

LLM/MA IN: International Commercial and Business Law

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DISSERTATION TITLE

-----What does the United Kingdom leaving the European Union mean in ----  
-----regards to Human Rights and Workers rights? -----  
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What does the United Kingdom leaving the European Union mean in regards to Human Rights and Workers rights?

Abstract: This dissertation aims to assess the consequences of the referendum that took place on June 23<sup>rd</sup> 2016 that determined that the UK was going to leave the European Union (EU) in regards to human rights and workers rights. It will commence as an outline of the conditions that lead to Brexit as well as an outline of the human rights legislation that covered anyone living in the UK prior to Brexit. Furthermore, it will aim to show how human rights will diminish after Brexit through the constitutional order and will demonstrate how the new legislation that will replace the old Treaties and Charters is in fact a regressive reform. It is generally recognisable at this stage to say that the fundamental rights protection will be weakened in its very core due to the loss of the EU Charter of Fundamental Rights (Charter/CFR). A major loss in terms of both procedural terms and remedies available against violations of human rights will be lost, not only in EU law but also as far as domestic law is concerned. The reduction of protection will be at such a level that it would be difficult to say it could be compensated for by indirect influence applied by EU fundamental rights that shadow over domestic law however with continuous efforts to adhere to the European Convention on Human rights and efforts for future cooperation between the EU and the UK, particularly in the key fields of data protection, right to employment and fair occupation, right to fair trial and rights to fight discrimination. While the very principle behind Brexit has caused unrest and legal uncertainty throughout the entire duration of the negotiations, it is important to recognise the efforts that are being made to preserve human rights, even if those efforts do not seem to be producing the much wanted result of giving reassurances to the general public. This dissertation focuses mainly on the implications and the losses created by the abandonment of EU law in the framework of human rights and offers some amendments to the proposals that have been brought forward by the government.

Introduction:

In June of 2016, the United Kingdom (UK) , in a shocking vote for the world, declared a referendum which called on the nation to decide on whether the UK should leave the European Union (EU). This act represented the first time in history that a country voted to leave the EU. The greater question and the focus of the debate, has been on the material scope of the rights they are to hold after Brexit is successfully carried through. The EU Withdrawal Bill was set in place to help elaborate on the details of the UK's exit from the EU by identifying possible legal and political problems that the UK would have to endure as well as the answer on how to resolve them. It was in that Bill that Lord Pannick proposed an amendment that would retain the European Charter of Fundamental Rights and its continuous enforcement in the UK once Brexit was completed. However, despite his efforts and his strong arguments in the House ranging from legal uncertainty regarding the application of EU law without the Charter, the government was categorical about it being removed. Despite the Prime Minister at the time giving her word that human rights would not be affected negatively by Brexit, the loss of a major Charter that protected fundamental rights pointed to the other direction.

This exploration will focus on the Human Rights as well as the Working rights of EU citizens who chose to remain in the UK under the revised scheme in a world after Brexit. This problem needs to be investigated and is extremely important because of the number of lives that are affected and the way in which they are affected. Brexit has caused and will continue to cause issues for the economy but also with sociology, interfering with issues that range from the right to work without discrimination and fair wages to the right to private life, private information and the right to remain in the country. It is no secret that the UK majority vote showed hostility towards the free movement of citizens from members of the EU, as they entered the labour market and took up opportunities that the UK voters felt should be taken up by them, as they supported in various documents supporting Brexit and the campaign for it. It is also a known fact that the UK has long been attacking the very institution of Human Rights law framework has not been a matter of secrecy on behalf of the government either. The negotiations for Brexit have been intense and have not stopped, seeing as a conclusion and a finalised agreement is yet to be reached. Furthermore, as the Brexit deals stands incomplete, there is no information as to how Human Rights will be safeguarded in the said agreement. The UK has had a long history of problems and concerns in regards to human rights laws and there is a need to ensure they are protected at all costs.

The Withdrawal Agreement draft provides for a new status that will be offered to EU citizens, which is close to their current status but not the same. As named by the Agreement, the EU settled resident scheme would deprive of those citizens some of the rights they currently hold, in particular family reunion as well as the increased risk of deportation on the basis of criminality for acts committed after Brexit. Essentially, there will be harsher immigration laws that may deny spouses and children entry to the country, if they are not in the country already present by May of 2022. However, the settled status still represents a challenge, due to the amount of people who may not be able to have access to it due to the specific requirements it presents itself with. There is also a lot of uncertainty on whether the Withdrawal Agreement will be implemented, and the different outcome this will have for EU citizens based on whether the UK can ensure Brexit with a deal, or a hard no-deal Brexit which would leave a lot of questions unanswered. This will be especially challenging for the EU citizens that choose to remain in the UK, with an inferior status and comprehensive judicial protection provided by EU law completely removed. This exploration will aim to focus on the legal status that EU citizens will hold if in the UK by analysing the procedural mechanisms that are in place as well as further mechanisms that should be in place to ensure a smooth transition.

Although Brexit is yet to be completed as the exit deal is being debated, there have already been attacks against people of Caribbean origin who lived legally in the UK for years, as part of the "Windrush" scandal. Those people were "suddenly deprived of all entitlements, detained and sometimes deported, because their legal entry to the country decades earlier was suddenly contested". It is therefore not out of order for EU citizens to be reluctant to believe their rights would be completely respected and protected, in a country that chooses to review immigration law so harshly and deny people of their basic rights after decades of them respectfully and legally residing in the UK.

