

Using the Charter

The experience of an NEB / NHRI

Clare Collier
Senior Managing Lawyer

Equinet Seminar 16 June 2015



**Equality and
Human Rights**
Commission

Content

- Role of the EHRC
- Legal Powers
- Non-legal powers
- Sources of law in the UK
- The Charter in the UK
- Using the Charter
- Litigation: NS
- Litigation: other cases
- Parliamentary and other engagement
- Consultation responses
- Research
- What does the Charter add
- Charter issues
- Summary
- Contact details



**Equality and
Human Rights**
Commission

Role of the Equality and Human Rights Commission

- To promote and protect equality and human rights
- It has a range of statutory powers and duties, set out in the Equality Acts
- UN National Human Rights Institution operating in accordance with the Paris Principles
- National Equality Body as mandated by the European Union Equality Directives

Legal powers

- EHRC has a unique suite of enforcement powers
- Assist and represent individuals taking cases (equality cases only)
- Judicial Review proceedings in our own name (equality and human rights)
- Formal inquiries, investigations and assessments – disclosure powers, can lead to further legal action such as compliance notices
- Intervene in EHRC name as an independent third party in cases brought by others in the domestic courts and in Europe (equality and human rights)

Non-legal powers

- Research
- Five yearly 'state of the nation' report – Is Britain Fairer?
- Parliamentary briefings and consultations
- Project work e.g. religion or belief in the workplace, employment practices in the cleaning sector, making sport inclusive, LGBT hate crime
- Treaty Monitoring
- International engagement
- Co-operation with other regulators, inspectorates and ombudsmen



**Equality and
Human Rights**
Commission

Sources of law in the UK

Sources of human rights and equality law in the UK are:

- EU Directives
- The Equality Acts
- The Human Rights Act – incorporating the ECHR into UK law
- International Treaty obligations – not directly enforceable in the UK courts
- EU Charter of Fundamental Rights – status still partially uncertain

The Charter in the UK

- Protocol 30 to the Lisbon Treaty – not an “opt-out”, but what?
- Conflicting case law in the domestic courts
- Only one judgment on it from CJEU so far
- Primarily used in immigration and asylum cases
- Scope
- Horizontal application (Benkharbouche v Embassy of Sudan)



Using the Charter

- The Charter is one of the tools or levers we can use in our work
- We always try to select the method of influencing that is most likely to be successful
- In most equality cases EU Directives, and the domestic legal provisions that implement them, will be the most effective and most direct route
- In human rights cases the ECHR has a broader scope than the Charter – you don't need to be within scope of EU law
- But the Charter includes rights that are not found in those sources, or differently defined, and therefore may be used to plug 'gaps' that are not covered by the other two main sources

Litigation: NS v SSHD

- Most important Charter case for the UK so far
- Interpretation of Protocol 30 to the Lisbon Treaty signed by the UK, Poland and Czech republic
- High Court judgment was significantly wrong – triggered intervention by the EHRC
- Court of Appeal made a reference to the CJEU
- Participation by 15 member states – very important that there were other voices (equality body / NHRI and NGOs – Amnesty, AIRE Centre and UNHCR)
- CJEU judgment December 2011, found that the Protocol “does not intend to exempt [the UK] from the obligation to comply with the provisions of the Charter”



**Equality and
Human Rights
Commission**

Litigation: other cases

- Charter never relied on exclusively but is used to bolster an argument, or provide an alternative route to a desired outcome
- Bull and Bull v Preddy and Hall – B&B case – the Bulls sought unsuccessfully to rely on Arts 15 and 16 of the Charter
- R v L and other appeals – child trafficking cases – Art. 24 (Art. 3 CRC) – best interests of the child
- Detention Action v SSHD – Art. 53 – relationship between Charter and ECHR, significance of Art. 47
- Hainsworth v MOD

Parliamentary and other engagement

- Draft Modern Slavery Bill response - Article 7 and Article 49(1) of the Charter, Art 24 (Art.3 CRC)
- Not frequent source, partly for political reasons
- Evidence in the UK shows that Parliamentarians have a very limited understanding of the Charter, and of EU law more generally
- Work with Regulators, Inspectorates, and Ombudsmen – as shown in our Human Rights in Action report, November 2014



**Equality and
Human Rights**
Commission

Consultation responses

In 2014 the UK government carried out a wide-ranging review into the balance of competencies between the UK Parliament and the EU, a part of which included a call for evidence from the Ministry of Justice on fundamental rights

EHRC submitted a detailed paper:

- Too early to say how effective the Charter is
- Importance of state promotion (art. 51)
- Confusion in parliament and even in the courts as to the meaning of the Protocol
- Review of the domestic case law
- Differences between ECHR and Charter rights, and the approach of the ECtHR
- Relationship between UK equality law and EU Directives

Research

- Human Rights Review 2012. Article 18 – right to asylum; freedom of assembly, right to protest
- The UK and the ECtHR, 2012 report
- Is Britain Fairer? Major study of the state of the nation in 2015 – mapping improvements or regressions in compliance with equality and human rights standards across 10 domains
- In each one, the legal framework sets out all the operative provisions including the Charter, and the effectiveness of the domestic law provisions that give effect to them



**Equality and
Human Rights**
Commission

What does the Charter add?

- Examples above show that the Charter is used most effectively when it does something different from the standards and norms found in the other main sources of fundamental rights law
- What those differences are will depend on the national context – so, for instance, in Germany, where there is a constitutional right to dignity, Article 1 of the Charter may be less significant than it might (eventually) become in the UK where there is no such right
- Engaging EU law is a more powerful way to assert fundamental rights than through the HRA because it can lead to the disapplication of domestic law

Charter issues

Live issues in Charter jurisprudence:

- Meaning of Protocol 30 (UK / Poland / Czech republic)
- Material and personal scope of the Charter – when does it apply?
- Title IV – socio-economic rights
- Relationship between the Charter and the ECHR



**Equality and
Human Rights**
Commission

Summary

- Important to find what the Charter can bring for you in your national context
- Look for areas where Charter rights are wider than ECHR rights
- Will rarely be better to rely on the Charter where a Directive does the job
- Use it wisely – we don't want too many bad precedents!



**Equality and
Human Rights**
Commission

Contact details

clare.collier@equalityhumanrights.com

www.equalityhumanrights.com



**Equality and
Human Rights**
Commission