

Article

# Diplomatic and Consular Protection with Special Reference to Article 46 of the EU Charter of Fundamental Rights

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**Abstract:** Central to EU law and policies is the protection of human rights. For the European Union (EU), these rights are sacrosanct. Over the years, more substance to the protection of fundamental rights emerged. The European Court of Justice (ECJ) is notably entrusted with the protection of human rights and has always deemed it imperative that fundamental rights must be protected within the scope of EU law. The Court has always relied on strong European traditions and values and is guided by the inalienable principle of the rule of law. In the human rights record of the EU, the Kadi cases occupy a special place. The scope of the application of Article 46 is limited, and the application of the Charter is still not used to its full potential, and too few citizens are even aware of it. The Commission intends to present a strategy that would improve the use and awareness of the Charter. By the middle of 2020, the UK's withdrawal from the EU had become acrimonious. One issue that still begs the conclusion is the status of and protection available to EU citizens living in the UK beyond 31 December 2020. These basic rights of its citizens are not negotiable for the EU.

**Keywords:** Article 46; Brexit; Charter of Fundamental Rights; ECJ; EU law; human rights; Kadi cases; Treaty of Lisbon

## 1. Introduction

This Charter of Fundamental Rights (the Charter) was first proclaimed by the European Union (EU) Parliament, the Council and the Commission of the EU as an instrument of law on 18 December 2000 (Rosas 2012). It became legally binding on the EU and all Member States with the entry into force of the Treaty of Lisbon (the Treaty) on 1 December 2009. With its incorporation into the Treaty, the Charter acquired, in terms of Article 6(1) of the former, equal value with the founding Treaties. In other words, the Charter, according to Lenaerts—who at the time of writing the article in his personal capacity was Vice-President of the European Court of Justice (ECJ)—“is primary EU law” (Lenaerts 2012). For this declaration on the status of the Charter, he refers to several other leading authorities. The Charter followed first on the European Convention on Human Rights (the Convention). This Convention was signed in Rome on 4 November 1950 by 12 Member States of the Council of Europe and entered into force on 3 September 1953. Then the European Social Charter and other human rights conventions were adopted. This Social Charter (revised) of 1996 embodies in one instrument all rights guaranteed by this Charter of 1961, its additional Protocol of 1988 and adds new rights and amendments adopted by the Parties who are members of the Council of Europe. Some of the provisions constitute refinements or even developments of existing human rights instruments (Rosas 2012).

Central to EU law and policies is the protection of human rights. The Treaty guarantees that protection. In Article 2, the values of the EU are enumerated and on which the EU is founded for its adherence to the values of democracy and the rule of law and respect for fundamental rights. The Treaty

gave the Union its own values for the first time (Nakanishi 2018). Lavranos terms these values as the very “untouchable core” of the EU legal order (Lavranos 2009b). For Weatherill, this ensures “the EU as a project driven by values” (Weatherill 2016). The foundational values are laid down as the rule of law, human dignity and equality. Listing the protection of human rights as an important one of the Union’s values, the Article commits the EU to adhere to human rights. The EU’s values are, therefore, to be respected not only by the EU’s organs but also by Member States (Nakanishi 2018). Article 21(1) of the Treaty formulates the political principles that must guide the EU. These are listed as democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of international law. Nakanishi draws attention to the fact that this also includes respect for the principles of the United Nations (UN) Charter and that human rights, as one of the political principles, boost the EU “in protecting human rights in its external relations” (Nakanishi 2018). For him, the combination of the objectives in the Treaty does not only afford the EU the opportunity to protect human rights in the world, but it also enables the Union to do so in pursuing its own internal and foreign policies. In fact, many international agreements concluded by the EU with third countries include human rights clauses (Nakanishi 2014; Bartels 2015). The objectives to be pursued by the EU are described in Articles 3(5) and 21(2) of the Treaty. Accordingly, all the organs of the EU support and advance this protection as an objective of the EU.

Eeckhout stresses an important point that needs to be highlighted and understood, namely that there is “a proliferation of sources of EU human rights law”. He identifies three sources: the Charter, the Convention and general principles of EU law. He concludes that the different sources of EU human rights law should be read in an integrated way, contributing to the further development of a European common law of human rights (Eeckhout 2014). One important point that requires clarification is the relationship between these three sources, especially between the Charter and the Convention, as it is not constitutionally regulated—at most Article 6 of the Treaty “simply juxtaposes them” (Eeckhout 2014). While the existence of the Convention is noted and its importance recognized, it is neither the intention nor the purpose of this article to dwell on it. Suffice it to state that the Charter is clear that it does not want to belittle the Convention in any way. Article 53 of the Charter provides:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Furthermore, Eeckhout emphasizes that the Convention is “a special case in that, in substance, it is incorporated in the EU Charter, which is of equal value to the Treaties” (Eeckhout 2014).

