Summary of evidence

It is undeniable that both the CJEU and national courts are now frequently confronted with arguments based on the EU Charter and therefore have no choice but to work with fundamental rights aspects of EU law. Although it is stated time and again that the Charter has created no new rights, nonetheless, this swiftly accumulating case law is a bold testament to the difference that a written Bill of Rights can make.

This written evidence considers 3 particular issues, namely:

A. Does the UK/Poland Protocol function as an opt-out from the EU Charter?
B. The application of the Charter in and to the UK
C. The extent to which the Charter is being applied horizontally between private individuals and bodies

Each of these issues raises complex, technical and tricky issues of law, where there are sometimes no clear answers. However, a very terse summary of my conclusions would be the following:

A. The Protocol does not generally function as an opt-out
B. The application of the Charter is quite complicated, but recent CJEU caselaw has given a very broad interpretation of when the Charter is applicable in member states
C. The Charter has been, and will continue to be, applied horizontally between private parties both by the European Court and the national courts, although we must take care to define what we mean by ‘operate horizontally,’ as this is not necessarily the same as giving rise to directly enforceable rights.
A. DOES THE UK/POLAND PROTOCOL FUNCTION AS AN OPT OUT?

1. Introduction

In *R (AB) v Secretary of State for the Home Department* [2013] Mostyn J stated (para. 10 of the judgment) –

‘. . . I was sure that the British government . . . had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law.’ However Mostyn J continued at paragraph 14 to state that, as a result of the judgement of the European Court of Justice in *N. S. v Secretary of State for the Home Department* [2011] ‘Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law.’

This particular statement has helped to reignite the debate as to whether Protocol No 30 on the application of the Charter of Fundamental Rights to Poland and to the UK functions to exclude the application of the EU Charter within the UK.

Mostyn J’s comments were themselves surprising to those of us who never believed that the UK had secured an opt-out from the operations of the Charter. For example, the House of Commons Select Committee on European Scrutiny, Third Report 2007, stated clearly at paragraph 38: ‘It is clear that the Government accepts that the Charter will be legally binding, and it has stated that the Protocol is not an opt-out. Since the Protocol is to operate subject to the UK’s obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter.’ In the 2012 case of *Rugby Football Union v Consolidated Information Services* the UK Supreme Court confirmed at paras. 26-28 that the Charter takes effect in national law, ‘binding member states when they are implementing EU law’.

Further, if the Protocol were to operate as an effective opt-out then this would cast doubt on the wording of various recitals of the Preamble to the Protocol which seem to assume the applicability of the Charter in the UK, and give the impression that the Protocol is a clarifying exercise eg (bold highlighting added):

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

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

NOTING the wish of Poland and the United Kingdom to **clarify** certain aspects of the application of the Charter, DESIROS therefor of **clarifying** the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom . . .’

Such an interpretation is confirmed by the judgment of the European Court of Justice (CJEU) in the 2011 NS case, in which the Advocate General held (at para 167): ‘the question whether Protocol No 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative,’ and the CJEU held (at para 119): ‘ ... Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol.’
However, even if the Protocol does not operate as an opt-out overall, this does not mean that it may have no impact whatever on the application of the Charter within the UK. In particular, the wording of Art 1(2) of the Protocol may have lessened the application of Title IV (Solidarity) provisions within the UK. So it is necessary to consider each of the provisions of Protocol no 30 in turn.

2. Article 1 (1) Protocol

‘The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’

The crucial words are ‘does not extend the ability.’ According to Art 1(1) Protocol, the Charter provides no new competences for the EU but it does not limit any existing EU competences. This position is also substantiated by Article 51(2) Charter which states:

‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

The CJEU has long had the power to find national laws that fall within the scope of EU law inconsistent with EU fundamental rights law. In these circumstances, Article 1(1) Protocol does not exempt the UK from the obligation to comply with the Charter or prevent a UK court from ensuring compliance with the Charter.

A final point to be made here is that Art 1(2) Protocol, discussed immediately below, would appear to be redundant, if Art 1(1) had in fact succeeded in creating a general opt–out.

3. Article 1(2) Protocol:

‘In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.’

Title IV of the Charter concern rights of Solidarity and covers Arts 27-38 Charter. It contains, for example, Art 30 ‘Protection in the event of unjustified dismissal’ and Art 28 on the right to collective bargaining, ‘including strike action’. These rights were of particular concern to the UK (there is no explicit right to strike under UK domestic law).

