

RESPONSE FROM THE UNITED KINGDOM
TO ACA-EUROPE QUESTIONNAIRE ON THE CHARTER OF
FUNDAMENTAL RIGHTS

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Introduction

1. The Charter of Fundamental Rights has come into force almost ten years after it was first agreed. Having spent the past decade coming to terms with domestic incorporation of the European Convention on Human Rights (ECHR), the UK must now grapple with a new catalogue of rights. The nature of the UK legal system, with the common law, a supreme Parliament and a unique relationship with EU law makes it difficult to offer a formulaic – or definitive – response to any inquiry as to the implications of such a Charter. Mindful of that limitation, this memorandum seeks to highlight how the UK courts may address this latest wave in the “incoming tide” of EU law.¹

2. Incorporation of the Charter in UK Law

1. The Charter of Fundamental Rights became part of the law of the United Kingdom following the ratification and coming into effect of the Lisbon Treaty. The Charter is given effect in accordance with the requirements of UK membership of the EU and through the same legal mechanism as other EU law.

* I am grateful to Cian Murphy (King’s College London) and to my judicial assistant, Christopher Owen, for their assistance.

¹ As Lord Denning famously described European law in *HP Bulmer Ltd v J Bollinger SA* [1974] 2 WLR 202.

2.1 EU Law in the United Kingdom

2. EU law takes effect in the UK legal system in accordance with the European Communities Act 1972. The European Communities Act has been amended on several occasions to give further effect to subsequent EU treaties. The most recent amending legislation is the EU (Amendment) Act 2008, which gives effect to UK ratification of the Lisbon Treaty.
3. The leading case on the application of EU law in the UK, *Factortame*, established that UK membership of the EU entails the application of EU law in the UK and, if necessary, the disapplication of any conflicting national law.² There remains a lively intellectual debate on the relationship between EU and UK law. However, it is generally accepted that on a day-to-day basis EU law is treated as superior to national law albeit because national law affords it that status.
4. This constitutional settlement may be reinforced if legislation currently before Parliament comes into force. Clause 18 of the EU Bill, as initially drafted, provides that “It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law ... falls to be recognised and available in law in the United Kingdom”. The precise wording of this clause is currently the subject of negotiation between the two Houses of the UK Parliament.
5. Therefore the Charter has effect in UK law as a result of and to the extent that EU law requires it to do so but in accordance with the UK’s constitutional settlement.

2.2 Protocols to the Lisbon Treaty

6. Two protocols to the Lisbon Treaty may impact upon the Charter’s effect in the UK legal system: the UK-Poland Protocol and the UK-Ireland Protocol.

² *Factortame Ltd v Secretary of State for Transport (No. 2)* [1991] 1 All ER 70.

7. The UK-Poland Protocol seeks “to clarify certain aspects of the application of the Charter”. The precise implications of the Protocol remain contested. Statements from political leaders at the time of the negotiation and ratification of the Lisbon Treaty sought to portray the Protocol as a UK “opt-out” from the Charter. However, neither the text of the Protocol itself, nor subsequent statements from, amongst others, former UK Attorney-General Lord Goldsmith Q.C., supports such a strong conclusion.³ Ongoing litigation in the case of *R (NS) v Secretary of State for the Home Department*, discussed below, should provide the European Court of Justice with an opportunity to clarify the Protocol’s effect.⁴
8. The UK-Ireland Protocol does not explicitly relate to the Charter. Rather, it concerns the UK and Ireland’s exemption from certain EU legislation in the area of freedom, security and justice. The UK participates in this policy field on a case-by-case basis as it decides whether or not to become party to each piece of legislation. It is unclear whether or not the UK will be bound by case-law of the European Court of Justice on the Charter in this field if the UK has not opted-in to a particular measure. An appropriate test case on this point is difficult to conceive and as such it may remain unresolved for some time.

2.3 Status of the Charter in UK Law

9. The *prima facie* status of the Charter in the UK is therefore as follows: a litigant may rely on the Charter to challenge an act of the EU or an act of the Member State when it is implementing EU law. The UK-Poland and UK-Ireland Protocols may impact upon this application but it is not, as of yet, possible to give a definitive answer as to

³ See D Anderson QC & CC Murphy “The EU Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe” EUI Working Papers LAW 2011/08 (EUI, Florence, 2011).

⁴ See Case C-411/10: Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010.

what that impact might be. However, it is also possible that the protocols will not have any practical implications and as such the Charter will be applied in the UK to the same extent as it is applied in other Member States.

