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The EU Charter of Fundamental Rights in Northern Ireland under the Windsor Framework*

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ABSTRACT

This article analyses the ways in and extent to which the European Union Charter of Fundamental Rights (CFR) continues to operate in Northern Ireland after Brexit. It shows that, primarily through article 2 of the Windsor Framework and article 4 of the Withdrawal Agreement, the CFR retains considerable force in Northern Ireland, even though it has been removed from the statute books in the rest of the United Kingdom (UK). This retention is legally significant as the CFR gives rise to stronger individual remedies and protects a broader range of fundamental rights than any other instrument in UK law, including the Human Rights Act 1998. The article contributes to litigation and human rights policy in Northern Ireland a) by explaining the added value of the CFR for individuals and b) by setting out the legal tests that must be met for the CFR's application, under both EU law and Brexit legislation.

Keywords: Brexit; Windsor Framework; Charter of Fundamental Rights of the EU; human rights; fundamental rights; article 2 of the Northern Ireland Protocol; EU–UK Withdrawal Agreement; diminution of rights.

INTRODUCTION

The year is 2024 AD. The United Kingdom (UK) has entirely expunged the European Union (EU) Charter of Fundamental Rights (CFR) from domestic law and restored its constitutional sovereignty. Well, not entirely … There is one small bastion of impenetrable constitutional complexity, where the CFR still holds out. And life is

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not easy for the MPs and civil servants who garrison the law-drafting chambers at Westminster …

Much like *Asterix* (which inspired this introduction), where a small village of indomitable Gauls tirelessly held out against the Romans, Northern Ireland is in a unique position in post-Brexit UK. It continues to apply aspects of EU fundamental rights law including the CFR since the ratification of the Withdrawal Agreement (WA), even though these have otherwise disappeared from the statute books.

This article analyses the ways in and extent to which the CFR continues to operate in Northern Ireland after Brexit. More specifically, while some attention has already been paid in the academic literature[1] to the possibility of a diminution of rights in Northern Ireland following Brexit in the context of article 2 of the Windsor Framework,[2] this article is among the first to analyse the status of the CFR in the context of Northern Ireland's special post-Brexit constitutional arrangements. The article's contribution is twofold: first, it highlights the important benefits that the CFR continues to bring to litigation and human rights policy in Northern Ireland through its capacity to engage strong individual remedies, as well as through its protection of various fundamental rights which have no equivalent protection elsewhere in UK law. Second, the article explains and sets out the legal tests for the application of the CFR in Northern Ireland, bringing together the requirements for the application of the CFR under EU law and the specificities of Brexit legislation. In this respect, the article argues that the application of the CFR in Northern Ireland currently flows from two separate legal obligations: first, there is an obligation to observe the CFR under the WA, which renders the CFR as interpreted by the Court of Justice of the European Union (CJEU) directly relevant to domestic law and litigation in the fields of continuing application of EU law. Second, there is a seemingly more limited obligation to observe the CFR under the non-diminution requirement in article 2 of the Windsor Framework, whose significance is defined by the scope of both EU law and of the Belfast/Good Friday Agreement 1998 (BGFA). The article shows that the distinct legal character of these obligations

1 See eg Christopher McCrudden, Human Rights and Equality, in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 143.

2 The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland. In fact, the Withdrawal Agreement still calls it that, but in line with Joint Declaration No 1/2023 of the Union and the United Kingdom in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 [2023] OJ L102/87, this article refers to it as the Windsor Framework.

is determinative of the extent and, crucially, the *means* of the CFR's applicability in Northern Ireland.

The article is structured in three parts: first, it sketches the legal framework that defines the application of the CFR in Northern Ireland, explaining the different sources that protect its application and their interaction. It then goes on to analyse and showcase, through a series of hypothetical examples, the operability of the CFR, firstly, through article 4 of the WA and, secondly, through article 2 of the Windsor Framework. Finally, it highlights the significance that the CFR's continued application could make to Northern Irish citizens and institutions, through the maintenance in Northern Ireland of otherwise obsolete rights and remedies.

INTERPRETING THE LEGAL FRAMEWORK GOVERNING THE APPLICATION OF THE CFR AFTER BREXIT

In order to be able to fully appreciate the applicability of the CFR in Northern Ireland litigation and policy, it is essential to understand both the requirements for engaging the CFR under EU constitutional law and the provisions made for it under the legal framework governing Brexit. This section sets out these requirements in turn and interprets their interaction: first, it outlines the applicability of the CFR under EU law, which is the starting point for *any* further analysis of the CFR's application in Northern Ireland. It then goes on to outline the legal framework that deals with the applicability of the CFR in EU–UK relations under the WA. Lastly, it analyses the interaction between the provisions of the WA and domestic Brexit statutes – the European Union (Withdrawal) Act 2018 (EUWA) and Retained EU Law (Revocation and Reform) Act 2023.

Applicability of the CFR *rationae materiae* under the principles established by the CJEU

The CFR applies primarily to the institutions, offices, bodies and agencies of the EU. Hence, the EU is bound to comply with the CFR in everything it does. By contrast, according to article 51(1) thereof, the CFR applies to the member states 'only when they are implementing Union law'. As will be shown, the same applies under the Windsor Framework: the UK and Northern Ireland institutions can only be bound by the CFR when the threshold criterion of 'implementing Union law' is met. It is therefore necessary to establish what is meant by 'implementing Union law'.

In the landmark judgment of *Åkerberg Fransson*, the CJEU adopted a wide understanding of this criterion and equated 'implementing Union law' with acting 'in the scope of Union law'.[3] This encompasses two broad situations: the first is where a member state is relying on a derogation from EU free movement law.[4] An example would be the removal of an EU citizen from a member state's territory for public security reasons, which requires compliance with article 7 CFR, the right to private and family life. The second situation is where the member state is 'implementing Union law' in the strict sense, that is, the member state is acting in order to comply with an EU law obligation (eg an obligation under an EU directive; application of an EU regulation).

The second situation, which is conceptually more complex, is illustrated by the facts of the *Åkerberg Fransson* case. Mr Åkerberg Fransson – a self-employed fisherman – was charged with serious tax offences for providing false information in his tax returns concerning income tax and value added tax (VAT). He was further charged for failing to declare employers' social security contributions. The tax authorities ordered him to pay tax surcharges in relation to the wrongly declared tax and social security contributions, which Mr Åkerberg Fransson did not challenge. He subsequently relied on article 50 CFR – the prohibition of double jeopardy[5] – to challenge the compatibility of his criminal prosecution with the Charter. In the case, neither the national legislation on whose basis the tax penalties were ordered to be paid nor the national legislation on which the criminal proceedings were founded had been adopted by Sweden to implement an EU obligation. In fact, they pre-dated Sweden's EU membership.

Nonetheless the CJEU found there to be an 'implementation of Union law' in so far as VAT was concerned, given that the relevant VAT Directive[6] in combination with article 4(3) of the Treaty on European Union prescribed that every member state was under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. This finding was buttressed by article 325 of the Treaty on the Functioning of the European Union (TFEU), which obliges the member

3 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

4 Case C-390/12 *Pfleger* EU:C:2014:281; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* ECLI:EU:C:1991:254.

5 Article 50 CFR reads: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

6 Directive 2006/112/EC, arts 2, 250(1) and 273.

states to counter illegal activities affecting the financial interests of the EU through effective deterrent measures.[7]

Hence the tax penalties and criminal proceedings in relation to VAT constituted an implementation of the obligations flowing from the VAT Directive and from article 325 TFEU and thus of EU law. The Court deemed it irrelevant that the national legislation was not adopted in order to transpose the directive.

The *Åkerberg Fransson* judgment is instructive in at least two respects: first, it adopts a functional approach to the term 'implementing Union law'. This means that, as long as a national law provision has the function of effecting compliance with an EU law obligation, it constitutes an implementation even if historically it was adopted independently of such an obligation. Second, one and the same national law provision may be considered an implementation of Union law under one set of facts and not an implementation under another set of facts. In *Åkerberg Fransson* the relevant provisions of the tax code and of domestic criminal law were only implementations of EU law in so far as VAT was concerned. As far as income tax and social security contributions were concerned, they were not. This resulted in the case being split up into a purely domestic part (concerning income tax and social security contributions), to which the CFR did not apply, and an EU law part (concerning VAT), to which the CFR applied.

