



**SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND  
IN COOPERATION WITH ACA-EUROPE**

**MAPPING THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPEAN ADMINISTRATIVE  
COURTS**

**Questionnaire**

*The Finnish presidency of ACA-Europe focuses on the vertical dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This questionnaire addresses this vertical dialogue from the perspective of the pluralist framework of European fundamental rights protection on the one hand and the national constitutional framework of fundamental rights on the other hand.*

*The term “fundamental right” in the title of the questionnaire is used as an umbrella concept. It refers to rights recognized as fundamental by the respective legal orders. This implies that those rights are in some sense supreme norms, often judicially protected against violation by public authorities, including the legislature.*

*In national legal systems, these rights are usually laid down by the constitution, or they may be provided by domestically applicable international human rights conventions. Within the scope of application of European Union law, the Charter of Fundamental Rights (CFREU) provides the main source of fundamental rights. Quite often, these various sources of law are simultaneously applicable in concrete cases. Furthermore, each individual system usually provides for specific court(s) or other authorities regarded as supreme or authoritative. In this sense, the fundamental rights protection in Europe may be regarded as “pluralist”.*

*As legal norms, fundamental rights norms in Europe have several features that complicate their application in national courts. First, they are usually open to different interpretations, which in turn emphasises the role of precedents delivered by both national and European courts. Secondly, because of the pluralist nature of the European fundamental rights system, national courts sometimes need to decide which of the different sources of fundamental rights should be given primacy over the others and on what grounds. Third, it seems that there is not a single right answer to the second question. For instance, European Union law has primacy over national law, and this also applies to national constitutions. However, as provided by Article 52.4 of the CFREU, fundamental rights recognized by the Charter should be interpreted in harmony with the constitutional traditions of the Member States.*

*Building on the above-mentioned framework, the following questionnaire is prepared with a view to a comparative assessment of the functioning of the system of fundamental rights protection in the light of the legal practice of supreme administrative jurisdictions in Europe.*

*For this purpose, the questionnaire starts with questions concerning the basic institutional framework for the application of fundamental and human rights in the domestic legal order and then moves to questions about the modes in which the interpretation of national and European fundamental rights norms interact in the practice of national courts.*

*Acknowledging the differences between European legal cultures, please, feel free to complement any answer with additional and/or clarifying information.*





### **I Background information**

1. *The formal title of your court? Please include the country.*

The Supreme Court of the United Kingdom.

Justices of the Supreme Court also carry out the functions of the Judicial Committee of the Privy Council (JCPC). The JCPC originated as the highest court of civil and criminal appeal for the British Empire. It now fulfils the same purpose for many Commonwealth countries, as well as the United Kingdom's overseas territories, crown dependencies, and military sovereign base areas. In our response to this questionnaire, we have not included information on the work of the JCPC.

2. *The number of decisions your court gives annually (average)?*

The Supreme Court has typically given between 55 and 65 judgments per year.

3. *The number of published precedents your court gives annually (average)?*

See answer to question 2.

### **II Constitutionality of legislation and the applicability of fundamental rights norms. Mark your answer with bold letters.**

4. *Does your country have a written Constitution?*

- Yes
- No**

5.a *Is your court authorised to apply the (written or unwritten) Constitution directly in its decisions?*

- Yes**
- No

5. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often**

5. c. *If yes, what areas of constitutional law are typically involved in these cases?*

- Fundamental rights**
- Democratic principles
- Rule of law**
- Federalism and local self-government**
- Legislative process
- Finance
- Other. Please describe below.

5. d. *If your court is not authorized to apply the Constitution directly, please explain briefly how your national system works.*





N/A

6. a. Is your court authorised to repeal a piece of ordinary legislation if it is found unconstitutional?

- Yes
- No

6. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often
- Very often

N/A

6.c. If not, which institution, if any, has the power to decide on the constitutional validity of ordinary legislation (either in abstracto or in concreto)?

No judicial body in the United Kingdom is permitted to invalidate an act of the Parliament of the United Kingdom. This is subject to two qualifications.

First, section 4 of the Human Rights Act 1998 (HRA) permits the higher courts (including the Supreme Court) to make a declaration that an act of the UK Parliament is incompatible with the European Convention on Human Rights (ECHR). This declaration does not affect the validity, continuing operation, or enforcement of an act of the UK Parliament. If a declaration is made under section 4 of the HRA, the UK Government may, if it considers that there are compelling reasons to do so, by order make such amendments to the legislation as it considers necessary to remove the incompatibility (see section 10(2) of the HRA).

Second, courts are, however, permitted to invalidate acts of devolved legislatures i.e., the Scottish Parliament, the Welsh Parliament, and the Northern Ireland Assembly. Under the acts of the UK Parliament establishing these legislatures, each legislature is prohibited from legislating on matters reserved to the UK Parliament or in violation of the ECHR. If a court concludes that a statute passed by one of these devolved legislatures relates to reserved matters or violates the ECHR, then it may declare it to be invalid.

