

Article 11(3) of the European  
Convention on Human Rights

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# Article 11(3) of the European Convention on Human Rights

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## Abstract

*This article outlines the engagement of British trade unions with the European Court of Human Rights and investigates the suggestion (gaining currency in trade union circles) that, for reasons of political expediency and without legal justification, the Court has, in recent cases, utilised a range of responses to art.11 cases brought by British trade unions to avoid embarrassing the British government by an adverse judgment. In effect, it is said, there is a secret implied art.11(3), impossible to surmount, which applies only to applications to the Court by British unions. Such a suggestion could not be more serious for the most successful international legal institution in the world, protector of the rights of 800 million citizens of the states comprising the Council of Europe, some 400 million of whom are workers. At a time when capitalism is in crisis, inequality of wealth and income is increasing and governmental policies of austerity profoundly affect relations between workers and employers, the protection by the Court of art.11 trade union rights has particular significance. We find that the suggestion is not “manifestly ill-conceived” and that the Court has a case to answer.*

## I. Introduction

Article 11(1) of the ECHR protects the right to freedom of association, including the right to form and join trade unions. Article 11(2) contains a typical range of permitted exceptions, though uniquely the “second sentence” of art.11(2) makes special provision for the armed forces, the police and those engaged in the administration of the state. The suggestion is, however, that art.11 also includes a subliminal art.11(3) created by and visible only to the judges of the European Court of Human Rights. This provides as follows: “(3) The foregoing provisions of this Article shall not apply to the United Kingdom”. There are of course serious concerns about the creation of such exceptions by a process of overt judicial amendment, and equally serious concerns about the lack of transparency relating to any such provision.

In the pages that follow we consider the merits of the claim that there is an art.11(3) by an examination of evidence that seems highly persuasive. Five strong applications have now been made to Strasbourg successively by British trade unions or trade union members claiming a violation of art.11 rights. Some deal with the most egregious forms of discrimination imaginable against trade unionists, some clearly violate other international treaties on which European Court of Human Rights jurisprudence has recently been constructed, and all build on the landmark unanimous decision of the Grand Chamber in *Demir and Baycara v Turkey*. All were ruled to be manifestly ill-founded.

Before examining these cases, we set out the context in which they have been decided. Here there are two factors at work, the first being the opposition of the British government to the jurisprudence of the Court in other areas and the genuine fear in Strasbourg of a Brexit from the ECHR, and the second being the inconvenient development of art.11 and the Court's radical departure from earlier jurisprudence to develop a bold elucidation of trade union rights. We can only surmise that the carving out of a British exception to art.11 is a conscious decision to protect both the ECHR and the European Court of Human Rights from further attack, and a conscious decision to avoid opening another area of conflict with the belligerent British Tory leadership.

Although some may applaud the Court's eye for self-preservation, it has come at a high price not only for the protection of trade union rights, but more generally for its obligation to respect the rule of law, a principle which the preamble to the ECHR states the Convention was designed to promote. It is also a principle that the Court itself applied in *Demir and Baycara* when it referred to the need for "legal certainty, foreseeability and equality before the law".<sup>1</sup> But apart from a duty to apply its own principles in a consistent manner, it might be expected that the Court would also apply to its own proceedings the relevant provisions of the Convention it was established to enforce. In particular, the art.6 right to a fair trial has been disregarded in some of the cases to which we refer below.

## II. The politics of Convention rights

There can be little doubt that the success of the Little Englanders in achieving a Brexit result in the referendum has predictably encouraged elements of the Conservative Party to press harder for their longstanding demand for denunciation of the ECHR and the European Court of Human Rights.<sup>2</sup> Of course, Brexit will, in any event, free the United Kingdom from such human rights constraints as are imposed by the Charter of Fundamental Rights of the European Union (CFREU), though to date these have proved to be insubstantial in many areas.<sup>3</sup> Indeed the implied right to strike advanced by the CJEU (before the

<sup>1</sup> *Demir v Turkey* (2009) 48 E.H.R.R. 54 at [153].

<sup>2</sup> P. Goodman, "[S]enior Conservatives, for quite some time, have shared an unhappiness with the Court and a willingness to contemplate radical change—even before the stand-off between the Commons and the Court over votes for prisoners" (3 October 2014) *Conservative Home*. The unhappiness was shared by some senior judges, notably Lord Hoffman, who has asserted that the European Court of Human Rights has usurped its function and should not be intervening in the domestic laws of Member States: "The Universality of Human Rights" (2009) 125 L.Q.R. 416; and see his foreword to M. Pinto-Duschinsky, *Bringing Rights Back Home* (Policy Exchange, 2011). Policy Exchange is a conservative oriented think tank. Lord Hoffman's arguments were magisterially rebutted by E. Metcalfe, "The Strange Jurisprudence of Lord Hoffman: Human Rights and the International Judge" [2009] 2 U.C.L.H.R.R. 35, and C. Rozakis, "Is the Case-Law of the ECtHR a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffman's Criticisms" [2009] 2 U.C.L.H.R.R. 51. At the Conservative Party Conference in September 2013 the then Prime Minister spoke of the possibility of denouncing the ECHR: <http://www.theguardian.com/politics/2013/sep/29/david-cameron-human-rights-convention> [Accessed 17 July 2017]. In September 2014, the Conservative Party published *Protecting Human Rights in the UK*. It contained the following proposals: "The European Court of Human Rights [will be] no longer binding over the UK Supreme Court. The European Court of Human Rights [will be] no longer able to order a change in UK law and becomes an advisory body only". Chris Grayling as Lord Chancellor and Justice Minister wrote on 3 October 2014 in *Conservative Home*: "Our Bill will break its formal link to UK Courts, so they no longer need to take account of its decisions. That will leave the European Court of Human Rights as only an advisory body in the UK, ... [if the Court and the Council of Europe do not consent] we will invoke our treaty rights to withdraw from the Convention altogether, to coincide with the passage of the new Bill into law". Michael Gove's first speech as Minister of Justice (23 June 2015) stated that the government could denounce the European Convention on Human Rights, <http://www.theguardian.com/politics/blog/live/2015/jun/23/politics-live> [Accessed 17 July 2017].

<sup>3</sup> In relation to workers' social rights the CJEU effectively limited the benefits of the CFREU for workers. Thus it has held the impugned act out of the scope of EU law so that the Charter was inapplicable (*Sindicatos dos Bancários do Norte* (C-128/12), 7 March 2013; *Elisabeta Danó* (C-333/13) [2015] 1 C.M.L.R. 48), or refused to give effect to the Charter on the grounds that it needed more specific expression before that was possible (*Association de médiation sociale v Union locale des syndicats CGT* (C-176/12) [2014] 2 C.M.L.R. 41). More significantly, the CJEU ignored the art.28 right to collective bargaining (and the art.12 right to freedom of association) in *Alemo-Herron v Parkwood Leisure Ltd* (C-426/11) [2014] 1 C.M.L.R. 21 and gave precedence instead to art.16 (the right to run a business) in a case which turned on the rights of workers to the benefits of collective agreements (see J. Prassl, "Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*" (2013) 42 I.L.J. 434). The case is consistent with the policy of the CJEU in rendering trade union rights subservient to the business interests protected by the four freedoms of the EU Treaty: *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2007] E.C.R. I-10779; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2007] E.C.R. I-11767; *Dirk Ruffert v Land Niedersachsen* (C-346/06) [2008] E.C.R. I-1989; *Commission v Luxembourg* (C-319/06) [2008] E.C.R. I-4323; and most recently, *Holship Norge AS v Norsk Transportarbeiderforbund* (E-14/15), EFTA Court, 19 April 2016, followed by the decision of the Norges Høyesterett (Supreme Court) HR-2016-2554-P (sak nr 2014/2089), 16 December 2016, in that case. Perhaps surprisingly, the Court of Appeal upheld the High Court in rejecting a freedom of establishment/services argument as grounds for an injunction against a strike in *Govia GTR Rly Ltd v ASLEF* [2016] EWCA Civ 1309.

Lisbon Treaty embedded the CFREU as a legally binding instrument) proved to be insufficiently robust to stand up to the business freedoms enshrined in the Treaty.

The politics of the ECHR are complex and at times absurd, if not comical. Both the main UK political parties have had voices for and against the Convention. At the time it was drafted and agreed, some senior Labour Cabinet ministers were strongly against for fear of the threat it presented to a planned economy under a socialist government.<sup>4</sup> In contrast, a leading role in its drafting was played by Sir David Maxwell Fyfe, a Tory lawyer appointed by the Attlee government for this purpose. Maxwell Fyfe was later to become Home Secretary under Churchill before his appointment as Lord Chancellor, taking the title Viscount Kilmuir, leaving no human rights footprint on domestic law.<sup>5</sup>

Signed and ratified by the Attlee government, the Convention has since then become the favoured tool of Labour governments despite Maxwell Fyfe's early involvement. The Wilson government opened up the right of individual petition and the Blair government provided for the enforcement of Convention rights in British law, following John Smith's commitment to this cause in 1994. Although the Convention had thus become the political property of the Labour Party, it is likely to be more accurate to say that it was the property of the liberal non-socialist wing of the Labour Party, and of the lawyers within that particular faction.<sup>6</sup>

The Conservative position on the Convention has in contrast evolved from one of apparent support in the immediate post-War era, through apparent indifference but acceptance, to one of explicit visceral hostility. That hostility has been led by Theresa May when Home Secretary who appeared to resent the fact that the rule of law required her to give effect to the decisions of the Strasbourg Court, and resent the fact that there was some external scrutiny of the conduct of the government generally and of her department particularly on controversial questions such as prisoners' rights and the rights of terrorist suspects. It would not be an exaggeration to say that under Cameron the British Coalition government engaged in a process of bullying the Court by making very clear its disdain for some of the judges' decisions.

The petulant aggression with which the latter was accompanied nevertheless appeared to give rise to a desire on the part of the Council of Europe to accommodate British demands, which would no doubt also suit the interests of other countries. This led initially to the Brighton Declaration in 2012,<sup>7</sup> which addressed a number of concerns, including not only the long backlog of cases and the long delays in the Court's processes, but also British demands that more decision-making under the Convention should be left to domestic judges, presumably in the expectation that they would be more likely to produce outcomes more acceptable to governments. The treaty was thus significantly amended by the 15th Protocol, leading to the inclusion of references to "margin of appreciation" and "subsidiarity" in the Preamble.

