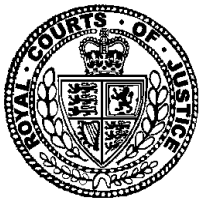

Neutral Citation Number: [2021] EWCA Civ 260

Case No: C1/2019/0889

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
THE HON MR JUSTICE SUPPERSTONE
CO/1604/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal Civil Division))
LORD JUSTICE BEAN
and
LORD JUSTICE PHILLIPS

- -

Between :

THE QUEEN on the application of the INDEPENDENT WORKERS UNION OF GREAT BRITAIN	**Appellant**
- and –	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY AND OTHERS	**Respondents**

- -
- -

Lord Hendy QC and Sarah Fraser Butlin (instructed by **Harrison Grant**) for the **Appellants**
Daniel Stilitz QC and Joseph Barrett (instructed by **Government Legal Department**) for the **Secretary of State** (the Third Interested Party in the High Court)
The Central Arbitration Committee, Cordant Security Limited and the University of London (the Defendant, First Interested Party and Second Interested Party in the High Court) **did not appear and were not represented**.

Hearing date: 26 November 2020

- -

Approved Judgment

Lord Justice Bean :

Introduction

1. The Independent Workers' Union of Great Britain ("the IWGB" or "the Union") is an independent trade union whose members include security guards, post room workers, audio-visual staff, porters and receptionists who in 2017 were working for Cordant Security Ltd at the University of London.

2. The Central Arbitration Committee ("the CAC") is the statutory body charged with resolving union recognition disputes. Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") sets out the detailed scheme under which it operates.

3. The Secretary of State for Business, Energy and Industrial Strategy has ministerial responsibility for the CAC. The Secretary of State was joined as an interested party to these proceedings pursuant to s 5 of the Human Rights Act 1998 ("the HRA"), in particular because the Union seeks a declaration of incompatibility under s 4 of the HRA.

4. On 20 November 2017 the Union made two applications to the CAC to be recognised by Cordant and by the University for collective bargaining purposes under Schedule A1 to the 1992 Act. The CAC, in accordance with its usual practice, allocated the applications to a panel of three members of the CAC: the panel chair in the present cases was Regional Employment Judge Barry Clarke (now President of Employment Tribunals in England and Wales).

5. The IWGB sought judicial review of two decisions of the CAC. The first rejected the Union's application to be recognised for collective bargaining purposes by Cordant for a proposed bargaining unit comprising "Security Guards, Postroom workers, AV Staff, Porters and Receptionists" working for Cordant at the University's Senate House site ("the proposed Cordant bargaining unit") ("the First Decision").

6. The second rejected the IWGB's application to be recognised for collective bargaining purposes by the University, which it described in evidence as "the *de facto* employer", in respect of the proposed Cordant bargaining unit ("the Second Decision").

7. The basis of the First Decision was that the CAC was satisfied that, for the purposes of paragraph 35 of Schedule A1 to the 1992 Act there was in force a collective agreement under which another independent trade union, namely UNISON, was recognised by Cordant, the employer, as entitled to conduct collective bargaining on behalf of workers falling within the IWGB's proposed bargaining unit. Accordingly, the IWGB's application to the CAC against Cordant was rejected as not admissible.

8. The basis of the Second Decision was that the CAC was satisfied that the University was not the employer of the workers in the Union's proposed bargaining unit and therefore the Union's application to the CAC against the University was likewise not admissible, although on different grounds.

9. On 20 July 2018 Lambert J granted the Union permission to seek judicial review to challenge the two decisions and directed that the two cases be listed together. The

hearing took place in the Administrative Court before Supperstone J on 26 February 2019. By a reserved judgment handed down on 25 March 2019 he dismissed the claim. Permission to appeal to this court was granted by Floyd LJ on 19 December 2019.

10. The former employees of Cordant working at the University and in respect of whom IWGB seek negotiating rights are now employed by the University itself, having been the subject of transfers under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") in two tranches (in May 2019 and March 2020) since the decision of Supperstone J.

Is the appeal academic?

11. Although the Union sought, and was granted, permission to appeal against both decisions of the CAC, it has not pursued the appeal against the Second Decision. That aspect of the case – the attempt to seek bargaining rights with a "*de facto* employer" - is no longer a live issue, since the University is now the actual employer. The Government Legal Department, on behalf of the Secretary of State, suggested in correspondence before the hearing that the appeal against the First Decision had also become academic since Cordant were no longer involved at the relevant workplace (and have taken no part in this appeal). However, at the outset of the hearing Mr Stilitz QC for the Secretary of State accepted that we should proceed to hear the appeal. It would be excessively formalistic not to do so since the effect of TUPE is that the University have taken the place of Cordant as the employer concerned.

12. Mr Stilitz did enter the caveat that we have no up to date evidence of fact about matters such as the total number of employees of the University at the Senate House site, or the total number of employees of the University covered by the collective bargaining agreement with UNISON. That is a fair point, but Lord Hendy QC for the IWGB was right to submit that the issue of principle on which the Union appeals arises irrespective of the detailed evidence of fact. Nothing would be gained, he pointed out, and much time and costs would be wasted, by requiring the IWGB to make a new application to the CAC, have it inevitably rejected under paragraph 35, seek judicial review before a judge who would follow the previous decision of Supperstone J, and finally seek permission to appeal to this court. In the meantime the IWGB would remain shut out from seeking compulsory collective bargaining rights.

13. Accordingly we heard the appeal against the First Decision on its merits. We were greatly assisted by the submissions on each side.

The factual background

14. At the time of the CAC's First Decision Cordant employed approximately 4,000 workers at sites owned or controlled by their clients under outsourcing agreements in "support" roles, such as security. The University had an outsourcing contract with Cordant for the provision of its "front of house" services.

15. Originally a voluntary collective agreement had been made between Balfour Beatty and UNISON with effect from 23 September 2011. This collective agreement was the subject of various TUPE transfers and by 2017 had become, so far as relevant, a collective agreement between UNISON and Cordant covering all staff employed by Cordant at the University's sites. UNISON (and the University and College Union,

which represents teaching and research staff) were recognised by the University for collective bargaining purposes for all except its most senior staff.

16. Approximately 70 of the workers then employed by Cordant to work at the Senate House site, and now employed by the University itself, would fall within the IWGB's proposed bargaining unit.

The Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

17. The legal framework governing applications for recognition by trade unions is set out in Schedule A1 to the Act, originally inserted by the Employment Relations Act 1999.

18. Paragraph 1 of Schedule A1 provides:

> "A trade union (or trade unions) seeking recognition to be entitled to conduct collective bargaining on behalf of a group or groups of workers may make a request in accordance with this Part of this Schedule."

19. "Worker" is defined by s.296 of the 1992 Act, in so far as relevant, as follows:

> "(1) In this Act 'worker' means an individual who works, or normally works or seeks to work—
>
> (a) under a contract of employment, or
>
> (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or
>
> (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.
>
> (2) In this Act 'employer', in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work."

20. A classic statement of the CAC's procedure is contained in the judgment of Elias J in *R (Kwik-Fit Ltd) v Central Arbitration Committee* [2002] EWHC Admin 277 at [6]-[15]:

> "6. The purpose of the legislation is to enable a trade union which is refused recognition by an employer to use the legal process to require the employer to enter into collective bargaining. Recognition means that the union should be "entitled to conduct collective bargaining on behalf of a group or workers" (paragraph 1). Collective bargaining, in turn, is defined as

"negotiations relating to pay, hours and holidays", unless the parties agree to a broader range of matters (paragraph 3).

7. The process commences with the trade union making a request for recognition from the employer. Certain conditions must be met if the request is to be treated as valid within the terms of the legislation. For example, it must be in writing, be made by an independent trade union and identify the proposed bargaining unit. In addition, the employer (together with any associated employer) must employ at least 21 workers (paragraphs 4 to 9).

8. The employer is given 10 working days to agree the request. If the request is accepted that is the end of the matter. If it is rejected or there is no response, then the union applies for recognition. This is made pursuant to paragraph 11 (2), an important provision in this case which I set out below. (There is a variation of the procedure where the employer agrees to negotiate about the proposed recognition but those negotiations fail to bear fruit).

9. The second stage is the acceptance or otherwise of the application. The CAC must decide two questions in order to determine whether the application can be accepted. First, it must be satisfied that the original request was valid in the way I have described above. Second, it must decide whether it is admissible within the meaning of paragraphs 33 to 42 (paragraph 15). The most important criterion of admissibility is that members of the union must constitute at least 10 per cent of the workers in the proposed bargaining unit, and that the CAC must be satisfied that a majority of the workers would be likely to favour recognition (paragraph 36).

10. The third stage is the determination of the bargaining unit. …… In accordance with the general philosophy that voluntarism is preferable to legal regulation, the CAC must try to help the parties reach agreement as to the relevant bargaining unit. But if that is unsuccessful, then the CAC itself must determine the bargaining unit (paragraph 19 (2)). Paragraphs 19 (3) and (4) set out criteria which must be taken into account in the course of that process……

11. Once the CAC has determined the bargaining unit, the fourth stage depends on the outcome of that decision. If the bargaining unit determined is the same as that proposed by the union, then a ballot may have to be held. In general, a ballot will not be required if the union has a majority of the workers in the bargaining unit as members (although even then a ballot may be required if, broadly, there are doubts as to whether the majority does want the union to be recognised, or if good industrial relations makes this desirable) (paragraph 22). Otherwise a ballot will be necessary. Where no ballot is required, the CAC

simply declares that the union is recognised and entitled to conduct collective bargaining.

12. The position is more complex if the stipulated bargaining unit is not that proposed by the union. The CAC must then decide whether the application is invalid within the meaning of paragraphs 43 to 50 (paragraph 20). The most significant feature here is that the CAC must be satisfied in respect of the stipulated bargaining unit that the 10 per cent criterion and that relating to the likelihood of majority support are met. If not, the application will at that stage be treated as invalid. If it is valid, then the issue as to whether a ballot is required is determined in the same manner as I have outlined above.

13. Where a ballot is required it will be carried out by a qualified independent person appointed by the CAC. The employer must co-operate in the process and permit the union to have access to the workers. The CAC must make a declaration of recognition if the result is favourable; this requires both that those who vote in favour constitute a majority of those voting; and that they constitute at least 40 per cent of the workers constituting the bargaining unit (paragraph 29 (2)).

14. If the vote is against then the CAC must declare that the union is not entitled to recognition. Essentially it cannot re-apply for recognition in respect of that group of workers (or a substantially similar group) for three years (paragraph 40).

15. The consequences of the declaration in favour of recognition are that the employer is obliged to recognise the union in respect of the relevant bargaining unit. In the absence of agreement between the parties, the CAC will be required to stipulate the method by which collective bargaining can be carried out (paragraphs 30 and 31). The ultimate, and only, sanction for failure to comply is specific performance (paragraph 31 (6)).”

21. Paragraphs 19B(2)-(3) of Schedule A1 as amended in 2004 (reproducing paragraphs 19(3)-(4) of the 1999 version) provide:

“(2)The CAC must take these matters into account—

(a) the need for the unit to be compatible with effective management;

(b) the matters listed in sub-paragraph (3), so far as they do not conflict with that need.

(3)The matters are—

(a) the views of the employer and of the union (or unions);

(b) existing national and local bargaining arrangements;

> (c) the desirability of avoiding small fragmented bargaining units within an undertaking;
>
> (d) the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant;
>
> (e) the location of workers."

22. Paragraphs 33-42 contain provisions about the "admissibility" of applications to the CAC. The crucial provision in the present case is paragraph 35(1) which states:

> "(1) An application under paragraph 11 or 12 is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit……."

23. Paragraph 37 of Schedule A1 is concerned with an application made by more than one union under paragraph 11 or 12. Paragraph 37(2) states:

> "The application is not admissible unless—
>
> (a) the unions show that they would cooperate with each other in a manner likely to secure and maintain stable and effective collective bargaining arrangements, and
>
> (b) the unions show that, if the employer wishes, they will enter into arrangements under which collective bargaining is conducted by the unions acting together on behalf of the workers constituting the relevant bargaining unit."

24. Part II of Schedule A1 is concerned with voluntary recognition, that is to say where following a request under Part I the employer agrees to recognise a trade union without the need for an application to the CAC. Paragraph 56 provides for termination of an agreement for voluntary recognition. It enables the relevant employer to terminate the agreement after three years, with or without the consent of the union.

