



European Scrutiny Committee

Oral evidence: [The application of the EU Charter of Fundamental Rights in the UK](#) HC 979

Wednesday 15 January 2014

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Written evidence from witnesses:

- [David Anderson QC](#)
- [Professor Paul Craig](#) ([supplementary evidence](#))
- [Professor Sionaidh Douglas-Scott](#)
- [Martin Howe QC](#)

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Members present: Mr William Cash (Chair); Andrew Bingham; Mr James Clappison; Mr Michael Connarty; Geraint Davies; Chris Kelly; Linda Riordan; Stephen Phillips; Jacob Rees-Mogg; Henry Smith; Mr Michael Thornton

Questions 1-34

Witnesses: **David Anderson QC**, Brick Court Chambers, Temple and Visiting Professor at King's College, University of London, **Professor Paul Craig**, Professor of English Law, St. John's College, Oxford University, **Professor Sionaidh Douglas-Scott**, Professor of European and Human Rights Law, Lady Margaret Hall, Oxford University, and **Martin Howe QC**, 8 New Square Chambers, Lincoln's Inn, gave evidence.

Q1 Chair: Thank you all very much for coming to this important inquiry. I am going to make an introduction just to set the scene, and after that we will get into the questions themselves.

This inquiry has been triggered by recent comments of a High Court judge, in a case in the Administrative Court, expressing surprise that the UK did not have an opt-out from the Charter. These were picked up in the press and responded to in the press by the Secretary of State for Justice. They were subsequently debated in the House of Commons on 19 November. It struck the Committee at the time that, to say the least, there was confusion on

all sides of the debate about the national impact of the Charter. Accordingly, the overarching purpose of this inquiry is to clarify the extent to which the Charter applies in the UK, in the light of Protocol 30 and the case law of the Court of Justice and national courts.

We have a distinguished panel of academics and practitioners before us today, for whose presence and written evidence to the Committee we are very grateful. Next Wednesday, Lord Goldsmith, who played a key role in the negotiation of the Charter, will give evidence to us, and the following Wednesday the Secretary of State for Justice will also give evidence. We aim to produce a report with our conclusions before Easter.

The application of the Charter and Protocol 30 is complex and subject to differing expert opinion, so it requires us to ask a number of detailed questions of our witnesses today. As we have limited time, I respectfully ask the witnesses to keep their answers as short as possible and—I am sure this would not happen—to avoid repeating one another where possible.

Before we enter into any detail, I want to ask a very general introductory question, which requires a very general reply at this stage. You have all been looking at this for a long time and you have all written about it. We are grateful to you for your written evidence. I am sure you have also been thinking about it for an extended period. In your view, and in the light of the Court of Justice judgments in *Fransson* and *NS Saeedi*, to what extent is the Charter applicable in the UK, and what does Protocol 30 achieve for the UK? If I could go from Professor Douglas-Scott, from one to the other. If you would like to answer that question first, or, in the course of discussion, try to pick up the points that you have in common.

Professor Douglas-Scott: I can be quite short here. I think that in the light of those two judgments and in the light of the Protocol, the Charter does apply within the UK where any action taken by the UK falls within the scope of EU law. The Protocol does not operate as an effective opt-out, except perhaps by reference to Article 1, paragraph 2 of the Protocol, dealing with Title IV of the Charter, the solidarity measures, where it may operate to a limited extent. I have covered that in greater detail in my evidence, so I will stop there.

Q2 Chair: Professor Craig?

Professor Craig: I agree entirely.

Chair: Mr Howe?

Martin Howe: I agree.

Q3 Chair: David Anderson?

David Anderson: Yes, I agree. The Charter has the same legal value as the treaties. That is stated in the Treaty on European Union, and it is as true in the United Kingdom as it is anywhere else. That means that it is not only an aid to interpretation, but potentially that it

provides grounds for invalidating both rules of the European Union and measures taken by member states within the scope of European law.

The Charter certainly was not described as an opt-out by those who negotiated it. I do not see it as an opt-out, although I think there are some helpful clarifications—particularly towards the end of the Charter—that might be instrumental in restricting the scope of Title IV, the solidarity title of the Charter.

Q4 Chair: Given what you all said, and your all being in agreement with one another on this very important first question, how do you construe the circumstances that would follow from the fact that an Act of Parliament was passed with certain words in it at the time when the Lisbon Treaty was enacted, on the one hand, and what has been said in the European Court in these cases? What effect would that have with respect to the Supreme Court, in the event that the Supreme Court was asked which view it was going to take: was it going to support the Act of Parliament and what it said there, or was it going to support the European Court of Justice under section 3 of the European Communities Act 1972?

Professor Craig: Could I ask for clarification? Are you positing a hypothetical Act of Parliament that does not yet exist, in which the UK Parliament might seek to demonstrate its independence in relation to the Charter or some such thing, and then what the possible reaction of the Supreme Court in the UK would be?

Q5 Chair: No. I am asking the question with respect to what is in the Lisbon Treaty Act—the European Communities (Amendment) Act 2008. So what those words convey, and the extent to which—in relation to the words that are in that Act—there is a problem, in that the European Court of Justice had made its declarations with regard to the issues in question in *Saeedi* and *Fransson*.

