

## **Response of the Equality and Human Rights Commission to the Consultation:**

### **Consultation details**

Title:	What are the human rights implications of Brexit?
Source of consultation:	Joint Committee on Human Rights
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## Executive summary

The implications of the United Kingdom's (UK) decision to leave the European Union (EU) will depend on the terms of our future relationship with the European Union (EU). The UK leaving the EU could have the following implications for human rights:

- It would be possible for the UK to repeal domestic laws which protect or advance human rights, which we are currently required to have in place by EU laws
- The removal of certain constraints under EU law, for example, rules which regulate public procurement and prohibit more favourable treatment of a person because of a protected characteristic, may give rise to opportunities to promote equality or strengthen human rights protection
- The UK would not be bound to implement EU laws which come into force after the UK has left the EU, some of which may enhance the enjoyment of rights
- The future status of the case law of the Court of Justice of the European Union (CJEU, formerly European Court of Justice or ECJ) in relation to domestic legal concepts which are derived from or reflect concepts in EU law will be uncertain
- The EU is an important forum through which the UK currently cooperates internationally on cross-border human rights issues. When the UK leaves the EU, it will no longer take part in this forum
- Some mechanisms which are currently available under EU law and the devolution settlements in Scotland and Wales, which allow an individual to challenge laws and acts which breach their rights will no longer be available
- Some rights which are protected by the Charter will no longer be protected in our domestic legal order
- New immigration rules could mean that families who wish to live together no longer have the right to do so
- New immigration rules could affect staffing levels for services which play an important role in the fulfilment of human rights

- EU funding which supports the human rights infrastructure in the UK, such as civil society organisations, academic research and the advice sector, will no longer be available.

The UK is currently a world leader in relation to the protection and promotion of equality and human rights and should continue to be so. In the Commission's view, at least the current level of equality and human rights protection should be maintained now and in the future. To that end we make the following key recommendations:

- Domestic rights-enhancing laws which are currently underpinned by EU law should not be diminished
- EU rights-enhancing laws which currently have effect in the UK without domestic implementation should be given domestic effect and should only be repealed following a rigorous equality and human rights impact assessment
- The UK Government should consider whether the removal of constraints imposed by EU laws provides the opportunity to introduce measures to further advance human rights or equality
- The UK should make an explicit commitment to remaining amongst the best in the world in relation to the protection of equality and human rights. It should make a commitment to analyse future rights-enhancing laws emanating from the EU and elsewhere, with a view to considering whether similar measures are appropriate for implementation in the UK
- The Government should ensure clarity in relation to the status of existing and future CJEU case law in the domestic legal order
- The Government should ensure mechanisms are in place through which it can continue to collaborate internationally on human rights issues
- A very careful analysis will be required of the protections that will be lost when the EU Charter ceases to have effect. It should ensure that there is no regression in human rights protections, for example by enhancing the status in domestic law of unincorporated international human rights treaties
- New immigration rules should be subject to a rigorous equality and human rights impact assessment

- The UK Government should conduct a rigorous equality and human rights impact assessment of the loss of EU funding which supports the enjoyment of human rights and carefully consider how it will ensure that the human rights infrastructure in the UK is not undermined by the loss of EU funding.

The Equality and Human Rights Commission (the Commission) will carefully scrutinise measures taken in the wake of the UK's decision to leave the EU which have implications for the protection or advancement of equality and human rights in the UK, and will seek opportunities to enhance protections.

## Introduction

The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence in response to the Joint Committee on Human Rights' call for evidence on the human rights implications of Brexit.

As a National Human Rights Institution, the Commission has an important role to play in advising on changes that may impact on the enjoyment of human rights and equality in Great Britain. This role is reflected in section 9 Equality Act 2006. The Commission considers itself a guardian of human rights protection and will seek to ensure, whatever process is followed and whatever arrangements are put in place following the United Kingdom's exit (Brexit) from the European Union (EU), that at least the current level of equality and human rights protection is maintained now and in the future. The Commission would also support measures which permit or require wider or stronger action to promote equality and human rights across the Great Britain and/or within its constituent nations.

EU law is an important source of human rights law. Human rights principles form part of the Treaty on European Union (the TEU). Article 2 of the TEU provides that respect for human rights is one of the values on which the EU is founded.<sup>1</sup> Article 6 of the TEU recognises three sources of fundamental rights: the Charter of Fundamental Rights of the European Union (the Charter), the European Convention for the Protection of Human Rights (the ECHR) and the constitutional traditions common to the Member States.<sup>2</sup> The Charter is granted the same legal value as the Treaties<sup>3</sup> and therefore has become part of primary EU law.

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<sup>1</sup> Article 2 provides: "The Union is founded on the values of respects 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 men and women prevail."

<sup>2</sup> Although Article 6 does not itself indicate how the sources of fundamental rights relate to one another, and does not indicate whether the Charter should have priority, the European Court of Justice (ECJ) has confirmed in a number of cases that the Charter is the primary point of reference when considering fundamental rights, see Case C-577/11 *DKV Belgium SA v. Association Belge Des Consommateurs Test Achats ASBL* [2011] ECR I-773; [2012] 1 WLR 1933 ("*Test-Achats*") and Cases C-293/12, 594/12 *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources* [2015] QB 147 ("*Digital Rights Ireland*").

