

Information Note: United Kingdom (UK) referendum on membership of the European Union (EU) and the Human Rights issues

A referendum on whether the UK should remain in the EU will take place on Thursday 23 June 2016. This paper sets out the human rights issues raised within the UK's current membership of the EU and the relationship between membership of the EU and the Council of Europe.¹

The Northern Ireland Human Rights Commission provided a briefing to the UN Committee responsible for reviewing the compliance of the UK with the International Covenant on Economic, Social and Cultural Rights on the EU exit advising the Committee to recommend that:

all necessary steps are taken so that there is no detriment to all current rights and benefits for UK citizens and EU nationals residing in the UK in relation to employment, social security, health care and public services in the EU, notwithstanding the outcome of the referendum.²

This paper sets out the human rights issues raised within the UK's current membership of the EU and the relationship between membership of the EU and the Council of Europe.

What is the difference between the European Union and Council of Europe?

The EU is a politico-economic union of 28 member states. The main bodies, namely the European Coal and Steel Community and the European Economic Community, which preceded the EU were formed in the 1950s. Their original functions were purely economic, regulating coal and steel production and creating a single market amongst the member states.³ The EU formed in 1992 by way of the Treaty on European Union.

The EU is completely separate from the Council of Europe. The Council of Europe was formed in 1949 its stated goal is to promote human rights,

¹ HM Government Why the Government believes that voting to remain the EU is the best decision for the UK (April 2016)

² Northern Ireland Human Rights Commission Submission to the UN Committee on Economic Social and Cultural Rights 58th Session on the Sixth Periodic Report of the United Kingdom's Compliance with ICESCR April 2016

³ Open Society Foundation, Israel Butler 'Background Paper: The EU Charter of Fundamental Rights: What can it do? February 2013

democracy, and the rule of law in its 47 member states. The contracting parties to the Council of Europe drafted the European Convention on Human Rights, which all members are party to. The European Convention on Human Rights is enforced by the European Court of Human Rights. A withdrawal from the European Union would not result in withdrawal from the Council of Europe or Convention.

Under the Treaty of Lisbon the EU committed to accede to the European Convention on Human Rights, therefore the EU is committed to become the 48th contracting party to the Convention.⁴ Upon its accession individuals will be able to apply to the European Court of Human Rights for review of the acts of the EU Institutions.⁵

Are human rights relevant to the work of the European Union ?

Human rights have gradually been given enhanced status in EU law.⁶ In the Van Gend en Loos judgement the European Court of Justice (now Court of Justice of the European Union, CJEU) found that Community law not only 'imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.⁷ The CJEU through its case law continued to develop human rights standards, which formed part of the 'general principles' of EU law as identified on a case by case basis.⁸

The Treaty on European Union at article 2 declares:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In 1999 the EU began the process of collating rights developed by the CJEU and other institutions into the EU Charter of Fundamental Rights.

⁴ Article 49 of the Treaty on European Union

⁵ See for discussion Council of Europe website : <http://www.echr.coe.int/Pages/home.aspx?p=court/accessioneu&c>

⁶ Paul Craig and Grainne de Burca 'EU Law: Text, Cases and Materials Oxford 1998 p. 337

⁷ Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen [1963] ECR 1.

⁸ Open Society Foundation, Israel Butler 'Background Paper: The EU Charter of Fundamental Rights: What can it do? February 2013

The Charter was proclaimed in 2000 but was not given legal status until 2007 in the Treaty of Lisbon, which stated that it had equal legal status with the EU Treaties.⁹ The Charter binds EU institutions and member states when they are implementing EU laws and policies.

The Charter is intended to be complementary to the ECHR, Article 52(3) states:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

How does European Union Law fit within the UK human rights framework ?

The European Communities Act 1972 gave legal effect to the UK's membership of the EU. In *Thoburn v Sunderland City Council* Laws LJ described the 1972 Act as a constitutional statute.¹⁰ In the *Factortame* case the UK courts accepted that EU law prevails over conflicting domestic primary legislation.¹¹

The European Charter of Fundamental Rights ('the Charter') contains a range of civil, political, social and economic rights, these are clustered within six chapters under the headings of Dignity, Freedom, Equality, Solidarity, Citizen's Rights and Justice. The Charter contains both civil and political and socio-economic rights. A number of the rights contained within the Charter are unique for instance the right to the protection of personal data and to dignity.

