

# Briefing note

## ***ASLEF v UK***

**By Michael Ford and  
John Hendy QC**

**John Hendy QC and Michael Ford are  
members of Old Square Chambers and  
were counsel for ASLEF in the case,  
instructed by  
Victoria Phillips of Thompsons.**

**THE  
INSTITUTE  
OF  
EMPLOYMENT  
RIGHTS**

**The Institute of Employment Rights  
The People's Centre  
50 –54 Mount Pleasant  
Liverpool  
L3 5SD  
0151 702 6925  
[www.ier.org.uk](http://www.ier.org.uk)**

## Introduction

In *ASLEF v United Kingdom* [2007] IRLR 361 the European Court of Human Rights (“ECtHR”) held that UK law, which prohibited ASLEF from expelling a BNP member, was in breach of Article 11 of the European Convention on Human Rights (“ECHR”).<sup>1</sup> The direct result will be that the government should amend s.174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) and, in the meantime, tribunals should interpret the section so far as is possible to give effect to the *ASLEF* judgment. The case is also important because the ECtHR expressly recognised the autonomy of trade unions, and their right to determine their own rules as to membership, drawing upon the decisions of the ILO and international human rights’ instruments. It opens the way to other legal challenges based on the Human Rights Act 1998 (“HRA 1998”) and the ECHR.

## The facts in the *ASLEF* case

Article 11 ECHR states:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and to join trade unions for the protection of his interests.

(2) No restriction shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 27 ECHR makes clear that the Convention is not intended to protect persons who engage in activity aimed at the destruction of any of the rights or freedoms set out in the ECHR. Article 11 is given effect in UK law principally by the HRA 1998. Under the HRA a UK court must interpret domestic legislation “so far as is possible” in a way which is compatible with Article 11, and it is unlawful for a public authority to act in a way which is incompatible with Article 11.

Prior to being amended in 2004, s.174 of TULRCA provided by rather tortuous wording that a trade union could not exclude or expel a person from membership if the exclusion or expulsion was attributable to the person being, ceasing to be, or having been or ceased to be,

---

<sup>1</sup> Readers may be interested in J Henty and KD Ewing, “Trade Unions, Human Rights and the BNP”, [2005] 34 ILJ 197 and, by the same authors, *Submission to the Joint Committee on Human Rights on the Employment Bill 2004 and the Trade Union and Labour Relations (Consolidation) Act 1992 s.174*, April 2004, IER for a more detailed discussion of the law prior to the judgment of the ECtHR.

a member of a political party. These provisions were introduced by the Trade Union Reform and Employment Rights Act 1993, the same legislation which the Major government used to introduce the right on the part of a citizen to obtain an injunction against a trade union. The section was later amended to become even more convoluted but still so as to prevent a trade union from excluding or expelling a member if that exclusion was wholly or mainly attributable to the fact a person was or had ceased to be a member of a political party.

The simple effect of s.174, both before and after the 2004 amendment, was that if a union expelled or excluded someone because of his or her membership of a political party, that person could complain to an employment tribunal and obtain compensation, currently subject to a minimum of £6,600 if the person was not admitted to membership by the time of the remedies hearing. The maximum figure is at present £69,900 - even higher than the maximum compensatory award for unfair dismissal. It is no wonder that some political groups on the extreme Right encouraged their members to make use of these provisions.

It was a member of the BNP, Mr Lee, who gave rise to the litigation in *ASLEF*.<sup>2</sup> After he stood as a BNP candidate in local elections, ASLEF expelled him. Before his appeal, ASLEF passed a resolution deeming membership of the BNP or similar fascist organisations to be incompatible with the objects of the union, and the rules reflected this. After his unsuccessful appeal, Mr Lee brought proceedings under s.174 in the tribunal. The first tribunal decision in his favour was confused in its reasoning and ASLEF appealed it to the EAT. In its judgment the EAT accepted ASLEF's arguments and remitted the case to a different tribunal to be heard again. The second tribunal again found in Lee's favour on the basis that it did not accept that the reason for his expulsion was exclusively to do with Lee's conduct as a BNP member but that part of the reason was his membership of the BNP. ASLEF was consequently obliged to re-admit him into membership, even though this was contrary to its own rules. Because there was no means of challenging the decision of the second tribunal by an appeal to the EAT - the tribunal had correctly followed s.174 TULRCA - ASLEF applied directly to the ECtHR.