#### CHAPTER 1: The History, the Politics and the conditions that lead to Brexit

In order to best understand Brexit and the affects it will have once fully implemented, it is important to know the reasons behind what brought it forward. The European Union has always been seen in a positive and negative light throughout history. More specifically, joining the EU meant better trade deals, freedom of movement for the people and connections with the whole of Europe through that single link. The UK has benefitted from the perks of the European Union for centuries, however Politicians and citizens have felt differently when it comes to some bigger targeted issues. The economy at the time was one of the biggest factors that pushed people to vote in favour of leaving the EU, as well as the issues of immigration and sovereignty. In detail, the economic conditions with the EU had been nothing but strenuous since the economic crisis that hit Europe in 2008. The unemployment rate reached 20% in Southern Europe, something which the EU failed to assist with. The whole region was becoming economically stagnant and the campaign that was lead in favour of leaving the Union made good use of that information. The campaign in favour of remaining in the EU made the points that had they chosen to leave, they would be faced with a catastrophic economic situation, due to trade deals being lost as well as import and export routes. However, the public felt they could not rely on an organisation that had already failed to deal with unemployment and poor economic conditions could not help them in any way. In a way, the argument presented was that anyone who stayed in the EU would soon come to face the same end.

Nationalism was also on the rise across the world and particularly the UK as the issue of Sovereignty was brought up repeatedly by the campaign that was called "leave" and its counterpart called the "remain" campaign. More and more countries are growing to distrust multinational organisations, whether they deal with matters of finance, trade or defence<sup>1</sup>. An example of such institutions is the IMF, NATO and of course the EU itself. A lot of people who opposed to the idea of the UK being part of the EU drew focus to the fact that such organisations were losing their purpose as nations were becoming more independent and relying on them less to secure agreements and protection. Additionally, they felt that not only were they unnecessary, but they diminished the control that individual nations hold. Parliamentary sovereignty has been a crucial issue for many years, as the very idea of it makes it the supreme legal authority in all of the UK, meaning it can generate and end any law as long as it doesn't overrule future parliaments<sup>2</sup>. Due to the nature of the UK's constitution, parliamentary sovereignty is crucial and perhaps the most important component of it. However, the "leave" campaign made a lot of efforts to pinpoint that on numerous instances, EU law will trump domestic law, making parliament in fact not the sovereign authority on those particular matters. There have been debates stating that while EU law will be supreme in these instances, parliament remains sovereign as it is still in a position to generate and end any law they want to, even if it conflicts with EU law. However, if they do so, they would be in breach of their obligations under the Treaties imposed by the EU. Therefore, sovereignty stands but it is unlawful for it to be exercised in ways that are not compatible with EU law.

On the other hand, for the people who support the EU and believe the UK belongs among them, believe that those organisations are not acting to the best of their abilities and fulfilling all of their aims and promises, but all that requires is some tweaking, not complete abandonment<sup>3</sup>.

The last issue that the campaign against the EU focused on extensively was the problem of immigration. A major survey conducted by the Independent found that the British public voted to leave the EU because they feared immigration above anything else. The anti-immigration sentiment was widespread throughout the campaign against the EU and it is arguably one of the major reasons that people voted in favour of the UK leaving the EU rather than the actual politics behind it<sup>4</sup>. The British Social Attitudes (BSA) conducted a survey and its findings support that statement, as people were appearing concerned over the amount of people that were coming into the UK taking advantage of the free movement of people that being a member of the EU provided. People from older generations were more likely to be in favour of Brexit as nationalism reached all time highs and British people expressed fear over losing their culture and social stability due to large amounts of immigration. On the other hand, the EU leaders have always proclaimed that aiding refugees and/or immigrants is a moral obligation, especially since the European migrant crisis started in 2015 as these people seek asylum or they constitute economic immigrants in need<sup>5</sup>.

Last but not least, the political scene in the UK at the time of Brexit faced a profound loss. The campaign in favour of leaving the EU were rejecting both the Conservative and Labour parties which had represented the majority until that moment in time, giving space for the UK Independent Party (UKIP) to arise to the challenge of setting Brexit in motion. This new party that saw their supporters growing quickly had a hard stance against Brexit, declaring that there needed to be an effective exit from the EU as soon as possible, having very strong opinions on the withdrawal agreement, focusing on the calling an end to giving the EU any more funds and frequently refers to "re-instating the UK into an independent, self-governing state"<sup>6</sup>. Ultimately, the two major parties lost a lot of supporters who were now drawn to a third front with an aggressive approach in favour of leaving the EU. At the same time, the financial markets were growing more anxious and frightened at the prospect of Brexit, seeing as everything that was known to them was about to change and so much uncertainty was in the horizon during the transition period. However, the public saw them as less than adequate to talk about this topic, seeing as no one foresaw the economic crisis that occurred in 2008, making them lose their credibility in the process<sup>7</sup>. In fact, most of the "leave" campaign supporters blamed them as the cause of disaster for many people and considered them generally incompetent and reckless. In fact, George Friedman writing for Forbes stated that "It is vital to understand that Brexit was a vote against the British elite. Voters through political, business leaders, and intellectuals had lost their right

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<sup>1</sup> Henry Jackson, 'Challenges To European Unity' (University of Washington 2017).

<sup>2</sup> T. R. S Allan, *The Sovereignty Of Law*.

<sup>3</sup> George Friedman, '3 Reasons Brits Voted For Brexit' *Forbes* (2016).

<sup>4</sup> George Friedman, '3 Reasons Brits Voted For Brexit' *Forbes* (2016).