At the same time, Sir Nicolas Bratza's term of office as President of the Court expired in 2012. This fiercely independent judge was replaced as the British judge by Paul Mahoney who had spent over 30 years as an administrator and registrar at the European Court of Human Rights.<sup>8</sup> By 2014 the Court appeared to begin to take a softer line in British cases. In lectures and articles its judges sought to reassure the UK government that it had nothing to fear from the Strasbourg Court.<sup>9</sup> Indeed, there is evidence that might

<sup>4</sup> Stafford Cripps during the negotiation of the ECHR in 1950 said that "a Government committed to the policy of a planned economy" could not ratify the Convention, drawing attention to various draft Articles said to be "inconsistent with the powers of economic control which were essential to the operation of a planned economy": TNA, CAB 128/18 (Cabinet Conclusions, 1 August 1950).

<sup>5</sup> Nevertheless, he has become an implausible darling of some on the Left, the Mayor of London expressing his "admiration and gratitude": Sadiq Khan, "The Left's Favourite Tories: David Maxwell Fyfe", *New Statesman*, 6 October 2011.

<sup>6</sup> It was more Society of Labour Lawyers than Haldane Society of Socialist Lawyers, whatever the state of the debate in the Labour party may be today.

<sup>7</sup> See [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf) [Accessed 17 July 2017].

<sup>8</sup> Thereafter six years as President of the European Union Civil Service Tribunal.

<sup>9</sup> Note that the then President of the Court, Dean Spielmann, gave a lecture at University College, London on 20 March 2014, less than a month before the judgment in *RMT v United Kingdom* (2015) 60 E.H.R.R. 10 (see below) emphasising the width of the margin of appreciation and the deference paid by the Strasbourg Court to national courts (and in particular the UK courts): "Wither the Margin of Appreciation?", [http://www.echr.coe.int/Documents/Speech\\_20140320\\_London\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf) [Accessed 17 July 2017]. See, to comparable effect, the former President, N. Bratza, "Living Instrument or Dead Letter—the Future of the European Convention on Human Rights" (2014) E.H.R.L.R. 116.

raise a suspicion in the mind of a cynical observer that the European Court of Human Rights has sought to avoid judgments that might fortify the UK government's antipathy to the Court and the ECHR.

Such a cynical observer might point to *McHugh v United Kingdom*.<sup>10</sup> There the European Court of Human Rights held that the United Kingdom was in flagrant breach of the Court's earlier ruling in *Hirst (No.2) v United Kingdom*<sup>11</sup> (that a blanket ban on prisoners' right to vote breached the Convention) because the United Kingdom refused to amend the offending legislation. Nonetheless, the Court concluded that no compensation would be ordered and no costs would be recoverable in any of the 1,015 cases lodged in that application.<sup>12</sup> More recently, our suspicious observer might highlight *Faulkner v United Kingdom*<sup>13</sup> where the Court found that there was no breach of art.5(1) in an unwarranted 10-month delay before a Parole Board hearing. This conclusion was reached notwithstanding that the Court of Appeal had made clear that if the Parole Board had heard the case when it should have done, the prisoner would have been released 10 months earlier. Our observer might also cite *Da Silva v United Kingdom*<sup>14</sup> where the Court dismissed a complaint that art.2 was breached by the absence of a prosecution of any police officer involved in the shooting of Jean Charles de Menezes.

The Strasbourg Court will, of course, have been well aware of the reaction of the Conservative government and most of the British media to its judgments in earlier UK cases such as that of *Qatada v United Kingdom*,<sup>15</sup> claiming that the Court was preventing the deportation of dangerous terrorists. The government used such cases as propaganda in its campaign to win support to be rid of the ECHR and the Strasbourg Court,<sup>16</sup> but the attempts at appeasement by the Court have conspicuously failed. Before the EU Brexit referendum and before becoming Prime Minister, Mrs May made her views clear<sup>17</sup>:

"The ECHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals—and does nothing to change the attitudes of governments like Russia's when it comes to human rights. So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court."

The former Lord Chancellor, Liz Truss, also made clear as late as September 2016 that the government intended to repeal the Human Rights Act 1998, enact a British Bill of Rights but remain subject to the European Convention: "We are still working on it and I don't have details about the proposal".<sup>18</sup> By Christmas 2016, however, it appears that the challenge of EU-Brexit was beginning to overwhelm the government, a well-placed source now reporting that the future of the HRA and the United Kingdom's future relationship was to be postponed until after EU-Brexit, and relegated to the Conservative manifesto for an anticipated 2020 general election.<sup>19</sup>

<sup>10</sup> *McHugh v United Kingdom* (App. No.51987/08), judgment of 10 February 2015 and followed *Greens and MT v United Kingdom* (App. Nos 60041/08 and 60054/08), judgment of 11 April 2011.

<sup>11</sup> *Hirst (No.2) v United Kingdom* (2006) 42 E.H.R.R. 41(Grand Chamber), which had been upheld in *Scoppola (No.3) v Italy* (App. No.126/05), judgment of 22 May 2012.

<sup>12</sup> Similarly in *SMM v United Kingdom* (App. No.77450/12), judgment of 22 June 2017, the European Court of Human Rights held that the unlawful detention of an asylum seeker for seven months because of the lack of diligence of the authorities was in violation of art.5(1) but that finding in itself constituted just satisfaction and no compensation was payable.

<sup>13</sup> *Faulkner v United Kingdom* (App. No.68909/13), judgment of 6 October 2016.

<sup>14</sup> *Da Silva v United Kingdom* (2016) 63 E.H.R.R. 12.

<sup>15</sup> *Qatada v United Kingdom* (2012) 55 E.H.R.R. 1 (deportation of terror suspect would violate art.6 by reason of risk of evidence obtained by torture being used in his trial in Jordan).

<sup>16</sup> See the occasion on which Mrs May made the ludicrous claim that a deportation had been judicially blocked on art.8 grounds because the intended deportee owned a cat, in an attempt to bring the ECHR into disrepute: "Theresa May under fire over deportation cat claim" (4 October 2012), *BBC News*: <http://www.bbc.co.uk/news/uk-politics-15160326> [Accessed 17 July 2017].

<sup>17</sup> P. Stewart, "UK must leave European convention on human rights says Theresa May" (25 April 2016), *The Guardian*. And see "UK should quit European Convention on Human Rights" (25 April 2016), *BBC News*, <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36128318> [Accessed 17 July 2017].

<sup>18</sup> "Truss insists Bill of Rights would protect rights in a 'better way'" (8 September 2016), *Scottish Legal News*, <http://www.scottishlegal.com/2016/09/08/truss-insists-bill-of-rights-would-protect-rights-in-a-better-way/> [Accessed 8 July 2017].

<sup>19</sup> H. Stewart, "Ministers put British bill of rights plan on hold until after Brexit" (29 December 2016), *The Guardian*.

As reported, the plan was that the Tories would go into the 2020 election with a commitment to “lift and shift” human rights, by which they *now* meant denunciation of the ECHR and the embedding of selective human rights principles in a British Bill of Rights, enforced by British judges.<sup>20</sup> But that too has been thrown into disarray by Mrs May’s ill-fated “snap election” in which the government lost its majority. The Conservative Party Manifesto for the 2017 election confirmed that the government had postponed its plans for human rights, with the following commitment;

“We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next Parliament.”<sup>21</sup>

Conservative plans were doubtless postponed to what would now be the election manifesto in 2022. But it is of course far from clear whether the government will survive until 2022, or whether it can be as confident of success at the next election as it may have been in the past. It is also far from clear whether in the new political climate hostility to human rights will have the same populist appeal that the Conservatives have been able to exploit in recent years in their campaign against the Convention. As the prospect of Brexit from the ECHR begins to recede, so the recent deference of the Strasbourg Court to the British government appears even more ill-judged and inexcusable.

This is not to say of course that attempts will not continue to be made to dilute the Convention and its reach in the meantime: while the Conservative Party has been working on the strategy of repeal and possible denunciation, the Government has been actively pursuing a derogation from the ECHR in relation to the armed forces.<sup>22</sup> But it remains to be seen also just how much life is left in this strategy, as the Government faces demands to strengthen its commitment to human rights generally post-Brexit. These demands arise not least in relation to free trade agreements, with the Joint Committee on Human Rights beginning to express concern about the nature of human rights obligations under such arrangements.<sup>23</sup>

### III. The British Labour Movement, Politics and the European Court of Human Rights

Initially the British unions were bruised by their contact with the Strasbourg Court in cases such as *Young v United Kingdom*<sup>24</sup>; *Council of Civil Service Unions v United Kingdom*<sup>25</sup>; and *National Association of Teachers in Further and Higher Education v United Kingdom*.<sup>26</sup> This was against a background in which the Strasbourg Court had since 1975 refused to uphold either a right to strike or to bargain collectively as essential elements of art.11(1), holding instead that the state could legitimately choose other means by which trade unions could exercise art.11 rights to protect the interests of their members (*National Union of Belgian Police v Belgium*<sup>27</sup> and *Swedish Engine Drivers’ Union v Sweden*<sup>28</sup>). This was coupled with a

<sup>20</sup> C. Hope, “Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed” (28 December 2016), Daily Telegraph.

<sup>21</sup> Conservative Party, *Forward, Together, Our plan for a stronger Britain and a prosperous future* (London, 2017), p.37.

<sup>22</sup> Into which the Joint Committee on Human Rights has launched an Inquiry: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/> [Accessed 8 July 2017].

<sup>23</sup> HL Paper 153, HC 443 (2016–17), paras 238–239.

<sup>24</sup> *Young v United Kingdom* (1982) 4 E.H.R.R. 38. The closed-shop position was cast in concrete in *Sigurjonsson v Iceland* (1993) 16 E.H.R.R. 462 and *Sorensen and Rasmussen v Denmark* (2008) 46 E.H.R.R. 29.

<sup>25</sup> *Council of Civil Service Unions v United Kingdom* (1988) 10 E.H.R.R. CD269.

<sup>26</sup> *National Association of Teachers in Further and Higher Education v United Kingdom* (App. No.28910/95), judgment of 16 April 1998 (European Commission on Human Rights). But see *Cheall v United Kingdom* (1986) 8 E.H.R.R. CD74.

<sup>27</sup> *National Union of Belgian Police v Belgium* (1979–80) 1 E.H.R.R. 578 at [39].

<sup>28</sup> *Swedish Engine Drivers’ Union v Sweden* (1979–80) 1 E.H.R.R. 617 at [40]. Though *Ezelin v France* (1992) 14 E.H.R.R. 362 and *Gustafsson v Sweden* (1996) 22 E.H.R.R. 409 suggested a more positive attitude to trade union rights.

wide margin of appreciation.<sup>29</sup> The prospects of successfully litigating trade union rights were regarded as bleak.