---

<sup>2</sup> The BNP has been creative in litigation on behalf of members. Note the race discrimination claim by a member of the BNP dismissed in *Redfearn v Serco Ltd* [2006] IRLR 623 where Mummery LJ held that:

the dismissal of Mr. Redfearn was not on racial grounds but because the former employer ...wished to avoid the perceived detrimental effects of Mr. Redfearn's membership of, and election to office representing, the BNP, which propagated racially discriminatory policies concerning non-white races who formed part of [the employer's] workforce and customer base.

So he was not dismissed because, as he claimed, as a BNP member he was necessarily white (paragraphs 49 and 54). It is worth noting that in *Jersild v Denmark* (1994) 19 EHRR 1 the ECtHR emphasised the need to combat racial discrimination in all its manifestations and held that the promotion of racist views does not attract the protection of the ECHR.

Referring expressly to ILO Convention No.87 on Freedom of Association, which gives unions the right to draw up their constitution and rules without interference by public authorities, the ECtHR said that under Article 11 unions enjoy the freedom to set up their own rules on membership and thus to choose their members. It stated (para. 39):

Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.

In light of that important, collective dimension to freedom of association, the ECtHR said that any state interference could only be justified if it complied with the strict criteria in Article 11(2), of being ‘necessary in a democratic society’ and of meeting one of the permitted aims referred to in Article 11(2). In the circumstances the ECtHR did not consider that the interference with ASLEF’s autonomy was justified. One reason was that the expulsion of Mr Lee did not significantly affect his freedom of expression or political activities or caused him other identifiable hardship. A second was that the ECtHR gave particular weight to ASLEF’s right to choose its members in accordance with its political aims and values, recognising that historically trade unions throughout Europe have commonly been affiliated to political parties and movements, particularly on the Left: “They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues” (para.50). Because Mr Lee’s membership of the BNP was in fundamental conflict with ASLEF’s political objectives, ASLEF was entitled to expel him from membership. Consequently UK law was in breach of Article 11 in making such expulsion unlawful.

### **The immediate importance**

The first direct effect of the *ASLEF* decision is that s.174 of TULRCA should be amended in order to bring UK law into compliance with Article 11 of the ECHR. The amended section must recognise that membership of a political party cannot be a trump card for an excluded or expelled member (which is the effect of the current provisions); rather, the union must have the right to exclude and expel persons who are members of political parties the objectives and beliefs of which conflict with the fundamental values of the union. The cases on Article 11 suggest that an individual can compel a union to associate with them only in circumstances where the effect of exclusion or expulsion would be to cause them to lose their job or to

suffer some similar serious detriment. In the absence of legally enforceable ‘closed shop’ arrangements in the UK nowadays, it is difficult to envisage such facts arising. For this reason, in principle unions should be entitled to exclude or expel someone because of his or her membership of a political party, and s.174 should no longer provide that such membership is ‘protected conduct’.

It is not yet clear what form the amendment will take. In May 2007 the DTI published a consultation document proposing two options for amending the legislation.<sup>3</sup> One option is to remove any special treatment of political party membership or activities from the section, so that expulsion or exclusion would be justified on grounds of conduct even if that conduct included being a member of a political party or political activities.<sup>4</sup> The second option is to permit exclusion or expulsions only if the membership of a political party is incompatible with the aims of the union and the decision to exclude or expel was made in accordance with its rules. The second option will, of course, generate arguments about what are the aims of the union; the first option seems preferable.

It is regrettable, however, that the DTI does not propose making more substantial amendments to s.174 in particular and trade union law in general in the light of the ECtHR’s judgment in *ASLEF*. The case has wider implications than its effect on membership of political parties and s.174. The trade union autonomy upon which the decision is based is not restricted to exclusion on grounds of political membership. Below we set out some other examples of where the UK law may well conflict with Article 11 as interpreted in *ASLEF*, and which may lead to further challenges to the ECtHR in the future.