In contrast with the European Convention on Human Rights the Charter only applies domestically "within the scope of EU law". The Charter is only relevant in cases that involve the implementation of EU laws. As a result, it arguably has a narrower range of application than the European Convention on Human Rights.

⁹ Effects of the EU Charter of Rights in the UK Standard Note: SN/IA/6765 Last updated: 17 March 2014
Author: Vaughne Miller

¹⁰ [2003] QB 151

¹¹ [1991] 1 AC 603

As a result of a Protocol to the Charter, negotiated by the Government of the UK and Poland, it was originally thought that the Charter could not be enforced by domestic courts in the UK.¹² However the CJEU has since ruled, on a reference from the Court of Appeal in England & Wales, that the Charter is enforceable in the UK courts, except for articles within the 'solidarity' heading.¹³

A Parliamentary Select Committee recently examined the application of the EU Charter of Fundamental Rights in the UK and concluded:

'the Charter is directly effective in the UK with supremacy over inconsistent national law (as it is for all other EU Member States): it does not apply to all areas of national law, however, only those that fall within the scope of EU law, a test which the ECJ was interpreted broadly: it will nonetheless broaden the ambit of EU law and increase human rights litigation in the UK'.¹⁴

The government in its response to the Select Committee agreed: 'that the Charter as interpreted by the CJEU, applies in the UK when the UK is acting within the scope of EU'.¹⁵

Nonetheless the Select Committee recognised that there is still legal uncertainty about the Charter including; the issues of the distinction between rights and principles; the scope of the application of the Charter and; the effect of having the Charter and the European Convention on Human Rights in parallel.¹⁶

The approach of the CJEU of the European Union in a number of matters relating to the Charter is yet to be settled.¹⁷

How does the European Union affect human rights protections in the UK?

¹² Ibid

¹³ Case C-411/10, N.S. v Secretary of State for the Home Department [2012] 2 CMLR 9 See for discussion Gordon Anthony 'Judicial Review in Northern Ireland' Second edition (Hart Publishing: Portland Oregon) 2014

¹⁴ House of Commons European Scrutiny Committee Report 43rd report 2013-2014 HC 979. The Application of the EU Charter of Fundamental Rights in the UK: A state of confusion.

¹⁵ Government response to the HC European Scrutiny Committee Report July 2014

¹⁶ House of Commons European Scrutiny Committee Report 43rd report 2013-2014 HC 979. The Application of the EU Charter of Fundamental Rights in the UK: A state of confusion.

¹⁷ Gordon Anthony 'Judicial Review in Northern Ireland: Second Edition' (Hart Publishing, Oxford) p. 11-12

As noted earlier, the EU is founded on the values of respect for human dignity, freedom, democracy, equality and the rule of law and respect for human rights (Article 2, TEU). The EU organs must adhere to these values when exercising their legislative competences as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union. The following explanation of how the EU affects UK human rights protections largely focuses on the impact of Directives.¹⁸

In the case of *Van Gend en Loos*¹⁹ the CJEU considered the EU Treaties to confer a new system of individual rights through the doctrine of direct effect whereby EU legislation could be invoked in proceedings in domestic courts. This principle was extended to Directives in *Van Duyn*.²⁰ The Directives of the European Union extend to a broad range of human rights issues.

Below, the rights implications of EU law for a number of groups are considered. Directives which give rise to enforceable rights in UK law are identified along with relevant provisions of the Treaties and Charter.

Disability Rights

The EU has ratified the UN Convention on the Rights of Persons with Disabilities and as such is bound to comply with its provisions.

The EU is given competence regarding disability issues via article 19 TFEU which states that appropriate action may be taken to combat-among others-discrimination based on disability. Likewise Article 10 TFEU provides a basis for disability rights mainstreaming within the EU stating

¹⁸ A "directive" is a legislative act in EU law which is binding on Member States as to the result to be achieved but which leaves the choice as to form and methods used to implement it to the discretion of Member States. Member States must transpose these obligations into national law by a given deadline. See further Chalmers, Davies and Monti, *European Union Law* (2nd ed., Cambridge University Press, 2010), 99.

¹⁹ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

²⁰ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 Further to this, the Court in *Marleasing* articulated the principle of "indirect effect" whereby all national legislation should be interpreted in light of EU law by national courts. Following the Treaty of Lisbon, EU law includes the EU Charter of Fundamental Rights, however the articles of the Charter need only be considered in cases involving the implementation of EU laws.

that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [among others] disability.'