Martin Howe: On pursuing this point of clarification, my recollection of the way that Act was framed is that it simply added the Lisbon Treaty to the list of treaties that are recognised as European treaties under the European Communities Act. It did not alter the structure of the Act, although it altered the terminology following the change from European Community to European Union. From memory—and I have not looked this point up—I cannot recollect any specific provision in that relating to the Protocol, beyond that it was one of the instruments added as parts of the treaties recognised in UK law under the Act.

Q6 Chair: The next question is: how do you explain to a non-lawyer the difference between a right and a principle in the Charter, and how can they be identified?

Professor Douglas-Scott: Do you want me to start? We have very little clear authority explaining that difference. We do not have any clear authority from the European Court of Justice. We do not have any clear authority from the UK courts. It seems from the wording of the Charter itself, that principles are intended to be those provisions that require some sort of further legislation or some further implementation before they may be legally enforceable in courts, whether they be national courts or the Court of Justice, whereas rights may be legally enforceable or directly effective.

I would say we could not even be very clear about that factor. From the wording of the Charter itself, there is intended to be a difference but it is not clear which provisions of the Charter are principles and which provisions are rights. However, it has to be said that the term “principle” within the wording of the Charter itself is very rarely used, which might give one the impression that most of its terms are in fact rights.

Professor Craig: I agree with what my colleague has said. The only point I would add is that, even in relation to those Charter rights that are deemed to be principles, one should not imagine that that precludes all forms of judicial oversight. The actual idea of a principle being distinct from a right does not preclude a court taking cognisance of such a principle in an action for judicial review, either under Article 263 or under Article 267 of the Treaty, and using that principle as a strong interpretative device when construing the legality of whatever issue is before it. Even when the court does come around to delineating more specifically the Charter rights that are only principles, one should not conclude that they will be devoid of legal impact.

Martin Howe: Yes. The distinction between rights and principles comes from or is recognised in paragraph 5 of Article 52 of the Charter—the so-called horizontal provision. That states, “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”.

So what Professor Craig has said is quite right. But even though it is a principle and not a right, it can still be used as a basis either for interpretation or for striking down a measure either of the European Union institution or of a member state. Even if you get to the stage of clearly identifying something as being a principle and not a right, it still has significant legal effect, even if it is not quite the same as one you categorise as a right.

David Anderson: I agree that the distinction between “right” and “principle” was intended to be significant, as one sees from Article 52(5) and from the explanations, which one must take into account according to the Treaty. I also agree that the distinction, as it appears from the Charter and from the explanations, is entirely confusing, not least because the first of the three examples given in the explanations of a principle is the so-called rights of the elderly. That is not a very promising starting point.

I take some comfort from the UK/Poland Protocol on this point because, although it is dealing only with Title IV, I think that is the most sensitive area where these matters are concerned. It concerns solidarity. What the UK/Poland Protocol says, in much clearer terms, is that nothing in Title IV of the Charter creates justiciable rights applicable in the United Kingdom, except insofar as the UK has provided for such rights in its national law. I assume certainly that other member states would also take the benefit of what is clarified in this respect in relation to the United Kingdom. To me that does suggest that, where Title IV is concerned, if the right is not contained in the national legislation, it is difficult to see how the court could find a justiciable right, and it had not done so to date as far as I am aware.

Q7 Mr Clappison: Many of the civil and political rights in the Charter correspond to those in the European Convention on Human Rights and its protocols. Do you think it was necessary for these ECHR rights to be incorporated into primary EU law in this way? Professor Douglas-Scott?

Professor Douglas-Scott: Yes I do, because all member states of the European Union have signed up to the European Convention on Human Rights. It is a document that binds all public authorities within the European Union. It would not be very desirable if it were to bind all the member states and not the European Union itself. Then there would be some sort of idea that there were higher standards being imposed on the states and not on the European Union, and surely we want the European Union to comply with the basic standards set out in the ECHR.

Professor Craig: I agree with that. The only thing I would add is as follows. When the Charter was devised, over 10 years ago, it was not clear whether the EU would accede to the ECHR or not; in fact, at that time it was not even talked about. The rationale for the drawing up of the Charter was—just to remind ourselves—to give greater visibility, clarity and certainty as to the list of rights that had at that time been developed by the European Court of Justice. The idea was to replace a common law accretion of rights with a clearer Bill of Rights for the EU.

Given that the EU is a legal and political entity that is now comprised of 28 member states, and even at that time was comprised of 15, with a significant body of people, it seemed to me then—and it still seems to me now—perfectly right and proper for a body of that kind to have a Bill of Rights of its own, in the same way that any national legal system would have a Bill of Rights. Indeed, we should not forget that it was member state legal systems—particularly the German and the Italian—that pushed the EU to develop a fundamental rights jurisprudence 30 or 40 years ago.

Once one puts it in that perspective, the inclusion of basic civil and political rights seems to me to be unanswerable and indubitable. The fact that they are also included in the European Convention is interesting. At the time when the Charter was devised, I think to have a Bill of Rights that did not include the fundamental civil and political rights, binding both the EU institutions and member states when they acted within the scope of EU law, would have looked very odd.

