ECHR right. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11 above).

Article 18

66) Article 18 of the Charter sets out the right to asylum. The Government states that the source of this right is Article 78 TFEU, which entails due respect for the *UN Refugee Convention*. The Government also points to various domestic asylum and immigration statutes.³⁶

67) Article 18 only applies to the extent that the UK is bound by EU legislation in this area. The UK has opted out of the right to asylum in Article 78 TFEU by virtue of Article 1 of Protocol 21 of the Treaties, which provides that “the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union.”³⁷ Article 78 TFEU comes under Title V of Part Three and does not therefore bind the UK.

68) The UK has not incorporated the *Refugee Convention* into UK law. Therefore, the sources of Article 18 are not enforceable in the UK pre- or post-exit.

Article 19

69) Article 19 sets out the right to be protected in the event of removal, expulsion or extradition. The Government states that this right is retained based in part on the Article 4 Protocol 4 to the ECHR and in part based on Article 13 of the *International Covenant on Civil and Political Rights (ICCPR)*.³⁸

70) The UK has not incorporated Article 4 Protocol 4 to the ECHR into domestic law under the *Human Rights Act 1998*. The Government acknowledges this and states that Article 13 ECHR requires fair and effective procedures in respect of Article 3 claims (i.e. claims regarding torture or other inhuman or degrading treatment).³⁹ However, the UK has not incorporated Article 13 ECHR into domestic law either. Whilst it is the case that UK courts must take into account ECtHR case law on Article 13, this is not equivalent to a domestically enforceable right under the HRA.

71) The UK has not incorporated the ICCPR into domestic law either. These international obligations are merely persuasive.

72) None of the sources of Article 19 will confer an enforceable right upon individuals post-exit.

36 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 37

37 Article 1 of Protocol 21 of the Treaties

38 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 38

39 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 38

Article 20

73) Article 20 of the Charter sets out the right to equality before the law. The Government states that the source of this right is the “general principles of EU law”. The Government also points to the UK’s common law, Article 14 ECHR and various statutes such as the *Equality Act 2010*.⁴⁰

74) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

75) The right to equality before the law will therefore exist to the extent that it already exists at common law and in domestic statutes. Article 14 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 21 of the Charter is the same as Article 14 ECHR. However, Article 14 is not a free-standing right—it can only be relied upon in conjunction with another Convention right. In the context of this limitation, the substance of Article 14 will be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11 above). The various EU directives containing this right have been incorporated into domestic law, such as the *Equality Acts*. These domestic statutes will be retained by virtue of clause 2 of the Bill.

Article 21

76) Article 21 of the Charter sets out the right to non-discrimination. The Government states that the sources of this right are the “general principles of EU law”; Article 14 ECHR; various EU directives; and Article 18 TFEU. The Government also points to various domestic statutes such as the *Equality Act 2010*.⁴¹

77) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

78) However, Article 14 is not a free-standing right (see paragraph 75). The various EU directives containing this right have been incorporated into domestic law, such as the *Equality Acts*. These domestic statutes will be retained by virtue of clause 2 of the Bill. Article 18 TFEU is directly effective and will therefore be retained by virtue of clause 4 of the Bill. However, “retained EU law” that is preserved by virtue of clauses 2–4 of the Bill will be subject to the delegated powers provided for in the Bill (i.e. the power to modify retained EU law using secondary legislation).

Article 22

79) Article 22 of the Charter sets out respect for cultural, religious and linguistic diversity. The Government states that the sources of this right are the “general principles of EU law”. They also state that this Charter provision is a principle and does not therefore confer an enforceable right upon individuals. As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals. However, the Government points to

40 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 39

41 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 40

various domestic statutes such as the *Belfast Agreement on Rights, Safeguards and Equality of Opportunity and the Welsh Language (Wales) Measure 2011*, which provide protections for linguistic diversity.⁴²

80) The Explanations to the Charter set out additional sources to those noted by the Government. These are Article 6 TEU; Article 167(1) and (4) TFEU (concerning culture) and Article 3(3) TEU concerning cultural and linguistic diversity. These provisions could be retained by virtue of clause 4 of the Bill if they are directly effective.

