

CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

A GUIDE FOR NGOS

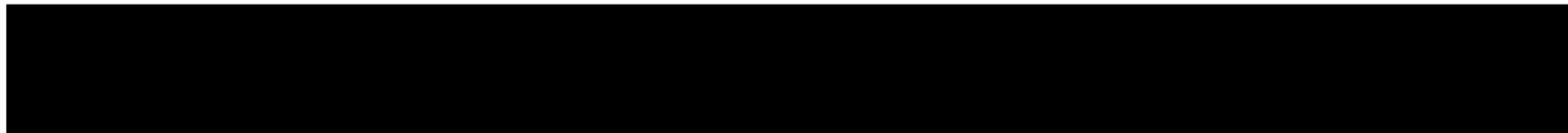


Charter of Fundamental Rights of the EU

What this guide covers

This is a guide to help people working at NGOs understand what the EU Charter of Fundamental Rights covers and how they can use it when helping people whose rights have been violated.

It is written within the context of Brexit - the UK leaving the EU. It is meant as a simple guide that can be accessed quickly, rather than a detailed analysis of law. There are some links at the end to more detailed reading.



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Origins

The rights of every individual in the EU were established at different times, in different ways and in different forms. That has made it very complex for an individual in an EU member state to see what rights are covered.

For this reason, the EU decided to include them all in a single document, which is kept up to date in the light of changes in society, social progress and scientific and technological developments. This gives clarity and consistency to European rights.

The Charter of Fundamental Rights brings together all the personal, civic, political, economic and social rights enjoyed by people within the EU in a single text.

It covers:

- all the rights found in the case law of the Court of Justice of the EU
- the rights and freedoms enshrined in the European Convention on Human Rights
- other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.

The charter became legally binding within the EU with the entry into force of the Treaty of Lisbon in December 2009. It is interpreted by the Court of Justice of the European Union in Luxembourg. It was originally drafted in 1999, amended for the European Constitution 2004 and for the Lisbon Treaty 2007.

In 2010, the European Commission adopted a strategy to monitor and ensure the effective implementation of the rights and freedoms in the Charter. The Fundamental Rights Agency monitors and publishes reports on the situation of fundamental rights in all EU countries within the scope of EU law.

Rights and freedoms covered by the Charter

The charter contains rights and freedoms under six themes - called titles - with general provisions (the interpretation and application of the Charter) a seventh title:

- **dignity** (human dignity, right to life, right to the integrity of the person, prohibition of torture and inhumane or degrading treatment or punishment, prohibition of slavery and forced labour)
- **freedoms** (right to liberty and security, respect for private and family life, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property, right to asylum, protection in the event of removal, expulsion or extradition)
- **equality** (non-discrimination, cultural, religious and linguistic diversity, equality between men and women, rights of the child, rights of the elderly, integration of persons with disabilities)
- **solidarity** (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, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection)

○ **citizens' rights** (right to vote and stand as a candidate at elections to the European Parliament, right to vote and stand as a candidate at municipal elections, right to good administration, right of access to documents, European Ombudsman, right to petition, freedom of movement and of residence, diplomatic and consular protection)

○ **justice** (right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties, right not to be tried or punished twice in criminal proceedings for the same criminal offence)



What is the difference with the European Convention on Human Rights and the Human Rights Act?

The Charter is sometimes confused with the European Convention on Human Rights. Although the Charter incorporates rights from the European Convention, the two are entirely separate legal instruments. The European Convention on Human Rights was drafted by the Council of Europe and is interpreted by the European Court of Human Rights in Strasbourg.

When the Charter contains rights that stem from the European Convention, their meaning and scope are the same. The European Convention on Human Rights was incorporated into UK law as the Human Rights Act 1998. Both the Human Rights Act and the European Convention on Human Rights (when the legal process in country has been exhausted) can be used by individuals who believe that their human rights have been violated.

The European Convention on Human Rights has many strengths as an arbiter of rights stemming from the case law of the European Court of Human Rights. However as a piece of legislation it was drafted in 1950 and entered into force in 1953.

The Charter is a more contemporary document that was drafted in 1999 and updated for the Lisbon Treaty in 2007. It includes so-called third generation human rights consistent with the society we now live in, for example rights on data protection. The Charter strengthens the protection of fundamental rights by making those rights more visible and more explicit for citizens.

In line with the implementation of the Charter, the European Commission promotes the fight against racism and xenophobia, homophobia and the protection of persons belonging to minorities.

How can the Charter be used?

The Charter can only be used to determine whether EU law has been correctly applied by national governments and courts. There is no direct route for individuals to bring a case to the Court of Justice. However the Charter is often used in legal proceedings to strengthen a case that uses UK legislation or case law. It is also used in advocacy work - with an NGO or other advice centre representing an individual's rights problem to a statutory body, such as a local authority, NHS hospital or state school.



