# Brexit and the EU Charter of Fundamental Rights

Menelaos Markakis*

## Introduction

In preparation for Brexit, Parliament has adopted the European Union (Withdrawal) Act 2018 (EUWA). The Act is a keystone of the Government's strategy. It repeals the European Communities Act 1972, preserves laws made in the UK to implement EU obligations, and converts existing EU law into domestic law, subject to a number of exceptions.

One of the most notable exceptions is the EU Charter of Fundamental Rights.[1] The EU Charter offers legal protection to the rights of UK citizens and companies, as well as to those resident in the UK. However, it will not be part of domestic law after exit day.[2] The precise reasons for this choice are not fully known.[3] A first argument is that because the Charter is primarily addressed to the EU it will no longer be relevant to the UK. However, the Charter also applies to the Member States when acting within the scope of EU law. It is not relevant in this respect that the EU institutions are its primary addressees. The Charter may also be thought to be redundant after Brexit, because it codifies existing rights which would be nevertheless kept in domestic law.[4] The Act provides, as we shall see, that any fundamental rights or principles which exist irrespective of the Charter will be retained in domestic law.[5] Or the Charter may be thought to be redundant after exit day, because it only applies when the UK is acting within the scope of EU law.[6] Leaving the EU would obviate, according to this argument, the need to retain a separate human rights instrument that only binds the domestic authorities when they are acting within the scope of EU law. These arguments indeed form part of the Government's reasoning for excluding the Charter.[7] Moreover, the Charter has been criticised quite severely for being "too vague", and the EU courts have come under fire for expanding its coverage.[8]

*Postdoctoral Researcher, Erasmus University Rotterdam. I am grateful to Hayley Hooper, Ewan Smith, Alison Young, the participants of a seminar at Oxford, and the anonymous reviewers for their comments. The usual disclaimer applies.

[1] For a view on this, see Schona Jolly, "Scared About Your Human Rights After Brexit? You Should Be" (14 July 2017), https://www.theguardian.com/commentisfree/2017/jul/14/british-citizens-human-rights-brexit [Accessed 8 August 2017].

[2] EUWA s.5(4).

[3] David Allen Green, "Brexit: Why Did the ECJ Become a UK 'Red Line'?" (12 April 2017), https://www.ft.com/content/32cd1e87-c7d1-3026-86fc-bce5229711d1 [Accessed 8 August 2017].

[4] "Charter of Fundamental Rights of the EU: Right by Right Analysis" (5 December 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf [Accessed 11 December 2017], paras.5-6.

[5] EUWA s.5(5).

[6] "Right by Right Analysis" (n 4), paras.14-15.

[7] See further Alison Young, "Four Reasons for Retaining the Charter: Part 4 – The Counter-Arguments and their Weaknesses" (5 February 2018), http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-part-4-the-counter-arguments-weaknesses/ [Accessed 26 March 2018].

[8] See, e.g., Marina Wheeler, "Cavalier with Our Constitution: A Charter Too Far" (9 February 2016), https://ukhumanrightsblog.com/2016/02/09/cavalier-with-our-constitution-a-charter-too-far/#_ftnref15 [Accessed 8

There can be reasonable disagreement as to whether Charter rights are "too vague" or different views on their added value with respect to the UK's human rights framework. Further, opinions might reasonably differ on the scope of application of the EU Charter and the EU courts' take on this, and this is so notwithstanding the opinion that one might have on the merits of the EU Charter. The opinion of the current author is that these criticisms can be exaggerated, and that insofar as the critics of the Charter could be said to have a point, most (if not all) of their arguments are equally applicable to the European Convention on Human Rights (ECHR) and/or national constitutions and bills of rights.[9]

The focus of this article is quite different, in that it explores the impact of the EU Charter in the UK. The key purpose is not to criticise the EUWA, nor to address the key arguments against keeping the Charter in domestic law – this is only done insofar as relevant for the purposes of this paper. It is important to note that the Charter will be removed from the statute book with little analysis of its impact –both actual and potential– in the UK. The only two available studies are as follows. First, there is the 2014 study by the European Scrutiny Committee of the House of Commons, which primarily focused on the scope of application of the EU Charter.[10] But this study is rather out of date and nevertheless falls short of examining the impact that the Charter has had in our jurisdiction. Second, there is a "right by right analysis" that was published by the Government in December 2017. It seeks to explain how the gap left by the removal of the EU Charter in the UK's human rights framework would be plugged by general principles of EU law, retained EU law, other international human rights instruments and, more generally, domestic legislation (whether EU-derived or not).[11] This study focuses exclusively on the potential impact of losing the EU Charter after the country leaves the EU and is, as we shall see, rather incomplete. What is more, neither of these studies makes a (strong) case for not keeping EU Charter rights in the statute book after Brexit.

This article makes three key claims. First, it will be argued that the EU Charter has thus far not been as "dangerous" as it is often suggested. As illustrated in the article, there has thus far been only a relatively small number of UK cases that have reached the EU courts, and these cases culminated in fairly uncontroversial rulings. Second, it will be argued that the EU Charter and the related EU courts' jurisprudence will remain relevant, in legal terms, after Brexit. They may be used by the Executive and Courts, in the manner explained in this article. Third, it will be argued that, notwithstanding the limited saving provisions in the EUWA, the UK's human rights framework would be markedly different without the EU Charter. This would be the case, as explained in the paper, in terms of both the substance and scope of the rights protected, as well as with regard to the available remedies.

---

August 2017]; Richard Ekins, "The Charter of Fundamental Rights Gives Judges Too Much Power, and Is Bad for Accountable Government' (14 July 2017), https://www.conservativehome.com/platform/2017/07/richard-ekins-it-gives-too-much-power-to-judges-and-is-bad-for-accountable-government-why-the-charter-of-fundamental-rights-must-go.html [Accessed 8 August 2017]; European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights in the UK: A State of Confusion* (HC 2013-14, 979) paras.75-82.

[9] See notably Sionaidh Douglas-Scott, "Fundamental Rights Not Euroscepticism: Why the UK Should Embrace the EU Charter" (November 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528768, Oxford Legal Studies Research Paper No 82/2014.

[10] European Scrutiny Committee (n 8).

[11] "Right by Right Analysis" (n 4).