Martin Howe: I take a slightly different view. It is a question of desirability. It is correct that there was a gap in protection of fundamental rights when it came to the institutions of the then European Community, in that the European Convention on Human Rights bound all the member states but did not bind the Community and its institutions as such. However, Mr Clappison, your question does not relate to the other rights included in the Charter. But even if you just restrict yourself to those rights in the Charter that do correspond to European Convention rights, it strikes me that the whole exercise of rewording them and redrafting them in a different way—coupled with explanations that then link them back together with each other—is undesirable, if all that was wanted to be achieved was to make sure European Community institutions would respect the rights in the Convention.

It would have been simpler, even without the mechanism of accession to the Convention, to have a short provision saying, “The Community institutions shall respect the rights in

the Convention”. I do not agree it is a desirable way to close that particular gap. To look for the motivations for the creation of the Charter, they are much broader political and constitutional motivations to create a document that sounds to people as if it creates larger numbers of rights across wide areas.

David Anderson: I do not think it was necessary to produce the Charter to supplement the European Convention on Human Rights, even from the legal point of view and even from the point of view of somebody asserting those rights. That is because, under the doctrine of the general principles of law—in particular, the general principle of fundamental rights—the court was already applying Convention rights as a matter of common law in order to strike down not only acts and measures of the member states within the scope of Community law, but also acts and measures of the Union itself.

Nonetheless, was it desirable? On balance, I would say it is desirable that those rights were given the greater prominence that is accorded to them by the Charter. In saying that, I am not blind to the fact that the Charter was not led by lawyers; it was led by politicians and by struggles between political factions. It perhaps has that in common with Magna Carta and other instruments of this kind.

Those of us who practise in this field and come up every day against the European institutions, have to remember that the point of this Charter is not as some sinister inroad into our sovereignty. Its point is to protect individuals from the abuse of power by the European institutions and by those acting in their name. Mr Akerberg Fransson was a Swede who faced being penalised twice in respect to the same tax offence, and he asked the Charter to come to his aid. Mr Moloney was resisting a European arrest warrant because he said the procedure in the country that had asked for him was not satisfactory. Again, he relied on the Charter. These are important things. Those of us who have to deal with the Commission and other European institutions do not find it an altogether satisfactory experience, and it can be very helpful not only to have the rights available but to have them given this degree of prominence.

Martin Howe: I add a very brief point to that regarding the Moloney case. I think that is an interesting illustration of where the application of the Charter has resulted in a weakening of fundamental rights, compared with the position under the Convention. In the Moloney case, the Court of Justice said essentially, “This is within the scope of the Charter, but we are interpreting the framework decision on the European arrest warrant in such a way that, effectively, although the member state rendering the person subject to the warrant believes that the person subject to the warrant will have their fair trial rights not respected in the requesting state, it is not a ground for refusing to execute the warrant”.

I think we have a different balance between individual rights and the interests of the European Union when the Luxembourg Court comes to make these judgments under the EU Charter, as compared with the approach you get under national Bills of Rights or, indeed, from the Strasbourg Court.

Professor Craig: I will comment very briefly on the previous comment; I do not quite agree with that interpretational reading of Moloney. What was at stake in Moloney was a situation in which an amended European arrest warrant had dealt with a very difficult and complex issue, which was concerned with the kinds of procedural rights that the individual should be entitled to in the country that was requesting that that individual should be sent

there, i.e. to Italy from Spain. There had been a great deal of debate in the European legislature about the appropriate levels of protection, and a great deal of reasoned thinking about what constituted a fair trial. One should not forget that, on the facts of *Moloney*, the reason why the person ended up in Spain was that he had absconded from Italy back to Spain.

Although the case ended up in the European Court of Justice, the Spanish were not particularly keen on defending the rulings or protecting the rulings of their own constitutional court in this instance. I think what we have in *Moloney* is not truly regarded as a situation in which the EU is giving lower standards of protection to rights in respect of a criminal trial. What we have is a situation in which there are very difficult issues about what constitutes a fair trial in the context of a European arrest warrant. The European legislature, having given very considered thought to this, comes out with an amended system that I thought was perfectly reasonable, and then the Spanish court takes exception to that.

Chair: It is not just the question of the qualitative distinctions between these two or their correspondence to one another; surely it is also in relation to the European Communities Act and section 3. The fact that if it is done under the European Court of Justice in Luxembourg, it has an impact jurisdictionally, which is considerably more powerful and more effective than it would be if it came from Strasbourg because of the nature of the section 3 problem that emerges. So if we are agreed on that.

Q8 Michael Connarty: What risk do you think there is that these parallel rights in the Charter could or will be used by the Commission to propose EU legislation that will go further than the corresponding ECHR rights? For example, we have the Commission's proposals on presumption of innocence, the right to legal aid and procedural safeguards for children as examples that might point in that direction.

Professor Douglas-Scott: I do not know exactly what the Commission has in its current proposal to work with. What I would say, though, is that the Charter should not be used as a basis to go beyond the existing competencies of the EU. That is made extremely clear, both in the provisions of the Charter itself and in the provisions of the Treaty on European Union: in Article 6(1) of the Treaty of European Union, in Article 5 of the Treaty on European Union, and in some of the so-called horizontal provisions of the Charter.

If it were used as a basis for EU legislation that went further than existing competencies, that could be the basis for an action brought by a member state—for example, by the UK if it wished—on the basis of a lack of competence for the EU, as in the case of the previous tobacco advertising case. I think I will stay with that for the time being.