<sup>3</sup> Article 6(1) TEU.

The TEU also makes provision in respect of equality, providing that the EU shall “combat social exclusion and discrimination... equality between women and men... and protection of the rights of the child”.<sup>4</sup> Similarly, the Treaty on the Functioning of the European Union (the TFEU) places obligations on EU institutions and Member States in respect of combatting discrimination and ensuring equal treatment. As well as the provisions of the Treaties and the Charter, the EU has promulgated further fundamental rights in secondary legislation (in Regulations and Directives) including in relation to discrimination, data protection, protection from trafficking and many other areas.

When the UK leaves the EU, it will need to enter into some sort of trading arrangement with the EU, which may well require the UK to comply with some EU law. For example, Norway has signed the Treaty establishing the European Economic Area (EEA) and they are required to comply with EU social law relating to EEA activity. Similarly, Switzerland’s bilateral trade agreements with the EU require compliance with EU legislation relevant to those areas covered by the agreements.<sup>5</sup> At this stage, we do not know whether the nature of the UK’s future relationship with the EU will require the UK to maintain or introduce domestic measures to implement existing or future EU rights-enhancing laws. At this stage, we have identified the principal ways in which human rights protection could, subject to the terms of our future relationship with the EU, be affected by the UK leaving the EU. We have identified below the ways in which human rights protections currently arise, to a degree, from the UK’s membership of the EU, and given examples of areas of law in which this is the case. In the time available we have not attempted to identify every such area or law.

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<sup>4</sup> Article 3(3) TEU, and see also Article 9 which provides that the EU “shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”.

<sup>5</sup> Overall, around 100 bilateral agreements currently exist between the EU and Switzerland. The cornerstone of EU-Swiss relations is the Free Trade Agreement of 1972. Other agreements cover: free movement of persons, technical trade barriers, public procurement, agriculture and air and land transport, scientific research, participation in Schengen and Dublin, taxation of savings, processed agricultural products, statistics, combating fraud, participation in the EU Media Programme, the Environment Agency, and Swiss financial contributions to economic and social cohesion in the new EU Member States, Swiss participation in EU education, professional training and youth programmes.

Much EU derived rights-enhancing law is fully incorporated into domestic law. Where this is the case there is no reason that any changes to these laws should automatically follow Brexit. Even in respect of those rights enhancing laws which are not currently incorporated into domestic law, but which have direct effect in the UK, the Government has indicated that existing protections will be maintained post-Brexit via a Great Repeal Bill, to be reviewed on a case by case basis by Parliament.<sup>6</sup> The principal implication of leaving the EU for human rights in the UK is that the UK will no longer be required by our EU membership to maintain these protections.

## EU law incorporated into British law

There is a very substantial body of EU law made by Directives that has been incorporated into domestic law either by primary or secondary legislation. These domestic laws will remain in force unless repealed by Parliament. It is, of course, procedurally easier to repeal provisions which have been implemented by secondary legislation.<sup>7</sup> Many of these Directives promote human rights. For example:

- Equality is a fundamental human right. The Equality Act 2010 implements and indeed goes beyond what is required by EU equality law<sup>8</sup> providing protection against age, disability, gender

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<sup>6</sup> 'As we repeal the European Communities Act, we will convert the 'acquis' - that is, the body of existing EU law - into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free - subject to international agreements and treaties with other countries, and the EU on matters such as trade - to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as it did before. Any changes in the law will have to be subject to the full scrutiny and proper Parliamentary debate. Any let me be absolutely clear: existing workers' legal rights will continue to be guaranteed in law - and they will be guaranteed for as long as I am Prime Minister'. The Prime Minister, Theresa May, 2/10/16.

<sup>7</sup> Maternity and Parental Leave etc Regulations 1999; Part time Workers (Prevention of Less Favourable Treatment) Regulations 2000; Agency Worker's Regulations 2010; Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. In its' Inquiry into the Meat Industry the Commission found evidence of widespread poor treatment of agency workers, particularly migrant and pregnant workers, both by agencies and in the meat processing factories. Some amounted to breaches of the law and licensing standards, such as coercing workers to do double shifts when they are tired or ill or clear affronts to respect and dignity.

<https://www.equalityhumanrights.com/en/inquiry-meat-and-poultry-processing-sectors>

The Commission's Pregnancy research found worse treatment of agency and fixed term workers in some areas. <https://www.equalityhumanrights.com/en/our-work/news/three-four-working-mothers-say-they%E2%80%99ve-experienced-pregnancy-and-maternity>

<sup>8</sup> Race Directive 2000/43/EC, The Recast Gender Directive 2006/54/EC, The Employment Framework Directive 89/39/EEC, Arts 8 and 10 Treaty on the Functioning of the EU, Gender Goods and Services Directive 2004/113/EC

reassignment, pregnancy and maternity, race, sex, sexual orientation and religion or belief discrimination in Great Britain.

