



Fundamental Rights: Opportunities and Limitations under Protocol 30

Dr Catherine Donnelly BL
Barrister, Dublin and Blackstone Chambers, London
Fellow, Trinity College, Dublin
NICEM Annual Human Rights and Equality Conference
23 March 2012



Introduction (1)

- Originally described as an “opt-out”
- Catherine Barnard, “The Triumph of Rhetoric over Reality”



Introduction (2)

- Meaning
- Legal status



Article 1(1)

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



Article 1(2)

- 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.**



Article 2

- To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains **are recognised in the law or practices of Poland or of the United Kingdom.**



Broad View (1)

- Article 1(1):
 - No extension of the ability of a Court to find laws inconsistent with fundamental rights, freedoms, principles
- Broad view:
 - Charter creates no legally enforceable rights that can be pleaded against UK/Poland



Broad View (2)

- Not sustainable
 - Article 1(2) and Article 2 would be legally redundant
 - Article 2 assumes application to UK and Poland (application to extent recognised in national laws and practices)

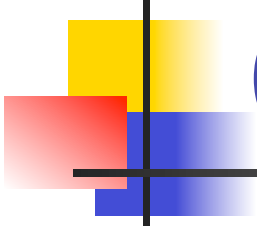


Broad View (3)

- Inconsistent with Preamble
 - Contracting parties “note”
 - UK and Poland wish to “**clarify** aspects of the **application** of the Charter”
 - “**Reaffirm**” that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter

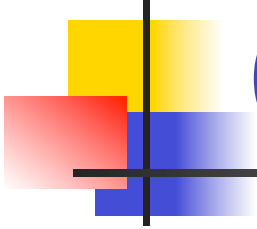
Article 1(1) in the Courts

(1)



- **R (Saeedi) v Secretary of State for the Home Department [2010] EWHC 705 (Admin)**
 - Cranston J, Charter “cannot be directly relied on as against the United Kingdom, although it is an indirect influence as an aid to interpretation”

Article 1(1) in the Courts (2)

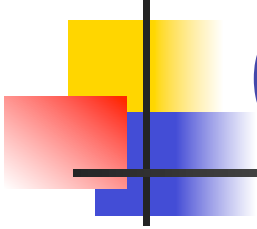


- **[2010] EWCA Civ 990**

- “in principle, . . . fundamental rights set out in the Charter can be relied upon against the United Kingdom, and submits that the Judge erred in holding otherwise . . . The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect”

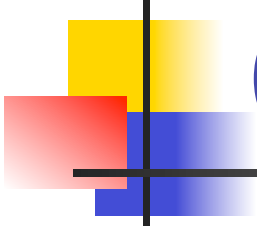
Article 1(1) in the Courts

(3)



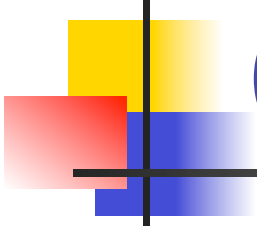
- **R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin) (Lloyd Jones J)**
 - Challenge by US citizens on death row in Tennessee and Kentucky to refusal of Secretary of State to impose export control on sodium thiopental pursuant to Export Control Act 2002
 - Charter of Fundamental Rights of the European Union
 - Common law protection of fundamental rights

Article 1(1) in the Courts (4)



- Concession that the ECHR did not apply
 - Article 1
 - The High Contracting Parties shall secure to **everyone within their jurisdiction** the rights and freedoms defined in Section I of this Convention.

Article 1(1) in the Courts (5)



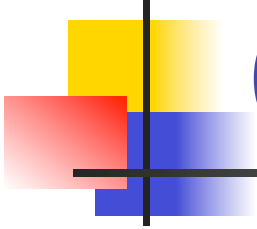
- **Article 4, EU Charter**

- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

- **Article 51, EU Charter**

- Member States bound when **implementing EU law**
 - Council Regulation 1236/2005: ban on export of goods having no other purpose than for the purpose of torture, cruel, inhuman and degrading treatment
 - Export control within EU's Common Commercial Policy pursuant to Article 207 TFEU

Article 1(1) in the Courts (6)

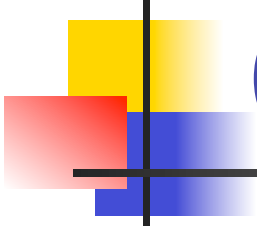


- **Article 52(3), EU Charter**

- 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.