If any part of Protocol 30 is capable of functioning as an ‘opt-out’ then it is, surely, Art 1(2). But can it function in this way?

3.1 No clear CJEU authority yet on status of Art 1(2) Protocol

To date, there is no clear authority on the status of Art 1(2) from the CJEU. In the NS case, the CJEU held that ‘Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).’

However, Advocate General Trstenjak, in NS, while remarking that Title IV was not at issue in the NS case, did consider what might be the implications for Art 1(2) Protocol, noting (in para 173 of her Opinion) that:
‘With the statement that Title IV of the Charter of Fundamental Rights does not create justiciable rights applicable to Poland or the United Kingdom, Article 1(2) of Protocol No 30 first reaffirms the principle, set out in Article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals.

However, Article 1(2) of Protocol No 30 also appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland.’

With respect, the first sentence of para 173 of her Opinion is puzzling, given that Art 51(1) Charter is not limited to claims between private individuals. However, the second part of para 173 seems to me to be a more accurate statement of the law, although must be regarded in English legal terms as merely ‘obiter’ given that those rights were not at issue in the NS case itself.

3.2 The distinction between rights and principles

Art 1(2) should be read in line with Art 52(5) of the Charter itself, which states:

Art 52(5) ‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.’

In this way, those rights designated ‘principles’ are deemed incapable of creating directly enforceable rights. It is often suggested that ‘principles’ refer to economic, social and cultural rights, and Art 52(5) reflects the desire of at least some of the Charter’s drafters to ensure that socio-economic rights would not be directly in enforceable in courts.

Many commentators on the Protocol have suggested that Art 1(2) merely confirms the distinction between rights and principles in Art 52(5). The problem, however, is that Article 52(5) does not clearly distinguish which provisions are to be interpreted as ‘rights’ and which as ‘principles’, although in fact only three provisions in the Charter explicitly use the word ‘principle’ – Art 23 (principle of equality between men and women); Art 37 (sustainable development) and Art 47 (proportionality and legality of criminal offences). The Official Explanations to the Charter are not of great help, especially as they note that some Articles may contain both rights and principles – eg Arts 23, 33 and 34. Therefore, it cannot be said with certainty that Title IV contains only principles. So the distinction between rights and principles does not work as an adequate explanation of Art 1(2) Protocol, although it does appear to confirm that those provisions in Title IV that are principles, are not justiciable. But this would be the case anyway under the Charter.

3.2 Does Art 1(2) render Title IV rights non justiciable?

However, an important question is whether Art 1(2) might reach beyond Art 52(5) Charter and succeed in establishing that even provisions of Title IV which are classified as rights are not justiciable unless the UK has provided for them in national law? For example, the Art 28 right of collective bargaining and strike action presents itself as a right not a principle, but it could be argued that the effect of Art 1(2) Protocol is to ensure that it is not justiciable. However, Art 28 Charter itself provides that workers have these rights ‘in accordance with Union law and national laws and practices’. UK law only permits strikes under limited conditions, and there is no ‘right to strike’ as such. So it would appear that, even according to the provisions of the Charter itself, the right must be grounded in national law and practices,
so Art 1(2) adds little in this case.

3.3 General Principles of law operate in any case

In any case, the possibility for Art 1(2) to function as an effective opt-out for the UK from socio-economic rights is further limited by the fact that, even were all of Title IV itself to be unenforceable in the UK, the UK would be still bound by EU fundamental rights law in these areas. This is because, according to Art 6(3) TEU, ‘Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’ and the Protocol does not apply to general principles of law.

Art 6(3) reflects the earlier caselaw of the CJEU, in which it was held that respect for fundamental rights forms part of the general principles of law protected by the Court.

3.4 But do Charter rights extend beyond general principles of law?

Art 1(2) Protocol would only be of significance if the rights in the Charter went beyond those recognised as general principles of law. But, although as Mostyn J rightly pointed out in the AB case, the Charter extends well beyond those ECHR rights enforced through the UK Human Rights Act, it is still the case that the Charter draws on those rights that were already recognised in EU law, as the official Explanations make clear. The Explanations set out the sources for all of the Charter rights. In the case of the Title IV rights, many of these are sourced from the Council of Europe European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. The European Social Charter is a treaty which is binding on those that have ratified it (which includes the UK). In contrast, the Community Charter of the Fundamental Social Rights of Workers is not binding but a political declaration only, although many of its obligations have been enforced by other texts, such as EU directives.

