



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

**CASE OF ASSOCIATED SOCIETY OF LOCOMOTIVE
ENGINEERS & FIREMEN (ASLEF) v. THE UNITED KINGDOM**

(Application no. 11002/05)

JUDGMENT

STRASBOURG

27 February 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

In the case of Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,

Sir Nicolas BRATZA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 6 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11002/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the Associated Society of Locomotive Engineers & Firemen (ASLEF) (“the applicant”), on 24 March 2005.

2. The applicant was represented by Thompsons, solicitors practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Ms K. McCleery of the Foreign and Commonwealth Office, London.

3. The applicant trade union alleged that it had been prevented from expelling one of its members due to his membership of the British National Party, a political party which advocated views inimical to its own. It invoked Article 11 of the Convention.

4. On 7 December 2005, the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a trade union, representing mainly train drivers on the United Kingdom's railways. Founded in 1880, it has some 18,000 members and most train drivers are members of ASLEF. It is an independent trade union. The various companies on the United Kingdom rail network do not operate a "closed shop" and railway workers, including drivers, are free to join ASLEF or other unions or not to join a union at all.

6. Its Rules provide that its objects include, as well as regulating relations between workers and employers and protecting the welfare of members and the industry, that it "assist in the furtherance of the labour movement generally towards a Socialist society (Rule 3.1(vii) and to "promote and develop and enact positive policies in regard to equality of treatment in our industries and ASLEF regardless of sex, sexual orientation, marital status, religion, creed, colour, race or ethnic origin" (Rule 3.1(viii)).

7. In 1978 the Annual Assembly of Delegates ("AAD") of ASLEF, its governing body, resolved, pursuant to rule 14(a) of ASLEF rules, that "this AAD being concerned with the rise of Fascist activists and groups instruct the Executive Committee to campaign vigorously to expose the obnoxious policies of political parties such as the National Front."

8. In February 2002, a Mr Lee (a member of the far-right, lawful, British National Party ('BNP'), previously known as the National Front) applied for membership in ASLEF and was accepted. In April 2002 Mr Lee stood as a candidate in the local elections in Bexley for the BNP.

9. On 17 April 2002 an ASLEF trade union officer sent a report to the General Secretary concerning Mr Lee, attaching information that Mr Lee was an activist in the BNP, had handed out anti-Islamic leaflets dressed as a priest and that in 1998 he had stood as a candidate for the BNP in Newham. The report included an article written by Mr Lee for Spearhead (the BNP magazine) and a fax from Bexley Council for Racial Equality stating that Mr Lee had seriously harassed Anti-Nazi League pamphleteers, including taking pictures of them, taking their car numbers, making throat-cutting gestures and following one woman in his car and visibly noting her home address, which matters had been reported to the police.

10. On 19 April 2002, an Executive Committee meeting of ASLEF voted unanimously to expel Mr Lee, who was so informed by a letter of 24 April 2002, which stated that his membership of the BNP was incompatible with membership with ASLEF, that he was likely to bring the union into dispute and that he was against the objects of the union.

11. Mr Lee appealed against the expulsion and was informed that a hearing would take place on 13 March 2003. On 20 February 2003, he

stated that he would not attend. On 13 March 2003, the Appeals Committee of ASLEF met and rejected his appeal.

12. On 18 May 2002, AAD resolved "that membership of the BNP or similar Fascist organisation is incompatible with being a member of ASLEF as determined under Rule 5-Objects. Therefore any members of BNP who are members of, or apply for membership, of ASLEF shall be removed from membership or refused membership." The rules were changed accordingly to read:

Rule 4.1(d):

"No person shall be admitted into membership of ASLEF if by choice they are members of, supporters of, or sympathisers with, organisations which are diametrically opposed to the objects of the union, such as a fascist organisation."

13. In the meantime, Mr Lee had brought proceedings in the Employment Tribunals ('ET') in respect of his expulsion, on the basis of section 174 Trade Union and Labour Relations (Consolidation) Act 1992 ('section 174'), which prohibits trade unions from excluding a person or expelling a member wholly or to any extent on the ground that the individual is or was a member of a political party. The ET found in favour of Mr Lee on 21 May 2003. The applicant appealed to the Employment Appeal Tribunal ('EAT'), which on 10 March 2004 found that the first ET had fallen into serious errors of law, quashed the decision and remitted it to a second ET.