The Charter encompasses the ideals underpinning the EU: the universal values of fundamental rights. It brings together in one single text all the rights of the individual. Although the Charter only explicitly refers to the implementation of EU law in Article 6(1), all institutions and Members of the EU must also respect the Charter in the EU’s foreign relations.

Article 46 of the Charter deals with diplomatic and consular protection and stipulates the following:

“Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.”

The ECJ is notably entrusted with the protection of human rights in the EU (Wollenschläger 2018). This Court has guaranteed fundamental rights as far back as 1974. Whereas EU law guarantees human rights to EU citizens, it is the duty of the Court in interpreting EU law to ensure the faithful application of those rights that are protected by the EU and all its laws and human rights instruments (Ofuji 2018). Coupled with the force embodied in the Treaty, more substance to the protection of fundamental

rights emerged with the adoption of the Charter. It is established case law that mixed agreements are within the Court's interpretative jurisdiction in so far as their provisions are within EU competence (Koutrakos 2010). Eeckhout (2014) elaborates further:

“The EU system of human rights protection . . . is characterized by the integration of laws [and] EU human rights law integrates both the constitutional laws of the Member States . . . as well as other international instruments.”

The EU judicial system unashamedly defends human rights and thereby ensures their adherence and enforcement also on a national level in the Member States.

Great challenges face EU citizens in the post-Brexit era. Then their treaty-ensured legal protection, and in particular those that Article 46 of the Charter guarantees, falls away, and they will henceforth rely for their presence in the UK on new formulations derived from acrimonious negotiations between the UK and the EU during which other issues demanded more time and consideration. In this forthcoming era, the Charter as such will no longer be available to them.

## 2. The European Court of Justice

Against this background, the vital and complex question of the scope, limits and application of EU human rights law must be discussed (Lenaerts 2012). The ECJ has always deemed it imperative that fundamental rights must be protected “within the scope of EU law”. With the Court being the chief interpreter of EU law and having maintained that role ever since its establishment, it is necessary to assess this role in the context of the provisions of the Charter. For that to be done, the prominent place that the ECJ occupies in the structure of the EU must first be evaluated. Its complexity is firmly rooted in a structured framework that demands both a juridical and a political grasp and appreciation. Its role cannot be ignored and must be recognized (Eksteen 2020).

No democracy can thrive without independent courts, guaranteeing the protection of fundamental rights and civil liberties. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. Ovádek (2016) quotes from a full Court opinion in which the ECJ defined this in 2014:

“A tripartite of interlinked legal issues with particular constitutional significance to the Court and the EU: the protection of fundamental rights in the EU, including its legal sources; the observance and development of international law; and the autonomy of the EU legal system, including the CJEU's [ECJ's] role within it.”

The ECJ's mandate has evolved over many decades. It has as its overall aim to ensure that the Union shall be perceived as one unit, speak with one voice, and implement consistent policies (Pernice 2008–2009). When the Court interprets Treaties, it retains to a maximum degree judicial power to interpret that which applies to the Union and plays a key role in developing the law of EU affairs. Being the core to the judicial identity of the Union, the ECJ is one of the most powerful supranational courts in history with an extensive authority that has been clearly achieved and defined. For the EU, the ECJ forms an integral part of overseeing all judicial aspects of the Union. Thus, its Court is a non-negotiable subject.

The rule of law is one of the common values upon which the EU is founded and part of the common constitutional traditions of all Member States. In terms of the Treaty, all EU institutions are responsible for guaranteeing the respect of the rule of law as a fundamental value of the EU and ensuring that EU law, values and principles are respected. For Pardavi (2020), the rule of law “is an essential foundational value of the EU.” He added this crucial observation:

“Without it, neither citizens nor private sector actors can feel secure that their rights will be duly protected. In this sense, our security as European citizens and businesses is what is at stake when the rule of law is threatened.”