The precise decision of whether a national law provision constitutes an implementation of Union law or not is at times difficult to make. The CJEU reiterates that implementation 'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[8] The CJEU spelled out a set of indicators, which may inform such a decision:

> In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it … .[9]

The CJEU's broad interpretation of the threshold criterion contained in article 51(1) CFR means that, in principle, there is no area of EU law to which the Charter does not apply. And more importantly, perhaps, there is no area of domestic law that is *per se* immune from

7 *Åklagaren v Hans Åkerberg Fransson* (n 3 above) [25]–[26].

8 Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126, [24].

9 Ibid [25].

CFR review.[10] As the judgment in *Åkerberg Fransson* demonstrates, even in fields like substantive criminal law, for which the EU only has limited competence, member state legislation can constitute an 'implementation of Union law' if the legislation has the function of ensuring compliance with a broader obligation under EU law to ensure the correct collection of VAT.

According to the CJEU, a member state is implementing EU law also where the member state has discretion over *how* to comply with its EU law obligations;[11] and even where a member state has discretion *whether* to act at all, provided it chooses to act.[12] By contrast, where EU law stipulates minimum harmonisation requirements, the member states are not deemed to be 'implementing Union law' in so far as their national implementation exceeds the minimum required by EU law.[13]

Before leaving the EU, then, the CFR applied to domestic authorities (including domestic courts) in any situation in which EU law was involved, whether to a significant or to a more limited degree, and regardless of whether the legislation in question was specifically designed as an implementing measure. An example of the application of the Charter in a case concerning the exclusion of EU measures is *Benkharbouche*.[14] In this case, the Employment Appeal Tribunal and Court of Appeal accepted, and the Supreme Court confirmed, that the CFR was applicable in a dispute between two domestic workers and their employers (the Sudanese and Libyan embassies in London). The dispute engaged the CFR because it concerned the setting aside of the Working Time Regulations (a domestic piece of secondary legislation implementing the EU Working Time Directive), as a result of the application of the State Immunity Act 1978.

An example of a situation concerning the meaning of the phrase 'implementing EU law' under article 51(1) CFR can be seen in the

10 Daniel Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 Common Market Law Review 1267, 1278.

11 Case C-571/10 *Servet Kamberaj v Istituto per l 'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233, [80].

12 Joined Cases C-411/10 and C-493/10 *N S v Secretary of State for the Home Department* EU:C:2011:865, [68].

13 Joined Cases C-609/17 and 610/17 *TSN and AKT* EU:C:2019:981, [41]–[55].

14 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, [2019] AC 777.

judgment of the Northern Ireland High Court in *SPUC*,[15] where this issue was addressed in a post-Brexit context. In that case, the question arose whether the CFR applied because the EU was a party to the United Nations Convention on the Rights of People with Disabilities (UNCRPD). The UNCRPD was concluded by both the EU and the member states as a 'mixed' agreement chiefly because the EU did not possess the competence to conclude the agreement alone. Hence the UNCRPD is only 'Union law' in so far as the EU had the competence to conclude it. For this reason, any member state implementation of EU law with regard to the UNCRPD presupposes that the member state was implementing an obligation under the UNCRPD for which the EU had competence. Otherwise, the member state would not be 'implementing Union law'. In this case, the applicant – an anti-abortion society – sought to rely on the UNCRPD as a general lock onto EU law in order to benefit from the CFR's protection of the right to non-discrimination on grounds of disability under articles 21(1) and 26 of the CFR. Colton J therefore concluded that 'the applicant cannot rely upon the UNCRPD, or the Charter or EU General Principles because the issue of abortion is not an EU competence'.[16] In turn, when properly understood within its specific (and atypical) context of an established lack of EU competence,[17] the *SPUC* judgment can be viewed as a clear restatement of the principles of the application of the CFR *rationae materiae* in domestic law before Brexit and even, as we will go on to explain in the following section, of the continued application of the CFR in Northern Ireland in certain cases.

The continued application of the Charter in Northern Ireland under the WA

The WA concluded between the EU and the UK, including the Windsor Framework, contains five provisions that are relevant for the purposes of assessing the applicability of the CFR in the Northern Ireland legal order.

The first provision is article 2 WA, which defines 'Union law' as including the CFR and the general principles of EU law and defines 'member states' as the 27 member states of the EU.

15 *Re SPUC's Application for Judicial Review* [2022] NIQB 9, subsequently affirmed on appeal ([2023] NICA 35). Similarly, in the more recent judgment in *Dillon* the court emphasises the 'scope of EU law' requirement by noting that diminution of victims' rights was a matter relevant to article 2 Windsor Framework because the UK would have needed to implement the Victims' Rights Directive: *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons' Applications for Judicial Review* [2024] NIKB 11, [578], per Colton J.

16 *SPUC* (n 15 above) [131].

17 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and Others* EU:C:1991:378.

The second provision is article 4(1) WA, which mandates that the 'provisions of Union law made applicable' in the WA shall 'produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This includes direct effect and primacy or – as article 4(2) puts it – disapplication of inconsistent domestic law.[18] Furthermore, articles 4(3) and 4(4) require an interpretation of EU law (referred to in the WA) which is in accordance with the general principles of EU law, and which conforms with relevant CJEU case law. It is also noteworthy that this mandate for the conformity of EU law interpretation with CJEU case law is not temporally limited to case law handed down prior to the end of the transition period on 31 December 2020, as article 13(2) of the Windsor Framework (the third relevant provision) removes article 4's temporal limit. The fourth relevant provision is article 13(3), which creates an obligation of dynamic alignment between the UK and the EU for all EU acts referred to in the Windsor Framework.[19]

The fifth and final provision of relevance is the non-diminution guarantee contained in article 2(1) of the Windsor Framework, which reads:

> The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol,[20] and shall implement this paragraph through dedicated mechanisms.

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18 On these concepts see below.

19 This is subject to the so-called 'Stormont Brake' in article 13(3a) Windsor Framework, briefly explained in the 'Editorial' to this special issue (433–442).

20 The annex 1 Directives are: Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

By virtue of the express inclusion of the CFR in the definition of 'Union law' in article 2 WA, therefore, the CFR continues to apply in Northern Ireland in all areas of application of the WA (including article 2 of the Windsor Framework), in line with article 4 WA. Moreover, in the circumstances in which dynamic alignment is engaged, this obligation entails a prospective, forward-looking dimension because it is essential to track future changes to annexed measures.

The relationship between the WA and Windsor Framework and UK-wide Brexit legislation

The terms of the WA and Windsor Framework at first glance appear to be contradicted by UK-wide domestic legislation for Brexit. Section 5(4) of the EUWA provides: 'The [CFR] is not part of domestic law on or after [the end of the implementation period following the UK's exit from the EU]'. This sweeping statement is somewhat qualified when considered alongside other aspects of domestic law, notably section 5(5) EUWA, which clarifies that the exclusion of the CFR does not thereby exclude the retention of any general principles of EU law, and that any EU case law which contains references to the CFR should be read as referring to these general principles.[21] However, the practical effect of the retention of the general principles for claimants is limited.[22] Schedule 1 EUWA declares that general principles of EU law which emerge after Brexit are not part of domestic law,[23] abolishes the right of action in domestic law grounded on a breach of the general principles of EU law,[24] and prevents disapplication and quashing of inconsistent national law ensuing therefrom.[25] Finally, any possibility of relying on fundamental rights as general principles of EU law in order to bridge the contradiction between the terms applicable in Northern Ireland under the WA and Protocol and the exclusion of the CFR from domestic law under the EUWA has now been eliminated by the Retained EU Law (Revocation and Reform) Act 2023 (REULA), section 4 of which has ended the availability of general principles of EU

21 According to the CFR's preamble, it 'reaffirms' the general principles of EU law, so that there is a considerable degree of overlap (though in some cases the general principles go further): see Koen Lenaerts and Antonio Gutiérez-Fons, 'The place of the Charter in the European legal space' in Steve Peers et al (eds), *The Charter of Fundamental Rights* 2nd edn (Hart 2021) paras 55.53–58; Tobias Lock, 'Article 6 TEU' in Manuel Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 12019) para 23.

22 EUWA, sch 8, para 39 provided for temporal limits for the use of general principles to ground actions arising within three years of the end of the implementation period, but these have now expired and the limitations in sch 1 are operational.

23 Ibid sch 1, para 2.

24 Ibid sch 1, para 3(1).

25 Ibid sch 1, para 3(2).

law in the domestic legal order entirely as of 1 January 2024.[26] How, then, can the apparent incompatibility between the terms of the WA/Windsor Framework and the terms of the EUWA/REULA be resolved?