<sup>5</sup> "Europe migrant crisis". BBC News. 4 November 2015. Retrieved 25 November 2015.

<sup>6</sup> UKIP Policy Manifesto, 2019.

<sup>7</sup> George Friedman, '3 Reasons Brits Voted For Brexit' *Forbes* (2016).

to control the system” before going on to explain that there is a wave of people that are displaying the same patterns of behaviour not only in Europe, but also in the US with the rise their latest president Donald Trump. Every day there are more examples present on how minor political parties that were displaying extreme views and beliefs such as UKIP are becoming bigger and gaining credibility due to a rise of nationalism and difficult financial and economic conditions.

#### Chapter 2: Human Rights Law before Brexit

Prior to the referendum and Brexit being triggered, the human rights of everyone living in the UK were protected and ensured by the Human Rights Act 1998 (HRA) as well as the Charter of Fundamental Rights 2009 (CFR). The latter however is as legally binding as an EU Treaty, giving them the same status<sup>8</sup>; though it did not simultaneously introduce fundamental rights into EU law.

The Charter is responsible for outlining and ensuring the fundamental rights of everyone living in the EU. The sole purpose of it was to solidify what fundamental rights are exactly as well as to clarify in detail the rights established in particular ways at a particular time in the individual EU Member States<sup>9</sup>. Under the Charter, a wide range of civil, economic, social and political rights are protected based on the rights that have been recognised as fundamental under the European Convention of Human Rights (ECHR). The Charter is also responsible for setting out the rights that are based on constitutional legislation and traditions of the EU Member States in question an example of which is the protection of rights that arise from common law and constitutional law in the UK<sup>10</sup>. Additionally, the Charter has a specialised Charter within itself, the Council of Europe’s Social Charter (CESC), which focuses on safeguarding rights that are relevant to today more than the old Charter of 1961. In particular, the latest treaty focuses on rights of protection against economic and social rights, such as the right to protection against poverty, the right to housing, right to protection against sexual harassment as well as amendments to in order to ensure the principle of non-discrimination, gender equality, protection of children and disabled people<sup>11</sup>. Human rights in regards to workers rights in particular are safeguarded by the Community Charter of Fundamental Social Rights of Workers 1989, which applies to the workforce within the European Union. Within that charter there are Articles that protect some of the key issues that have needed additional protection and clarification for decades, such as the free movement of workers, the right to fair remuneration for their employment, the right to fair working conditions, the right to strike, the right to a safe working environment and much more<sup>12</sup>.

The Charter is not to be mistaken as the European Convention on Human rights as even though they contain human rights provisions that may overlap, the two operate within two entirely separate legal frameworks. The Charter of Fundamental Rights of the European Union was, as the name suggests, drafted by the European Union and the Court of Justice of the European Union is in charge of overseeing its interpretation and safeguarding. On the other hand, the European Convention of Human Rights was drafted by the Council of Europe, which is not to be confused with the European Union itself<sup>13</sup>. It is an entirely separate international organisation that is based in Strasbourg and comprises of 47 countries of Europe. Its sole purpose for existing is to promote democracy and protecting human rights as well as the rule of law in Europe<sup>14</sup>. Not every member of the Council of Europe is a member of the European Union themselves.

It is important to outline the differences between the two in order to better understand the effect that Brexit will have on human rights, seeing as the Charter could arguably be seen as the extended framework for the protection of human rights in the EU and the European Convention of Human rights forms a key part of it, but it is not its entirety. The Charter of fundamental rights only applies in matters concerning EU Law and can be raised in the UK courts depending on the matter, however the European Convention on Human Rights has been incorporated into EU law through an Act of Parliament, the Human Rights Act 1998. In particular, Article 53 (3) of CFR states that the meaning and scope of the rights outlined by the Charter corresponding to those in ECHR should be

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<sup>8</sup> 'What Is The Charter Of Fundamental Rights Of The European Union? | Equality And Human Rights Commission' (*Equalityhumanrights.com*, 2019).

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<sup>10</sup> Lock, Tobias, Human Rights Law in the UK after Brexit (September 29, 2017). Edinburgh School of Law Research Paper No. 2017/17.

<sup>11</sup> European Social Charter, ETS No.163.

<sup>12</sup> Community Charter of the Fundamental Social Rights of Workers, 2012.

<sup>13</sup> 'What Is The Charter Of Fundamental Rights Of The European Union? | Equality And Human Rights Commission' (*Equalityhumanrights.com*, 2019).

<sup>14</sup> The Council of Europe, Council of Europe Portal, 2019.

considered equal and the same as those that are laid down by the Convention, even though the Charter has a wider range of protection<sup>15</sup>.

### CHAPTER 3: Protection of Human Rights after Brexit

The EU Withdrawal Bill was set in place to help elaborate on the details of the UK's exit from the EU by identifying possible legal and political problems that the UK would have to endure as well as the answer on how to resolve them. It was in that Bill that Lord Pannick proposed an amendment that would retain the European Charter of Fundamental Rights and its continuous enforcement in the UK once Brexit was completed<sup>16</sup>. However, despite his efforts and his strong arguments in the House ranging from legal uncertainty regarding the application of EU law without the Charter, the government was categorical about it being removed. Despite the Prime Minister at the time giving her word that human rights would not be affected negatively by Brexit, the loss of a major Charter that protected fundamental rights pointed to the other direction<sup>17</sup>.

