HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Fundamental Rights

Evidence: Lawyers

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BALANCE OF COMPETENCES REVIEW: FUNDAMENTAL RIGHTS

Summary

The EU Charter of Fundamental Rights ("the Charter") is a well drafted statement of values to which almost everybody in the UK would readily subscribe. These values are also those of European countries. It is, therefore, entirely appropriate that such a political statement should have status within the process of building a united Europe of which the EU is the principal organ.

Unfortunately the Charter embodies an intellectual muddle as to its role. It is unclear whether the Luxembourg Court is to have a supreme court power to strike down any EU legislation, past or future, which the Court considers incompatible with the rights in the Charter, or whether the Charter is purely a codification of interpretative principles which the Court has already evolved. The ECJ itself seems to consider the role is the former, and is ready to use the Charter in a highly interventionist way.

Whatever might in the abstract be the merits of a strike-down role, the activist jurisprudence of the Court has become a threat to democracy operating at European level.

Whilst the MoJ's present exercise does not directly request ideas for a UK renegotiation, it follows from the discussion in this paper that a desirable goal would be a some form of new Charter of Democratic Values, by which the Court's role would be circumscribed in the application of the Charter.

The activist tendency of the European Court of Justice may be illustrated by reference to two important cases.

Association Belge

The ECJ's decision in *Association Belge des consommateurs Test-Achats v Conseil des Ministres* [2012] 1 WLR 1933 concerned insurance premiums. In the early years of the 21st century the EU decided to implement a range a measures to implement policies to counter discrimination of

various types. The jurisdiction to adopt these measures was art 13(1) of the EC Treaty[1] which states:-

> "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

It may be observed that the Treaties required unanimity in the Council for legislation in this field: one may imagine that reflected a realisation of the potentially wide-ranging consequences of anti-discrimination legislation.

One of the measures which the Council adopted in accordance with the procedures specified in the Treaty was Directive 2004/113/EC. Its general purpose was to require equal treatment between men and women in access to and the supply of goods and services. Amongst the areas of its application was insurance. Art 5(1) enacted a general rule against the use of sex as a factor in the calculation of premiums to come into effect in December .

In 2004 the national law of some member states permitted the use of gender as a factor in the setting of premiums; and some of these states considered that it was reasonable and desirable for this to continue. A well-known example of the effect of such use of gender was the lower motor insurance premiums available for young female drivers compared with young male drivers, reflecting the well-established data of the higher incidence of accidents by young male drivers. It seems apparent that some of these member states did not wish to introduce an inflexible ban on the use of gender as a factor in the setting of premiums. In consequence art 5(2) created a carve-out for those states which decided prior to December 2007 to permit proportionate differences in premiums on the basis of sex where this was based on "relevant and accurate actuarial and statistical data".

Amongst the states which chose to take advantage of this carve-out was Belgium, which enacted a law permitting the continued use of gender as a factor in limited circumstances. The law

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[1] Now art 19(1) TFEU

required a public body to collect actuarial and statistical data. In the meantime the law stated:-

> "... a direct distinction on grounds of sex shall be permitted for the purposes of calculating insurance premiums and benefits if it is objectively justified by a legitimate aim and if the means of achieving that aim are proportionate and necessary."

A consumer organisation in Belgium challenged the constitutionality of this law. The Belgian Constitutional Court sought guidance from the ECJ on the validity of art 5(2). The argument for its invalidity was based on art 6 of the Treaty on the EU :-

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

The ECJ found that the art 5(2) of the Directive was invalid, null and of no effect, on the grounds that it conflicted with the Charter. The ECJ held that the remainder of the 2004 Directive was valid, but that the carve-out was not. Accordingly the Court decreed that all states in the EU were bound to ban the use of gender in the setting of premiums. The Court found it possible to hold that, despite this fundamental problem as to the validity of the provision, it was valid until a date arbitrarily selected by the Court 21 months after the delivery of its judgment.

The ground of the decision on the invalidity of art 5(2) was that it infringed two articles of the Charter. These were:-

> "Article 21
> Any discrimination based on any ground such as sex ... shall be prohibited.
>
> Article 23
> Equality between women and men must be ensured in all areas ..."

It will be immediately apparent that these propositions are stated in very general terms. Indeed, Advocate General Kokott[2], who made little secret of her own views by describing the Council's decision to enact art 5(2) as "astonishing"[3], conceded in her opinion that differences in treatment

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[2] Juliane Kokott, who was the Advocate General at the hearing of this case in the ECJ, was prior to her appointment to the Court a distinguished academic lawyer. She is of German nationality. She was never in practice as a lawyer, and held no judicial appointment in Germany.

[3] [2012] 1 WLR 1933 at [22]

between the sexes may be justified in particular circumstances, and that a justification for direct discrimination on grounds of sex is conceivable in limited circumstances[4].

In the minds of some people it is obvious that the use of gender in the determination of an insurance premium amounts to discrimination. In the original meaning of the word "discriminate", meaning to recognise a distinction, that is certainly so. But in the context of equality legislation "discrimination" has a more specific meaning of treating less favourably on account of what in British law is now called a protected characteristic. In this sense it is arguable that neither men nor women receive less favourable treatment by the use of gender in the setting of premiums, provided that there is sound actuarial evidence to justify the distinction being made: they receive equal treatment in the sense that both sexes are charged premiums fairly reflecting the risks for an insurer of covering members of their group. Thus there is a perfectly arguable case either way as to whether the use of gender in setting insurance premiums amounts to unequal treatment. The first thought of a democrat may be that a decision whether or not it should be permissible to take account of gender in this way is pre-eminently a decision for a democratic legislature – in this case the legislature of the EU, which is itself in essence an international democratic polity.