- Some workers' rights are human rights, as protected by the UN Convention on Economic, Social and Cultural Rights and international treaties prohibiting discrimination. These include regulations relating to maternity, paternity and parental leave, part time workers, fixed term and agency workers. We welcome the Prime Minister's statement that "existing workers' legal rights will continue to be guaranteed in law - and they will be guaranteed for as long as I am Prime Minister".<sup>9</sup>
- The right to respect for private life is a human right protected by a number of international conventions including the ECHR.<sup>10</sup> The Data Protection Act 1998 (DPA) is the principal domestic legislation which gives effect to EU law in this area.<sup>11</sup>
- Trafficking in human beings is an infringement of human rights, prohibited by the ECHR<sup>12</sup> and other international instruments.<sup>13</sup> In EU law, Directive 2011/36/EU establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also requires assistance, support and protection to be given to victims of trafficking. The implementation of the Directive into domestic law in England and Wales<sup>14</sup> has meant that civil legal aid should be available for an application for leave to enter or remain in the UK where there has been a conclusive determination that the individual is a trafficking victim; a claim under employment law arising in connection with the exploitation of an individual who is a trafficking victim; or a claim for damages arising in connection with the trafficking or exploitation of a trafficking victim. In Scotland, support and assistance for victims of human trafficking can include counselling and legal advice.<sup>15</sup> The principles in the Directive have also been

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<sup>9</sup> The Prime Minister, Theresa May, 2/10/16

<sup>10</sup> Article 8 ECHR.

<sup>11</sup> In particular to Directive [95/46/EC](#).

<sup>12</sup> The prohibition of slavery under article 4 ECHR includes trafficking, see *Rantsev v. Cyprus and Russia*, Application no. 25965/04.

<sup>13</sup> Including the Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol") and the Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention").

<sup>14</sup> Part 5 Modern Slavery Act 2015

<sup>15</sup> S.9 Human Trafficking and Exploitation (Scotland) Act 2015

used to ensure that a Court stayed a prosecution of a trafficking victim who committed an offence under compulsion.<sup>16</sup>

- EU law has also resulted in progress towards improved accessibility and safety in for disabled people in areas such as the use of braille in medicine labelling.<sup>17</sup>

The primacy of EU law means that domestic laws implementing EU rights-enhancing Directives cannot be removed whilst the UK remains bound by EU law. The Government has indicated an intention not to repeal any of this body of law as an immediate response to Brexit. However, leaving the EU will mean that these rights could, as a matter of domestic law, be removed or diluted by a future government.

Scottish Ministers will need to consider whether they wish to retain secondary legislation made under s.2 European Communities Act 1972 which implements EU law in relation to devolved matters. There are Scottish statutory instruments which relate to children's rights, family law and rights of accused persons and victims in criminal law. There has been no indication that the Scottish Government has any plans to repeal any relevant Scottish legislation.

### **Directly applicable EU law not incorporated in British law**

There is also a substantial body of directly applicable EU law including rights under the Treaties, Regulations and the Charter which have not been incorporated into British law. Currently these laws, particularly the Charter, are a significant source of directly enforceable human rights law which the courts can apply when considering a matter within the scope of EU law, such as some aspects of workers' rights.

For example, accessibility is a fundamental human right for disabled people. At present, none of the equality Directives make express provision to outlaw discrimination against disabled people in the context of transport. However, there are some specific EU Regulations which have progressed the rights of disabled people regarding accessible

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<sup>16</sup> *R v L* [2013] EWCA Crim 991. The defendants were Vietnamese nationals who had been trafficked to the United Kingdom as children and forced to cultivate cannabis plants on a large scale. They were all convicted of drugs offences. Their appeal was allowed.

<sup>17</sup> EU Medicinal Products for Human Use Directive 2004/27/EC

transport by air,<sup>18</sup> by bus,<sup>19</sup> by rail,<sup>20</sup> and by ship.<sup>21</sup> There are some areas where EU accessibility regulations apply to a wider group than those protected by the definition of disability under the Equality Act 2010.<sup>22</sup> There is also mutual recognition of preferential terms for blue badge parking in all EU countries. Secondary legislation has been made under S. 2 of the 1972 Act which plays a vital role in ensuring accessible transport for disabled people.

We welcome the Government's announcement that the existing rights guaranteed under EU law will be initially retained via a Great Repeal Bill. It is not, though, clear whether the Great Repeal Bill will "save" all of this body of law, such as the Charter and, in any event, once the UK has left the EU, it would be open to Parliament to repeal any protections initially saved by the Great Repeal Bill.

One particularly important source of directly applicable rights is the EU Charter of Fundamental Rights. The Charter reaffirms the rights, freedoms and principles already recognised in EU law. It is divided into sections: dignity, freedoms, equality, solidarity, citizens' rights and justice. The Charter applies to Member States 'only when they are implementing Union law'. The UK (and Poland and the Czech Republic) agreed a Protocol to the Charter, which explains that the Charter does not extend the ability of any UK courts or the EU Court of Justice (CJEU) to find UK law inconsistent with the Charter, and does not affect which cases courts in the UK can review. The Protocol provides that the 'solidarity' section of the Charter, which contains provisions on collective bargaining, fair and just working conditions, healthcare, environmental protection and other issues, does not create justiciable rights in the UK unless they are already part of national law. This provision has not been interpreted by the courts and there is legal uncertainty about its effect.