The answer is still found in the EUWA itself. Section 7A EUWA – added to the EUWA by the European Union (Withdrawal Agreement) Act 2020 – does three things. First, it directly incorporates the UK–EU WA into domestic law.[27] Second, it mandates that the 'rights, powers, liabilities, obligations and restrictions' which are created, or which arise 'from time to time' under the WA, be given legal effect within domestic law 'without further enactment'.[28] Third, it subjects every enactment, including provisions within the EUWA itself, to the incorporated WA.[29] The immediate consequence of this is the same as under the now repealed section 2(1) of the European Communities Act 1972: the entirety of the WA, *including* the principles which inform its application and scope, as these principles develop or are progressively interpreted, have automatic effect (via section 7A) within the domestic legal sphere in the UK generally and Northern Ireland specifically. Last but not least, the exceptions in schedule 1 WA mentioned above are in turn subjected to a long list of overriding provisions in section 7C, which restores their applicability in the application of 'separation agreement law' which includes, *inter alia*, article 4 of the WA[30] and article 13 of the Windsor Framework.[31] Since the whole of section 5 EUWA (including section 5(4)) is subject to 'separation agreement law', defined in section 7C as *inter alia* including section 7A, the requirements of article 4 WA (including, crucially, the primacy requirement) and article 13 of the Windsor Framework,[32] the apparent irreconcilability of section 5(4) EUWA with the provisions of the WA and the Windsor Framework falls away given that section 5(4) EUWA has been modified by virtue of section 7A EUWA.

This interpretation has already been confirmed by the Northern Ireland High Court in *SPUC*, discussed earlier. As Colton J put it in that judgment:

> The combined effect of section 7A EUWA 2018 and Article 4 of the Protocol limits the effects of section 5(4) and (5) of the EUWA 2018 and Schedule 1, para 3 of the same Act which restrict the use to which

26 REULA, s 4(2)(a). The provision was brought into force by the Retained EU Law (Revocation and Reform) Act 2023 (Commencement No 1) Regulations 2023, reg 3(b).
27 EUWA, s 7A(2).
28 Ibid s 7A(1).
29 Ibid s 7A(3).
30 Ibid s 7C(2)(a).
31 Ibid s 7C(2)(c).
32 Ibid s 5(7) and s 7C(2) and (3).

> the Charter of Fundamental Rights and EU General Principles may be relied on after the UK's exit.[33]

The same conclusion would appear to follow from the judgment of the Northern Ireland Court of Appeal in *Allister and Peeple's Applications for Judicial Review*[34] and from the judgment of the UK Supreme Court when the case reached it on appeal.[35] The Supreme Court's judgment in this case confirmed that section 7A EUWA does not merely modify domestic UK law (including Northern Ireland law) by giving primacy to the express provisions of the WA (and the Windsor Framework), but also modifies domestic law in ways which are a *necessary implication* of the WA's incorporation into domestic law.[36] This approach to section 7A WA was also recently confirmed, within the specific context of article 2 Windsor Framework, in *Re Dillon*.[37]

Overall, then, existing case law confirms that the operation of section 7A of the EUWA ensures not only that the CFR has effect, but that it has effect to the maximum possible extent to ensure compliance with EU law obligations in the broadest terms. Given that the CFR has the same legal force as the EU treaties under EU law,[38] this means that, section 5(4) of the EUWA notwithstanding, the CFR has the same effect in Northern Ireland law as it did before Brexit, albeit in respect of a greatly reduced body of EU law mentioned in the Windsor Framework.

The effect of section 7A of the EUWA appears indeed to be preserved (notwithstanding the amendments made by section 3 of the REULA) by section 3(3) of the REULA, which supports our analysis. Section 3(3) REULA *inter alia* replaces subsections (1)–(3) of section 5 of the EUWA (including references to these subsections within section 5 of the EUWA) with new subsections (A1)–(A3). The effect of this replacement is at its most important in the reference to (new) subsection (A1) in section 5(7) of the EUWA. This last provision subjects the sweeping language of section 5(1) (which brings an end to the principle of EU law supremacy in the domestic legal order) to 'relevant separation agreement law', defined in section 7C of the EUWA to include, *inter alia*, section 7A of the EUWA, all of the requirements of article 4 of

33 *SPUC* (n 15 above) [78].

34 *Allister and Peeple's Applications for Judicial Review* [2022] NICA 15, [328].

35 *Allister and Peeple's Applications for Judicial Review* [2023] UKSC 5, [2023] 2 WLR 457.

36 The explicit disapplication of the petition of concern mechanism was achieved by way of secondary legislation amending the Northern Ireland Act 1998, but section 7A had already 'modified' the Northern Ireland Act – see *Allister and Peeple's* (n 35 above) [108]. See also Anurag Deb, 'Allister: the effect of the EU Withdrawal Act' (*EU Law Analysis* 22 February 2023).

37 *Re Dillon* (n 15 above) [525]–[526].

38 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 6(1).

the WA and article 13 of the Windsor Framework (conferring dynamic alignment on the annex 1 EU legislation concerning equality and non-discrimination).[39]

The key principle of this meandering and complicated statutory tangle appears to be that section 3(1) of the REULA, which purports to end the supremacy of EU law, applies to assimilated law *only* (formerly known as 'retained EU law'), thereby preserving supremacy for 'genuine' EU law (that is, law made by the EU and not its UK simulacrum created by the EUWA) as applicable via the WA and the provisions of the EUWA which incorporate it. The same goes for the effect of section 4 REULA. This would apply to the Northern Ireland legal order in much the same way as the wider UK legal order: in any matter *not covered by or within the scope of the Windsor Framework*, the supremacy of EU law would not apply.

Consequently, in our view, the only viable position for ensuring respect of the Windsor Framework is to treat the CFR as applicable in the same manner as it was prior to Brexit – the only difference being that it is now only relevant to the reduced body of EU law applying to the UK (mainly in respect of Northern Ireland) as a result of Brexit.

THE OPERABILITY OF THE CHARTER IN NORTHERN IRELAND

Having established the applicability in principle of the CFR in Northern Ireland under the Windsor Framework, it is nevertheless necessary to explore in greater detail the different ways in which it can operate. One can distinguish two principal avenues through which the CFR has effect in the Northern Ireland legal order: the first is via article 4 WA, which provides for EU law to be interpreted according to its own methods of interpretation. Given that EU law must be interpreted and applied in accordance with the CFR, this also applies in Northern Ireland in so far as the Windsor Framework lists EU law as applicable (notably through its annexes). The second avenue through which the Charter applies in Northern Ireland is article 2 of the Windsor Framework. This section goes on to analyse the operation of the Charter under these two avenues in turn, highlighting the potentially divergent extent to which it is likely to shape law and policy in Northern Ireland.

39 EUWA, s 7C(2) and (3).

Applicability of the Charter in Northern Ireland due to article 4 WA

Various provisions of the Windsor Framework make reference to EU law or declare specific provisions of EU law applicable in Northern Ireland.[40] One can broadly distinguish three situations: first, the Windsor Framework declares EU secondary law laid down in annexes 2–5 of the Windsor Framework applicable;[41] second, the Windsor Framework provision itself declares one or more provisions of EU primary or secondary law applicable, for example articles 34 and 36 TFEU;[42] third, the Windsor Framework makes reference to 'Union law' more broadly.[43]

According to article 4(3) WA the 'provisions of [the WA, of which the Windsor Framework is a part] referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law'. According to the CJEU, this means in particular that:

> every provision of [Union] law must be placed in its context and interpreted in the light of the provisions of [Union] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[44]

In other words, the provisions of EU law made applicable by the Windsor Framework must be interpreted and applied in the same way as they would be interpreted and applied in an EU member state. As far as the applicability of the CFR is concerned, the CJEU put it succinctly thus: the 'applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter'.[45] Hence the CFR must be considered to apply by virtue of article 4 WA, in so far as Union law is made applicable by it.[46] The reference to the 'general principles of Union law' in article 4(3) WA confirms this: after all, they guarantee – broadly speaking – the same rights as the CFR and apply in the same situations as the CFR.[47]

There are four situations in which the CFR may have an effect in the Northern Ireland legal order under this heading. First, the CFR

40 Notably, arts 5(3)–(5), 7(1), 8(1), 9(1), 10(1), 11(1), 13(7).

41 Eg art 8(1).

42 Art 7 (1); but also the limitation in art 13(7).

43 Art 11(1).

44 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, [20].

45 *Åklagaren v Hans Åkerberg Fransson* (n 3 above), [21].

46 See also Bernard McCloskey, 'The Charter of Fundamental Rights' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 159.