3. Relationship between the Charter & UK Human Rights Law

10. The Charter of Fundamental Rights has come into effect at a time when UK human rights law is in flux. Since its commencement in 2000, the Human Rights Act 1998 has been the source of much human rights litigation and the subject of political, judicial and academic discussion. Ten years after the incorporation of the ECHR into national law the Government has commissioned a review of the relevant legislation.

3.1 UK Constitutional Tradition & the Human Rights Act 1998

11. For much of its history the UK protected human rights, traditionally known as ‘civil liberties’ by UK lawyers, through the common law. On the classic understanding an individual was free to do anything except that which was prohibited by law, while the state was required to have legal authority for its actions. Despite drafting and being a signatory to the ECHR, the UK did not incorporate the ECHR into national law until 1998. The Human Rights Act 1998 has provided a system of judicial oversight of legislative and executive action – albeit one which retains Parliament’s position as the supreme organ of government. The incorporation of the ECHR into national law means that many of the rights provided for in the Charter are already protected in the UK legal system as a matter of national law. However, the remedies for breaches of those rights differ under the Human Rights Act and under EU law.

3.2 Human Rights Remedies Under UK Law

12. The different mechanisms of incorporation of the ECHR and EU law have resulted in different powers for the judiciary and in different remedies being available to litigants. An individual seeking to challenge national legislation as incompatible with the ECHR has two available remedies. The court may interpret the legislation ‘in so far as is possible to do so’ in a manner that is compatible with the ECHR. This can afford the applicant immediate relief as a compatible interpretation allows the court to remedy the violation of rights. If a compatible interpretation is not possible the court may issue a ‘declaration of incompatibility’. Such a declaration has no immediate effect on the parties before the court. Rather, it triggers a mechanism by which Parliament may amend the legislation in question. While impugned legislation is usually amended, the time taken to do so denies the successful applicant immediate relief from the violation of their human rights.
13. In contrast to challenges to national legislation based on incompatibility with the ECHR, a challenge to national legislation based in EU law offers a more potent remedy to a litigant. Since the *Factortame* case any national law that is incompatible with EU law is disapplied and EU law is applied instead. As such, a successful applicant can be given immediate relief. In the future applicants may seek to find a basis for human rights litigation in EU law so as to obtain this more potent remedy. To do so the litigation would have to relate to an act of the EU or one of the UK state while implementing EU law. Such litigation would likely require the courts to explore the scope of effect of the Charter (i.e. what ‘implementing EU law’ might mean) and the relationship between the Charter and the ECHR in greater depth.

3.3 EU Accession to the ECHR & UK Human Rights Law

14. The most pressing question in relation to EU accession concerns the relationship between the European Court of Justice and the European Court of Human Rights. While these two courts have, to date, had separate jurisdictions, the case of *Bosphorus v Ireland* demonstrates that some litigation may arise before both courts.⁵
15. The applicant in *Bosphorus* was a Turkish airline which claimed a breach of its property rights. An aeroplane that Bosphorus Airways had leased from the former Yugoslavian national airline was impounded in Ireland in accordance with European law implementing international sanctions against the former Yugoslavia. The applicant challenged the seizure in the Irish courts, and on a preliminary reference, before the European Court of Justice, which found the impounding lawful. The European Court of Human Rights stated that the EU was presumed to provide an equivalent level of protection to the ECHR system. As such, the European Court of Human Rights would not review EU actions unless an applicant could prove that the level of protection had become manifestly deficient. The application was therefore dismissed.
16. The current position of the European Court of Human Rights is thus to operate a rebuttable presumption of equivalent protection of human rights in the EU. Whether that position will be maintained after EU accession to the ECHR remains to be seen. The relationship between the two courts is of interest as it may be determinative of who may give the authoritative interpretation of ECHR and Charter rights.
17. In addition to requiring a resolution of the relationship between the two European Courts the accession of the EU to the ECHR also requires clarification of the correct procedures when a litigant seeks to challenge an action of the EU in national courts on the ground that the action is in violation of the ECHR. The national court might

⁵ *Bosphorus v Ireland* [2006] 42 EHRR 1.

then make a preliminary reference to the European Court of Justice, or rule on the case itself (aware of a potential application to the European Court of Human Rights), or, as in the *Bosphorus* case, both might occur. The latter outcome could result in very lengthy litigation involving three systems of courts.

18. It is not yet clear what, if any, effect EU accession to the ECHR will have on UK human rights law. A poor system of accession might simply complicate and prolong the length of human rights litigation. However, it is likely that inventive litigation before UK courts will explore the possibilities created by EU accession – as is clear from the creative use of the Human Rights Act over the past decade.