However, neither the European Social Charter, nor the Community Charter might be seen as binding in the sense of ‘directly effective’, or directly enforceable in a court of law, so unless a further source for the right in question could be found – for example in an EU directive, or a judgement of the CJEU, then an attempt to render these rights directly effective in national law, could be seen as going further than existing practice and introducing new rights in the UK. An example here might be the right to a placement service in Art 29 Charter, which is expressed as a right, not a principle, and has a prior source in the European Social Charter and the Community Charter. In such as case, Art 1(2) Protocol might operate in what has been described as a ‘belt and braces’ fashion, to ensure that Art 29 cannot be directly effective in the UK.

4. Art 2 Protocol

‘To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.’
This provision does not appear to offer very much new. It seems merely to underline Art 52(6) Charter which states:

‘Full account shall be taken of national laws and practices as specified in this Charter’.

4. Conclusion

The Protocol, with the possible exception of Art 1(2), and that to a limited extent only, does not function as an opt-out.
B. THE APPLICATION OF THE CHARTER IN AND TO THE UK

1. Given that Protocol 30 does not function as an opt-out for the UK (except perhaps to a limited extent for Art 1(2) Protocol) it will be crucial to know exactly when the Charter applies in the UK.

The Charter is not an instrument of limitless general review – Article 51(1) of the Charter specifies that it is ‘addressed to the institutions… of the Union… and to the Member States only when they are implementing Union law’ (italics added). This, in turn, begs the question of what exactly is covered by member states in the act of implementing EU law.

2. The meaning of ‘implementing Union law’

The term ‘implementing’ might seem to imply some sort of delimitation of the Charter, rendering it applicable only in situations where, for example, the UK is implementing an EU directive. Indeed the use of ‘implementing’ in Article 51(1) may suggest the intention of its drafters to reduce the CJEU’s scope of review of national measures on fundamental rights grounds, from the expansive reading given by the Court in its pre-Lisbon case law. Indeed, the Convention drafting the Charter actually rejected an earlier Praesidium drafting proposal designed to bind Member States ‘when acting within the scope of Union law’.

However, this situation is further complicated by the Charter’s Official Explanations, which indicate that the Charter is ‘binding on Member States when they act in the scope of Union law’ and cite previous caselaw of the CJEU to that effect.

This phraseology is certainly broader than that of ‘implementing’ EU law. In R (Zagorski) v Secretary of State for Business, Innovation & Skills [2010] paras 66-71, the English High Court held that a member State derogating from EU law was acting within the scope of EU law for the purposes of the Charter. In N.S., the CJEU held that, in deciding an asylum application on whether an applicant should be returned to Greece under EU Regulation 343/2003, the EU was implementing EU law, and fell within the scope of the Charter.

2.1 The CJEU Åkerberg Fransson ruling of 2013

While there were some attempts for a narrower understanding of the phrase ‘implementing Union law’ (for example AG Cruz Villalón in Fransson, see further below) the CJEU itself in the highly important 2013 Åkerberg Fransson case preferred a wider reading of the phrase, holding at para 21 that ‘the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law’.

The breadth and implications of this ruling can be seen more clearly if we look more closely at the facts of Åkerberg Fransson itself, which concerned tax law.

In Åkerberg Fransson, the Swedish referring court asked the CJEU whether the principle of double jeopardy, in Art 50 Charter, was relevant to the case at hand and could be used to set aside domestic law. Fransson had provided false information to the revenue authorities, and had already incurred an administrative penalty, but could additionally face criminal prosecution for the same misconduct. The Swedish court was uncertain whether the Charter applied, as it was unclear whether the Swedish dual system of tax penalties fell within the ‘implementation of Union law,’ as required by Art. 51(1) Charter. However, EU law was at least of some relevance in that Directive 2006/112 entitles States to ‘impose other obligations
which they deem necessary to ensure the correct collection of VAT and to prevent evasion.’ Was this sufficient to bring the Swedish tax law within the scope of the Charter?