Examples of using the Charter in the UK

Ms F A Benkharbouche v Embassy of the Republic of Sudan: UKEAT/0401/12/GE and Ms M Janah v Embassy of Libya UKEAT/0020/13/GE

A cook at the Sudanese embassy, and a member of the domestic staff of the Libyan embassy, both made claims arising out of their employment. They were met with pleas of State Immunity, which were upheld by two separate Employment Tribunals. They appealed on the basis that the plea of immunity denied them access to court to enforce their rights, relying upon the decisions of the European Court of Human Rights in *Cudak v Lithuania* and *Sabeh el Leil v France* to establish that this had been in breach of Article 6 of the European Convention on Human Rights. An argument that the judges (both of whom held there to have been such a breach) were wrong to hold that the State Immunity Act 1978, which provides for the immunity in UK law, could not be interpreted to permit the claims to proceed failed. A second argument, that to the extent the claims fell within the material scope of EU law the State Immunity Act should be disapplied, succeeded on the basis that although the Human Rights Act dealt with the approach of courts and tribunals to alleged breaches of the European Convention, the EU Charter was now recognised as applicable in the UK, and recognised general principles of fundamental importance to the EU where matters fell within the material scope of EU law. Article 47 of that Charter recognised the same principle as contained in Article 6 of the European Convention. The Tribunal was bound by EU law (following *Kucukdevici* and *Aklagaren*) to disapply domestic law in conflict with these principles even in a dispute between private litigants.

This is an example of where the Charter provides more powerful mechanisms for protecting rights than are available elsewhere in UK law. The cases show how, without the Charter, the claimants would have been left without an effective remedy for their claims of discrimination at work.

NS v Secretary of State for the Home Department, Court of Appeal

The Equality and Human Rights Commission intervened at the Court of Appeal and the European Court of Justice.

The European Court of Justice's judgment clarified that the EU asylum system cannot operate on the basis of a "conclusive presumption" that all EU Member States "observe the fundamental rights of the European Union". EU Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' under the Dublin II agreement where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights.

Migrants Rights Network v Secretary of State for the Home Department, Secretary of State for Health and NHS Digital

in 2017 Migrants Rights Network, with legal counsel from Liberty, brought a judicial review challenging the legality under human rights of a memorandum of understanding in which the private information and personal data obtained for the purpose of providing healthcare is shared for immigration enforcement purposes. The case alleged breaches of article 8 of the European Convention on Human Rights and article 8 of the Charter of Fundamental Rights, discrimination contrary to article 14 of the European Convention and article 21 of the Charter, plus UK law violations.

In May 2018 the government agreed to suspend most of the data-sharing arrangement and limit its use to tracing those being considered for deportation because they had committed a serious crime. In November 2018 NHS Digital confirmed that it will completely withdraw from the data-sharing deal that was made in secret in November 2016.



Brexit and the Charter

Although the government has said that there will not be a reduction in present rights after the UK leaves the EU, the policy has been to remove the Charter from UK national law through the EU (Withdrawal) Bill. Although there was a strong debate for keeping the Charter during the Bill's progress through both houses of parliament, motions by parliamentarians to incorporate the Charter in the Bill were defeated by strong pressure for party loyalty.

The EU (Withdrawal) Act became law on 26 June 2018. When the UK finally leaves the EU, the Charter will cease to apply. The status of the Charter during the transition period from 30 March 2019 until possibly 31 December 2022, when the UK is neither in nor out of the EU, is likely to be that the Charter will continue to apply during that period.

The political position on Brexit is unclear. There is still a possibility that the UK will retain all EU laws, or that a UK government will reverse the decision to leave the EU. However as it stands at the moment, the Charter will no longer have effect in the UK when the UK finally leaves the EU at the end of any transition period.

The Scottish Parliament has said that it intends to retain the Charter in Scottish law after the UK finally leaves the EU (although this would only apply to rights and freedoms that were devolved to Scotland).

Why it is important to keep the Charter in UK law

The Equality and Human Rights Commission have said that the Charter:

- provides more powerful mechanisms for protecting rights than currently available in UK law;
- is a living instrument that is flexible to social change, creating new rights or extending existing ones;
- allows for EU law to be struck down. Many EU laws will become UK legislation on leaving the EU. But we would lose the ability to challenge any of these EU 'retained' laws on human rights grounds using the Charter;
- covers many rights that have no direct equivalents in UK law;
- has principles which have been used to interpret rights and other laws;
- provides certainty and avoids confusion. Rights in UK law are scattered over many pieces of national legislation, case law and international law.

The Equality and Human Rights Commission strongly urged parliamentarians to vote to retain the protections of the Charter of Fundamental Rights in UK law. UKREN joined the EHRC and other human rights organisations in writing an open letter to parliamentarians during the EU (Withdrawal) Bill's passage through parliament.

Further reading

Equality and Human Rights Commission (2018), What is the Charter of Fundamental Rights of the EU?, available at: <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union>

Equality and Human Rights Commission (2018), Brexit and the EU Charter of Fundamental Rights: our concerns, available at: <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0>

Equality and Human Rights Commission (2018), EU Withdrawal Bill will not protect UK rights: open letter, available at: <https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter>

European Commission (2018), EU Charter of Fundamental Rights, available at: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en

European Union Agency for Fundamental Rights (2018), available at: <http://fra.europa.eu/en>