However, *UNISON v United Kingdom*<sup>30</sup> for the first time provided some encouragement. This was a paradigm example of a union restrained from exercising its fundamental right to organise strike action to protect the interest of its members by what appeared to be wholly unjustifiable restrictions in the legislation (restrictions which were probably unintended by the legislators).<sup>31</sup> The political possibility of reversing this and other legislative restrictions by repeal or amending legislation appeared negligible, the then Labour Government having committed itself to a refusal to alter the trade union legislation brought in by previous Conservative governments.<sup>32</sup> In *UNISON* the UK legislation restricting the scope of a trade dispute (thus limiting the statutory protection for organising a strike) was treated as engaging art.11(1).

This was the first time that the European Court of Human Rights had held that the right to strike was, of itself, protected by art.11. The restriction in question had therefore to be justified by reference to the criteria in art.11(2) which, in the circumstances (and disturbingly from a jurisprudential point of view), the Court held it was. But *UNISON* and other unions (and their legal advisers) contemplated, since the right to strike in itself was now protected by art.11(1), then it might be that other UK restrictions on industrial action might fail the art.11(2) tests.<sup>33</sup> This view was encouraged when subsequently the European Committee of Social Rights considered the *UNISON* case and held that the restriction in question was not compatible with art.6(4) of the European Social Charter.<sup>34</sup>

Had the latter decision preceded that in Strasbourg, it was thought, the Court might have been persuaded that conditions in art.11(2) were not fulfilled. Further heart was taken on receipt of the judgment in *Wilson v United Kingdom*,<sup>35</sup> which had been lodged a couple of years before the facts in *UNISON* had occurred. There the Court overturned the House of Lords, which had effectively held that the right of freedom of association so far as a trade union was concerned amounted to no more than a mere right to hold a membership card.<sup>36</sup> The unions concerned were vindicated, the Court upholding the right not be penalised for seeking to be represented by a union and invoking the right to strike as one of the means by which unions could seek to be heard on behalf of their members.<sup>37</sup>

In consequence, Parliament had to amend the Trade Union and Labour Relations (Consolidation) Act 1992 to strengthen the right not to suffer detriment or dismissal and to extend to employees the right not to be bribed to give up union membership, the use of union services, or participation in trade union activities.<sup>38</sup> Further statutory amendment was required following a second and another reassuring victory in *ASLEF v United Kingdom*,<sup>39</sup> where the Strasbourg Court upheld trade union autonomy against one aspect of the United Kingdom's anti-union legislation which violated the right of a union to expel a member whose political views were antithetical to its constitution.<sup>40</sup> The amending legislation partially restored trade union autonomy on a sensitive question.

<sup>29</sup> *Gustafsson v Sweden* (1996) 22 E.H.R.R. 409 at [45].

<sup>30</sup> *UNISON v United Kingdom* [2002] I.R.L.R. 497.

<sup>31</sup> The restrictions in question are set out in the judgment of the Court of Appeal in *University College London Hospitals NHS Trust v UNISON* [1999] I.C.R. 204.

<sup>32</sup> See T. Blair, "We won't look back to the 1970s" (31 March 1997), *The Times*.

<sup>33</sup> The unions were not discouraged by *Federation of Offshore Workers Trade Unions v Norway* (App. No.38190/97), decision of 27 June 2002, because of its unique facts.

<sup>34</sup> See ECSR, *Conclusions C XVII-1*, at pp. 516–519; ECSR, *Conclusions XVIII-1*, at pp. 819–822; and see ECSR, *Conclusions XIX-3*. There was no suggestion that the breach of art.6(4) could be justified under art.31 of the Social Charter, which permits restrictions on Charter rights (including art.6(4)) similar in terms to those to be found in art.11(2) of the Convention.

<sup>35</sup> *Wilson v United Kingdom* (2002) 35 E.H.R.R. 20.

<sup>36</sup> *Associated Newspapers Ltd v Wilson and Palmer* [1995] 2 A.C. 454.

<sup>37</sup> *Wilson* (2002) 35 E.H.R.R. 20 at [45] and [46].

<sup>38</sup> Though it is doubtful if the amendments were sufficient to comply with the judgment, see K.D. Ewing, "The Implications of *Wilson and Palmer*" (2003) 32 I.L.J. 1.

<sup>39</sup> *ASLEF v United Kingdom* (2002) 45 E.H.R.R. 33.

<sup>40</sup> Again the law had to be changed and again it is doubtful if the amendments went far enough, see J. Henty and K.D. Ewing, "Trade Union, Human Rights and the BNP" (2005) 34 I.L.J. 197. Trade union autonomy is, of course, guaranteed by ILO Convention 87, arts 3 and 5, the Strasbourg Court's recognition of this foreshadowed in *Johansson v Sweden* (App. No.13537/88), decision of 7 May 1990.



A series of Strasbourg judgments between 2007 and 2010 in art.11 trade union cases from other countries gave further encouragement that the Court was taking the protection of trade union rights seriously. The 2008 landmark decision in *Demir and Baykara v Turkey*<sup>41</sup> established that the right to bargain collectively was an “essential element” of art.11, holding that the list of such elements was not closed. The right to strike was upheld in a series of cases which included: *Karaçay v Turkey*<sup>42</sup>; *Dilek v Turkey*<sup>43</sup>; *Urcan v Turkey*<sup>44</sup>; *Enerji Yapi-Yol Sen v Turkey*<sup>45</sup>; *Kaya and Seyhan v Turkey*<sup>46</sup>; *Saime Özcan v Turkey*<sup>47</sup>; *Çerikçi v Turkey*<sup>48</sup>; to which *Danilenkov v Russia*<sup>49</sup> can be added. In each case the respective government unsuccessfully prayed in aid art.11(2) as justification.

The Court was so robust that in the cases of *Karaçay*, *Kaya and Seyhan* and *Çerikçi* it held there to be a violation where there was no more than a mere disciplinary warning to be more attentive to the worker’s duties in the future after each had taken part in a day of industrial action.<sup>50</sup> It appeared, especially in the light of *Demir and Baykara*, that the jurisprudence of the Court was converging, in trade union rights cases, with that of the ILO Committee of Experts and Committee on Freedom of Association, and with the European Committee of Social Rights. Indeed it was hugely significant that in *Demir* and the subsequent cases the Court acknowledged the importance of the jurisprudence of the ILO and the European Committee of Social Rights to be influential in the interpretation of Convention rights.

Against this background, and buoyed with the not unrealistic hope that the Strasbourg judges would uphold fundamental rights suppressed in the United Kingdom, some British unions felt emboldened to make applications to the Court. Some moral support was derived from their Canadian counterparts pursuing a test case strategy on a parallel provision of the Canadian Charter—a strategy which, as it turns out, has been spectacularly successful.<sup>51</sup> We should make clear that what appears to be a coordinated UK litigation strategy in Strasbourg was not the result of the decision of the TUC or any cross-union committee; it merely emerged piecemeal as one union after another contemplated its latest defeat in the UK courts; there was nowhere else to turn.<sup>52</sup>

Not only was it considered that parliamentary reform of the panoply of trade union laws described by Tony Blair as “the most restrictive in the Western World”<sup>53</sup> was extremely unlikely within any reasonable timescale, but in addition attempts to run arguments based on fundamental rights in trade union cases within the English courts were and would be largely unproductive,<sup>54</sup> and unchallengeable unless and until overruled in the Supreme Court.<sup>55</sup> But as the optimistic tranche of cases brought by British trade unions

<sup>41</sup> *Demir v Turkey* (2009) 48 E.H.R.R. 54.

<sup>42</sup> *Karaçay v Turkey* (App. No. 6615/03), judgment of 27 June 2007.

<sup>43</sup> *Dilek v Turkey* (App. Nos 74611/02, 26876/02 and 27628/02), judgment of 17 July 2007, sub. nom. *Satlimiş v Turkey*, final version 30 January 2008; name corrected on 28 April 2008 to *Dilek v Turkey*.

<sup>44</sup> *Urcan v Turkey* (App. No.23018/04 etc), judgment of 17 October 2008.

<sup>45</sup> *Enerji Yapi-Yol Sen v Turkey* (App. No.68959/01), judgment of 21 April 2009.

<sup>46</sup> *Kaya and Seyhan v Turkey* (App. No.30946/04), judgment of 15 September 2009.

<sup>47</sup> *Saime Özcan v Turkey* (App. No.22943/04), judgment of 15 September 2009.

<sup>48</sup> *Çerikçi v Turkey* (App. No.33322/07), judgment of 13 October 2010.

<sup>49</sup> *Danilenkov v Russia* (App. No. 67336/01), judgment of 10 December 2009.

<sup>50</sup> Though see *Akat v Turkey* (App. No.45050/98), judgment of 20 September 2005, for a less upbeat view of trade union rights.

<sup>51</sup> *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 S.C.R. 3; *Saskatchewan v Attorney-General of Canada* [2015] 1 S.C.R. 245.

<sup>52</sup> A general tactical proposal was put forward by the authors and the Institute of Employment Rights: J. Hendy, “The Trade Union Strategic Cases Unit” (2008) 8 *Federation News* 1; K. D. Ewing and J. Hendy, “The Dramatic Implications of *Demir and Baykara*” [2010] 39 I.L.J. 2. It was criticised by the late Sir Bob Hepple, “Rethinking Laws against Strikes”, in A. Kerr (ed.), *The Industrial Relations Act 1990—20 Years On* (Dublin, Round Hall, 2010), p.137, who took the view that litigating the right to strike in Strasbourg would invoke the “Trojan horse of the ECHR” and would be to follow “a flickering will-o’-the-wisp”. Instead, he said, the legislature should be persuaded to protect the right to strike. A parallel debate about a test case strategy took place in Canada: see the special issue (2009–10) 15 *Canadian Labour and Employment Law Journal* 129. The strategists were proved spectacularly right in Canada (above) but Hepple was proved to have been prescient in relation to the Strasbourg Court. Hepple’s alternative strategy now, as then, requires the return of a radical Labour government which now, unlike then, appears possible.

<sup>53</sup> See Blair, “We won’t look back to the 1970s” (31 March 1997), *The Times*.

<sup>54</sup> See *R. (National Union of Journalists) v CAC* [2006] I.C.R. 1; *Metrobus Ltd v Unite the Union* [2010] I.C.R. 173 (esp. at [35]); though see Elias LJ in *London & Birmingham Railway Ltd v ASLEF*; *Serco Ltd v RMT* [2011] I.C.R. 848, at [8] and [9].

<sup>55</sup> As Elias LJ held in the *Serco* case ([2011] I.C.R. 848) at [8]. The same point was made in *Milford Haven Port Authority v Unite the Union* [2010] EWCA Civ 400. In *British Airways v Unite (No.1)* [2010] I.R.L.R. 423, Cox J said that “sooner or later, the extent to which the current statutory regime

have come to the top of the backlogged pile in Strasbourg over the last couple of years, these applications have all been dismissed by the Court. The view has thus gained ground in informed British trade union circles that Strasbourg appears to have effectively closed its doors to British workers and their unions.