25. Parts IV to VII of Schedule A1 are concerned with the derecognition of trade unions previously recognised to conduct collective bargaining. They provide in elaborate detail for a number of different situations, including where a non-independent trade union has been recognised.

26. Under s.5 of the 1992 Act an independent trade union is defined as a union which is not under the domination or control of an employer and is not liable to interference by the employer tending towards such control. A list of trade unions is maintained by the Certification Officer, who determines, on application by a union, whether it should be given a certificate of independence (s.6 of the 1992 Act). Where the Certification Officer considers that a trade union no longer satisfies the definition of independence, she may withdraw its certificate of independence under s.7(1) of the 1992 Act.

27. Ms Emma Waite, Deputy Director of Employment Rights and Enforcement at the Department for Business, Energy and Industrial Strategy, explains in her witness statement the proposals for the machinery for recognition of trade unions which were first set out in the White Paper, *Fairness at Work*, published on 21 May 1998. At paragraph 9 she summarises the policy objectives underlying Schedule A1, which as I have already noted was inserted into the 1992 Act by the Employment Relations Act 1999:

> "9. The changes implemented by way of Schedule A1 to the 1992 Act were envisaged to achieve the following policy objectives, among others:
>
> (a) the encouragement of voluntary arrangements for collective bargaining, which were to be given primacy;
>
> (b) the avoidance of competing and overlapping collective bargaining arrangements, and 'turf wars' between rival unions;
>
> (c) the encouragement of stability and continuity in collective bargaining arrangements;
>
> (d) the avoidance of small, fragmented bargaining units; and
>
> (e) the grant of greater rights to independent trade unions, as opposed to non-independent trade unions."

28. These policy objectives are plain on the face of the statute, and the paragraphs requiring the CAC to take them into account when determining the appropriate bargaining unit remained unchanged when Schedule A1 was amended in 2004.

Article 11 of the European Convention on Human Rights ("ECHR")

29. Article 11 of the ECHR provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"

Grounds of challenge

30. The IWGB initially contended that both decisions of the CAC were unlawful on ECHR Article 6 grounds because there was no oral hearing. That issue was not pursued before Supperstone J and I need say no more about it. The IWGB also alleged that the First Decision was unlawful because, by precluding the Union's application for recognition, paragraph 35 of Schedule A1 to the 1992 Act breached the Union's rights under Article

11 ECHR. In the circumstances, it was argued, paragraph 35 should either be (a) "read down" pursuant to s.3 of the HRA, so as not to preclude such an application for recognition, or (b) be subject to a declaration of incompatibility pursuant to s.4 of the HRA.

31. Lord Hendy made it clear before us that the IWGB no longer pursues the challenge to the First Decision under domestic law, and accepts that the CAC correctly interpreted and applied the relevant domestic legislation. The remaining issue is the Article 11 challenge. The only party resisting the appeal to this court is the Secretary of State.

32. In the course of argument counsel and the court adopted the terminology of an "incumbent" union, being one (such as UNISON in the present case) which is already recognised by the relevant employer for collective bargaining purposes, and an "insurgent" or "competitor" union (such as IWGB in the present case) which is not so recognised but wishes to invoke the machinery to achieve recognition.

The CAC Decision on Article 11 ECHR

33. The material part of the First Decision of the CAC is at paragraphs 20-23. So far as is relevant they state:

> "20. The Panel recognises that paragraph 35 [of Schedule A1] must be read and given effect in a way which is compatible with Article 11. We also recognise that Article 11 includes the right to engage in collective bargaining (*Demir v Turkey* [2009] IRLR 766). However the wording of paragraph 35 is clear and, in the Panel's view, it is not possible to read and give effect to it in a manner which would enable the Union to seek recognition in the face of the existing recognition agreement with UNISON. Furthermore, such an approach would run counter to the CAC's general duty under paragraph 171 to have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, since it would upset existing collective bargaining arrangements.
>
> 21. The Panel recognises that the Union may wish to contend that paragraph 35 is incompatible with Article 11. However, the CAC has no power to make any such declaration. That is a matter for the High Court…
>
> …
>
> Decision
>
> 23. The Panel is satisfied that, for the purposes of paragraph 35 of the Schedule, there is in force a collective agreement under which an independent trade union is recognised by the Employer as entitled to conduct collective bargaining on behalf of workers falling within the Union's proposed bargaining unit. Accordingly, by virtue of paragraph 35, the Panel finds the Union's application to the CAC is not admissible."

The judgment of Supperstone J

34. The judge held:

> "In my judgment there has been no interference with Article 11 in the present case. The Union is free to seek voluntary collective bargaining arrangements with the University. I agree with Mr Stilitz that is sufficient to ensure compliance with the right to bargain collectively under Article 11.
>
> However, if contrary to my view there has been interference with Article 11, such interference must be justified in accordance with the requirements of Article 11(2).
>
> Mr Stilitz and Mr Christopher Jeans QC for the University submit that Schedule A1 sets out a comprehensive scheme for the recognition of trade unions which seeks to balance the competing rights and interests of employers, trade unions and workers. Mr Stilitz advances three reasons in particular, as to why paragraph 35 is justified. First, in precluding an application for compulsory recognition when there is already a voluntary recognition agreement in place, it furthers the important aim of avoiding a multiplicity of competing collective bargaining arrangements with different unions in respect of one bargaining unit. As such, as the CAC observed, it is conducive to efficient and effective collective bargaining between trade unions, their members and employers. Second, it furthers the aim of encouraging the formation and maintenance of voluntary collective bargaining arrangements wherever possible. Such voluntary arrangements are in general desirable, in giving effect to the rights and freedoms of employers, unions and their members freely to enter into bargaining arrangements of their choosing, and in avoiding contentious recognition proceedings where consensual arrangements have been agreed. Third, it furthers the aim of giving primacy and additional protection to bargaining arrangements entered into between an employer and an independent trade union, which will be likely to be more robust in serving its members' interests in collective bargaining than a union which lacks independence.
>
> Mr Stilitz points out that only approximately 70 of the workers employed by Cordant to work at the University sites would fall within the Union's proposed bargaining unit. It follows that the bargaining unit proposed by the Union would have represented a very small sub-set of workers employed at the University sites and of Cordant's workforce. Moreover, under their contracts with Cordant, the workers currently allocated to the University sites may be assigned to work for any other of Cordant's clients.
>
> I agree with Mr Stilitz that the manner in which Schedule A1 has operated in the present case is consistent with the principles

> underlying Article 11 that the voluntary recognition agreement Cordant entered into with UNISON, now transferred to the University, should be protected by the scheme of Schedule A1. Were the Union able to obtain compulsory recognition for collective bargaining purposes that would potentially adversely affect the rights and freedoms of workers within the proposed bargaining unit who are or wish to become members of UNISON and/or who wish to continue to be represented by UNISON for collective bargaining purposes; and those of the employer, which wishes to conduct collective bargaining with UNISON, and UNISON, which has in place a collective bargaining agreement with the University. The Union remains free to seek to persuade Cordant to enter into a voluntary collective bargaining arrangement with it; and nothing in Schedule A1 prevents the University from terminating its voluntary arrangement with UNISON and entering into a new one with the Union."

