

The Trade Union Act 2016, the European Court of Human Rights and the 'right to strike' under Article 11 of the European Convention.¹

Introduction

Article 11(1) of the European Convention on Human Rights provides that 'Everyone has the right ... to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.' Article 11 case law holds that protection extends beyond a mere right to join a trade union but also encompasses a number of freedoms including a right of a trade union to make representations to an employer on behalf of the membership²; a right for trade union members not to be discriminated against by an employer³ and a right to engage in collective bargaining⁴. The Strasbourg Court has also now formally accepted that a 'right to strike' is within the scope of trade union rights under Article 11.⁵

Legal action at the European Court of Human Rights challenging the United Kingdom's strike law as contrary to Convention rights, has however, so far yielded scant satisfaction for trade unions. The Strasbourg Court has failed to directly adjudicate on this question, arguably due to an inflexible application of the admissibility criteria, or has not effectively applied Convention principles to the United Kingdom legal framework – acknowledged to be the most restrictive on strike action in Europe.⁶ For example, in *NURMT v United Kingdom*⁷ (*RMT v United Kingdom*), the admissibility criteria was used in order to strike out a claim that the balloting requirements (that a union must follow prior to taking industrial action) were incompatible with Article 11. The union (after earlier strike action had been subject to an injunction) had eventually complied with the strict balloting rules and had successfully called the industrial action. The Court held that as the union had been able to take action, the application was 'manifestly ill-founded' pursuant to Article 35(1)(b) - as it did not demonstrate a potential violation of Convention rights. The Court failed to take into account that the delay (caused by having to comply again with the detailed balloting provisions) adversely impacted on the union's campaign and that the union incurred additional substantial financial costs - both examples of interference with the 'right to strike' guaranteed by Article 11.⁸

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2 *National Union of Belgian Police v Belgium* (1975) 1 E.H.R.R. 578; *Swedish Engine Drivers' Union v Sweden* (1976) 1 E.H.H.R. 617

3 *Wilson and Palmer and Others v United Kingdom* [2002] I.R.L.R. 568

4 *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54

5 *Enerji Yapi-Yol Sen v Turkey*, (App No. 689591), judgment of 21 April 2009; *RMT v United Kingdom* (2015) 60 E.H.H.R. 10; *Hrvatski lijevnicki Sindikat v Croatia* (App No. 36701/09), judgment of 27 February 2015.

6 As Tony Blair commented in an interview with *The Times* 31 March 1997, 'Let me state the position clearly, so that no-one is in doubt. The essential elements of the trade union legislation will remain. The changes we propose would leave British law the most restrictive on trade unions in the western world.'

7 (2015) 60 E.H.H.R. 10

8 For further analysis of this case see C Barrow, '*RMT v United Kingdom* [2014]: The European Court of Human Rights Intimidated into Timidity or Consistent in its Inconsistency' (2015) 3 E.H.R.L.R. 277

A failure to comply with procedural criteria was also the cause of rejected applications in *Roffey v United Kingdom*⁹ and *Prison Officers' Association and others v United Kingdom (POA v United Kingdom)*.¹⁰ In *POA v United Kingdom* a claim that an outright ban on strike action by prison officers' was in breach of Article 11 was rejected on the basis that a similar complaint had been submitted in 2004 by the POA to the International Labour Organisation's (ILO) Freedom of Association Committee alleging the ban was a breach of ILO Convention 87. Article 35(2)(b) of the European Convention provides that an application to the European Court that is substantially the same as an earlier claim submitted to a different competent judicial international body for adjudication is inadmissible unless there is new relevant information – such as where there are new parties affected by the restriction. The complaint failed on these grounds even though the new applicants were not parties to the original ILO application and were directly affected by the measure as individual union members and employees. The Strasbourg Court took the view that, as they were also local (unpaid) officials, they were sufficiently closely associated with the earlier proceedings through their trade union links – despite the fact that the ILO action was of a purely collective nature, taken solely by the union many years earlier.¹¹

In *Roffey v United Kingdom*¹² the union initiated industrial action in April 2010. The employers responded by penalising those on strike with a loss of non-contractual discretionary travel privileges. The union lodged a claim in December 2010 that the state's failure to provide a remedy for the imposition of sanctions short of dismissal (the loss of travel benefits) during an industrial dispute constituted an unjustified violation of Article 11. The European Court found the application inadmissible on the grounds that the application was out of time – it was made after the 6 month time limit contained in Article 34(1) - which runs from when the date of the interference with Convention rights occurred. The Strasbourg Court determined that this was from the date when the applicants were informed of the withdrawal of their travel benefits, in April 2010, at the beginning of the main industrial action. The Court failed to take into account that the violation was not a one off event but a continuing interference, with the travel benefits not being restored until after the settlement of the dispute in July 2011.¹³

9 *Roffey v United Kingdom* (App No. 1278/11), decision of 21 May 2013.

