



Review of the Balance of Competences between the UK and the EU

Fundamental Rights

Response

For further information contact:

Jodie Blackstock, Director of Criminal and EU Justice Policy

Tel: (020) 7762 6436 Email: jblackstock@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ

Tel: 020 7329 5100 Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

Established in 1957, JUSTICE is an independent law reform and human rights organisation. It is the United Kingdom section of the International Commission of Jurists. JUSTICE has been working on the role of the European Union with regards to fundamental rights in the UK for over a decade, both in relation to the role of the Charter of Fundamental Rights and with a particular focus on criminal justice. Our answers relate to our knowledge of and application of EU fundamental rights principles in our work.

1. What evidence is there that the impact of the Charter / the EU's broader framework of fundamental rights has been advantageous or disadvantageous in the UK?

EU fundamental rights

1. We agree with the Call for Evidence that fundamental rights have been recognised and upheld by the Court of Justice of the European Union since the 1960s, which has since been reflected in the treaty arrangements of the European Union, expressly in 1993 by way of the Maastricht Treaty. The Lisbon Treaty now provides in article 2 that the Union is founded on the value of respect for human rights, with a description of other values comprising such rights to include freedom and equality. Article 3(3) provides competence for specific activities within this sphere:

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child.

2. As to where the CJEU's legal basis for importing fundamental rights as general principles of EU law prior to express treaty provisions arose, the reliance on these claims logically came from the applicant's submissions before the Court. In *Nold*¹, the German applicant relied upon the fundamental rights enshrined in the German Constitution which it argued have been 'received' into Community law. The Court agreed that the claim must be examined in light of fundamental rights principles, drawn from the member states and international law:

As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible

¹ Case 4/73 *Nold v Commission* [1974] ECR 491.

with fundamental rights recognized and protected by the Constitutions of those States.²

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

3. This approach has been followed in a substantial body of cases, on wide ranging areas of EU competence.³ The Court has also endorsed and followed the jurisprudence of the European Court of Human Rights for many years,⁴ and stated that the Convention has special significance.⁵
4. The advantage to applicants of relying upon fundamental rights is that where the Court draws guidance from an international convention or national constitutional law principle and incorporates this into its reasoning, the principle becomes Union law, making its fulfilment a condition of the lawfulness of the EU act. If the act does not adhere to the fundamental right, the act must be read so as to conform, or be struck down:

Where national legislation falls within the field of application of EU law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of EU law.⁶

5. The fact that the Court has been so ready to adopt fundamental rights principles has enabled many applicants to receive the direct benefit of international human rights principles through the prism of EU law, with the equal consequence of primacy of EU law, that would not

² At [13].

³ See A. O'Neill, *EU Law for UK Lawyers* (Hart Publishing: Oxford, 2011), Chapter 6 for a detailed discussion of these.

⁴ See in particular Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 where the Court stated that measures are not acceptable in the Community which are incompatible with observance of the human rights recognised and guaranteed by the European Convention on Human Rights.

⁵ Case C-260/89 *ERT v DEP* [1991] ECR I-2925 at [41].

⁶ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan and Others* [1991] ECR I-04685 at [31], amongst others. See also Opinion 2/94 *Re Accession by the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759 at [34]: Respect for human rights is therefore a condition of the lawfulness of Community acts.

necessarily otherwise be available through the respective measures themselves, unless given such effect by way of national law.

6. The corollary is that the Member States may argue that they find national law overruled by the indirect application of principles obtained from agreements made outside of the EU, not intended to have that effect when they became contracting parties, or in respect of some measures, such as protocols to the ECHR, that they have not even signed. Despite this, as the Call for Evidence acknowledges, a Joint Declaration of the European Parliament, Council and Commission, 'Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms',⁷ stressed the 'prime importance' and respect that the Institutions attach to the protection of fundamental rights, as derived from the constitutions of the member states and the ECHR. In particular, the Declaration acknowledged in its preamble that the Community was based on the principle of respect for the rule of law, and,

[A]s the Court of Justice has recognized, that law comprises, *over and above* the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based. (emphasis added)

7. Moreover, by agreeing the content of the EU Charter of Fundamental Rights, and by way of the Lisbon Treaty, affording it equal status with the Treaties, the Member States endorsed the primacy of fundamental rights in the EU legal order.