In light of these provisions, the Employment Directive 2000/78/EC was adopted, creating a source of community law from which EU citizens affected by disability discriminations could derive justiciable rights in the area of employment. The Directive was implemented in Northern Ireland by the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004. The 1995 Act expanded previous disability discrimination legislation to protect the rights of disabled persons faced with direct discrimination in the workplace, a failure by employers to make reasonable adjustments to accommodate their needs and less favourable treatment for a reason related to disability.²¹

The rights protected by the Employment Directive have been extended by CJEU jurisprudence, notably in the case of EBR *Attridge Law LLP v Coleman*²² the Directive was interpreted by the CJEU to include protection from "associative discrimination" in relation to both direct discrimination and harassment, i.e. an employers harassment or less favourable treatment of a non-disabled employee on the grounds of their association with a disabled person is unlawful.

Children's Rights

The Treaty of Lisbon introduced as an objective, the promotion by the EU of children's rights in Article 3(3) TEU. Moreover Article 24 of the EU Charter states:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

²¹ Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' *Industrial Law Journal*, Vol.32, No. 4, December 2003; Kajtar, 'Life outside the bubble: International and European legal framework of disability discrimination in employment' (6) *PMJK* 2013 5.

²²EBR *Attridge Law LLP (formerly Attridge Law) v Coleman* Employment Appeal Tribunal, 30 October 2009

Article 24 ensures that these central principles of the UN Convention on the Rights of the Child are respected in the implementation of the EU Directives.

EU secondary legislation on matters including asylum (e.g. Directive 2013/32/EU), human trafficking (Directive 2011/36/EU), combating child sexual abuse and exploitation and child pornography (Directive 2011/93/EU) and victims' rights (Directive 2012/29/EU) all provide particular rights to children which must be implemented by Member States. There is also a focus within the EU on the development of "child friendly" justice processes as a necessary precondition for fulfilling the rights of the child.²³ For example, the recently adopted Directive on special safeguards for child suspects determines that providing children with a lawyer is now compulsory.²⁴ This is a very important development as previously children in the UK could waive this right.²⁵

Women's Rights

The equal treatment of men and women has been a fundamental tenet of the EU since its inception and the principle of gender equality is central to all its activities. The TEU commits Member States to non-discrimination and equality between men and women in Article 2 and 3. Likewise the TFEU provides that the EU will aim to eliminate inequalities and promote equality between men and women (Article 8). The Charter also states that equality between men and women must be ensured in all areas, including employment, work and pay (Article 23).

In keeping with these provisions, a series of EU directives aimed at securing the equality of men and women in the workplace have been adopted over a number of years (Directives 76/207/EEC; 2002/73/EC;

²³ Rebecca O'Donnell, 'The Role of the EU legal and policy framework in strengthening child friendly justice' (14) ERA Forum 2013 507

²⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0079+0+DOC+XML+V0//EN&language=EN>

²⁵ Hayley Chapman (18th March 2016) <<http://rightsinfo.org/explainer-eu-law-safeguarding-1-million-children/>> accessed 29/03/2016.

75/117/EC; 86/378/EEC). These have recently been consolidated in the 2006 Recast Directive (2006/54/EC). This Directive provides women with a number of enforceable rights including: equal treatment in the workplace free from harassment or discrimination on grounds of sex (Article 14); equal pay for equal work or for work of equal value (Article 4); equality in occupational social security schemes (Article 5); and equal access to training and promotion. In order to realise these rights the Directive requires that Member States take positive action to ensure full equality in practice (Article 3). Directive 92/85/EEC specifically targets the improvement of working conditions for pregnant women and new mothers and entitles women to a continuous period of maternity leave of 14 weeks and paid time off for ante-natal examinations. Directive 2004/113/EC extends the equality rights of women into the sphere of access to and supply of goods and services.

The above provisions were given effect in NI by a number of amendments to our legislative framework for instance the Equal Pay Act (Northern Ireland) 1970 and the Sex Discrimination (Northern Ireland) Order 1976.