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<sup>18</sup> Regulation 1107/2006

<sup>19</sup> Bus and Coach regulations 181/2011

<sup>20</sup> Regulation (EC) No 1371/2007 on rail passengers rights and obligations and Consolidated Railways Interoperability Directive 2008/57/EC

<sup>21</sup> Sea and Inland Waterways Regulation 1177/2010

<sup>22</sup> The definition under the air passengers' regulations is wider than the Equality Act definition of disability. 'Disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers.

The Protocol explains how the Charter should apply to all Member States and does not mean that the Charter does not apply in the UK. Because the impact of the Charter on the domestic legal order of the UK is unclear, the impact of its inapplicability following Brexit is unclear. However, we have set out below the protections which could be lost.

There are several ways in which the protection afforded by the Charter is stronger than that available under the Human Rights Act 1998 (HRA):

- First, domestic legislation that conflicts with a fundamental right protected by the Charter can be ‘disapplied’ by the domestic courts. For example, in *Benkharbouche v Embassy of the Republic of Sudan*, the Court of Appeal disapplied the law on state immunity, which prevented the Claimants from accessing the courts to enforce their employment rights, breaching fair trial rights under the Charter.<sup>23</sup> This is significantly different from the position under the HRA, where domestic courts cannot disapply incompatible legislation – they can only interpret domestic law so as to comply with the Convention to the extent possible or declare it incompatible with the ECHR rights. In this respect, the consequence of the Charter not applying may be less profound in Wales, Scotland and in Northern Ireland than in England. Domestic courts have the power to quash legislation from the Welsh Assembly, the Scottish Parliament or the Northern Ireland Assembly that conflicts with ECHR rights.
- Second, claiming for damages for a breach of EU rights can be easier than claiming compensation for a breach of the HRA.
- Third, the Charter protects rights not protected by the HRA. For example, Article 8 of the Charter provides a right to protection of personal data; Article 13 provides that the arts and scientific research shall be free of constraint, and that academic freedom shall be respected; Article 15 provides a right to engage in work and to pursue a freely chosen or accepted occupation; and Article 16 sets out the freedom to conduct a business. There are also

group-specific protections in the Charter for women, children, the elderly and people with disabilities.

- Fourth, even where the rights contained in the Charter are also in the HRA, they are defined in the Charter to provide broader protection than the equivalent right in the HRA. For example, Article 21 prohibits discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality. Article 14 of the ECHR, which is protected by the HRA is not a free-standing right, but can only be relied on in relation to one of the other ECHR rights. The ECHR's equivalent to Article 21 of the Charter is Protocol 12, which the UK has not ratified.

However, the Charter does not come into play at all unless the case arises in an area within the scope of EU law.

The Charter is therefore a substantial source of human rights protection in the UK. To ensure that there is no regression in human rights protections, a very careful analysis will be required of the protections that will be lost when the Charter no longer applies to the UK. The proposed Bill of Rights may be an opportunity to fill some of the gaps left when the Charter no longer applies in the UK – see further below.

### **Future developments in EU law**

Future EU legislation which provides for further human rights protection would have applied in the UK had we not voted to leave the EU, but may not be introduced into domestic law in the UK following Brexit. For example:

- The proposed “Horizontal Directive”, which would provide protection against age, disability, sexual orientation and religion and belief discrimination outside employment. The UK already has protection against discrimination on these grounds outside of employment, but the proposed EU Directive would bring in provisions which would require changes to domestic legislation

e.g. introducing protection against intersectional discrimination. The definition of disability will accord with the UNCRPD definition and measures will clarify the nature of accessibility obligations for disabled people.

- The European Commission is also currently consulting on strengthening provisions relating to parental leave: introducing special leave for fathers, carers' leave, more flexibility in working arrangements for parents and carers and improving the implementation and enforcement of equal treatment.<sup>24</sup>
- The EU has recently passed new data protection legislation (the General Data Protection Regulation (GDPR)) which will apply from May 2018.<sup>25</sup> The GDPR offers improved protections for privacy in some areas. For example, it includes a stronger "right to be forgotten" and a more extensive duty to report some types of data protection breach than under existing provisions. The new Regulation will apply to organisations outside the EU that offer goods or services to EU citizens.<sup>26</sup>
- The European Accessibility Act, which is expected to be enacted by the EU, will benefit disabled people by providing common rules on accessibility in relation to computers and operating systems, ATMs, ticketing and check-in machines, smartphones, TV equipment related to digital television services, telephony services and related equipment, services related to air, bus, rail and waterborne passenger transport, banking services, e-books and e-commerce. The proposed Act would require domestic provisions allowing consumers and interest groups to take action under national law. It would require authorities within Member States to have the power to restrict, prohibit or recall offending products and services. Manufacturers would be required to produce information

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<sup>24</sup> See Micheal Ford's Advice to TUC; European Commission Roadmap (August 2015) and EC Consultation Document on addressing the challenges faced by working parents and care givers (11.11.2015) C (2015) 7754 final)

<sup>25</sup> This includes a Regulation and a Directive. The [Regulation](#) entered into force on 24 May 2016 and will apply from 25 May 2018. The [Directive](#) entered into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018.

