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The Charter and its applicability in UK law

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Human Rights analysis: The UK government's European Security Committee recently published a report into the applicability of the EU Charter of Fundamental Rights (the Charter). Benjamin Burrows, solicitor in the human rights department at Leigh Day, looks at the report and its implications.

Original news

Report: The application of the EU Charter of Fundamental Rights in the UK--A state of confusion, LNB News 02/04/2014 121

The Charter does currently apply in the UK and will affect how existing fundamental rights are applied, according to a report by the House of Commons European Scrutiny Committee. The Committee has called on ministers to ensure 'beyond any doubt' the Charter will not in future apply in the UK, in particular through an amendment to the European Communities Act 1972.

What are the key findings and recommendations contained in the report?

There is currently a state of confusion in the UK about the applicability of the Charter in UK law. This report arises from that confusion, and aims to provide clarification and recommendations.

The report's main findings are as follows:

- o the Charter is directly effective in the UK courts, and has supremacy over any UK law which is inconsistent with EU law
- o therefore, the Charter can be used to both interpret and enforce EU law in UK courts
- o however, the Charter does not apply to all areas of UK law, only those areas which fall within scope of EU law--it does not create new rights for litigants or powers for the European Court of Justice (ECJ)
- o nonetheless, the ECJ has interpreted the applicability of EU law broadly, and, as such, the Charter will be used to broaden the ambit of EU law and lead to an increase in human rights litigation in the UK courts

Ultimately, the report's main recommendation is that the government urgently introduce primary legislation to disapply the Charter from UK law.

How surprising are these conclusions?

These conclusions have come as a surprise to many judges and politicians. The Charter was given legally binding status by the Lisbon Treaty in December 2009. When negotiating the Lisbon Treaty, the government negotiated and signed Protocol 30. Protocol 30 was widely assumed to be an 'opt-out' from the Charter.

However, in his judgment in the High Court case of *R (on the application of AB) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin), [2013] All ER (D) 94 (Nov) in November 2013, Mostyn J expressed surprise that, following a judgment in the ECJ case of *NS v Secretary of State for the Home Department (Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK); ME v Refugee Applications Commissioner (Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK)*: Joined Cases C-411/10 and C-493/10 [2013] QB 102, [2012] 3 WLR 1374, [2012] All ER (EC) 1011, the Charter was directly enforceable in UK courts and did extend to UK law. Mostyn J's surprise was subsequently echoed by MPs and a House of Commons debate ensued.

This report emphatically finds that Protocol 30 was in 'no sense' an opt-out from the Charter, and that there is 'no doubt' that the Charter extends to UK law (albeit only UK law which falls within scope of EU law).

What are the implications for lawyers and their clients?

The implications of these conclusions are significant for lawyers and their clients, as well as the courts themselves. As recognised by this report, the clarification over its applicability is likely to result in the Charter, and the rights it protects, being relied upon more frequently in the UK courts. This is largely because the Charter may be seen by lawyers and their clients as a more effective mechanism in protecting rights than the European Convention of Human Rights (the Convention).

Firstly, the Charter covers a broader range of rights than the Convention. Secondly, the Charter can be applied between private individuals and bodies. Thirdly, the Charter can be used to enforce, as well as interpret, rights in UK courts.

The latter is particularly significant as UK courts would be obliged to disapply an Act of Parliament which is inconsistent with a Charter right, as opposed to simply making a 'declaration of incompatibility' where an Act of Parliament is incompatible with a Convention right.

The implication for the courts will be that, as well as determining more rights-based claims, they will be left with the task of determining the complicated test of whether or not the UK law subject of the claim falls within scope of EU law.

How does this fit in with other developments in this area?

Any increase in rights-based claims under the Charter would be consistent with the significant increase in rights-based claims under the Convention, which followed the introduction of the Human Rights Act 1998 (HRA 1998).

However, it is likely any such increase in claims under the Charter would meet the same opposition from the government as the increase in claims under the Convention. This staunch and growing opposition has stemmed from fears that Parliamentary Sovereignty over the UK courts is being usurped by HRA 1998 and has culminated in calls for HRA 1998 to be abolished.

As stated above, it seems arguable that the Charter may in fact go further than HRA 1998 in usurping Parliamentary Sovereignty, and, for that reason alone, may be in a more vulnerable position than the Act. This report is clear that, to abolish HRA 1998, would not undermine the applicability of the Charter.

Therefore, the report, ultimately, recommends that the government introduce primary legislation to disapply the Charter from UK law.

However, such a move would amount to a direct conflict with EU law, and would be likely to lead to infringement proceedings against the UK. Therefore, it seems more likely that the government will act upon the report's other recommendation which would be to intervene in a test case before the ECJ with a view to arguing for a higher threshold for the test of whether or not the UK law subject of the claim falls within scope of EU law.

Interviewed by Anne Bruce.

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