The parties' submissions in this court

35. The Union contends that the CAC fell into error in failing to read paragraph 35 of Schedule A1 to the 1992 Act down to ensure compliance with Article 11 ECHR; in the alternative, a declaration of incompatibility is sought.

36. In *Pharmacists' Defence Association Union v Boots Management Services Ltd and another* [2017] EWCA Civ 66; [2017] IRLR 335 ("*Boots*") Underhill LJ described paragraph 35 as imposing an "inhibition" on "what would otherwise be the Union's right to seek compulsory collective bargaining under Schedule A1". Lord Hendy submits that in the present case the inhibition is unjustifiable.

37. In *Boots* an independent union sought recognition but the CAC rejected its application under Schedule A1 paragraph 35 because another union was already voluntarily recognised by the employer. However, the incumbent union in that case was not independent and Schedule A1 provided a procedure by which a non-independent incumbent union could be derecognised. If that procedure were utilised and resulted in the derecognition of the incumbent union then there would cease to be an impediment to the admission of the applicant union's claim for recognition.

38. In the present case there is no mechanism within Schedule A1 for the workers in the bargaining unit or their union to obtain the derecognition of the incumbent union, UNISON, since it is independent. Schedule A1 provides for the derecognition of (1) independent trade unions who have been *involuntarily* recognised, that is, by virtue of a declaration of recognition by the CAC (see Parts IV and V of Schedule A1); and (2) *non-independent* trade unions who have been voluntarily recognised (see Part VI of Schedule A1). The effect of paragraph 35 is that the CAC will not entertain an application for recognition if there is already in force a voluntary agreement for collective bargaining with an independent trade union in respect of the relevant bargaining unit, as is the case here.

39. Lord Hendy describes the lack of any mechanism for the derecognition of a voluntary agreement with an independent trade union as being a lacuna in the legislation in respect of which there is no clear legislative rationale. This, he suggests, is particularly striking

in circumstances where the incumbent union has ceased to represent the majority of workers in the bargaining unit but the applicant union does. He submits that in those circumstances, paragraph 35 of Schedule A1 must be read down to ensure that there is no breach of Article 11, or a declaration of incompatibility must be made. He relies on Underhill LJ's *obiter* statement in *Boots* at para 62 that: "… if derecognition under Part VI were not available there would in my view be a breach of Article 11".

40. Lord Hendy contends that the doctrine of margin of appreciation is not a relevant consideration in the present context. He contends that on a proper analysis the court is concerned here with a negative obligation. The Union is asking not to be excluded from machinery put in place by Parliament. He submits that it is the exclusion from existing legislative machinery which is an interference that must be justified.

41. Mr Stilitz responds that what the Union is seeking to do in the present case is what the Court of Appeal in *Boots* deprecated, namely using Article 11 to challenge some allegedly "sub-optimal element" in the scheme. He argues that Underhill LJ's statement is of no relevance to the instant case where the existing collective bargaining arrangement is with an independent trade union. In *Boots* this court was looking at a "sweetheart agreement" with a non-independent union, whereas in our case we have an incumbent independent union perfectly capable of protecting the rights of workers in the bargaining unit. The legislation draws a sharp distinction between existing bargaining units with an independent trade union and with a non-independent trade union.

42. Mr Stilitz submits that the Article 11 challenge to paragraph 35 needs to be viewed against the background of the scheme of the recognition provisions as a whole, and the policy objectives underlying that scheme. The Strasbourg court has never held Article 11 to encompass a right to compulsory recognition of trade unions by the relevant employer for collective bargaining purposes.

43. Mr Stilitz submits that Schedule A1 to the 1992 Act contains a detailed and comprehensive scheme which provides, in defined circumstances, for a trade union to apply for compulsory recognition from an employer for collective bargaining purposes. Where matters cannot be determined by agreement, applications for recognition are determined by the CAC, provided various complex pre-conditions are satisfied. The State's obligations under Article 11 are limited, and do not extend to a positive obligation to require compulsory collective bargaining in all circumstances. While the right to collective bargaining falls within the ambit of Article 11, there is no universal or unqualified right to compulsory recognition.

Demir and Baykara v Turkey

44. *Demir and Baykara v Turkey* (2009) 48 EHRR 54; [2008] ECR 1345 is the high point of the Appellant's case. The Grand Chamber of the European Court of Human Rights ("ECtHR") had to consider a case where Turkish law invalidated a collective bargaining agreement reached voluntarily between a municipal council and a trade union representing municipal civil servants. The court held at paragraph 119 that

> "…..lawful restrictions may be imposed on the exercise of trade union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that

> the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining in such cases whether a "necessity" – and therefore a "pressing social need" – within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts…".

45. The court then set out at paragraphs 140-146 the evolution of its case law concerning the right of association under Article 11:-

> "140. The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21).
>
> 141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström*, cited above, § 36).
>
> 142. As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, § 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström*, cited above, § 34).
>
> 143. Subsequently, in the case of *Wilson v National Union of Journalists and Others*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members'

> interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*Wilson v National Union of Journalists and others*, cited above, § 44).
>
> 144. As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.
>
> 145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson v National Union of Journalists and others*, cited above, § 44).
>
> 146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights….."

46. After referring to ILO Convention no. 98 concerning the Right to Organise and to Bargain Collectively, and to other international instruments, the Court continued:-

> "153. In the light of these developments, the Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, § 39, and *Schmidt and Dahlström*, cited above, §

> 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others*, cited above, § 56).
>
> 154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong (see paragraph 108 above)."