This judgment represents a remarkable inroad on the principle of the democratic competence of the legislative institutions of the EU. It is little exaggeration to say that it amounts to legislation by the Court.

Advocate General Kokott accepted that there was never any obligation on the legislative institutions of the EU to introduce law on insurance premiums. The treaties created a competence which allowed the legislative institutions of the EU to legislate in this field, but did not compel them to do so. It would have been perfectly open to the Council to decide not to legislate on insurance premiums at all. The Council could legislate only by unanimous vote. It needs little imagination to think that, in the absence of the art 5(2) carve-out, there would never have been the necessary unanimity for a provision affecting insurance premiums at all. Judicial decisions of this kind do little to encourage the give-and-take necessary to achieve decisions in

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[4] at [37]

the Council.

The Court's decision amounts to what is in common parlance called a strike-down – that is, a court declaring that a legislative instrument is of no effect. As discussed more fully below, this is significantly different from a court using a declaration of rights as an aid to interpretation, or "reading down" a statute so as to be compatible with a declaration of rights (such as an English Court does under the Human Rights Act). There was no scope whatever for interpreting art 5(2) so as to invalidate the Belgian law. The Belgian law was itself framed in the most careful terms so as to authorise the use of gender in setting premiums only where proportionate, justified by evidence and so on.

Another curious feature of the decision is that in 2004, when the Council enacted the Directive, the Charter had no force of law at all. It was a purely declaratory document until the Lisbon treaty which was signed in December 2007 and did not enter into force until December 2009.

Assuming, despite the above-mentioned issues, that the ECJ was convinced that art 5(2) was outside the competence of the Council, one might have thought that the correct conclusion would have been that the whole of art 5, that is the entire law on insurance premiums, would be declared invalid. The effect of declaring invalid only art 5(2) was that all member states are compelled to prohibit an insurance practice which the Council expressly enacted should continue.

Thus, relying on an instrument, namely the Charter, which had no legal force at the relevant date, the Court has brought into force a law which the democratic organs of the EU did not enact, and manifestly did not wish to enact. Many people may like the policy of ending the bias in favour of women in young driver premiums. But in constitutional terms the desirability or not of the policy is not the point. At the level of the value of democratic government the outcome is that a legislative decision has been taken not by the democratic institutions of the EU, namely the Council and the Parliament, but by a non-democratic institution, namely the Court.

ZZ

ZZ has dual French and Algerian nationality. In 1990 he married a British national and resided

in Britain for the next 15 years. In 2005, whilst he was in Algeria, the Home Secretary decided that his presence in the UK was not conducive to the public good and cancelled his right of residence. ZZ was then refused re-admission to the UK.

ZZ challenged the Home Secretary before the Special Immigration Appeals Commission. At a preliminary stage SIAC considered an application that much of the Home Secretary's case should be considered in a closed procedure, where ZZ's interests would be looked after by special advocates. SIAC found that the case for such a closed procedure was made out on grounds of national security. SIAC then proceeded to consider much of the substantive case in closed session. It found that he had been involved in terrorist activities of the Armed Islamic Group network. SIAC further considered for reasons which were set out only in a closed judgment that ZZ represented a genuine, present and serious threat to public security.

ZZ appealed to the Court of Appeal. It was accepted on his behalf that he had no grounds for complaint either in domestic law or under the ECHR. However, he argued that art 47 of the Charter provided a basis on which he was entitled to challenge the proceedings in SIAC. His complaint was that, whilst it might have been permissible to withhold from him some of the details of the evidence he should at the minimum have been told the gist of what was put forward in the closed session.

The general principle of the EU is, of course, free movement of persons. But this is not absolute. The principal relevant instrument is the so-called Citizens Directive, Directive 2004/38/EC. It has been transposed into English law by the Immigration (EEA) Regulations 2006. By art 27.1 th Directive permits restricting the freedom of movement of EU citizens on grounds of public policy and public security. In the case of a person who has been resident in the host country, as ZZ had, for over 10 years, expulsion is permissible only if based on imperative grounds of public security: in giving the open judgment of SIAC Mitting J stated that by reason of the closed material that high threshold was established by the Home Secretary.

The Citizens Directive provided for rights of challenge to government decisions restricting these rights. By art.31:-

> "1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host member state to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
> ....
> 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in article 28."

At the level of the ordinary meaning of language the UK's SIAC procedures satisfy all the above requirements. SIAC is a judicial procedure. It does allow examination of the legality of the decision; and of the facts and circumstances. SIAC does address proportionality: in ZZ's case there is a section of the Mitting J.'s open judgment specifically dealing with proportionality.

Art 30 contained a further relevant provision – the provision at the centre of the case. This stated:-

> "2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security."
> (emphasis added)

Since SIAC found in ZZ's case that the Home Secretary had made the case for closed proceedings, at the level of the ordinary meaning of language the requirement in art 30.2 did not apply.

It followed that as a matter of domestic law ZZ had no basis for contending that he was entitled to be told the gist of the case advanced by the Home Secretary in the closed session. It was also accepted, as has already been mentioned, that there was no Convention right of assistance to ZZ's argument.