14. The EAT considered that it could construe section 174 without the need to resort to Article 11. It noted the parties' submissions, including the applicant's reliance on the decision in *Cheall v. the United Kingdom* (no. 10550/83, Comm. Dec. 13.5.85, D.R. 42, p. 178) and continued:

"As we have indicated [counsel for the applicant] accepts that we are not in a position to grant a declaration of incompatibility, on the one hand... But it is also clear to us that the very existence of competing claims under Article 11 (albeit that it would seem to us, on the authorities, that, absent a case of prejudice to livelihood, in this case [the applicant's] right of negative association for the Union and its members would seem likely to override the asserted right of association of [Mr Lee]) renders it more appropriate for us to seek to resolve the construction of the statute without reference to those competing rights. [Counsel for the applicant], while reserving his position, does not dissent from that course, and [counsel for Mr Lee] said that he understood, and indeed accepted that it was thereby being assumed in [his favour] that there is at least arguable an Article 11 right, such as he asserts."

15. The EAT's conclusion on the meaning of section 174 was that a union could rely as a legitimate ground for expulsion on the conduct of the expelled member so long as that conduct was not the fact of being a member of a political party. It found that a union could not rely on conduct which was a "*necessary act for the purpose of being or continuing to be a member*" (at paragraph 29 of its judgment). It specifically rejected the submission advanced by the applicant that included in the concept of membership (and thus amounting to conduct on which the union was not

permitted to rely) was conduct as a member, or in the capacity as a member, of a political party (paragraph 28.5 of the EAT judgment).

16. A second ET again upheld Mr Lee's complaint by way of decision promulgated on 6 October 2004. It rejected the applicant's defence that Mr Lee's expulsion was entirely attributable to his conduct (apart from the fact of membership of the BNP) for the purpose of section 174, holding that the expulsion was "*primarily because of his membership of the BNP*" (paragraph 25 of its judgment).

17. The applicant did not appeal to the EAT against the second decision of the ET.

18. In consequence of the second decision of the ET, the applicant has been obliged to re-admit Mr Lee to the membership of the Union. It is in breach of its own Rules in so doing. Had the applicant not re-admitted Mr Lee, it would have been liable to pay him compensation in such sum as the ET considered just and equitable (subject to a statutory minimum of, currently, just over 8,600 euros (EUR), with no upper limit). Even though it has re-admitted Mr Lee, the applicant remains exposed to an application from Mr Lee for compensation in such sum as the ET considers just and equitable but subject to an upper limit of around EUR 94,200. It does not appear that Mr Lee has made any such application.

II. RELEVANT DOMESTIC LAW

19. Section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 reads in relevant part:

(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if) –

...

(d) the exclusion or expulsion is entirely attributable to his conduct.

...

(3) For purposes of subsection 2(d) 'conduct,' in relation to an individual, does not include –

(a) his being or ceasing to be, or having been or ceased to be -

(...)

(iii) a member of a political party, or ..."

20. Subsequent to the decision of the second ET in Mr Lee's case, section 174 was amended (with effect from 31 December 2004) to read as follows (again in material part only):

“(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if) –

(...)

(d) the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct.

...

(3) For purposes of subsection (2)(d) “excluded conduct,” in relation to an individual, means –

(a) conduct which consists in his being or ceasing to, or having been or ceased to be, a member of another trade union

(b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or

(c) conduct to which section 65 (conduct for which an employer may not be disciplined by a union) applies or would apply if the references in that section to the trade union which is relevant for the purposes of that section were references to any trade union.

(4A) For the purposes of subsection (2)(d) “protected conduct” is conduct which consists in the individual's being or ceasing to be, or having been or ceased to be, a member of a political party.

(4B) conduct which consists of activities undertaken by an individual as a member of a political party is not conduct falling within subsection (4A). ..”