Professor Craig: I entirely agree. The only thing I would add and reinforce is that every time the EU makes a legislative act under Article 289—whether it is a regulation, a decision or a directive—nothing is changed. It must locate the legislative act within the particular article of the Treaty that gives it competence so to act. Although, to be fair, it has never tried to do this, it is not open to the EU legislature to ground a legislative competence in a particular article of the Charter and say that justifies a directive in relation to the presumption of innocence or whatever. That has to be founded in the relevant provisions of the Lisbon Treaty concerning the area of freedom, security and justice.

Q9 Chair: Martin, if you answer the question, and then David would like to come in at the end.

Martin Howe: I agree with that answer. It does not provide an independent basis for legislation. On the other hand, where there is a basis for legislation, say, in assigning matters, the Charter provides the basis for the inclusion of provisions within that legislation that are based on the rights in the Charter.

David Anderson: Yes, I agree. No independent basis for legislation. But I do not think one can look at the Charter as a ceiling. It is more of a floor. There have already been examples in which it has been prepared to go a little further than the Strasbourg Court in the way that it gives effect to rights similar to those in the Strasbourg Court. If it is any reassurance, I said in my written evidence that I do not get the impression that this is a court full of rights-crazed people who wish to interpret fundamental rights in a perverse or dangerous way. I quite appreciate that, with any instrument as broad as this, one inevitably does take a leap of faith when one entrusts its interpretation to a court of any kind.

Chair: That is the issue that it can extend, but you do not think it will go too far.

Stephen Phillips: If I could just record Mr Anderson's nod in answer to that question?

Chair: Yes.

Stephen Phillips: He agreed.

Q10 Jacob Rees-Mogg: I want to ask a simple question. Mr Anderson, you said—and everybody agreed—that the Charter of Fundamental Rights has equal standing with the Treaty, as it says in the Treaty, but that it cannot then be used as a legislative basis, even though it has equal standing. That is a correct understanding?

David Anderson: Yes.

Jacob Rees-Mogg: Thank you.

Q11 Andrew Bingham: What is the risk of having a parallel European Court of Human Rights in the Charter that will confuse the scope and the meaning given to the European Court of Human Rights in the UK? What is the risk of the confusion? It all does seem very confusing.

Professor Douglas-Scott: Well—

Andrew Bingham: Shall we start with Professor Craig, just to give you one off? You have gone first on every one, so just to share the duty out a bit.

Professor Craig: There are problems here in the sense that, in effect, the situation going forward is that a litigant in the UK has a number of different rights-based documents that they can seek to rely on when pursuing a claim. The HRA, the Human Rights Act feeds directly into, off of or off from the European Convention on Human Rights. Of course,

they can also use the EU Charter of Rights, but only in circumstances where there is a particular link on, a legal connection, to bring the case within the scope of EU law.

In those circumstances, if the individual does have a link on to EU law and can access Convention rights through the EU Charter, there is indeed at least one advantage in pursuing the action in that way: the preemptory force of EU law within the UK legal order is greater than the preemptory force of the Strasbourg Convention within the EU legal order, at least in relation to primary legislation.

In relation to primary legislation, the effect of *Factortame et al* is that, if a primary Act of Parliament conflicts with EU law, then the courts, as they have demonstrated, will grant a declaration of inapplicability. They will declare the relevant primary Act inapplicable in the circumstances. Whereas, under the HRA, if it is a pure domestic case or you choose to access Convention rights through the HRA, then the most you are going to get—although I agree in substance it may end up the same—is the court finding the primary Act of Parliament to be incompatible with Convention rights, with the result that it is sent back to Parliament under the regime in the HRA. In that respect, there is a different effect flowing from tapping into Convention rights based upon EU law, when you can, and tapping into Convention rights based upon or from the HRA.

Q12 Henry Smith: If parallel grounds for judicial review were to arise under the Human Rights Act and also the Charter, on what grounds would you pursue that and why?

David Anderson: It would be very common in a case begun in the United Kingdom, if you wanted to assert the right to a fair trial or the right to privacy of data—whatever it might be—to plead that right, both as a matter of English law using the Human Rights Act if appropriate, and also, if it was within the scope of European law, you would add in the Charter. Unless you had some reasons for persuading the judge that the Charter went further than the Human Rights Act, certainly at the moment the judge would tend to decide the case under the Human Rights Act, which is what the judge is more familiar with.

Q13 Chair: You would not take it that there was a primary route? It would be a question of choice and it would be up to the court?

David Anderson: No. There could be cases in which both arise, and probably, to be thorough, one would plead both. All I am saying is that the court is more comfortable. If one is looking at a national measure within the scope of European law, subject to the Human Rights Act, also subject to the Charter, the national court on the whole is more comfortable with the Human Rights Act. It has become familiar with the Convention and the case law goes back many years and it is rather extensive in Strasbourg. So, on the whole, that is the basis on which they choose to decide them at the moment. Of course, if you say you have some turbo charger in the Charter of Fundamental Rights, then the judge would have to look at that, too.

Q14 Henry Smith: I suspect there is some difference of opinion, so I would be interested to—

Martin Howe: There are two reasons for basing the right on the Charter of Fundamental Rights. One is when there is a right in the Charter that is not in the Convention. An example of that is a case in which I was involved—so I do not want to say too much about it—which is the Rugby Football Union case. The right to protection of personal data is a fundamental right in the EU Charter but is not as such in the Convention. There is a more narrowly restricted right relating to information about your private and family life in the Convention.