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The formal loss of the Charter of Fundamental Rights from the UK legal system as proposed in the EU withdrawal bill will create a human rights deficit which would lead to different groups within the country without appropriate protection<sup>18</sup>. As established, the Charter provides an extended protection of fundamental rights which is greater than the Human Rights Act. Some key issues that have arisen during the past decade are not protected under the HRA, such as the right to data protection, the freedom to conduct a business, right to asylum and against refoulement, the protection of the rights of children, anti-discrimination laws and precautions, physical and mental integrity as well as the absolute prohibition of human trafficking and the right for same-sex couples to marry<sup>19</sup>.

It is important to note that the Charter is not the only body which protects these rights as some are recognised in both the European Court of Human Rights (ECtHR) as well as domestic law<sup>20</sup>. Taking into consideration the procedure under which the case law of the Court of Justice of the European Union (CJEU) has been applied to UK courts, the following conclusions could be drawn; the rights that are only guaranteed and protected under the Charter will ultimately be lost. Where the legislation that is covered by EU law is also protected in a similar way under domestic or international law, EU law tends to be interpreted in a different light, more modern and adherent to the challenges and circumstances that are always changing in the world, which is something that will not be available to the UK courts as readily as the rest of the EU<sup>21</sup>. Last but not least, EU citizens who choose to remain in the UK will have tangible losses in different forms, but particularly as far as their rights to private family life is concerned.

Chapter 4: The effect of Brexit on safeguarding the right to private life and data protection and Article 8 of the ECtHR.

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<sup>15</sup> Lock, Tobias, Human Rights Law in the UK after Brexit (September 29, 2017). Edinburgh School of Law Research Paper No. 2017/17.

<sup>16</sup> Jonathan Cooper, 'The Fate Of The Charter Of Fundamental Rights In UK Law After Brexit Is Sealed' (OHRH, 2018).

<sup>17</sup> Rob Merrick, 'Theresa May To Consider Axeing Human Rights Act After Brexit, Minister Reveals' (The Independent, 2019).

<sup>18</sup> Jamie Doward, 'Brexit Bill Leaves A Hole In UK Human Rights' (*the Guardian*, 2018).

<sup>19</sup> Daniel Denman, 'The EU Charter of Fundamental Rights: How Sharp are its Teeth?' [2014] *Judicial Review* 160, 172

<sup>20</sup> E. Fitzgerald Oonagh, *Complexity's Embrace: The International Law Implications Of Brexit* (1st edn, Centre for International Governance Innovation 2018).

<sup>21</sup> E. Fitzgerald Oonagh, *Complexity's Embrace: The International Law Implications Of Brexit* (1st edn, Centre for International Governance Innovation 2018).

It was within the decision of the High Court made on the case of *Davis and others v Secretary of State for the Home Department* that revealed the true value the Charter upholds especially when necessary to facilitate an understanding of whether domestic law is compatible with EU law. In this particular case, the issue at hand was whether the Data Retention and Investigatory Powers Act 2014 was compatible with Article 7 which refers to the right for respect for private and family life as well as to Article 8 which refers to the protection of personal data<sup>22</sup>. The purpose of the Act was to allow the security services of the country to retain personal information from people's phones and internet records for up to twelve months, which however was found to be unlawful on the grounds of incompatibility with EU law. The CJEU declared that the EU Data Retention Directive 2006/24/EC was not compatible with the Charter and was invalidated by the case of *Digital Rights Ireland*<sup>23</sup>. This Act was eventually replaced by one that would be compatible with EU law and a new Regulation that was introduced for all individual citizens of the European Union and the European Economic Areas, including the UK, which is known as the General Data Protection Regulation (GDPR)<sup>24</sup>.

The Data Retention and Investigatory Powers Act (DRIPA) was drafted in as a response to the declaration of incompatibility with the Data Retention Directive 2006/24/EC as it was invalidated by the case of *Digital Rights Ireland*<sup>25</sup>. In this particular case, the directive that was introduced was found by ECJ to be invalid on the basis exceeding the limits of EU legislation and was not in compliance with the principle of proportionality as far as Articles 7, 8 and 52(1) of the Charter and was no longer going to be applicable<sup>26</sup>.

Moreover, DRIPA mirrored some of the qualities from the Data Retention Directive, such as giving the Home Secretary a vast amount of power and in particular the power to demand for telecommunication operators to withhold all communication data for up to twelve months, regardless of how or whether they intended to use it<sup>27</sup>. Additionally, in this case the CJEU had stated that there would be strict requirements and safeguards in place before allowing for interference with Articles 7 and 8 CFR to be acceptable and justified. Notably, there would have to exist minimum safeguards in place to protect the data that was retained. The CJEU also supported this principle, stating that an excessive collection of everyone's personal data and communications record they held was in a generalised manner, with no criteria and no exceptions was entirely disproportionate, particularly the fact that there was no guidelines on how that information was going to be accessed by the national authorities and what the objective of their interference would be. It was under those circumstances that they held it was imperative that those issues would need to be elaborated on prior to the application of the Act and they were to be carried out by an independent body or by the courts with a retention period that would also reflect objective criteria being used in the decision making and implementation it. Seeing as there was a failure to comply with the standards set by the CJEU, DRIPA was declared inconsistent with EU law by the High Court and was disapplied.