Pending any changes to the law, unions should be alert to claims brought under s.174 by e.g. excluded BNP members.<sup>5</sup> Under the HRA 1998, an employment tribunal (“ET”) in approaching s.174 has a duty to construe the section “so far as is possible” in a way which is

---

<sup>3</sup> DTI, *ECHR Judgment in ASLEF V UK Case – Implications for Trade Union Law*, DTI, 05/07/NP URN 07/963.

<sup>4</sup> Cf. current s.174(4A).

<sup>5</sup> A copy of *British Nationalist*, January 2003, which is published by the BNP for its members was produced in evidence in the *ASLEF* case and stated:

The BNP’s legal team is now pursuing no fewer than 20 legal cases. All the cases taken on represent the easiest actions likely to bring the greatest reward....Even better, our Legal Department is now running the cases of four activists who were sacked from their unions for BNP membership. The four are now looking at the receipt of some very substantial compensation for the illegal actions of their far-left union bosses. This is most important. If you are not a member of a (left wing) union, then join....those looking to be thrown out of their union and then getting a big five figure payout should make it known to the local union lefty (there’s always one!) that they are BNP members and may (even better!) be standing as candidates for the BNP. Watch the union lefties squeal and [then] delight in being chucked out of the union. You haven’t got long to get on this particular gravy train, because the far-left loonies will soon stop their persecution of us once they find out just how expensive it can be!...

compatible with the decision of the ECtHR in *ASLEF*.<sup>6</sup> The duty is only to interpret, however, and not to re-write legislation.<sup>7</sup> It is far from clear that this interpretative obligation will enable an ET in effect to ignore the express wording of s.174 so as to permit a union to expel someone on account of his or her membership of a political party. Before the EAT, counsel for *ASLEF* submitted that the term “membership” should be construed in light of Article 11 as narrowly as possible, so as to be restricted to the fact of membership only.<sup>8</sup> This is probably as far as the duty of interpretation can go.

On this interpretation, if a union expelled a person because of their political activities on behalf of the BNP, and not merely their membership of the BNP, the expulsion would be permitted. But if the expulsion was solely because of membership, the express wording of s.174 TULRCA indicate that the expulsion will still be in breach of the section. In the event that an ET felt constrained by the express words of s.174 to hold that an exclusion or expulsion on grounds of membership of a political party was unlawful, a union should consider lodging a claim before the ECtHR, just as *ASLEF* did. The argument, in essence, would be the same as in *ASLEF*. It would be important, however, to check that there is no scope for an appeal on the basis that the ET did not interpret the legislation as narrowly as it could because the ECtHR will refuse to hear an application if domestic remedies have not been exhausted first.

### **The wider effects**

The judgment in *ASLEF* accords importance to the collective dimension to freedom of association. In particular, drawing on ILO Convention 87, it highlights for the first time in ECtHR jurisprudence that trade union autonomy is an aspect of Article 11. In paragraph 38 the Court held:

The right to form trade unions involves, for example, the right of trade unions to draw up their own rules and to administer their own affairs. Such trade union rights are explicitly recognised in Articles 3 and 5 of ILO Convention No.87, the provisions of which have been taken into account by the Convention organs in previous cases....<sup>9</sup> Prima facie trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member.

---

<sup>6</sup> See s.3 Human Rights Act 1998.

<sup>7</sup> See Lord Hope in *R(Anderson) v Secretary of State for Home Department* [2003] 1 AC 837 at paragraph 59.

<sup>8</sup> See *ASLEF v Lee* [2004] All ER (D) 209; EAT/0625/03/RN. The argument exploited the analogy with the very narrow approach to the notion of ‘membership’ adopted by the House of Lords in cases of discrimination on grounds of trade union membership: *Associated Newspapers v Wilson* [1995] ICR 406, HL.