As guardian of justice, the ECJ is guided by the inalienable principle of the rule of law. Threats to the rule of law challenge its legal, political and economic basis. Deficiencies in one Member State have an impact on the other Member States and the EU as a whole. Bulgaria, Hungary and Poland are lately seen as the Member States that “have been able to run roughshod over the rule of law for several years” (Dempsey 2020). Ensuring respect for the rule of law is a primary responsibility of each Member State. In her State of the Union 2020 address, EU President Ursula von der Leyden observed:

“The rule of law helps protect people from the rule of the powerful. It is the guarantor of our most basic of every day rights and freedoms.”

The other characteristic that is an inextricable part of the Court’s existence and flows from the application of the rule of law is judicial review. The Court has re-affirmed in several rulings that “the very existence of effective judicial review to ensure compliance with EU law is of the essence for the rule of law”.

The ECJ has always relied on strong European traditions and values. For the Court, the rule of law is vital to create and ensure a democratic and equitable Union and to defend its core values, principles and objectives. Throughout its history, the Court has held the rule of law to be supreme and the fundamental cornerstone of the EU and for what it stands and wants to promote. It is, and remains, undeniably sacrosanct for the Union—as a former Foreign Minister of Luxembourg observed: “The rule of law is the cement of the EU” (Muller and Schult 2017). It is the linchpin of the Union. It permeates the jurisprudence of the ECJ. In the final analysis, it is the EU body politic that proposes, but its judiciary that disposes. The Court will not tolerate any action that will undermine the Union and its effectiveness. Even in times of crisis and conflict, it is incumbent on the judiciary to ensure that the rule of law is respected, obeyed, enforced, and defended so that it remains and is held supreme.

The EU is a major treaty-making power and signatory to numerous bilateral and multilateral agreements. The EU is committed to more than a thousand such agreements. They form part and parcel of the legal order of the EU and bind the Union and each of its Member States. Apart from judicial review being of such crucial importance in respect of all these agreements, the Court also bears the heavy responsibility to oversee the proper and consistent interpretation and application of the foundational law of the Union. Decisions of the ECJ carry, in many instances, profound consequences. EU law, as applied by the ECJ, determines how international law is to be adhered to by the EU and its Member States. Consequently, the Charter forms ipso facto an integral part of the EU’s jurisprudence, and together with other major legal instruments, it is a guiding light for the ECJ in its pursuit of enforcing a human rights regime throughout the Union.

### 3. Methodology in Respect of the ECJ

During the EU’s existence, international law has become part of its legal order (Wouters et al. 2008; Cannizzaro et al. 2011; Boschiero et al. 2013). International obligations of Member States are no longer confined to their own domestic constitutional surroundings. They are now increasingly governed by EU law. European integration has brought consequences for the Member States in the field of international law. The ECJ has facilitated and advanced European unification by means of judicial interpretation and influential rulings. This interpretation became central to its transformation of EU law from treaty-based international law into what has been described as “a hegemonic supra-national legal order” (Beck 2018).

It is against this background that the ECJ’s application and interpretation of international law must be assessed and recognized. As methodology seeks to define the means of acquiring scientific knowledge, the Court consequently supplies rich, varied and significant research material. As a source of international law, the Court is unique. Its rulings contain persuasive arguments to ensure the proper structuring of core theoretical frameworks for research. The main structure is thus based primarily on qualitative research focusing on the identification of the relevant rulings and, thereafter, systematic analysis of their contents and impact. To complete the understanding of the ECJ’s place in

international law, these rulings must be placed in the broader context of the Court's own understanding and appreciation of the EU's legal order (Eckes 2010).

When it comes to the sources of international law and the practice of treaty interpretation, no better institution presents itself than the ECJ. Especially its treaty interpretation is beyond compare. Rulings in which these interpretations are embedded have cemented the pillars of the European legal order. Bold jurisprudence has enabled the Union to advance new policies. What has emerged from this role of the Court is that it presents two sides of equal importance: decisions advancing the aims of the EU; and decisions limiting the formulation and execution of policy.