Advocate General Cruz Villalón thought not. He had suggested that the controlling consideration should be whether the EU had a ‘specific interest’ in centralizing human rights review of the measures. He argued that argued that ‘[t]he mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the implementation of Union law’ and he considered the link between the EU legislation and the Swedish measures too tenuous.

The CJEU decided the issue differently. It ignored the AG’s argument requiring a specific EU interest, and instead repeated its former caselaw, requiring domestic acts to comply with EU law when they fall within the scope of EU law. It highlighted that provisions of EU law require member states to collect VAT and prevent VAT evasion, and noted that any shortcoming in the domestic collection of VAT affects the EU budget, and so, even if the Swedish legislation was not designed to transpose Directive 2006/112, its application penalised the infringement of that directive and, as a result, the Charter applied.

2.2 The Response to the CJEU ruling in Åkerberg Fransson

Perhaps understandably, Åkerberg Fransson has not been universally welcomed, given that it allows a broad interpretation of the CJEU’s competences, thus enabling EU fundamental rights to apply in a potentially wide range of cases that appear to go beyond the literal wording of Art 51. Interestingly, Åkerberg Fransson has also been subject to criticism by the German Constitutional Court. In a 2013 judgment (24. April 2013 1 BvR 1215/07) concerning a counter-terrorism database, the German Court insisted that the case before it was clearly outside the scope of the Charter, as it pursued national objectives with only a possible ‘indirect’ effect on the functioning of legal relationships under EU law. Such a statement would surely be superfluous if the German Court were not wary of the possibility of a wide reading of the scope of the Charter by the CJEU. The German Court continued:

‘The Senate acts on the assumption that the statements in the ECJ’s (Åkerberg) decision are based on the distinctive features of the law on VAT, and express no general view.’ (Press release no. 31/2013 of 24 April 2013, 1 BvR 1215/07). This looks like quite a clear warning to the CJEU, and an attempt to confine the implications of Åkerberg to tax law – an approach not adopted however by the CJEU itself.

2.3 The breadth of the CJEU understanding of ‘the scope of EU law’

Indeed, the wide reading of the scope of the Charter in Åkerberg does not signify a new approach for the CJEU. It has been interpreting the scope of EU law in fundamental rights matters widely for a number of years. As well as the cases cited in the Official Explanations, and by the CJEU in the Åkerberg case, an earlier case on fundamental rights nicely illustrates this. In the Mary Carpenter [2002] case, which predates the binding Charter, Mrs Carpenter, a Filippino national, challenged her proposed deportation from the UK (the official grounds for her deportation were certain violations of immigration law on her part). This looked to be a purely domestic case, turning on national immigration law. However, Carpenter argued that she derived EU law rights through her husband, a British national. Spouses of European nationals normally derive EU rights only when they move to another country, not in the country of origin, and so it might have been assumed that this was purely internal situation. However, the Court found in her favour. It stated that, first, Mr Carpenter was engaged in
providing services to other Member States’ nationals as a ‘significant proportion of his business’. Yet, the link between Mrs Carpenter’s situation and EU law was extremely tenuous. Neither she nor her husband had moved to another EU state. Nevertheless, EU law applied and human rights standards were invoked.

3. The shape of things to come? A ‘federalizing’ EU Charter of Rights?

Cases such as Carpenter and Åkerberg illustrate the wide potential reach of EU law. Do they set the outer limit for the scope of EU law, or is there room for even wider interpretations? Here it is worth considering the recent 2011 Ruiz Zambrano case, in which perhaps one of the most far reaching suggestions regarding the potential scope of EU fundamental rights law was made by AG Sharpston. The main issue for determination by the CJEU was whether Mr Ruiz Zambrano, a Colombian national, could claim a right of residence in Belgium under EU law following the birth of his children (who were EU citizens) in 2003 and 2005, notwithstanding that his EU citizen children had yet to exercise their right of free movement within the Union, which would normally be a requirement for triggering the application of EU law.