<sup>26</sup> Overview of the General Data Protection Regulation (GDPR) ICO July 2016.

relating to complaints, compliance and product recall.<sup>27</sup> The Act will apply to persons with functional limitations, which protects a wider group than the definition of “disability” under the Equality Act 2010.

- On 3rd December 2012 the European Commission adopted a proposal for a Directive on the accessibility of the public sector bodies' websites, in recognition of their importance in imparting essential information for citizens.<sup>28</sup>

The UK is currently a world leader in relation to the protection and promotion of equality and human rights and should continue to be so. The UK should make an explicit commitment to remaining amongst the best in the world in relation to the protection of equality and human rights. It should put in place measures to ensure that it is not isolated from developments in other jurisdictions and at the regional and international levels and make a commitment to analyse future rights-enhancing measures emanating from the EU and elsewhere, with a view to considering whether similar measures are appropriate for implementation in the UK.

## **Collaboration on human rights issues**

International human rights instruments recognise the important role of international cooperation in promoting human rights.<sup>29</sup> This is particularly important when a state is seeking to tackle a cross-border human rights issue, such as the migration crisis, environmental rights and the role of business in promoting human rights. The EU is an important forum through which the UK currently cooperates on such issues. When the UK leaves the EU it will no longer take part in this forum.

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<sup>27</sup> From the European Accessibility Act brochure <http://ec.europa.eu/social/BlobServlet?docId=14869&langId=en> and web page <http://ec.europa.eu/social/main.jsp?catId=1202>

<sup>28</sup> Proposed Public Sector Website Accessibility Directive

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See, for example, UN Committee on the Rights Of the Child, General Comment Number 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), paragraph 60

For example, the right to asylum is a fundamental right guaranteed by Article 18 of the EU Charter, in accordance with the rules of the Geneva Convention.<sup>30</sup> The Dublin Regulations set out the EU system for establishing which Member State is responsible for dealing with a claim for asylum and arrangements for information sharing and fingerprint comparison.<sup>31</sup> In general terms these Regulations prioritise family connections, but if no other consideration applies they make the first state entered responsible. For unaccompanied minor children, the child must normally be transferred to a Member State where they have family connections, but otherwise the state where they have lodged their claim is required to deal with their claim provided that is in their best interests. Coming out of this system would have important human rights implications, and should be subject to careful scrutiny.

The UK should ensure that mechanisms are in place to allow it to collaborate on human rights issues where appropriate.

### **Case law of the CJEU and supervisory role and EU institutions**

There are a number of obligations on domestic courts when applying laws within the scope of EU law. The most important is that domestic legislation which gives effect to EU law must be construed purposively, so as to give it a meaning consistent with EU law in so far as is possible.<sup>32</sup> It is also a principle of EU law that domestic law must provide effective remedies for a breach of EU law.<sup>33</sup> Where the position is not clear, national courts can refer questions on the interpretation of EU law to the Court of Justice of the European Union (CJEU). Domestic legislation, including primary legislation, can in some cases be dis-applied if it conflicts with EU law.<sup>34</sup> EU case law has had an important impact on human rights in the UK:

- The CJEU's interpretation of the Equality Directives has extended protection domestically, including when relying on the Charter. For instance, it is no longer lawful to charge men and women different

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<sup>30</sup> Geneva Convention on the Status of Refugees adopted 28 July 1951.

<sup>31</sup> EU: Regulation (EU) No 604/2013

<sup>32</sup> *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 and *Marleasing SA v La Comercial Internacional de Alimentacion* Case C-106/89.

<sup>33</sup> Article 19 TEU and article 47 of the EU Charter.

<sup>34</sup> *Google v Vidal-Hall* [2015] EWCA Civ 311.

premiums for insurance because of the *Test-Achats* case.<sup>35</sup> In the case of Mrs Coleman<sup>36</sup> the CJEU decided that under the General Framework Directive<sup>37</sup> protection from discrimination ‘on grounds of disability’ included those who were treated less favourably because of their association with a disabled person. Case law from the CJEU has led to providing protection against gender reassignment discrimination,<sup>38</sup> giving women special protection against discrimination during pregnancy without the need for comparison with, for example, a sick man,<sup>39</sup> and extending protection against harassment.<sup>40</sup> The principle that compensation must be adequate led to the removal of a cap on compensation for sex discrimination.<sup>41</sup>

- Recent EU case law has led to increased protection of human rights in the context of data protection and state surveillance.<sup>42</sup> For example, in *Schrems*<sup>43</sup>, the CJEU held that an earlier EU Commission decision, that the US provided an adequate level of protection of personal data transferred to it, was invalid. In *Google Spain*<sup>44</sup> the CJEU held that Google must consider requests by an individual to remove links to web pages resulting from a search on their name. In the domestic courts, the Court of Appeal recently applied the EU Charter to overrule a provision of the DPA which was held to be incompatible with EU law.<sup>45</sup> In that case, Google had collected private information about the Claimants’ internet usage which enabled it to offer information to advertisers. The Court of Appeal ruled that the Claimants could recover damages for non-material loss and a provision of the DPA which prevented them from doing so was to be dis-applied.