21. Section 177(1)(b) provides that “*conduct includes statements, acts and omissions.*”

III. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

22. Article 5 of European Social Charter 1961 provides for the following “right to organise”:

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

23. In that context, the European Committee of Social Rights of the Council of Europe (formerly the “Committee of Independent Experts”, which is the supervisory body of the European Social Charter 1961 has given consideration on numerous occasions to sections 174-177 of the 1992 Act. Concern with the interference by section 174 in the right of trade unions to fix their own rules and choose their own members was expressed by the Committee in Conclusions XIII-3, p. 109; Conclusions XV-1 p. 629; and in November 2002, Conclusions XVI-1, p. 684 where it held:

“Section 174 of the 1992 Act limits the grounds on which a person may be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the rights of a trade union to determine its conditions for membership and goes beyond what is required to secure the individual right to join a trade union....The Committee concludes that, in light of the provisions of the Trade Union and Labour Relations (Consolidation Act) 1992 referred to above (sections 15, 65, 174 and 226A) the situation in the United Kingdom is not in conformity with Article 5 of the Charter”

24. In Conclusions XVII-1 (2004) it again concluded that the United Kingdom was not in conformity with Article 5 of the Charter as section 174 constituted an excessive restriction on trade unions’ right to determine their membership conditions.

B. The International Labour Organisation (“ILO”)

25. The (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87) provides, *inter alia*:

“Part I. Freedom of Association

...

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION AND ADMISSIBILITY

A. The parties' observations

26. The Government submitted that the application should be rejected for non-exhaustion of domestic remedies, as although the applicant had raised a claim under Article 11 of the Convention in the EAT it did not press that submission at the oral hearing and accepted that the EAT should proceed to interpret section 174 without reference to Article 11. It was then not able to pursue an appeal against the EAT for ignoring that claim. In particular, the applicant did not require the EAT to apply section 3 of the Human Rights Act 1998, by seeking to construe the legislation so as to make it compatible with its Convention right. It was only concerned to ensure that it could rely on Mr Lee's various activities as the basis for expelling him; it did not propose any construction of section 174 which would have accorded with its case before this Court, namely that it had an Article 11 right to determine its own membership. They submitted that Article 35 § 1 was not satisfied where an applicant relied on some other ground for impugning a measure, ignoring a possible Convention argument (*Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). They asserted that, if the applicant had pressed its submission that Article 11 entitled it to choose its own membership save where exclusion or expulsion caused loss of livelihood and that submission had been accepted, there was ample scope for a creative interpretation of section 174 which would have given effect to that conclusion, including the possibility of reading in a clause "save as necessary to avoid breach of Convention rights".

27. Insofar as the applicant argued that it was unable to appeal from the EAT as it had been successful, the Government further submitted that the Court of Appeal could still admit such appeals in "exceptional circumstances". Further, the applicant could have pursued a declaration of incompatibility under section 4 of the HRA before the Court of Appeal, which could be an effective remedy as found in *Upton v. the United Kingdom* (no. 28900/04, decision of 11 April 2006) as, if successful, this would have obliged the Government to change the law to allow the expulsion on ground of BNP membership.

28. The applicant submitted that its counsel made full submissions on Article 11 to the EAT and that it was entirely wrong to assert that it was accepted by him that the EAT should ignore Article 11. Counsel did rely on section 3 submitting that section 174 should be construed so far as possible

in accordance with Article 11, so that the phrase ‘member of a political party’ be construed as narrowly as possible so as to be limited to mere membership and thus to permit expulsion for activities other than the mere fact of membership: it was not possible in that context to construe the term “member of a political party” so as to permit a union to expel a person just because he or she was a member of a political party. It only desisted in pursuing its submissions further orally after the EAT made clear that it was not inclined to decide the point and gave indications that ASLEF was in any event unlikely to be successful on the point. Furthermore, as the applicant had been successful in its appeal to the EAT no appeal could have been brought against that decision to the Court of Appeal. In any event any appeal would have been hopeless as it was not impossible to ignore the words of section 174 altogether. It noted that the Government accepted that once the second employment tribunal had made its decision there was no further domestic remedy that could have been pursued with any prospect of success.

B. The Court’s assessment

29. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, ECHR 1996-VI, §§ 51-52, and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, ECHR 1996-IV, §§ 65-67).