The article is structured as follows. The discussion begins with the legal status of the EU Charter in the UK. The focus then shifts to the impact that the EU Charter has thus far had in the UK, as evidenced through the case law of the CJEU concerning cases that originated in the UK. Domestic judgments will also be considered where appropriate. This article engages in both a quantitative and –to the extent possible– a qualitative analysis of the relevant CJEU case law, setting out the numbers of cases for each year and discussing the seminal cases. It will be shown that the number of EU cases that originated in the UK is fairly small, but that some of these cases have shaped the EU courts' Charter jurisprudence more generally. The penultimate section of the article looks at the impact that the EU Charter and related CJEU case law are bound to have after exit day, according to the terms of the EUWA. It will be argued that Charter rights will remain relevant in this jurisdiction in a number of ways, but that there will be important differences after exit day, both in terms of substance as well as with respect to the available remedies. These differences in the UK human rights framework after exit day will be dealt with in the final section of the article.

## The legal status of the EU Charter in the UK

The EU Charter was proclaimed in Nice in 2000 and acquired binding legal status with the entry into force of the Lisbon Treaty on 1 December 2009. The Charter forms part of EU primary law and has the same legal value as the EU Treaties (art.6(1) TEU). It coexists with general principles of EU law, which may also be the source of fundamental rights (art.6(3) TEU). The Charter only applies when the UK is "implementing Union law" (art.51(1) EU Charter). National legislation which does not fall within the scope of EU law cannot be reviewed by courts for its compatibility with the EU Charter.

The meaning of "implementing Union law" (art.51(1) EU Charter) is ambiguous.[12] The leading authority on the scope of application of the Charter is the *Åkerberg Fransson* ruling. The Court ruled that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations".[13] The Court added that:

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law,

[12] Amongst the copious literature, see particularly Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 488-99; Michael Dougan, "Judicial Review of Member State Action under General Principles and the Charter: Defining the 'Scope of Union Law'" (2015) 52 CMLR 1201; Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 EuConst 375, 376-87; Daniel Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe" (2013) 50 CMLR 1267. The relevant body of case law is equally large: Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* EU:C:1991:254; Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* EU:C:1997:631; Case C-292/97 *Kjell Karlsson and Others* EU:C:2000:202; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105; Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126.

[13] Case C-617/10 *Åkerberg Fransson* at [19].

> situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[14]

In other words, whenever EU law is applicable, the Charter too is applicable.

More specifically, it is settled case law that domestic authorities are bound by the Charter when they are implementing EU law (e.g. an EU Regulation or Directive). The Court provided more guidance on what it means for national law to implement EU law in the *Siragusa* case:

> In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it…[15]

Domestic authorities are further bound by the Charter when they are derogating from a fundamental economic freedom enshrined in the EU Treaties. The latter is the case when the domestic authorities are restricting the exercise of free movement of goods, services, persons or capital for a number of public policy grounds listed in the Treaties or recognised in the CJEU's case law as "overriding requirements in the public interest". When the domestic authorities are restricting the exercise of EU economic freedoms, their actions also have to comply with fundamental rights. For example, restrictions on radio or television broadcasting have to respect freedom of expression.[16] To be sure, the Member States may also restrict the exercise of EU economic freedoms precisely in order to allow for the exercise of human rights, such as is the case when free movement of goods is restricted to allow for a demonstration blocking one of the main routes for intra-EU trade.[17]

There used to be a misconception that the UK had an "opt-out" from the EU Charter. This was said to be the effect of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, which is annexed to the EU Treaties.[18] Art.1(1) thereof provides that:

> The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of

[14] ibid at [21].
[15] Case C-206/13 *Siragusa* at [25]. See further Case C-40/11, *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691 at [79]; Case C-87/12, *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:291 at [41].
[16] Case C-260/89 *ERT*.
[17] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333.
[18] European Scrutiny Committee (n 8) paras.83-88.

> the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

The Court ruled however in the *NS* case that this provision "…explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions".[19] In other words, this provision did not constitute a genuine opt-out from the EU Charter for the UK and Poland.

Art.1(2) of the Protocol, which provides that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law", is rather more cryptic. The Court did not pass judgment on the meaning of that provision in the *NS* case, as this was not necessary for deciding the case.[20] As such, art.1(2) of the Protocol may or may not "safeguar[d] against new justiciable 'solidary' rights under Title IV" of the Charter, which sets out a number of socioeconomic rights.[21] However, it is argued that these rights may still apply to the UK and Poland in the form of general principles of EU law, insofar as such general principles with the same content as the rights enshrined in Title IV could be said to exist.[22]

## The impact of the EU Charter in the UK: Mapping the EU courts' jurisprudence

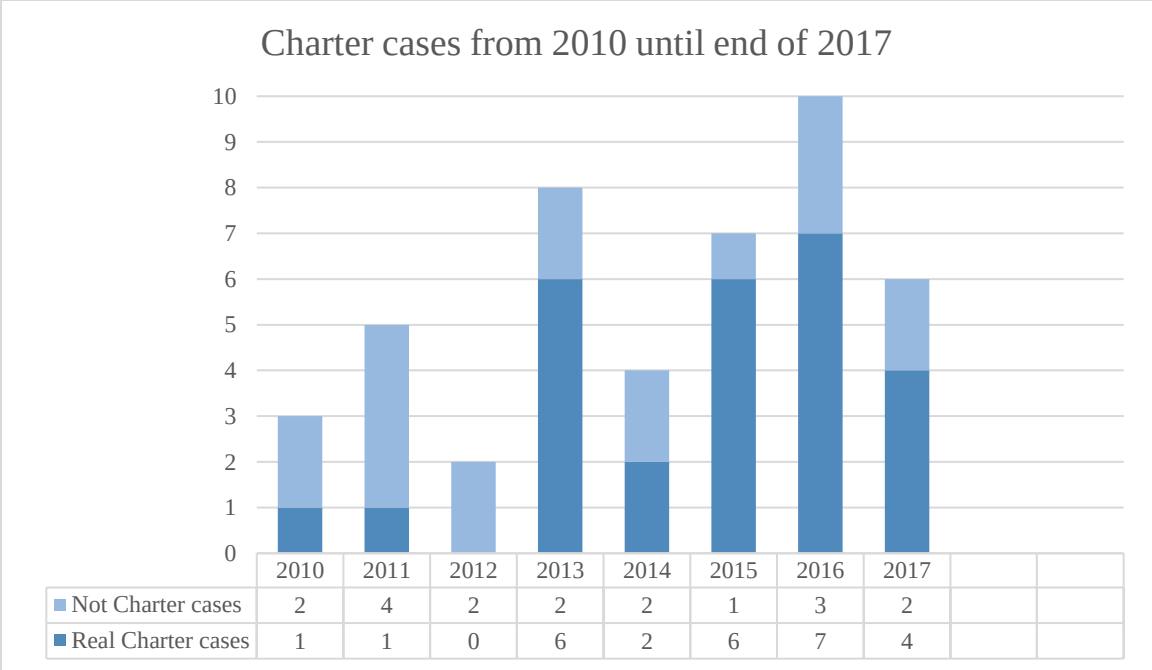
A search on eur-lex.europa.eu, which is the key database for access to EU case law and legislation, reveals that there have thus far been 719 judgments from the EU courts that refer to the EU Charter. 48 of those EU cases originated in the UK and were then decided by the EU courts. These numbers are as of end of 2017. This is, in the opinion of the author, a rather small number of cases, considering that the UK is one of the largest Member States and that the Charter was adopted 17 years ago and has been legally binding upon the domestic authorities for 8 years. The relevant figures for other large Member States are, e.g.: 103 cases from Germany, 75 from Italy, 53 from Spain, and 45 from France. Moreover, in what follows, we shall see that the number of cases from the UK (or from other countries, for that matter) needs to be revised downwards, as some of the cases listed in the search results did not in fact concern the EU Charter.