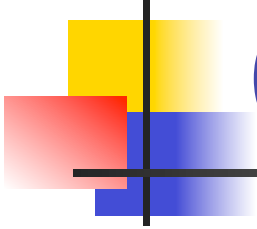
Article 1(1) in the Courts

(7)



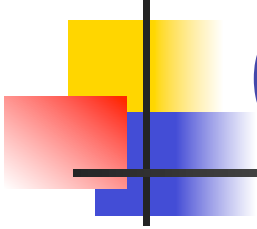
- Lloyd Jones J
 - If Charter recognises Convention rights without the limitation of Article 1 ECHR, “the result would be very radical indeed ... the Charter would confer such rights on anyone, anywhere in the world, regardless of whether they have any connection with the European Union”
 - Correspondence not only in their content but also **ratione personae**

Article 1(1) in the Courts (8)



- **Case C-411/10 NS v Secretary of State for the Home Department** (21 December 2011)
 - Article 1(1): “does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol”

Article 1(1) in the Courts (9)



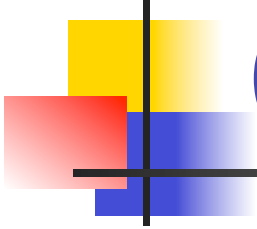
- **Third Recital**

- WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article

- **Sixth Recital**

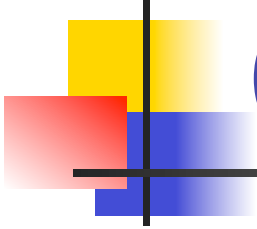
- WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles,

Article 1(1) in the Courts (10)



- 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 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.

Article 1(1) in the Courts (11)



■ Article 51

- 1. 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.
- 2. 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.**



Narrow View (1)

- **Narrow view**

- Does not **extend** the ability of national courts to find that national laws are inconsistent with EU fundamental rights
- Courts could do this previously; now they can do so by reference to the Charter



Narrow View (2)

- **Potential Difficulty**

- Dispute about whether a particular right was actually protected by EU law **prior** to the introduction of the Charter
- **Article 15(3)**: Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.
- **NS**: Charter reaffirms rights and makes those rights more visible, **but does not create new rights or principles**



Article 1(2)

- 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.**



Title IV

■ **Solidarity Chapter**

- Workers' right to information and consultation within the undertaking
- Right of collective bargaining and action
- Right of access to placement services
- Protection in the event of unjustified dismissal
- Fair and just working conditions



Title IV

- Prohibition of child labour and protection of young people at work
- Family and professional life
- Social security and social assistance
- Healthcare
- Access to services of general economic interest
- Environmental protection



Article 52(5)

- The provisions of this Charter which contain **principles** may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
- **Unclear which provisions contain principles and which are rights**
- Article 1(2) appears to suggest that Title IV definitely covered for UK and Poland



Rights or Principles

- **Article 28:** the **right** to negotiate and conclude collective agreements...including strike action
- **Article 30:** the **right** to protection against unjustified dismissal, in accordance with Union law and national laws and practices.



Interpretive Principles

- Duty to interpret national law insofar as possible to be compatible with EU law



Article 2 Analysis (1)

- Article 2 entails a substantive limit, which provides that insofar as a provision of the Charter refers to national laws **and** practices, it shall only apply to Poland or the UK to the extent that the rights or principles that it contains are recognised in the law **or** practices of those countries



Article 2 Analysis (2)

- Article 9

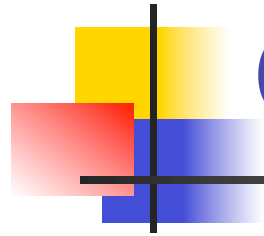
- “The right to marry and the right to found a family shall be guaranteed in accordance with the **national laws governing the exercise of these rights.**”



Legal Status

- **Zagorski**

- Confirmation of interpretation of Charter reached by other methods



Charter References

- **References on the Charter**

- Case C-300/11 **ZZ**

- Article 47 (entitlement to fair and public hearing)

- Compatibility of secret hearings and Special Advocate procedures



Summary (1)

- **Catherine Barnard**

- **Daily Mail, 23 June 2007:** "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"
 - B Brogan, "Deal but at What price?"
- **News of the World, 24 June 2007:** "EU chiefs have agreed to give Britain an opt-out on the Charter of Fundamental Rights which could bring in new laws which would destroy jobs"
 - J Lyons, "EU Traitor"



Summary (2)

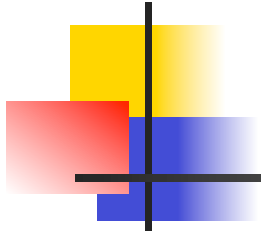
- **The Sun, 9 October 2007**

- “When Tony Blair agreed the outline EU Treaty last June, he boasted Britain had an ‘opt-out’ from the Charter of Fundamental Rights – which includes the right to strike. But the Commons European Scrutiny Committee report publishes a letter from Labour’s Europe Minister Jim Murphy in which he concedes we do NOT”
 - G Wilson, 10 days to save Britain



Summary (3)

- Scope for argument regarding Article 1(2)
- To what extent will it be possible to contend that the protections in Title IV **are** rights in national law?



Thank you!