<sup>9</sup> Citing as examples: *Cheall v the United Kingdom*, no. 10550/83, Comm. Dec. 13.5.85, DR 42, p.178; *Wilson, Palmer, NUJ and RMT v the United Kingdom* [2002] IRLR 568, paragraph 34.

The case thus marks a clear break with conceptions of freedom of association based solely on an individual's right to belong or not to belong to a union.<sup>10</sup> The ECtHR implicitly recognised that, save for exceptional circumstances, the individual's right to associate is a right to associate with those who wish to associate amongst themselves and with the individual.<sup>11</sup> It explicitly recognised the right of the association of individuals to choose collectively in accordance with their agreed rules, aims and values with whom they will associate. Thus a union, according to the ECtHR, has the right to decide its own fundamental values and objectives, and in the exercise of its autonomous power to exclude those who oppose those values and objectives. The decision endorses a conception of politics and association based on democratic and collective values, rather than narrow, individualised rights.<sup>12</sup> The individual has the right to participate in collective bodies which are important intermediaries between him or her and the state, but this right is conditional upon abiding by the rules of the organisation and accepting the outcomes of decisions which it reaches. The case illustrates that the fundamental political model which underpins the ECHR is based on a conception of democracy in which collective, participatory associations such as trade unions form an important part of citizenship; it is a far richer conception than the US model, in which rights are modelled on property rights, protecting private individuals alone.<sup>13</sup>

The case also emphasises the fundamental nature of trade union rights under Article 11 and thus reinforces the Court's groundbreaking decision in *Wilson, Palmer, NUJ and RMT v UK* [2002] IRLR 568. Almost contemporaneously the fundamental nature of trade union rights has been highlighted by two Opinions of Advocate Generals delivered on the same day (23<sup>rd</sup>

---

<sup>10</sup> There is much ECtHR jurisprudence on the individual's right to dissociate, e.g.: *Young, James and Webster v UK* [1981] IRLR 408; *Sigurjónsson v Iceland* (1993) 16 EHRR 462; *Sibson v UK* (1993) 17 EHRR 193; *Chassagnou v France* (Appns 25088/94 etc, 29<sup>th</sup> April 1999); *Sørensen and Rasmussen v Denmark* (Appns 52562/99 and 52620/99, 11<sup>th</sup> January 2006). For an early discussion on the subject see Lord Wedderburn, "Freedom of Association or Right to Organise? The common law and International Sources" in *Employment Rights in Britain and Europe*, 1991.

<sup>11</sup> As Lord Diplock put it in *Cheall v APEX* [1983] 2 AC 180 (HL) at 190-191: (a case which pre-dated s.174(4)(a)(iii) and the Human Rights Act 1998, though not, of course, the European Convention):

*My Lords, freedom of association can only be mutual; there can be no right of an individual to associate with other individuals who are not willing to associate with him. The body of the membership of A.P.E.X., represented by its executive council and whose best interests it was the duty of the executive council to promote, were not willing to continue to accept Cheall as a fellow-member. ...*

*Different considerations might apply if the effect of Cheall's expulsion from A.P.E.X. were to have put his job in jeopardy, either because of the existence of a closed shop or for some other reason. But this is not the case. ...*

<sup>12</sup> Perhaps surprisingly this concept is well established in the English common law: in *R v The Benchers of Lincoln's Inn* (1825) 4 B&C 845 at 858, 859-860; *Weinberger v Inglis* [1919] AC 606 (HL) at 641; *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254 at 264; *Faramus v Film Artistes' Association* [1964] AC 925; *Gaiman v National Association for Mental Health* [1971] Ch 317 at 331; *Cheall v APEX* [1983] 2 AC 180 (HL) at 190-191; *RSPCA -v- Attorney General and Others* [2001] 3 All ER 530 (Ch D) paragraph 37(b).

<sup>13</sup> Interestingly, the European conception of participatory citizenship owes much to a writer who wrote about America - see De Tocqueville, *Democracy in America*. For De Tocqueville it was only through participation in voluntary associations that individuals came to understand democracy.