The temporal breakdown was as follows. The number of CJEU cases from the UK which referred to the EU Charter from year 2000 (the year on which the Charter was adopted) until 2009 (the year on which the Charter acquired binding effect) was only 3. However, none of these cases were "real" EU Charter cases. They either did not concern the EU Charter at all[23] or only

[19] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865 at [120].
[20] ibid at [121].
[21] European Scrutiny Committee (n 8) para.85.
[22] ibid para.86.
[23] See Case T-49/04 *Faraj Hassan v Council of the European Union and Commission of the European Communities* EU:T:2006:201, which instead concerned the United Nations Charter.

mentioned the Charter *en passant*, i.e. the relevant Charter provision was briefly mentioned but was not decisive for the case in any sense.[24]

With regard to the Charter cases that originated in the UK between 2010 and 2017, some of these cases were not "real" Charter cases either, in that either the EU Charter was not mentioned at all in the judgment or was only mentioned *en passant*. Consequently, the total number of Charter judgments should in fact be brought down to 27.




A qualitative analysis of the relevant body of case law reveals that there are five categories of EU Charter cases from the UK. First, there are asylum and migration cases (3). Second, there are cases that concern the EU's Common Foreign and Security Policy (CFSP). The latter covers all areas of foreign policy and all questions relating to the EU's security, including the progressive framing of a common defence policy that might lead to a common defence.[25] There are two sub-categories of CFSP cases that originated in the UK: cases concerning restrictive measures directed against certain persons and entities associated with terrorist networks (6); and a case on restrictive measures adopted in view of Russia's actions in Ukraine. Third, there are competition law cases (6), where the emphasis lies on the applicant company's rights of defense, the right to good administration, and the right to effective judicial protection. Fourth, there are internal market cases where litigants seek to challenge EU legislation, also on grounds of its incompatibility with the EU Charter (3). Fifth, there is a number of cases (8) that do not neatly fall within any of the categories mentioned above and could be simply described as "other cases" (concerning, e.g., the legal professional privilege between a lawyer and his client; a Community trade mark; and so on).

[24] See, e.g., Case C-145/04 *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* EU:C:2006:543, at [42], [56].
[25] Art.24(1) TEU.

Some of the EU cases that originated in the UK have been tremendously important not only for the UK but also for the development of the CJEU's jurisprudence on the EU Charter more generally. Notably, the Court of Justice held in an asylum case (*NS*) that the UK authorities may not transfer an asylum seeker to another Member State if there were substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment stemming from systemic deficiencies in the asylum procedure and reception conditions in that country.[26] In *Kadi II*, a case concerning the freezing of assets of a person suspected of involvement in terrorist activities, the Court of Justice carefully struck a balance between the rights of defence and the right to effective judicial protection, on the one hand, and security considerations on the other hand.[27] Most recently, in *Tele2 Sverige and Watson*, the Court ruled that Directive 2002/58/EC on privacy and electronic communications, interpreted in the light of arts.7 ("respect for private and family life"), 8 ("protection of personal data") and 11 ("freedom of expression and information") of the EU Charter, precluded national legislation which, for the purpose of fighting crime, provided for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.[28] The importance of this judgment for data protection law cannot be overstated.[29] The same is true for the other judgements mentioned above.

For the sake of completeness, one further ought to refer to the number of *orders* by the EU courts that refer to the EU Charter. Their number is substantially lower (100). These numbers are, again, as of end of 2017. These are typically cases which were swiftly dismissed by the EU courts. Only four of those EU cases originated in the UK and they are all post-Lisbon (2 cases in 2013; 1 in 2014; and 1 in 2016). They do not merit further analysis for the purposes of this article.

**Interim conclusion**

The preceding analysis illustrates that the EU Charter has –at least thus far– not been as "dangerous" as it is often suggested. There has so far been only a relatively small number of UK cases brought before or sent to the EU courts. Moreover, these cases have given rise to fairly uncontroversial (or otherwise "expected") rulings that could only be criticised for "erring on the side of caution": it cannot be argued that the EU courts did not go far enough in protecting our fundamental rights, and it may only be argued – as it is argued by some commentators – that in two or three of these cases the EU courts may have afforded too extensive protection to the applicants. Space precludes a detailed exegesis of these arguments. Suffice it to say for present purposes that there can be reasonable disagreement about the legal reasoning and/or the outcome in a specific case, and that this has certainly been the case in the UK at least insofar as privacy rights are concerned.[30] However, this is equally the case for the jurisprudence on any human rights

[26] Joined Cases C-411/10 and C-493/10 *NS*.
[27] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* EU:C:2013:518.
[28] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970.
[29] See most recently in this journal, Jennifer Cobbe, "Casting the Dragnet: Communications Data Retention under the Investigatory Powers Act" (2018) Public Law 10.
[30] See, e.g., Marina Wheeler (n 8).

instrument, be it domestic or international (e.g., prisoner voting rights and the ECHR). But almost nobody seems to be suggesting that those instruments should be abolished, and the argument instead focuses on the appropriate standard of review, the intensity of such review, and/or the margin of appreciation that should be accorded to the primary decision-maker.[31]