47 See n 21 above.

may be used to interpret the provisions of EU law made applicable by the Windsor Framework. Second, the CFR may be invoked where such provisions are 'applied' in Northern Ireland, that is, beyond the interpretation of the provisions themselves, so that the CFR may notably be used to inform the way they are enforced. Third, the CFR may be invoked to challenge the validity of EU secondary law made applicable by the Windsor Framework. And fourth, the Charter is relevant when interpreting provisions of the WA and Windsor Framework themselves.

The third situation also means that the CFR may be of relevance in the context of article 4 WA challenges to new EU secondary law with which Northern Ireland would be dynamically aligned according to article 13(3) of the Windsor Framework. All EU secondary law must be CFR-compliant to be valid. Article 12(4) of the Windsor Framework decrees that the CJEU continues to have jurisdiction as regards articles 5 and 7–10 and thus over EU secondary law mentioned in annexes 2–5. Article 12(4) also makes express reference to the CJEU's jurisdiction over preliminary references from national courts. According to article 267(1)(b) TFEU preliminary references can be requested concerning the validity and interpretation of the acts of EU institutions. Given that article 12(4) makes reference to article 267(2) and (3) TFEU which gives the courts a right to request a preliminary ruling (paragraph 2) on such questions, and in the case of the highest court a duty to do so (paragraph 3), it will be possible for claimants in Northern Ireland to challenge the validity of EU secondary law that is currently applicable or which becomes applicable through dynamic alignment by virtue of article 13(3) of the Windsor Framework.

As far as case law handed down by the CJEU after the end of the transitional period is concerned, article 13(2) would strongly suggest that the provisions of EU law referred to in the Windsor Framework continue to be interpreted and applied in light of such case law.[48] Hence, any interpretations of the CFR in connection with those provisions in post-Brexit case law would need to be followed, too.

An example of the Charter applying in the context of the Windsor Framework's obligations relating to the free movement of goods would be the case of *Schmidberger*. The case concerned a potential clash between the right to free movement of goods (article 34 TFEU – made expressly applicable by article 7(1) of the Windsor Framework) with a fundamental right (freedom of assembly – now guaranteed by

48 For a fuller analysis, see Sarah Craig and Eleni Frantziou, 'Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments' (2022) 73(S2) Northern Ireland Legal Quarterly 65.

article 11 CFR).[49] In *Schmidberger*, the Austrian authorities ordered the closure of the Brenner motorway – the major transit route for goods connecting Germany and Italy through Austria – for a duration of 30 hours so that a demonstration organised by an environmental group could take place. The demonstration and the fact that it had been given permission by the authorities had been announced well in advance. The claimant in the case was a haulage company, which claimed that it had suffered a loss (lost profits, having to pay drivers' wages etc) due to the motorway closure. The claimant relied on EU state liability, which required it to show a 'sufficiently serious breach' of EU law.

The CJEU accepted that the free movement of goods guaranteed by article 34 TFEU – which remains applicable in Northern Ireland due to article 7(1) Windsor Framework – not only concerned imports of goods, but also their transit.[50] Hence the decision not to ban the demonstration was capable of restricting intra-EU trade, so that this decision amounted to a 'measure having equivalent effect to a quantitative restriction' and was thus incompatible with article 34 TFEU, unless it could be objectively justified.[51]

It then held that fundamental rights could be invoked as a legitimate interest which 'in principle justifies a restriction of the obligations imposed by [EU] law, even under a fundamental freedom guaranteed by the treaty such as the free movement of goods'.[52] The CJEU then pointed out that free movement of goods is subject to restrictions according to article 36 TFEU – also applicable in Northern Ireland – as well as the unwritten overriding (or mandatory) requirements.[53] It then carried out a proportionality exercise weighing the interests concerned – the free movement of goods on the one side and freedom of expression and assembly on the other – and balancing them and concluded that Austria had not violated article 34 TFEU by allowing the demonstration to go ahead as it enjoyed wide discretion in this case. There was therefore no breach of EU law, which meant that there was no basis for a claim of state liability.

It is not difficult to imagine a similar situation in the context of Northern Ireland (eg a protest by environmentalists, or perhaps even

49 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333; it should be noted that the *Schmidberger* case arose before the Charter became binding, so that the CJEU based its decision on EU fundamental rights guaranteed as general principles of EU law. If the case arose today, it would in all likelihood be argued and decided in the same manner with the exception that, instead of the general principles, the Charter would be invoked as the main source of fundamental rights in the EU legal order.

50 Ibid para 61.

51 Ibid para 64.

52 Ibid para 74.

53 Ibid para 78.

a protest blocking a transit route by people opposed to the Windsor Framework).

While the example of *Schmidberger* concerned the (rare) clash between a fundamental right and the free movement of goods, Case C-579/19 *Food Standards Agency* is another example, which shows how the procedural rights in the Charter – first and foremost article 47 CFR – are relevant in litigation concerning EU secondary law (Regulations 854/2004 and 882/2004)[54] made applicable by the Windsor Framework.[55] According to article 54(3) of Regulation 882/2004 the operator of a slaughterhouse has to be informed of rights of appeal against decisions taken under the Regulation, notably a decision by an official veterinarian – such as the one in the case before the Court – not to affix a hygiene mark to the carcass of a slaughtered animal, which means that it cannot be sold for human consumption. One of the questions in the case was whether the limited judicial review against such a decision available in England and Wales was compatible with the right to an effective remedy guaranteed by article 47 CFR. The CJEU held that for a court or tribunal to determine a dispute concerning rights and obligations under EU law, it must have power to consider all the questions of fact and law that are relevant to the case.[56] Yet this was not the case because the powers of judicial review of the courts in England and Wales in the case did not go so far as to constitute an appeal on the merits of the decision. Instead, the courts were limited to reviewing the decision of the veterinarian declaring the carcass unfit for human consumption as to its lawfulness, which includes whether the veterinarian acted for an improper purpose, failed to apply the correct legal test or reached a decision that was irrational or taken without sufficient evidential basis.

The CJEU decided that the regulations 'read in light of Article 47 CFR' did not require more expansive powers of judicial review. This was chiefly because the veterinarian had to carry out a complex technical assessment and possessed broad discretion. In light of the objective of protecting public health, article 47 CFR therefore did not require

54 Regulation 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L 226/83; Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165/1 (since replaced by Regulation 2017/625); applicable by way of Windsor Framework, annex 2.

55 Case C-579/19 *Food Standards Agency* EU:C:2021:665.

56 Ibid [80].

judicial supervision of all of the veterinarian's assessments of the very specific facts of the case.[57]

Applicability of the Charter under article 2 of the Windsor Framework

The non-diminution provision contained in article 2(1) of the Windsor Framework may also result in the CFR being applicable in the Northern Ireland legal order. Considering that the CFR was applicable in Northern Ireland before Brexit in cases where the public body at issue (whether UK-wide or specific to Northern Ireland) was deemed to be 'implementing EU law', on a plain reading of article 2 the non-diminution obligation must include rights contained in the CFR, in so far as they would have protected individuals before Brexit and in so far as the additional requirements of article 2 are met.

According to the Northern Ireland Court of Appeal, the test for the application of article 2 is as follows:[58]

> A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
>
> i. That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
>
> ii. That Northern Ireland law was underpinned by EU law.
>
> iii. That underpinning has been removed, in whole or in part, following withdrawal from the EU.
>
> iv. This has resulted in a diminution in enjoyment of this right; and
>
> v. This diminution would not have occurred had the UK remained in the EU.

The key thing to remember in respect of the application of the CFR in this context is that, as noted earlier, the CFR only applies where a member state is implementing Union law. This question is best considered at stage iii) of the test outlined above as the Northern Ireland law in question was only ever underpinned by the CFR if there was an implementation of EU law. This requires answering the hypothetical question: was this situation in the scope of EU law, when the UK was still an EU member state? This question cannot be answered in the abstract, as the answer is always dependent on

57 Ibid paras [85], [88], [91].

58 *SPUC v Secretary of State for Northern Ireland and Others* [2023] NICA 35, [54]. NB: in *Angesom* [2023] NIKB 102, [86], per Colton J, the above test was slightly revised. However, in *Dillon* (n 15 above), the *SPUC* test was affirmed as it is of higher authority.

a concrete set of facts. One cannot therefore say, for instance, that certain Charter rights are *per se* captured by article 2 of the Windsor Framework and therefore applicable in Northern Ireland in all circumstances and that others are not. Nevertheless, the applicability of the CFR in the context of the non-diminution obligation can be further broken down into two areas, which engage the Charter with a varying degree of certainty: the annex 1 directives and all other EU law. As we highlight below, with respect to the former set of measures, the CFR is engaged in quasi-automatic fashion as soon as these directives apply. On the other hand, the CFR also applies, albeit subject to closer scrutiny over its scope of application, to any other situation that engages the 'Rights, Safeguards and Equality of Opportunity' (RSEO) section of the BGFA.