There have been arguments surrounding the requirements that the CJEU set out, in particular referring to the possibility that they were much more strict than those that the ECtHR would require. This theory could have some truth, as in the case of *Kennedy v United Kingdom*<sup>28</sup> the ECtHR had entertained a prior authorisation given to the Secretary of State at the time to access the content of data without any further requirements needing to be met, where the CJEU would have asked for an independent body or a court to determine they were authorised to<sup>29</sup>. It can definitely be argued that these two cases and the way they were dealt with indicate that there are attempts being made in order to identify the best way forward to ensure data protection is not lost. In particular, while the case of *Kennedy* shows the CJEU to not apply strict guidelines as to who will be granted the authority to access the data collected, the case of *Digital Rights Ireland* definitely showcases a strong sense of willingness in terms of advancement in the field of data protection law as the ECtHR case law is no longer restricting in that area. If however this approach was not adopted by the ECtHR and

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<sup>22</sup> EU Charter of Fundamental Rights Article 7.

<sup>23</sup> *Digital Rights Ireland v Commission Case T-670/16*

<sup>24</sup> 'What Is The General Data Protection Regulation? Understanding & Complying With GDPR Requirements In 2019' (*Digital Guardian*, 2019) <<https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection>> accessed 9 October 2019.

<sup>25</sup> 'What Is The General Data Protection Regulation? Understanding & Complying With GDPR Requirements In 2019' (*Digital Guardian*, 2019).

<sup>26</sup> (*Uk.practicallaw.thomsonreuters.com*, 2019)

<sup>27</sup> the High Court of the maximum powers contained in DRIPA in *Davis* (n 36) para 65.

<sup>28</sup> *Kennedy v United Kingdom App no 26839/05* (ECtHR, 18 May 2010).

<sup>29</sup> (*Uk.practicallaw.thomsonreuters.com*, 2019)

subsequently introduced to UK law through the HRA, the UK would see their data protection rights diminished or entirely lost.

During the timeframe that the negotiations on Brexit took place, a new Regulation was introduced and came into effect across all EU member states, including the UK, in May 2018. This new Regulation, the General Data Protection Regulation (GDPR) has been charged with the governing of UK data protection law under the principle that there is a need for a harmonised legal framework which is needed in order for the regulation of the methods that are used for personal data collection, data usage and the way it is shared within the EU. Even though GDPR is part of EU law and it will no longer have an immediate affect on the UK when they leave the Union, the government has committed to maintaining a regime that will be equal to that of GDPR the following day after the UK's departure is complete.

In order to achieve that, the Withdrawal Agreement 2018 states that the "body of EU Law as it exists on exit-day will be transitioned into UK law thereafter". Therefore, there will be a UK GDPR drafted by the UK government, however even if there was no provision for that, GDPR applies to all companies that are based in the EU and those with EU citizens as costumers and as a regulation with extraterritorial effect, it affects non-EU countries as well<sup>30</sup>. This is a demonstration of the EU's regulatory power beyond the EU, as it forces the majority of companies that wish to have European customers to oblige by these rules. Additionally, any necessary changes that the GDPR may need and that are relevant to the departure from the EU will be carried out by a separate Statutory Instrument which will be in charge of tasks such as removing references to cross-border data transfers with other Member States as well as ensuring participation in EU wide-institutions such as the European Data Protection Board (EDPB)<sup>31</sup>. The Data Protection Act 2018 will remain to work alongside GDPR as supplementary legislation, however it is at this time unclear whether it would bridge any major gaps caused by the loss of GDPR and whether the Regulation will be a mirrored copy in its entirety.

Overall, taking into consideration the magnitude of the loss of the Charter and the potential it has to fill the cracks in the safeguarding of Human Rights it is important to note that the Charter has only been in force since 2009 and while the protections it offers initially are extended and considerable, they do not compare to the loss of the unfulfilled potential that the Charter has yet to reach. As the UK exits the EU entirely they will no longer be bound by any judgments of the CJEU, which have been working to refine the charter and make sure it delivers solutions to the problems that people are facing every day as far as human rights are concerned.

## Chapter 5 : Data protection developments during Brexit negotiations

The UK Parliament drafted a Withdrawal Agreement in order to set out the terms and conditions of the withdrawal of the UK from the EU. It targets the key topics and sources of concern that have arisen because of Brexit. While the agreement was met with a positive reaction and accepted by the remaining members of the EU, it was rejected in UK parliament on three different occasions, making it impossible to ratify<sup>32</sup>. Continuing from having established the importance of data protection rights and how they have evolved in the three years that Brexit has been negotiated, it is important to understand that as Parliament is currently not accepting the Withdrawal Agreement, there is a possibility of a no-deal Brexit if no further Agreements are accepted by the Parliament as a viable solution.

Data protection laws do not only apply on how data is collected and how it is stored or used but also on how this data can be transferred. Under the GDPR there are certain restrictions to how data can be transferred to a "third country" which refers to countries that are not in the EU. The UK Government has taken a strong position on this, saying they do not intend to apply any such restrictions on transfers of personal data that derive from the UK to the Economic European Area (EEA)<sup>33</sup>. UK organisations will continue to benefit from data transfers in the EU and the US under the Privacy Shield Scheme, but only if the conditions on the scheme are met and the US entity is a fully registered one with a privacy notice that extends protection of transfers. On the other hand however,

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<sup>30</sup> 'GDPR And Brexit - Does The UK Still Need To Comply?' (*GDPR Associates*, 2019).

<sup>31</sup> 'UK: Understanding The Full Impact Of Brexit On UK: EU Data Flows | Privacy Matters' (*Blogs.dlapiper.com*, 2019).

<sup>32</sup> Heather Stewart, 'May Suffers Heaviest Parliamentary Defeat Of A British PM In The Democratic Era' (*the Guardian*, 2019).