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<sup>35</sup> Case C-236/09 *Association belge des Consommateurs Test-Achats ABL v Conseil des ministres* (1 March 2011)

<sup>36</sup> C-303/06 *Coleman v Attridge Law* [2008] CMLR 777

<sup>37</sup> 2000/78/EC

<sup>38</sup> *P v S and Cornwall CC* (C13/94) European Court of Justice, 30 April 1996.

<sup>39</sup> *Webb v Emo Air Cargo (U.K.) Ltd.*[1995] 1 W.L.R. 1454

<sup>40</sup> *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

<sup>41</sup> *Marshall v Southampton and South West Hampshire AHA* (C-271/91) European Court of Justice, 02 August 1993.

<sup>42</sup> *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others*, case C-293/12; *Schrems v Data Protection Commissioner* Case C-362/14, 06 October 2015; *Google Spain SL v AEPD*. Case C-131/12.

<sup>43</sup> *Schrems v Data Protection Commissioner*, case C-362/14.

<sup>44</sup> *Google Spain SL v AEPD*, case C-131/12.

<sup>45</sup> *Google Inc. v Judith Vidal-Hall, Robert Hann, Marc Bradshaw* [2015] EWCA Civ 311

- State surveillance is a particularly intrusive interference in the right to privacy and an area in which the case law of both the CJEU has had a significant impact. In *Digital Rights Ireland*<sup>46</sup>, the CJEU held that EU data retention Directive 2006/24, which required telecommunications service providers to retain communications data in order to combat crime, was not compatible with Articles 7 and 8 of the Charter. The court noted it applied to all means of electronic communication, thereby affecting the fundamental rights of practically the entire European population, and it was not limited to what was strictly necessary. The court held that where personal data is collected in order to prevent or detect crime, strict safeguards are required to protect individual rights.

Leaving the EU also has implications for the mechanisms through which human rights can be enforced or promoted. As well domestic courts referring questions to the CJEU about the interpretation of EU (rights-enhancing) laws, EU law is enforced by the European Commission. The European Commission can issue an opinion if it considers that a Member State has failed to fulfil an obligation under the Treaties. Where the Member State does not comply with the opinion, the European Commission can refer the matter to the CJEU.<sup>47</sup>

In Theresa May's statement on 2 October 2016 setting out plans for the Great Repeal Bill she proposed that the jurisdiction of CJEU will be removed. It is unclear what the impact of existing ECJ/CJEU case law will be on the interpretation of domestic legal concepts which were derived from or reflect equivalent concepts in EU law. The loss of these principles and enforcement mechanisms could impact on the domestic protection and promotion of human rights within the scope of EU law in the following ways:

- The re-litigation of settled principles, such as those that are described above
- The courts will be unlikely to continue to apply EU rules of statutory interpretation so that in future if issues arise about the

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<sup>46</sup> *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others*, case C-293/12

<sup>47</sup> Article 258 TFEU. For example, in 2013 the European Commission made a reference to CJEU regarding the application of the habitual residence test for social security benefits in the UK. The challenge was rejected by the CJEU in June 2016.

scope of rights previously protected under EU law they may be interpreted more or less restrictively

- Individuals will no longer be able to rely directly on EU law rights, including fundamental rights, in domestic courts
- Parties to litigation will no longer be able to seek an interpretation from the CJEU which removes an additional forum in which litigants can currently seek justice
- If existing rights are diluted or removed by a future Government, individuals will not be able to seek to dis-apply such provisions as contrary to EU law in the courts
- The supervision of the European Commission in this respect will also end.

The Commission recommends that the Government should issue statutory guidance on the status of existing case law and future CJEU decisions for domestic legal concepts which are derived from, or reflect similar concepts in, EU law.

In the Commission's view, the loss of the CJEU's and the European Commission's supervisory role makes it even more important that the UK should take seriously its obligations under international human rights treaties and that rigorous domestic accountability mechanisms should be introduced in this respect.

## **EU law and Devolution**

EU law has an impact on the legislative competence of the Scottish Parliament. The Scotland Act 1998<sup>48</sup> provides that any provision which is incompatible with EU law (or ECHR) is outside the legislative competence of the Scottish Parliament and is not law. The Courts have the power to consider the compatibility of Scots law with EU law and a member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with EU law (or ECHR rights).<sup>49</sup> To the extent that these EU laws are rights-enhancing and go beyond the requirements of

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<sup>48</sup> S.29

<sup>49</sup> S. 57 Scotland Act 1998

the ECHR, when the UK leaves the EU, this will remove a mechanism through which human rights can be enforced in the courts.

## Free movement

EU law currently provides a right for EU citizens, with their families, to move freely and to work and reside anywhere in the EU.<sup>50</sup> This right provides a high level of protection for the family life of EU citizens living abroad. The rights of EU citizens currently living in the UK to remain here after we leave the EU is uncertain. UK citizens living in other EU Member States at the time we leave the EU may lose their right to stay there. Non-EU family members of EU citizens will also be affected by the loss of free movement rights. For example, following the CJEU judgment in *Zambrano*<sup>51</sup> and subsequent cases, a non EU parent or carer of a child with EU citizenship can acquire a right to reside in a Member State if the child would otherwise have to leave because she or he is dependent on that person. In the event that, following Brexit, some non-UK citizens are required to leave the UK and/or some UK citizens living abroad are required to return to the UK, this may engage their human rights, particularly the right to respect for private and family life.