That view has been reinforced by the robust decisions of the Strasbourg Court in cases from jurisdictions other than the United Kingdom. The cases from other countries at the same time as those we will examine in relation to the United Kingdom do not appear to support a suggestion that there has been a general trend towards narrowing trade union rights.<sup>56</sup> So cases on the right to strike from other countries appear to continue to uphold the notion that the right to strike is seriously protected by art.11(1) of the ECHR; see *Hrvatski Liječnički Sindikat v Croatia*<sup>57</sup> and *Veniamin Tymoshenko v Ukraine*.<sup>58</sup> *Junta Rectora del Ertzainen Nazional Elkartasuna v Spain*<sup>59</sup> in which the Court upheld, under art.11(2), the denial of the right to strike to armed police officers does not appear to undermine that proposition.

Indeed, the Spanish case contrasts with another in relation to a different aspect of trade union rights in which again the Court appears assertive: *Mattelly v France*.<sup>60</sup> In that case, national law prohibited members of the military from joining an occupational association, which had apparent trade union characteristics. The Court held, in particular, that the special protections put in place by the French state to protect the interests of military personnel were no substitute for the right to form and to join trade unions.<sup>61</sup> Although freedom of military association may be subject to legitimate restrictions, a prohibition pure and simple on forming or joining a trade union encroaches on the very essence of this liberty, a restriction prohibited by the Convention.

Apart from the British cases to which we are about to turn, the only cases to buck the art.11 trend are from Romania, both dealing with highly unusual circumstances. In *Sindicatul "Pastoral Cel Bun" v Romania*,<sup>62</sup> the Grand Chamber surprisingly overturned a Chamber judgment which had upheld the right of priests and lay employees of the Romanian Orthodox Church to form a trade union, in circumstances that do not permit any general conclusions of retreat to be made. Similarly, in *Manole and "Romanian Farmers Direct" v Romania*,<sup>63</sup> a refusal to register an organisation of self-employed farmers as a trade union was held by the Strasbourg Court not to be a violation of art.11, it being noted that there was no bar on them becoming a professional association under other legal provisions, and so protecting the interests of the members.

is in compliance with international obligations and with the relevant international jurisprudence will fall to be carefully considered". In *Secretary of State for Education v NUT* [2016] I.R.L.R. 512 at [77] Kerr J considered the art.11 aspect but thought that "there is a strong possibility that the existing law would be held to be justified within Art.11(2) , and I do not regard this argument of the N.U.T. as having sufficient strength to influence the court significantly against the grant of an interim declaration", though he refused it on other grounds. In the picketing cases, *Gate Gourmet London Ltd v TGWU* [2005] I.R.L.R. 881 and *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB), Fulford J and Warby J respectively took into account art.11 (and art.10) rights, but in both cases concluded that injunctions against certain aspects of picketing could be framed compatibly with both UK and ECHR law. In *Netjets Management Ltd v CAC* [2013] 1 All E.R. 288 Supperstone J at [41]–[42]) applied the art.11 collective bargaining right to the statutory recognition provisions (Trade Union and Labour Relations (Consolidation) Act 1992 Sch.A1) and was able to construe the Act in accordance with art.11. However, in *R. (Boots Management Services Ltd) v CAC* [2017] EWCA Civ 66, the CA held that though the statutory recognition provisions engaged the art.11 right to collective bargaining ([21]), and there was, nevertheless a (tortuous) way in which the complex exclusionary provisions of the 1992 Act could be held to be compatible with art.11.

<sup>56</sup> Apart from the cases cited in this part of our paper we considered the following which, in our opinion, are not suggestive of a trend in any direction: *Geotech Kancev GmbH v Germany* (App. No.23646/09), judgment of 2 June 2016; *DISK and KESK v Turkey* (App. No.3867/08), judgment of 29 April 2013; *Slovak Police Trade Union v Slovakia* (App. No.11828/08), judgment of 11 February 2013; *Eğitim ve Bilim Emekçileri Sendikası v Turkey* (App. No.20641/05), 25 September 2012; *Trofimchuk v Ukraine* (App. No.4241/03), 28 October 2010.

<sup>57</sup> *Hrvatski Liječnički Sindikat v Croatia* (App. No.36701/09), judgment of 27 February 2015.

<sup>58</sup> *Veniamin Tymoshenko v Ukraine* (App. No.48408/12), judgment of 2 Jan 2015.

<sup>59</sup> *Junta Rectora del Ertzainen Nazional Elkartasuna v Spain* (App. No.45892/09), judgment of 21 April 2015.

<sup>60</sup> *Mattelly v France* (App. No.10609/10), judgment of 2 October 2014.

<sup>61</sup> *Mattelly* (App. No.10609/10) at [70] and [75].

<sup>62</sup> *Sindicatul "Pastoral Cel Bun" v Romania* (2014) 58 E.H.R.R. 10.

<sup>63</sup> *Manole and "Romanian Farmers Direct" v Romania* (App. No.46551/06), judgment of 19 June 2013.

#### IV. Politics and the art.11(3) cases in the European Court of Human Rights

There is a sequence of five British cases which we consider here. In each the European Court of Human Rights display flaws in legal logic which might be random, but which otherwise fits the suspicions of our cynical observer. In each case the application was ruled inadmissible. All were decided in quick succession between 2013 and 2017.<sup>64</sup>

##### *The Prison Officers' Association case*

*Prison Officers' Association v United Kingdom*<sup>65</sup> originated in an application to the Strasbourg Court in 2011 challenging the UK prohibition on prison officers taking, and on their union, the POA, calling industrial action.<sup>66</sup> The Court decided in 2013 that the application was, in the standard phrase, “manifestly inadmissible” under art.35(2)(b) of the ECHR which precludes the court entertaining an application which is

“substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

The POA had indeed made a complaint in 2004 to the ILO Committee on Freedom of Association (CFA), which had considered the matter.<sup>67</sup> However, the POA was entitled to feel unjustly treated by the Strasbourg Court’s decision.

In the first place, the danger of being struck out by reason of a prior international application to the CFA was not appreciated until the Strasbourg Court’s decision in *Fédération hellénique des syndicats des employés du secteur bancaire v Greece*,<sup>68</sup> which was handed down two-and-a-half months after the POA application was lodged. There the Court held that the CFA met the conditions for another international procedure in that its proceedings were public, independent, judicial or quasi-judicial, it determined responsibilities, and could redress the violation. This description stretches the reality of the processes of the ILO CFA to the point of unrecognisability.<sup>69</sup> The POA would certainly have wished to argue that the CFA process did not fulfil the conditions required of a qualifying “procedure of international investigation or settlement”, in particular that the CFA did not make judicial determinations of civil rights and obligations, its findings were unenforceable, and it was incapable of redressing the violation, the continuance of which was the very reason for applying to the Strasbourg Court.

<sup>64</sup> Each of these five cases was dealt with by a section of the Court containing the British judge Paul Mahoney whose term of office expired in September 2016 when he was replaced by Tim Eicke QC. Judge Mahoney strongly favoured the Court being deferential to national courts: see his strong dissent in *AK v Latvia* (App. No.33011/08), judgment of 24 June 2014, where the Court held by six to one that the Latvian courts had given “the appearance of arbitrariness” ([94] in rejecting (in violation of art.8) a mother’s claim that inadequate ante-natal care had resulted in her continuing a pregnancy of her baby born with Down’s syndrome). The favouring of a non-interventionist approach for the Court is evident in the cases we examine below.

<sup>65</sup> *Prison Officers' Association v United Kingdom* (App. No.59253/11), judgment of 21 May 2011. The applicants argued, in the first place, that this ban was in breach of the right to strike, under art.11. Alternatively, if the right to strike was held not to have been breached (on the basis that it is permissible to remove the right to strike from those engaged in the administration of the state) then it was contended that the conditions permitting the removal of the right to strike in such circumstances were not met. Such conditions are well established in ILO jurisprudence and were in fact applied by the CFA in its decision on the complaint, namely that there must be collective bargaining, and that in the event of a failure to agree both sides must have speedy access to independent, impartial and binding arbitration. The ILO held that the Prison Service Pay Review Body, which deals with pay, did not meet those criteria. But the government took no notice.

<sup>66</sup> Criminal Justice and Public Order Act 1994 s.127.

<sup>67</sup> It upheld the ban on strikes (on the ground that the prison officers were engaged in the administration of the state) but held that they should therefore have the benefit of speedily accessible, binding arbitration by independent and impartial arbitrators enjoying the confidence of both sides. This had not been achieved.

<sup>68</sup> *Fédération hellénique des syndicats des employés du secteur bancaire v Greece* (App. No.72808/10), judgment of 6 December 2011.

<sup>69</sup> The European Court of Human Rights cited *Cereceda Marking and 22 v Spain* (App. No.16358/90), judgment of 12 October 1992. There the applicants, members of a Spanish Works Council, had argued that the CFA could not be regarded as a judicial body for these purposes and therefore its decisions did not have the status of final binding decisions. However, the Commission did not deal with that obviously critical submission.

In the alternative, the POA would have argued that its application in fact fulfilled the conditions for permitting an application under art.35(2)(b) to proceed. In particular the POA application (in 2011) unsurprisingly contained “new relevant information” about what had transpired in the seven years since the complaint to the CFA had been made in 2004.<sup>70</sup> The POA application to Strasbourg was 56 pages and its Response to the Government’s Observations a further 65 pages. They contained a huge amount of material that had not been before the CFA, much put forward to deal with points raised by the government, which it too had not raised in the CFA. There were several volumes of Appendices providing detailed factual material in support of the Application, and a further volume supporting its Response. Most of this material equally had not been before the ILO—indeed much of it post-dated the ILO decisions. Much was devoted to showing that the arbitration offered in place of collective bargaining underpinned by a right to strike was not binding on the government nor was it independent and impartial, and it did not have the confidence of the POA.

In the further alternative, the POA would have argued that, even if art.35(2)(b) ruled out the POA, the Application was also brought by two individual Applicants who were prison officers whose cases should not have been struck out. They had made no complaint to the ILO (indeed only trade union bodies can do so), so art.35(2)(b) could not have applied to them. Although the presence of different Applicants was the basis of allowing *Council of Civil Service Unions v United Kingdom* to proceed,<sup>71</sup> in the *POA* case, in contrast, the Strasbourg Court recognised this difficulty but held that the impact on the individuals “simply exemplify the effects of the statutory ban, which is likewise the subject of the present application”. That appears untenable and fails to distinguish between the effect on the POA of being unable to be heard on behalf of its members and the effect on the individuals of being barred from exercising the right to strike, for example by applying pressure for an increase in wages, so directly affecting their personal interests.