In methodological writing, the term qualitative data is generally taken to encompass the rough materials researchers collect from the field they study. The case study research method provides insight and enables interpretation leading to a substantive end product—an in-depth study of a particular topic rather than a superficial reading of a few sources. A careful case selection that focuses on relevancy is at the heart of this qualitative research. The array of cases that is available for this purpose is impressive and unsurpassed. One point in this regard that must be noted is the one that has been highlighted as follows:

“The decision-making of the CJEU is not subject to unusually high legal uncertainty. The CJEU's decisions are probably more predictable than those of many higher national courts. They are predictable, however, not because the CJEU approach is governed by a high degree of methodological rigor, but because its pro-Union prejudice is so settled.” (Beck 2018)

#### 4. Basic Tenets of EU Law

Many ECJ decisions have political dimensions. Several rulings have addressed fundamental principles such as human rights, monetary policy, immigration and citizenship. The Court is committed to guiding the EU on these issues. It is this overall involvement that fits into the subject matter of this presentation. During the EU's existence, international law has become part of its legal order. International obligations of Member States are no longer confined to their own domestic constitutional surroundings. They are now increasingly governed by EU law. European integration has brought consequences for the Member States in the field of international law. The ECJ has facilitated and advanced European unification by means of judicial interpretation and influential rulings. This interpretation became central to its transformation of EU law from treaty-based international law into what Beck (2018) describes as “a hegemonic supra-national legal order”. In evolving over decades, the ECJ has transformed itself from being a Court by treaty law into one that is dominant and continues to achieve supra-national dominance over the courts of Member States and in matters of international treaty law. Then by doing so, the ECJ has ensured the supremacy of EU law over potentially conflicting international law. The EU demonstrated to the world through its Court that robust international legal oversight can co-exist with important national values such as democracy and human rights, dealing with security threats, and respecting heterogeneous national values. Once empowered as such, the Court was set to rule on the legality of counter-terrorism measures against individuals. The history of court cases captures crucial developments in and important applications of rulings, especially when a particular issue or ruling is studied over a period of time. This life trajectory ensures that critical events are evaluated.

At an early stage, the ECJ established the doctrine of EU law supremacy. That, in turn, created the doctrine of direct effect. In *Van Gend and Loos* and in *Flaminio Costa*, the ECJ structured these two pillars of EU law. They carry consequences for every Member State. In the case of a conflict, national law must yield to community law. The impact of these two maxims has been considerable. They are of profound importance for the EU legal system. They are still guiding principles. They resonate until this day. Together these two principles are regarded as perhaps of the most important achievements of the ECJ in constructing a constitutional legal order for the EU and, according to Eckes, the development of the general principles of EU law (Eckes 2010). Due to the establishment of these two doctrines and

their meticulous and consistent application, the Court no longer had to defend its existence, but was able to expand its jurisdiction, and consequently also its influence beyond the borders of the EU.

Over the years, the Court has confirmed and further clarified the principle of effective judicial protection and the right to an effective judicial remedy. No study of the EU legal system and of the impact of ECJ's rulings on human rights is ever complete without due attention paid to what is commonly referred to as the Kadi cases. The main and most important ruling of the four cases is the one commonly known as Kadi II. In the human rights record of the EU, these cases occupy a special place as a beacon that reminds and demonstrates to the Members of the EU, but, moreover, also, most importantly, to the international community, especially the United Nations (UN), that human rights are sacrosanct in the EU establishment.

From the above, it is clear that the foundation on which human rights was constructed was firm. To concretize this fundamental approach to human rights and to understand why these rights were protected without precedent, it is imperative that due regard be paid to the Kadi cases, which became the hallmark of the EU's commitment to human rights.

## 5. Kadi Cases

Before attending to these cases, it is important to record that the ECJ was already in the forefront of the EU's fundamental-rights protection ever since it made this declaration in the *Stauder* case in 1969 that fundamental human rights are "enshrined in the general principles of Community law and protected by the Court".

The Kadi cases left an indelible mark on the approach of the ECJ towards human rights and foreign affairs and the EU's relations with the UN Security Council (UNSC). On one hand, the landmark rulings empowered the EU to play a role in foreign affairs and security policy. On the other hand, it placed fundamental rights, and human rights in particular, at the apex of the Union's edifice and the central point of the EU's approach to foreign affairs. To better understand and appreciate the whole Kadi saga and its far-reaching consequences, there is no more useful publication than the one edited by Avbelj and her numerous contributors (Avbelj et al. 2014). It contains indispensable research material. Each of the contributors deals with a wide range of topical subjects. Background on Kadi and the Foundation is necessary to understand the complexity of all the issues the ECJ had to deal with and why each of the different decisions caused such a deluge of commentary—and why the reasoning for each provoked such severe criticism in certain quarters. Suffice it to focus mainly on the second of the four rulings—the appeal handed down by the ECJ on 3 September 2008 that led to the first Kadi ruling on 21 September 2005 being overturned. Ovádek (2016) categorizes this second decision as follows:

"One of the most important constitutional statements of the Court since the inception of the Union legal order and which has given rise to legal controversies far outside the EU."