May 2007) for the European Court of Justice, which of course is the supervisory court of the EU, the treaties of which contain no principle of freedom of association or trade union freedom (to the extent of forbidding EU legislation on strikes etc).<sup>14</sup> In the first, *ITWF v Viking Line*, Advocate-General Poiares Maduro nonetheless held, in the context of international co-ordinated strike action and boycotts against an employer relocating to another EU country where labour was cheaper, that:

The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract. They provide the means to emphasise that relocation, while ultimately gainful for society, entails costs for the workers who will become displaced, and that those costs should not be borne by those workers alone. Accordingly, the rights to associate and to collective action are of a fundamental character within the Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms.<sup>15</sup>

In a parallel Opinion, delivered on the same day, in the case of *Laval v Svenska Byggnadsarbetareförbundet* - the pronouncement is straightforward - Advocate-General Mengozzi addressed the right of workers and unions to take collective action to compel a service provider from another member state to sign a collective agreement for the benefit of posted workers. Having analysed the case-law of the ECtHR on Article 11, including *Wilson*, the European Social Charter, the EU Charter of Fundamental Social Rights, and the “constitutional traditions of the Member States” he concluded:<sup>16</sup>

This analysis prompts me to consider that the right to resort to collective action to defend trade union members’ interests is a fundamental right. It is therefore not merely a ‘general principle of labour law’, as the Court has already held in relatively old case-law in Community staff cases, but rather a general principle of Community law, within the meaning of Article 6(2) EU. That right must therefore be protected in the [EU].

The reliance by the Advocates General on the Community Charter of Fundamental Social Rights 1989 was timely (though Advocates General had relied on it in earlier cases).<sup>17</sup> On 22<sup>nd</sup> June 2007, the European council meeting in Brussels, consisting of the heads of State and/or governments of the EU, agreed a draft mandate to an Inter Governmental Conference

---

<sup>14</sup> See Article 137(5) EC which is discussed in the Opinion in *Laval* (below) at paragraphs 52-62. The European Social Charter is referred to in the preamble to and Article 136 of the Treaty.

<sup>15</sup> Case C-438/05 at paragraph 60. The judgment of the ECJ is awaited. The reliance on the Community Charter is a regular feature of A-G Opinions for the ECJ, see the cases referred to below. In *Viking* A-G Maduro referred to his earlier Opinion in *Ordre des Barreaux Francophones et Germanophone*, case c-305/05, paragraph 48, which also relied on the Community Charter. The status of the Community Charter is also highly topical with the CBI pressing Mr. Blair to red line collective rights within it when it becomes (inevitably) part of the new Treaty to replace the failed EU Constitution (just as the Attorney General, Lord Goldsmith, had succeeded in red-lining it in the draft Constitution): *Financial Times*, 18<sup>th</sup> June 2007.

<sup>16</sup> See Case C-341/05 at paragraphs 60-78. In considering the permissible limits of the right to strike, he again referred to the relevant international instruments: see paragraphs 81-83.

<sup>17</sup> In *BECTU v UK* [2001] ICR 1152, for example, the Advocate-General’s Opinion on the proper meaning of the Working Time Directive, had regard to the Community Charter of Fundamental Social Rights as well as the International Covenant on Economic, Social and Cultural Rights 1966 in deciding how rights to annual leave were to be interpreted.

to be held in July to settle amendments to the founding Treaties of the EU. The mandate includes a provision making the Charter of Fundamental Rights legally binding across the EU (though subject to some unspecified wording as to “the scope of its application”).<sup>18</sup> However, the UK has secured an opt-out to prevent the fundamental rights guaranteed by the Charter being of benefit to those within the UK jurisdiction.<sup>19</sup> This agreement accords with the government’s minimalist approach to the protection of trade union rights, illustrated by the DTI’s response to the *ASLEF* decision. The opt-out has potentially very serious consequences for the protection of workers’ and trade unions’ rights in the UK, giving rise to a risk that EU law will apply differently in the UK to its application in other Member States. The wider consequences of this opt-out is too large a subject for this paper, and an analysis will need to await the final form of the wording in the Treaty. But unions should be aware that the opt-out continues the policy of the Thatcher years, of resisting “social” Europe, of blocking or watering down all but minimal rights for workers in the name of economic ‘efficiency’, and of seeking to ensure that workers in the UK do not receive the same protection as do their colleagues across the Channel.