<sup>33</sup> 'UK: Understanding The Full Impact Of Brexit On UK: EU Data Flows | Privacy Matters' (*Blogs.dlapiper.com*, 2019) .

the EU has not agreed to grant any such leniency and once Brexit has concluded, the transfer of personal data from the EEA to the UK will be restricted to that of a "third country". This will have a shocking impact on organisations that have relied on the easy movement of personal data in order to conduct business as regular, as they will struggle to provide their services to their EU customers. For a lot of organisations that are affected by this loss of free movement of data, they will have to adopt specific safeguards to ensure that their transfers will be lawful, in particular those that are in agreement of Article V<sup>34</sup> of the GDPR which refers to the correct handling of data. Another way to protect an organisation from an accidental GDPR breach is to adopt the Standard Contractual Clauses, which includes safeguarding data transfers in a contractual agreement between two entities, a form of protection of Article 8 that is approved by the EU as a legal basis for transfers to third countries<sup>35</sup>.

Another basic component of data protection that was recently added into the Charter, extending Articles 7 and 8 was the "right to be forgotten", a concept that was seen in the landmark case of *Google Spain*<sup>36</sup>. In this specific case, the matter at hand was deciding whether an internet search engine operator could be held accountable as a processor of personal information which would appear on web pages owned by third parties. By considering internet search engines as data processors under Directive 95/46<sup>37</sup> there is an opportunity for individuals to invoke their Charter rights against a private operator under the framework of the CJEU<sup>38</sup>. The CJEU ruled in favour of the claimant, stating that "the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when the publication in itself on those pages is lawful".<sup>39</sup> This development was most useful for those who require a link from the list of results published by the search engine to be removed, on the basis of considering different circumstances that are presented by the case and whether the data needs to be removed. The main focus of this issue is to continue to monitor the information that is being published by the search engine, in particular information that was published beyond a certain period of time and represents information that may no longer be accurate or information of a past mistake<sup>40</sup>. With this decision, the CJEU has defended that the Articles 7 and 8 ultimately "override, as a rule, not only the economic interests of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subjects name"<sup>41</sup>. It is important to note, that prior to the introduction of the GDPR, the CFR the right to be forgotten was unique to the CFR. Nowadays it is protected by the GDPR, however had Brexit negotiations ended sooner with no promises of GDPR being adopted into UK law, there would be a complete loss of that right along with the Charter.

## Chapter 6 : Immigration: The Immigration Bill, The free movement of people and the EU settled status

The issue of immigration has been one of the most key topics of the discussion as far as Brexit is concerned. It is, as aforementioned, one of the main reasons that the campaign that was lead in favour of leaving the EU succeeded, as the immigration rates in the UK have grown exponentially throughout the duration of the enforcement of the free movement of people in the UK.

Ever since the free movement of people begun in the UK, the majority of the EU free movement law has been applied in the UK through statutory instruments that come up under section 2 (2) of the European Communities Act 1972 (ECA). Through Section 2, the ECA is granted the power to create orders, rules, regulations and schemes which are created with the sole purpose of meeting EU obligations within the UK. It was that very provision that facilitated for the creation of the

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<sup>34</sup> Article 5, EU GDPR "Principles relating to processing of personal data".

<sup>35</sup> 'International Transfers' (*Ico.org.uk*, 2019).

<sup>36</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos [es]*, Mario Costeja González, C-131/12.

<sup>37</sup> Directive 95/46/EC of the European Parliament and of the Council ,[1995] OJ L281/31.

<sup>38</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos [es]*, Mario Costeja González, C-131/12.

<sup>39</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos [es]*, Mario Costeja González, C-131/12, (n45)

<sup>40</sup> *Ibid*, para 93.

<sup>41</sup> *Ibid*, para 97.

Immigration (EEA) Regulations 2016 was created. Any individual who is entering the UK by exercising EU law rights that are enforceable at the current time, is doing so under Section 7 of the Immigration Act 1988 or under section 2(2) of the ECA. Individuals who fall under that category are exempt from the requirement of obtaining immigration leave to enter or remain.

It was therefore under this framework that the Immigration Bill was introduced. Going into greater depth and breaking apart the Bill, clauses 1-4 were in charge of setting the provision that would call to an end the free movement of EU citizens to the UK. The citizens of the EU that are currently in the UK would have to be brought under UK Immigration law and require authorisation in order to enter and/or remain in the UK. The second part of the Bill, clause 5 schedule 2 and 3 outlines the necessary provisions for social security co-ordination<sup>42</sup>. Part 3 of the Bill, Clauses 6 and 7 are to outline the general provisions on the interpretation of EU in domestic law where applicable, as well as commencement towards being entirely legally unbound from the EU.

Alas, in order for the Bill to fulfil its purpose and repeal free movement and ultimately bring EU citizens under the control of UK immigration law, the Withdrawal agreement or a deal of equivalent weight would have to be ratified through parliament. This new immigration system would only begin to come into effect in January 2021 as the UK turns over an entirely new leaf with and returns to existing outside the EU. Clause 1 and Schedule 1 are the most substantive as far as the free movement of the UK is concerned as it sets out the various provisions or pieces of legislation that will need amending, including any legislation derived from EU law that has been adopted as domestic legislation, any EU derived rights as well as any direct EU legislation that was possibly retained<sup>43</sup>. Once the free movement is completely repealed, there are guarantees by the government that the rights offered under the free movement will be replaced by a range of measures that would be more suited towards the relevant individual rather than a generalised system. A product of these ideas has already been discussed in the form of immigration rules for settled status of EU citizens.