The four decisions by the EU's legal system involving Kadi, a Saudi national, and the Al Barakaat International Foundation, being a Somali firm founded and located in Sweden, have special significance for two main reasons when an assessment of the ECJ's role in human rights is made. First, by putting fundamental rights at the heart of the EU legal order and its foreign policy (De Búrca 2010; Tridimas and Guitierrez-Fons 2009), the ECJ placed a sharper focus on security concerns and human rights protection (Harpaz 2009). Second, there is no conflict between European and international law obligations as far as the aim of fighting international terrorism is concerned (Lavranos 2009a). What the Court did was to warn EU institutions and the Member States that they cannot hide behind the UNSC and escape judicial review. For Poli and Tzanou (2009), this is an exercise of full judicial review over EU regulations implementing UNSC resolutions. For De Búrca, a seasoned authority on the ECJ and an expert on the Kadi cases, the most important aspect of Kadi II, in particular, is the Court's vindication of the basic rights of individuals and its insistence on adequate guarantees of due process before an individual's assets can be indefinitely confiscated (De Búrca 2010). However, for her, there was definitely much more at stake in that Kadi case: it established guiding principles that cannot be ignored. The Court

advanced the autonomy of EU law and importance of human rights in the EU in no uncertain terms “the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights”.

It presented a high-profile and path-determining opportunity for the ECJ to make its views felt in the international debate about the extent to which human rights principles should inform the UNSC’s sanctions regime, as well as to develop its jurisprudence on the relationship between the EU and the international legal orders in the novel context of the UN (De Búrca 2010). Its handling of these cases has not made the ECJ universally popular or appreciated—even among some members of the EU. Some of the decisions went against the will of Member States or caused the chagrin of many international players, such as the UN. The four cases captured the attention of the ECJ for a period of 12 years. In the end, the Court ensured that human rights not only deserve a prominent place in the EU and its legal system but that it will be protected and their fundamental principles are safeguarded.

## 6. Status of Charter

Although the Charter is part of binding primary EU law and constitutes an important codification and clarification of fundamental rights in the EU, the scope of its application is limited. Rosas describes in what significant way it is limited.

“The Charter only applies when EU law is at stake. When national courts and authorities in the EU Member States are confronted with problems of purely national law, they are not obliged to apply the Charter but should instead rely on the national constitutional Bill of Rights as well as the international human rights instruments which are binding on the Member State in question. The borderline between EU law and national law is not always easy to establish in a concrete case.” (Rosas 2012)

Arnaiz and Perez already concluded in 2012 that the Charter has “thus unmistakably become the instrument of choice for the Court” (Arnaiz and Pérez 2012).

Despite this, the EU Commission had to confess in its 2018 Report on the application of the Charter that the Charter was still not used to its full potential, and too few citizens were even aware of it (Report 2018). This while EU institutions, bodies, offices and agencies are required to comply with the Charter in all their actions and also that cases of noncompliance can be brought before the Court.

The awareness of the Charter had not increased when the Commission issued its ten-year review of the Charter in 2019. In that review, the Commission laments the fact that only one in ten Europeans knows what the Charter is. Eleven years after the Charter became legally binding, the situation remained dismally the same. Although the situation has slightly improved since 2012, by 2019, only 42% of respondents have heard of the Charter, and only 12% really know what it is. This has made it difficult for citizens to use their full potential. Consequently, the Commission intends to present a strategy that would improve the use and awareness of the Charter in the EU so that it becomes a reality for all. In its strategy for the effective implementation of the Charter by the EU, the Commission is on record that it is determined to use all the means at its disposal to ensure that the Charter is adhered to by all Member States when they implement EU law. It also recognizes that for “the rights enshrined in the Charter to be effective, the public needs to be well informed about these rights and how to enforce them in practice when they are violated” (European Commission 2020).

In an effort to improve the situation, the Commission continued to mainstream fundamental rights in its legislative and policy initiatives to ensure compliance with the Charter (Report 2018). On the other hand, the Commission’s Report on the involvement of the ECJ with the Charter makes for better reading. References to the Charter by the ECJ have increased substantially—up from 27 references in 2010 to 195 in 2017 and 356 in 2018. National courts are not only referring to the Charter in their decisions; they are increasingly asking the Court for guidance on this subject. When referring questions to the Court by requests for preliminary rulings, national courts increasingly make reference to the Charter—from 84 in 2018 in comparison to 19 in 2010.