This may be done either before the act has entered into force (in concreto) or prior to entry into force (in abstracto). For instance, under section 32A of the Scotland Act 1998, the chief law officers of Scotland (the Lord Advocate and the Attorney General) may refer a bill passed by the Scottish Parliament to the Supreme Court for a determination of whether it is within the legislative competence of the Scottish Parliament before that act enters into force. Similarly, in any proceedings concerning an individual, where those proceedings relate to an act of the Scottish Parliament, the individual concerned may raise the question of whether that act is within the competence of the Scottish Parliament (see schedule 6 of the Scotland Act 1998). Similar provisions exist in the acts of the UK Parliament establishing the Northern Ireland Assembly and the Welsh Parliament.

7. During the last 10 years, has your court given precedents involving the following topics:

- Right to asylum**
- Social rights**
- Environmental rights**
- Rights of future generations





- Rights of indigenous peoples
- Human Dignity**
- Fundamental rights in the context of national security**
- Fundamental rights in the context of state of emergency

8. In the cases where your court has referred to the Constitution, what kind of role has the Constitution had in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation**
- A source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e., fundamental rights friendly interpretation)**
- A decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand**
- An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds
- Other. Please explain and/or provide an example.

Please note that the above answers are subject to the fact that, in the UK, there is no distinction between (i) constitutional legislation and (ii) ordinary legislation passed by the UK Parliament. All acts of the UK Parliament are of equal legal status.

### **III Interplay of national and European fundamental rights and international human rights norms**

9.a. Is your court authorised to apply international human rights conventions and follow their international case law in its decisions?

- Yes**
- No

Please see the answer to question 21 below for further detail.

9. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often**
- Very often

10.a. Is your court authorised to apply the Charter of Fundamental Rights of the European Union (CFREU) in its decisions?

- Yes
- No**

See the answer to question 12 below for further detail.





10. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often
- Very often

N/A

11. *When applying fundamental rights provisions of the Constitution, is your court also simultaneously applying similar provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR)?*

- Very rarely
- Sometimes
- Often
- Very often**

The human rights framework in the UK is based upon the HRA. That statute brings the rights under the ECHR into domestic UK law. For further details please see the answer to question 21 below.

12. *When applying fundamental rights provisions of the Constitution in the field of application of European Union law, is your court also applying corresponding provisions of the CFREU?*

- Very rarely**
- Sometimes
- Often
- Very often
- My court does not apply the Constitution in the field of application of European Union Law.

Prior to the UK's exit from the EU, the Charter was applicable in the UK in the same manner as other EU law pursuant to the (now repealed) European Communities Act 1972. It was therefore binding on national authorities (including courts) when acting within the scope of EU law.

Following the UK's exit from the EU, only those EU laws which are categorised as "*retained EU law*" under UK law form a part of the domestic UK law. The Charter was not transposed into domestic UK law as "*retained EU law*". The Charter does not therefore form part of domestic law following exit day. This does not, however, affect the retention of the underlying fundamental rights which exist irrespective of the Charter. Substantive EU law and the principles which underpin them flowing from the Charter were converted into domestic law to the extent they constitute "*retained EU law*" under the relevant domestic legislation. As such, they will continue to be enshrined in UK domestic law, through domestic legislation, the common law, or retained EU law. This includes EU legislation and decisions of the Court of Justice of the EU which refer to the Charter (see also the answer to question 14 below). For example, the interpretation (as set out by the CJEU) of a piece of EU which is "*retained EU law*" is incorporated into domestic UK law, even if the CJEU based that interpretation upon the principles enshrined in the Charter.

The courts may also still apply the Charter in specific circumstances. The agreement reached between the EU and the UK regarding the UK's exit from the EU (the "Withdrawal Agreement") and the Protocol on Ireland and Northern Ireland (the "NI Protocol") both expressly identify matters in the UK to which EU law remains directly applicable post-exit. The Withdrawal Agreement includes the Charter within the scope of 'Union Law'





as defined therein. Several rights of EU nationals, for example as set out in articles 15 and 16 of the Withdrawal Agreement, must be applied by the UK “in accordance with Union law”, and therefore also in accordance with the Charter (article 4). Similarly, the Charter is relevant under article 2 of the NI Protocol, which requires that that the UK’s exit from the EU shall not diminish the rights as enshrined in law prior to the UK’s exit from the EU. The Charter is, therefore, an interpretative tool for such matters falling within the Withdrawal Agreement and the NI Protocol. This was confirmed by the court in *SSWP and AT* (UA-2022-001067-USTA), which concluded that the Charter continues to apply to certain EU citizens residing in the UK who are within the scope of the Withdrawal Agreement, and in *SPUC* [2022] NIQC 9, in which the court confirmed that the Charter applies in the context of the UK’s implementation of the NI Protocol.

13. In the cases where your court refers to the ECHR, what kind of role does the convention have in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation**
- A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation)**
- A decisive role so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand**
- An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR.
- Other. Please explain and/or provide an example.