Although most of the discussion in this case turned on EU citizenship, AG Sharpston, in her Opinion, considered the role of fundamental rights in EU law, arguing that their invocability should be ‘dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted.’ Rather, AG Sharpston argued that EU fundamental rights should protect the European citizen in all areas of EU competence, regardless of whether such competence had actually been exercised. Part of the point of her comparison was to compare the present EU law on fundamental rights, with its uncertain scope of EU competence, against an ideal of consistent protection of fundamental rights (italics added). (In particular, the question of reverse discrimination, whereby member states can, in purely internal situations, apply less favourable laws than would EU law in similar situations, continues to cause problems.) AG Sharpston did, however, acknowledge that, this was likely to be too bold a step for the Court to take unilaterally at present, but she nonetheless suggested that the Court should consider that the evolution of EU fundamental rights law in the context of the now binding nature of the Charter, and proposed EU accession to the ECHR, might require a more robust scrutiny of fundamental rights. The Court in Ruiz Zambrano, however, did not discuss this point.

Interestingly, AG Sharpston also stated that: ‘[m]aking the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an overtly federal element into the structure of the EU’s legal and political system. Simply put, a change of the kind would be analogous to that experienced in US constitutional law after the decision in Gitlow v New York . . . A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case-law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.’ (paras 172–73).

AG Sharpston’s reference to US jurisprudence may explain why most national governments were keen to have Art 51(1) inserted in the Charter in the first place, namely to avoid a ‘federalizing’ movement in the field of fundamental rights, comparable to that exercised by the US Supreme Court which, in the earlier 20th century, incorporated the US federal Bill of Rights and applied them to the states through a very wide interpretation of the 14th Amendment of the US Constitution. For example, in the 1925 case of Gitlow v New York, mentioned by AG Sharpston in her Opinion, the US Supreme Court held that the First
Amendment of the US Federal Bill of Rights may also apply to the States through the operation of the 14th Amendment (which specifically applies to the states). Since then, the US Supreme Court has applied the federal bill of rights (and its expansive interpretations of those rights) to State laws even when the States are acting within their own sphere of competence. In this way, the US Supreme Court has created a unified constitutional order of fundamental rights.

It seems clear however, that, at present at least, the Charter does not permit the CJEU to emulate the US Supreme Court, and identify a ‘federal’ or EU standard of fundamental rights against which all national laws may be assessed and even set aside or invalidated.

Therefore, however wide the scope of EU law, there will continue to be domestic situations in which it cannot be applied. For example, the Supreme Court in *R (on the application of Chester) v Secretary of State of for Justice; McGeoch (AP) v The Lord President of the Council and another* [2013] UKSC 63 unanimously dismissed two prisoners’ claims that the UK government’s refusal to allow them to vote whilst in prison breached their EU rights, on the basis that the case did not fall within the scope of EU law.

### 4. Who is protected by the EU Charter? The *Personal* scope of application of the Charter

In addition to the material scope of EU law – namely, the EU must be acting within the scope of EU law according to Åkerberg and Art 51 Charter, the applicant must also be able to show that they, personally, are protected by the Charter – or at least this seems to be the import of the UK *Zagorski* case, discussed below. This point may not be automatically obvious, so it deserves a little further exploration.

Art 51 Charter states on whom the Charter imposes obligations, but it does not state who may benefit from the Charter’s rights. Instead, the EU Charter appears to deal with this question on a case-by-case basis. Each provision states who is protected by the Charter – or at least this seems to be the import of the UK *Zagorski* case, discussed below. This point may not be automatically obvious, so it deserves a little further exploration.

Art 51 Charter states on whom the Charter imposes obligations, but it does not state who may benefit from the Charter’s rights. Instead, the EU Charter appears to deal with this question on a case-by-case basis. Each provision states who is protected by the Charter – or at least this seems to be the import of the UK *Zagorski* case, discussed below. This point may not be automatically obvious, so it deserves a little further exploration.

So, for example, Article 4 Charter prohibits all forms of torture and inhuman or degrading treatment or punishment. This appears to apply universally. But it is not as universal as first impressions suggest. First, we must read Art 4 Charter in conjunction with Article 51, so that Art 4 offers protection only if EU or national authorities torture people 'when implementing Union law'. However, even in the event that the national authorities do fall within the scope of Art 51, it is not the case that ‘everyone’ will be able to benefit from this right. The 2010 UK *Zagorski* case adds a further twist to this situation.