4. Use of the Charter Before the UK Courts

4.1 Overview of Charter and Legislation

19. Although it is over 18 months since the Charter came into force, it has not yet become a widely used tool in human rights litigation before the English Courts. To date there have been only six cases citing provisions of the Charter. A short summary of each of those cases is at Appendix 1.
20. Despite the relatively small number of cases citing the Charter, those cases reveal that its application has been varied and, on some occasions, extremely novel. The following Articles of the Charter have been raised in argument in one or more of the six cases: Articles 1, 2, 4, 7, 8, 11, 17, 18, 19, 24, 47, 51 and 52.
21. It is premature to indicate in which areas the use of the Charter is likely to predominate. The most common provisions to which counsel have referred currently are Articles 51 and/or 52, relating to interpretation and scope. However, given the limited volume of case-law at present, that is not surprising.

4.2 Interpretation of UK-Poland Protocol

22. Perhaps one of the reasons why counsel are yet to deploy Charter based arguments on a regular basis is due to the uncertainty of its applicability in the UK, following the Protocol adopted by the UK and Poland, as discussed above.
23. That issue is likely to be determined shortly by the European Court of Justice, as a result of the reference made in *R (NS) v Secretary of State for the Home Department*.⁶ The case involved a national of Afghanistan who arrived in Greece, seeking asylum. Due to the ill-treatment he claimed to have suffered in Greece, he fled and eventually came to the UK where he presented himself as an asylum seeker to the authorities. Although he passed through other Member States en route, he asserted that he was unable to claim asylum in any of those countries as he was under the control of an agent.
24. The UK Secretary of State for the Home Department determined that he should be returned to Greece pursuant to Regulation 343/2003 (the Dublin Regulation). The applicant sought a judicial review of that decision and claimed that to return him to Greece would involve a breach of his human rights under the ECHR and also a breach of his Charter rights. In particular, he sought to rely on Articles 1, 4, 18, 19(2) and 47 of the Charter.
25. The applicant failed at first instance.⁷ He then appealed to the Court of Appeal.⁸ A reference was made to the European Court of Justice in order to clarify a number of issues relating to the interplay between the Charter and the Dublin Regulation. The reference also included a question as to whether the answers to the substantive

⁶ The case is also known by two other names: *R (S) v Secretary of State for the Home Department* and *R (Saeedi) v Secretary of State for the Home Department*.

⁷ [2010] EWHC 705 (Admin).

⁸ [2010] EWCA Civ 990.

questions were altered in light of the UK's adoption of the Protocol.⁹ It is hoped that the European Court of Justice will take this opportunity to determine the applicability of the Charter in the UK.

26. The issue of the Protocol was raised again in the subsequent case of *R (Zagorski) v Secretary of State for Business, Innovation and Skills*¹⁰ (discussed further below). The High Court noted that the question was subject to a reference to the European Court of Justice but was able to determine the case before it on other grounds.

4.3 Scope of the Charter

27. *R (Zagorski) v Secretary of State for Business, Innovation and Skills*¹¹ involved a novel attempt to invoke the protections contained within the Charter. The claimants were two US prisoners, held on death row in Tennessee and Kentucky, since 1984 and 1994 respectively. Both of these US states execute death row prisoners by means of lethal injection. The precise cocktail of drugs that can be used to carry out an execution by lethal injection has been subject to detailed judicial scrutiny, as a result of which an approved procedure has been established. That approved process involves the injection of three separate drugs, the first of which is sodium thiopental, which is used as an anaesthetic.

28. The claimants became aware that stocks of sodium thiopental were running very low in the US and that steps were being taken to secure supplies from overseas, particularly from the UK. Seeking to prevent sale of the drug from the UK to the US, the claimants asked the UK Secretary of State to impose an export ban on sodium thiopental under the Export Control Act 2002. They argued that given the length of

⁹ See Case C-411/10: Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010 – *NS v Secretary of State for the Home Department*.

¹⁰ [2010] EWHC 3110 (Admin).

¹¹ *Ibid.*

time the claimants had spent on death row to date, execution would be in breach of their human rights and that allowing the export to go ahead would facilitate that breach.