Particularly relevant for our consideration was the fact that the Applicants were effectively ambushed by the Court, and denied the opportunity to be heard on what turned out to be the decisive point against them. Notwithstanding the many procedural and substantive points raised by the UK government in its 55-page written defence, crucially it did not raise the art.35(2)(b) argument that the application was inadmissible because it had already been dealt with in another forum.<sup>72</sup> Nor did the Court itself hint at the point when it sent the parties its extensive “Statement of Facts” and identified three questions to deal with.<sup>73</sup> In the result, the Applicants did not learn of the argument against them until the decision was handed down. As subsequently in *Svenska Transportarbetareförbundet*,<sup>74</sup> the Court presumably exercised discretion under rr.51(5) and 54(3) and decided not to hear the Applicants on the decisive point of admissibility and then decided the point against them without an opportunity to respond. This appears to be a clear breach of the right under art.6(1) of the ECHR for a party to have “a fair and public hearing” and to know the case against it. Whilst it is accepted that the Strasbourg Court labours under a huge backlog of cases and therefore is inevitably alert to render inadmissible as many cases as can legitimately be so designated, the denial of the opportunity for the Applicants in the *POA* case to address the fatal argument against them might be seen as suggestive of wider considerations. But whatever the explanation, the Court appears to have violated of one of the first principles of the rule of law.

<sup>70</sup> ILO, CFA Case No.2383, Report No.336, March 2005, at pp.722–777.

<sup>71</sup> *Council of Civil Service Unions v United Kingdom*. (1988) 10 E.H.R.R. CD269, under the heading “Law” at [1(a)]. The case was held manifestly inadmissible on other grounds.

<sup>72</sup> As indeed the Court acknowledged at [27].

<sup>73</sup> Which quoted at length, at p.10, from the findings of the ILO Committee in the *POA* complaint.

<sup>74</sup> *Svenska Transportarbetareförbundet* (App. No.29999/16), judgment of 1 December 2016.

*The British Airways' cabin crew case*

The second case is *Roffey v United Kingdom*.<sup>75</sup> Again, the Strasbourg Court decided that an Application against the United Kingdom was “manifestly inadmissible”, this time for being out of time. The Application arose from the British Airways cabin crew dispute 2009–2011. The Application challenged the failure of UK law to provide any protection against sanctions (short of dismissal) imposed by an employer on strikers. British Airways had penalised all those who took part in any of the single days of official, lawful, strike action by removing their (valuable) travel benefits. Their entitlement to those benefits was not restored until the dispute was ultimately settled on 1 July 2011. It is important to make clear that the Application was not directed to the *employer's* prospective threat that the benefits would be withdrawn from strikers but instead at the *state's* lack of protection against the imposition of the sanction itself.<sup>76</sup>

Applications to the Strasbourg Court must be lodged within six months of the alleged violation.<sup>77</sup> The Application was lodged on 17 December 2010. The Court took the cut-off date from which the six-month period ran as the last date on which written *threats* to withdraw the benefits were made. The threats were made on 13 April 2010 and 10 May 2010. The Court described the latter date as “the date of the interference complained of” and “the date on which the act complained of occurred”.<sup>78</sup> Yet the complaint was not against the threats but against the unprotected imposition of the penalty. That could not be earlier than the date a particular cabin crew member participated in a strike triggering the removal of her benefits. Before actual participation in a strike, a crew member might have been discouraged by the existence of the threat but she would not be “directly affected” by it unless and until, by taking strike action, the sanction impacted on her.

The industrial action consisted of several separate days of strike action. Crew members not rostered to work on a strike day would not therefore take part (even though they supported the strike). So there were some members who did not join a strike day until the last such day, 9 June 2010, less than six months before the Application was lodged. Such a member would only have lost her entitlement from that date. The logic goes further, for the sanction did not “directly affect” a crew member until she claimed and was denied a travel benefit, when the sanction was activated. So the detriment against which the Applicants asserted protection should have been given under art.11, was the denial of travel benefit on each occasion the individual wished to use it but was refused by BA.<sup>79</sup> This constitutes a parallel with *Dilek* (above) and *Kaya and Sehan* (above) where the imposition of, respectively, damages and a disciplinary warning were the detriments against which the state should have protected. No doubt any prior threat to withhold benefits would also have been a violation.

But “the date on which the act complained of [in the instant case] occurred” was surely the date on which the travel benefit was denied to the crew seeking it. More than that, once a crew member had taken strike action, the sanction continued to have effect by barring any subsequent use of the travel benefits until ultimately the benefits were restored on settlement of the dispute more than six months after the Application was lodged. This case was a paradigm example of a continuing violation of Convention rights until the benefits were restored. Furthermore, the union was also an Applicant. From its perspective, both the continuation of the application of the sanction to those who *had* struck and the continuation of the threat of the sanction to those who *had not yet* struck, created and then maintained the “chilling effect” of the employer’s tactic continuously until the union decided to call no further strike action, a decision

<sup>75</sup> *Roffey v United Kingdom* (App. No.1278/11), judgment of 21 May 2013.

<sup>76</sup> As in *Wilson* (2002) 35 E.H.R.R. 20.

<sup>77</sup> ECHR art.35(1).

<sup>78</sup> *Roffey* (App. No.1278/11) at [43] and [36].

<sup>79</sup> Consider an analogy: had BA threatened to dismiss cabin crew strikers and subsequently then dismissed an individual for participation in a strike, the act about which that individual would complain would not be the threat but rather the act of dismissal. Time would obviously run from the date of such dismissal—which might be weeks, months or even years after the threat was issued. It would not be a defence to an unfair dismissal claim under national law for BA to assert that the dismissal was more than six months after the threat to dismiss; and if it was, it is inconceivable that the state could erect the time limit defence in the Strasbourg Court to a claim for consequential lack of unfair dismissal protection.

which was not made until sometime after completion of a further ballot for industrial action which it held in January 2011.

So the “the interference complained of” was a *continuing* act both for the individuals and for Unite, one which continued up to and past the date on which the Application was lodged. In Strasbourg jurisprudence, where a violation is continuing, the six-month limitation does not apply at all. So in the well-known *Dudgeon v United Kingdom*,<sup>80</sup> the existence of statutory provisions which had been in effect since 1861 and 1885 criminalising homosexual acts did not prevent the Applicant from succeeding in an application in 1976 for breach of art.8, since those laws posed a continuing “threat hanging over him [which] was real” (at [41]). The issues in *Dudgeon* and *Roffey* were of course very different, as was the source of the restraint. However, the principle at stake was the same in both, namely the existence of a restriction on Convention rights of a continuing nature, which could be invoked at the discretion of the state or the employer.

Convention rights are designed to be universal, and to apply equally to victims in all countries, regardless of the attitude of the incumbent government. As in the *POA* case, however, the injustice of the Court’s clear error of law was magnified by the Court’s own breach of art.6 (once again) in denying the Applicants the opportunity of dealing with it. Neither the government nor the Court raised the limitation point, and again the Applicants knew nothing of it in advance of the handing down of the decision.<sup>81</sup> In the result, the Applicants were denied any opportunity to respond to what was the crucial argument against them. The failure of the Court to draw to the Applicants’ attention the fact that it was considering an argument that the Application was out of time and the defective basis of that argument, might suggest that there was more to the decision on admissibility than trying to reduce the court’s list.

### *The RMT case*

The third case is *RMT v United Kingdom*.<sup>82</sup> The judgment is widely known and has been the subject of critical academic analysis.<sup>83</sup> The Application challenged UK restrictions on the right to strike on the basis of two sets of facts, the first relating to the requirement of a trade union to give notice to the employer of an intention to ballot for industrial action, a technically complex obligation without parallel in other countries and at the time the application was lodged, the basis of injunctions in several cases. The second related to a more substantive question, namely the total ban on all forms of secondary action operating since 1990, again without parallel in other leading European jurisdictions.

### Notice of industrial action

The first aspect of the Application challenged the High Court judgment in *EDF Energy Powerlink Ltd v RMT*.<sup>84</sup> For the purposes of giving the statutorily required notice of intention to conduct a ballot for industrial action to the employer (one of the conditions legitimating subsequent industrial action),<sup>85</sup> a union must identify in the notice the number of members to be balloted, their workplaces and their job categories

<sup>80</sup> *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149. See also *Hilton v United Kingdom* (App. No.12015/86), decision of 6 July 1988 (Commission): “The Commission further observes that the six months rule does not apply to that part of the applicant’s complaint under arts 8 and 10 of the Convention which relates to the continued retention of personal information about the applicant since such a complaint concerns a continuing situation (at 113)”. And in *Almeida Garrett v Portugal* (App. Nos 29813/96 and 30229/96); judgment of 11 January 2000 at [43]; *Roche v United Kingdom* (App. No.32555/96), judgment of 23 May 2002 at [2].

<sup>81</sup> The suggestion that the Application was made out of time was not raised by the UK government in its lengthy written Observations; nor by the Court in its Statement of Facts which identified five questions for the parties to answer. Nor indeed was the point raised in the Government’s Response. All this was effectively acknowledged by the Court at [33].

<sup>82</sup> *RMT v United Kingdom* (2015) 60 E.H.R.R. 10.

<sup>83</sup> Alan Bogg and KD Ewing, “The Implications of the RMT Case” (2015) 43 I.L.J. 221.

<sup>84</sup> *EDF Energy Powerlink Ltd v RMT* [2010] I.R.L.R. 114, Blake J.

<sup>85</sup> Trade Union and Labour Relations (Consolidation) Act 1992 s.226A. The requirement of notice of ballot is in itself incompatible with the European Social Charter art.6(4): ECSR, *Conclusions XIX-3* (2010).

(but not necessarily their names). In the *EDF* case, the High Court held that the union could not rely on the job titles its members had provided to the union, which the union maintained on its database in respect of each of them. Instead the court held, in granting an injunction to prevent the ballot and any subsequent strike, the union should have used its lay representatives to obtain from each member his/her official job title and used these official titles in its notice.

The union applied to Strasbourg on the grounds that such an obligation on top of all the other procedural requirements necessary to legitimate strike action in the United Kingdom was in breach of art.11(1) and could not be justified under art.11(2). The Strasbourg Court found the Application manifestly inadmissible because, though the injunction resulted in the union “experience[ing] some delay in taking action to protect the interests of its members”, there was no basis for the Court to find interference with the union’s rights other than being required to comply with “procedural requirements set down in law”, which the union had subsequently achieved, hence there was manifestly no breach of art.11.<sup>86</sup> This was not an argument advanced by the government in its Observations, or by the Court in its communications to the parties. As a result, the Applicant knew nothing of the crucial argument against it until the judgment was received. As before this appears to be a plain breach of art.6.