The other reason that I think is the primary reason in many instances for wanting to pursue cases under the Charter, as distinct from cases under the Human Rights Act, is that—as Professor Craig says, and I completely agree with the answer he gave—you can then invalidate or disapply even primary Acts of Parliament, which you cannot do under the Human Rights Act. That, indeed, was the thinking of the complainants in the prisoner voting case that was dealt with by the Supreme Court.

David Anderson: If I may say so, that is entirely true in the unusual case where what one is seeking to do is to attack an Act of Parliament. There is no doubt that the Charter does have that extra turbo power that the Convention does not.

All I would add to that is that this is not something that began with the Charter. For better or worse, the European Court has always asserted the power, through the application of the general principles of European law—which, of course, included fundamental rights—to invalidate even primary legislation in a member state. In that respect, the Charter simply continues the position as it was before.

Q15 Chair: That may be a sovereignty question to deal with later. Professor Scott?

Professor Douglas-Scott: Yes. I just want to add something to what both the previous speakers have said. I agree with a lot of what they have said, but nonetheless, I think that the courts—both the European Court and national courts—have been willing to throw out Charter-based claims where the Charter is clearly not applicable, and the Charter will not be applicable where the action does not fall within the scope of EU law. For example, we have had cases where applicants have tried to plead road rage claims based on the Charter, and those have failed; cases where Ryanair have tried to rely on the Charter and those have failed. It will not be available in quite a number of cases.

Q16 Jacob Rees-Mogg: Professor, thank you for that. In your paper, you refer to the Mary Carpenter case, which fits in with what is being said about this general principle being applied. That struck me as being an extremely wide interpretation of EU law applying. Following on from your answer, although the courts may throw it out when there is no link, they will accept it when there is a pretty tenuous link. That also applies in the Zambrano case, which is obviously after the Charter has come in.

Professor Douglas-Scott: Yes. There is no denying that in the Carpenter case the link did seem rather tenuous, and I think the case is almost notorious for that reason. On the other hand, in the Zambrano case—as I try to make clear in my evidence—this was the suggestion of the UK Advocate General Sharpston. She was sounding out an idea, in the way that Advocates General sometimes do, which the court did not take up. It was an idea

similar to that that had been sounded out almost 20 years previously by Advocate General Jacobs, also a UK Advocate General, in a case called Konstantinidis. In both of these cases the Court of Justice itself did not embrace that wider jurisdiction. The evidence tends to go against the Court of Justice taking this broader approach, at present at least.

Q17 Chair: We are now going to move on to non-ECHR rights. Geraint, I will make the statement and you ask the questions. I will start with number 7. It is just a statement of our analysis of the position. “The Charter contains additional rights and principles, often in the economic and social sphere, that go beyond the ECHR. One example is Article 33(1), which states as follows. ‘The family shall enjoy legal, economic and social protection.’ This is derived not from EU law but from Article 16 of the European Social Charter, a Council of Europe convention, which has been ratified by all member states”. Geraint, would you be kind enough to ask the questions on that?

Geraint Davies: You have taken away all my glory. I was just going to add to that. Firstly, is that a principle or a right? You cannot stop talking. Is that a principle or a right?

Professor Douglas-Scott: Are you directing that to me?

Geraint Davies: I will go on to Professor Craig, if I took you unawares.

Professor Craig: A good question.

Q18 Geraint Davies: This is, “The family shall enjoy legal and economic, social protection”. For instance, we are talking about additional rights and principles in the economic social sphere that go beyond the ECHR, yes?

Professor Craig: I think that particular one would probably be regarded as a principle. But until it is adjudicated upon by the European Court of Justice, we will not know.

Q19 Geraint Davies: The supplementary we have here from the Clerk was, “On what basis can this be said to be a pre-existing fundamental right or principle, recognised as a general principle of EU law?”

Professor Craig: On that point, which goes back to a point touched upon by the Chairman, I think the answer is this. The Charter itself has never hidden the fact that, when it said it was declaratory of existing rights, it was in fact drawing upon sources of those rights, or principles, from taking into account quite a broad, empirical base. Indeed, in the preamble to the Charter, that is made clear.

In other words, it draws not only on case law of the European Court of Justice, but on the European Social Charter, Charter of Rights of Workers, and so on. Those are all listed. In that formalistic sense, the Charter is declaratory. But then I think, as all of us probably would agree—but if anyone dissents, of course they are entitled to—the very fact of putting those pre-existing provisions in a thing called a Charter of Fundamental Rights does give them a degree of peremptory force that they would not otherwise have had. That is true even if or insofar as some of them are denominated as principles rather than rights.

What I would add in that respect is that no one was hiding the ball in this respect. That preamble has been there for 14 years. That was the basis on which the Charter was initially drafted, and that was the basis on which it was then agreed and then given legal force. That is not something that has suddenly been sprung upon us by anything in the post-Lisbon world. Undoubtedly, the fact that in the post-Lisbon world the Charter itself is given legal force, in a way that it had not been before, obviously has an impact in that respect. All I am saying is the preamble, setting out very clearly the sources from which the Charter rights were drawn, was always there.