Strasbourg decisions since Demir

47. In *Sindicatul "Pastorul cel Bun" v Romania* [2014] IRLR 49 (the *Good Shepherd* case) the Grand Chamber at Strasbourg held that the Romanian Court's refusal to register a union formed of Orthodox clergy and laity had not been a violation of its members' rights to form a trade union under Article 11, given the risk to the autonomy of the Church. However, they did find that the domestic court's refusal had amounted to interference by Romania with the exercise of Article 11 rights. At paragraphs 130-135 they said:

> "130. The Court observes at the outset, having regard to developments in international labour law, that trade union freedom is an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony.
>
> 131. It further reiterates that Article 11 of the Convention presents trade union freedom as a special aspect of freedom of association and that, although the essential object of that Article is to protect the individual against arbitrary interference by public authorities with the exercise of the rights it protects, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 109 and 110, ECHR 2008).

> 132. The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by the public authorities which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.
>
> 133. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured (see *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I).
>
> 134. Article 11 of the Convention affords members of a trade union the right for their union to be heard with a view to protecting their interests, but does not guarantee them any particular treatment by the State. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police v. Belgium*, 27 October 1975, §§ 38 and 39, Series A no. 19, and *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, §§ 39-40, Series A no. 20).
>
> 135. Through its case-law, the Court has built up a non-exhaustive list of the constituent elements of the right to organise, including the right to form or join a trade union, the prohibition of closed-shop agreements, and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. It recently held, having regard to developments in labour relations, that the right to bargain collectively with the employer had in principle, except in very specific cases, become one of the essential elements of the right to form and join trade unions for the protection of one's interests (see *Demir and Baykara*, cited above, §§ 145 and 154)."

48. In *National Union of Rail, Maritime and Transport Workers v UK* [2014] IRLR 467 ("the *NURMTW* case"), a challenge to UK legislation prohibiting secondary industrial action, the ECtHR 4th Section held:-

> "86. In previous trade union cases, the Court has stated that regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. Since achieving a proper balance between the interests of

labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured. In its most recent restatement of this point, and referring to the high degree of divergence it observed between the domestic systems in this field, the Grand Chamber, considered that the margin should be a wide one (*Sindicatul "Păstorul cel Bun"*, cited above, §133). The applicant relied heavily on the *Demir and Baykara* judgment, in which the Court considered that the respondent State should be allowed only a limited margin (see §119 of the judgment). The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned. The breadth of margin will still depend on the factors that the Court in its case-law has identified as relevant, including the nature and extent of the restriction on the trade union right at issue, the object pursued by the contested restriction, and the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right. The degree of common ground between the member States of the Council of Europe in relation to the issue arising in the case may also be relevant, as may any international consensus reflected in the apposite international instruments (*Demir and Baykara*, §85)."

87. If a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade union freedom are concerned.

…

99. The domestic authorities' power of appreciation is not unlimited, however, but goes hand in hand with European supervision, it being the Court's task to give a final ruling on whether a particular restriction is reconcilable with freedom of association as protected by Article 11 (*Vörður Ólafsson v.*

> *Iceland*, no. 20161/06, §76, ECHR 2010). The Government have argued that the "pressing social need" for maintaining the statutory ban on secondary strikes is 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. In the sphere of social and economic 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 and Others v. the United Kingdom* [GC], no. 42184/05, §61, ECHR 2010). Moreover, the Court has recognised the "special weight" to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely (see in the context of Article 10 of the Convention the case *MGN Limited v. the United Kingdom*, no. 39401/04, § 200, 18 January 2011, referring in turn to *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §97, ECHR 2003-VIII, where the Court adverted to the "direct democratic legitimation" that the legislature enjoys). The ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom. These considerations lead the Court to conclude that in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11."

49. *Unite the Union v The United Kingdom* [2017] IRLR 438 was a challenge to the abolition of the Agricultural Wages Board which had set minimum wages and conditions in the agricultural industry in England and Wales since 1917. The ECtHR said:-

> "54. According to the Court's case-law, the right of association in the trade union context has a number of essential elements. These include the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and, in principle, the right to bargain collectively with the employer (see *Demir and Baykara*, cited above, §§ 145 and 154, and the further references cited there). As regards the latter, it should be understood that States remain free to organise their systems so as to grant special status to representative trade unions if appropriate (see *Demir and Baykara*, cited above, § 154).

55. To be considered necessary in a democratic society, it must be shown that an interference with a right protected by Article 11 corresponded to a "pressing social need", that the reasons given by the national authorities to justify it were relevant and sufficient and that the interference was proportionate to the legitimate aim pursued (see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 83, ECHR 2014). In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the starting point is that Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members are secured (see *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I; and *Sindicatul "Păstorul cel Bun"*, cited above, § 133). However, in some circumstances, that margin may be reduced (see *Sørensen and Rasmussen*, cited above, § 58). The Court has recently explained that the breadth of the margin of appreciation depends on, among other things, the nature and extent of the restriction of the trade union right at issue, the object pursued by the contested restriction, the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right and the degree of common ground between member States of the Council of Europe or any international consensus reflected in the apposite international instruments (see *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 86-87). As to the latter factor, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned; it is sufficient that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see *Demir and Baykara*, cited above, §§ 67-86).

56. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights it protects, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights. The boundaries between the State's positive and negative obligations do not lend themselves to precise definition but the applicable principles are similar. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (see *Sindicatul "Păstorul cel Bun"*, cited above, §§ 131-132).

…

59. The applicant has argued that the abolition of the AWB amounted to an interference with its right to engage in collective bargaining, an essential element of the freedom of association accorded to trade unions. The Court is not persuaded by this argument. In *Demir and Baykara*, cited above, the Court found an interference with the applicants' trade-union freedom as a result of the absence of legislation necessary to give effect to the provisions of international labour conventions ratified by Turkey and a court judgment annulling the voluntary collective agreement entered into by the applicants on account of that absence. By contrast, in the present case the United Kingdom does not restrict employers and trade unions from entering into voluntary collective agreements. Legislation, in the form of section 179 in particular of the 1992 Act, is in place to govern the enforceability of collective agreements (see paragraph 26 above). Even where the conditions in section 179 are not satisfied, a collective agreement may nonetheless be enforceable in respect of a particular individual where he succeeds in showing that its terms have become incorporated into his employment contract (see paragraph 27 above). Thus the applicant 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*.