Annex 1 directives

If a situation falls within the scope of the annex 1 directives,[59] the applicability of the CFR is relatively straightforward: article 2 itself decrees that the annex 1 directives form part of the non-diminution commitment; the directives had been made applicable in Northern Ireland law through regulations prior to 31 December 2020;[60] and those domestic regulations must be considered an implementation for the purposes of article 51(1) CFR.[61] As a consequence, the CFR applies whenever the annex 1 directives apply.

This is in keeping with the settled case law of the CJEU, which shows that the operative provisions of these directives merely constitute a 'specific expression' of the corresponding provisions of the CFR, such as the right to equal treatment,[62] and must in any event be interpreted in accordance with any CFR provisions that may be relevant to a particular factual scenario. In other words, it is essential to highlight that the annex 1 measures do not simply engage the CFR's provisions on equality and working conditions (ie strictly the provisions corresponding to the content of these measures). Rather, they trigger the application of the CFR as a whole and may equally engage, for example, the application of its dignity or justice chapters.

This is illustrated by the case of *Egenberger* which, despite being a case about discrimination substantively, offers a telling account of the importance of the CFR more generally – in this case through reliance

59 Listed in n 20 above.

60 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (ECNI, NIHRC and IHREC 2022) app 4.

61 See eg Case C-414/16 *Egenberger* EU:C:2018:257, [49].

62 See eg Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* EU:C:2010:21, [21].

on both article 21 CFR (the right to equal treatment) and article 47 CFR (the right to an effective remedy). In the case, the claimant had applied for a temporary position with a development organisation wholly owned by various German Protestant churches and church organisations. The position would have mainly involved the drawing up of a parallel report to an official German government report to be submitted to the United Nations in accordance with the UN Convention on the Elimination of All Forms of Racial Discrimination. The claimant was not invited to interview for the post despite being shortlisted because she was not a member of a Protestant church; the post went instead to an active member of that church. The respondent relied on the German transposition of article 4(2) of Directive 2000/78, which contains the so-called 'religious ethos exception' allowing churches and other religious organisations to treat persons differently according to their religion if that 'person's religion or belief constitute a genuine, legitimate and justified occupational requirement'. According to German law, the decision whether such an occupational requirement existed was to be determined by the organisation itself 'in view of its right to self-determination', so that judicial review was limited to a review of the plausibility of such a decision on the basis of the church's self-perception.[63]

The CJEU held that Directive 2000/78 should, as a whole, be interpreted as a 'specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter'.[64] Article 4(2) of Directive 2000/78 was designed to ensure a fair balance between the right of autonomy of churches and the rights of workers not to be discriminated against and that it set out the criteria to be taken into account in the balancing exercise which must be performed to ensure a fair balance between those competing rights. The CJEU then went on to hold that 'in the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court'.[65]

Hence, the CJEU held that article 47 of the CFR (the right to an effective remedy) applied in this case, and this created an obligation on national courts to hear challenges and, in appropriate cases, set aside decisions by churches and affiliated bodies that invoked the 'religious ethos exception' in the directive. Interestingly, the referring German court subsequently decided that the German legislation allowing the churches to determine the existence of a genuine occupational requirement autonomously would have to be disapplied. It then

63 *Egenberger* (n 61 above) [31].
64 Ibid [47].
65 Ibid [53].

went on to review the decision of the church organisation itself and concluded that the applicant had been discriminated against on the basis of her religion.[66] This case demonstrates how the CFR could be invoked in an annex 1 scenario and result in the disapplication of domestic law which restricted the availability of certain judicial remedies (such as full judicial review).[67]

The CFR and article 2 outside the annex 1 directives

The applicability of the CFR by virtue of the non-diminution obligation contained in article 2 of the Windsor Framework is more complex outside the annex 1 directives. This is due to the interaction between elements i) to iii) of the test outlined above with the requirement that the situation at issue is deemed to be an implementation of Union law.

Apart from the directives mentioned by the UK Government as falling within the scope of article 2,[68] there is a degree of legal uncertainty in this area at present as to which rights, safeguards or equality provisions contained in the RSEO section of the BGFA were underpinned by a domestically effective iteration of EU law on 31 December 2020. The RSEO section is worded as follows under the sub-heading 'human rights':

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation.

The Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission's working paper on the scope

66 Federal Labour Court (Bundesarbeitsgericht) 8 AZR 501/14, DE:BAG:2018:251018.U.8AZR501.14.0.

67 More on disapplication as a remedy in the next section.

68 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What Does It Mean and How Will It Be Implemented?'.

of article 2(1)[69] features an appendix mapping relevant rights contained in the RSEO section of the BGFA onto EU law as it stood on 31 December 2020. This provides a good indication as to which provisions of EU law might be considered to underpin the civil and political rights mentioned in the RSEO section, though it should not be considered exhaustive in this regard. Moreover, as appears from the text of the RSEO section quoted above, the section *itself* is not drafted with sufficient particularity or precision to embody legally enforceable rights – the famed 'constructive ambiguity' of the BGFA,[70] a feature which also runs through the RSEO section, thus makes it crucial to understand the *underpinning* EU law through which these rights were realised prior to Brexit, and which cannot now be eroded without breaching the guarantee in article 2 Windsor Framework.

The effects of the CFR in these cases are twofold: first, it may be relevant for the interpretation of the legislation that is considered to have 'implemented Union law' in Northern Ireland on 31 December 2020; and, secondly, the CFR may have the effect of requiring the availability of a specific remedy to give effect to the implementing act. The following three examples – based on CJEU case law – demonstrate how the CFR applies outside the scope of the annex 1 directives at present. The examples were chosen to reflect the degree of connection with the RSEO section ranging from the UK Government's own suggestion of a connection in example 1 to a more tenuous, but still very much arguable connection in example 3.

Example 1: Parental Leave Directive – mentioned in the UK Government explainer

According to the UK Government, Directive 2010/18/EU on parental leave is within the scope of the UK Government's commitment under article 2[71] as – even though the UK Government does not expressly say so – it helps to ensure the right to equal opportunity in all social and economic activity found in the RSEO chapter of the BGFA. Consequently, there must be no diminution of existing parental leave rights.

Case C-129/20 *Caisse pour l'avenir des enfants* shows that the rights contained in the directive must be interpreted in light of article 33(2)

69 NIHRC and ECNI Working Paper, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol' (December 2022).

70 Chris Ó Rálaigh, 'From constructive ambiguities to structural contradictions: the twilight of the Good Friday Agreement?' (2023) Peace Review 1.

71 UK Government (n 68 above) para 13.

CFR.[72] In the case the claimant was a mother of twins who had applied for parental leave to be granted by her employer, the state of Luxembourg. According to Luxembourgish law, she would have only been entitled to parental leave if she had been employed at the time of the birth of the children, whereas the claimant had been unemployed at that time. The CJEU held that:

> the individual right of each working parent to parental leave on the grounds of the birth or adoption of a child, enshrined in clause 2.1 of the revised Framework Agreement [to which Directive 2010/18/EC gives effect], must be interpreted as articulating a particularly important EU social right which, moreover, is laid down in Article 33(2) of the CFR. It follows that that right cannot be interpreted restrictively.[73]

The CJEU thus used the CFR to reiterate the fundamental right-character of the right to parental leave,[74] which means that it had additional weight compared to rights merely guaranteed in secondary EU law. This then allowed the CJEU to conclude that the right could not be interpreted restrictively. As a result, the claimant in the case could not be excluded from claiming parental leave because she was not in employment at the time she was giving birth.

Example 2: data protection law – right contained in the ECHR as ratified by the UK

The second example relates to the broader category in the RSEO section of 'civil rights and religious liberties of everyone in the Community'. Given the prominent role accorded to the European Convention on Human Rights (ECHR) in the BGFA, it would be a convincing argument to assume – as the two commissions do in their article 2 working paper[75] – that the term 'civil rights' encompasses at a minimum the rights contained in the ECHR. At this juncture it may be useful to distinguish between ECHR rights contained in parts of the ECHR that have been ratified by the UK and those that have not. While it should not be suggested that the latter are outwith the scope of the non-diminution commitment (see the next example), the connection between the former and the non-diminution commitment is more certain than in case of the latter.

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72 Art 33 (2) CFR reads: 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.'