By a chronological near coincidence, on 8<sup>th</sup> June 2007 the Canadian Supreme Court handed down a landmark decision in *Health Service and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27 (CanLII) holding (and making reference to the international instruments and jurisprudence) that the right to collective bargaining was a fundamental aspect of freedom of association enshrined in the Canadian Charter on Rights and Freedoms: “collective bargaining was... the most significant collective activity through which freedom of association is expressed in the labour context.”<sup>20</sup> Space does not permit analysis of this historic decision reversing 20 years of Canadian restrictive law on freedom of

---

<sup>18</sup> Presidency Conclusions of the Brussels European Council (21/22 June 2007), Concl 2, 11177/07, see paragraph 9 of Annex I “Draft IGC Mandate”. Annex 1 to the Draft IGC Mandate referred to above sets out the actual drafting of some controversial issues. At point 5 is the provision that the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [...2007], which shall have the same legal value as the Treaties.”

<sup>19</sup> Footnote 19 to point 5 of Annex 1 to the Draft IGC Mandate referred to above contains the following agreement to be annexed to the Treaty on European Union:

*Article 1*

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

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

*Article 2*

*To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.*

<sup>20</sup> On collective bargaining in international law see P Macklem, “The Right to Bargain Collectively in International Law:

association, nor does it permit consideration of the value of the decision in UK and ECtHR cases.

In reaching its decision in *ASLEF* the ECtHR explicitly referred to ILO Convention No.87, to Article 5 of the European Social Charter of the Council of Europe and to decisions of its European Committee of Social Rights.<sup>21</sup> It thus continued the trend of *Wilson and Palmer v UK* [2002] IRLR 568 which also contained extensive citation of the ILO and ESC jurisprudence (at paras 30-37 of that judgment).<sup>22</sup> The effect of these decisions is that the jurisprudence of the ILO and the ESC (and probably other human rights bodies too) are relevant in deciding the proper approach to provisions of the ECHR. Section 2(1)(a) HRA 1998 requires UK courts and tribunals to take into account “in determining a question which has arisen in connection with a Convention right”, not merely the Convention itself but also “any judgment decision, declaration or advisory opinion of the European Court of Human Rights”. Since the ECtHR consider the decisions of the ILO and ESC committees are relevant to the determination of such questions, so must UK courts. As a matter of domestic law, ILO Conventions and the European Social Charter and the decisions of their supervisory bodies have had little historical impact in UK courts - in contrast to the deference paid to the ECHR and decisions of the ECtHR even before the HRA 1998 came into force. The judgment in *ASLEF* points the way to much greater reliance on ILO and ESC principles and decisions in UK litigation, certainly in employment litigation involving the ECHR or the Human Rights Act 1998.

This possibility is reinforced by decisions of the European Court of Justice on EU law, which acknowledge the fundamental social rights which underpin EU law, and which explicitly refer to general norms of international human rights law, and especially the ECHR, in deciding what are those fundamental social rights.<sup>23</sup>

### **Future challenges?**

Unions and their advisors should be alert, then, to the possibility of challenges based on the ECHR and the HRA 1998, and to relying on other international human rights instruments and their jurisprudence, in the course of litigation. It is an area where trade union lawyers must become familiar with international case law. Consideration must be given to raising the issues through the mechanisms of the ILO and the ESC since pronouncements in favour of the

---

Workers’ Right, Human Right, International Right?” in P Alston (ed), *Labour Rights as Human Rights*, 2005.

<sup>21</sup> Paragraphs 22-25 of *ASLEF*.

<sup>22</sup> For earlier use of this material by the ECtHR, see e.g. *Sigurjonsson v Iceland* and *Jersild v Denmark*, cited above.