29. The Secretary of State refused to make such an order on the basis that sodium thiopental is a legitimate drug which has many others uses and so an export ban would affect legitimate trade of medical value. Further, it would be unlikely to prevent any execution taking place on the basis that the drug is generally available and traded globally. The claimants sought judicial review of that decision. The Secretary of State made two arguments in its defence. First, it said that in making its decision it was not “implementing EU law” and therefore, pursuant to Article 51(1) of the Charter, the protections afforded by the Charter were not engaged. Second, it said that if it was wrong about that, the Charter nonetheless still had no application in the present case because the claimants, as US citizens, were outside of the jurisdictional scope of the Charter.
30. In respect of the first issue, the High Court relied on the decision of the European Court of Justice in *ERT*¹² and held that the Secretary of State’s power to issue export bans was a derogated power arising from EU law. The High Court therefore held that in deciding whether to impose an export ban, the Secretary of State was acting within the material scope of EU law and was therefore “implementing EU law” within the meaning of Article 51(1).
31. The defendant had sought to distinguish the present case on the basis that because the Secretary of State had decided *not* to legislate, that could not be an implementation of EU law. The High Court disagreed, finding that it would be surprising if the answer as to whether the Secretary of State was implementing EU law was determined by whether he did, or did not, impose an export ban.

¹² C-260/89 *ERT* [1991] ECR I-2925

32. In respect of the second issue, the matter of jurisdiction, the claimants argued that the Charter is not subject to the same jurisdictional restrictions as are contained within Article 1 ECHR. The claimants submitted that the Charter is engaged both where the claimants are present in the UK but also in the circumstances where a decision taken within a Member State (in this case the UK) would affect the treatment of the claimants abroad.
33. The High Court held that the rights recognised by Articles 2 and 4 of the Charter were co-extensive with the rights in Articles 2 and 3 ECHR, not only in terms of their content but also in terms of the scope *ratione personae* of their application. Thus, notwithstanding the fact that the Charter contained no express jurisdictional limitation akin to Article 1 ECHR, the provisions of Article 2 and 4 of the Charter did not confer any rights on the claimants. To conclude otherwise would very significantly expand the scope of protection offered by the Charter, which was not its intention.

4.4 Other Litigation

34. As identified in the table at Appendix 1, four other cases decided since 1 December 2009 have referred to the Charter. Of those cases, aside from the two discussed above, two further cases merit discussion. The remaining two cases mention the Charter only briefly.
35. *ZZ v Secretary of State for the Home Department* concerned an appellant with dual Algerian and French nationality.¹³ He was granted indefinite leave to remain in the UK in 1999. In 2005, he travelled to Algeria at which time the Secretary of State cancelled his indefinite leave to remain, excluding him from the UK on the grounds

¹³ [2011] EWCA Civ 440.

that his presence was not conducive to the public good for reasons of national security. A year later, the appellant arrived in the UK on a French passport but was refused admission on the basis of national security. The appellant exercised his right to appeal to the Special Immigration Appeals Commission (SIAC). The SIAC upheld the decision of the Secretary of State and reasons were given in open and closed judgments.

36. The Appellant appealed to the Court of Appeal. He argued that he was entitled to an effective remedy, pursuant to his rights contained within Article 47 of the Charter. Such an effective remedy required him to receive disclosure of at least “the gist” of the closed material which formed part of the national security case against him. The Court of Appeal, by a majority two to one decision, referred the question to the European Court of Justice. A decision from that reference is still pending.
37. *Preiss v Latvia* concerned an individual present in the UK whom the Latvian authorities sought to be extradited.¹⁴ In accordance with the Extradition Act 2003, as interpreted by the House of Lords¹⁵, notice to appeal against a decision to extradite must be made within seven days and must also be served on the requesting authority within that same period. The appellant appealed in the seven day period, but missed the time limit to serve notice of that appeal on the Latvian requesting authority. Accordingly, his notice of appeal was struck out.
38. The claimant appealed. He referred to the concession in *R (NS) v Secretary of State for the Home Department* (see above) that Article 47 of the Charter had direct application in the UK. He then sought to rely on the right in Article 19(2) of the Charter, restricting deportation. Reading these two Articles together, the claimant alleged that it was necessary to disapply the strict time limit for appeals on the basis that were he

¹⁴ [2011] EWHC 316 (Admin).

¹⁵ See *Mucelli v Government of Albania* [2009] UKHL 2.

to be deported and imprisoned in Latvia, he would receive a diet that would breach his rights under Article 3 ECHR.

39. The judge in the High Court rejected this argument on the basis, amongst other things, that it was not inappropriate to have a time limit in place. Further, if the appellant considered that his Article 3 ECHR rights would be breached by imprisonment in Latvia, it always remained open to him to take that issue to the European Court of Human Rights.

5. Conclusions

40. The paucity of UK case-law invoking the Charter to date renders it impossible to convincingly predict the impact the instrument will have in this jurisdiction. It may be that convergence of human rights standards across Europe renders the Charter a more evolutionary, rather than revolutionary, development. However, some of the recent cases – in particular *NS* and *Zagorski* – suggest that the Charter will at least result in some innovative litigation before UK courts. It is, at the very least, likely to complicate the task of both national and European judiciaries in the coming years.