Moreover, there is academic debate that while the EU withdrawal Bill does offer the opportunity of signing up to the settlement scheme, it is quite possible that the immigration bill will only strip EU citizens that choose to remain in the UK of their rights and can offer no substantive guarantees to replace them. The UK Parliament Human Rights Committee raised the issue of how uncertain the EU settlement scheme appears to be as well as the rights acquired through it.<sup>44</sup>

While the Bill says that a lot of the rights of EU citizens living in the UK would be removed after Brexit, especially those focusing around EU law protection, such as the free movement of people and the entirety of the Charter of Fundamental Rights which protects more rights than any legislation found in domestic or international law. Moreover, the power to reinstate these rights relies on the home Secretary deciding to propose secondary additional legislation to support the domestic legislation that already exists. The Parliament Human Rights Committee (PHRC) of the UK has expressed concern about the guarantee of citizens rights and whether it is contingent on Ministers that would take action and leave families in a rather difficult situation as far as their social security, their housing and their other free movement of rights are concerned.

## Chapter 7 : The radical immigration crisis within UK politics

The new Prime Minister introduced the idea of an amnesty that would apply for illegal immigrants, though they would have to have resided in the UK with no previous criminal record for 15 years. It was immediately criticised, especially within his own party as it would be seen as rewarding illegal behaviour and it would be entirely unfair to migrants who take the time and the care to use the proper channels designated for it. His logic behind this proposal was to ensure that another Windrush scandal wouldn't occur, even though the circumstances behind the scandal should be easily distinguishable as the people who were caught up in the scandal had entered the UK legally.

The EU settlement scheme has sparked a lot of debate and has been a great cause of concern for a lot of academics and politicians alike. The PHRC shares concerns that were expressed by different parliamentary committees over the fact that the EU settlement scheme is as currently proposed creating problems in a few different fronts. First and foremost, there is a lack of physical proof of the status. There seems to be greater concern about raising awareness over the Scheme and assisting individuals with successfully filling their applications than issuing physical proof of status for those who are under the scheme in order to successfully avoid another Windrush scandal scenario.

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<sup>42</sup> 'Research Briefings' (*Researchbriefings.parliament.uk*, 2019).

<sup>43</sup> Brexit's effect on Immigration, Citizens and Human rights, Michaela Benson, (2019)

<sup>44</sup> 'Immigration Bill Strips EU Citizens In UK Of Rights After Brexit - News From Parliament' (*UK Parliament*, 2019).

There is also the matter of ambiguity regarding any individuals who miss the deadline for the application of the Scheme. It is currently unclear whether those who fail to register within the designated framework will be eligible to apply at a later stage, whether they will be treated as a special individual case or whether they will be denied the right to remain regardless of their personal situations, for instance an individual who has lived and worked in the UK their whole life. In light of protecting rights, there should be more of a provision for more vulnerable people and individuals who will be at risk of losing the deadline on the basis of difficulties accessing the Settlement Scheme.

## Chapter 8 : The Workers Rights in a Post-Brexit world

During the Brexit negotiations, the Prime Minister at the time Theresa May focused largely on immigration law. She took a hard approach to immigration, making promises to lower immigration influx levels in order to create a "hostile environment for migrants"<sup>45</sup>. However, since the new Prime Minister Boris Johnson has taken over, he has taken a different approach towards immigration. During his first ever speech at the House of Commons, he effectively drafted a plan to seek the advice of the Migration Advisory Committee in order to radically rewrite the system. Eventually, a White Paper was brought forward a proposal for a "Skills Based Immigration System" which was drafted in preparation of the UK leaving the UK and will apply to both EU and non EU citizens. Under this new Bill, migrants will only be able to enter the UK if they hold a secure job offer and if that job offers a salary that pays above the threshold which is currently set at £30,000 and has been cause of outrage. The reason for the outrage is based on the fact that most full time jobs will not reach the high threshold set by the Bill and will cause UK employers and particularly the NHS a lot of difficulty, as they employ a diversity of people from different backgrounds and their salaries at beginner levels do not reach the threshold. It could be argued that a skills based immigration system would not be entirely compatible with human rights as it is entirely limiting on the aspect of the type of employment individuals would need to acquire to meet that threshold. That would only be possible after the loss of Article 15 of the CFR, which protects the rights of individuals to choose an occupation in a "freely chosen" manner. The Prime Minister will be taking a lot of employment choices away, with sectors that always need more skilled workers such as care assistants, receiving an average annual salary of just £18,255<sup>46</sup>.

The rights for workers that were already employed before the UK entirely withdraws from the EU are given guarantees by the government that would not change. There would be an active effort to maintain the status quo under the Equality Act 2010 and there will be not be a reduction against the standards of workers rights that are already granted by EU law. The Department for Exiting the European Union published a factsheet that divulged that UK workers rights were in place before the UK entered the European Community and they have been upheld ever since. They also stated that in regards to employment protections, the UK law often provides greater safeguards, such as higher annual leave allowance and more generous maternity and paternity leave<sup>47</sup>. However, a lot of government critics<sup>48</sup> are right to shine light to the fact that even though parliament made promises that the workers rights would be kept the same and not diminished after Brexit, there is no guarantee that the future parliament will not. No UK law can represent a cast-iron guarantee as future Parliaments can always undo laws made by the parliament before them, as Parliamentary Sovereignty overlines.