#### 4.1 The relevance of the *Zagorski* case

In this case, the applicant, Zagorski, was in custody in the US facing execution for the killing of two men in 1983. He sought judicial review of the decision by UK Business Secretary not to ban the export of sodium thiopental (a drug used for lethal injections) to the United States. This case raised several questions regarding the applicability of European human rights standards. From the outset, the Court acknowledged that the ECHR was not applicable as Article 1 of the Convention requires states to secure the rights of ‘everyone within their
jurisdiction’. As Zagorski was in the US and under the effective control of US authorities he could not claim protection under the European Convention.

But Zagorski also claimed a breach of Art 4 Charter, and claimed that the Charter was not jurisdictionally bound in the same way as the Convention. However, in Zagorski, Lloyd Jones J held that the Charter also had a restricted personal scope, in that it would only apply to persons within the jurisdiction of the UK, and not to the applicants, who were prisoners on death row in Tennessee. The judge relied upon Art 52(3) (which requires Charter rights to have the same meaning as equivalent ECHR rights - holding that this applied not only to the meaning of the rights, but also to their scope) as the basis for reading into Arts 2 and 4 of the Charter jurisdictional limitations equivalent to those in Art 1 ECHR.

The judge also noted that Art 52(3) further provides that the EU may provide more extensive protection but it is not completely clear to me on what grounds the judge concluded that the EU did not seek to provide more extensive protection in this area. Lloyd Jones J did suggest that protection without territorial limits as proposed by the applicants would be ‘radical’ because it would mean that the ‘Charter would confer such rights on anyone, anywhere in the world, regardless of whether they have any connection with the EU’. However, perhaps the judge’s supposition here goes too far, because as discussed above, the Charter always requires a connection with EU law for its rights to be engaged. The UK would simply be prohibited, when acting under EU law, from engaging in action which violated the rights of any individual regardless of where they are on the globe. Understood this way, the applicant’s proposal is less radical. However, the judge may have come to a sensible conclusion – if the EU seeks to provide further protection than the ECHR, then it is arguable that such action should be taken by EU institutions and not by the UK courts.

So it is clear that the requirement for some sort of personal connection lessens the potential scope of the Charter in the UK, although the Charter itself sets no territorial limits in the way that the ECHR does, and Art 52(3) may be used in future to secure a broader personal scope for it.

5. Conclusion

The potential application of the Charter in the UK is pretty broad, following the generous interpretation given by the CJEU in Åkerberg of Art 51 Charter. However, at present, despite the considerations of AG Sharpston in her Ruiz Zambrano Opinion, there does not seem to be a danger of the Charter operating as a federalizing instrument similar to the approach taken by the US Supreme Court to the US federal Bill of Rights. However, there is room for a wide interpretation of the Charter’s personal scope, notwithstanding the UK Zagorski authority, given that there is, unlike in the case of the ECHR, no territorial limit to its personal scope, and Art 52(3) permits a broader interpretation of the Charter, going beyond that of the ECHR comparable rights.
C. TO WHAT EXTENT IS THE CHARTER BEING APPLIED HORIZONTALLY BETWEEN PRIVATE INDIVIDUALS AND BODIES

1. Horizontal effect of fundamental rights
The notion of horizontal effect is clearly controversial when applied to fundamental rights. Rights are traditionally justified as individual protections against the state, but if applied instead as obligations on citizens then they are liable to appear as intrusions into private liberty. However, against this, it may be argued that some private entities are just as capable as the state of wielding power in a way affecting the rights of citizens, and so horizontal effect of fundamental rights provides protection against this.

Notwithstanding this, the majority of EU member states do not recognise direct horizontal effect of fundamental rights under national constitutional law. Further, given that Article 51(1) limits the legal effect of Charter rights to EU institutions and bodies, and to Member States only when implementing Union law, this raises the issue of whether recognising horizontal direct effect of Charter rights undermines the intent of the drafters of the Charter.

I now consider these issues in the light of relevant caselaw.

2. Kucukdeveci
The CJEU *Kucukdeveci* judgment of 2010 is a very important authority, and suggests that both general principles of EU law and provisions of the Charter are capable of affecting legal relations between private parties.