81) The sources of Article 22 will not provide an enforceable right to individuals. Respect for cultural, religious and linguistic diversity will therefore be protected to the extent of existing domestic law.

Article 23

82) Article 23 of the Charter sets out the principle of equality between men and women. The Government states that the sources of this right are the “general principles of EU law” and that Article 23 is based on a mixture of the following principles and rights:

- a) Article 157 TFEU and Directive 2006/54 (which are recognised by the Government as rights); and
- b) Article 3(3) TEU and Article 8 TFEU (which are recognised by the Government as principles).⁴³

83) The Government also points to the Public Sector Equality Duty (PSED), the common law and Article 14 ECHR which enshrine the principle of equal treatment.

84) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals. However, certain equality rights will be retained by the Bill. Article 157 (1) and (2) TFEU on the right to equal pay will be retained as directly effective rights under clause 4 of the Bill, as well as being incorporated into the *Equality Act 2010*. EU directives on equality have also been incorporated into domestic law in the *Equality Act 2010* and will be retained by virtue of clause 2 of the Bill. However, “retained EU law” that is preserved by virtue of clauses 2 - 4 of the Bill may be subject to the delegated powers provided for in the Bill (i.e. the power to modify retained EU law using secondary legislation).

Article 24

85) Article 24 of the Charter sets out the rights of the child. The Government states that the source of this right is the *UN Convention on the Rights of the Child*.⁴⁴ This is not incorporated into domestic law and therefore does not confer enforceable rights upon

42 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 42

43 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 43

44 The rights set out in the Convention are wide-ranging, encompassing civil and political rights as well as economic, social and cultural ones, for all children under 18. They have been categorised as rights to provision, rights to protection and rights to participation, with the last of these often considered the Convention’s main achievement (although implementation is often particularly problematic). The Convention also says what governments, public authorities and adults must do to ensure all children can enjoy all their rights.

individuals. The Government notes that the UNCRC is taken into account by the CJEU when applying “general principles of EU law”. Whilst this may be taken into account by the UK courts, this does not confer enforceable rights upon individuals.⁴⁵

86) In its 2015 report on Children’s Rights, the JCHR supported the incorporation of the UNCRC into domestic law. The Government stated it was “confident that the laws and policies that [...] [the Government] [...] has in place already are strong enough to comply with the Convention” and that while the Government was “not at a stage of incorporation” it would “continue to keep it under review”.⁴⁶ However, the NGO witnesses gave evidence that the piecemeal approach was too slow and that full incorporation was ultimately necessary to ensure that the UNCRC was properly adhered to.⁴⁷

87) In written evidence to the Committee, many organisations expressed concern regarding the exclusion of the Charter from a children’s rights perspective. A number of organisations argued that the Government must protect children’s rights in the context of Brexit. This could be achieved through requiring all regulations that are introduced as a result of Brexit to give due regard to the UN Convention on the Rights of the Child (UNCRC) or by the full incorporation of the UNCRC into UK law.⁴⁸ The Law Society submitted that the rights contained in provisions of the Charter, which have equivalent UN treaty rights, and which do not already form part of domestic UK law, should be brought into UK law, and be explicitly protected.⁴⁹

88) The Government also points to Article 8 ECHR which protects family life and various domestic statutes such as the *Children Acts* which contain principles such as the “best interests of the child” and impose various safeguarding duties on public authorities. The rights underlying Article 24 will therefore be retained only to the extent that they are already protected in the *Children Acts*.