30. In the present case, the Court observes that the applicant trade union raised complaints in the proceedings under Article 11 claiming that it had the right to choose its own membership. The argument was, the Government conceded, made before the EAT; however the Court cannot accept the Government’s assertion that the applicant somehow waived or dropped this part of his case. It appears rather from the terms of the EAT judgment that, in face of that Tribunal’s view that Article 11 was irrelevant and that they should seek to resolve the construction of the statute without reference to the competing rights under that provision, the applicant’s counsel reserved his position. As, therefore, the issues were squarely raised before the EAT and indeed considered, the Court does not consider that on this basis the

applicant has failed to exhaust domestic remedies. Nor is it persuaded that the applicant could, given the EAT ruling was in his favour on other grounds, have appealed to the Court of Appeal and applied in addition for a declaration of incompatibility, as it was in effect the winning party and appeal lies against orders not reasons or findings. While the Government asserted that the Court of Appeal could admit an appeal by a winning party in exceptional circumstances, there is no indication that this case fell within such a category. The Government have not argued that the applicant should have appealed when it lost before the second Employment Tribunal and the Court sees no basis on which to differ, given the Employment Appeal Tribunal's earlier stance and the findings of fact reached by the first instance body.

31. The Court therefore rejects the Government's preliminary objection on non-exhaustion. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

32. Article 11 of the Convention provides:

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

2. No restrictions 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, for the protection of health or morals 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.”

A. The parties' observations

1. The Government

33. The Government accepted that section 174 represented an interference with rights under Article 11 § 1 in interfering with the autonomy which a trade union would otherwise possess in the matter of determining its membership. The restrictions imposed in respect of membership of a political party were, however, justified as necessary and proportionate. They relied on the importance of the countervailing rights of trade union members and prospective members to freedom of expression

and freedom of association which would be engaged by expulsion from a trade union. Those rights were at the very foundation of democratic society, not least as the case concerned sanctions in respect of membership of a political party. They also claimed that a wide discretion remained for trade unions to expel or exclude on grounds of political activities. Section 174 only imposed a limited restriction on expelling those with views inimical to the trade union's objectives; it was only the applicant's own error in approach that led to a problem as there was ample conduct by Mr Lee, going beyond mere membership of the BNP, which the applicant could have relied on in order to found an entirely lawful decision to expel him.

34. The Government also emphasised the special status of trade unions which set them apart from other voluntary associations, pointing out that they play a potentially very important role in the working lives of individuals and exercising a direct influence over matters such as pay, holidays and other terms and conditions of employment, such that the Government were justified in imposing some limits on the applicant's power to confer or withhold the considerable benefits of membership. Finally, they relied on the wide margin of appreciation which applied when striking a balance between the autonomy of trade unions and the Articles 10 and 11 rights of individual members and prospective members.

2. The applicant

35. The applicant submitted that there was no justification for the interference with its right to determine its membership. There was no interference with Mr Lee's freedom of expression as expulsion did not interfere with his right to express his political views. In any event any sanction was minimal and did not take priority over its right, and its members' rights, to exercise their own freedom of association and expression. Mr Lee never claimed that he suffered any detriment from exclusion. It referred to Article 17 to the effect that Article 10 would not protect some-one engaged in destroying other rights and freedoms. Since it was committed to opposing race discrimination, it would interfere with its rights, and its members, to be forced to admit into membership a person who was a member of such a right wing organisation. It did not accept that section 174 imposed a limited restriction, pointing out that it simply did not wish to associate with those whom they regarded as fascists or members of extreme right wing parties, whether active or not. It claimed that it had the right to dissociate itself from those whose political membership they abhorred. While Mr Lee's status as an activist might furnish greater reason to expel him, this did not touch on the fundamental issue. It would be acceptable if section 174 were framed so as to limit exclusion to membership of a party the objectives of which were contrary to the objectives of the trade union.

36. The applicant did not consider its role as a trade union was significant as alleged, since the collective bargaining that it was involved in applied to all, not just its members. There was nothing to suggest that Mr Lee lost any benefit in his working life from exclusion from ASLEF. Finally the applicant denied that there was a wide margin of appreciation as this was a situation where domestic law ran counter to freedom of association and considered that the Court was not precluded from examining the proportionality of the measure and ensuring a fair balance was struck.

B. The Court's assessment

1. General principles

37. The essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. The right to form and join trade unions is a special aspect of freedom of association which also protects, first and foremost, against State action. The State may not interfere with the forming and joining of trade unions except on the basis of the conditions set forth in Article 11 § 2 (see *Young, James and Webster v. United Kingdom*, Commission's report of 14 December 1979, § 162, Eur. Court H.R., Series B no. 39, p. 45

38. 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 (see *e.g. Cheall v. the United Kingdom*, no. 10550/83, Comm. Dec. 13.5.85, D.R. 42, p. 178; *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 34, ECHR 2002-V). *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.