73 Case C-129/20 *Caisse pour l'avenir des enfants* EU:C:2021:140, [44].

74 Previously established in Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* EU:C:2015:473, [19].

75 NIHRC and ECNI Working Paper (n 69 above).

Applying the test set out in *SPUC* (above), one can argue as follows: first, the broad field of data protection is covered by the right to private and family life in article 8 ECHR. As argued above, the term 'civil rights' encompasses the rights contained in the ECHR, so that a data protection case engages a right included in the RSEO section, particularly given the European Court of Human Rights' long-established line of case law in this regard.[76] Second, that right was given effect in Northern Ireland before the end of the transposition period primarily through the General Data Protection Regulation 2018 (GDPR). Third, it was underpinned by EU law, most prominently by the GDPR.[77] This also brings into play the Charter as whenever the GDPR would have been applied (or was wrongly not applied) in Northern Ireland, the situation would have been in the scope of EU law, so that the criterion for the Charter's applicability laid down in article 51(1) CFR would have been met. This is relevant because the CJEU has interpreted the GDPR and connected data protection provisions broadly in light of those CFR rights. For instance, it read a 'right to be forgotten' into the GDPR's predecessor Directive 95/46/EC.[78] Furthermore, articles 7 and 8 CFR set clear limits to the extent to which EU member states can order the wholesale retention of communication data[79] as well as to the transfer of data to non-EU countries.[80] Those limits therefore form part of the non-diminution commitment.

Example 3: prohibition of double jeopardy – right in an ECHR protocol not ratified by the UK

Could rights contained in a protocol of the ECHR, which has not been ratified by the UK, be considered 'civil rights and religious liberties of

76 Going back to cases such as *Klass and Others v Germany* 6 September 1978, Series A no 28; *S and Marper v United Kingdom* ECHR 2008; and most recently *Big Brother Watch and Others v United Kingdom* nos 58170/13, 62322/14, 4960/15, 25 May 2021.

77 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.

78 Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317.

79 Fundamentally established in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* EU:C:2014:238 and later refined in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970; Case C-623/17 *Privacy International* EU:C:2020:790; Joined Cases C-511/18, 512/18, 520/18 *La Quadrature du Net and Others* EU:C:2021:791; and Case C-140/20 *GD* EU:C:2022:258.

80 *Maximillian Schrems v Data Protection Commissioner*; Case C-311/18 *Schrems II* EU:C:2020:559; Opinion 1/15 *PNR Agreement EU–Canada* EU:C:2017:592.

everyone in the community'? The example of article 4(1) of Protocol No 7 to the ECHR, which contains the prohibition of double jeopardy, demonstrates that this is a possibility. There is an expanding line of case law by the CJEU on the prohibition of double jeopardy (or *ne bis in idem* as it is often referred to), which is also protected in article 50 CFR. The question is whether the prohibition of double jeopardy as protected by EU law forms part of the non-diminution commitment.

First, it would need to be established that a right that is included in the RSEO section of the BGFA is engaged. While the prohibition of double jeopardy is part of the ECHR, the UK is clearly not bound by article 4 Protocol No 7 as it has not even signed the protocol, let alone ratified it. At the same time, it can hardly be denied that, given that it is a procedural right, the prohibition of double jeopardy is a 'civil right'. It is also protected in article 14(7) of the International Covenant on Civil and Political Rights, which the UK has ratified. There is thus a strong argument to be made that the prohibition of double jeopardy constitutes a 'civil right' within the scope of the RSEO section of the BGFA.

Second, this right was given effect in Northern Ireland as part of the common law[81] (subsequently modified by the Criminal Justice Act 2003).[82] Third, it was underpinned by EU law: article 54 of the Convention Implementing the Schengen Agreement (CISA) contains the prohibition of double jeopardy and the UK had opted into this particular provision of the Schengen Agreement.[83] Additionally, article 3(2) of the Framework Decision on the European Arrest Warrant mandates that a European arrest warrant must not be executed if 'the requested person has been finally judged by a Member State in respect of the same acts'[84] and the UK was bound by that particular provision until 31 December 2020.[85] Hence there are good grounds in favour of a finding that the non-diminution guarantee covers the prohibition of double jeopardy at least in a cross-border context. Fourth, that underpinning has been removed following withdrawal from the EU as neither article 54 CISA nor the European Arrest Warrant Framework Decision continue to apply to and in the UK.

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81 See *Re Cranston's Application for Judicial Review* [2002] NI 1 (NIQBD), 9e, per Kerr J (as he then was). For the wider principle at common law, see also *Connelly v DPP* [1964] AC 1254 (HL).

82 See Criminal Justice Act 2003, pt 10.

83 See Council decisions 2000/365, 2004/926, and 2010/779 as amended by Council Decision 2014/854/EU [2014] OJ L 365/1.

84 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

85 It is also found in art 50 CFR, but that provision is only applicable in the scope of EU law.

The key difference between the protections against double jeopardy in EU law (article 54 CISA and article 50 CFR) and the protection in domestic law is that the former has a potentially broader scope in that it protects individuals who have been finally convicted or acquitted anywhere in the EU and not just in the domestic legal order of the state concerned.

This can have far-reaching consequences as the recent CJEU decision in Case C-435/22 PPU *Generalstaatsanwaltschaft München* demonstrates.[86] Here a Serbian national, who had been finally convicted of an offence in Slovenia, had been arrested in Germany on foot of an international arrest warrant issued by the United States (US). The US requested extradition on the basis of the US–German extradition treaty, which contains a more limited double jeopardy clause allowing refusal of extradition only if the requested person had been convicted or acquitted in Germany. Hence a refusal to extradite on the part of the German authorities in this case would have been in breach of the extradition treaty. However, the requested person successfully invoked EU law to protect him: the CJEU held that article 54 CISA 'read in the light of Article 50 of the Charter' had to be interpreted as precluding the extradition in such a case.

WHY DOES THE CFR STILL MATTER? THE CFR'S ADDED REMEDIAL VALUE AND BROAD CONCEPTION OF HUMAN RIGHTS

The preceding sections have sought to a) show that the CFR still applies in Northern Ireland in broadly the same way as it did before Brexit; b) illustrate how this happens through the existing legal framework; and c) offer a series of representative examples of areas of EU law that remain applicable to Northern Ireland, in which the CFR retains applicability. But what does the CFR change, in practical terms, for the individuals or groups who may invoke its protection in line with the foregoing analysis, for instance in the examples highlighted in the previous section? In this section, we aim to show that the continued operation of CFR rights in Northern Ireland under the Windsor Framework is important in at least two respects: first, remedies remain stronger under EU law than they are under domestic withdrawal legislation and the Human Rights Act 1998 (HRA), which gives litigants who can rely on the CFR an advantage compared to those whose situation does not fall within its scope. Second, the CFR offers the prospect of using certain rights, such as the right to an effective remedy and the right to

86 Case C-435/22 PPU *Generalstaatsanwaltschaft München* EU:C:2022:852.

human dignity, which have no other easily identifiable iteration within domestic law.

EU law remedies and article 4 WA

As far as the CFR applies via article 4 WA, it follows from that provision that it produces 'in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This means that the usual EU law remedies of disapplication (resulting from the primacy of EU law), consistent interpretation, and state liability apply if a CFR right can be invoked. While it is not the purpose of this article to rehearse the nature of these remedies in detail, it is essential to briefly explain what they mean for Northern Irish courts, so as to demonstrate why their use makes the CFR especially significant.

Disapplication

First – and perhaps most strikingly – the principles of primacy and direct effect require a Northern Ireland court to disapply, when in conflict with EU law, any domestic primary or secondary legislation, whether specific to Northern Ireland or UK-wide (albeit only in respect of the Northern Ireland dimension). The possibility to disapply primary law is not normally available to domestic courts outside of EU law (it is not provided for, eg, under the HRA), and has been excluded from the statute books in the rest of the UK under the EUWA and REULA, as discussed earlier. Thus, using the CFR has an immediate advantage for claimants because it offers the prospect of an effective remedy in situations where none would otherwise exist.[87] Of course, as with other provisions of EU law, the possibility of disapplication is not automatic under the CFR, as it must first be established that the provision being invoked meets the conditions for direct effect (namely, that the provision in question be clear, precise and unconditional).[88] Nevertheless, in a similar fashion as with the other remedies discussed below, the CFR's entry into force has led over the last decade to useful clarifications and restatements of the applicability of this remedy in the fundamental rights context, thus improving legal certainty for litigants and domestic courts, particularly in certain fields. For example, since the CFR's entry into force, the CJEU has attributed direct effect

87 In these situations, if addressed under the HRA, the analogous tool available before domestic courts would be a declaration of incompatibility – an uncertain and, as the European Court of Human Rights has confirmed, not in itself effective, remedy for victims: *Burden and Burden v UK*, Application No 13378/05, ECtHR 29 April 2008, [40]–[44].