The Charter of Fundamental Rights

8. The Charter (CFR) is, therefore, a binding set of principles 'bringing together in one place all of the personal, civic, political, economic and social rights enjoyed by people within the EU'⁸ aimed at protection of the individual against actions of the state. It is a free standing instrument that derives its authority from Article 6(1) Treaty on the European Union (TEU):

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Its scope is, however, circumscribed by the subsequent part of Article 6(1):

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

⁷ OJ C 103 (27th April 1977), p 1.

⁸ See the European Commission website http://ec.europa.eu/justice/fundamental-rights/index_en.htm

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

9. As intended by its drafters, the Charter operates to consolidate the fundamental rights applicable in the EU and make them more visible.⁹ As commentators have observed,

[S]trong protection of individual rights, whatever its political or constitutional motivations, serves both as a compass for the formulation of policy and a necessary judicial safeguard for the individual against the growing legislative and administrative power of the Union.¹⁰

The Charter gives potential applicants the opportunity to see which rights are already protected by the EU legal order, codified in one place, without having to trawl through the Treaties or case law to find them. Moreover, the Explanations to the Charter provide guidance on the origins of the right in the Treaties, jurisprudence of the CJEU or international law to aid applicants in understanding the scope of each right.

10. The Charter is significant since, despite not creating new rights, it is the first constitutional rights document to apply to the EU Institutions and their operations. To this end, the Institutions have each adopted measures to ensure that they are complying with the Charter when legislating: The Commission *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* in 2010, which includes the Fundamental Rights Checklist¹¹ and *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*;¹² Parliament Rules of Procedure;¹³ and Council *Guidelines*

⁹ Cologne European Council Conclusions, 3 and 4 June 1999, para 44, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm; Preamble to the Charter of Fundamental Rights of the European Union (2010/C 83/02) OJ C (30.03.2010) 83, p389 at 391.

¹⁰ D. Anderson and C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, EUI Working Papers, Law 2011/08, p1.

¹¹ COM(2010) 573 final (Brussels, 19.10.2010).

¹² SEC(2011) 567 final (Brussels, 6..05.2011).

¹³ European Parliament, rules of procedure, rule 126 ('requests to European agencies'). <http://www.europarl.europa.eu/sides/getDoc.do?type=RULES-EP&reference=20121023&secondRef=RULE-036&format=XML&language=EN>. Rule 36(1)) introduced at the end of 2009 further requires Parliament to fully respect fundamental rights as laid down in the Charter in all its activities, as well as the rights and principles enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union. Rule 36(2) allows the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to include an additional procedure for *ex ante* fundamental rights scrutiny. This allows a committee responsible for a subject matter, a political group, or at least 40 Members of Parliament, to refer a matter to 'the committee responsible for the interpretation of the Charter'

on *Methodological Steps to be taken to Check Fundamental Rights Compatibility at the Council's Preparatory Bodies*.¹⁴ By applying these procedures, the assessment of fundamental rights compliance is more ingrained and transparent than in pre-Charter procedures. For possible claims of fundamental rights infringement, the adoption of these processes makes holding the Institutions to account more achievable.¹⁵

11. As with the pre-Charter application of fundamental rights principles, the Charter is binding upon the Institutions and Member States in a way that other international and regional human rights conventions are not. Where those rights are imported into the Charter, their application through EU law and the jurisprudence of the CJEU create primary rights that take precedence over national rights. With respect to the ECHR in particular, although the UK must only take account of the jurisprudence of the ECtHR, read national legislation to give effect to Convention rights so far as it is possible, or make a declaration of incompatibility,¹⁶ the replicated rights in the Charter, which pursuant to article 52(3) should be interpreted in the same way as the Convention, have binding effect so as to require a conforming interpretation of national law.¹⁷ Therefore, where EU law is in scope, persons who seek to argue that their Convention rights have been violated have a far greater prospect of obtaining effective redress by claiming infringement of the Charter rather than the Convention, since the court

(LIBE), where it considers that a proposal for a legislative act or parts of it do not comply with the rights enshrined in the Charter.

¹⁴ Council, 10140/11 (Brussels 18.05.2011).