39. As an employee or worker should be free to join, or not join a trade union without being sanctioned or subject to disincentives (*e.g. Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, *mutatis mutandis*, *Wilson & the National Union of Journalists and Others*, cited above), so should the trade union be equally free to choose its members. 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. By way of example, it is uncontroversial that religious bodies

and political parties can generally regulate their membership to include only those who share their beliefs and ideals. Similarly, the right to join a union “for the protection of his interests” cannot be interpreted as conferring a general right to join the union of one’s choice irrespective of the rules of the union: in the exercise of their rights under Article 11 § 1 unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union (*Cheall*, cited above; see also Article 5 of the European Social Charter and the Conclusions of the European Committee of Social Rights, Relevant International Materials, paragraphs 22-24 above).

40. This basic premise holds good where the association or trade union is a private and independent body, and is not, for example, through receipt of public funds or through the fulfilment of public duties imposed upon it, acting in a wider context, such as assisting the State in securing the enjoyment of rights and freedoms, where other considerations may well come into play (*e.g. Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, § 50, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, § 26-27, where in providing education throughout the country, the State is responsible for both public and privately run schools §§26-27; or, *mutatis mutandis*, organisational frameworks for trades or professions where membership may well be compulsory or highly regulated *e.g.* public law institutions which are not covered by Article 11 § 1 at all: *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, § 31).

41. Accordingly, where the State does intervene in internal trade union matters, such intervention must comply with the requirements of Article 11 § 2, namely be “prescribed by law” and “necessary in a democratic society” for one or more of the permitted aims. In this context, the following should be noted.

42. Firstly, “necessary” in this context does not have the flexibility of such expressions as “useful” or “desirable” (*Young, James and Webster*, cited above, § 63).

43. Secondly, pluralism, tolerance and broadmindedness are hallmarks of a “democratic society” (*Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. For the individual right to join a union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions (see *Young, James and Webster* judgment, cited above, § 63). Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly

unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship (see *Cheall*, cited above, *Johanssen v. Norway*, no. 13537/88, Comm. Dec. 7.5.90).

44. Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued (amongst many authorities, *Handyside*, cited above, p. 23, § 49).

45. Fourthly, where there is a conflict between differing Convention rights, the State must find a fair and proper balance (see no. 11366/85, Comm. Dec 16.10.86, DR 50 p. 173; *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160, §§ 42-44).

46. Finally, in striking a fair balance between the competing interests, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (amongst many authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). However, since this is not an area of general policy, on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy-maker should be given special weight (see *e.g. James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation “available to the legislature in implementing social and economic policies should be a wide one”), the margin of appreciation will play only a limited role.

2. Application in the present case

47. The question that arises in the present case concerns the extent to which the State may intervene to protect the trade union member, Mr Lee, against measures taken against him by his union, the applicant.

48. It is accepted by the parties in this case that section 174 had the effect in this case of prohibiting the applicant from expelling Mr Lee as it barred unions from such action where it was motivated, at least in part, by membership of a political party. This constituted an interference with the applicant’s freedom of association under the first paragraph of Article 11 which requires to be justified in the terms set out above.

49. In the context of the case, lawfulness is not an issue. Nor is it disputed that the measure had the aim of protecting the rights of individuals, such as Mr Lee, to exercise their various political rights and freedoms without undue hindrance. The crucial question is whether the State has struck the right balance between Mr Lee’s rights and those of the applicant trade union.

50. Taking due consideration of the Government’s argument as to the importance of safeguarding fundamental individual rights, the Court is not persuaded however that the measure of expulsion impinged in any significant way on Mr Lee’s exercise of freedom of expression or his lawful political activities. Nor is it apparent that Mr Lee suffered any particular

detriment, save loss of membership itself in the union. As there was no closed shop agreement for example, there was no apparent prejudice suffered by the applicant in terms of his livelihood or in his conditions of employment. The Court has taken account of the fact that membership of a trade union is often regarded, in particular due to the trade union movement's historical background, as a fundamental safeguard for workers against employers' abuse and it has some sympathy with the notion that any worker should be able to join a trade union (subject to the exceptions set out in Article 11 § 2 *in fine*). However, as pointed by the applicant, ASLEF represents all workers in the collective bargaining context and there is nothing to suggest in the present case that Mr Lee is at any individual risk of, or is unprotected from, any arbitrary or unlawful action by his employer. Of more weight in the balance is the applicant's right to choose its members. Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those 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. There was no hint in the domestic proceedings that the applicant erred in its conclusion that Mr Lee's political values and ideals clashed, fundamentally, with its own. There is no indication that the applicant had any public duty or role conferred on it, or has taken the advantage of state funding, such that it may reasonably be required to take on members to fulfil any other wider purposes.