60. The Court is accordingly of the view that the applicant's complaint should be viewed from the perspective of the respondent State's positive obligations, and in particular whether the respondent State is obliged to have in place a mandatory, statutory forum for collective bargaining in the agricultural sector in order to comply with its Article 11 obligations. The applicant argued that the margin of appreciation was a limited one, relying on *Demir and Baykara*, cited above, § 119 (see paragraph 48 above). However, as the Court explained in *National Union of Rail, Maritime and Transport Workers*, cited above, § 86, the Court in that case was examining a very far-reaching interference with freedom of association. In the present case, by contrast, the question concerns the extent of the State's positive obligation in the area of collective bargaining. As the Court has already noted (see paragraph 55), the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys 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 Article 11 of the Convention."

After referring to European and international instruments, including those of the International Labour Organisation, the Court continued:

> "65. It is significant that, as noted above (see paragraph 59), the applicant is not prevented from engaging in collective bargaining. The circumstances in which collective agreements are deemed to be legally enforceable in the United Kingdom are set out in section 179 of the 1992 Act (see paragraph 26 above). The conditions essentially require parties to confirm their intent to be bound by the collective agreement and stipulate that the agreement be reduced to writing. These conditions do not appear to be unreasonable or unduly restrictive. Furthermore, it is possible under English law for the terms of a collective agreement which is not, itself, legally enforceable to be incorporated into an individual employment contract and thus become indirectly enforceable (see paragraph 27 above). Moreover, there are circumstances, set out in the 1992 Act, whereby a union has the right to be entitled to conduct collective bargaining on behalf of a group of workers (see paragraph 28 above). While, as the applicant pointed out, the legislation is of limited assistance in the agricultural sector given the dispersal of workers among employers which renders the provision inapplicable in most cases ……., it nonetheless represents a measure intended to encourage and promote collective bargaining across industry in general. In the absence of any information in the case-file as to the reasons for the applicability restrictions in the 1992 Act, it cannot be assumed that they are unjustified or otherwise unsuitable. Finally, even accepting the applicant's submission that voluntary collective bargaining in the agricultural sector is virtually non-existent and impractical, this is not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation. The applicant remains free to take steps to protect the operational interests of its members by collective action, including collective bargaining, by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it has the right to be heard. As noted above (see paragraphs 61-63), the European and international instruments to which the applicant referred, as they currently stand, do not support its view that a State's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector.
>
> 66. Bearing in mind the wide margin of appreciation in this area, the Court is not satisfied that, in deciding to abolish the AWB, the respondent Government failed to observe the positive obligations incumbent on them under Article 11 of the Convention. It cannot be said that the United Kingdom Parliament lacked relevant and sufficient reasons for enacting the contested legislation or that the abolition of the AWB failed

> to strike a fair balance between the competing interests at stake. No violation of Article 11 is disclosed and the application must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention."

Decisions of this court

50. In *Boots* Underhill LJ, with whom Sales LJ and Sir James Munby P agreed, considered the reasoning of the ECtHR in *Unite the Union v UK*, in particular paragraphs 65-66 which I have just cited. He said:

> "45. The structure of that reasoning is not entirely explicit, but it seems to break down into three elements (the second and third being introduced by the words "moreover" and "furthermore"), namely:
>
> (1) that the UK has an effective system for giving effect to the results of voluntary collective bargaining;
>
> (2) that the UK has a machinery under the 1992 Act for imposing compulsory collective bargaining, and that, although the minimum numbers threshold means that that machinery is not in practice available to agricultural workers, there was no reason to believe that that restriction was unjustifiable;
>
> (3) that the union retained the right to advance its members' interests because it had the "right to be heard" – this harks back to the language of the *Swedish Engine Drivers* and *Wilson* cases (though these are not explicitly cited) – and that the international instruments did not support the view that "a state's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector".
>
> 46. At first sight the third of those points reads like a re-affirmation of the position established by the pre-*Demir* authorities and would support a reading of *Demir* which limited its effect to cases of positive interference by the state with voluntary collective bargaining arrangements. I do not however think that that is correct. If that had been the Court's understanding, the multi-factorial approach taken in para. 65 would have been unnecessary: the third point would have been conclusive by itself. There would have been no need for a reference to the UK's margin of appreciation nor to the striking of a fair balance. Nor would there have been any need, in relation to the second factor, to raise the question whether the restrictions which prevented the union being able to access the statutory machinery in the agricultural sector were justifiable. Indeed arguably the conclusion at the end of para. 58 that the complaint "may be said to fall within the scope of article 11",

> which is the gateway to the remainder of the Court's reasoning, would be falsified. It is necessary to note the three final words of the conclusion in para. 66 – "for agricultural workers": given the broader context to which I have referred, I think they must be read as equivalent to "in the circumstances of the present case".
>
> 47. In my view, therefore, the reasoning in the *Unite* case acknowledges the possibility that the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of article 11. Such a reading is consistent with the logic of the reasoning in *Demir* itself, as discussed at para. 38 above. It is fair to say that various observations by the Court, and indeed the outcome of the case itself, tend to suggest that complaints based on the denial of a right to compel an employer to engage in collective bargaining may face an uphill struggle; but the point at this stage is simply that the attempt is not excluded *in limine*."