Had the union been heard, it had several powerful points. First, it was subjected to an injunction which prevented and delayed exercise of its Convention rights.<sup>87</sup> Delay is a violation: the *Spycatcher* case.<sup>88</sup> Secondly, the “procedural requirements set down in law” to interrogate the members in order to ascertain their correct job titles were not set down in law by the very extensive statutory provisions on industrial action—as the Court of Appeal had made clear in the *Serco* case,<sup>89</sup> to which the union drew attention. But thirdly and most significantly in relation to the Strasbourg Court’s finding that there was no interference with the union’s rights, it ignored the fact that RMT was not only subject to an injunction, but was also ordered to pay £79,216.25 legal costs to the employer. In addition, of course, it bore its own (lesser) costs making a total bill considerably in excess of £100,000.

This was surely a significant interference with the exercise of the Applicant’s art.11 rights, even ignoring the expense and inconvenience of serving a second notice and balloting its membership again.

## Secondary action

The second aspect of the case (the *Hydrex* case) involved secondary action which RMT wished to call amongst its members in a large company, in order to defend its members in a small company, the latter earlier having been hived off from the former. The hived off members were in dispute with their new employer to prevent an imposed wage cut. The Application challenged the UK prohibition of all secondary industrial action.<sup>90</sup> This prevented RMT calling industrial action amongst its members in the large company. The Strasbourg Court held that secondary industrial action, as well as primary industrial action, fell within art.11, yet declined to hold that the right to organise (or take) industrial action was an “essential element” of art.11.<sup>91</sup> This was despite the essential quality of the right to strike in the jurisprudence of the ILO, the European Committee of Social Rights, other international instruments, and the constitutions of so many European states. The Strasbourg Court had upheld the right to strike in many cases yet failed to recognise that industrial action is the usual means of exercising effectively the “essential element” of the right to collective bargaining (see *Demir* above).<sup>92</sup>

<sup>86</sup> *RMT* (2015) 60 E.H.R.R. 10 at [45]. See Bogg and Ewing “The Implications of the RMT Case” (2015) 43 I.L.J. 221, 231–235.

<sup>87</sup> Delay is particularly significant in industrial action cases, see Lord Diplock’s comment in *NWL v Woods* [1979] I.C.R. 867 at 879 about “striking while the iron is hot”.

<sup>88</sup> *Observer and Guardian v United Kingdom* (1991) 14 E.H.R.R. 153 at [48].

<sup>89</sup> *London and Birmingham Railway v ASLEF; Serco Ltd v RMT* [2011] I.C.R. 848 at [71].

<sup>90</sup> Trade Union and Labour Relations (Consolidation) Act 1992 ss 224 and 244(1).

<sup>91</sup> *RMT* (2015) 60 E.H.R.R. 10 at [77], [84].

<sup>92</sup> The Canadian Supreme Court decision in *Saskatchewan v Attorney-General of Canada* [2015] 1 S.C.R. 245 is the latest in a long line of cases to hold that the right to strike for the purposes of collective bargaining is a fundamental aspect of freedom of association.

The objection to the decision on this aspect of the case is not simply disagreement with the result, so much as the somersaults that were turned in order to reach it. First, the Court created a new distinction relating to art.11, holding that a ban on secondary action, in contrast to restrictions on primary industrial action, did not strike at the “core” or “very substance” of art.11, with the consequence that the state’s margin of appreciation was enlarged rather than diminished. Quite apart from the fact that there is no authority for such a distinction and no trace of it in the landmark *Demir* decision, the distinction between primary and secondary industrial action is a false one in the context of the right to strike. The distinction depends on the legal identity of the employer, which is surely immaterial to the right under art.11 to the effective protection of the interests of trade union members. The principal purpose of association in a trade union is, by means of solidarity, to exert greater pressure than a single worker could achieve alone (e.g. for the purpose of effective collective bargaining). The scope of this solidarity is delineated, in the first place, by the association between members in the union not by the legal identity of their employers or the structural arrangements of and between businesses.<sup>93</sup>

Having created this false distinction to downgrade trade union activity protected in other decisions, the Court also significantly diluted the margin of appreciation in art.11(2), greatly to the advantage of the British government. To that end it sought to distinguish the Grand Chamber judgment in *Demir* which had held that there was only a “limited margin of appreciation” under art.11(2).<sup>94</sup> That principle, the court held in *RMT*, only applied to the dissolution of a trade union.<sup>95</sup>

Yet on a proper analysis of *Demir* that proposition is wholly unsustainable. *Demir* (and its holding that the margin of appreciation was limited) did not involve the dissolution of a trade union.<sup>96</sup> Next the Court erected a novel test in relation to what it viewed as “accessory” rights under art.11. It held that<sup>97</sup>:

“In the sphere of social and industrial policy, which must be taken to include a country’s industrial relations policy, the Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’ (*Carson v UK*, ECHR 2010, §61).”<sup>98</sup>

This goes far beyond the hitherto understood margin of appreciation. It subverts the very words of art.11(2) which renders a restriction on an art.11 right to only be justifiable for one of the stated objectives and where the restriction is “necessary in a democratic society”. Though intended to benefit the United Kingdom, if art.11 is only violated where the victim can demonstrate that the incursion is *manifestly without reasonable foundation*, all states acquire practically unlimited discretion to violate freedom of association.

It is to be noted that the Court did not purport to break with its own precedent as it did in *Demir*, yet it is to be wondered how cases like *Kaya and Sehan* or even *Demir* could survive the application of this new test. But in a marked break with precedent, the Court elected not to follow the jurisprudence of the ILO and the ECSR which had both concluded that the United Kingdom’s ban on secondary industrial action was incompatible with their respective instruments. The Court’s justification for disregarding the findings of those bodies was that they had criticised the United Kingdom’s ban in “various hypothetical scenarios”,

<sup>93</sup> See Bogg and Ewing, “The Implications of the RMT Case” (2015) 43 I.L.J. 221, 236–238; 243–244.

<sup>94</sup> *RMT* (2015) 60 E.H.R.R. 10 at [119].

<sup>95</sup> *RMT* (2015) 60 E.H.R.R. 10 at [86].

<sup>96</sup> The trade union in *Demir and Baycara* (2009) 48 E.H.R.R. 54 was not dissolved but instead denied legal personality, the consequence of which was that existing collective agreements were annulled, it was the latter issue to which the Application, and the Grand Chamber’s judgment, was principally directed ([19], [27]–[29], [331], [93], [113]–[115]). Having held that the right to collective bargaining was an “essential element” of art.11 ([154]), *Demir and Baycara* applied precisely the same test in considering whether the annulment of the collective agreement was justified under art.11(2): at [162]–[169]. See also Bogg and Ewing, “The Implications of the RMT Case” (2015) 43 I.L.J. 221, 238ff.

<sup>97</sup> *RMT* (2015) 60 E.H.R.R. 10 at [99].

<sup>98</sup> See Bogg and Ewing, “The Implications of the RMT Case” (2015) 43 I.L.J. 221, 231–232. In fact *Carson* had nothing to do with industrial relations policy and does not mention it. Likewise, the Court at [89] cites *Stummer v Austria* (App. No.37452/0), judgment of 7 July 2011 as authority for “industrial policy” consideration but that case too had nothing to do with industrial policy and does not mention it. Both cases dealt with entitlement to old age pensions.



which produced “far-reaching negative effects” though these did not arise on the facts in the instant case.<sup>99</sup> Yet the jurisprudence of those bodies cited by the Court<sup>100</sup> was *not* confined to the effect of the ban in “various hypothetical scenarios”. Scenarios identified were no more than particularly egregious examples. Those bodies condemned the United Kingdom’s ban on secondary industrial action unequivocally on the basis of general principles which were universally applicable. Indeed, this is made clear in a passage actually cited by the Court<sup>101</sup>:

“... it appears to the Committee that where a boycott relates directly to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to ‘sympathy strikes’.

It would appear that more frequent recourse is being had to this form of action (i.e. sympathy strikes) because of the structure or the concentration of industries or the distribution of work centres in different regions of the world. The Committee considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful.”

## Other matters

So what we have is the creation of a false and novel distinction, the expansion of the margin of appreciation, and the break with the precedent of the Grand Chamber by the Fourth Section. But that was not the end of it. In its consideration of proportionality the Court relied heavily<sup>102</sup> on the fact that the members at Hydrex were not precluded from *some* industrial action “albeit on a limited scale and with limited results”. Accordingly, the interference did not strike at the “very substance of the applicant’s freedom of association”.<sup>103</sup> But effective collective bargaining cannot take place in the absence of an effective right to take strike action, and the right to protect members’ interests in art.11 must be practical and real, not theoretical. In previous cases, the Strasbourg Court had held that even minimal interferences with art.11 are not compatible with the Convention: e.g. *Karaçay, Çerikçi*, and *Kaya and Seyhan* (above).

On the other side of the equation, the UK government justified the total ban on secondary action because it had a “pressing social need ... to shield the domestic economy from the disruptive effects of such industrial action, which, if permitted, would pose a risk to the country’s economic recovery”.<sup>104</sup> Yet the government failed to adduce any evidence that secondary industrial action had ever had that effect or was likely to in the future.<sup>105</sup> Certainly, it defied imagination to suggest that the secondary action sought by RMT in this case could disrupt the British economy, and that absurd suggestion was not made. However, the Court apparently accepted the government argument that a more limited prohibition restricted only to secondary action which demonstrably posed a threat to the domestic economy would be “impracticable and ineffective”<sup>106</sup>—though a legislative regime short of a total ban had operated for 10 years.<sup>107</sup>

In so holding, the Court expressly rejected a test as to whether the regime imposed was the least restrictive necessary to achieve the government’s objective,<sup>108</sup> though such an approach has been long established in

<sup>99</sup> *RMT* (2015) 60 E.H.R.R. 10 at [98].

<sup>100</sup> *RMT* (2015) 60 E.H.R.R. 10 at [30]–[37].

<sup>101</sup> *RMT* (2015) 60 E.H.R.R. 10 at [32] which cited the ILO Committee of Experts’ Observations on the UK in 1989. See Bogg and Ewing, “The Implications of the RMT Case” (2015) 43 I.L.J. 221, 241 ff.

<sup>102</sup> *RMT* (2015) 60 E.H.R.R. 10 at [85], [88], [101].

<sup>103</sup> *RMT* (2015) 60 E.H.R.R. 10 at [88].

<sup>104</sup> *RMT* (2015) 60 E.H.R.R. 10 at [99].

<sup>105</sup> *RMT* (2015) 60 E.H.R.R. 10 at [61] and cf. [25].

<sup>106</sup> *RMT* (2015) 60 E.H.R.R. 10 at [100]–[103].