¹⁵ See Joined Cases C-92/09 and C-93/09 *Schecke and Eifert v Land Hessen* [2010] ECR I-11063 for the approach of the Court prior to the procedures being implemented. A preliminary reference from the Verwaltungsgericht Wiesbaden (Germany) resulted in the CJEU declaring invalid provisions of Regulation No. 1290/2005 and Regulation No. 259/2008 obliging member states to make publicly available the names of recipients of EU agricultural subsidies. While recognising the principle of transparency, the Court considered that the contested provisions disproportionately interfered with the right to protection of personal data and to private life, pursuant to articles 7 and 8 CFR. In particular the Court criticised the Council and the Commission for failing to consider whether the measure went beyond what was necessary for achieving the legitimate policy of increasing transparency in the management of EU agricultural funds. The Court suggested that the institutions ought to have considered limiting publication by name the beneficiaries of aid but there was no indication that this was done.

¹⁶ Pursuant to sections 2, 3, and 4 of the Human Rights Act 1998 (HRA).

¹⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Grand Chamber (unreported 26th February 2013), at [45]: 'As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means', as applied domestically in the Employment Appeals Tribunal in *Benkharbouche v Embassy of the Republic of Sudan*, [2013] IRLR 918.

must read the national law in conformity with the right, as opposed to making a s3 HRA declaration of incompatibility.

12. The Charter also provides for expansion upon the rights contained in the ECHR, both in substance and with the potential for wider jurisprudential development pursuant to article 52(3) (which allows for Union law to provide more extensive protection). Some Convention rights have been incorporated to encompass the evolved interpretation provided by the ECtHR, thereby making its jurisprudence, which may not necessarily be followed in the UK (due to the requirement for a clear and cogent line of authority from the ECtHR where there is a departure for UK law¹⁸), binding law. For example, article 8 ECHR (the right to privacy), as elaborated by the ECtHR, is separated into three rights in the Charter – article 3 (integrity of the person), article 7 (respect for private and family life) and article 8 (protection of personal data). Further, article 47 CFR incorporates the right to a fair trial, but as is clearly stated in the Explanations, is not limited to disputes relating to civil rights and obligations or criminal charges. This is particularly significant in the sphere of immigration and asylum, where article 6 ECHR has provided limited assistance.¹⁹ Perhaps of most significance is the provision against discrimination in article 21 CFR, which is not only free standing, and therefore contains no condition precedent that another substantive right be infringed as is required by article 14 ECHR, but also incorporates very broad characteristics that go further than Protocol 12 to the ECHR to include genetic features, disability, age and sexual orientation.²⁰

¹⁸ See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [26].

¹⁹ See Case C-300/11 *ZZ v SSHD* (4th June 2013, unreported), with regard to the right to an effective remedy and the need for parties to be able to examine the facts and documents upon which a decision is based. Where exceptionally qualified by State security needs, such processes must themselves be subject to judicial review, and still enable an effective defence to be put forward, whereby the person must be informed of the essence of the grounds constituting the decision against them. We intervened in *SS (Libya) v SSHD* EWCA Civ 1547 (unreported, 19th December 2011) to make a similar argument with respect to the application of the Qualifications Directive while *ZZ* was pending, but the appeal was successful on other grounds and as such, the Court declined to seek a preliminary reference. See also Case C-69/10 *Diouf v Ministre du Travail* [2011] ECR I-0000; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. The CJEU has consistently applied fair trial principles in its case law, see Case C-294/83 *Les Verts v European Parliament* [1986] ECR 1339.

²⁰ We intervened in the case of *HH v Deputy Public Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 with respect to the rights of dependent children in the assessment of whether a requested person should be surrendered under an European arrest warrant (EAW). One of our submissions was that article 24 CFR clearly sets out the obligation to consider the best interests of the child. Though the ECtHR had reached this position through its case law, under the auspices of article 8 ECHR, the UK Supreme Court had to apply the right contained in the Charter. See paras 21, 98, and 155 of the judgment.

13. There is also some indication that the ECtHR is finding the Charter useful to its consideration as to the scope of Convention rights as persuasive authority.²¹ This would indicate that the CJEU and the ECtHR are engaging in helpful dialogue rather than advancing fundamental rights in diverging ways.
14. As to scope, the obligation to comply with EU law has been interpreted through successive cases to apply to any implementing legislation,²² irrespective of when it was past, even pre-existing if it gives effect to the EU obligation,²³ even when the Member State is derogating from EU law,²⁴ and with potential horizontal effect²⁵ – another advantage over the ECHR provisions.