88 Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1.

(and, with it, the prospect of disapplication) to a range of provisions that are key to the EU withdrawal arrangements, as explored in the preceding section, such as: privacy (eg articles 7 and 8 CFR);[89] non-discrimination (eg article 21 CFR);[90] effective judicial protection and the rights of defendants (eg articles 47 and 50 CFR);[91] and workers' rights (eg article 31 CFR).[92] In respect of these rights, it is not essential for claimants to establish afresh the conditions for direct effect. In turn, in these fields, claimants have a straightforward option to have CFR-incompatible legislation disapplied, and this option is available both in disputes with the state and with other private actors (who are also bound to observe the CFR, even in the face of incompatible legislation).[93]

Consistent interpretation

Second, even where disapplication is not deemed essential or possible (eg in the context of provisions considered by the CJEU not to meet the direct effect conditions),[94] it is worth noting that EU law still gives rise to a strong interpretive duty for domestic courts. This duty is variously known as 'indirect effect', 'consistent interpretation' or the 'Marleasing principle'.[95] As shown in our analysis of the *Caisse pour l'avenir des enfants* judgment above, all provisions of the CFR – even if they do not have direct effect – engage a strong interpretive duty on the part of domestic courts to read national legislation compatibly with the CFR as far as it is possible to do so. Notably, the duty of consistent interpretation under EU law is more extensive than ordinary canons of interpretation under domestic law.[96] It applies to all litigation before domestic courts, both against the state and against private actors, and is particularly broad. In *Pfeiffer*, for example, the CJEU found that consistent interpretation required a national court to do 'whatever lies within its jurisdiction' to find a compatible reading, thereby treating the 'whole body of rules of national law' as a potential source of such

89 See, eg, Case C-362/14, *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

90 See, eg, *Küçükdeveci v Swedex GmbH & Co KG* ECLI:EU:C:2010:21.

91 See, eg, *Egenberger* (n 61 above) and *Åklagaren v Hans Åkerberg Fransson* (n 3 above).

92 See, eg, Joined Cases 569-570/16, *Bauer and Willmeroth* ECLI:EU:C:2018:871.

93 Case C 684/16, *Cresco Investigation v Achatzi* ECLI:EU:C:2019:43.

94 Examples of such provisions are arts 27 CFR and 33 CFR: see, respectively, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT* ECLI:EU:C:2014:2; *Caisse pour l'avenir des enfants* (n 73 above).

95 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* EU:C:1990:395

96 Even the far-reaching interpretive canons in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at [30]–[33], per Lord Nicholls.

a reading, rather than sectionally reviewing a single piece of domestic legislation.[97] The only limit to the duty is that it falls short of requiring domestic courts to adopt a *contra legem* interpretation.[98] The strength of consistent interpretation has been affirmed more recently in the *Dansk Industri* judgment, demonstrating its continuing relevance under the CFR.[99] Combined, the strength of the direct and indirect effect mechanisms cannot be overstated: they mean that all provisions of the CFR can be invoked in domestic disputes (including in disputes between private actors) as strong interpretive obligations for courts and, in respect of the rights for which direct effect is available, even in the face of primary legislation.

State liability

Finally, like all other provisions of EU law that confer rights on individuals, the CFR gives rise to the possibility of state liability in damages. Where the actions of the state (including through rights-incompatible legislation) violate the CFR and a private party sustains damage displaying a direct causal link and proximity with that violation, domestic courts must award financial compensation, under the so-called *Francovich* principle of state liability in damages.[100] Crucially, state liability not only functions as a remedy for human rights violations – a function that has less relevance due to the expansive use of article 47 CFR by the CJEU, as discussed below – but also as a secondary remedy. State liability in damages can be invoked subsequently by a private violator of a fundamental right in order to recover from the state any losses they incurred because of the operation of direct effect in the context of non-implementation or seriously erroneous or incomplete implementation of EU law in domestic legislation.[101] This means that the Charter is not only significant remedially for *victims* of human rights violations in the strict sense, but also for other actors harmed by the legislative or policy choices of the state, if these have caused them to sustain serious and quantifiable damage. A typical example of this would be the case of employers being held directly liable to pay compensation to victims of discrimination, even though their discriminatory conduct was mandated by legislation.[102]

97 Joined Cases 397/01-403/01, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* EU:C:2004:584, [118].

98 Case C-334/92 *Wagner Miret* EU:C:1993:945, [20]; *Pfeiffer* (n 97 above) [112].

99 Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278.

100 Case C-6/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, [33]. See also Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v SS for Transport, ex parte Factortame* EU:C:1996:79.

101 This was eg affirmed in *Cresco* (n 93 above).

102 Ibid.

EU remedies and non-diminution

Do these remedies apply in Northern Ireland whenever the scope of the CFR is engaged, under the same conditions as they did under EU law? As discussed above (in the section on interpretation), it is clear that this question must be answered affirmatively, particularly to the extent that the CFR is brought into Northern Irish law through the WA, as stipulated by section 7A EUWA. Still, a possible counter-argument could be that a narrower reading is required for situations that are not governed directly by EU law *qua* EU law, namely where the CFR is not relevant as a result of the application of an annexed measure but as a result of the wider, frozen-in-time guarantee against diminution made in article 2 of the Windsor Framework. This view could be supported by analogy with domestic case law on retained EU law, which draws a line between EU law *qua* EU law and retained EU law, such as retained general principles. Courts have tended to view retained general principles as relevant to judicial interpretation, but without recognising the applicability of the remedies of state liability and disapplication in situations where that interpretation is insufficient, unlike EU law applicable in itself, which comes with all of its associated remedies.[103]

Nevertheless, the disaggregation of state liability and disapplication from the protection of EU rights under the terms of the EUWA would be difficult to operationalise within article 2 of the Windsor Framework, which – as already highlighted above in the interpretation section – commits the UK to ensuring in respect of Northern Ireland 'that no diminution of rights, safeguards or equality of opportunity … results from its withdrawal from the Union'. In this context, while the analogy with the approach to retained EU law may seem attractive from the perspective of ensuring a homogenous approach to the question of remedies, there is an important distinction. There is no mention of retained EU law in the WA and Windsor Framework. Article 2 of the Windsor Framework, however, *obligates* the prospective lack of diminution from a baseline which existed on 31 December 2020. It follows that the temporal reach of the remedy presupposed by this obligation must be further forward in time as compared to the baseline. Moreover, as the annex 1 directives in article 2 are a *subset* of matters to which the non-diminution guarantee applies, it would be incongruous to conceive of two versions of remedies for breaching the same guarantee: the stronger version for breaching current EU law (the annex 1 directives) and the weaker version for breaching the baseline.

103 *Adferiad Recovery v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC), [120]; *Secretary of State for Work and Pensions v Beattie and Others* [2022] EAT 163, [140].

Proceeding on the basis of the six-part test for engaging article 2 that was set out in *SPUC* (analysed in the previous section), references to the CFR must be viewed as remaining relevant alongside the remedies they engaged, since the non-diminution commitment relates to a snapshot of all the applicable EU law immediately prior to the entry into force of the Windsor Framework. Indeed, in this context, any solution other than a full application of the remedies of disapplication and state liability could result in considerable aberrations in the type and breadth of the reparation offered to victims in like cases in Northern Ireland, thereby undermining the non-diminution guarantee. Reliance on the CFR enables individuals in Northern Ireland to benefit from a range of remedies rendered unavailable in the rest of the UK as a result of EU withdrawal.

A broad substantive conception of human rights

Being a relatively new instrument, the CFR contains a long list of rights compared to most human rights treaties and is innovative in its inclusion of employment rights alongside classical freedoms and procedural guarantees. In this sense, the CFR is by its nature more protective of victims than the UK's principal human rights legislation (the HRA). But two specific provisions of the CFR not otherwise present in domestic legislation are especially worth highlighting in order to show its potential of offering a higher standard of human rights protection: the right to an effective remedy protected in article 47 CFR as an actionable claim both alone and in conjunction with other rights; and the right to human dignity protected in article 1 CFR as a vehicle for the attainment of minimum welfare standards, also as an actionable element of EU human rights law.