<sup>23</sup> See e.g. *Connolly v Commission* [2001] ECR I-1611 at paragraph 37.

applicant will carry much weight in the ECtHR, as noted above. It is essential that all domestic points are identified at an early stage because the ECtHR will expect a union to have taken all practicable means to raise points based on the ECHR before the domestic courts. This then is an area where litigation strategy should be carefully thought through at every stage. The importance of European wide consideration before launching an application to the ECtHR cannot be overstressed: a case which establishes or denies workers' rights in the ECtHR affects hundreds of millions of workers. It is vital that the national trade union centre (in the UK the TUC) is consulted and that there is appropriate liaison with the ETUC before a case is brought.

Below we indicate some areas in which human rights instruments, based on the right to freedom of association enshrined in Article 11 ECHR, may provide a fruitful means of challenge. It is not only s.174 TULRCA which substantially restricts trade union freedom of association in tension with Article 11.<sup>24</sup> It is to be regretted that the DTI is not proposing to make wider changes to the law. It is to be hoped that the trade unions will press them to do so.

1. Section 174 TULRCA restricts trade union autonomy more generally. It also has the effect of preventing a trade union excluding or expelling a member in order to comply with a TUC Disputes Committee ruling, because such a ruling does not amount to an enforceable membership requirement for the purpose of s.174(2)(a). Thus membership can not be refused because someone is a member of another union.<sup>25</sup> These provisions, which aimed at the abolition of the Bridlington Principles, also owe their origin to the 1993 Act.<sup>26</sup> The justification was to create a "market" in trade unions.<sup>27</sup> (The provisions were the subject of criticism in Parliament by the shadow employment secretary, Tony Blair,<sup>28</sup> his government subsequently seemed to have changed its mind). These provisions, and the other restrictions in s.174, are a clear interference with the right, recognised in *ASLEF*, of trade unions to decide with whom they associate and to set their own rules. Indeed, as the Court noted in *ASLEF* the restrictions which flow from s.174 have already been strongly criticised by the Council of Europe's Social Rights Committee because they amount to an excessive

---

<sup>24</sup> An early discussion of the incursions into trade union autonomy may be found in Lord Wedderburn, "Trade Union Democracy and State Regulation" in *Labour Law and Freedom*, 1995.

<sup>25</sup> See s.174(4).

<sup>26</sup> See the Green Paper, *Industrial Relations in the 1990s* (HMSO: 1991) Cmnd 1602 at chapter 6.

<sup>27</sup> See Green Paper, above, at paragraph 2.24.

<sup>28</sup> HC Deb vol 195, Col 1169.

restriction on the rights of a trade union to determine the conditions of membership.<sup>29</sup>

2. Section 64 of TULRCA gives an individual the right not to be unjustifiably disciplined. For this purpose unjustified discipline includes taking action against a member because he or she failed to participate or support a strike or other industrial action.<sup>30</sup> This applies regardless of the fact that a majority of members are in support of industrial action following a lawful ballot. Hence a democratic decision cannot be enforced against a dissenting member (even if that member agreed to the rules and took part - even voted in favour – in the ballot). This requirement is difficult to reconcile with the conception of freedom of association endorsed in *ASLEF*: a member has the right to participate in the democratic decision to strike or not but then the association is barred from using the mechanisms under its rules to discipline him or her for refusing to abide by the decision reached. Owing their origin to s.3 of the Employment Act 1988 introduced by the Thatcher government, these provisions have been held by the Council of Europe's Social Rights Committee, the body overseeing the European Social Charter, to be incompatible with Article 5 of the Charter.<sup>31</sup> The ILO Committee of Experts has repeatedly held that these provisions conflict with the ILO Convention.<sup>32</sup> In light of how the ECtHR in *ASLEF* read these international conventions into Article 11 in *ASLEF*, it is probable that s.65(2)(a), (b), and (f) to (i) TULRCA can no longer be considered to be compatible with a union's freedom of association.<sup>33</sup>
  
3. UK law gives effect to the right not to be victimised on ground of trade union membership, no doubt a requirement of Article 11 ECHR, by means of the provisions in TULRCA, including s.152 which deems a dismissal to be unfair if the reason for it was that the individual e.g. was or proposed to become a member of a trade union, took part in the activities of a trade union or made use of trade union services. The Age Discrimination Regulations have amended the Employment Rights Act 1996 so as to deem retirement to be the only reason for dismissal provided the employer

---

<sup>29</sup> See *ASLEF* at paragraph 23.