The argument against this is the number of domestic cases that use the Charter where no reference is made. This may occur at lower instance courts and in tribunals, where the Charter may be used to protect rights over and above the protection they would otherwise get in national law. This is particularly concerning to some as regards the extent to which it protects workers' rights.[32] There is research showing that there have thus far been 248 domestic judgments that refer to the EU Charter.[33] Examining which of those cases should have been sent to the CJEU falls outside the scope of this article and would indeed require a separate treatise in and of itself. However, it should be noted that, whenever there is a question as to the interpretation or validity of EU law, domestic courts may or shall, depending on the case, refer the matter to the Court of Justice.[34] It is readily acknowledged that this may not always be the case, and there are indeed such examples from domestic case law.[35] From the standpoint of EU law, domestic courts and tribunals against whose decision lies no judicial remedy are under a legal obligation to refer the matter to the CJEU. Domestic courts do not have the power to declare EU law invalid, as this would jeopardise the uniformity of EU law and create legal uncertainty.[36] The same EU law instrument could potentially be valid in one Member State and partially or fully invalid in another Member State. Moreover, unless the very strict requirements of the *acte claire* doctrine are met, national courts are bound to refer a question on the interpretation of EU law to the Court of Justice.[37] More specifically, unless the answer to the problem at hand is so obvious as to leave no scope for any reasonable doubt as to the manner in which it ought to be solved, *and* the court seized of the dispute is convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice, *and* it has gone as far as comparing different language versions of the impugned EU law instrument, the case will be sent to the Court of Justice. It is readily apparent that these stringent requirements would almost never be met.

Notwithstanding the force of the preceding argument, it is nevertheless possible to argue that the EU Charter has "untapped potential" and may therefore prove itself "dangerous" in the years to come. This argument is not backed by the preceding analysis, which clearly illustrates that there is no tendency for the number of UK "Charter cases" reaching the EU courts to increase over the years. Moreover, it is not clear which aspects of the EU Charter, which are unique to it as a human rights instrument, would create this unspecified threat for the national legal orders. The Charter chiefly operates as a bulwark against EU powers and only binds the Member States when

[31] This is unfortunately not entirely true for the ECHR. For a convincing rebuttal, see Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016).
[32] I am grateful to Alison Young for this observation.
[33] See the evidence provided by Charlotte O'Brien to the Exiting the European Union Committee, meeting of 11 October 2017, http://parliamentlive.tv/Event/Index/7b9cfa19-578f-4148-90b7-df3b5273e40b.
[34] Art.267 TFEU.
[35] See, e.g., *R (on the application of AZ) v Secretary of State for the Home Department* [2015] EWHC 3695 (Admin) at [62].
[36] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* EU:C:1987:452 at [13]-[18].
[37] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335 at [16]-[21].

they are acting within the scope of EU law. As flexible as the limits of EU law might sometimes appear, this jurisdictional limit is hard to overcome, and many litigants fall on this hurdle. One need not look further than those litigants hit by national measures taken to combat the economic crisis within the context of EU-coordinated bailouts who sought to take their case to the EU courts. The substantive and institutional links to the EU legal order were clear in most cases: the EU institutions were themselves involved in the bailouts; and there were EU law measures setting out the conditions attached to the bailout packages. Nevertheless, the vast majority of these challenges were declared inadmissible, and the CJEU's case law has only recently started to shift.[38]

## The potential impact of the EU Charter after exit day

The discussion thus far has focused on the impact that the EU Charter has so far had in the UK. The focus now shifts to the potential impact of the EU Charter after Brexit. This section examines the ways in which the Executive or Courts may use the EU Charter and related case law after exit day, the emphasis being on the relevant provisions of the EUWA.

### *The Executive*

*Section 5(2) EUWA*

S.5(1) EUWA provides that the principle of supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day, thereby ending the supremacy of EU law over domestic law after Brexit. S.5(2) provides, however, that the principle of supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made *before* exit day. The Explanatory Notes add that:

> The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.[39]

The Executive is bound by the principle of supremacy, and so are the Courts. Insofar as the EU Charter would not be part of domestic law after exit day, the question that arises is whether the Executive or Courts should interpret domestic legislation passed or made before exit (to which s.5(2) applies) without having regard to the EU Charter. Normally, it would not be possible to interpret pre-exit domestic legislation without having regard to the EU Charter. It is not possible to regard an EU Directive in isolation and interpret the relevant implementing legislation solely in

[38] See further Menelaos Markakis and Paul Dermine, "Bailouts, the Legal Status of Memoranda of Understanding and the Scope of Application of the EU Charter: *Florescu*" (2018) 55 CMLR 643.
[39] Explanatory Notes, para.104.

light of the Directive's wording and purpose. The EU Directive would have to be considered in its proper context and should be read in the light of the EU Charter (as well as other hierarchically superior norms). However, this does not seem to be an option under s.5(4) EUWA, which provides that the Charter shall not be part of domestic law after exit day; and under s.6(3) EUWA, which explains how questions as to the validity, meaning or effect of any retained EU law will be decided. It would not be possible to refer the matter to the CJEU either (s.6(1)(b)).

Nevertheless, it may be possible to argue that, since the EUWA is predicated on the assumption that the Charter codifies rights and principles which already existed in EU law,[40] one could draw on those rights and principles for the purposes of interpreting the provision at hand. Hence, the substantive outcome in those cases could be the same as it would have been if one were able to draw directly on the Charter, provided that there are "retained" principles that correspond to such Charter rights. This is of course subject to the argument made later in this article, according to which these "retained" principles may not be identical to Charter rights. The real impact of the EUWA, however, would be on legal certainty, as there would be lots of future legal arguments as to whether the relevant Charter right exists independently of the Charter or not.[41] What is more, it should not escape our attention that, under Schedule 1, these principles may only be used to *interpret* and not to disapply legislation.

*Section 8 EUWA*

Moreover, s.8(1) EUWA grants a Minister of the Crown the power to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the UK's withdrawal from the EU. Deficiency "covers a wider range of cases where [retained EU law] does not function appropriately or sensibly".[42] It is submitted that such deficiencies in retained EU law could be brought to light by the CJEU in its case law after Brexit. In which case, such deficiencies may be remedied by a Minister of the Crown using the power in s.8. This interpretation might *prima facie* sit uneasily with deficiencies in retained EU law that are listed in s.8(2).[43] However, s.8(3) provides that "[t]here is also a deficiency in retained EU law where the Minister considers that there is (a) anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2)...". The deficiencies discussed here could be "of a similar kind" to those listed in s.8(2) and would therefore fall within s.8(3).[44]

The interpretation of s.8(1) that is proposed here might also come across as sitting uneasily with the logic underpinning s.8(4), which provides that "retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day". However, it should be noted that this provision only

[40] EUWA s.5(5); Explanatory Notes, paras.61, 106-07.
[41] I am grateful to Alison Young for this observation.
[42] Explanatory Notes, para.124.
[43] See further the examples of "deficiencies" provided in Department for Exiting the European Union, Legislating for the United Kingdom's Withdrawal from the European Union (Cm 9446, 2017) pp.20-21 to which the Explanatory Notes cross-refer (para.128).
[44] S.8(3) also contains a delegated power for Ministers of the Crown to provide for additional sorts of deficiencies.

concerns amendments to EU law (not judgments by the EU courts).[45] It should further be noted that the Explanatory Notes set out that "those subsequent changes and the consequent divergence between UK and EU law do not *by themselves* automatically make the UK law deficient" [emphasis added].[46] Crucially, the proposed interpretation of s.8(1) is not precluded by s.8(7), which sets out the substantive limits to the power accorded under s.8(1). The temporal limit in s.8(8) should, however, be borne in mind: no regulations may be made under this section after the end of the period of two years beginning with exit day.