Against that background ZZ submitted to the Court of Appeal that art 47 of the Charter justified his case to be told the above-mentioned gist. Art 47 of the Charter states:-

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated

has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented..."

One could understand an argument that, if the validity of every previous EU Directive is subsequent to 2009 to be subjected to the test of its compatibility with the literal meaning of the Charter, and if the opening phrase of art 47 is meant to read "Everyone who claims that his rights and freedoms guaranteed by the law of the Union are violated ...", then the state security limb of art 30.2 of the Citizens Directive could not stand. If every hearing has to be a public hearing, then every species of closed hearing would be prohibited. However, ZZ did not advance that argument. ZZ accepted that evidence could be closed. He said merely that he was entitled to a summary. This may seem an illogical half-way house.

Kay LJ was firmly against ZZ's argument. He relied on the interaction of the EU principle of procedural autonomy and the clear statements in the treaties that neither EU competences nor the Charter affected national security. The principle of autonomy is that in the absence of specific EU rules it is for domestic legal systems to lay down the procedural rules governing actions for safeguarding EU rights[5].

As to the exclusion of national security from EU competence, by art 4.2 TEU,

"national security remains the sole responsibility of each Member State".

That is reinforced by art 346 TFEU:-

"No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security"
(Kay LJ's emphasis)

Art 6 TEU states that the Charter,

"shall not extend in any way the competences of the Union as defined in the Treaties."

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[5] *Impact v Minister for Agriculture* [2008] 2 CMLR 47 at [44]

Accordingly Kay LJ considered that the SIAC procedures were not susceptible to challenge on the ground of incompatibility with art 47. However, Carnwath and Moses LJJ felt that the issue was not "acte clair", and so the issue was referred for a decision by the Luxembourg Court.

At the ECJ Advocate General Y Bot delivered a long and careful opinion. He stressed that since art 30(2) was a derogation from a general proposition it should be construed strictly. He stressed the general application of the EU principle of effective judicial protection. He stressed that where national security was to be relied on to invoke a derogation the burden to establish this was on the government concerned. He considered that a fully closed session, that is to say complete non-disclosure without a summary, should occur only in exceptional cases. But, despite recognising all those factors, his opinion was against ZZ. He concluded that the UK's SIAC system struck a fair balance. He did not consider that ZZ was entitled to a summary of the closed session case.

The Court, however, took the unusual step of differing from its Advocate General. It held that art 47, whilst not requiring full disclosure of all the evidence to which the national security consideration applied, did require the provision of "the essence of the grounds". It is hard to know why the Court reached this conclusion, since the judgment simply asserts this conclusion, without explaining the intellectual steps by which it was reached. The explanation, no doubt, is the practice of the Court delivering only a single judgment: one may guess that 13 members of the Court did not all follow the same line of thought.

Thus this decision demonstrates a strikingly wide application of the Charter. It connotes the Charter altering the clear, or at any rate literal, meaning of an EU Directive, and doing so despite both the principle of autonomy and the exclusion of EU competence on national security standing in the path of doing so.

Discussion

These two cases demonstrate that the Luxembourg court regards the Charter as creating what in common parlance is called a "strike-down" power. That is to say the Court uses the Charter as a yardstick by which to judge the lawfulness of EU primary legislation.

In English law, of course, courts have a "strike-down" power over the acts of local authorities and public officials, including government ministers, but no such power over the laws enacted by Parliament. The absence of such a power over Parliament's laws follows naturally from the doctrine of the sovereignty of Parliament, and the existence of such a power in respect of administrative bodies reflects the principle of legality. If a court "strikes down" a ministerial decision or a local authority bye-law what the court is doing is holding that the purported action is outside the power of the institution or official in question. Although the grant of a remedy is discretionary, and the administrative action is valid until quashed, the justification for the interference of the court is that the administrative body never had any power to do what it purported to do.

This rationale is the explanation for the intervention of the court in the situation in UK law where a legislative assembly's laws can be held invalid on the ground of conflict with fundamental rights. Such intervention is possible in the UK in respect of the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly. For example, by s.29 of the Scotland Act 1998:-

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
> (2) A provision is outside that competence so far as any of the following paragraphs apply –
>
> ....
> (d) it is incompatible with any of the Convention rights or with EU law
> ..."

Thus in the case of the UK devolution legislation there is a clear intellectual structure: the devolved institutions have certain powers, but those powers do not extend, inter alia, to infringing rights in the ECHR; and if a law is passed which is incompatible with such rights, it is not law at all.

This contrasts with the role of ECHR rights in respect of the Westminster Parliament's primary legislation. There the rights merely are a tool to assist interpretation. By s.3(1) Human Rights Act:-

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

One might expect there to be a clear statement in either the treaties or the Charter as to which role the Charter is to perform – to set the limits of legislative competence, or merely as an interpretative canon.

Unfortunately one does not find any such clear statement. Chapter VII of the Charter is entitled "General Provisions Governing the Interpretation and Application of the Charter". That sounds as though it will be place where we shall learn which of the two possible roles the Charter is to have. But it blows hot and cold, leaving us unsure.

Art 51(1) begins:-

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

This might be merely exhortatory, or might lean towards setting as the outer limit of institutional competence anything which the Court considered incompatible with the rights. But it is hard to see how this could empower the Court to strike down instruments enacted by EU institutions prior to the Charter achieving legal effect in December 2009.