Webb v EMO Air Cargo (UK) Ltd is a good illustration of how EU law has affected women's rights in the UK.²⁶ Ms Webb had been employed for an indefinite term to cover the maternity leave of another employee. Shortly after recruitment however she too fell pregnant and was subsequently dismissed on the grounds that she could not fulfil a fundamental condition of her employment contract. The House of Lords relied on Directive 76/207/EEC in reading that UK legislation precluded such dismissal as discriminatory. Furthermore the Lords found that no comparison should be made with a man dismissed for medical or other reasons as the two circumstances are materially different.

Racial and Ethnic Minority Rights

Article 10 TFEU provides that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [among other] racial or ethnic origin'.

Under Article 19 TFEU, Directive 2000/43/EC was adopted implementing the principle of equal treatment between persons irrespective of racial or

²⁶ *Webb v EMO Air Cargo (UK) Ltd* [\[1995\] 1 W.L.R. 1454](#) (House of Lords)

ethnic origin. Directive 2000/43/EC was implemented into Northern Ireland Law by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003.

Article 5 of the Directive is of particular interest as it provides for the undertaking of positive measures to give practical realisation to its stated aims. Of particular relevance to the Northern Ireland context, given the relatively large Traveller community here, was the adoption in 2011 by the Council of an 'EU Framework for National Roma Integration Strategies up to 2020' pursuant to the 2000 Equality Directive.²⁷ The framework draws attention to the disadvantaged position of Roma and Traveller populations in the areas of education, employment, healthcare and housing and promotes use of EU funding to deliver equality in these areas.

Rights of Older People

Articles 10 and 19 TFEU also provide for legislative action by the EU to combat age related discrimination. The Employment Equality Directive 2000/78/EC is also applicable here in prohibiting direct and indirect discrimination in the workplace. The Directive is given effect for older people in Northern Ireland through the Employment Equality (Age) Regulations (Northern Ireland) 2006. In cases of dismissal of a person of 65 or over for the reason of reaching the compulsory retirement age there must be an objective and reasonable justification based on legitimate social policy aims. In addition the grounds must be appropriate and necessary in meeting the aim. The standard of proof in establishing legitimacy is a high one.²⁸

In addition Directive 2003/41/EC sets standards regarding the supervision of institutions providing pension schemes. The Directive requires that the UK ensures that such institutions are run by appropriately qualified persons of good repute (Article 9 (1b)) and that properly constituted rules exist for the functioning of the pension scheme of which all members have been adequately informed (9(1c)). The EU has committed to improving the quality of life of older people in a number of other ways

²⁷ See: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444910104414&uri=CELEX:52011DC0173>> accessed 29/03/2016.

²⁸ Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (C-388/07)

including through Decision 742/2008/EC aimed at supporting the use by older people of new information and communications technologies.

Summary

There is a degree of uncertainty around the implications of an EU exit on human rights protection in the UK. The procedural requirements regarding withdrawal are set out in Article 50 of the Treaty of the European Union. The process commences by a Member State notifying the European Council of its intention to withdraw. The European Council then provides guidelines for the negotiations between the EU and the state concerned, with the aim of concluding a withdrawal agreement.²⁹ The European Union and withdrawing Member State have two years in which to negotiate a withdrawal agreement, after two years the membership ceases automatically. A withdrawal agreement will set out the Member State's future relationship with the European Union. The European Council must obtain the consent of the European Parliament before concluding a withdrawal agreement by way of a 'super qualified majority' vote (72% of the members of the Council, comprising at least 65% of the EU population).

In the event of a withdrawal EU law will cease to apply to the United Kingdom. However, any national acts adopted in implementation or transposition of EU law would remain valid until the Westminster Parliament amend or repeal them. The impact of a UK exit from the European Union is uncertain and as such how such an exit would impact on the human rights protection introduced to UK law by virtue of UK membership in the EU is similarly uncertain. A House of Commons Research and Library service briefing paper recently summarised the current position namely that:

If the UK withdrew from the EU, it would no longer have to comply with the human rights obligations of the EU Treaties, including with the EU Charter of Fundamental Rights. Although the Charter was not intended to create any new rights, a breach can result in the UK courts disapplying UK Acts of Parliament – something they cannot do under other human rights instruments. The impact of the Charter is now being considered as part of the Government's consultation paper on a new British Bill of Rights.³⁰

²⁹ European Parliament Briefing 'Article 50 TEU: Withdrawal of a Member State from the EU February 2016 p. 3

³⁰ Briefing Paper Number 07213, 12 February 2016 Exiting the EU: impact in key UK policy areas para 13.1