10 *POA v United Kingdom* (App No. 5925/11), decision of 21 May 2013.

10 It was also arguable that the ILO's Freedom of Association Committee was not a competent judicial body for these purposes (relating to an application of Article 35(2)(b)) as its decisions were unenforceable and not binding on state actors.

12 *Roffey v United Kingdom* (App No. 1278/11, decision of 21 May 2013.

13 The application in *Brough v United Kingdom*, (App No. 52962/11), decision of 30 August 2016 - alleging that the lack of statutory protection for those workers 'blacklisted' by employers was a violation of Article 11 - was also declared inadmissible as 'out of time' even though the applicant had sought to exhaust his domestic remedies during the relevant time frame.

Where an application overcomes these procedural hurdles the European Court has not always applied Convention principles consistently to *prima facie* evidence of violations of Article 11. In *RMT v United Kingdom*¹⁴ the Court had declared that although Article 11 did encompass a right to strike, an absolute ban on secondary action was within the state's 'margin of appreciation' and therefore a 'proportionate' restriction even though there was little evidence to justify such an extensive ban and it was not in conformity with European labour standards or with instruments of relevant international labour law.¹⁵

This rather sorry recent record of Strasbourg adjudication on United Kingdom strike law has emboldened the Conservative administration to argue that the additional limitations on industrial action introduced by the Trade Union Act 2016 are in full compliance with Convention standards.¹⁶ This statute further complicates the balloting procedure a union must undertake prior to taking strike action by, for example, introducing new stringent turnout requirements and by imposing additional restrictions on peaceful picketing; all provisions that are, *prima facie*, in violation of Article 11(1). Under Article 11(2) the 'right to strike' may be restricted where it is "... necessary in a democratic society ... for the protection of the rights and freedoms of others'. The terminology '...necessary in a democratic society' has been interpreted to imply that intervention can only be permitted under Article 11(2) if it meets a "pressing social need" – which involves a balancing of competing interests and an examination as to whether the state's intervention goes no further than is necessary to meet that need – i.e. it is a proportionate response to the legitimate objective pursued.¹⁷ This test is met if the new restrictions are a balanced, measured and proportionate means of securing the policy objectives behind the legislation. As the provisions of the Trade Union Act 2016 plainly interfere with a trade union's right to take industrial action under Article 11(1), it is arguable that significant reasons would therefore need to be established to justify these measures.

The picketing provisions.

An enduring feature of strike action is that those who are engaged in such action will seek to persuade others to support them or join them so as to enhance the effectiveness of the strike. As picketing inevitably conflicts with the interests of other

14 *RMT v United Kingdom* (2015) 60 E.H.H.R. 10

15 See also *Unite v United Kingdom*, (App No. 65397/13), decision of 26 May 2016. This case concerned the abolition of the Agricultural Wages Board that promoted and supported collective bargaining in the agricultural sector. The application was struck out as inadmissible on the grounds that abolition did not prevent the union from exercising its right to engage in voluntary collective bargaining - even though the relevant employers had steadfastly refused to do so.

16 *The Trade Union Bill: European Convention on Human Rights Memorandum*, (BIS/15/415, July 2015), at pp.4-7

17 On the interpretation of the expression 'necessary in a democratic society' in the industrial context see *Wilson and Palmer v United Kingdom* [2002] I.R.L.R. 586 and *ASLEF v United Kingdom* [2007] I.R.L.R. 361.

parties (such as employers, working employees, and where there is disruption to public order, members of the public) picketing has always been subject to control by the criminal and civil law. Criminal charges can be brought against pickets, for example, relating to obstruction of the highway or offences under the Public Order Act 1986 (relating to disorder on a picket) or under s 241 Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A 1992) (relating to intimidation and other miscellaneous offences). Civil liability may follow where the pickets are trespassing or committing a nuisance. The undue application of existing criminal and civil restrictions may well have implications for compliance with the requirements of Article 10 (on freedom of speech) as well as Article 11 of the Convention.¹⁸

Of particular relevance to industrial action is the tort of inducing breach of contract, which occurs when picketing successfully discourages workers from attending their place of work in breach of their employment contract. Picketing may also interfere with commercial contracts, where, for example, lorry drivers' are persuaded not to deliver to the employer; resulting in a breach of a commercial contract of supply between the supplier of goods and the employer who is the target of the action. Trade unions and individual pickets only have immunity from these civil actions if they comply with the conditions outlined in s.220 TULR(C)A 1992 – that the picketing relates to a 'trade dispute' and the pickets attend 'at or near' their workplace in order to peacefully communicate or obtain information or persuade others not to work.