*Section 23(6) EUWA*

Furthermore, s.23(6) provides that "[a] Minister of the Crown may by regulations make such transitional, transitory or saving provision as the Minister considers appropriate in connection with the coming into force of any provision of this Act (including its operation in connection with exit day)". It cannot readily be excluded that Ministers may use the s.23(6) power to make specific saving and transitional provisions through regulations that could touch upon fundamental rights. This possibility is readily acknowledged, it seems, in Schedule 8.[47] This could potentially have an effect in relation to anything occurring on or after exit day. That being said, it should be noted that cases like *Public Law Project* and *Ingenious Media* make it clear that the principle of legality may apply even more strictly with respect to Henry VIII provisions.[48] Consequently, a general power of this sort would not provide Ministers of the Crown with the specific ability to overturn fundamental principles of the common law.[49]

## Courts

The Charter retains relevance "in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before exit day" (Schedule 8 Part 4 para.39(3)). Beyond this limited exception, courts may wish to have regard to judgments handed down by the CJEU after exit day, and the EUWA indeed gives them that option (s.6(2)).[50] In this way, Charter-related jurisprudence of the CJEU may still feature in domestic judgments after the UK leaves the EU. This makes good sense,[51] especially "in cases involving concomitant converted law"[52] or where

[45] It is nevertheless contestable whether this provision would prohibit a Minister of the Crown from modifying domestic law whenever EU law was amended, as relevant deficiencies may arise on other grounds.
[46] Explanatory Notes, para.130.
[47] See Schedule 8 Part 4 para.39(1): "Subject as follows and subject to any provision made by regulations under section 23(6), section 5(4) and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before exit day (as well as anything occurring on or after exit day)."
[48] *R. (on the application of Public Law Project) v Secretary of State for Justice* [2016] UKSC 39; *R. (on the application of Ingenious Media Holdings Plc) v Revenue and Customs Commissioners* [2016] UKSC 54.
[49] I am grateful to Alison Young for this observation.
[50] Explanatory Notes, para.110.
[51] See also Alison Young, "The White Paper on the Great Repeal Bill: Part I – Good News" (10 April 2017) http://ohrh.law.ox.ac.uk/the-white-paper-on-the-great-repeal-bill-part-i-good-news/ [Accessed 8 August 2017].
[52] Joelle Grogan, 'The (Not So) Great Repeal Bill, Part 1: Only Uncertainty Is Certain' (2 June 2017) <http://blogs.lse.ac.uk/brexit/2017/06/02/the-not-so-great-repeal-bill-part-1-only-uncertainty-is-certain/> [Accessed 9 August 2017].

there is a point of EU law.[53] It perhaps makes even more sense to refer to the CJEU's jurisprudence on the Charter whenever there are any fundamental rights or principles that are converted into domestic law (s.5(5)) which correspond to Charter rights and principles. Domestic courts or tribunals may also have regard to what is done by "another EU entity or the EU", so far as it is relevant to any matter before them (s.6(2)). This also covers, e.g., publications by the EU Fundamental Rights Agency, which may hence make their way into UK judgments.

The Charter will not be part of domestic law on or after exit day (s.5(4)) but this "does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter" (s.5(5)). The seemingly "innocuous" s.5(6), stipulating that "Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect", is more important than it first seems. Para.2 of that Schedule provides that "[n]o general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case)." Consequently, if one can find pre-exit CJEU case law on those principles, one would still be able to use them after exit day, as they would be "retained general principles of EU law" according to the Act. We have seen that these general principles can be the source of fundamental rights within the EU legal order. The EUWA does not convert the Charter rights into domestic law, but nevertheless retains those rights that have been recognised as general principles of EU law by the CJEU before exit day.[54]

In this connection, s.5(5) provides that "references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles". Consequently, even a pre-Brexit CJEU judgment that does not explicitly refer to a general principle of EU law may be used to recognise the existence of a "retained general principle of EU law". For the purposes of the Act, CJEU case law specifically focused on the Charter also applies to general principles.

Moreover, s.6(3) provides that any question as to the validity, meaning or effect of any retained EU law that has not been amended after exit day is to be decided "in accordance with any retained case law and any retained general principles of EU law". Retained EU law that has been amended on or after exit day can also be determined in accordance with CJEU case law and the general principles but only where that accords with the intention of the modifications (s.6(6)). These general principles include, according to the Explanatory Notes, "fundamental rights".[55] In those cases, pre-exit CJEU case law and the retained general principles would continue to be relevant. It is only logical that domestic courts may have regard to post-exit CJEU case law (if any) on the subject matter, as they may well do if they wish to do so (s.6(2)). This is all the more likely for the UK Supreme Court and the High Court of Justiciary (except where there is a further appeal to the UKSC), which will not be bound by the "retained EU case law" (s.6(4)-(5)), and may therefore wish to take all relevant considerations into account before deciding whether to depart from it. For example, a finding of incompatibility of an EU law norm with the Charter (or other,

[53] Sir Konrad Schiemann gives the example of a commercial contract between a British firm and a German firm that provides that the goods are to comply with EU law: Exiting the European Union Committee (n 33).
[54] Explanatory Notes, para.209.
[55] ibid paras.59, 209.

hierarchically superior norms) after exit day would presumably weigh in favour of departing from "retained EU case law" with regard to the relevant "retained" EU norm. It should be stressed, however, that the UKSC and HCJ may also depart from "retained EU case law" protecting such fundamental rights.[56]

With regard to lower courts, the Explanatory Notes provide that "…although all courts can have regard to post-exit CJEU decisions, unless and until the UKSC or HCJ have departed from pre-exit CJEU case law, the latter remains binding on lower courts even if the CJEU has departed from it after exit day."[57] This still leaves the option to lower courts to have regard to (and follow) post-exit CJEU judgments which do not depart from pre-exit CJEU case law. The latter category of CJEU judgments is clearly much larger than CJEU judgments which depart from earlier case law. The CJEU almost never explicitly departs from earlier case law – it distinguishes judgment. It commonly adds new requirements/conditions to the ones established in earlier case law, or "clarifies" the effects or meaning of earlier judgments. There is almost invariably debate as to whether a new judgment departs from earlier case law or not. It is argued here that lower courts may still have regard to judgments that do not openly (or implicitly) contradict a pre-exit CJEU judgment (and then, accordingly, leave the option to the UKSC or HCJ as to whether to depart from the relevant pre-exit CJEU case law in light of newer judgments). This would include, in my opinion, cases which take earlier case law to its logical conclusions, thereby building on well-established principles.