However, not one of these referred to Article 46 of the Charter. In its overview of the 2018 ECJ case law, which directly quotes the Charter or mentions it in its reasoning, the Commission noted that no reference was at all made to Article 46. The same applied to the overview of the applications for preliminary rulings submitted to the ECJ in 2018, which refer to the Charter (Report 2018).

## 7. Application of Article 46

Vigni poses the question of whether diplomatic and consular protection in EU law is either a misleading combination or a creative solution. By referring to the right of EU citizens to diplomatic and consular protection by the Member States other than the State of nationality in the territory of a third country, it is not clear what are the concepts of diplomatic and consular protection embodied in that right. Her paper concludes that political and legal practice of the EU and of Member States has yet to provide clear answers to these questions (Vigni 2010/2011). The Commission's Report of 2018 notes the following:

“The Charter has proven to be a key instrument to make fundamental rights a reality in people's lives. It is still a relatively young instrument when compared, for example, to the European Convention of Human Rights, which has existed for over 65 years. It will take time and sustained work for it to be used to its full potential, especially at local and national level.” (Report 2018)

The Commission expressed these sentiments at a time when the Brexit-exercise was still at a stage where the UK and the EU were confident that all matters stemming from the withdrawal of the UK from the EU would be amicably concluded. By the end of 2020, that withdrawal had become acrimonious, with major issues still begging for finality and solution. One such issue that still escapes the conclusion is the status of and protection available to EU citizens living and visiting the UK beyond the final date of separation on 31 December 2020.

## 8. Consequences for EU Citizens with the Withdrawal of the UK from the EU

This withdrawal affects both UK citizens in the EU and EU citizens in the UK. However, it is the latter that has been placed in a precarious position since the protection of Article 46 as such for one will no longer be at their disposal to rely on.

From the outset, the EU was determined to ensure that its Court continued to be the protector of all that had been created by the Union for the well-being of the Member States and their citizens, whether the negotiations with the UK succeed or fail. European integration has brought peace and prosperity to the EU and its Members and allowed for an unprecedented level of cooperation on matters of common interest in a rapidly changing world. The ECJ had been instrumental in creating and advancing that unity. Therefore, the EU's overall objective in its negotiations with the UK had been not only to preserve its own interests, but also those of EU businesses, the Member States, and their citizens—all several million of them in the UK. Moreover, for this, the EU owes much gratitude to the ECJ for its role in influencing policies and decisions in this regard.

In the context of Brexit, the term “citizens' rights” was used to define the future status of UK ex-pats living and working in the EU (about 900,000), as well as EU nationals (more than three million) who are in the UK for the same purpose. The Brexit process resulted in the UK withdrawing from various treaties. With that in mind, the UK and EU devoted priority for the rights of these citizens to be resolved so that the legal status of these two groups could be secured. This issue was of pivotal importance to the EU to resolve as a no-deal Brexit would create huge uncertainty over the legal status of the EU citizens present in the UK. The end of the free movement of labor would lead to a sharp fall in the number of persons from EU countries working in the UK. That freedom is one of the fundamental principles for the EU. This right, together with other equally inviolable rights, is incorporated in EU treaties. In important decisions, the ECJ has also enshrined those rights, especially the right to reside and work within the EU, including the UK, while that state was still a member of the EU.

As pillars of the EU, these freedoms are crucial tenets of the EU's foreign policy. As such, they have played a significant role in the evolution and development of the EU and in the achievement of ambitious common aims among the Member States. These basic rights of its citizens are not negotiable for the EU. In the context of Brexit, this issue spiraled into a dispute over basic principles. The EU being a legal community, its agreements are effectively international treaties. The Withdrawal Agreement (WA) signed between the UK, and the EU is no exception. It had been ratified by both parties. It covers the protection of the rights of EU citizens in the UK and UK citizens living in other parts of the EU. These citizens will be among those most affected by Brexit.

When agreements that are enforceable under international law are not complied with or violated, the ECJ will be involved as it is the Court's responsibility to oversee adherence to all EU treaties and commitments. Not without reason that the Commission launched an infringement procedure against the UK, accusing it of violating international law with its plans to adopt its Internal Market Bill that would allow it to rewrite the WA after it had been concluded.