David Anderson: I can have a shot at answering Mr Davies's specific question by reference to the explanations to which account must be had. It says, "In some cases, an article of the Charter may contain both elements of a right and of a principle" e.g. among others, Article 33. I suspect what the explanations have in mind is that the first paragraph of Article 33 is based on the European Social Charter, and therefore is probably a principle. The second paragraph draws on the Council Directive 92 of 85, and therefore is probably a right to the extent that it is given effect in that directive and under the UK/Poland Protocol in United Kingdom law.

Q20 Geraint Davies: Good. Moving on, obviously you are referring specifically to Article 33, "The family shall enjoy legal, economic and social protection". As one example, in essence, is this an evolutionary situation? What is likely to be the effect of incorporating this right into primary EU law in the form of the Charter? Is that effect likely to change over time?

David Anderson: Yes. I must say I rather agree with what Professor Craig had to say about that. The notion that the Charter does not create any new rights is founded on the assumption that the Court of Justice had the ability to apply all these rights beforehand as part of its own judge-made general principles of law. One might feel quite grateful that they have been written down, pinned down and restricted in some cases, but at the same time a little doubtful as to whether all of these rights had been applied by the Court of Justice in the pre-Charter world. Although it certainly did make reference from time to time to the European Social Charter, I am not sure that before the Charter came into force the Court of Justice would have been prepared to treat rights of this nature as equivalent to the Treaty, which is what the position is now.

Chair: Any further questions, Geraint, on that?

Geraint Davies: I do not know whether I can go on to my supplementary, because it does seem to link in.

Chair: Do ask the question that you would like to ask. That is the important thing.

Q21 Geraint Davies: Do any of you envisage cases being brought under the Charter's rights—to secure a fair trial—in respect of changes made in individual countries on, for instance, legal aid and austerity and this sort of thing, whether that has a bearing on that and whether you think that might happen or not? Professor Douglas-Scott, would you mind?

Professor Douglas-Scott: I think it depends on the nature of the right. If you take, for example, the right to a fair trial, in the case of legal aid, first of all you would have to show that the matter fell within the scope of EU law according to the Fransson judgment. It could not just be any old case that somebody was bringing. Say, in the case of a criminal case where somebody is denied legal aid, it is unlikely that EU law would be involved in that case. There would have to be some sort of other peg by which the EU could be implicated.

Once it was, and the matter then fell within the scope of EU law, it is possible that somebody could then try to say, “I am being denied a right to a fair trial on this basis”. Then there is the question of: how you interpret that right? Does it require the right to legal aid? I am not sure that—should the matter go to the Court of Justice, let alone be decided in the national courts—we would find that those courts would take a different position from UK authorities and UK courts. Just because a matter is said to implicate the Charter, it does not necessarily determine the case in a way that certain elements in the UK might find undesirable.

Q22 Geraint Davies: Martin Howe, do you agree?

Martin Howe: I certainly agree with the proposition that there has to be an engagement of EU law in order for the Charter to come in. For example, the right to a fair trial under the Charter cannot apply to a case that has no EU law element. I think probably the Fransson case makes it clear that, for example, if the offence itself is something that flows from EU law—and there are enormous numbers of offences now, where the substantive offence arises from some directive or regulation or some obligation to enforce EU law—that seems to imply that all the procedural aspects of the criminal case are then within the scope of the EU Charter. I think that is an inevitable consequence of the Fransson decision, so it is extremely broad in its coverage.

Q23 Geraint Davies: Could you perhaps answer this at the same time, because this is the same question? I know we have talked about legal aid, say, on social security. If there were significant changes in social security, would the Charter have any relevance in terms of the right to social security, or would it be outside the scope of a British court?

David Anderson: Where legal aid is concerned, I think it is quite possible. There have been lots of legal aid cases in Strasbourg, and they say that you must have legal aid if your liberty is at stake. I think there is a European instrument concerning entitlement to legal aid. Whether we have opted into it or opted out of it, I am afraid I am not entirely sure at the moment. That indeed raises another issue. If it is an instrument that we have opted out of, nonetheless is it within the scope of European law for the purposes of litigation in the UK? I certainly would not rule out a case on legal aid, although of course it might be the British football hooligan wanting legal assistance in the Bulgarian Court just as easily as it would be the Frenchman wanting legal aid in England.

So far as social security is concerned, I think it is much more difficult, because there one is within Title IV. That is the so-called solidarity title, which the United Kingdom fought tooth and nail to render non-justiciable. They did walk away in the end with Article 1(2) and Article 2 of the 30th Protocol, which I think do severely restrict the scope for the

application of that title, save in circumstances where we already have legislation in respect of which it might have an interpretative role. So, yes, to legal aid; I could easily imagine that. Social security, I think much more difficult to imagine.

Chair: Thank you very much.

Q24 Chris Kelly: Article 29 says everyone has the right of access to a free placement service. What do you understand to be meant by “a free placement service”?

David Anderson: I think it is somewhere you can go to look for a job. It is what used to be called a labour exchange.

Q25 Chris Kelly: A labour exchange. Anybody else?

David Anderson: Or a job centre, whatever one calls it.

Q26 Chris Kelly: Is this a principle or a right?