Notwithstanding the exceptions highlighted above, it should be stressed that there will be no right of action in domestic law on or after exit day based on a failure to comply with EU general principles.[58] Courts could not disapply domestic laws post-exit on the basis that they are incompatible with EU general principles. Further, domestic courts will not be able to rule that a particular act was unlawful or quash any action taken on the basis that it was not compatible with the general principles.[59] This rule is subject to two exceptions. First, a challenge which relates to something that occurred before exit day may be made within three years from exit day against either administrative action or domestic legislation other than Acts of Parliament or rules of law.[60] In the event of a successful challenge, courts, tribunals and other public authorities will be able to disapply legislation or quash conduct.[61] Second, the rule does not apply "in relation to any decision of a court or tribunal, or other public authority, on or after exit day which is a necessary consequence of any decision of a court or tribunal made before exit day or made on or after that day by virtue of this paragraph".[62] This is a very sensible exception, which "saves the effect of case law decided before exit day or during the transitional period in which the courts have disapplied a provision of pre-exit legislation on the grounds that it is incompatible with one of the general principles of EU law."[63]

[56] ibid, para.113. "Retained EU case law" is defined in s.6(7) EUWA.
[57] Explanatory Notes, para.114.
[58] Schedule 1 para.3(1).
[59] Schedule 1 para.3(2).
[60] Schedule 8 Part 4 para.39(5).
[61] Explanatory Notes, para.408.
[62] Schedule 8 Part 4 para.39(6).
[63] Explanatory Notes, para.409.

## Human rights protection in the UK without the EU Charter

Notwithstanding what was discussed in the previous section, it is clear that the UK human rights framework would be markedly different without the EU Charter. This is true both in terms of substance and remedies, which will now be discussed in turn.

### *The rights protected*

In terms of substance, the rights included in the ECHR are not identical to those included in the EU Charter, even taking into account the rich case law of the European Court of Human Rights. A full-scale comparison could only be undertaken on an *ad hoc* basis, in the application of those rights to the specific claims brought by the claimants. Nevertheless, it is clear that some Charter rights are not included in the text of the ECHR and its Protocols at all[64] or that, as the European Scrutiny Committee notes, "some ECHR Articles in the Charter have been 'updated', and so are drafted differently".[65] Litigants relying on the HRA in domestic courts or taking their case to the Strasbourg Court would have to argue that one of the "traditional" rights in the ECHR encompasses the meaning that they wish to accord to it, and there might or there might not be case law by the Strasbourg Court to rely on in support of their claim.

For example, the list of grounds on the basis of which discrimination is prohibited is different in art.21 of the EU Charter than the one in art.14 ECHR. This is important, because "…the list of protected groups is open-ended and non-exhaustive, whereas UK law has a closed list of nine protected characteristics".[66] In which case, after exit day, litigants would have to use art.14 ECHR (whenever possible) and argue that those characteristics that are not enshrined therein should in fact be protected. On the other hand, the Equality Act 2010 only protects the nine characteristics listed in s.4.

What is more, other rights are protected to a lesser degree under the ECHR than they are under the EU Charter,[67] an obvious example being the right to the protection of personal data (art.8 EU Charter).[68] In this connection, it will be recalled that the Strasbourg Court's case law acts as a reference point for the EU courts when interpreting Charter rights that correspond to Convention rights, but the CJEU may choose to provide more extensive protection than would have been the case under the ECHR.[69] As such, there is something to be lost in terms of substance after exit day[70] – also in terms of the Charter's "yet unfulfilled potential".[71]

The Government's "right by right analysis" seeks to argue that retained EU law and case law, the common law, international human rights instruments, and domestic legislation are enough

[64] See also Tobias Lock, "Human Rights in the UK after Brexit" (2017) Public Law 117, 122.
[65] European Scrutiny Committee (n 8) para.163.
[66] Women and Equalities Committee, *Ensuring Strong Equalities Legislation after the EU Exit* (HC 2016-17, 979) para.37.
[67] See also Tobias Lock (n 64) 122-26.
[68] See also Alison Young, "The White Paper on the Great Repeal Bill: Part III – More Bad News" (12 April 2017) http://ohrh.law.ox.ac.uk/the-white-paper-on-the-great-repeal-bill-part-iii-more-bad-news/ [Accessed 8 August 2017].
[69] Art.52(3) EU Charter.
[70] Concurring with this view, Sionaidh Douglas-Scott (n 9) 3; Adrienne Yong, "Forgetting Human Rights – The Brexit Debate" (2017) EHRLR 469, 475-78.
[71] Tobias Lock (n 64) 126.

to fill the void left in the human rights framework after the removal of the EU Charter. This is, with respect, not satisfactory. In the Government's defence, the report is carefully drafted, with the end result that reservations abound. For example, the report notes that, after exit day, domestic courts will be required to interpret retained EU law consistently with a certain Charter right "so far as it reflects a general principle of EU law". In other cases, the report notes that domestic legislation "covers some of the same ground" as a Charter right. Occasionally, the Government comes clean in its analysis: for example, "…Article 8 of the Charter has no direct equivalent in the ECHR…";[72] and "[t]he scope of the right [to an effective remedy and to a fair trial] in Article 47 is not however identical to that of Article 6 ECHR because it is not limited to the determination of civil rights and obligations or a criminal charge."[73] With respect to Title IV rights ("Solidarity"), it is noted that they "set out principles to guide the EU institutions when they legislate", but it is equally true that they ought to guide the Member States when they are acting within the scope of EU law. Furthermore, Title IV provisions can have a bearing on the interpretation of secondary EU law. In other cases, it is noted in the Government's analysis that retained EU case law that relates to those rights will be preserved by the EUWA, but this is only true, as we have seen, for pre-exit case law. The "right by right analysis" should only be seen as making a strong case for not keeping Title V rights ("citizens' rights") in domestic law, such as the right to vote and to stand as a candidate at elections to the European Parliament, because these rights depend on our being a member state of the EU.