<sup>30</sup> See s.65(2)(a).

<sup>31</sup> See e.g. 1989, *Conclusions* XIII-3, 110 and 1991, *Conclusions* XIII-1, 137.

<sup>32</sup> See e.g. the Reports of 1989 on the Application of Conventions and Recommendations, Report III, Part 4A, pp 236-7 and the 1991 Report III, Part 4A, pp 219-220. The findings were repeated in the 1992, 1995, 1997, 1999, 2001 and 2003 Reports.

<sup>33</sup> In *NALGO v UK* (Application no. 21386/93) the Commission ruled as inadmissible a complaint based on s.65 TULRCA in relation to the sanctioning of strike breakers. But it appears that the international materials and the decisions of the ILO Committee of Experts and the Experts of the European Social Charter were not cited. Since that decision the law on Article 11 has moved on, most noticeably in *Wilson* and *ASLEF*.

notifies the employee that he or she is to be retired.<sup>34</sup> An employer could rely on these provisions, and argue that retirement was the only reason for dismissal of a trade union activist, so excluding the application of s.152 TULRCA altogether. Such a result cannot be reconciled with Article 11 ECHR.

4. It is well-known the UK law imposes many restrictions on the rights of unions to take industrial action. For example, secondary action and strikes for political purposes are unlawful altogether,<sup>35</sup> and the balloting and notice rules are so complex as to make compliance in many cases almost a practical impossibility.<sup>36</sup> These rules have been the subject of repeated criticism by the ILO and the ESC supervisory bodies.<sup>37</sup> Thus far the ECtHR has not held that prohibitions on the right to strike infringe Article 11. Though it considered such restrictions amount to interferences with freedom of association and so engaged Article 11(1), the ECtHR has allowed member states a considerable margin of appreciation in deciding whether a particular restriction was justified under Article 11(2).<sup>38</sup> It will be interesting to see if the increased importance the ECtHR accords to ILO and ESC decisions will in the future provide a means of challenging the legal and practical obstacles placed by UK law on strike action.
5. Funds of a trade union which are applied to political objects have been subject to special regulation since 1913. The legislation of and since the Thatcher era has resulted in detailed rules in Chapter VI of TULRCA. As well as balloting requirements, these provisions include certain rules which it is compulsory for a trade union to include in its rule book.<sup>39</sup> The provisions appear to amount to an interference with trade union autonomy; the more difficult question is their justification under Article 11(2).

There are other incursions on trade union autonomy in UK law and union lawyers will, no doubt be reviewing them: the extensive requirements in relation to the election of union presidents, general secretaries and executive committee members; the prohibition on indemnification of members' fines; check-off formalities; and so on.

---

<sup>34</sup> See s.98ZB-ZE.

<sup>35</sup> See s.224 TULRCA (secondary action) and the definition of a 'trade dispute' in s.244 TULRCA, the basis of the 'golden formula' in s.219, which has been held not to extend to political action: see *Mercury Communications v Scott-Garner* [1984] ICR 74, CA.

<sup>36</sup> See ss 226-235 TULRCA.

<sup>37</sup> See T Novitz, *International and European Protection of the Right to Strike*, 2003, OUP; J Hendy, "Industrial action and international standards" in KD Ewing (ed), *Employment Rights at Work*, 2001, IER.

<sup>38</sup> See *UNISON v United Kingdom* [2002] IRLR 497.

<sup>39</sup> See s.82.

It will be seen that the *ASLEF* case, particularly taken with *Wilson and Palmer*, is a landmark. It is perhaps a matter of some irony that the unions in the UK have been obliged to secure these rights by litigation rather than by exerting pressure in the traditional way. Part of the reason is plainly that unions in the UK are denied the legal means of exerting such pressure, through precisely the kind of legal restrictions on their autonomy which were at issue in *ASLEF*.

13<sup>th</sup> July 2007