Article 47 CFR

The examples provided in the previous section have already shown that article 47 CFR (the right to an effective remedy) is becoming a prominent feature of CJEU case law. The CJEU has started to rely extensively on the right to an effective remedy and effective judicial protection, thus justifying consideration of article 47 CFR as an additional remedial tool for applicants invoking breaches of procedure, delays, or ineffectiveness by domestic authorities in the application of their EU rights. Indeed, earlier research has shown that article 47 CFR is, by a large margin, the most frequently invoked provision of the CFR, being used in a range of disputes spanning across different areas of EU law.[104] The provision has been found to have direct effect and

104 E Frantziou, 'The binding Charter ten years on: more than a "mere entreaty"?' (2019) 38 Yearbook of European Law 73, 79–84.

has been used both on its own[105] and in conjunction with substantive rights, such as non-discrimination, even where these rights also enjoy direct effect.[106]

The possible benefits of the CJEU's keen use of this provision for individuals are twofold. First, article 47 captures process-based violations of fundamental rights that may not be fully detailed in the substantive provisions. For example, in its judgment in *Braathens Regional Aviation* the CJEU derived from article 47 CFR the need to have a judicial pronouncement that race discrimination had occurred as part of the remedies required to address discrimination, even though neither the Race Equality Directive nor article 21 CFR expressly require this.[107] Similarly, in *Fuß* the CJEU found a violation of article 47 CFR in a situation that was substantively occupied by another provision (article 31 CFR)[108] due to the lack of dissuasive penalties contained in the Working Time Directive. Second, article 47 CFR imposes an obligation on domestic courts to *find* effective remedies for the substantive violation of a fundamental right through direct and indirect effect in order to avoid a further, procedural violation of the right to an effective remedy. This is best highlighted by the *Egenberger* case, already discussed above, where judicial review of the religious ethos exception to religion and belief discrimination[109] was severely limited to a review of the plausibility of such a decision on the basis of the church's self-perception.[110] In addition to finding an incompatibility with article 21 CFR, which is directly effective and must be adequately protected in domestic law, the CJEU found that the narrow judicial review protection offered in domestic law was also incompatible with the CFR – this time article 47. The possibility to rely on article 47 in addition to or in lieu of another provision can thus be viewed as a defining feature of the application of the CFR. Crucially, it is a field that exceeds the protection offered by the right to an effective remedy under article 13 ECHR, which is dependent upon the violation of another substantive provision and, in any event, has not been incorporated in the HRA and cannot, therefore, be invoked before domestic courts.

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105 Case C-243/09 *Fuß* EU:C:2010:717.

106 *Egenberger* (n 61 above).

107 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* EU:C:2021:269, [33]–[34] and [45].

108 Fuß (n 105 above) [66].

109 Directive 2000/78, art 4 (1).

110 *Egenberger* (n 61 above), [31]; a similar question arose in *Food Standards Agency* (n 55 above) though in that case the limited judicial oversight of certain veterinary assessments was held to be compatible with art 47 CFR.

Article 1 CFR

In addition to article 47 CFR, the right to human dignity protected in article 1 CFR offers a useful illustration of how the CFR can sometimes impose state obligations with important social/resource implications, such as the allocation of welfare to vulnerable groups. For example, in *CG*, the CJEU found that Northern Irish authorities were under an obligation to disburse universal credit to a Croatian national who had been granted a temporary right to reside in the UK, despite the fact that they could have refused the application based on the absence of sufficient resources under article 7 of the Citizens' Rights Directive (Directive 2004/38/EC).[111] According to the CJEU, since the permit was granted, it was essential to ensure that an individual lawfully residing in a (then) member state could benefit from a dignified standard of living, in line with the protection of human dignity in article 1 CFR.[112] This use by the CJEU of the right to human dignity shows that EU human rights law can be particularly onerous for the state in terms of the allocation of its priorities, including its financial resources. This stance can be contrasted with the approach taken by domestic courts in welfare cases under the HRA and may, therefore, be preferable for human rights claims falling within this sensitive area.[113] More generally, the case law on human dignity is representative of a broader tendency in EU law to safeguard the *essential* core of all substantive rights (as exemplified in the right to human dignity, but not necessarily confined thereto), even where this has budgetary/policy repercussions.[114]

The CFR as a rights-based counterweight

Cases such as *Dillon*, the aftermath of the *Rwanda* litigation[115] and the enactment of the Illegal Migration Act 2023 all demonstrate a

111 Case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602, [78].

112 Ibid [89].

113 See, eg, *Re S and Re W (Care Orders)* [2002] 2 AC 291; and more recently, *R (on the Application of SC, CB and 8 Children) v Secretary of State for Work and Pensions and Others* [2021] UKSC 26, [2022] AC 223.

114 Koen Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU' (2019) 20 German Law Journal 779.

115 *R (AAA and Others) v Home Secretary* [2023] UKSC 42. The aftermath of this judgment, in which the UK Supreme Court found that the UK Government policy of deporting certain asylum seekers to Rwanda to have their claims processed there was unlawful, is the Safety of Rwanda (Asylum and Immigration) Act 2024, which generally prohibits the scrutiny of Rwanda as a safe country for asylum seekers, but the new UK Government has formally announced that it will not proceed with this plan, see Sam Francis, 'Starmer confirms Rwanda deportation plan "dead"' (*BBC News* 6 July 2024) .

certain style of law-making. Not content merely to narrow the scope of existing rights, certain statutes now openly assault such rights by disregarding[116] or all but extinguishing them.[117] In this context, where a favourable parliamentary majority weighs heavily against the rights of certain individuals or groups, the CFR and the general architecture of the WA and EUWA act as a counterweight – limited in its scope but powerful in its impact. *Dillon* demonstrated this impact by disapplying 10 provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 which breached not only the ECHR but also the corresponding rights in the CFR.[118] The Illegal Migration Act 2023 has been challenged before the Northern Ireland High Court[119] and disapplied in *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35 – and this statute's susceptibility to disapplication via the CFR and article 2 Windsor Framework has already been explored elsewhere.[120]

The wider impact of the CFR, however, may go beyond the legal effects of Acts of the UK Parliament. Let us consider, for example, the Illegal Migration Act 2023. Although not yet authoritatively answered, let us assume for the sake of argument, that any disapplication of the statute is jurisdictionally limited to Northern Ireland. Given that asylum is not a devolved matter,[121] the disapplication of any provisions of the Illegal Migration Act only within Northern Ireland would necessitate the establishment of dual asylum regimes – one in Great Britain and one in Northern Ireland. The added cost of such a reality may itself discourage future statutes of this kind.

The key point here is that the UK committed to protect the BGFA 'in all its parts', in respect of which Parliament subsequently incorporated legal obligations into the domestic legal order. The CFR's continued application therefore ensures that the UK honours its commitments to their fullest extent.

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116 Ibid cl 3 (disapplication of the Human Rights Act 1998) and the Illegal Migration Act 2023, s 5(1)(b) (disregard of human rights claims).

117 The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s 43(1) (the extinguishment of actions relating to the Troubles brought after the first reading of the Bill in the House of Commons).

118 *Dillon* (n 15 above) [541] and [613].

119 *Re JR295's Application for Leave to Apply for Judicial Review* [2024] NIKB 7, [4] and [69].

120 Anurag Deb and CRG Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?' (2023) 6 European Human Rights Law Review 608, 618–621.

121 See the Northern Ireland Act 1998, sch 2, para 8; the Scotland Act 1998, sch 5, pt II, s B6; and the Government of Wales Act 2006, sch 7A, para 29.

CONCLUSION

It follows from our analysis that the CFR has not only remained relevant in Northern Ireland after Brexit but that it is indeed likely to continue to be applied in much the same way as it applied whilst the UK was in the EU. Thus, despite successive attempts to expunge EU fundamental rights under the EUWA and, more recently, under the REULA, the application of the relevant provisions of the WA and the Windsor Framework, translated into domestic law through section 7A of the EUWA, have kept Northern Ireland almost entirely shielded from the domestication of rights – and related attempts to revise them – that has been ongoing in the rest of the UK. As we have argued in the preceding sections, holding out against such revision is legally valuable because the CFR's remedial strength and broad conception of rights have neither been replicated under domestic withdrawal legislation in the rest of the UK nor can they be viewed as interchangeable with domestic human rights protection under the HRA.

The downside of this state of affairs, of course, is that it may evoke a sense of exceptionalism for Northern Ireland or the sentiment that Brexit is being prevented from being delivered uniformly across the UK. More importantly still, as a result of the application of the WA/Windsor Framework, Northern Ireland is now likely to serve as a case study of the CFR's added significance and material benefits to citizens, showing whether and to what extent the substantive rights and remedial prospects of residents of other parts of the UK are diminished as a result of its removal. So, for how long could this unusual situation hold out? There is no better way to answer this question than through the words of Chief Vitalstatistix: 'The sky may fall on your head tomorrow, but tomorrow never comes.'