Disadvantages

15. Using the Charter is not simple, however. Pursuant to article 51 CFR, the Institutions and Members States are obliged to respect the rights, observe the principles and promote the application of the Charter. There are two difficulties in doing this.
16. First, the distinction between rights and principles is not set out clearly. Article 52 attempts to draw a distinction, explaining that rights are to be interpreted in accordance with the originating right they are derived from,²⁶ whereas principles need to be included in EU legislative acts to be judicially cognisable. However, there is no clear delineation between Charter provisions as to which are rights and which are principles. Assistance can be gained from the Explanations, but not all specify the distinction clearly.²⁷ Of more confusion is that

²¹ See the discussion in D. Anderson and C. Murphy, note 10 above.

²² Case 5/88 [1989] ECR 2609 *Wachauf*.

²³ *Fransson*, *op cit*.

²⁴ *ERT*, *op cit* and *R (on the application of Zagorski and Base) v Sec State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) at [70]. For a detailed discussion of the case law up until 2010, see D. Denman, 'The Charter of Fundamental Rights' [2010] EHRLR 349 at 352.

²⁵ Case C-555/07 *Kücükdeveci v Swedex GmbH* [2010] ECR I-00365 (in reliance upon article 21 CFR to prohibit age discrimination in an employment dispute); Case C-400/10 PPU *Deticek v Sgueglia* [2010] ECR I-08965 (in reliance upon article 24 to consider the best interests of the child) where the Court relied on the Charter as expressing general principles of EU law, which accordingly could be applied, despite the claims being between private individuals.

²⁶ The limitations differ dependent upon the originating text – 'within the limits' where the Treaties provide the right; 'the same' where the right derives from the ECHR, though the Union may provide more extensive protection; or 'in harmony' where they result from the constitutional traditions of the Member States.

²⁷ The House of Lords, European Union Committee, *The Treaty of Lisbon: an impact assessment*, (10th Report of Session 2007-08), HL Paper 62-I, <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf> took some useful evidence on this, in particular from Lord

article 49, described as 'principles of legality and proportionality, confers clearly justiciable rights, whereas other clear principles are described as rights, such that the Charter descriptions themselves do not afford much assistance.²⁸ Some articles contain elements of both rights and principles.²⁹ Applicants must therefore be able to establish whether the article they rely on is judicially cognisable in order to rely upon it to obtain redress, though principles will still provide persuasive authority.

17. Second, given that the Member States must comply with the Charter when implementing EU law, there is a lack of information dissemination to or by the Member States to aid people in the EU in using the Charter. When the Human Rights Act was enacted in the UK, it was made clear that public authorities would be obliged to comply in order to ensure that the rights of individuals were fulfilled. By comparison, there has been so little information provided about the Charter that a Flash Eurobarometer survey in 2012 found that in the UK, only 10% of people had heard of the Charter and knew what it was. Of these, 46% had heard of it but weren't sure what it was, and 44% had never heard of it.³⁰ However, two-thirds of respondents across the EU were interested in learning more about their rights as enshrined by the Charter (66%), where to go if they feel that these rights have been violated (65%) and when the Charter applies and when it does not (60%). The e-justice portal has a dedicated page on the Charter to explain what it is and how EU citizens can enforce their rights. It currently has information about how to do this domestically for twelve of the member states. The UK has provided information about going to court, accessing legal aid, the Equality and Human Rights Commission, the various ombudsmen and links to information services which might be helpful, such as the CAB and Community Legal Service.³¹ This may be useful in explaining the legal system in the UK, but does not assist people here with how to use the Charter, since these bodies are unlikely to be familiar with it.
18. Moreover, there appears to be a lack of knowledge amongst the professions and the judiciary. The *obiter* comments of Mr Justice Mostyn, an experienced and well respected judge in the High Court, in *AB v SSHD* [2013] EWHC 3453 (Admin), expressing surprise at the reliance upon the Charter, which he thought the UK had opted out of, demonstrates the clear need for training amongst the judiciary on the nature and scope of the Charter, which may well be

Goldsmith who sat on the Convention that drafted the Charter, as to the possible distinction between civil liberties and socio-economic rights, at paras 5.15- 5.23.

²⁸ See article 27 'Workers' right to information and consultation within the undertaking' and article 30 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.'

²⁹ Such as articles 23, 33 and 34 according to the Explanations.