Article 25

89) Article 25 of the Charter sets out respect for the rights of the elderly. The Explanations to the Charter state that Article 25 draws upon Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. It is not explicit in the Explanations as to whether Article 25 is a right or a principle. However, the Government states that this is a principle and does not therefore confer an enforceable right upon individuals.⁵⁰

90) The Government points to various domestic protections for the rights of the elderly such as the prohibition on age-based discriminations (*Equality Act 2010*) and Articles 3, 8,

45 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 45

46 Joint Committee on Human Rights, Eighth Report of 2014–15, [The UK’s Compliance with the Convention on the Rights of the Child](#), HC 1016 / HL 144, para 33

47 Joint Committee on Human Rights, Eighth Report of 2014–15, [The UK’s Compliance with the Convention on the Rights of the Child](#), HC 1016 / HL 144, para 31

48 Written evidence from Coram Children’s Legal Centre ([EUB0008](#)), Children in Wales and the Wales Observatory on the Human Rights of Children and Young People ([EUB0013](#))

49 Written Evidence from the Law Society ([EUB0010](#))

50 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 57

and 14 ECHR,⁵¹ which are incorporated into domestic law by virtue of the *Human Rights Act 1998*. The rights of the elderly will therefore only be retained to the extent that they are already provided for in domestic law.

Article 26

91) Article 26 of the Charter sets out respect for the rights of persons with disabilities. The Government notes that the sources of Article 26 are the European Social Charter and the Community Charter on the Fundamental Social Rights of Workers. The Government states that this is a principle rather than a right and does not therefore confer an enforceable right upon individuals.⁵²

92) However, the Government points to various domestic protections for disabled people (e.g. the *Equality Act 2010*). These rights will therefore only be retained to the extent that they are already provided for in domestic law.

93) In written evidence to the Committee⁵³, a number of organisations expressed concern regarding disability rights. Both Mencap and the Equality and Human Rights Commission noted that the Bill fails to provide concrete assurances on the ‘non-regression’ of rights hard fought for by the disabled community, such as ‘special assistance’ at airports, web accessibility, accessible goods and services, public procurement and manufactured goods. They also submitted that ensuring there is no loss of fundamental rights is particularly important for adherence to our obligations under the UN Convention on the Rights of Disabled People (CRPD). The CRPD has been ratified by the EU and is legally binding upon the EU, and Member States when acting within the scope of EU law. The EHRC therefore calls for UN human rights treaties such as the CPRD to be given effect in UK law.⁵⁴

Article 27

94) Article 27 of the Charter sets out workers’ right to information and consultation. The CJEU has held that this right is not directly effective and does not confer a right upon individuals.⁵⁵ However, there are various sources of Article 27 including EU directives and Articles 154 and 155 TFEU. The Government notes that domestic regulations already give effect to Article 27 in UK law. These regulations will be preserved in UK law after exit day by virtue of clause 3 of the Bill.⁵⁶

95) However, “retained EU law” that is preserved by virtue of clauses 2–4 of the Bill may be subject to the delegated powers provided for in the Bill (i.e. the power to modify retained EU law using secondary legislation).

51 Prohibition on torture, inhuman or degrading treatment; the right to private and family life; and the prohibition on discrimination.

52 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 48. The CJEU held that Article 26 cannot by itself confer a right upon individuals which they may invoke. See Glatzel, Case C-356/12.

53 P 28

54 Written Evidence from the EHRC ([EUB0003](#)) and Mencap ([EUB0007](#))

55 AMS Case C-176/12 2012

56 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 49

Article 28

96) Article 28 of the Charter sets out the right of collective bargaining and action. The Government recognises that the sources of this Article are the revised European Social Charter; the Community Charter of the Fundamental Social Rights of Workers; Article 11 ECHR; and the “general principles of EU law”. The Government also points to various domestic protections that cover the “same ground”.⁵⁷

97) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

98) Article 11 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. This aspect of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available would be diminished. (See paragraphs 9–11 above). The Government also points to the *Trade Union Acts* which also provide similar protections. The European Social Charter and Community Charter of the Fundamental Social Rights of Workers are non-justiciable aids to interpretation.⁵⁸

Article 29

99) Article 29 of the Charter sets out the right of access to job placement services. The Government recognises that the sources of this Article are the revised European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, which are non-justiciable aids to interpretation.⁵⁹ They consider this to be a principle such that it does not confer an enforceable right upon an individual.⁶⁰

Article 30

100) Article 30 of the Charter sets out the right to protection in the event of unjustified dismissal. The Government recognises that the sources of this Article are various EU directives.⁶¹

101) The CJEU has held that Article 30 does not confer an enforceable right on its own.⁶² However, the underlying EU directives have been incorporated into domestic employment legislation. This EU-derived legislation will be preserved by clause 2 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁶³

102) The Government also notes its membership of the International Labour Organisation Fundamental Conventions. However, these international conventions do not confer enforceable rights upon individuals.