Art 51(2) then says:-

> "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

That would seem to rule out the extension of an EU impact on a purely procedural domestic arrangements directly concerned with national security – and so to rule out the *ZZ* decision.

Next comes art 52(1):-

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms."

The implication of that proposition – that limitations to the rights must be provided for by law – has to be that law <u>can</u> limit the rights. In other words, if EU legislation by clear words limits the rights, then they are validly so limited. So this must entail the proposition that EU law, such as

an EU Directive, limiting rights can be valid law. That necessarily negates the proposition that the ECJ has power to declare a Directive or part of a Directive invalid on the ground that it is incompatible with Charter rights.

But the very next sentence may take away with the other hand what the first hand has just given:-

> "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. "

So, for a limitation to be valid, it must meet objectives and criteria, which are described in the vaguest possible language. Is this basis for a supreme court to strike down legislative acts as invalid? or mere political aspiration?

The treaties do not resolve the dilemma. Art 6 EU states:-

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

Since, as we have seen the Charter itself is unclear as to its role, the statement that it is to have the same value as treaties falls short of resolving the ambiguity.

It is, therefore, not surprising that different judges have understood the role of the charter in different ways. On the one hand, it is implicit in the judgments discussed above that ECJ regards the Charter as conferring on it a strike-down power. On the other hand, Kay LJ was clear that it did no more than codify pre-existing principles of interpretation. He said at [16]:-

> "It is important to keep in mind what the Charter is and what it is not. The first time it was mentioned by the ECJ was in European Parliament v Council [2006] ECR I-5769 , at paragraph 38 where its principal aim was described as being to reaffirm rights resulting from constitutional traditions and international obligations common to the Member States, the Treaties, the ECHR , the Social Charters and the case law of the ECJ and the Strasbourg Court (see Preamble). At that time the ECJ described it as "not a legally binding instrument. However, Article 6 of TEU provides that the Union "recognises the rights, freedoms and principles set out in the Charter which shall have the same value as the Treaties. On the other hand, its provisions,

> "shall not extend in any way the competences of the Union as defined in the Treaties,"
>
> and rights, freedoms and principles in it are to be interpreted with due regard to the Explanations which have been provided to accompany it. Putting all this together, it seems to me that the Charter is not a free-standing, rights-creating legislative instrument. It is akin to a restatement of rights, freedoms and principles already established in law as a result of, inter alia , judgments of the Luxembourg Court."

In short the Charter constitutes an intellectual muddle. The crucial question of whether the EU's democratic institutions or judicial institution is to prevail is fudged. The loser of that fudge is EU democracy, since, in the absence of clear ground rules, ECJ's decisions are de facto unchallengeable.

This is unfortunate because respect for democracy is a foundation value of the Union. Art 2 TEU states-

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."
> (emphasis added)

Whilst the MoJ's present exercise does not directly request ideas for a UK renegotiation, it follows from the discussion in this paper that a desirable goal would be a some form of new Charter of Democratic Values, by which the Court's role would be circumscribed in the application of the Charter.

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BALANCE OF COMPETENCES REVIEW

FUNDAMENTAL RIGHTS

EVIDENCE OF DAVID ANDERSON Q.C.

EXECUTIVE SUMMARY

1. The Charter has the same legal value as the Treaties. It is a powerful legal instrument that is fully justiciable and can be relied upon before the courts of the EU and of the UK:

    a. as an aid to the interpretation of both EU rules and national rules within the scope of EU law, and

    b. as a ground for invalidating both EU rules and national rules within the scope of EU law.

2. All these things were true also of the Charter's legal parent: the general principle of fundamental rights, developed by the European Court of Justice ("ECJ") in case law dating back to 1969, which gave birth to the Charter and survives alongside it.

3. This fact explains the apparent paradox that the Charter, though powerful, is said "*not [to] create new rights or principles*" and not to "*extend*" the ability of EU or national courts to find that UK rules are inconsistent with fundamental rights. That ability existed previously; the Charter perpetuates but does not extend it.

4. The Poland-UK Protocol is not (and was never claimed to be) an opt-out. Rather, it helpfully clarifies the basis on which the Charter applies in all Member States, with specific reference to Poland and the UK.

5. Four years after the Charter came into force, there are no significant signs of competence creep. Those vigilant in these matters will however want to keep an eye on:

    a. the manner in which the ECJ defines the category of national rules and decisions that fall within the scope of EU law and hence of the Charter;

    b. the manner in which the Title IV ("*solidarity*") rights are given effect; and

    c. the possible future emergence of a more intense human rights culture within the ECJ.

6. Fundamental rights are an essential part of EU law. The Charter reaffirms and makes more visible those rights. The principle of government limited by individual rights was in large part developed in Britain: that principle as expressed in the Charter remains advantageous to the UK and its citizens.

INTRODUCTION

1. I am a Q.C. in private practice, and a Visiting Professor at King's College London. Over the past 25 years I have pleaded more than 130 cases before the EU courts and many more before the courts of England and Wales. I also practise before the European Court of Human Rights, and have served for the past three years in the part-time role of Independent Reviewer of Terrorism Legislation. In 2011 I published (with Cian Murphy) a chapter on the Charter of Fundamental Rights which is freely available to the public in the form of a working paper.[1]

2. This evidence is grounded in my reading and my experience, and limited to the Charter. It deals with:

    a. the legal status of the Charter

    b. the UK-Poland Protocol

    c. the issue of competence creep

    d. whether the Charter is advantageous or disadvantageous.