David Anderson: I will put my head on the block and predict that it is going to be a principle, but of course it also falls within Title IV, so we have the protection given to us by the UK/Poland Protocol for that reason. I am not pretending to have any powers to distinguish rights and principles in all cases. I freely admit that it is a very difficult thing to do and we just do not have the guidance in the case law at the moment to do it.

Professor Craig: The only other thing I would add to what David has said is that of course we have the protection of Title IV but, subject to that, the placement service provision is an interesting one. On the one hand, one can see why the court might treat it as a principle. On the other hand, it is about as clear and as unequivocal as anything gets. Therefore, in some respects it would be really odd to treat it as a principle. It simply says, “Thou shalt have a free placement service”. As I said, it seems to me a straightforward legal obligation on the state to make such placement services available. Therefore, I think it would be legally difficult—not impossible—to construe it as anything other than a right.

Q27 Stephen Phillips: Just before we go on, Professor Craig said we have the protection of Title IV. I think you meant we have the protection of Protocol 30. At the beginning of that answer—just so we get it right on the transcript—you said we have the protection of Title IV. I think you meant we have the protection of Protocol 30. Is that right?

Professor Craig: Yes, sorry. That is it, exactly. Thank you.

Q28 Chris Kelly: On what basis can this be said to be a pre-existing, fundamental right, recognised as a general principle of EU law?

David Anderson: The explanations provide the key. They say this article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers. Whether one could point to a case before the Charter, in which the Court of Justice had given those specific provisions the force of a

general principle of fundamental rights, I do not know, but that is the basis on which they are said to have that status. No doubt reliance would also be placed, as appropriate, on the constitutions of member states to the extent that there may be constitutions that provide for free access to a job centre.

Q29 Chris Kelly: Finally, what is likely to be the effect of incorporating this right into primary EU law in the form of the Charter?

David Anderson: This is not a Treaty requirement that rights be introduced, because it is not a basis for European competence. Nothing in the Charter is a basis for European competence. It is not a legal basis for legislation. Certainly, under the terms of the Protocol, Title IV—and including this provision—can create justiciable rights if the United Kingdom has provided for such rights in national law. Quite what that means I do not know, but presumably if we do have a job centre then the interpretation of the right to access to that job centre may be influenced by this provision of the Charter.

Martin Howe: Can I supply a hypothetical?

Chair: You go first, and then Professor Scott.

Martin Howe: It seems to me the Charter as such does not impose a general obligation. But if EU law is applicable, for example, in the case of a migrant worker exercising the Treaty freedom to move to the United Kingdom and search for a job, that is a context where EU law would become engaged in which that right to a free placement service would then become relevant. It would then potentially raise a test case on the interpretation of Article 1, paragraph 2 of the Protocol, if, for example, UK law limited the right to free placement services for migrant workers. Of course, if it did so in a discriminatory way it would be challengeable under other bases under the Treaty, but if it did so in a non-discriminatory way then that might perhaps arise as an issue.

Professor Douglas-Scott: Yes, I would like to make two points here. The first is I think we should all remember that the European Social Charter and the Community Charter of Fundamental Social Rights are instruments that the UK has signed up to in one or other way. That does then render the question of exactly what form these rights take. Interesting, and I would agree with what David Anderson has said on that point.

I would also say that there has been at least one case before the Court of Justice—the Dominguez case—where the Advocate General was unwilling to find that a Title IV type right could be directly effective or directly enforceable, so it is not necessarily the case that we should assume that a right under Title IV will be seen as directly enforceable.

Chair: Stephen, did you want to ask a question on that?

Q30 Stephen Phillips: Yes. It rather follows on from that answer, in a sense, but also from the discussion that we have been having in relation to these two specific articles, which are both obviously part of Title IV. The question is somewhat difficult to frame, but it is whether the solidarity rights in Title IV are general principles of EU law that would apply even if the Charter had not been drafted, or whether they are in fact created by the Charter itself. Since

she has taken the lion's share, I will ask Professor Douglas-Scott to take up the rear, and we will start with Mr Anderson.

David Anderson: I think you have hit on a very important point there. When in my written submission I pointed to various things that needed to be kept an eye on by those who are concerned about competence creep, I think perhaps I should have added exactly that point. In an ideal world, one might have expected that, having gone to all the trouble of collecting these rights in a Charter, one would then render the Charter the only game in town, at least so far as EU law is concerned. But by Article 6(3) of the Treaty on European Union, it does sound as though the previous jurisprudence of the court is retained at least to some extent, certainly as it relates to the ECHR and as it relates to the constitutional principles of the member states.

Yes, one could conceive of a case—whether this is one of them—in which, frustrated by limitations on the Charter, the Court of Justice were nonetheless to derive a particular right or a particular application of a right from its continuing jurisdiction to apply the general principle of fundamental rights.

Q31 Stephen Phillips: Does anyone want to add anything to that, or is that an adequate answer on behalf of the panel?

Professor Douglas-Scott: I simply want to say that, just because something has a prior status as a general principle of law, it does not necessarily mean that it is a directly enforceable right. It might still simply be seen as a principle that affected the interpretation.

Professor Craig: The only thing I would add to what the two previous speakers have said is this. The fact that Article 1(2) of Protocol 30 does limit the extent to which Title IV is applicable in the United Kingdom, of course will not affect the possible application of the substance of those provisions where there is an alternative legal basis for those provisions to apply. Insofar as a worker has a right to information derived from, for example, a directive, then that will continue to be applicable against the United Kingdom. The fact that Title IV is barred from forming a legal basis for that worker's claim will not prevent the worker from relying on the relevant provision of the directive, in the example I just gave, if such a directive exists, which it does in certain areas.