14. It follows from the case law of the CJEU (see, eg, C-14/83, von Colson) that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law. Within the scope of the application of EU law, how frequently does this kind of interpretation and application of law appear in the argumentation of your court?

- Never
- Rarely**
- Sometimes
- Often

Prior to the UK’s exit from the EU, the Supreme Court was bound by the judgments of the CJEU.

However, following the UK’s exit from the EU, the Supreme Court is no longer bound by the case law of the CJEU. Under section 6 of the European Union (Withdrawal) Act 2018, only judgments rendered by the CJEU on or before 11pm on 31 December 2020 are binding on UK courts. Any CJEU judgments handed down on matters referred from UK courts before 31 December 2020 are also binding on UK courts. CJEU judgments handed down after 31 December 2020 are not binding on UK courts.

The Supreme Court also has the power to depart from any CJEU case law, even if handed down before 31 December 2020. In doing so, the Court will apply the same test as it would apply in deciding whether to depart from its own case law i.e., where it is right to do so (section 6(5) European Union (Withdrawal) Act 2018; see for example *Warner v Tuneln* [2021] EWCA Civ 441).

UK courts are, however, free to have regard to CJEU case law should they consider it appropriate when interpreting EU law which has been incorporated (as “retained EU law”) into UK law following Brexit,







including decisions handed down after that date, so far as they are relevant to the matter before the Court (section 6 European Union (Withdrawal) Act 2018). For example, in *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998, the Court of Appeal of England and Wales had regard to a post-31 December 2020 CJEU decision in C-154/20 *Kemwater ProChemie* when interpreting UK VAT legislation that had implemented the requirements of the EU Principal VAT Directive.

15. *The obligation to interpret national legislation in line with EU law is extensive, but it is not without limits. According to the case law of the CJEU (eg, C-12/08, Mono Car Styling), that obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem. Where there is any inconsistency between national law and Union law, which cannot be removed by means of such a construction, the national court is obliged to declare that the provision of national law which is inconsistent with (directly effective) Union law is inapplicable (eg 152/84, Marshall). How frequently does this kind of reasoning appear in the argumentation of your court?*

- Never
- Rarely
- Sometimes
- Often

16. *Has your court given any precedents regarding the application of Article 51 (Field of application) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).*

No. See the answer to questions 12 and 14.

17. *Has your court given any precedents regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).*

No. See the answer to questions 12 and 14.

18. *In the cases where your court has referred to the CFREU, what kind of role has the Charter had in the argumentation? Choose all applicable options.*

- Symbolic / Decorative
- An additional argument supporting a decision based on EU law and ordinary domestic legislation
- A source of interpretation which provides for a correct application of EU law and ordinary legislation in the concrete case at hand
- A decisive role so that the decision is based solely on the CFREU in a situation where EU law and national legislation is silent on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside / declared invalid on grounds based on the CFREU
- Other. Please provide an example.

N/A

19. *Has your court given any precedents regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR? If yes, please provide a brief description of the context and outcome of the decision(s).*

No. See the answer to questions 12 and 14.





20. Has your court given any precedents regarding the application of Article 53 (Level of protection) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No. See the answer to questions 12 and 14.

21. Has your court applied fundamental rights laid down in the Constitution in a way that provides for a better standard of protection of individual rights than those provided for in international human rights conventions? If yes, please explain and/or provide an example.

The UK's human rights law is based primarily upon the HRA and common law principles, supplemented by various other acts of Parliament addressing specific topics, such as immigration law. The HRA incorporates certain rights under the ECHR into UK domestic law. Section 2 of the HRA requires that a court or tribunal determining a question of whether an individual's rights under the act have been breached must consider the judgments of the ECtHR.

In the judgment of *R (Ullah) v Special Adjudicator* [2004] UKHL 26, the House of Lords (the Supreme Court's predecessor) stated that this provision requires that, in the absence of some special circumstances, the UK courts should follow any clear and constant jurisprudence of the ECtHR, but that they should not exceed the scope of the ECHR as laid down by the ECtHR.

The courts will inevitably be faced with situations which have not yet come before the ECtHR. In those situations, the UK courts will aim to anticipate, where possible, how the ECtHR might be expected to decide a given case on the basis of the principles established in the ECtHR's existing case law, even if some incremental development may be involved (see paragraph 59 of *R (AB) v Secretary of State for Justice* [2021] UKSC 28 and paragraph 101 of *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56).

Save for the above points, we are not aware of the UK providing for a better standard of protection for individual rights promulgated under international conventions on human rights other than the ECHR. It should be noted that under the UK's dualist system, other international human rights conventions do not have direct effect within the domestic UK legal order unless specifically incorporated by an act of the UK Parliament.

22. Has your court applied fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to either international human rights conventions or to CFREU, and the case law relating to them? If yes, please explain and/or provide an example.

See the answer to questions 12 and 14.