For clarity’s sake, the facts are worth summarising. Ms Kücükdeveci had been employed in Germany by Swedex for ten years, when, aged 28, she was dismissed by that company, with one month’s notice. In accordance with German legislation, in calculating her notice period, no account was taken of any employment prior to age 25. She challenged her dismissal, claiming that German law discriminated on grounds of age and itself violated EU law, and, in particular, Directive 78/2000, whose implementation period had expired prior to her dismissal. However, given that Swedex was a private party, the general prohibition on horizontal direct effect of directives would normally have prevented her reliance on the Directive. In spite of this, the CJEU held that non-discrimination on grounds of age was a general principle of EU law which was given specific expression in the Directive. Indeed, in *Mangold* in 2005, the Court had already recognized the principle of non-discrimination on grounds of age as a new general principle of EU law. Article 21(1) of the Charter also provides that ‘... discrimination based on ... age ... shall be prohibited’. The Court in *Kucukdeveci* concluded that the principle, as given expression by the Directive, precluded the German national legislation.

*Kucukdeveci* illustrates that general principles of EU law (and their realization as EU fundamental rights) can have horizontal direct effect. This development is very important, given that general principles and fundamental rights usually protect individuals from public authorities not private parties. Given the significance of such a holding, it might have been thought desirable that the CJEU set out the reasons for the extending the reach of general principles of law into the private sphere. However, *Kucukdeveci* provides no such clear reasoning. In *Mangold* and *Kucukdeveci* the Court looked to member state constitutional traditions and international law as a source for the principle of non-discrimination on grounds...
of age. Yet the horizontal application of the equality principle is not the norm at the national and international level, and very few EU member States even explicitly recognize such a general principle. Nor does the Court’s citation of the Charter provide any support for horizontal application because the scope of the Charter is, as already discussed, in Art 51 CFR, limited to EU bodies and member States.

2.1 The holding in Kürükdeveci provokes speculation as to which other general principles the Court might consider to have horizontal effect. In the 2009 Audiolux case, the CJEU held that a principle must have a ‘constitutional status,’ to qualify as a general principle of EU law. Obvious candidates for principles of constitutional status are those set out in the Charter, although the field is not limited to the Charter. Therefore, although according to Art 51 CFR, the Charter may not extend EU competences, it may nonetheless be utilized to enable the faster transposition of EU law into domestic law, and bind private parties.

3. Confirmation by Advocate General of CJEU that wording of Art 51(1) Charter does not rule of out horizontal effect – AMS case

A recent case that tackles the horizontal effect of the Charter head on is Association de Médiation Sociale [2013]. In this case, AG Cruz Villalon had to determine whether Article 27 Charter, which sets out the workers’ right to information and consultation within the undertaking, and is implemented through Directive 2002/14, could be applied in a legal dispute between two private parties. In so doing, the Advocate General emphasized that Article 51(1) Charter does not exclude effects on private parties by not mentioning them (para 29) (italics added). After discussing some different interpretations of horizontal effect, the Advocate General found that the potential for horizontal effect differed from right to right (para 38). Given that Article 27 itself refers in its title to the right having to be granted ‘within the undertaking’ (paras 39-40) this would seem to imply some at least legal obligations for companies (para 40). The Advocate General therefore concluded that Art 27 can be relied upon in principle in legal proceedings between private parties.

4. What is meant by horizontal effect of fundamental rights?

But how are we to understand the effect of a fundamental right being applied horizontally, against a private party? Is this an example of a directly enforceable right? And if so, does it open the door to the direct enforcement of socio-economic rights against (both state and) private parties – for example, the right to fair and just working conditions in Art 31 Charter. This is where the position becomes very complicated.

Notably, many commentators use the term ‘horizontal direct effect’ of the Charter to capture any occasion on which a Charter norm is invoked in litigation between two private parties. However, when considering these examples, further situations in fact need to be distinguished, such as the following considered below.

4.1 Strict direct horizontal effect between private parties

Direct horizontal effect *in the strict sense* is at issue where the litigation concerns only the private law relations between two private parties, and there is no act of the State whose fundamental rights-conformity could be at issue. For example, in the case of an employment law dispute, an employee might attempt to invoke Article 31 Charter directly, arguing that it
required his employer to provide a particular working condition for which there is no basis in national law and no EU specific provision (for example a directive) requiring such a condition to be implemented. Here, it would appear that strict horizontal effect would conflict with Article 51(1). Article 51(1) would be redundant if national courts could directly apply Charter rights, in such a case where there exists no connection to any other EU law being implemented, and thus, falling entirely within the scope of national law. This would be the sort of federalising of EU fundamental rights law discussed above. In such a case, the Charter is simply inapplicable.