Martin Howe: I would go further than that and say that that is quite right, supposing there is a directive that gives a particular right and nothing in the Protocol prevents the directive being relied upon. However, nothing in the Protocol prevents the Charter from being relied upon to interpret the right under the directive. What it says in Article 1(2) is that the Charter itself does not give rise to a justiciable right. That does not prevent an existing justiciable right in the relevant field being interpreted by reference to Title IV of the Charter.

Q32 Chair: That is interesting. David Anderson and Paul Craig both seem to agree with you on that, but David Anderson wants to add something else.

David Anderson: Yes. It is nice to agree with Mr Howe, and sometimes we do. I think a good example of the point he makes is the case of *Kamberaj*, C571/10, in which the court had to look at what a social security directive meant by “core rights”, to which member states were supposed to ensure access. The question was whether housing benefit was one of these core rights referred to in the directive. In order to interpret the directive as saying, “Yes, it did refer to housing benefits”, the court had reference to Article 34(3) of the Charter, which makes a specific reference to housing benefit. They were saying, “If it is in the Charter, it must be important. If it is important, it must be a core right”.

Chair: I would like to move on now to the question about whether the Charter only reaffirms pre-existing rights.

Q33 Jacob Rees-Mogg: To some extent we have covered it, Mr Anderson, in an answer you gave earlier, but it is just to summarise. Does the mere fact of writing something down solidify a right in spite of the assurances given, in both the Treaty and the Charter itself, that the Charter shall not extend in any way the competences of the Union, and nor shall it extend the field of the application of Union law? Although that might have been the intention, once it is in the black letter of the law it is much more powerful than it was as perceived rights. I do not mind who answers, but why not Mr Howe, because you have not answered first on anything?

Martin Howe: Yes. I think one can make a case to say that the previous jurisprudence of the European Court, with its recognition of principles common to the law of member states, did give it a very broad but vaguely defined power, which could be used, for example, to strike down even Community instruments that might conflict with those general principles. However, the reality is that, once you have collected together a series of rights and labelled them in the formal Charter, it then becomes much more concrete and easier for the court to do that, more likely that it will do it.

I think the Belgium insurance case is a striking example of that, where they struck down the derogation and the directive permitting differential premiums based on different risks posed by different genders. Personally, I cannot see the court, under its previous jurisprudence, having said there is a general principle of law common to the member states that makes these kinds of differential premiums so contrary to everyone’s common legal traditions that we can strike it out of a directive. But, given the Charter and its express provisions about discrimination on the grounds of sex, then that provided the court with the basis to do that.

David Anderson: Although of course the Treaty has always—at least for a very long time—had precisely such a prohibition on discrimination on the grounds of sex, so in a sense there has been a provision with Treaty force saying that for a very long time.

Professor Douglas-Scott: I would have two things to say here. One is that, yes, of course, I think that was part of the point of the Charter, to provide a road map and clarity as to what rights existed. On the other hand, just because something has the same legal status as an EU treaty does not mean it provides a directly effective enforceable right in courts. Lots of the provisions in the EU treaties themselves are not directly effective, so it does not answer that question.

Professor Craig: I would just make two distinct points in answering your question. One is that we should not forget the historical fact that the reason why the Charter is of the breadth that it is, is not because there was some smash and grab operation by the Commission or the EU institutions back in 1999, saying that as drafted the Charter must include not only first-generation civil and political rights but also economic and social rights. The historical fact was that in the Helsinki European Council meeting and in the Cologne European Council meeting—back, I think, in 1999—when the framework for what became the Convention that led to the Charter was laid down, it was the member states that gave a blueprint saying, “We want this Charter to include economic and social rights as well as civil and political rights”. That was driven in part by the Scandinavian countries, who were very keen on that, but that was the historical fact. That was the reason why it was drafted in the way that it was. That is the first point.

The second point, which is entirely different, is this. Even in its broadened form, the Charter—and this is something that we have mentioned already—does not exonerate the EU institutions from finding a legislative competence within one of the heads of legislative competence that already exist. Just to repeat what we said before, you cannot locate a legislative competence in an article, per se, of the Charter itself.

Q34 Chair: Thank you very much. We are just about to come to a vote—that is why this chatter has been going on in the background—because we have timetables we have to fit into, but then so do you. We are extremely grateful to you for coming. But given the circumstances of today, and because this is extremely important and it takes a little bit of time to tease out all the issues, would you mind coming back? I recognise that two of you are practitioners, so, for all we know, it may be that you have court cases to deal with. But if we could find the time by agreement with our Clerk, drawing stumps now, and then coming back at a time that is convenient to the Committee and to yourselves, would that be agreeable? We are going to have to go off and vote and people have other engagements that are accumulating on us. Is that all right?

Professor Douglas-Scott: Yes.

Chair: Are you sure? David Anderson, you are fine with that?

David Anderson: Yes, we can certainly do that.

Chair: That is very kind of you. Thank you very much. In the circumstances, we will draw stumps now. We look forward to seeing you again a little bit later when we have been able to work out some dates. Thank you all very much indeed.