57 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 50

58 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 15

59 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 15

60 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 51

61 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 52

62 AMS Case C-176/12 2012

63 Clause 7 of the [Bill](#)

Article 31

103) Article 31 of the Charter sets out the right to fair and just working conditions. Although the CJEU has held that Article 31 does not confer an enforceable right upon individuals, the Government recognises that this right is based on EU directives which have been incorporated into domestic law in various health and safety regulations and employment Acts.⁶⁴ This EU-derived legislation will be preserved by clause 2 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁶⁵

Article 32

104) Article 32 of the Charter sets out the prohibition of child labour and protection of young people at work. The Government recognises that the source of this Article is an EU directive, which has been incorporated into domestic law by the *Children and Young Persons Act and the Children Acts* which set out the “best interests of the child” principle.⁶⁶

105) These EU-derived provisions will be retained by virtue of clause 2 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁶⁷

Article 33

106) Article 33 of the Charter protects family and professional life. The Government states that Article 33 contains elements of a right and a principle. The Government recognises that the sources of the enforceable rights are EU directives on health and safety protections of pregnant workers and new mothers, as well as protections for parental leave. These protections have been incorporated into domestic employment legislation.⁶⁸

107) These EU-derived provisions will be retained by virtue of clause 2 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁶⁹

Article 34

108) Article 34 of the Charter sets out rights concerning social security and social assistance. The Government states that Article 34 contains elements of a right and a principle. The Government recognises that the sources of the enforceable rights are EU regulations on free movement of workers.⁷⁰

109) These provisions are directly applicable in the UK and will be retained by virtue of clause 3 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁷¹

64 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 53

65 Clause 7 of the [Bill](#)

66 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 54

67 Clause 7 of the [Bill](#)

68 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 55

69 Clause 7 of the [Bill](#)

70 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 56

71 Clause 7 of the [Bill](#)

Article 35

110) Article 35 of the Charter sets out rights concerning health care. The Government recognises that the source of Article 35 is Article 168 TFEU and the European Social Charter. The Government states that Article 35 sets out a principle rather than an enforceable right.⁷² This has not been determined by the CJEU. However, as far as the Government is concerned it does not confer enforceable rights. Further, the ESC is a non-justiciable aid to interpretation.⁷³

Article 36

111) Article 36 sets out the principle of respect by the Union for access to services of general economic interest. As recognised by the Government, this is clearly a principle and does not confer an enforceable right upon individuals.⁷⁴

Article 37

112) Article 37 provides for the integration of environmental protection into Union policies. This is explicitly recognised as a principle in the Explanations to the Charter. As stated by the Government, this does not confer an enforceable right.⁷⁵

Article 38

113) Article 38 provides for consumer protection in Union policies. This is explicitly recognised as a principle in the Explanations to the Charter. As stated by the Government, this does not confer an enforceable right.⁷⁶

Articles 39–46

114) The set of Articles under Title V of the Charter are categorised as citizens' rights. The sources of these rights are various provisions of the TFEU and TEU. However, these rights are largely dependent on EU membership, such as the right to vote and stand as a candidate at European Parliament elections. These rights become largely irrelevant post-exit.⁷⁷

115) However, Article 45 guaranteeing freedom of movement and residence derives from Article 21 TFEU, which has been held by the CJEU to be directly effective. This right will therefore be retained by clause 4 of the Bill. This may be subject to amendment by way of secondary legislation.⁷⁸

72 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 56

73 The Charter: Right by Right Analysis', page 15

74 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 59

75 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 60

76 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 61

77 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), pp 62–67

78 Clause 7 of the [Bill](#)

Article 47

116) Article 47 guarantees the right to an effective remedy and fair trial. The sources of this right are Articles 6 and 13 ECHR. The CJEU has also affirmed that Article 47 is a “general principle of EU law”.⁷⁹

117) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

118) Article 6 has been incorporated into domestic law by the *Human Rights Act 1998*. However, the scope of Article 47 is wider under the Charter than under the ECHR. Unlike Article 6 of the ECHR, Article 47 is not limited to disputes concerning civil rights and obligations or criminal charges. Article 6 ECHR does not, for example, apply to decisions regarding immigration status, such as deportation hearings. However, in the case of *ZZ*, the CJEU held that Article 47 of the Charter concerning the right to a fair hearing applied to deportation hearings and that the person concerned had the right to know the reasons for a decision made in closed material proceedings.⁸⁰ The Government acknowledges that the scope of Article 6 is narrower.