    All but the last of those points were addressed, in similar though not identical form, in written evidence requested by the House of Commons European Scrutiny Committee and submitted to it on 7 January 2014. I have also been invited to give oral evidence to that Committee on 15 January 2014.

LEGAL STATUS OF THE CHARTER

3. Article 6(1) of the Treaty on European Union (TEU) states plainly that the Charter "*shall have the same legal value as the Treaties*". The provisions of the Charter "*shall not extend in any way the competences of the Union*" (Article 6(2)), meaning that they may not form the legal basis for Union action. As a document with Treaty force, however, the Charter functions both as an interpretative mechanism and as superior source of law, sufficient to invalidate EU rules/practices or national rules/practices (within the scope of EU law) that do not comply with it. As the Supreme Court held in *RFU v Consolidated Information Services*, the Charter has direct effect in national law, "*binding member states when they are implementing EU law*".[2]

[1] The Charter of Fundamental Rights: History and Prospects in post-Lisbon Europe http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953619

[2] [2012] 1 WLR 3333, paras 26-28.

4. A well-publicised example of the application of the Charter is the recent judgment of the Employment Appeal Tribunal (EAT) in *Benkharbouche*.[3] Langstaff J disapplied two provisions of domestic statute on the basis that by permitting the Sudanese and Libyan embassies to avoid unfair dismissal claims by reference to state immunity, they failed to comply with the fair trial right guaranteed by Article 47 of the Charter. I understand that the case is subject to appeal. As a matter of principle, however, there is no novelty in the proposition that national rules or practices which fail to comply with EU principles of fundamental rights fall to be disapplied. A 30-year-old analogy is the case of *Kent Kirk*,[4] in which a Danish MEP's conviction for illegally fishing in UK waters was set aside after it was judged to infringe the principle of non-retroactive application of criminal penalties. Then described as "*a general principle of law whose observance is ensured by the Court of Justice*", that principle is now to be found in Article 49 of the Charter.[5]

THE POLAND-UK PROTOCOL

5. When the 30th Protocol was negotiated in mid-2007, the Eurosceptic press was quick to hail it as an opt-out.[6] The perception that an opt-out had been achieved has been seen as helpful to the Government in convincing the public that the Lisbon Treaty was different from the Constitutional Treaty and therefore did not require the referendum promised in the 2005 manifesto.[7]

6. Informed opinion was very different. This Committee recorded later in 2007 the views expressed to it by the then Europe Minister and Foreign Secretary that "*the Protocol was not an opt-out from the Charter*" and that "*the Charter would be legally binding*".[8]

7. The following year Lord Goldsmith, who was Attorney General when the Charter was first negotiated, stated:

> "It will be clear the UK Protocol does not in any way constitute an 'opt-out' in the sense of trying to disapply certain rights to UK citizens. That would be neither necessary nor desirable given that the UK fully accepts the rights reaffirmed in the Charter."[9]

8. To similar effect Daniel Denman, who was involved in negotiating the Protocol on behalf of the UK, wrote (albeit in a personal capacity):

> "Although the Protocol is in terms that are specific to the United Kingdom and Poland, it does no more than set out some of the implications of the way in which EU law gives effect to the Charter. So every proposition in the Charter, although it only refers to the United Kingdom and Poland, is equally true for every other Member State."[10]

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3 UKEAT/0401/12/GE, 4 October 2013.

4 Case 63/83, [1984] ECR 2689.

5 The duty of national courts to set aside even national primary legislation that contravenes EU Treaty law or the general principles of law has been clear for longer still: see, e.g., Case 106/77 *Simmenthal* [1978] ECR 629, which inspired the *Factortame* (Spanish Fishermen) litigation in the late 1980s.

6 "Mr. Blair's final appearance on the European stage produced a clear negotiating success as Britain won a legally-binding opt-out from the controversial charter": Daily Mail, 23 June 2007; "EU chiefs have agreed to give Britain an opt-out on the Charter of Fundamental Rights": News of the World, 24 June 2007.

7 Prof. Catherine Barnard (Trinity College Cambridge), "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality"?, EUI conference, Florence, April 2010.

8 House of Commons European Scrutiny Committee, Report of 27 November 2007, paras 30-31.

9 "The Charter of Fundamental Rights", speech to BIICL, 15 January 2008.

10 "The Charter of Fundamental Rights" (2010) 4 EHRLR 349-359 at 355.

9. It was entirely predictable, therefore, that when the Grand Chamber of the ECJ came to rule upon the status of the Poland-UK Protocol, it would conclude that the Protocol "*does not call into question the applicability of the Charter in the United Kingdom or in Poland*".[11] The surprise recently expressed at this result by a High Court Judge (albeit *obiter*) is to be explained by the fact that the point was not fully argued before him.[12]

10. Whatever its motivations, I would not go so far as to agree that the Protocol is nothing more than "*an exercise in smoke and mirrors*".[13] It sets out more plainly than does the Charter itself that:

    a. The Charter does not create new rights or principles (a point specifically affirmed by the ECJ in *NS*).[14]

    b. The Charter does not extend the ability of the ECJ or of UK courts to invalidate UK rules/practices.

    c. Nothing in Title IV of the Charter creates justiciable rights applicable to the UK, except in so far as the UK has provided for such rights in its national law.

    As such, the Protocol may be not only of comfort but of practical use to any party seeking to avoid an expansive interpretation of the Charter.

