Rt Hon David Davis MP, Secretary of State for Exiting the European Union
Department for Exiting the European Union
Correspondence Team
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Dear David

European Union (Withdrawal) Bill

Thank you for your letter of 20 November and the accompanying ECHR Memorandum. We note that the letter to the Committee and the Memorandum are intended to constitute the Government’s response to its fifth report of the 2016-17 parliamentary session, ‘The human rights implications of Brexit.’ While a number of that Report’s conclusions and recommendations have been overtaken by events and are understandably therefore not referred to in detail, others remain live issues and it is disappointing that the response does not address them at all. These issues are residence rights (paragraphs 50-53) and human rights clauses in trade agreements (paragraphs 105 and 106). We expect to be provided with a clear statement of the Government’s current position on these issues.

We are also disappointed that your response does not address our questions on the EU (Withdrawal) Bill in sufficient detail. During the Committee stage debate on 21 November concerning clause 5, the Government did not provide any clarity on the outstanding questions below.

**Definition of “fundamental rights and principles”**

Your letter clarifies that the term “fundamental rights and principles” refers to “the rights and principles which underlie the Charter and which are to be found elsewhere in EU law.”

i. Are we correct to infer that all the provisions in the Charter would fall within this definition and would be retained in domestic law after exit day?

Further, it is important that the Government goes beyond citing examples and clearly identifies which of the underlying rights and principles will confer an enforceable right and which will be retained merely for interpretive purposes.
ii. Please can you clarify which of the provisions you consider to be rights and which you consider to be principles in domestic law after exit day?

**Status of fundamental rights and principles based on the source law**

We understand from your letter that the “fundamental rights and principles” referred to in clause 5(5) will be retained in domestic law by virtue of their source. As set out in the Explanations to the Charter, the sources of the Charter include the ECHR, EU legislation, general principles of EU law, international conventions, and national constitutions. Some of the Charter provisions contained in EU legislation may be retained by virtue of clauses 2, 3, or 4, however, some may fall outside of the scope of these clauses. Consequently, if the sources of the underlying rights and principles are (i) not retained by virtue of clauses 2, 3, or 4; (ii) are not already incorporated into domestic statutes; or (iii) are not replicated at common law, then they will no longer be available.

We would therefore be grateful if you could clarify the following.

**Charter provisions based on the ECHR**

iii. Where the source of the Charter provision is the ECHR, but the scope of the Charter provision is wider, will the wider scope of these rights be lost?

**Charter provisions based on EU legislation**

iv. Which of the Charter provisions will be preserved in EU-derived domestic legislation by virtue of clause 2?

v. Which of the Charter provisions will be converted from direct EU legislation into domestic law by virtue of clause 3?

vi. Which of the Charter provisions will be converted from directly effective EU rights into domestic law by virtue of clause 4?

vii. Which of the Charter provisions will not be caught by clauses 2, 3, or 4 and will not, therefore, form part of “retained EU law”? How will these rights be saved?

**Charter provisions based on international conventions**

viii. Various Charter provisions are based upon international conventions that have not been fully incorporated into domestic law. Will the Government commit to fully incorporate these international instruments, or will these rights be lost?

ix. Your letter states that international instruments may have been the “inspiration and guidance” for the development of EU fundamental rights, but “those instruments are not what gives those rights and principles legal force in EU law – it is EU law which does that”. Please can you clarify what you mean by “the EU law version of those rights and principles will have effect in UK law after exit”?
General principles

x. We note the statement of the Solicitor General, speaking in the House on 21 November, that he will revisit paragraph 3 of Schedule 1 concerning rights of action based on general principles of EU law. Please can you clarify exactly which Charter rights you consider to be largely or wholly drawn from a general principle of EU law such that they will no longer provide a right of action as currently drafted?

Charter analysis

We note that your department will shortly be publishing an “analysis” of the Charter of Fundamental Rights. Speaking in the House on 21 November, Dominic Raab MP confirmed that this would be published by 5 December.

xi. Please can you explain why an analysis is being undertaken at this stage and for what purpose?

We look to your publication on 5 December to provide the answer to these outstanding questions.

Yours sincerely

Harriet Harman MP
Chair