4 July 2011

Appendix 1

Cases before the courts in England and Wales post 1 December 2009 which have referred to the Charter

<u>Case Name</u>	<u>Court</u>	<u>Date</u>	<u>Citation</u>	<u>Charter Articles Cited</u>	<u>Brief Description</u>
R (British Telecommunications Plc) v Secretary of State for Business, Innovation and Skills	High Court (Admin)	20 April 2011	[2011] EWHC 1021 (Admin); (2011) 108(18) L.S.G. 18	Art 7 - Respect for family and private life Art 8 - Protection of personal data Art 11 - Freedom of expression and information Art 17(1) - Right to property Art 52 - Scope of interpretation	The applicant sought judicial review of the Digital Economy Act 2010. As part of its case it stated that the contested provisions within the Act were disproportionate in their impact on ISPs, consumers, business subscribers and public intermediaries. The applicant stated that the requirement of proportionality is derived from a number of sources, including Articles 7, 8, 11 and 52 of the Charter provisions. In considering the proportionality argument, the High Court did not focus on the Charter and its provisions do not form part of its conclusions.
ZZ v Secretary of State for the Home Department	Court of Appeal (Civil Division)	19 April 2011	[2011] EWCA Civ 440	Art 47 - Right to effective remedy and fair trial Art 51(2) - Field of application	The appellant sought to rely on the right to an effective remedy within Article 47 of the Charter, to require disclosure of closed material which had been used against him to refuse his rights of entry into the UK on national security grounds. The issue was referred to the European Court of Justice.
Preiss v Latvia	High Court (Admin)	7 February 2011	[2011] EWHC 316 (Admin)	Art 19(2) - Protection in the event of removal, expulsion or extradition Art 47 - Right to effective remedy and fair trial	The claimant sought to overturn the decision that his application to challenge an extradition order be struck out because it was out of time. He claimed that returning him to Latvia would breach his rights under Art 3 ECHR. He relied on his right to a fair trial under Art 47 and his right against deportation as enshrined in Art 19(2) in protection of those rights. The High Court dismissed his claim.

<u>Case Name</u>	<u>Court</u>	<u>Date</u>	<u>Citation</u>	<u>Charter Articles Cited</u>	<u>Brief Description</u>
R (Zagorski) v Secretary of State for Business, Innovation and Skills	High Court (Admin)	29 November 2010	[2010] EWHC 3110 (Admin); [2011] Eu. L.R. 315; [2011] H.R.L.R. 6; [2011] A.C.D. 33	Art 2 - Right to life Art 4 - Prohibition of torture and inhuman or degrading treatment or punishment Art 51(1) - Field of application Arts 52(2) and 52(3) - Interpretation	Two US death row prisoners sought judicial review of the Secretary of State's decision not to prevent the export of a drug used in lethal injections. They argued that exporting the drug would breach their Charter rights. The High Court held that the Secretary of State was implementing EU law when refusing to impose a ban, but held that the claimants lacked jurisdiction to be able to rely on rights contained within the Charter. Their claim therefore failed.
X v Secretary of State for Justice	High Court (Admin)	24 August 2010	[2010] EWHC 2507 (Admin); [2011] Fam. Law 13	Art 24 - Rights of the child	The claimant prisoner applied for judicial review of a refusal of the defendant secretary of state to allow him "level 4" contact with his children. One of his pleaded grounds of appeal related to his rights under Art 24 of the Charter. However, permission to appeal on this ground was not granted on the basis that there was no argument that the policy pursued by the Secretary of State breached Art 24.
R (NS) v Secretary of State for the Home Department (also known as R (S) v Secretary of State for the Home Department)	Court of Appeal (Civil Division)	12 July 2010	[2010] EWCA Civ 990	Art 1 - Human Dignity Art 2 - Right to life Art 18 - Right to asylum Art 19(2) - Protection in the event of removal, expulsion or extradition	The appellant had first sought asylum in Greece. He then fled to the UK, following alleged ill-treatment in Greece. The UK sought to return him to Greece in line with the Dublin Regulation. The appellant claimed that doing so would breach his Charter rights. A reference was made to the ECJ, in respect of issues relating to the interplay between the Charter and the Dublin Regulation, together with the issue of the application of

<u>Case Name</u>	<u>Court</u>	<u>Date</u>	<u>Citation</u>	<u>Charter Articles Cited</u>	<u>Brief Description</u>
and further known as R (Saeedi) v Secretary of State for the Home Department)				Art 47 - Right to effective remedy and fair trial Art 51 - Field of application Art 52(3) - Interpretation	the Charter in light of the UK-Poland Protocol.