Section 10 of the Trade Union Act 2016 strengthens these conditions by inserting a new s.220A into the 1992 Act, introducing several new provisions pickets and unions must meet before the immunity applies. A union must now appoint a 'picket supervisor'¹⁹ who has responsibility for managing the picket line; with the functions of the supervisor outlined in the re-issued Picketing Code of Practice.²⁰ The union must take reasonable steps to ensure the police are informed of the supervisor's name and contact details and location of the picket line.²¹ The picket supervisor (who must be an official or member of the union) should be present at the picket line or be readily contactable by the police or union to attend the picket at short notice and be in possession of a letter from the union confirming that the picketing is approved by the union.²² A picket supervisor is under a duty to show the relevant employer or their agent the letter on request 'as soon as reasonably practicable'.²³ When

18 An analysis as to what extent the picketing sanctions are in breach of Article 10 goes beyond the scope of this article.

19 S 220A(2)(3)

20 The Department for Business, Energy and Industrial Strategy, *Code of Practice on Picketing* (March 2017), at [58] – [61]

21 TULR(C)A 1992 s 220A(4)

22 TULR(C)A 1992 s 220A(5)(7)

23 TULR(C)A 1992 s 220A(6)

attending the picket the supervisor must wear 'something' (such as a badge or armband) so that they are readily identifiable.²⁴

Should there be a failure to comply with any of these conditions then the protection of the immunities against tort action, for the union and for individual pickets, will be withdrawn. Thus, for example, if a picket supervisor is not available or if the letter of authorisation has been mislaid, or if the picket supervisor has forgotten to wear the 'official' armband, the picket will be deemed to be automatically unlawful. The legal consequences of which is an injunction being granted to stop the picketing and a subsequent damages claim. Some of the conditions may be particularly difficult for unions to follow – the larger the workplace and the greater the number of entrances and exits the more supervisors will be required. It is highly unlikely that any union could meet such demands solely through their full time officials. In such circumstances a union may need to recruit ordinary members who, if they are not familiar with the law and the Code of Practice and are not able to be present or to be nearby at all times, may well inadvertently violate the provisions of the statute. It is clear that the new conditions constrain the freedom of workers and trade unions to organise and participate in peaceful picketing and the likely impact of these new rules will be further injunctions being granted for relatively trivial reasons.

In order to ascertain if these provisions are in violation of Article 11(2) safeguards the question to be addressed is – are they a balanced, measured and proportionate means of securing the government's objectives? The underlying policy objectives (identified in the Consultation papers published prior to the passage of the statute through Parliament) make it clear that the picket supervisors' role is to encourage responsible behaviour on the picket line and deter intimidatory and violent conduct in order to safeguard the rights of workers, management and members of the public.²⁵ Yet, there is little substantive evidence of disorderly picketing,²⁶ there is already a whole range of criminal and civil law actions available to the state or the employer to control unruly picketing and, as noted earlier, picketing has to be peaceful for a union to enjoy the benefit of the immunities. Academic research has also demonstrated

24 TULR(C)A 1992 s 220A(8). Originally the Government proposed to legislate in order to limit general protests associated with strike action. The consultation document (Department for Business Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers*, (BIS 15/415, July 2015), pp.10-12 contained proposals to require trade unions to publish a plan of intended action in advance of any protest, to limit their use of social media, to inform the Certification Officer of the picketing and protest activity and the creation of a new criminal offence of intimidation. After widespread criticism this attempt at even tighter statutory control was abandoned.