***Available remedies***

The removal of the EU Charter from the statute book is also remedially significant. Legislation falling within the scope of EU law may be disapplied or set aside by domestic courts on grounds of its incompatibility with the EU Charter. Domestic courts have very different powers under the HRA. If the impugned legislation cannot be read and given effect in a way which is compatible with the Convention rights (s.3(1) HRA), the courts listed in s.4(5) HRA may issue a declaration of incompatibility. Such a declaration does not of course affect the validity, continuing operation or enforcement of the impugned provision (s.4(6) HRA). Courts do not have the power to set aside primary legislation on the ground of its incompatibility with the Convention, and may only strike down or set aside secondary legislation if the terms of the parent statute do not make this impossible.

The remedial differences between the HRA and EU law were brought to the fore in the *Benkharbouche* case.[74] The claimants were members of the service staff of foreign diplomatic missions to the UK. The question that lay at the heart of the case was whether the provisions of the State Immunity Act 1978 barred them from bringing proceedings in this jurisdiction against the employer state to assert their employment rights. The Court of Appeal decided that this was indeed the case.[75] However, this prompted another question, more specifically whether the impugned provisions of the Act, in its application to the claims of the claimants, were compatible

[72] See supra n 4, 25.
[73] ibid 69.
[74] *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, [2016] Q.B. 347.
[75] ibid at [9].

with arts.6 ECHR ("right to a fair trial") and 47 of the EU Charter ("right to an effective remedy and to a fair trial"). The Court of Appeal found that there was indeed a violation of art.6 ECHR, taken alone and in conjunction with art.14 ECHR ("prohibition of discrimination").[76] Since "[a]ny attempt to read down these provisions so as to remove immunity would be to adopt meanings inconsistent with fundamental features of the legislative scheme", the judges proposed to make a declaration that those provisions were not compatible with Convention rights.[77] The impugned provisions were, however, also found to be incompatible with the EU Charter.[78] The employment claims fell within the scope of EU law and therefore art.47 of the EU Charter was applicable.[79] The remedial differences between the HRA and the EU Charter then became abundantly clear:

> EU law has potentially important consequences in this case. The judge held that, as a result of the violation of article 47, the court was bound to disapply sections 4(2)(b) and 16(1)(a). Ms Benkharbouche and Ms Janah could then bring their EU law claims, and those statutory provisions would not then bar their claims. By contrast, the declaration of incompatibility which we propose to make under section 4 of the Human Rights Act 1998 does not affect the operation or validity of the 1978 Act. The declaration acts primarily as a signal to Parliament that it needs to consider amending that legislation.[80]

The order of the Court of Appeal disapplied the impugned provisions of domestic law to the extent necessary to enable employment claims falling within the scope of EU law by members of the service staff such as the claimants to proceed.[81] This would have been impossible under the HRA, as a declaration of incompatibility does not affect the validity of an Act until and unless Parliament amends it. Most recently, the Supreme Court affirmed the order of the Court of Appeal.[82]

Going back to the EUWA, Schedule 8 thereof provides that for the purposes of the HRA, any "retained direct principal EU legislation" is to be treated as primary legislation.[83] Any "retained direct minor EU legislation" is to be treated as primary legislation so far as it amends any primary legislation but otherwise is to be treated as subordinate legislation.[84] Primary and subordinate legislation have the same meaning as in the HRA.[85] Consequently, after Brexit day, domestic courts may only issue a declaration of incompatibility with respect to "retained direct principal EU legislation" and "retained direct minor EU legislation" that amends primary legislation.

[76] ibid at [53], [66].
[77] ibid at [67]-[68].
[78] ibid at [71].
[79] ibid at [73]-[81].
[80] ibid at [72].
[81] ibid at [85].
[82] [2017] UKSC 62 at [78].
[83] Schedule 8 Part 2 para.30(2).
[84] Schedule 8 Part 2 para.30(3). For the relevant definitions, see s.7(6) EUWA and Explanatory Notes, para.122.
[85] Schedule 8 Part 2 para.30(4).

## Conclusion

The discussion thus far has shown that the standard critique that the EU Charter has been "dangerous" in this jurisdiction is empirically unfounded, insofar as and to the extent that there has only been a fairly small number of Charter cases that were brought before or sent to the EU courts from the UK. In qualitative terms, some of these cases have shaped the EU courts' Charter jurisprudence more generally, but they did not give rise, in the opinion of the current author, to controversial rulings.

It may then be argued that the "best" argument against keeping the Charter in the UK is a normative one. It has sometimes been argued by commentators that Charter rights are "too vague" or that the EU courts have used the EU Charter to expand their jurisdiction and hence the reach of EU law. These arguments have been addressed elsewhere and are not, in the opinion of the current author, very convincing.[86] To the extent that these arguments have any currency at all (and in some cases they do), they could also be said to apply to other human rights instruments and bills of rights – both domestic and international. But almost nobody seems to suggest that all such instruments should be abolished, because the limits of the jurisdiction of the bodies and courts in charge of overseeing their application are not crystal clear or because we cannot be too sure how they would interpret the rights enshrined in those instruments in the future. There is nothing exceptionally vague or broad about the EU Charter, compared to these other instruments, and contrary to what is sometimes suggested the EU courts routinely accord a (wide) margin of appreciation to the primary decision-maker.

In the opinion of the present author, the "best" argument against keeping the EU Charter in the statute book after exit day would be that it might be thought to be redundant. The EU Charter only applies when the domestic authorities are acting within the scope of EU law. Leaving the EU would render, according to this argument, the Charter redundant. Moreover, litigants could presumably rely on the HRA instead. We have seen, however, that there are important differences – in terms of rights and remedies – between the ECHR and the EU Charter. The latter instrument provides explicit recognition to a broader list of rights; accords greater protection even to some of those rights that are also found in the ECHR; and is backed by the legal remedy of disapplication. The latter remedy would only be available in domestic law after exit day whenever there would be a conflict between retained EU law (as interpreted in the light of retained general principles) and pre-exit domestic legislation.[87]

Moreover, the argument that Charter rights would be rendered redundant after Brexit proves too much. It fails to explain why Parliament felt compelled to retain general principles that

[86] Sionaidh Douglas-Scott (n 9); Alison Young, "Four Reasons for Retaining the Charter Post Brexit: Part 1 – A Broader Protection of Rights" (2 February 2018) http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-post-brexit-part-1-a-broader-protection-of-rights/ [Accessed 16 April 2018]; Alison Young, "Four Reasons for Retaining the Charter: Part 2 – Remedies" (4 February 2018) http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-part-2-remedies/ [Accessed 16 April 2018]; Alison Young, "Four Reasons for Retaining the Charter: Part 3 – Clarity and Democracy" (5 February 2018) http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-part-3-clarity-and-democracy/ [Accessed 16 April 2018]; Alison Young (n 7).