<sup>107</sup> *RMT* (2015) 60 E.H.R.R. 10 at [23]–[24].

<sup>108</sup> *RMT* (2015) 60 E.H.R.R. 10 at [103]–[104].

the Court's jurisprudence.<sup>109</sup> But not only did the Court fail to assess the less restrictive means or the rationality of a focus on one particular method of trade union action for reasons of economic recovery, it failed to give due weight to the law and practice of other Council of Europe Member States, just as it failed to give due weight to international treaty obligations in what had been a major departure from recent jurisprudence. As the Applicant's expert evidence showed, there was a "varied comparative picture"<sup>110</sup> as to the lawfulness of secondary action in European states. However, the Court rejected its submission that the United Kingdom's ban on secondary action was unique; holding instead that other states also outlawed secondary action.<sup>111</sup>

On this basis the Court was able to hold that "the respondent State finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach".<sup>112</sup> This was nonetheless sufficient to satisfy art.11(2); the implication being that only complete unanimity of law and practice among contracting states rejecting a restriction will trump the margin of appreciation of a state seeking to justify such a restriction. This is not consistent with the previous jurisprudence of the Grand Chamber, especially in *Demir*, which took into account in its conclusion on the right to bargain collectively the practice of "the vast majority" of European states to hold that there had been a breach of art.11 by the respondent government. Lack of unanimity was not fatal.<sup>113</sup>

In the *RMT* case our observer would not have to be very cynical or suspicious to conclude that the Strasbourg Court had bent over backwards to avoid reaching a judgment against the United Kingdom even at the expense of refusing to protect art.11 rights.

**The Agricultural Wages Board case** The fourth case is again a dismissal by the Strasbourg Court on manifest inadmissibility grounds. In *Unite v United Kingdom*,<sup>114</sup> the union's Application challenged the abolition of the Agricultural Wages Board (AWB) by the government on 30 September 2013 as a violation of its right to bargain collectively. The AWB was the last of the Wages Councils (originally established as trade boards in 1909) to survive. All but the AWB were abolished by a Conservative government in 1993. Created initially in 1917, the AWB had a statutory base and its awards (which covered not merely wages and allowances but also certain conditions of work in the agricultural industry) were enforceable both contractually and by criminal proceedings. The AWB consisted of equal numbers of representatives of employers (National Farmers' Union (NFU)) and workers (Unite) with a lesser number of government appointees who were called upon to tie-break if collective agreement could not otherwise be reached.<sup>115</sup>

The Strasbourg Court noted the government's impact assessment that a "downward pressure on wages" would ensue from abolition and that the loss of holiday entitlement alone would result in a transfer of £83.8 million from workers to farmers over the next 10 years. The Court also recorded that the NFU had made clear that it was not prepared to bargain collectively after the abolition nor to meet Unite to discuss any voluntary machinery for doing so. Nevertheless, the Court distinguished *Demir and Baykara* (above) on grounds which are to say the least obscure.<sup>116</sup> That case too involved the state annulling a collective agreement. The Court's distinction in *AWB*, however, appears to be that "in the present case the U.K. does

<sup>109</sup> See, e.g. *Van Mechelen v Netherlands* (1998) 25 E.H.R.R. 647 at [58]; *Informationverein Lentia v Austria* (1994) 17 E.H.R.R. 93 at [39]; *Campbell v United Kingdom* (1992) 15 E.H.R.R. 137 at [48]; *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 E.H.R.R. 244 at [73]–[74]; *Ahmed v United Kingdom* (1999) I.R.L.R. 188 at [62].

<sup>110</sup> *RMT* (2015) 60 E.H.R.R. 10 at [91].

<sup>111</sup> *RMT* (2015) 60 E.H.R.R. 10 at [38]: identifying the Netherlands, Austria and Luxembourg, though that was contested.

<sup>112</sup> *RMT* (2015) 60 E.H.R.R. 10 at [98].

<sup>113</sup> *RMT* (2015) 60 E.H.R.R. 10 at [151] and [154]. See Bogg and Ewing, "The Implications of the RMT Case" (2015) 43 I.L.J. 221, 245–246.

<sup>114</sup> *Unite v United Kingdom* (App. No.65397/13), judgment of 26 May 2016. This case too has been subject to academic criticism: K. Arabadjieva, "Another Disappointment in Strasbourg: Unite the Union v United Kingdom" [2017] 42 I.L.J. 289

<sup>115</sup> The government asserted that the AWB was not a forum for collective bargaining but the court disagreed: [58].

<sup>116</sup> It might be thought that a distinction could be drawn because the collective bargaining machinery was mandatory in the AWB rather than voluntary in *Demir*, or on the basis that in *Demir* a collective agreement was annulled whereas in the instant case it was the entire machinery for bargaining. But the Court did not draw any such distinctions.

not restrict employers and trade unions from entering into voluntary collective agreements”.<sup>117</sup> Therefore, *Unite* “is not prevented from exercising its right to engage in collective bargaining and the facts of the case are far removed from those at issue in *Demir and Baykara*”.<sup>118</sup> That curious proposition was not further explained.

The fact that the employers’ association (NFU) made quite clear that it would refuse to bargain collectively after abolition, and that the typical size of employers in the agricultural industry meant that the number which employed more than 21 workers (the minimum threshold for seeking compulsory recognition for the purposes of collective bargaining under the statutory recognition machinery<sup>119</sup>) “was almost zero”,<sup>120</sup> did not seem to trouble the Court. The reality was that, as the Court accepted, the abolition of the AWB was the end of collective bargaining in the agricultural industry. Despite the fact that the Grand Chamber had established in *Demir and Baykara* that the right to bargain collectively was an “essential element” of art.11, the Court was apparently unconcerned by its previous well-established jurisprudence that such Convention rights must be practical and effective, not theoretical and illusory or such as to render trade union freedom devoid of substance.<sup>121</sup>

The Court added a further justification for finding for the United Kingdom, namely that art.11 does not confer an obligation on a state to have a mandatory, statutory forum for collective bargaining.<sup>122</sup> How the absence of such an obligation justified the state in annulling existing collective bargaining machinery, especially in circumstances where the right to bargain collectively could not thereafter be exercised was not explained. Indeed, so irrelevant was it to the issue at hand that the Applicant union never suggested the existence of such an obligation, though the Court has previously held that the protection of art.11 rights sometimes requires the state to take positive measures and is not confined to a duty not to interfere in private relations.<sup>123</sup> Nor did the Court articulate what the right to bargain collectively, that essential element of art.11, amounted to, if it did not entail at the least the protection of an existing mechanism established for that purpose, in the absence of which, exercise of the right was rendered ineffective in the agricultural industry.

The Court relied again on a wide margin of appreciation “in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the AWB and the applicant’s competing rights under art.11”.<sup>124</sup> Yet why the public (other than those who were farm employers) might have an interest in the abolition of the AWB was neither explained by the Court nor advanced by the government in its submissions to it. The Court considered that the duty to promote collective bargaining in art.6(2) of the European Social Charter (ESC) and art.4 of ILO Convention 98 did not stipulate that states must put in place mandatory collective bargaining bodies,<sup>125</sup> nor impose any obligation on states to ensure that collective bargaining is conducted or even to promote the exercise of it.<sup>126</sup> Leaving aside the dubious nature of that analysis of the ESC and ILO obligations, the Court did not (perhaps because it could not) explain how the abolition of existing collective bargaining machinery could possibly be consistent

<sup>117</sup> *Unite* (App. No.65397/13) at [59], elaborated in [65].

<sup>118</sup> *Unite* (App. No.65397/13) at [59], elaborated in [65].

<sup>119</sup> Trade Union and Labour Relations (Consolidation) Act 1992 Sch.A1.

<sup>120</sup> *Unite* (App. No.65397/13) at [29], [65].

<sup>121</sup> *Demir and Baykara* (2009) 48 E.H.R.R. 54 at [66], [144].

<sup>122</sup> *Unite* (App. No.65397/13) at [60].

<sup>123</sup> *Plattform “Ärzte für das Leben” v Austria* (1991) 13 E.H.R.R. 204; *Wilson* (2002) 35 E.H.R.R. 20 at [48]: “the respondent State failed in its positive obligation to secure the enjoyment of the rights under Art.11 of the convention”.

<sup>124</sup> *Unite* (App. No.65397/13) at [60].

<sup>125</sup> *Unite* (App. No.65397/13) at [61]. ILO Convention 98 art.4 provides that: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”. ESC, art.6 provides that: “With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: ... 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

<sup>126</sup> *Unite* (App. No.65397/13) at [62].

with the duty to promote collective bargaining, as explicitly required by international legal instruments that were the foundation of its decision in *Demir and Baycara*.

In a break with *Demir and Baycara* and going even beyond *RMT*, the Court disregarded the relevant provision of the ESC on the basis that the obligations under ESC art.6 “cannot be considered synonymous with the positive obligations which arise under the Convention”.<sup>127</sup> Likewise, ILO Convention 98, though it requires states to “encourage and promote” collective bargaining, “plainly leaves a great deal of discretion to the States as to which measures are appropriate to national conditions or necessary”—and “it does not insist that such measures be mandatory”.<sup>128</sup> So that too could be disregarded as irrelevant to the termination of a 100-year-old collective bargaining machinery in the certain knowledge that bargaining in industry would thereupon cease.<sup>129</sup> There can be little doubt that this case renders the right to collective bargaining proclaimed as an essential element of art.11 in *Demir and Baykara*, without substance. Whether it will be followed in cases from other Member States remains to be seen but it can only fortify our observer in taking the view that only the most egregious violation of art.11 in the United Kingdom stands the slightest prospect of success in Strasbourg at the present time.

**The Blacklisting case** The fifth in our series is the case of Mr Brough who was one of over 3,000 (almost exclusively) construction workers who were, predominantly because of their legitimate trade union activities, blacklisted by a consortium of major British and international construction companies.<sup>130</sup> The existence of the blacklist was revealed after a raid by the Information Commissioner in 2009, and Mr Brough discovered from the files that the blacklist had operated to deny him work in his trade as a bricklayer in 1988. Shortly after learning of the entry, he brought employment tribunal proceedings against the company which denied him work in 1988. He based his claim on the Trade Union and Labour Relations (Consolidation) Act 1992 s.137, which gives a remedy for refusal of employment on grounds of trade union membership.<sup>131</sup>

The latter provision came into effect on 16 October 1992, so that there was no such cause of action prior to 1992 and it was not therefore unlawful to refuse employment on grounds of trade union membership in 1988. The claim was accordingly struck out in the employment tribunal, and Mr Brough’s appeal rejected by the Employment Appeal Tribunal. Mr Brough did not seek to appeal further because it would have been pointless to do so, and he applied to the Strasbourg Court on the ground that the United Kingdom had failed to provide legal protection against blacklisting in 1988. Yet again, the Court held that Mr Brough’s application was inadmissible, on this occasion on two grounds, the first being that he had failed to exhaust his domestic remedies. The Court held that at the employment tribunal he could have but failed to argue that, pursuant to the Human Rights Act 1998, s.3(1) (which requires legislation to be construed so far as possible compatibly with the Convention), the 1992 Act s.137 could and should have been

<sup>127</sup> *Unite* (App. No.65397/13) at [61].