25 Department of Business, Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers* (BIS 15/415, July 2015) at [15]-[18]

26 The Consultation paper (Department for Business, Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers* (BIS 15/415, July 2015), pp. 4-5 cited allegations made in the *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes*, 15 Oct 2014, commissioned by the prime minister to investigate allegations of intimidation during picketing activities at the Grangemouth industrial dispute. The authors of the review themselves admitted there was little empirical evidence for these assertions, apart from anecdotal unsubstantiated commentary.

there is little need for this level of control. Over a 10 year period from 2005 to 2015, only 5 applications were made for injunctions in relation to breaches of the picketing provisions of s 220 TULR(C)A 1992.²⁷

It is clear that the Government has not balanced the rights of both parties when introducing these restrictions; the protection of the immunities will be withdrawn no matter how minor the breach and without regard to whether the employer has suffered economic injury or been prejudiced in any way. The consequences for trade unions and their members, however, is not just the inability to picket but also that individual pickets will also lose their protection from unfair dismissal.²⁸ These harsh penalties for a failure of complying with an organisational regulation (such as forgetting to wear an armband or misplacing a letter of authorisation) offend against the notion of 'proportionality' inherent in the requirements of Article 11(2) and Strasbourg case law.

One aspect of the proportionality test outlined in Strasbourg case law is whether the domestic law is consistent with the requirements of relevant international law and contemporary European practice. Legislation that is in violation of international and European standards cannot be said to be 'proportionate'.²⁹ The International Labour Organisation (ILO) and European Social Charter (ESC) supervisory bodies recognise that the right to picket is an inherent part of the 'right to strike' and any unreasonable interference is a violation of ILO Convention 87, Article 3 and ESC Article 6(4).³⁰ As the new restrictions impose disproportionate and discriminatory obligations on trade unions and extensive regulation of picketing it is unlikely that these provisions will be in compliance with ILO and ESC standards.

As there is no clear 'pressing social need' for these new restrictions; as they are disproportionate; and as there has been no attempt to balance the interests of the relevant parties it is doubtful the government could establish a justification for these picketing initiatives. These provisions will simply hinder the organisation of legitimate picketing by trade unions and furnish employers with further opportunities to limit picketing in industrial disputes. In short, the picketing requirements in the Trade

27 G. Gall, Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain 2005-2014 (2016) 54 BJIR 187

28 If there is a breach of s.220A, picketing will not be 'protected industrial action' for the purposes of a claim for unfair dismissal under s 238A TULR(C)A 1992

29 For example, in coming to the conclusion that restrictions on collective bargaining were disproportionate the Grand Chamber in *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54 made specific reference to ILO Convention 98 (On the Right to Organise and to Bargain Collectively) and 151 (On the Right to Organise in Public Service) and Article 6 of the Council of Europe's 1961 Social Charter. In *Hrvatski Liječnicki Sindikat v Croatia* (App. No.36701/09), judgment of 27 February 2015 the court held that a prohibition on strike action by the Croatian medical union in support of collective bargaining was a violation of Article 11. In particular Judge Pinto De Albuquerque confirmed that instruments of international law must be taken into account when assessing proportionality.

30 See the Digest of Decisions and Principles of the *Freedom of Association Committee of the Governing Body of the ILO*, (2006) at [651]; On ESC Article 6(4) see *European Trade Union Confederation v Belgium*, 13 Sept 2011 at [29]

Union Act 2016, by imposing this level of state supervision of picketing without appropriate justification are likely to be in violation of Article 11.

The balloting provisions.

A trade union when taking lawful industrial action has to comply with existing detailed and complex procedures relating to the conduct and organisation of an industrial action ballot and to the content of any subsequent strike notice.³¹ Without full compliance with all the balloting procedures any strike is unlawful and an injunction may be granted prohibiting the industrial action. The provisions of the Trade Union Act 2016 builds on this existing structure of regulation. Section 2 of the Trade Union Act (inserting a new s.226(2)(a)(iia) into the TULR(C)A 1992) introduces a new minimum turnout requirement when a trade union is balloting for industrial action. At least 50% of union members eligible to vote must participate in the ballot, and of those that participate, a majority of those voting support the call for action. The Government's view is that this would enhance the democratic process; that it will ensure that '... industrial action has democratic support and legitimacy within the relevant workforce'³² and '... avoid great disruption on very old ballots secured by low turnouts'.³³

In the United Kingdom, across all national and municipal elections, an accepted principle is that a simple majority of those who voted is sufficient for a democratic mandate. The Government has, however, persistently refused, despite requests from trade unions, to countenance a switch from inefficient postal ballots (that historically produce low turnouts) to secure workplace ballots or electronic balloting – both systems that would be far more likely to yield higher levels of member participation and so guarantee a more democratic decision than an arbitrary minimum turnout condition that will, in practice, be very difficult to achieve.³⁴ This failure to introduce alternative and less restrictive voting methods has implications for the issue of proportionality as other methods of fulfilling the aim of strengthening the democratic legitimacy of a ballot could have been applied.³⁵