119) Further, Article 13 ECHR has not expressly been incorporated into domestic law by the *Human Rights Act 1998*. The scope of the right to an effective remedy and fair trial may diminish after exit day.

120) An example of the different remedies available under the Charter and the HRA can be found in the case of *Benkharbouche* concerning Article 47.⁸¹ In this case, the claimants were foreign employees working at embassies in the UK who were barred from bringing claims against their employers by virtue of the *State Immunity Act 1978*. The Court of Appeal held that the relevant provisions of *State Immunity Act 1978* breached both Article 6 of the ECHR and Article 47 of the Charter. Under the HRA, the court was limited to making a declaration of incompatibility. However, the Charter violation allowed the Court to disapply the provisions of the *State Immunity Act 1978* and hence provide an effective remedy for the claimants.⁸² In the absence of Article 47 of the Charter, such cases may result in a different outcome.

Article 48

121) Article 48 sets out the presumption of innocence and the right of a defence. The Government notes that the sources of this right are Article 6(2) and (3) ECHR, as well as the “general principles of EU law”.⁸³

122) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.

79 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 68

80 *ZZ v Secretary of State for the Home Department* [2013] EUECJ C-300/11

81 *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33

82 This was appealed by the Secretary of State to the Supreme Court. On 18 October the Supreme Court unanimously dismissed the appeal and upheld the judgment of the Court of Appeal: *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah (Respondent)* [2017] UKSC 62 (On appeal from [2015] EWCA Civ 33).

83 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 70

123) Article 6 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 6(2) and (3) ECHR is the same as Article 48 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available will be diminished. (See paragraphs 9–11 above). This right also exists at common law.

124) The Government also notes that these rights are reflected in various EU directives which have been incorporated into domestic law. These will be retained by virtue of clause 2 of the Bill. However, as “retained EU law”, they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.⁸⁴

Article 49

125) Article 49 sets out the principles of legality (no punishment without law) and proportionality of criminal offences and penalties. This derives from the “general principles of EU law”, Article 15 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 7 ECHR.⁸⁵

126) As currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals and the ICCPR is not incorporated into domestic law.

127) However, Article 7 ECHR is incorporated into domestic law by virtue of the *Human Rights Act 1998*. The scope of Article 7 ECHR is the same as Article 49 of the Charter. The substance of the right will therefore be retained in domestic law under the *Human Rights Act 1998*. However, the enforceability of the right and the remedies available will be diminished. (See paragraphs 9–11 above). This right also exists at common law.

Article 50

128) Article 50 sets out the right not to be tried or punished twice in criminal proceedings for the same criminal offence. The Government notes that this derives from the “general principles of EU law”. However, as currently drafted, “general principles of EU law” will not confer an enforceable right upon individuals.⁸⁶

129) The Explanations to the Charter state that this right also derives from Article 4 of Protocol 7 to the ECHR. However, Article 4 of Protocol 7 is not incorporated into domestic law by virtue of the *Human Rights Act 1998*. The sources of the Charter right will not therefore be retained in domestic law. However, the principle of double jeopardy (*autrefois acquit*) exists at common law, as amended by statute.