<sup>128</sup> *Unite* (App. No.65397/13) at [63].

<sup>129</sup> As for other ILO Conventions on collective bargaining, they were not ratified by enough Member States “to show anything approaching a consensus”: *Unite* (App. No.65397/13) at [63].

<sup>130</sup> *Brough v UK* (App. No.52962/11), decision of 30 August 2016.

<sup>131</sup> A second Strasbourg case arising from the same blacklisting operation by the construction companies was *Smith v United Kingdom* (App. No.54357/15), judgment of 20 April 2017. There an agency worker was precluded from a remedy against the end-user construction company (which both added detrimental information to the blacklist about him and then blacklisted him) because he was not, at the material time, an “employee” of the end-user: *Smith v Carillion (JM) Ltd* [2015] I.R.L.R. 467 (CA). The change in the legislation to protect “workers” came too late for him. The Strasbourg Court (First Section, which included the new British Judge Tim Eicke replacing Paul Mahoney) held that the retention of personal data was a breach of art.8(1), but Mr Smith had been adequately compensated by the settlement of the High Court group litigation (referred to in fn.136 below). It held that the breach had been remedied in relation to the *Brough* case and because the Data Protection Act 1998 had been strengthened to create criminal offences, one of which was then successfully used against the operating officer of the consortium. As to art.11, the Court appeared to accept that there was a violation (at [48]), but declined to intervene under ECHR art.35(3)(b) since the case failed to pass any of the three hurdles there erected (see [42]–[44]). First, the substantial settlement Mr Smith received in the High Court litigation together with the recognition by the employment tribunal of the “genuine injustice” he had suffered removed any “significant disadvantage” justifying the Court’s intervention. Secondly, “respect for human rights” did not compel the Court to examine the case since the law had been changed and the House of Commons had subjected the blacklisting of these workers to “detailed scrutiny”. Thirdly, the courts had “duly considered” the case—even though the tribunal could not give a remedy.

construed so as retrospectively to provide a remedy for the blacklisting in 1988 (i.e. before the section came into effect—indeed before it was even drafted).

The reality is, however, that there was no prospect whatsoever of persuading either the tribunals or the Court of Appeal of what the Strasbourg Court suggested, the Court's analysis based was on a profound misunderstanding of British law, which could easily have been clarified if the Court had not been so quick to rush to judgment without properly hearing the parties to the dispute. It is a fundamental rule of statutory construction that legislation does not have effect retrospectively so as subsequently to render an act unlawful which was lawful at the time it was done (a principle indeed recognised in the ECHR art.7, albeit in relation to criminal law).<sup>132</sup> This rule could not be circumvented by the Human Rights Act 1998 s.3(1) (which came into effect on 2 October 2000).<sup>133</sup> The Human Rights Act could not therefore have the effect of making the then lawful denial of employment in 1988 remediable by reference to a legislative provision which came into effect in 1992.<sup>134</sup> It is not surprising therefore that the government advanced no such argument before the Strasbourg Court. The argument was the Court's own invention. But as in the previous cases cited above, Mr Brough was denied the opportunity to rebut the fatal argument against him, one which, on analysis, was wholly without legal merit.

The second and alternative ground relied on by the Court against Mr Brough was that he was out of time in submitting his Application, since he did not do so within six months from the discovery of his name on the blacklist, 11 May 2009.<sup>135</sup> If, the Court held, he did not have an effective remedy available to him then he should have brought his case within six months of learning of the violating act. This would appear to be a truly preposterous argument rendering every Application inadmissible if it is delayed for more than six months whilst the Applicant attempts but fails (inevitably, if there is to be a Strasbourg application) to remedy a Convention violation in the domestic courts. The Court thus presented an Applicant in the position of Mr Brough with an impossible dilemma. Either he makes a futile attempt to resolve the matter in the domestic courts, in which case he is penalised by the Strasbourg Court for being out of time. Or makes an immediate complaint to Strasbourg, in which case he is penalised for not exhausting domestic remedies.

It is also striking that the Court, in advancing grounds which the government did not raise by way of defence, ignored the grounds which the government did raise. The government's central defence argument was that it was not obliged to protect against blacklisting because of the state's wide margin of appreciation.<sup>136</sup> That too was an absurd argument (even after *RMT*), since blacklisting goes to the very heart of freedom of association, to say nothing of the violation of the right to private and family life revealed by the blacklisting files.<sup>137</sup> The manner in which the Court dealt with this case could not do other than provoke the cynicism and suspicion of our observer. The deployment of such worthless arguments whilst denying Mr Brough an opportunity to rebut them might be thought to point to a desire to defend the United Kingdom from an adverse judgment.

<sup>132</sup> *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 A.C. 553, 558; *R. v Clark (Mark)* [2003] 2 Cr. App. R. 363 at [13]; *R. v Kansal (No.2)* [2002] 2 A.C. 69 at [84]; *Wilson v First Country Trust (No.2)* [2004] 1 A.C. 816 at [186]–[197].

<sup>133</sup> *Wilson v First Country Trust (No.2)* [2004] 1 A.C. 816.

<sup>134</sup> Indeed, Mr Brough's application pointed out that the fact that he had no domestic remedy available to him was in contrast to those who were dismissed in order to enforce a "closed shop" between 16 September 1974 (when the post-entry "closed shop" provisions of the Trade Union and Labour Relations Act 1974 came into force) and 15 August 1980 (when the amendments introduced by the Employment Act 1980 restricting the operation of the post-entry "closed shop" came into effect). The latter provided that retrospective compensation was payable (though, it is to be noted, by the government and not by the employer). See K.D. Ewing and W.M. Rees, "The Closed Shop Compensation Scheme" (1983) 12 I.L.J. 148.

<sup>135</sup> He submitted his application within six months of the dismissal of his appeal to the EAT on 9 February 2011. The European Court of Human Rights, however, declined to take that as the date from which time ran.

<sup>136</sup> The curiosity of the *Brough* case is that the Court resorted to these contorted arguments but failed to utilise the obvious argument that Mr Brough had an alternative domestic remedy in the High Court (in the CIVIG Group litigation) for conspiracy and other causes of action which resulted in early 2016 in a settlement which substantially compensated him (and some hundreds of others) for the violation of art.11. This was the rock on which the *Smith* case understandably foundered, see fn.131 above.

<sup>137</sup> And in contrast with the unambiguous holdings in the subsequent *Smith* case that blacklisting breached art.8 (see [36]–[37]) and art.11 (see [48]).

## V. Conclusion

It is to be noted that the second author was lead counsel for the Applicants in each of these five cases. It is possible, of course, that a less suspicious and cynical observer might well conclude that that fact may be explanatory of this series of wins by the UK government. We leave evaluation of that possibility to the reader.

Otherwise, the pattern detected by our cynical and suspicious observer in these cases and his or her analysis of the motivation of the Court is likely to have been observed by other governments irritated by judicial restraints imposed on violating the human rights protected by the ECHR. Indeed, it is perhaps a matter of surprise that other governments have not made the same threat as the United Kingdom in the hope of similarly gaining what appears to be a significant benefit. Be that as it may, if our observer's jaundiced view is correct, the Strasbourg Court may well have diminished its stature across Europe by its apparently supine attitude to the United Kingdom and by its enlargement of the margin of appreciation to permit the United Kingdom almost unfettered discretion to deny meaningful protection to trade union rights.

By subordinating justice to politics, the Court has been engaged in a futile exercise to protect its own status and perhaps its very survival. It is true that the current British Prime Minister has for many years shared the visceral dislike of her hard right backbenchers for the ECHR and the Court by which the latter is administered. It is also true that buoyed by the vote for Brexit, denunciation of the ECHR was thought to be only a matter of time. Once Brexit had been completed, there would then be an opportunity to clear the decks of the Strasbourg process and wrap ourselves in a union flag bearing a British Bill of Rights. But as recent electoral events have shown, politics is an unpredictable science, and not one which any self-respecting judicial body should be seeking to second guess.

Returning to the main theme of this article, if the Strasbourg Court is not prepared to enforce trade union rights it is in danger of failing hundreds of millions of workers in the countries of the Council of Europe. The failure of the latter Court to protect art.11 rights (diplomatically but very clearly spelled out by Judge Pinto du Albuquerque in the *Croatia* case),<sup>138</sup> is already having an impact, certainly in the United Kingdom. Apart from a massive costs risk, no doubt one of the factors in *Govia Thameslink Railway Ltd v ASLEF (No.2)*<sup>139</sup> for the union deciding not to fight the case through the domestic courts to exhaust its remedies so as then to seek relief from Strasbourg was because no relief could reasonably be expected from the latter.<sup>140</sup> Yet that case raises issues about art.11(1) every bit as serious as recently successful applications from other countries.

The other point of course is that the Court has provided valuable ammunition to governments seeking to impose further controls on trade unions. Tory ministers and Public Bill Committee members were greatly emboldened by the mantra of “margin of appreciation”, which the Court had conveniently handed them in the *RMT* case on the eve of the Trade Union Bill being introduced in 2015. The purpose of the Convention is to protect victims not to empower states. Unless the European Court of Human Rights raises its game and begins to display some commitment to the rule of law, it will not be only British trade unionists who will be heard to ask what the Court is for and whose interests it serves. If meek self-preservation is understandable, robust judicial independence is admirable—and expected.

<sup>138</sup> *Hrvatski Liječnički Sindikat v Croatia* (App. No.36701/09), judgment of 27 February 2015.

<sup>139</sup> *Govia Thameslink Railway Ltd v ASLEF (No.2)* [2016] EWHC 1320 (QB); [2016] I.R.L.R. 686.

<sup>140</sup> This was notwithstanding the fact that the grounds for the injunction were tenuous at the least: that a text message from the general secretary to relevant members stating (correctly) that there was no collective agreement to drive new trains should be construed as a call to strike. The court accepted that he had no intention to induce a breach of contract but found that it was likely that he was “wilfully” turning a blind eye to that consequence. The text thus amounted to a call for industrial action prior to the ballot which the union then held but that call precluded the union in perpetuity from ever lawfully calling strike action in relation to that matter, even over a wider constituency and on a wider dispute.