³⁰ Flash Eurobarometer, 340, *The Charter of Fundamental Rights of the European Union*, (April 2012), available at http://ec.europa.eu/public_opinion/flash/fl_340_en.pdf

³¹ See https://e-justice.europa.eu/content_fundamental_rights-176-en.do

required for the legal profession as a whole. JUSTICE has conducted three training seminars on the Charter and intends to continue an update programme. Two of these were held in London and Glasgow in 2012 as introductions to the Charter and its use, with an update in 2013, as well as a breakout session in the last two of our Annual Human Rights Conferences. The European Academy of Law has held a number of conferences on the Charter for practitioners and judges across Europe, with a focus on particular areas of practice. However, we readily acknowledge that these fragmented efforts can barely touch the surface of ensuring profession-wide understanding amongst lawyers. Training programmes run by national organisations are required to ensure that practitioners, in private practice as well as employed by public bodies, and judges are suitably familiar with the Charter.

19. The UK Parliament has not adopted similar legislative scrutiny measures to the EU Institutions or the s19 HRA compatibility obligation to ensure that proposed EU legislation or implementing national law complies with the Charter. Without this, the UK may not be taking sufficient steps to ensure compliance.

2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

20. In our view, the CJEU is consistently interpreting the Charter in line with the general provisions.
21. The Court has repeatedly refused applications for preliminary references where there is no EU law in operation,³² in line with pre-Charter requests for the application of fundamental rights,³³ despite cases where it would have been helpful to have clarification of general application.³⁴

³² See D. Denman, note 24 above, at 352 for a discussion of relevant cases; Case C-27/11 *Vinkov* (unreported, 7th June 2012) concerning whether a Member State had to provide an appeal from the administrative imposition of penalty points for a driving offence. This was outside the scope of EU law because thus far, the EU has only legislated for the mutual recognition of judgments in driving matters, not the procedures to be adopted.

³³ See Case C-249/96 *Grant* [1998] ECR I-621, at [45] that rules against discrimination on grounds of sex in employment did not extend to discrimination on grounds of sexuality because the Treaty provision was not intended to concern this.

³⁴ Case C-396/11 *Curte de Apel Constanța (Romania) v Radu*, Grand Chamber (unreported, 29th January 2013) was a particular opportunity to clarify that fundamental rights could act as a bar to surrender under a European arrest warrant (EAW), under the principles established in Joined Cases C-411/10 and C-493/10 [2011] *NS v Belgium* (21st December 2011, unreported). However, the Court focused on the factual circumstances complained of, such that articles 47 and 48 CFR do not provide for a warrant to be refused on the ground that the requested person was not heard by the issuing judicial authority before its issue. The Court held such an approach would lead to the failure of the very system of surrender established by the EAW framework

22. The CJEU has also provided a qualified interpretation to article 53 CFR in *Melloni*.³⁵ The Spanish Constitutional Court sought a preliminary reference concerning the guarantees that must be given in relation to a trial having taken place *in absentia* on a request for a conviction EAW. Under Spanish constitutional law it has been decided, though not unanimously, that the right to a fair trial is absolute and a person must be able to attend their trial. The question, amongst others was whether article 53 CFR could be relied upon to give primacy to the Spanish Constitutional law. The Court observed that the interpretation envisaged by the national court would give general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. This interpretation could not be accepted as it would undermine the primacy of EU law in as much as it would allow member states to disregard EU legal rules that are fully in compliance with the rights set out in the Charter. The Court considered it a settled principle of EU law that national rules cannot undermine the effectiveness of EU law on the territory of that state.³⁶ The Court held:

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*.³⁷

23. In this case, since detailed EU law applied to the question of whether a trial *in absentia* could be fair, the Court determined that the EU Member States had agreed the confines of the principle applicable to the context of mutual recognition procedures, which ought not to be undermined by national law.

decision. The Court did not consider the question of whether article 1(3) of the Framework Decision (the general fundamental rights override) and/or the Charter or Convention could otherwise provide grounds of refusal. The decision would have been helpful to clarify that executing states are obliged to consider the human rights of the requested person prior to their surrender. While this process is expressly required by s21 of the Extradition Act 2003, many Member States do not entertain such arguments, due to a rigid application of the principle of mutual recognition, as critically observed by the European Commission: Report from the Commission to the European Parliament and the Council, *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final (Brussels, 11.04.2011).

³⁵ Case 399/11 *Stefano Melloni v Ministero Fisca*, Grand Chamber I (unreported 26th February 2013), followed in *Fransson*, *op cit*.