COMPETENCE CREEP?

Application to national rules

11. The provisions of the Charter are addressed to the Member States "*only when they are implementing Union law*" (Article 51(1)). The interpretation of that phrase is central to the balance of competences between Member States and the EU, as the UK's Advocate General acknowledged when she made the point that to adopt the very wide interpretation that she herself was proposing "*would involve introducing an overtly federal element into the structure of the EU's legal and political system*" and could thus be contemplated only after a political statement of commitment from the Member States.[15]

12. A more conventional course was taken by the UK's Supreme Court in 2012. Following ECJ case law defining the circumstances in which the general principles of law were applicable to national rules and practices, it held that:

> "the rubric, 'implementing Union law', is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law'".[16]

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[11] Joined Cases C-411/10 and C-493/10 *NS and others v* SSHD, 21 December 2011, para 119. The Government had argued to the contrary in the High Court, but wisely conceded the point on appeal and before the ECJ.

[12] *R (AB) v SSHD* [2013] EWHC 3453 (Admin), paras 9-16. Mostyn J's misapprehension seems to have been widely shared (though not by the Lord Chancellor and Secretary of State for Justice) in the House of Commons debate of 19 November 2013, Hansard cols 1087-1094.

[13] Prof. Barnard, fn 7 above.

[14] At para 119.

[15] Case C-34/09 *Ruiz Zambrano*, Opinion of 30 September 2010, para 172. Sharpston AG's suggestion, that the application of EU fundamental rights should be dependent solely on the existence of exclusive or shared EU competence, whether or not exercised, was not taken up by the Court.

[16] *RFU v Consolidated Information Services Ltd.* [2012] UKSC 55, para 28.

It is well established that a State acts within the scope of EU law, in particular, when availing itself of one of the permitted derogations from freedoms such as the free movement of goods and the freedom to provide services. There have been pre-Charter cases in which the general principle of fundamental rights was given a remarkably wide application under that doctrine.[17]

13. An apparently similar analysis was applied by the Grand Chamber of the ECJ, in the 2013 case of *Åklagaren v Fransson*.[18] The Court held (at para 21) that:

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

noting at para 23 that the provisions of the Charter "*are not to extend in any way the competences of the European Union as defined in the Treaties*" and that the Charter "*does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties*". The United Kingdom did not intervene in the case, as it could have done had it wished to join the Commission and five other Member States[19] in contesting the application of the Charter.

14. The *Åklagaren* judgment has attracted some concerns, notably from the German Federal Constitutional Court – the traditional judicial guardian of Member State powers against EU encroachment.[20] Those concerns may be prompted not so much by the above formulation as by its application to the facts of the case at issue, which concerned the enforcement of tax liabilities – a subject not governed directly by EU law, even though one VAT, one of the taxes at issue, is regulated in other respects by EU law.

15. It remains to be seen whether this case could mark the beginning of competence creep. The language of the ECJ suggests that any such creep could be at most of a modest nature, compared at any rate to the bold proposal of Sharpston AG in *Ruiz Zambrano.* The UK Government's non-intervention in *Åklagaren* might suggest that it was relatively unconcerned about the outcome. It should also be noted that in many other cases, claims based on the alleged incompatibility of national rules/practices with the Charter have been dismissed by the ECJ, often in summary fashion or by reasoned order.[21]

Title IV rights

16. The UK's concerns about the Charter were at their most acute in relation to Title IV ("*solidarity*"), which contains 12 rights of a social and economic nature including the right of collective bargaining and action, fair and just working conditions, social security and social assistance and health care. Like the other rights in the Charter, they could of course apply only within the scope of EU law.

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17 Notably Case C-60/00 *Carpenter* [2002] ECR I-6279, in which it was held that the deportation of a third-country national had to comply with EU fundamental rights because of its incidental effect on occasional cross-frontier service provision by the deportee's husband.

18 Case C-617/10, Judgment of 26 February 2013.

19 Sweden, Czech Republic, Denmark, Ireland and the Netherlands.

20 The Federal Constitutional Court laid down a marker by indicating (at least in the press release accompanying its judgment) that it will interpret the judgment as limited to VAT: Press Release 31/2013 of 24 April 2013. See also Bas van Bockel, *New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson* [2013] EL Rev 866.

21 See, e.g., Joined Cases C-267/10 and C-268/10 Rossius, 23 May 2011; Case C-27/11 *Vinkov*, 7 June 2012.

17. Significant limits on the enforceability of these rights appear to be imposed by Article 52(5) of the Charter, but its scope is not clear. It will be particularly welcome, therefore, to those who oppose the development of free-standing EU rights under Title IV, that the Poland – UK Protocol clearly provides:

> "In particular and for the avoidance of doubt, 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."

18. I am not aware of case law on this provision, but it would seem to give strong protection against the assertion by the ECJ of Title IV rights going beyond what is provided for under UK law.

Human rights culture

19. The ECJ developed its fundamental rights jurisprudence after 1969 not out of enthusiasm for human rights but in order to placate those national courts (particularly in Germany) which were threatening to disregard judgments that did not meet their own fundamental rights standards. Its principal workload concerns the regulation of commercial activity: human interest cases, though increasing in number, are the exception. Like the higher UK courts, and in contrast to the European Court of Human Rights, it is essentially a court of generalists whose defining feature as lawyers is not usually a specialist knowledge of or interest in the legal application of fundamental rights.