The European Parliament (EP) is the only EU institution that is directly elected by EU citizens. Although it had no direct role in the Brexit negotiations, it did have a veto over the outcome. It was thus more likely to use it over this than any other issue. Consequently, it was not surprising that that institution was particularly focused on the issue of the rights of EU citizens living in the UK and UK citizens living elsewhere in the EU. From the beginning, the EP vigorously protected the rights of EU citizens by demanding equal and fair treatment for those living in the UK and equally so for UK citizens living in the EU. Members of the EP were particularly concerned over how the UK and the remaining 27 Member States of the EU would manage citizens' rights after Brexit. Accordingly, it provided guidelines for the negotiations between the EU and the UK and with that standpoint, the EP played a key role in the outcome of the talks as it adopted several resolutions and statements that reiterated the importance of protecting the rights of these citizens.

The EP endorsed the WA on 29 January 2020. Prior to that vote, Parliamentarians adopted a resolution requiring assurances on the protection of citizens' rights to ensure Parliament's support for the WA. The resolution notes specifically that the WA contains fair and balanced provisions to protect citizens' rights during and after the transition period. For the EP, a thorough implementation of the provisions of the agreement is of the essence in order to protect affected citizens and their fundamental rights in the long-term. In approving the WA, the EP made it abundantly clear that it took due account of "experiences gained and assurances given" about the protection of citizens.

While that agreement gives both UK and EU citizens the right to continue working and living in the country in which they now reside, other issues still had to be decided. However, recent actions by the UK government have not only placed that agreement in jeopardy, but they have also caused EU negotiators to question the UK's bona fides and desire to reach an amicable solution and conclusion to its future relationship with and commitments to the EU. The final stage of Brexit and the future relationship between the EU and the UK are currently very much in limbo, if not in total doubt.

Consequently, were a no-deal eventuates, as it now seems quite possible, EU citizens present in the UK may be left in a rather precarious position since the legal protection they may lack is what is specially provided for in Article 46 of the Charter. EU citizens living in the UK are facing an uncertain future on various points.

From the beginning of the negotiations, the EU warned the UK not to use its citizens as bargaining chips to reduce the rights of EU citizens (Portes 2017). For the EU, its bottom line has been all along for its citizens to continue to be covered by the ECJ. The EU was equally adamant, though: only the Court could provide the guarantees and certainty that EU citizens in the UK required and were entitled to after Brexit. They deserved to be protected by EU law. Their rights may not be diminished after the exit-date. Fearing that no UK court will ever be good enough to ensure that, the EU wanted the ECJ to enforce the settlement also in this respect. Both sides claim that their top priority was to end the uncertainty for millions of citizens living in each other's countries by guaranteeing their rights for the

future. These EU citizens have yet to be convinced that they will not be denied those rights which they were entitled to and enjoyed before Brexit became their worst nightmare.

At the beginning of December 2020, with only a few weeks left to finalize a post-Brexit relationship to commence on 1 January 2021. It has been reported that the UK has agreed to keep it tied to European human rights rules in order to strike a trade and security deal with the EU. The EU claims that the UK has accepted the prerequisites that the EU has advanced on the protection of human rights (Daily Express 2020).

The Kadi cases have no direct relevance to EU citizens in the UK post-Brexit. These cases were brought into the discussion because they set the EU on a firm path of protecting human rights. Because of that protection and the soul of the Charter being human rights and their protection, it is important to view Article 46 against that background. Not that the Kadi cases will, as such, be affecting or assisting EU citizens post-Brexit.

## 9. Conclusions

The EU has a well-established legal order based on the rule of law in which the protection of fundamental rights is of the utmost importance. Over the years, the EU has adopted many initiatives protecting and promoting the Charter rights of its citizens. References to the Charter by the ECJ have increased substantially. National courts are also referring to the Charter in their decisions and increasingly asking the Court for guidance. All these activities are important in ensuring that the Charter delivers for every citizen the protection it promotes. While the Charter is still not used to its full potential and awareness remains low, it is, therefore, most important that civil societies, organizations and human rights defenders increase their efforts in raising awareness of the Charter rights and ensuring that everyone can effectively enjoy them by knowing that they are protected. Furthermore, EU citizens residing now and in the future in the UK will not be left without access to fundamental rights such as those embodied in Article 46 of the Charter.

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