Research has demonstrated that this new provision will have a very serious impact on the ability of trade unions to take action in support of collective bargaining – an essential element of trade union rights under Article 11. In the period of investigation,

31 The laws regulating the conduct and organisation of industrial action ballots were originally developed in the Trade Union Act 1984, the Employment Act 1988 and the Trade Union Reform and Employment Rights Act 1993. These provisions and the limited reforms of 1999 and 2004 were consolidated into the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992).

32 *The Trade Union Bill: European Convention on Human Rights Memorandum*, (BIS/15/415, July 2015), p. 4

33 Trade Union Bill Deb 15 October, col 162, per Nick Boles

34 The power to introduce new forms of voting for strike ballots have been available since 2004 through s.54 Employment Act 2004.

35 The Strasbourg court in *Glor v Switzerland*, (App No. 13444/04), judgment of 30 April 2009 and in *Nada v Switzerland* [2012] E.C.H.R. 169 noted that a relevant consideration in determining whether a restraint is proportionate is whether there are less restrictive methods of fulfilling the aim of the measure under examination.

between 1997 and 2015, if the 50% criteria was in place, only 85 out of 158 strike ballots would have reached this threshold – a total of 3.3 million workers would have been denied the opportunity to take strike action.³⁶ The Government's own analysts have predicted a 65% reduction in industrial action stoppages.³⁷ This provision satisfies the stated objective of ensuring that industrial action has a very high level of democratic validity - nevertheless, in the context of its effect on trade union ability to defend the legitimate interests of their membership, it is doubtful whether this can be justified as a sufficiently balanced and proportionate constraint, particularly as alternative and less damaging voting methods could have been applied to meet the objective of strengthening the democratic legitimacy of the ballot.

In 'important public services' (including the fire service, education (of those under 17) and health services, and the transport, border security and nuclear decommissioning sectors³⁸) there is an additional requirement that industrial action will require the support of at least 40% of those entitled to vote.³⁹ A simple majority (that satisfies the new 50% participation threshold) will not be sufficient in order for action to go ahead in these particular industries and any union member who abstains or forgets to return their ballot paper will effectively be deemed to be opposing the strike.

The consequences of requiring a trade union to meet both the 50% threshold and the 40% minimum level of support for public sector disputes will have a serious impact on a trade union's capability in the public services to call for action - one of the few sectors where unions remain strong. It will compromise a trade union's ability to organise and prosecute lawful industrial action in order to protect centralised collective bargaining and weaken trade union opposition to the erosion of pay and conditions that are often the corollary to cuts in public services. The Government's justification for this measure is predominantly an argument based on the inconvenience strikes in the public sector cause to the general public.⁴⁰ However, it is not clear there has been any attempt to balance the competing interests as required under Strasbourg principles – a degree of disruption to the public is often unavoidable and temporary, yet the impact of enforcing these provisions on trade unions, essentially undermining a trade union's bargaining position, are potentially grave.

It is also the case that any restriction on trade unions operating in the public sector must still be justified as proportionate in the context of the facts. In *Demir and*

36 R Darlington and J Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: the Challenge to Trade Unions*, (Institute of Employment Rights, 2015) p. 27.

37 Department for Business, Innovation and Skills, *Ballot Thresholds in Important Public Services Consultation Impact Assessment*, (BIS/15/4181A, July 2015) at [33]

38 Section 3(2) (2D) & (2E) specifies that the details of the exact services affected will be determined by regulations through the Secretary of State's statutory instrument powers.