51. In paragraph 53 of *Boots* Underhill LJ gave his view on whether the union's right under Article 11 to engage in collective bargaining involved a correlative duty on the employer. Referring to the submissions of Mr Hendy (as he then was) who represented the union, Underhill LJ said:-

> "53. He says that all that the PDAU is doing is seeking entry into the Schedule A1 procedure, but that is a spurious distinction. The PDAU's purpose in entering the procedure is to obtain the outcome for which it provides, namely a decision obliging Boots to negotiate with it. Article 11 cannot give it a right to enter the procedure unless it also confers a right (assuming the prescribed conditions are satisfied) to the outcome. So it is necessary to face up to the Hohfeldian question. As to that, I cannot understand in what sense the union could be said to have a right to negotiate with the employer unless the employer were under an obligation to negotiate with it; and that was indeed Mr Hendy's submission albeit that he said that the question does not arise. However, all this is a side-issue. The real question is whether article 11 does indeed impose such a right, and its correlative obligation, in the present case.
>
> *DISCUSSION AND CONCLUSION ON THE SCOPE OF ARTICLE 11*
>
> 54. My conclusions on this issue are largely determined by what I have already said about the effect of the Strasbourg authorities. It follows from the recognition by the Court in *Demir* that "the right to bargain collectively with the employer" is an "essential element" of the rights protected by article 11 that a complaint that domestic law does not accord such a right in a particular case will fall within the scope of article 11. But, at the risk of spelling out the obvious, it does not follow from that that article 11

> confers a universal right on any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the rules of any such scheme constrain access to collective bargaining for a particular union (or its members) the constraints will have to be justified by – to use the language of the *Unite* decision (see para. 66, quoted at para. 44 above) – "relevant and sufficient reasons" and should "strike a fair balance between the competing interests at stake". But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation.
>
> 55. Applying that conclusion to this case, if the PDAU can demonstrate that the inhibition which paragraph 35 imposes on what would otherwise be its right to seek compulsory collective bargaining under Schedule A1 is unjustifiable that would give rise to a breach of its article 11 rights. (I formulate it that way for convenience: no question about burden arose in this case.) In the paragraphs from his judgment which I quote at para. 50 above the Judge did not put it in quite the same way as I have, but I think that his approach was substantially the same. It is accordingly necessary to go on to consider the second issue."

52. An important difference between the *Boots* case and the present one is that since the Boots Pharmacists Association, which had been recognised by the employer, was not independent, there was a procedure (albeit a lengthy one) provided in Schedule A1 for that union to be derecognised. Underhill LJ said:-

> "56. For the purpose of this stage of the argument, both Boots and the Secretary of State accepted, tacitly if not explicitly, that if, by reason of the limited recognition accorded to the BPA, the PDAU was conclusively precluded by paragraph 35 from seeking recognition, such a state of affairs could not be justified and accordingly that the statutory scheme was to that extent incompatible with article 11. It was, however, their case, to recapitulate, that the PDAU was not so precluded because it was open to it to procure the derecognition of the BPA, at which point the obstacle presented by paragraph 35 would disappear."

53. At paragraphs 61-62, he said:-

> "61. …The purpose of giving workers the right to secure the derecognition of a non-independent trade union must be to allow them to escape from the consequences of the recognition of a union by which they do not wish to be represented. Where the recognition is for the purpose of negotiating (at least) pay, hours and holidays, the primary consequence from which they will wish to escape is no doubt that of having those core terms

> negotiated for them by such a union. But that is not the only consequence of the recognition of a non-independent trade union. Another, because of paragraph 35, is that an independent trade union is prevented from securing recognition even where it has majority support. It would in my view be plainly contrary to the policy of Schedule A1 in general, and the purpose of Part VI in particular, if workers were unable to escape from that situation. That means that the conditions for the operation of Part VI must, so far as the language allows, be construed so as to allow it to be operated in any situation where paragraph 35 is preventing an application for recognition by an independent trade union: in other words, whatever counts as recognition for the purpose of paragraph 35 must count as recognition for the purpose of Part VI. There is no difficulty in reading paragraph 134 (1) (a) in that way. It is frankly impossible to know why the draftsman thought it necessary to include paragraph 136, but it is unnecessary to answer that question: all that matters is that it was not his intention to prevent Part VI being operated in all cases where paragraph 35 applied."
>
> 62. Like Sir Brian Keith [the trial judge] I would reach that conclusion on ordinary domestic principles of construction. But, also like him (see para. 21 of his judgment), if it were necessary I would invoke the special principles applicable under section 3 of the 1998 Act, since if derecognition under Part VI were not available there would in my view be a breach of article 11. Sir Brian in fact records at para. 21 of his judgment that before him Mr Hendy accepted that paragraph 134 could, with the assistance of section 3, be read so as to avoid the alleged incompatibility. That was not his position before us, where he argued that paragraph 136 represented an unequivocal expression of Parliament's intention which was incapable of being read down in the way proposed. For the reasons already given I do not accept that."

54. Finally, at paragraph 68 he said:-

> "68. The devising of a statutory scheme of recognition inevitably requires a large number of detailed choices about both substantive and procedural matters, seeking, as Mr Stilitz put it, to "balance and calibrate the interests of multiple stake-holders (e.g. workers, employers and competing trade unions)". There will inevitably be some choices which not only could have been made differently but could have been made better. But I think it is clear from the case-law of the ECtHR referred to above that article 11 cannot be used as a tool to challenge this or that arguably sub-optimal element in a scheme provided that a fair balance has been struck. Both before and after *Demir* the Court has emphasised the wide margin of appreciation which must be accorded to member states in this area: see, purely by way of

> example, paras. 60 and 66 of its judgment in the *Unite* case (paras. 43-44 above). Mr Stilitz also referred us to similar passages in *Sindicatul "Pastoral Cel Bun" v Romania* (2014) 58 EHRR 10, a decision of the Grand Chamber, (see at para. 133) and in *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10 (see para. 86).

55. The most recent decision of this court cited to us was *Vining and others v London Borough of Wandsworth* [2017] EWCA Civ 1092. The claimants were employed as parks constables. When the parks police were disbanded the claimants were made redundant. They brought claims for unfair dismissal and their trade union claimed a protective award for failure to consult. The issue was whether the claimants were employed in "police service" as defined by section 200 of the Employment Rights Act 1996 and Section 280 of the Trade Union and Labour Relations (Consolidation) Act 1992. If they were, they were excluded from the right to complain of unfair dismissal and from being the subject of a protective award. The claimant's appeal in respect of the right to claim for unfair dismissal failed. However, this court allowed the union's appeal, holding that the right to consultation in the event of collective redundancies fell squarely within the essential elements protected by Article 11. The judgment of the court (Sir Terence Etherton MR, Beatson and Underhill LJJ) stated at [63]-[65]:-