## Chapter 9 : The right to fair trial without the Charter of Fundamental Rights

The right to a fair trial is a key element that needs to be protected under any circumstances. The law can only deliver justice, if the system provides for a fair trial. Article 6 of the ECHR protects the right to a fair trial, however article 47 CFR provides a bigger scope of protection and safeguarding seeing as it is not restricted to cases where individuals show "determination of his civil rights and obligations or of any criminal charge against him"<sup>49</sup>, unlike the HRA. The Charter also includes administrative proceedings on matters such as immigration, a key example of which being the case of *ZZ v Secretary of State for the Home Department*<sup>50</sup> in which case an individual with a dual Nationality

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<sup>45</sup> 'UK Immigration System - Update September 2019 - David Gray Solicitors LLP' (*David Gray Solicitors LLP*, 2019).

<sup>46</sup> Average National Salary, Government.org.

<sup>47</sup> Lock, Tobias, Human Rights Law in the UK after Brexit (September 29, 2017). Edinburgh School of Law Research Paper No. 2017/17.

<sup>48</sup> Ibid.

<sup>50</sup> *ZZ v Secretary of State for the Home Department* [2014] EWCA Civ 7.

of both French and Algerian was denied permission in the UK. The Home Office was able to establish such a decision by relying on Article 27 of the Citizens Rights Directive which enabled EU Member States to restrict the free movement of EU citizens on the grounds of concerns due to public policy, public security or public health<sup>51</sup>. The claimant had to appeal this decision through a Special Immigration Appeals Commission which is in charge of checking whether the Secretary of State has issued a notification on grounds of national security, followed by lengthy proceedings by that same Commission from which him and his lawyer were excluded from, depriving him of the right to be actively involved in the proceedings behind closed doors. While the Committee had decided that there was sufficient evidence to keep him out of the country, he did not try to appeal it. He did however make an argument for the failure of the Special Immigrations Appeal Commission to give him a trial that did not exclude him and to inform him of the reasons he was being denied entry to the country<sup>52</sup>. His claim would not have been protected by Article 8 of the ECHR alone, as their scope does not include immigration law. It was Article 47 CFR that applied, seeing as it does not have such a limitation. The CJEU subjected compliance with article 47 CFR and these standards were eventually adopted by the CJEU in immigration cases<sup>53</sup>. It could be argued that once Brexit is effectively completed, there will be a major loss in the protection of human rights in issues of immigration, where the only rule that could make a difference and protect individuals seeking a fair trial to gain entry to the country will be entirely scrapped.

While there is undoubted similarities of the frameworks the Charter and the HRA offer, the weight of their proceedings are vastly different. Seeing as the Charter constitutes EU law it will always take primacy over conflicting domestic law, including Acts of Parliament. Any national court, regardless of its position in the judicial hierarchy, is obliged to disapply any national ruling that could be found to be conflicting with direct applications or effective applications of European Union law. On the contrary, if an Act of Parliament breaches human rights that are currently protected under the HRA, for the vast majority of cases all the HRA can offer to the claimant is to issue a declaration of incompatibility under S.4 HRA and that would only be an option in higher courts<sup>54</sup>.

#### Conclusion and ways forward

As it can be drawn from the discussion, with the exception of some very specific cases that are limited to the interpretation of EU legislation that will be introduced into domestic law, the EU fundamental rights are going to no longer be protected under the British legal system. There will be procedural and substantive reductions in the array of safeguarding and protection that would have been available to individuals in the timeframe before Brexit. This of course will cause a lot of uncertainty and create a lot of grey areas that will need interpretation and clarification, as well as active efforts from the government to include as much EU law protection of human rights as they can into domestic law whether it is in the form of a parliament approved Bill, or the scenario of a no-deal Brexit. It is crucial to note that in the unlikely case of the HRA not being reformed, human rights will not be restored to the state they previously were, as a lot of the safeguards in place were introduced by the Fundamental Rights Charter and only later on adopted onto the UK level. It is also important to note that for the first time the HRA will be protecting human rights in the UK based solely on domestic law. There will be an opportunity for the government to utilise Brexit to issue a reform on domestic human rights law and perhaps attempt to introduce the British Bill of Rights again in a way that will be accepted by the Parliament. Regardless of whether human rights are protected under the law of the HRA or the British Bill of Rights, there will always be the potential of the standards regressing rather than progressing. Brexit has been such a polarising issue for the entirety of the three year negotiations and during that time, little to no certainties have been obtained. The risk of no-deal Brexit is growing greater by the day, causing people from all backgrounds to be fearful of the future that is to come. While some honourable attempts have been made to protect human rights, it is not entirely clear whether domestic law will be able to fill the gaps left by the Charter of Fundamental Rights. As far as workers rights are concerned, while the current parliament makes promises to keep the rights those who are already employed in the UK the same, their promises for the future generations and those who will be entering the country after Brexit do not look promising. Overall, the consequences of Brexit could have been predicted almost from the start, however the crucial part to ensure stability for the future is to attempt to maintain the current level of human rights protection that is currently in

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<sup>51</sup> Article 27(1) Directive 2004/38).

<sup>52</sup> *ZZ v Secretary of State for the Home Department* [2014] EWCA Civ 7.

<sup>53</sup> Lock, Tobias, Human Rights Law in the UK after Brexit (September 29, 2017). Edinburgh School of Law Research Paper No. 2017/17.

<sup>54</sup> *Ibid.*

place. Ideally, that would be achieved by introducing the key protections of the Charter such as data protection, the right to a fair trial, the right to a family home and the right to be employed fairly and justly with no discrimination. Unfortunately however, the Charter upheld such a strong position both substantively and procedurally that will be hard to mimic and therefore, important protections may inevitably fall through the cracks and be lost.

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