³⁶ Considering Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 amongst others.

³⁷ At [60].

24. The decision can be contrasted with *Jeremy F*³⁸. While the Court did not expressly consider article 53 CFR, it held that the fundamental right to an appeal in France on the application of the speciality procedure post surrender on an EAW had not been contemplated by the framework decision, and therefore it was free to apply national fundamental rights principles. Of equal significance, the Court, in reviewing the procedures provided by the framework decision could have extended the application of the right to an effective remedy under article 47 CFR to include the right to review of surrender decisions in EAW cases. However, it looked at the procedure and ECHR case law and concluded that the judicial scrutiny provided was sufficient to comply with article 47 CFR. The decision also provides another example that the Court is not attempting to expand the application of the Charter.

3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous in the UK?

25. Considered above in question 1.

4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous in the UK?

26. We are not able to identify generally where the FRA has been of assistance in the UK. However, we are a member of the Fundamental Rights Platform, set up by the FRA and comprising a network of some 300 civil society organisations.³⁹ The Platform sends regular email newsletters sharing updates on FRA projects and reports, inviting observations and discussions amongst the Platform members. The FRA also seeks the involvement of Platform members as experts during projects to evaluate the methodology and results. The Platform is useful to us through notifying FRA projects that may be relevant to our work and provide helpful reference material. Since the FRA conducts projects across the EU, it has the capacity to collect information from all the EU Member States. It is very difficult for other organisations carrying out research projects to obtain so wide a reach⁴⁰. Its results can therefore helpfully supplement, or provide the impetus and justification for more detailed research in a given area.

27. The legislative scrutiny powers held by the FRA have also been useful in our law reform work briefing the EU Institutions and UK scrutiny committees on proposed legislation. Recent

³⁸ Case C-168/13 PPU *Jeremy F v Premier Ministre* (unreported 30th May 2013).

³⁹ For further information see <http://fra.europa.eu/en/cooperation/civil-society>

⁴⁰ Even with a consortium of other NGOs and academic institutions, the widest reach across the EU we have managed in our research projects is ten Member States: J. Blackstock, *European arrest warrants: ensuring an effective defence* (JUSTICE, 2012); E. Cape et al, *Effective Criminal Defence in Europe* (Intersentia, 2010).

examples have been, in its contribution to monitoring of implementation: Opinion on Racism and Xenophobia, with special attention to the rights of victims of crime⁴¹ which was provided upon request of the Council of the EU; and Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives,⁴² to assist with the European Commission follow up report on the Directives. With regard to opinions during the legislative process:⁴³ Opinion on the Confiscation of proceeds of crime,⁴⁴ following a request of the European Parliament, and Opinion on the proposed data protection reform package,⁴⁵ also upon request of the European Parliament. Given its prominence as the EU fundamental rights advisory body, we have found that opinions of the FRA can be persuasive authority in discussions with law makers.⁴⁶

28. The FRA has also responded to the growing influence, and since 2009 binding value, of the Charter by producing a website dedicated to its interpretation – Charterpedia⁴⁷ along with a mobile phone friendly application ‘Charter for mobile.’⁴⁸ The website follow the titles of the Charter, providing jurisprudence from the CJEU, international courts, national courts and academic material relating to each Charter article. It is a very useful starting point for any person seeking to understand the application of the Charter. However, while it has been advertised widely at EU level events, little has been done, as far as we are aware, in the UK to promote its existence.⁴⁹ Much more could be done to promote the website as a useful tool in the UK.

⁴¹ FRA Opinion – 02/2013 Framework Decision on Racism and Xenophobia, Vienna, 15 October 2013.

⁴² FRA Opinion – 1/2013 [EU equality directives] Vienna, 1 October 2013.

⁴³ Pursuant to Recital 13 of Council Regulation 168/2007, according to which ‘the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned.’

⁴⁴ FRA Opinion – 03/2012 Confiscation of proceeds of crime, Vienna, 4 December 2012.

⁴⁵ FRA Opinion – 2/2012, Data protection reform package, Vienna, 1 October 2012.

⁴⁶ The Opinion on the draft directive regarding the European Investigation Order (Vienna, 14th February 2011) was particularly helpful since the Member State initiative contained very little procedural safeguards for people who may be affected by the proposed directive and the FRA identified the need to provide measures that would comply with fair trial rights in articles 47 and 48 CFR and privacy and data protection in articles 7 and 8 CFR, as well as a fundamental rights base refusal ground. These measures have since been included during negotiations of the proposal.