Once EU law is no longer applicable, any new immigration rules would be expected to comply with the requirements of Article 8 ECHR and could be subject to challenge under the HRA. People whose rights are affected by individual immigration decisions could also challenge those decisions by relying on Article 8 ECHR, by virtue of the HRA. However, as a matter of law new immigration rules could be very much more restrictive than existing EU rights. Article 8 does not offer such strong protection of the right for families to live together as is currently available

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<sup>50</sup> The free movement of persons within the EU is one of “Four Freedoms” established by EU law along with the free movement of goods, services, and capital. Citizens of the EU and their family members have the right to move and reside freely within the territory of the EU, subject to certain conditions. This right is conferred directly on every EU citizen by Article 21 of the Treaty on the Functioning of the European Union. These EU rights are subject to certain restrictions, including that in order to have a continued right of residence in another EU country beyond three months, a person must qualify, for example as a worker, job seeker, student, self-employed or self-sufficient person. After five years there is a right to permanent residence (see further directive 2004/38).

<sup>51</sup> Case C-34/09 *Zambrano* [2012] QB 265. The principle as interpreted subsequently by the CJEU requires that the EU citizen would be forced to leave the EU if a right of residence is not granted to the parent or carer. The CJEU has stated that it concerns “situations in which the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person’s care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs”, see Case 256/11 *Derici* [2011] ECR I-11315; [2012] All ER (EC) 373 at §68.

under EU law. Article 8 guarantees the right to respect for private and family life but does not guarantee a right to reside or to enjoy family life in a particular country. A decision to remove a person from the UK may constitute an interference with their right to family life, but such interference can be justified under Article 8(2) if it is in accordance with law, in pursuit of a legitimate aim and a proportionate means of achieving that aim. This requires a balance to be struck between the reasons that the immigration policy was introduced and the effect on the individual. Whilst the outcome of this balancing exercise is uncertain and depends on individual circumstances, it is clear that Article 8 does not provide an equivalent level of protection of family rights as EU free movement laws. Therefore, Brexit is likely to lead to weaker protection of these rights unless similar rights are granted under the deal struck between the UK and the EU.

In some respects, the free movement rules under EU law do not adequately protect family rights. When the UK negotiates new immigration rules with the EU in the context of Brexit, it will have the opportunity to rectify some of these deficiencies. For example, the situation of same sex couples is currently unsatisfactory at the European level: the definition of 'family and family members' relied on by the Freedom of Movement Directive 2004/38/EC means that the legal recognition of a same-sex couple or a same-sex family depends on the current legislation of the host Member State.<sup>52</sup> If the host Member State does not acknowledge same-sex marriage/civil partnership, the family members of a Union worker will not be able to benefit from the help and support of bodies designated under the Directive, as they will not be legally recognised as the family of the worker. This creates legal uncertainty and a situation in which the freedom of movement of same sex couples is restricted.

It has been suggested that some services which play an important role in the fulfilment of human rights are highly dependent on workers from the EU. For example, EU nationals currently make up around 4.95 percent of the staff in NHS trusts and Clinical Commissioning Groups, and 5 percent of the social care workforce.<sup>53</sup>

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<sup>53</sup> HL Library briefing note

New immigration rules following the UK's departure from the EU should be subjected to a rigorous equality and human rights impact assessment.

## **EU funding for the human rights infrastructure**

Funding from the EU supports some organisations, institutions and measures which uphold and/or promote the enjoyment of human rights.

Many civil society organisations, research initiatives, higher education institutions, advice and support sectors rely on European funding. These organisations play an important role in researching human rights issues, advising on human rights, scrutinising and raising awareness of the UK's compliance with human rights and supporting victims of human rights abuses. A drop in funding from the EU, if not replaced by equivalent funding from elsewhere, is likely to have an impact on these organisations' ability to fulfil these roles. This is causing concern amongst civil society organisations.<sup>54</sup> There is also a concern that domestic civil society organisations and disabled persons' organisation will become detached from their European equivalents. For example, both the European Disability Forum and the European Union of the Deaf have issued statements on the implications of Brexit for the participation of UK civil society organisations in their work.<sup>55</sup>

European funding has also supported opportunities and integration for disadvantaged groups. The Papworth Trust have identified several potential impacts on disabled persons relating to future discontinuation of EU funding streams.<sup>56</sup> The European Social Fund (ESF) is Europe's main instrument for supporting jobs, helping people get better jobs and ensuring fairer job opportunities for all EU citizens. ESF provides financing of EUR 10 billion per year. The ESF has historically funded various employability initiatives in the UK including; 'Cornwall Works for Learning Disabilities' (2010 – 11) and First STEP into work, a project for

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<sup>54</sup> See for example, "Sector bodies seek government reassurance on EU funding", available at: <http://www.thirdsector.co.uk/sector-bodies-seek-government-reassurance-eu-funding/policy-and-politics/article/1406379>. A statement from Inclusion Scotland on the outcome of the EU Referendum;

<sup>55</sup> See for example, <http://www.eud.eu/news/brexit/>

<sup>56</sup> What Next for Disabled People? The Papworth Trust. Available at: <http://online.flipbuilder.com/afjd/wpxb/#p=1>

people from disadvantaged communities in the West of Scotland.<sup>57</sup> The ESF may have had a positive impact on the rates of employment of disabled people.<sup>58</sup> The European Integration Fund supports national and EU initiatives that facilitate the integration of non-EU immigrants into European societies, with a budget of EUR 825 million for the period 2007-13. For example, the Migration Matters Scotland project was set up with funding from this stream.