Conclusions

130) The Government’s intention is that substantive rights will not be weakened after exit from the EU. However, the exclusion of the Charter from domestic law results in a complex human rights landscape which is uncertain. Legal uncertainty is likely to undermine the protection of rights. There are various reasons why rights may be diminished owing to the exclusion of the Charter:

84 Clause 7 of the [Bill](#)

85 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 72

86 Charter of Fundamental Rights of the EU Right by Right Analysis, [5 December 2017](#), p 73

- a) Firstly, some of the rights will inevitably be lost as they derive from membership of the EU (i.e. Articles 39–45);
- b) Secondly, Charter rights which are based wholly or largely on “general principles of EU law” will no longer confer an enforceable right (although the Government may reconsider its position on this). This means a loss of enforceable rights such as Article 1 (human dignity);
- c) Thirdly, a number of the Charter rights derive from the ECHR and are incorporated into domestic law by virtue of the *Human Rights Act 1998*. Whilst these rights will therefore continue to exist and confer an enforceable right on individuals, the standing is narrower and the remedies are weaker under the HRA compared to the Charter;
- d) Fourthly, some of the Charter rights may be reflected in domestic statutes, but may not be as comprehensive as the Charter and may be subject to significant exemptions, for example, the rights to data protection in the Data Protection Bill vis-à-vis Article 8 of the Charter;
- e) Fifthly, some of the Charter rights that are based on EU treaties may be retained by virtue of clause 4 of the Bill if they are directly effective, but it is not always clear whether these provisions are directly effective. The Government itself appears unsure. For example, they state that Article 15 of the Charter will be retained *if* it is directly effective;
- f) Sixthly, some of the Charter rights are based wholly or in part on provisions of the ECHR or other international treaties that have not been incorporated into domestic law, such as the *UN Convention on the Rights of the Child*.

Declarations of Lords' Interests

Baroness Hamwee

Liberal Democrat Lords Spokesperson (Immigration)

Baroness Lawrence of Clarendon

Chancellor of De Montfort University

President of Stephen Lawrence Charitable Trust

Baroness Prosser

No relevant interests to declare

Lord Woolf

Membership of Committees,

Office holder of Solicitors and the bodies interested/involved with criminal law, penal policy and other justice issues.

Editor of De Smith Judicial Review, various editions

Chair of an EHRC event about the EU (Withdrawal) Bill (January 2018)

Chief Justice of the Commercial Court of the AIFC

Patron Woolf Institute

Ex Chair of UCL London, London University

Lord Trimble

No relevant interests to declare

Baroness O'Cathain

No relevant interests to declare

A full list of members' interests can be found in the [Register of Lords' Interests](#)

Formal minutes

Wednesday 24 January 2018

Members present

Ms Harriet Harman MP, in the Chair

Ms Karen Buck MP

Baroness Hamwee

Alex Burghart MP

Baroness Lawrence of Clarendon

Joanna Cherry MP

Baroness O’Cathain

Jeremy Lefroy MP

Baroness Prosser

Lord Trimble

Lord Woolf

Draft Report (*Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*), 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 and 2 read and agreed to.

Resolved, That the Report be the First Report of the Committee.

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

[Adjourned till Wednesday 31 January 2018]

Published written evidence

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

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

- 1 BrexitLawNI ([EUB0015](#))
- 2 Children in Wales (joint submission with the Wales Observatory on the Human Rights of Children and Young People ([EUB0013](#)))
- 3 Civil Society Brexit Project ([EUB0020](#))
- 4 Coram Children's Legal Centre ([EUB0008](#))
- 5 Dr Katie Boyle ([EUB0018](#))
- 6 Dr Tobias Lock ([EUB0001](#))
- 7 Equality and Human Rights Commission ([EUB0003](#))
- 8 Humanists UK ([EUB0004](#))
- 9 Justice ([EUB0016](#))
- 10 Law Society of Scotland ([EUB0019](#))
- 11 Liberty ([EUB0012](#))
- 12 Maternity Action ([EUB0006](#))
- 13 National Secular Society ([EUB0009](#))
- 14 Oxford Human Rights Hub ([EUB0005](#))
- 15 Professor Merris Amos ([EUB0014](#))
- 16 Royal Mencap Society ([EUB0007](#))
- 17 The Law Society ([EUB0010](#))
- 18 Together (Scottish Alliance for Children's Rights) ([EUB0017](#))
- 19 Written evidence from 31 civil organisations ([EUB0011](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753