⁴⁷ http://infoportal.fra.europa.eu/InfoPortal/infobaseFrontEndCountryHome.do?btnCountryLinkHome_1

⁴⁸ <http://fra.europa.eu/charter4mobile/>

⁴⁹ Certainly when we have mentioned it at events where we have spoken about the Charter, delegates have been unfamiliar with it.

29. More generally, the independent evaluation of the FRA conducted in 2012⁵⁰ (the Evaluation Report) provides a useful EU-wide survey of its effectiveness. We would agree generally with its findings, which are:

Overall, the evaluation findings point towards a clearly favourable assessment in terms of the timeliness and adequacy of the FRA's assistance and expertise relating to fundamental rights, in particular among the EU level institutions. At the level of Member States the picture is more mixed, both in terms of content of the research and also logistical barriers, such as language and dissemination. While EU-wide comparative studies are highly relevant for European policy makers, the national policy process requires more in-depth and contextual information, which cannot be provided by the FRA. The FRA has however gradually begun to explore and develop new modes of cooperation with key national actors at the Member State level.⁵¹

30. While the FRA may be well known and relied upon at an EU level, its application in the Member States, and in particular in the UK, is less effective. It appears to be making efforts to provide helpful material that can be used by individuals in the Member States. The evaluation report concludes:

While it is difficult to assess the impact of CSO cooperation in terms of raised awareness among the general public, the Agency is actively using electronic and social media to reach the general population as well as stakeholders, such as electronic newsletters, awareness-raising material targeting youth (S'cool agenda) and Facebook. Specific project results are generally promoted and disseminated to a wider public, through European and national media. As an example the recent comparative survey on Roma integration was cited in several European media, such as the BBC News and the Economist.⁵²

and:

In terms of the extent to which the FRA publications on project results have been taken into account by relevant EU, national and local actors on fundamental rights issues, the evaluation shows a mixed result. While contribution was assessed high at the EU-level, the results were much less positive at the national and local level. The case studies did, however, show a more positive picture also concerning the use of the publications by national level stakeholders. Among the civil society

⁵⁰ Ramboll, Denmark, November 2012 http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf

⁵¹ P III.

⁵² Ibid.

representatives, in particular the EU/international level NGOs are using the work of the FRA, but it does not seem that the results are disseminated actively enough towards the local level.⁵³

31. A particular disadvantage that we see, and has been reflected in the Evaluation Report, is that the FRA does not have a specific role in the legislative process, where it could provide a regular scrutiny check as to the fundamental rights compliance of proposed acts. Moreover, the FRA does not have a mandate in police and judicial cooperation under its Multi-Annual Framework and cannot therefore provide thematic reports specifically on matters arising in this area. However, the FRA has conducted research which has touched upon criminal justice issues and seems able to provide opinions in this field upon request, such as those set out above. It is disappointing that, given the volume of criminal justice measures agreed in the EU over the past decade, that the FRA's jurisdiction continues to be excluded from this area.

5. What evidence is there of whether the FRA demonstrates value for money?

6-8 The Fundamental Rights and Citizenship Programme

32. We are not in a position to observe the funding arrangements of the FRA, or the operation of the Fundamental Rights and Citizenship Programme since we have not applied for funding from this programme previously. However, the Evaluation Report does observe:

The FRA is considered to be in a unique role as a provider of comparative, EU-wide studies. The Agency is acknowledged for concentrating on topics that are not covered by other similar actors, and their position as an independent EU Agency gives their work additional backing. The evaluation does not provide sufficient evidence to conclude that the effects in the field of fundamental rights have been achieved at lower cost because of the Agency's intervention. There is some evidence concerning the lack of duplication of efforts, where the work of the FRA has been used by the stakeholders. On the one hand, without the work of the Agency such research would not exist (meaning that there is little risk for duplication of efforts) but on the other hand the work of the FRA in these fields is seen to be of relevance to developing effective policies, which could be cost-saving for those using the FRA's work in these fields.⁵⁴

33. We would agree that if the FRA is conducting EU-wide research, this would limit the need for expenditure of the same type under the Commission funding programme. The role of the FRA

⁵³ Id.