39 Section 3 (2) (2A-2C), amending section 226 TULR(C)A 1992

40 Department for Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services* (BIS 16/15, July 2015) at [4]

Bayakara v Turkey,⁴¹ (*Demir*) a case on restrictions on collective bargaining in the public sector, the Grand Chamber stated that such constraints on civil servants ‘must not impair the very essence of the right to organise’ and must ‘... not be arbitrarily imposed’.⁴² As noted earlier, the decisions of relevant international institutions outlining minimum labour standards are also relevant when determining the legitimacy of restrictions. The ILO Freedom of Association Committee has explicitly held that the requirement that at least 50% of relevant employees in a dispute must turn out to vote in a ballot, is an ‘excessive’ and ‘unjustified’ requirement that hinders the right to strike.⁴³ The ILO Committee of Experts has also condemned a requirement that over 50% of voters must approve a strike in a ballot as an ‘unreasonable’ requirement and inconsistent with ILO Convention 87.⁴⁴ The Government has attempted to justify the new balloting regulations in the public sector by arguing that the impact of strike action on public services justifies the additional controls.⁴⁵ The ILO does permit states to introduce a higher voting threshold in very limited circumstances – where the strike action is in ‘essential services’.⁴⁶ The list of ‘important services’ in the Trade Union Act 2016 includes services (such as education and transport) that do not fall within the ILO definition of ‘essential services’ and therefore should not be restricted in this way.⁴⁷

Article 6(4) of the European Social Charter⁴⁸ establishes the right of workers to take collective action subject to the qualification contained in Article 31 – a restriction has to be ‘necessary in a democratic society’ for the ‘protection of the rights and freedoms of others’.⁴⁹ By reference to this test, the supervisory bodies of the European Social Charter have repeatedly been of the view that the detailed balloting requirements in UK law is not in conformity with Article 6(4) – due to their technical and complex nature.⁵⁰ It is therefore highly likely that the additional balloting

41 *Demir* (2009) 48 E.H.R.R. 54

42 *Demir* (2009) 48 E.H.R.R. at [119]. The Court has ruled on a number of occasions that disciplinary measures taken against civil servants for participating in strike action contravenes Article 11 – see *Tum Haber v Turkey* (2008) E.H.R.R.19, *Kaya & Seyhan v Turkey*, (App No. 30946) judgment of 15 Sept, 2009, *Dogan Altun v Turkey*, (App No. 7152/08), judgment of May 26 2015.

43 Case 2698 (Australia) (2010).

44 Case 2896 (El Salvador) (2015).

45 Department for Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services* (BIS/16/15, July 2015) at [4]

46 These are defined by the ILO as services ‘... the interruption of which would endanger the liberty, personal safety or health of the whole or part of the people’. ILO General Survey on Freedom of Association and Collective Bargaining (1994) at [159]

47 The ILO has reserved particular criticism for the inclusion of education and transport as ‘important services’ where this 40% threshold must be met. *Committee of Experts (on the Application of Conventions and Recommendations)* Annual Report (2016) p. 153

48 The Charter is part of the same human rights structure as the Convention; deriving from the same parent body – the Council of Europe.

49 Identical to the test outlined in Article 11(2).

50 See the Committee of Experts Reports *Conclusions* XV-1 (2000) p.637; XVI-1 (2002) p.688; XV11-1 (2004) p.516; XV111-1 (2006) p.509. The most recent report of the Social Rights Committee re-iterated these criticisms *Conclusions* XX-3 (2014) p.22.

provisions in the Trade Union Act will also be denounced as a violation of Article 6(4).

In addition to the threshold criteria the Trade Union Act introduces further regulation of balloting procedure. For example, section 5 (2C) and (2D) also stipulates that where unions ask for support for action short of a strike, details of the actual type of action will need to be included on the ballot paper and that the ballot paper must specify the anticipated length of the industrial action. The designated purpose of this is to enable a trade union member to make an informed decision when deciding how to vote. Employers are, however, also entitled to receive a copy of the ballot paper in advance simply for the purpose of determining whether the union has complied with these (and existing) requirements and then, where there is an error, to seek an injunction to stay industrial action. The failure of the union to meet these detailed requirements will not cause the employer any practical disadvantage or inconvenience, and as they are obligations designed to protect the interests of members, not employers, it must be questioned whether, as an unnecessary requirement, they are compliant with the principles underpinning Article 11(2).

Section 231 and 231A of the TULR(C)A 1992 already obliges trade unions to provide, to all those members entitled to vote and relevant employers, detailed information about the number of votes cast; the number who voted yes; the number who voted no and the number of spoiled ballots. Section 6 of the 2016 Act (amending s.231 TULR(C)A 1992) now additionally requires trade unions to additionally specify how many members were entitled to vote and whether the new minimum thresholds have been met. A legislative requirement to inform the electorate of the result in broad terms may well be justifiable but compelling the union to inform their membership of the result of the ballot in such detail (with any failure resulting in injunctive relief) arguably goes beyond what is required to satisfy the democratic objective of the provision.