4.2 Horizontal effect within the scope of EU law

The case is different if – sticking with Art 31 Charter - there exists an EU directive requiring the working condition to be enshrined in national law, which has not been complied with by the national legislator. Given the scope of the Åkerberg Fransson ruling, it is arguable that such a situation falls within Article 51(1) because of the directive, and that the national courts must then interpret national law in the light of the Charter right invoked, if it is unconditional and sufficiently precise to have direct effect.

Related to this are the Mangold, Küçükdeveci and Dominguez cases. These cases share a common factual situation: the existence of a national provision controlling the relationship between two private parties, whose conformity with the Charter was at issue. Therefore, they do not present an issue of direct horizontal effect in its strictest sense, as discussed above. In Mangold and Küçükdeveci, scrutiny of the national law at issue led the CJEU to find it in conflict with the EU age discrimination prohibition, and to require the setting aside of national law as a consequence of the principle of EU supremacy which had what in these circumstances EU law deems an ‘exclusionary effect.’ Nevertheless, in both these cases, setting aside a discriminatory national provision acts to the detriment of the private employer, although strictly speaking this is not the same as holding that the employer was made an addressee of a fundamental right.

Dominguez is a further interesting case to consider here. In Dominguez, the issue was whether the Küçükdeveci approach could be applied in the context of the right to paid annual leave, on the basis that national law was contrary to Directive 2003/88, and that this directive simply gave concrete effect to Article 31(2). The CJEU in that case did not mention Article 31(2), but did however refuse to grant horizontal direct effect to the directive. However, AG Trstenjak did consider the issue and argued that an application of the Küçükdeveci approach would be inappropriate, as she found the social right in Article 31(2) to be of a fundamentally different character to the equality rights, including the right not to be discriminated against in Article 21(2) at issue in Küçükdeveci. This was because, unlike the equality right in Article 21, the social right to annual paid leave cannot function in a freestanding way, but requires further legislative action. Directive 2003/88 could only be construed as one possible implementation of Article 31(2) and therefore it would be misplaced to transpose the specific content of the directive to the level of primary law by importing it into Article 31(2). To put it differently, whereas the prohibition of discrimination on account of age was unconditional and sufficiently precise to produce direct effect in Mangold and Küçükdeveci, the right to paid annual leave does not satisfy these conditions. The CJEU left it to the national court and legislature to remedy this situation, without granting horizontal effect to the Charter right.
5. UK caselaw: *Benkharbouche*

So much for the CJEU authorities. There is also recent UK caselaw on this area, namely the important *Benkharbouche* case of 2013. In *Benkharbouche*, servants employed at the Sudanese and Libyan embassies in London brought a number of claims in the Employment Tribunal, including unfair dismissal, race discrimination and breaches of the EU Working Time Directive. However, their claims were dismissed under the State Immunity Act 1978 (SIA). The claimants appealed, arguing that this decision breached their rights of access to a court or tribunal under Article 6 ECHR and Article 47 Charter.

The Employment Appeal Tribunal held that it was bound by EU law to disapply domestic law. While the Human Rights Act (HRA) could not be used to disapply the provisions of the SIA, the EU Charter applies in UK law and, following the CJEU’s decision in *Kucukdeveci*, such rights can be enforced directly against private individuals. Therefore, the EAT was bound to disapply the provisions of the SIA by reference to the Charter.

The UK court (Langstaff P) stressed that the obligation to disapply the SIA was restricted to issues falling within the material scope of EU law. On that basis, the claims relating to discrimination, harassment and breaches of the EU Working Time Regulations were viable but their claims for unfair dismissal and minimum wage were not actionable.

*Benkharbouche* appears to be the first case in which EU Charter rights have been actionable in a UK dispute between private parties (in the slightly strange situation in which although the embassies are state institutions, as an employment dispute the matter is treated as one of private law).

The position may be stated bluntly: although the HRA does not require the disapplication of any statute by any UK court, EU law does require it, even in some cases concerning private parties.

6. Conclusion

Both the CJEU and UK authorities have considerable implications for the application of the Charter between private parties. While they indicate that they the Charter may be applied in a number of different ways horizontally, not all of them corresponding to the direct enforceability of Charter rights, they do indicate that the Charter has considerable potential to operate in the private sphere.

January 2014