20. The interest and expertise of UK judges in human rights was certainly increased when rights were "*brought home*" by the Human Rights Act 1998; and I have wondered whether the EU courts may react in a similar way now that the EU has its own fundamental rights instrument. Some of the more obscure rights – though previously applied by the ECJ, or present in a Treaty to which it referred – might come to greater prominence by their presence in the Charter.

21. Once again, this will be something to keep an eye on. My impression is, however, that the Charter – though increasingly pleaded and referred to – has so far been applied by the ECJ in a generally restrained manner and as part of its everyday work.

ADVANTAGEOUS OR DISADVANTAGEOUS?

22. I can understand the instinct of those who would prefer the United Kingdom to be entirely unconstrained by the EU. But if EU law is to remain a fact of life, fundamental rights must surely be an essential part of it. Their function is not to add to the burden of regulation, but to liberate individuals from unjust or oppressive constraints imposed by the Union or in its name. The desirability of such a safeguard against the abuse of power by public authorities – particularly European public authorities – should be evident to Europhobes and Europhiles alike.

23. The Charter is not a necessary vehicle for that safeguard. It may justly be said of the Charter (as indeed of other such instruments, including Magna Carta) that its origins lie in power struggles between elites as much as in concern for individual freedom.[22] Fundamental rights, deriving in particular from the ECHR and national constitutional traditions, were protected in EU law before the Charter, and would remain protected even if the Charter were no more.[23]

24. On a strictly legal level, the Charter may thus be considered inessential. But as one of the most readable documents ever produced by the EU, and one of the very few capable of inspiring the young, it achieves its stated aim of reaffirming and making more visible the core freedoms on which the peoples of Europe should be able to count in their dealings with the institutions and laws that govern them all. It is an elegant and enforceable expression of the principle – derived in large part from British political thought and practice – that essential freedoms may be restricted only to the extent that such restrictions can be demonstrated to be necessary. That principle, to which not every major economic power adheres, can be a source not only of pride but of global influence for Britain and for Europe. Closer to home, its visibility and its practical application have a part to play in diminishing the public perception, damaging to any democracy, of a gap between governors and governed.

25. For all these reasons, and for as long as we are subject to EU law, the Charter is indeed – in the words of the Call for Evidence – "*advantageous*" to the people of the UK.

DAVID ANDERSON Q.C.
Brick Court Chambers

9 January 2014

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[22] As I wrote in 2011 (fn 1, above), with reference to the initiating decision of the 1999 Cologne European Council: "*It may well be that enthusiasm for the Charter derived in some quarters from factors barely connected with the wish to improve human rights protection: in particular, the federalising desire to create a constitution for the Union more closely resembling that of a state, or thoughts of replacing or rendering redundant the Council of Europe as the ultimate protector of human rights standards within the Union and its Member States*."

[23] Treaty on European Union, Article 6(3).

Dear Sirs,

I attach my evidence to the Inquiry. I have sought to keep to a legal analysis, but I should say that I am concerned at the way in which certain groups in the European Parliament, most notably the European People's Party, use an exaggerated (and legally incorrect) reading of the Charter to argue for far reaching legislation. My own area of practice is in life science law. In this field, it is increasingly common for members of the EPP to use argue (wrongly) that the Charter binds states to adopt "rights" that the European Court of Human Rights expressly declares to fall within the exclusive province of national law.

Response to Inquiry on the Charter of Fur

INTERPRETING THE CHARTER OF FUNDAMENTAL RIGHTS

Julian Hitchcock, Lawford Davies Denoon

Conclusion

1. For the reasons set out below, with a view to containing the self-expansion of competence of the Court of Justice of the European Union, I recommend not that the government of the United Kingdom press the case that the UK/Polish Protocol is declaratory and thus not limited to the UK and Poland, but that it should seek to hasten the conclusion of the EU's accession to the European Convention on Fundamental Freedoms with a view of recouping the wider benefits of the Brighton Declaration.

2. Contrary to the views expressed by, for example, the European People's Party, the competence of the European Union to exceed the scope of the existing national rights, for example in enacting bioethical legislation, is restricted. I have not referred here to the UK/Poland Protocol, as I am sure that others will have extensively referred to this and *travaux preparatoires* and select committee reports.

3. I also assume that the Inquiry will be familiar with the case of *Secretary of State for the Home Department v ME and others* (21 December 2011), in which the Grand Chamber held that the Secretary of State was wrong to claim that the Charter did not apply to the UK. The Charter does apply to the UK and is only exempt from applying where it attempts to create new fundamental rights, freedoms and principles rather than re-affirming existing ones.

> *"In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt...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."

4. I also assume that the Inquiry is familiar with the case of *In R (on the application of AB) v Secretary of State for the Home Department*[1], in which Mostyn J., *considering* the Grand Chamber's reasoning[2], held that:

   - the European Convention of Human Rights (the "Convention") set out various rights to apply to all members of the Union;
   - the UK implemented only some of the rights in the Convention into domestic law, via the Human Rights Act 1998 (the "HRA");
   - the Charter "re-affirms" the rights set out in the Convention;
   - as a result of the decision in *Secretary of State for the Home Department v ME and others*, and more specifically, the Grand Chamber's statement at paragraph 120, all rights under the Charter apply to the UK; and
   - rights under the Convention which Parliament chose not to include in the *Human Rights Act* now apply in the UK as a result of the Charter.