The Government's consistent argument in the consultation documentation and whilst the Bill was proceeding through its parliamentary stages was that these constraints on industrial action are necessary in order to protect businesses, the economy and to avoid undue public inconvenience. Yet, the whole purpose of industrial action is to put economic pressure on employers in order to encourage settlement of the dispute and, at times, a degree of disruption to the public is an unavoidable and natural consequence of the enforcement of this right under Article 11. Disruption to a business is not, on its own, a sufficient reason to unduly limit strike action as a trade union's right to strike and so cause economic damage – in order to protect their members' interests by forcing the employer to comply with a collective agreement – took precedence over the employer's competing right to refuse to join the employers' association and engage in collective bargaining.⁵¹ Furthermore, the argument based on the damage strike action causes to the economy and to the general public, is

⁵¹ *Gustafsson v Sweden* (1996) 22 E.H.R.R. 409

itself weakened by the statistical data. Days lost for strike action has fluctuated over the past 25 years but has most recently has shown a decline – for example, from 1.04m in 2007 to 170,000 in 2015.⁵²

Conclusions

Under Convention principles it is self-evident that a government must act in good faith when devising and implementing any restrictions on a Convention right. If the motive for restrictions impacting on a Convention right is ill-intentioned then the state will clearly be in violation of the relevant Article. The Grand Chamber in *Demir*⁵³ reiterated this point when noting that the reasons introduced by the national authorities to justify the restrictions must be ‘...relevant and sufficient’.⁵⁴ The succession of additional hurdles (to taking lawful industrial action) introduced by the Trade Union Act 2016 suggests that the provisions may be more motivated by an ideological hostility to the trade union movement than a genuine attempt to improve industrial relations or economic efficiency; a motivation that the Strasbourg Court should take into account when assessing the validity of the aims of the legislation.

It is also relevant to note that in *Demir*⁵⁵ the Grand Chamber of the European Court not only referred to international labour standards (and associated jurisprudence) when determining the extent of Article 11 rights and the disproportionality of the Turkish law but also the legal consensus amongst contracting states to the Convention. The provisions of the Trade Union Act 2016 have developed controls on picketing and balloting far beyond regulatory requirements in Europe. Some regulation over picketing and balloting is not unusual prior to industrial action, but no member of the Council of Europe regulates these industrial activities to such an extent as the United Kingdom.

For a challenge to these provisions in the Trade Union Act 2016 to succeed at Strasbourg may depend on the European Court’s current attitude to the ‘margin of appreciation’ doctrine. In *RMT v United Kingdom*⁵⁶ the Strasbourg Court was willing to give the United Kingdom a wide ‘margin of appreciation’ (the discretion states have in determining national law in areas of political or social sensitivity) when determining that a total ban on secondary action was not in violation of Article 11. The Strasbourg Court classified secondary industrial action as an ‘accessory’ activity rather than a ‘core’ aspect of trade union freedom of association and held that if a restriction affects only an accessory aspect of trade union freedom, a wider margin

⁵²<http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/workplacedisputesandworkingconditions/articles/labourdisputes/2015>, accessed 19 Aug 2017

⁵³ *Demir* (2009) 48 E.H.H.R. 54

⁵⁴ In applying this principle the Strasbourg Court rejected the Turkish government’s broad and unsubstantiated view that the ban on collective bargaining was justified in order to limit industrial disorder.

⁵⁵ *Demir* (2009) 48 E.H.H.R. 54

⁵⁶ *RMT* (2015) 60 E.H.H.R. 10

of appreciation is permitted to signatory states when assessing whether the interference can be justified under Article 11(2).⁵⁷ On this hierarchical classification of strike action it is arguable a 'core' trade union activity such as primary strike action and associated picketing should attract a much narrower margin of appreciation than 'accessory' secondary action.