The UK Government should conduct a rigorous equality and human rights impact assessment of the loss of EU funding which supports organisations, institutions and measures which uphold and/or promote the enjoyment of human rights and carefully consider how it will ensure that the human rights infrastructure in the UK is not undermined by the loss of EU funding.

## **Importance of the international human rights treaties and the Human Rights Act 1998**

The UK has ratified seven of the nine ‘core’ UN human rights conventions. However, these are not incorporated into domestic law.<sup>59</sup> The UN Treaty Bodies, which oversee the UK’s compliance with these treaties, issue “concluding observations” indicating where the UK has failed to adequately implement the human rights in these treaties, but there are not domestic accountability mechanisms to enforce compliance. Therefore, while, changes to domestic laws or policy which undermine the human rights currently protected by EU law might breach these international human rights treaties, it would not currently be possible to take action before the domestic courts to challenge this.

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<sup>57</sup> <http://ec.europa.eu/esf/main.jsp?catId=46&langId=en&keywords=&country=381&theme=50&list=1>

<sup>58</sup> Richard Howitt (chair of the European Parliament’s All-Party Disability Rights Group), 11 March 2016. <http://www.theguardian.com/social-care-network/2016/mar/11/brexit-could-undermine-the-rights-of-disabled-people>  
“Last year, 87,000 British disabled people were helped towards employment by European social funds ...”

<sup>59</sup> The two Conventions not yet ratified by the UK are the Convention on the Rights of Migrant Workers and their Families, and the Convention on Enforced Disappearances (CED). No apparent progress has been made on ratifying the CED despite the UK Government having accepted UPR recommendations on this in 2012. See Annex 1, UPR Recommendations to the UK. September 2012. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBSession13.aspx> [accessed: 24 August 2016]

Rights in the ECHR are incorporated into domestic law by the HRA. Rights under the HRA can also, in appropriate cases, be interpreted in light of unincorporated treaties such as the UN Convention on the Rights of the Child (CRC).<sup>60</sup> The HRA can be used to challenge laws and policies which breach the rights protected by the Act. The HRA does not, though, incorporate all of the rights currently protected by the Charter.

The Government has made a commitment to replace the HRA with a Bill of Rights. It is important to take this into account when analysing the human rights implications of the UK's departure from the EU. It remains unclear how the Bill of Rights will affect the protection of human rights in the UK, both in terms of the rights protected and the mechanisms through which they are protected. If the Bill of Rights were to weaken the protections currently available under the HRA, then the implications of losing the human rights protections currently available under EU law, which we have outlined above, would be even more serious. For example, above we have explained how Article 8, as protected under the HRA, would offer some more limited protections for families who might otherwise be split up when the EU right to free movement is lost. In the event that a new Bill of Rights weakens the terms of Article 8 or the ways in which it can be relied upon before domestic courts, the impact of losing free movement rights would be more severe for families' rights to respect for their family life.

In light of these points, in our view the Government should consider whether it is appropriate to enhance the status in domestic law of the international human rights treaties by which the UK is bound. The Commission has set out a number of ways in which the status of these conventions could be enhanced in domestic law, which should be considered in the context of the UK's withdrawal from the EU

- Direct incorporation via the proposed Bill of Rights, to make further rights fully justiciable in the domestic legal order;
- The Commission has recently briefed on the impact of statutory duties introduced by the Scottish and Welsh Governments which enhance the status of the Convention on the Rights of the Child

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<sup>60</sup> R (on the application of SG and others) v Secretary of State for Work and Pensions [2015] UKSC 16.

(CRC) in national law.<sup>61</sup> We have recommended that such a duty should be introduced to apply to devolved and non-devolved matters across the whole of Great Britain. In the event that the legal protection of children's rights provided by the Charter will be lost when the UK leaves the EU, such an enhanced status for the CRC in domestic law is all the more pressing.

- Section 1 of the Equality Act 2010, which would place a duty of certain public authorities to have due regard to the desirability of reducing socio-economic disadvantage when taking strategic decisions, has not been brought into force. Its implementation would go some way towards promoting compliance with the International Covenant on Economic, Social and Cultural Rights.<sup>62</sup> Bringing this provision into force would help increase protection for socio-economic rights currently protected in the Charter, and would be in line with the recommendation of the UN Committee on Economic, Social and Cultural Rights (UN CESCR) that the UK “bring into force the relevant provisions of the Equality Act that refer to the public authorities’ duty on socio-economic disadvantage”.<sup>63</sup>

Additionally, implementation of the other unimplemented sections of the Equality Act 2010 would go some way towards implementing the provisions of those international human rights treaties which require the prohibition of discrimination and promotion of equality, such as the Convention on the Elimination of Discrimination against Women and the Convention on the Elimination of all forms of Racial Discrimination.

# About the Equality and Human Rights Commission

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

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