5. Nor do I wish to elaborate on my disagreement with Mostyn J., save to observe that, if he is correct, then there would be no purpose to Article 1(1) of the Protocol. The Recitals to the Protocol clearly state that the Charter is not designed to create new rights. Therefore, no Member State would be bound by any right that was not already within its domestic human rights legislation. Article 1(1) exists specifically to counteract such a problem: the Charter does not extend the power of either the Court of Justice of the European Union or the courts of the UK to find that laws, regulations or administrative provisions, practices or actions of the UK are inconsistent with rights set out in the Charter, where prior to the Charter's enactment, they would not have been.

Analysis

[1] [2013] EWHC 3453.
[2] Paragraphs 11 – 16.

6. The Treaty on the European Union ("TEU") comprehensively binds all EU Member States. Article 6(1) TEU confirms that Member States are no less obliged to respect human rights:

> *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union*[3] *… which shall have the same legal value as the Treaties."*

7. The subject of Title I of the Charter is "*Dignity*". It is the overarching principle under which subsist the rights in Articles 2 ("*Right to life*") and 3 ("*Right to integrity of the person*") and the freedoms in Articles 4 ("*Prohibition of torture and inhuman or degrading treatment or punishmen*t"), and 5 ("*Prohibition of slavery and forced labour*").

8. Article 1 introduces this overarching principle as follows:

> *"Human dignity is inviolable. It must be respected and protected."*

9. The rules under which the Charter must be interpreted derive from Article 6(1) TEU:

> *"The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."*

10. Title VII of the Charter begins by establishing, in Article 51, its field and, in Article 52, its scope.

11. Article 51 provides that:

> *1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

[3] *Charter of Fundamental Rights of the European Union* (2010/C 83/02).

> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

12. This clear limitation by reference to the principle of subsidiarity and to the limits of Union power. More detail of the extent to which Charter rights and freedoms can be limited is set out in Article 52. Here is its first paragraph:

> *"(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others…*

13. Paragraph 1, which confirms the pre-eminence of the principle of proportionality, is based on case-law of the Court of Justice, holding that restrictions on the exercise of rights are lawful if they *"…do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights..."* [4] and either correspond to objectives of general interest pursued by the Community (notably under Article 3 TEU) or "*the need to protect the rights and freedoms of others*" (i.e. non-EU rights and freedoms).

14. Paragraph 3 of Article 52 then limits the scope of the Charter to the confines of the European Convention on Human Rights and its Protocols:

> *"in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

15. The Charter Explanations confirm that:

> *"The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights."*

16. The European Court of Human Rights ("ECHR") has frequently emphasised that it must allow Member States a "*margin of appreciation*" in applying and interpreting fundamental rights. In its judgment in *Evans v United Kingdom*[5], the Court's Grand Chamber set out its rationale as follows:

> *"A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at*

[4] Paragraph 45, *Kjell Karlsson & Others* Case C-292/97.
[5] (Grand Chamber). Application no. 6339/05, 10 April 2007.

stake, the margin allowed to the State will be restricted…. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider… There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights."

17. The Union bound by more than ECHR case law to respect the margin of appreciation. Following the Brighton Declaration of April 2012, Convention states agreed a Protocol to the Convention, Protocol 15, which amends it so as to emphasise the principles of subsidiarity and of the margin of appreciation. As amended, the Preamble to the Convention now includes a recital that states:

""Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,"

18. On 6 February 2013, the European Court of Human Rights adopted an Opinion on the then draft Protocol 15, which confirmed that:

"The intended meaning can therefore be said to be in line with the relevant terms of the Brighton Declaration (in particular paragraph 12b, read along with paragraphs 10, 11 and 12a)…

The other principle that is referred to in the proposed new paragraph is subsidiarity. This having been a fundamental theme of the reform of the process, the insertion of a reference to it in the Convention is to be welcomed. The wording used in this respect, and in the explanatory report, reflects the Court's pronouncements on the principle."

19. The paragraphs of the Brighton Declaration referred to in the Court's Opinion state:

"10. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.

11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national

authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

12. The Conference therefore:

a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;"

20. The Council of Europe's Explanatory Report to Protocol 15 states that this amendment is:

> *"… intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law."*

21. In particular, the Explanatory Report states that:

> *"The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation."*

22. On 24 June 2013, Protocol 15 was signed by twenty-one Convention states.

23. Although the Protocol and, by extension, the amendments to the Convention, will not enter into force until all Convention states have agreed to be bound, there is no reason to believe that this will not take place. However, on the basis of signatures collected to date, it is clear that most EU Member States[6] support the constitutional principles of subsidiarity and the margin of appreciation.

24. The Preamble to the Protocol itself confirms the pre-eminence of the European Court of Human Rights ("ECHR") in protecting human rights in Europe:

> *"Considering the need to ensure that the European Court of Human Rights (hereinafter referred to as "the Court") can continue to play its pre-eminent role in protecting human rights in Europe,"*

25. Further, Article 6(2) TEU provides that the European Union shall accede to the Convention for the Protection of Human Rights and Fundamental Freedoms. A draft accession agreement has been agreed. Once finalised, legislative acts and decisions

[6] Austria, Cyprus, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

of the Court of Justice that do not respect the principles of subsidiarity and margin of appreciation will be susceptible to what will amount to judicial review by the ECHR.

26. For the reasons set out above, I reach the conclusion set out in paragraph 1.

If I may be of further service, please do not hesitate to contact me.

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