51. As regards the Government's assertion that domestic law would have permitted the expulsion of Mr Lee if the applicant had restricted its grounds to conduct not related to his membership of the BNP, the Court would note that the Employment Tribunal found that the applicant's objections to Mr Lee were primarily based on his membership of the BNP. It does not find it reasonable to expect the applicant to have used the pretext of relying purely on Mr Lee's conduct which was largely carried out by him as a member of, and reflected his adherence to the aims of, the BNP.

52. Accordingly, in the absence of any identifiable hardship suffered by Mr Lee or any abusive and unreasonable conduct by the applicant, the Court concludes that the balance has not been properly struck and that the case falls outside any acceptable margin of appreciation.

53. There has, accordingly, been a violation of Article 11 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Costs and expenses

55. The applicant sought only costs and expenses incurred both within the domestic legal system to obtain redress for the violation and before this Court. It claimed for the two Employment Tribunal hearings GBP 11,958.31 and for the Employment Appeal Tribunal proceedings GBP 12,799, both sums inclusive of value-added tax (VAT). It claimed for the Strasbourg proceedings, GBP 17,343, also inclusive of VAT, which included GBP 393 for solicitors, GBP 10,868.75 for senior counsel, GBP 4,993.75 and GBP 1,057, respectively, for the two junior counsel. Sums were also claimed for estimated future proceedings.

56. The Government argued that, as in the employment proceedings costs did not follow the event and that even if successful the applicant would have had to bear the expense of vindicating its rights, such costs should not be recoverable in Strasbourg. They also asserted that as the applicant had ample grounds on which it could have expelled Mr Lee, the proceedings had been entirely avoidable. Further as the proceedings were less formal than ordinary court proceedings and it was commonplace for parties to proceed without legal representation (as Mr Lee did), it was the applicant's choice to be represented and its instruction of a Queen's Counsel was disproportionate and the Government should not have to meet those costs, particularly where it failed to press its Article 11 claims and those aspects of the case were not involved in the second tribunal proceedings.

57. The Government submitted, as regarded Strasbourg costs, that the sums claimed by the applicant who had instructed three counsel were excessive. They considered 50% of the amount claimed would be reasonable. They also disputed the amount of possible future costs.

58. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United*

Kingdom (Article 41), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001).

59. Concerning, first, the domestic proceedings, the Court would note that it is not at all uncommon for courts and tribunals within Contracting States not to adopt the approach of costs following events. According to its long-established practice, where an applicant has, in such proceedings, incurred costs as a direct result of seeking redress for, or to prevent a, breach of his or her rights, these may be regarded as a financial loss flowing from that breach and thus recoverable in Strasbourg proceedings, regardless of whether these could have been reimbursed at the domestic level. The Court has already rejected above the Government's argument that the applicant was in some way responsible for provoking the proceedings through its own conduct and it does not find it unreasonable, in a matter of vital concern, that it instructed senior counsel. Nor are the sums claimed here unreasonable. The Court has also found that the applicant did not fail, as alleged, to raise his Convention claims before the tribunals and even if, pursuant to the Employment Appeal Tribunal decision the Article 11 point was not considered by the second Tribunal, this does not detract from the fact that it was that Tribunal's decision which finally decided that the applicant had acted contrary to section 174 in expelling Mr Lee and thus rendered the applicant a victim of a breach of Article 11 as found above. The Court awards the sum claimed, namely 38,900 euros (EUR) (*equivalent approx. GBP 24,757.31*), inclusive of VAT.

60. Turning to the Strasbourg costs, noting the relative lack of complexity of the proceedings before it and the awards made in comparable cases, and agreeing with the Government that the instruction of three counsel led to an unnecessary duplication of work, the Court awards EUR 15,000 (*approx. GBP 10,000*), inclusive of VAT.

B. Default interest

61. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 11 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 53,900 (fifty three thousand nine hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Josep CASADEVALL
President