[87] See further Alison Young, "Benkharbouche and the Future of Disapplication" (24 October 2017) https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/ [Accessed 30 October 2017].

correspond to Charter rights in domestic law, even going as far as providing that references to Charter rights in pre-exit CJEU case law should be read as references to "retained" general principles, so as to enlarge the scope of such principles that would be retained in domestic law (s.5(5) EUWA).[88] Furthermore, the Charter is a more up-to-date instrument that adds visibility to the rights enshrined therein.[89] It is probably needless at this stage to point out to the vast amounts of legal uncertainty that the retention of general principles of EU law in domestic law – to the exclusion of the EU Charter – is bound to cause after exit day.[90]

The argument against this is that the relatively small number of UK "Charter cases" in the EU courts would seem to be at odds with any claim that the EU Charter is of fundamental importance to the UK's human rights framework. However, it will be recalled that there used to be a misconception that the UK had an "opt-out" from the Charter and that therefore it was not applicable at all. The matter was solved as late as in 2012 with the *NS* case, where the CJEU ruled that there was no such "opt-out".[91] This, however, did not deter the European Scrutiny Committee from examining (and clarifying) the applicability of the Charter in the UK as recently as in 2014.[92] A similar state of confusion over the applicability of the EU Charter *still* persists in the other Member State covered by the Protocol, Poland.[93] Moreover, it will be recalled that the EU Charter only applies when the domestic authorities are "implementing Union law" (art.51), and that the meaning of this is also sometimes the subject of litigation. The Charter's limited scope of application does not, however, diminish the importance of the rights protected and the available remedies that were highlighted above. Nor does it diminish the importance of the UK "Charter cases" decided by the CJEU that were examined above, both for the claimants and for EU/domestic law more generally.

In light of the above, it is argued that there are at least two possibilities open to those wishing to retain the EU Charter in the statute book after Brexit. First, the legislator could incorporate the Charter into domestic law and retain its significance with respect to *all* domestic law (both retained EU law and other domestic legislation). It would then be possible to pick and choose those rights that the legislator wished to retain in domestic law after Brexit. This would be akin to treating the EU Charter in the same way that nearly all existing EU law would be treated, according to the terms of the EUWA. For example, Parliament may regard the EU Charter rights as significant legal safeguards that add to the ECHR in many ways, but may nevertheless wish that certain rights do not form part of domestic law after exit day. For example, it may wish that the socio-economic rights enshrined in Title IV of the Charter be not kept in domestic law after exit day. In which case, it would be possible to remove those Charter rights from the statute book and retain those other rights that are deemed appropriate for this jurisdiction.

[88] See also Alison Young (n 7).
[89] Catherine Dupré, "'Human Dignity is Inviolable. It Must Be Respected and Protected': Retaining the EU Charter of Fundamental Rights after Brexit" (2018) EHRLR 101.
[90] See further Alison Young, "Oh, What a Tangled Web We Weave… The EU (Withdrawal) Bill 2017-19 and Human Rights post Brexit: Part 2" (16 August 2017) http://ohrh.law.ox.ac.uk/oh-what-a-tangled-web-we-weave-the-eu-withdrawal-bill-2017-19-and-human-rights-post-brexit-part-2/ [Accessed 30 October 2017].
[91] See supra n 19.
[92] European Scrutiny Committee (n 8).
[93] I am grateful to Mikołaj Barczentewicz for this comment.

Second, it would be possible to retain the significance of the EU Charter *only with respect to retained EU law*. In which case, Charter rights would be "saved" and then only used to determine the interpretation, validity and effects of retained EU law that has not yet been modified. This could be done by means of amending s.6(3) EUWA and then Schedule 1 accordingly. Moreover, retained Charter rights could be used to interpret retained EU law that has been modified after exit day where that accords with the intention of those amendments (s.6(6) EUWA).

It should be stressed that none of these two options should necessarily be seen as advocating for "strong" judicial review.[94] If at all, Charter rights should only retain their "supremacy" over pre-exit domestic legislation, in the same manner that the principle of supremacy of EU law would continue to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made *before* Brexit (s.5(2) EUWA). There is no suggestion for the purposes of the argument put forward here that it should be possible to disapply any rule of law after exit day on grounds of its incompatibility with Charter rights. The aim of this article is rather more modest, in that it seeks ways to keep Charter rights in our jurisdiction after exit day, albeit almost inevitably in a different form, while at the same time being respectful of the salient features of the UK's constitutional framework. The discussion on the future of the UK's human rights framework and/or on a British Bill of Rights should not be preempted through the backdoor by means of amending the complex provisions of the EUWA. Those wishing to accord greater protection to human rights after exit day should walk through the front door, but there is no guarantee that they will be welcomed with open arms. Nevertheless, it might be well worth trying.[95]

One final note: from a legal standpoint, the discussion on the future human rights framework should not begin from the assumption that human rights protection may only deteriorate in range and strength. If anything, it is hoped that in their quest for developing a fully-fledged domestic jurisprudence after exit day the UK Courts may wish, in some cases, to accord *greater* protection to individuals than would have been the case under the Charter. This is legally possible, as they would not be barred anymore from CJEU jurisprudence to do so.[96] And in some cases, it would indeed be normatively desirable.

[94] I am grateful to Ewan Smith for this comment. For a different view, see Tobias Lock, "What Future for the Charter of Fundamental Rights in the UK?" (6 October 2017) http://www.europeanfutures.ed.ac.uk/article-5607 [Accessed 30 October 2017], who argues that "courts would have to be given the power to strike down retained EU law that is contrary to Charter rights" and that "the restriction on disapplying domestic legislation and declaring any domestic conduct unlawful for failure to comply with EU fundamental rights would equally need to go".

[95] See previously in this journal, Dominic Grieve, "Can a Bill of Rights Do Better than the Human Rights Act?" (2016) Public Law 223; Alexander Williams and George Williams, "The British Bill of Rights Debate: Lessons from Australia" (2016) Public Law 471.

[96] Alison Young (n 51).