It is undeniable, however, that the decision in *RMT v United Kingdom*⁵⁸ reflected a cautious attitude to the interpretation of Article 11; mirroring a recent trend across the Convention of affording states a wide margin of appreciation in 'sensitive' policy areas.⁵⁹ An alternative view is that the Court's ruling in *RMT v United Kingdom*⁶⁰ is an aberration; interrupting a more progressive line of case law that have applied Convention doctrines to labour law violations in a more consistent and purposive manner. There have been a number of decisions at Strasbourg (not involving the United Kingdom) that have endorsed the understanding in *Demir*⁶¹ and *Enerji Yapı-Yol Sen v Turkey*⁶² that strike action should be protected as an significant aspect of Article 11 and that any restrictions should therefore be construed strictly.⁶³ Furthermore, the Strasbourg Court in *Unite v United Kingdom*⁶⁴ referred to the Grand Chamber's judgment in *Demir*⁶⁵, when confirming that the application of the 'margin of appreciation' may be restricted in appropriate circumstances. Although the Court arguably failed to apply established Convention principles to the individual facts of the case (for possible 'political' reasons, considered below) the Court did endorse the view that the breadth of the margin of appreciation depends on the nature and extent of the right and the applicable restrictions, the strength of the competing interests and the state's compliance with international instruments and the European consensus. By reference to these guidelines a contemporary challenge to the industrial action provisions of the Trade Union Act 2016 should be more likely to be successful - taking into account that the Strasbourg Court has unequivocally accepted Article 11 protects the 'right to strike', that the relevant 'margin of appreciation' should be of a limited nature and that the Trade Union Act has significantly increased the level of interference - making it more difficult for the state to justify the provisions.

One major potential obstacle to an action at Strasbourg is the claim that the European court has failed in recent years to examine cases involving the United Kingdom in a vigorous and consistent manner; aided by the absence of a system of

57 *RMT* (2015) 60 E.H.H.R. 10 at [87]

58 *RMT* (2015) 60 E.H.H.R. 10

59 For further discussion of this theme see M Saul 'The European Court of Human Rights' Margin of Appreciation and the Process of National Parliaments' (2015) 15 H.L.R. 745

60 *RMT* (2015) 60 E.H.H.R. 10

61 *Demir* (2009) 48 E.H.H.R. 54

62 *Enerji*, (App No 68959/1), judgment of 21 April 2009

63 See as examples, *Cerikci v Turkey*, (App No 33322/07), judgment of 13 October 2010; *Danilenkov v Russia*, (App No 67336/01), judgment of 10 December 2009; *Veniamin v Ukraine*, (App No 48408/12), judgment of 2 January 2015

64 *Unite v United Kingdom* (App No 65397/13), judgment of 3 May 2016

65 *Demir* (2009) 48 E.H.H.R. 54

judicial precedent. Ewing and Hendy⁶⁶ have argued robustly that that the several unsuccessful Strasbourg cases, noted earlier in this paper, have created a *de facto* United Kingdom 'opt out' of Convention protection for labour law violations; the Court has '... closed its doors to the British worker and their unions'.⁶⁷ Although, in the United Kingdom context, persistent judicial, political and media criticism of 'activism' in the European Court have had a malign influence on decision making at Strasbourg, if these judgments (such as *RMT v United Kingdom*⁶⁸) are perceived in the future as an attempt at appeasing United Kingdom critics of the Strasbourg court this should weaken their authority and influence.

It remains to be seen whether the observations by the Strasbourg Court in *RMT v United Kingdom*,⁶⁹ and in other United Kingdom cases, are used as a justification to reject the argument that the industrial action provisions in the Trade Union Act are in violation of Article 11. An optimist may point to the existing Strasbourg case law, noted earlier (in decisions concerning other signatory states), that re-state and apply relevant and expansive Convention principles on the nature and scope of Article 11 rights in a more forceful and apt manner. Furthermore, it may be the case that the European court will revert to a more critical and considered analysis of United Kingdom labour law once it becomes clear that their emollient decision making has had little or no impact on political or media criticism in the United Kingdom of the Strasbourg process. If the criticism of European institutions generally becomes more strident as a consequence of conflict over the 'Brexit' negotiations the Court may come to this conclusion sooner, rather than later.

As a result of recent experience at Strasbourg trade unions may well have become more reluctant to litigate at Strasbourg. Although a 'test case strategy' is a dangerous course of action (as each failure can be used by government as a vindication of its legal policy) it may only be a matter of time before the European Court of Human Rights return to the principles stemming from cases such as *Demir*⁷⁰. When that happens the considered judgment of the Strasbourg Court is likely to be that the balloting and picketing provisions in the Trade Union Act 2016 are incompatible with the Convention and in violation of Article 11 safeguards.

66 Ewing and Hendy 'Article 11(3) of the European Convention on Human Rights' (2017) 4 E.H.R.L.R. 356

67 Ewing and Hendy (2017) 4 E.H.R.L.R. at p.361.

68 *RMT* (2015) 60 E.H.H.R. 10

69 *RMT* (2015) 60 E.H.H.R. 10

70 *Demir* (2009) 48 E.H.H.R. 54