⁵⁴ Id.

is especially important in this regard if the UK and other Member States limit their funding of future Commission programmes.

9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous...in the UK?

34. It is not yet clear what advantages or disadvantages EU accession to the ECHR might bring, as the Draft Accession Agreement will be subject to significant further scrutiny and revision prior to being finalised. From the perspective of the individual applicant, it has the potential to enable wider protection of human rights against bodies and agencies of the EU which do not currently have to adhere to Convention principles, yet may still operate in the Member States of the EU, such as FRONTEX and Europol. This would be both in protecting against infringement of individual rights by those bodies, and in enabling positive obligations to prevent infringements, as well as investigate allegations of infringements. It also has the potential to provide a more effective remedy through the individual petition procedure to the ECtHR against EU Institutions than the application procedure to the CJEU.

10. What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous...in the UK?

35. The Funding programme will be of benefit to groups that apply to carry out research or training under its terms. In our experience, the Commission programme conditions are rigorous ensuring that projects provide value for money, relevance to the project call proposals, and added value to the area of application. The wider benefits of projects funded by the Commission are potentially significant, but hard to measure. Where research leads to recommendations that may improve conditions for individuals, and these changes occur, there are clear advantages. Likewise, where gaps in understanding are identified, programme funding often provides for training and materials to be disseminated amongst relevant groups. JUSTICE intends to apply for funding under the current Programme call to provide training on the EU Charter to UK practitioners. Effective training programmes are disseminated much more widely through the application of the principles learned by the delegates, in the courts, in advice to individuals, decision makers, and in law reform. If organisations like our own secure funding from the Commission under this programme, we will be able to generate further understanding of the potential application of the Charter in the UK. In the context of EU competence, the Commission provides the best opportunity for funding EU related activity that we have found amongst the pool of funders for work that we are likely to undertake. Without such funding the opportunities for understanding EU law, and in this context, the application of the Charter amongst UK individuals is much more limited.

36. The general disadvantage to all EU Commission funding programmes is the requirement for matched funding, requiring organisations to find a significant percentage of the cost of the project through other sources. This can prevent organisations with limited resources that may be able to undertake valuable and significant work with Commission funding from being able to do so. Moreover, in order to ensure the programmes provide value for money, they are replete with bureaucracy that can put organisations without experienced administrative staff off undertaking the commitments required of a grant.

11. What future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?

37. The development of the Charter, advancement of the ECHR and accession to the ECHR will all be relevant to the UK. Ensuring that individuals and practitioners in the UK are familiar with EU fundamental rights law is the key challenge and opportunity that we see for the immediate future.

12. How could action in respect of fundamental rights be taken differently and how would this affect the UK?

38. As mentioned above, we consider it necessary to educate society and professionals as to the existence and potential application of EU fundamental rights in the UK, so as to provide alternative or complementary rights protection to the ECHR. This could affect the UK through litigation where the Courts interpret national legislation as requiring conformity with EU law, particularly to the extent that national law need be disapplied. By doing so, this would not only ensure greater familiarity with EU law but also that UK legislation complies with obligations under EU fundamental rights law, thereby ensuring greater protection for UK citizens and better conformity with our EU obligations.

39. We also consider the scrutiny of proposed EU legislation and implementing national legislation for Charter compliance in the UK Parliament necessary to ensure Charter compliance of legislation from the outset. These measures may prevent adverse scrutiny by the Commission and the potential for proceedings against the UK in the CJEU.

13. Is there evidence of fundamental rights being used indirectly to expand the competence of the EU?

40. We do not believe this is occurring. First, because the fundamental rights set out in the Charter are derived from existing areas of EU competence or fundamental rights principles of EU jurisprudence that have been endorsed by the Member States, thereby comprising EU competence. Proposed EU legislative acts must be founded in a legal basis under EU law.

Without further treaty provisions, wider legislative acts would be unlawful. Second, with regards to general actions or programmes of the Commission related to fundamental rights as set out in its annual reports on the application of the Charter, these all pertain to existing Treaty bases.⁵⁵ Third, as set out above, the jurisprudence of the CJEU has consistently demonstrated that the Court will not entertain preliminary references pursuant to the Charter unless the action is within the scope of EU law.

Jodie Blackstock
JUSTICE
15th January 2014

⁵⁵ For the 2012 Report see <http://ec.europa.eu/justice/fundamental-rights/report/2012/index.html>