> "63. … In our view a right of the kind conferred by sections 188-192 of the 1992 Act – that is, (in the case of the union) to be consulted, and (in the case of the employees) to be consulted for – falls squarely within the "essential elements" protected by article 11. ……Thus, whether or not the consultation rights afforded to a recognised trade union by sections 188-192 constitute "collective bargaining" in the sense that the Grand Chamber used that term in *Demir*, they are so closely analogous to the rights there recognised that they are plainly to be treated as "essential elements" of the rights protected by article 11. In that connection, we note that long before *Demir* the ECtHR had held that "the members of a trade union should have a right, in order to protect their interests, that the trade union should be heard …" (see *Swedish Engine Drivers' Union v Sweden* [1978] ECC 1): consultation about mass redundancy seems a paradigm example of a matter affecting members' interests.
>
> 64. If, accordingly, the rights in question fall within the scope of article 11 the UK is under a positive obligation to secure the effective enjoyment of those rights. That does not mean that it is under an obligation to ensure that they are available to all employees in all circumstances, but it does mean that where a legislative scheme is in place it must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation. The relevant principles are discussed at paras. 33-47 and 54-55 in the judgment of Underhill LJ in *Pharmacists' Defence Association*

> *Union* v *Boots* [2017] EWCA Civ 66, [2017] IRLR 355, on the basis of *Demir* and the later ECtHR decision in *Unite the Union v United Kingdom* [2017] IRLR 438.
>
> 65. That conclusion is fatal to the Secretary of State's, and thus also Wandsworth's, case on the issue of principle. As we have said, he has not sought in this case to advance any justification for the exclusion of parks police officers, or trade unions representing them, from the rights accorded by sections 188-192. In the absence of such justification the exclusion must represent a breach of their, and their union's, article 11 rights."

Discussion

56. There is no dispute that before *Demir* the ambit of essential Article 11 rights as established in the Strasbourg jurisprudence would not have included the rights which the IWGB seeks. As the Grand Chamber itself records at [144]-[145], those rights were to form and join a trade union; the prohibition of closed shop agreements (in other words, the right not to join a particular trade union or any trade union at all); and the right for a trade union to "seek to persuade the employer to hear what it has to say on behalf of its members". In *Demir* at [154] the Court held that save in very specific cases, with which we are not concerned here, the right to bargain collectively with the employer had become, in principle, an essential element of Article 11 rights. (I note that they observed at [158] that the failure of domestic legislation to impose on employing authorities an obligation to enter into collective bargaining with a trade union was not an issue in the case).

57. If the trade union movement in the UK or in other Member States had high hopes raised by paragraph 154 of *Demir*, the subsequent Strasbourg case law must have disappointed them. In the *Good Shepherd* case the court, while largely repeating what it had said in *Demir*, emphasised at [133] that "the Contracting States enjoy a wide margin of appreciation as to how trade union freedom and protection of the occupational interests of union members may be secured". At [134], having declared that Article 11 affords members the right for "their trade union to be heard with a view to protecting their interests", they qualified this by adding that it "does not guarantee them any particular treatment by the State".

58. The wide margin of appreciation afforded to Member States is a recurrent theme in the Strasbourg case law. An exception is the observation of the Grand Chamber in *Demir* at [119] that only a limited margin of appreciation should be given when restrictions on Article 11 rights are under consideration. But that paragraph, cited above, seems to me on its natural construction to be referring to Article 11(2) exceptions and restrictions, in particular those placed on members of the armed forces, the police or civil servants, rather than to the question of the extent of the essential rights conferred by Article 11(1). If the law of a Member State says "Municipal civil servants cannot form a trade union" (*Demir*), or "If employers are planning mass redundancies among parks constables there is no need to consult their trade union" (*Vining*), that is an exclusion which has to be justified as necessary in a democratic society and will be closely scrutinised. But the present case is not one of exclusion. Staff working for Cordant at the relevant University workplace were free to join UNISON, the IWGB, or any other trade union. The critical question is whether their right of freedom of association under Article 11(1) extends to

the right to be represented in collective bargaining by their own independent union rather than by another one.

59. A narrow interpretation of paragraph 119 of *Demir* was confirmed in the *NURMTW* case at [86] and in *Unite the Union v UK* at [60], where the ECtHR emphasised the remarkably drastic infringement of rights involved in the *Demir* case: a collective agreement entered into voluntarily by employers and a trade union representing municipal civil servants was rendered wholly ineffective by legislation dissolving the trade union.

60. The *NURMTW* judgment said at [87] that if a legislative restriction strikes at the very core of trade union activity, a lesser margin of appreciation is given, whereas if the issue is a secondary or accessory aspect of freedom of association the margin of appreciation is wider; and at [99] that the margin of appreciation is never unlimited. Later in [99] the court included industrial relations policy under the heading of "social and economic policy" where the policy choice made by the domestic legislature will be respected unless it is manifestly without reasonable foundation ("MWRF"). It held that the UK's ban on secondary action, which had stood unchanged for 20 years during which there had been two changes of government, was the subject of a "democratic consensus" representing a "broad spectrum of political opinion", and could not be said to violate Article 11.

61. *Unite the Union v UK* is a still more dramatic retreat from paragraph 154 of *Demir*. In rejecting Unite's challenge to the abolition of the Agricultural Wages Board the Grand Chamber noted at [59] that, in contrast to the Turkish statute considered in *Demir*, UK law did not restrict employers and trade unions from entering into voluntary collective agreements; nor from making them legally enforceable contracts pursuant to an agreement in writing under section 179 of the 1992 Act; nor from having terms of a collective agreement incorporated into individual employees' contracts. "Thus", said the ECtHR, "the applicant is not prevented from exercising its right to engage in collective bargaining". They reached that conclusion despite the fact that legally enforceable collective agreements are rarely if ever made in practice in the UK; and that while in theory a trade union representing agricultural workers could invoke the compulsory recognition machinery under Schedule A1 to the 1992 Act, the need to show a minimum of 20 workers in the proposed bargaining unit meant that the employees of all but the largest farming enterprises would not qualify.

62. I therefore agree the summary of the Strasbourg case law in Underhill LJ's judgment in *Boots* at [54], and the judgment of this court in *Vining* at [64], that to the extent that the rules of any statutory scheme constrain access to collective bargaining for a particular trade union or its members the constraints will have to be justified by relevant and sufficient reasons, and must strike a fair balance between the competing interests at stake; but that in assessing that justification the choice made by Parliament should be given a wide margin of appreciation. I also consider that the case law indicates that Underhill LJ was right to say in *Boots* that complaints based on the denial of a right to compel an employer to engage in collective bargaining face an uphill struggle, but are not excluded altogether.

Application of the authorities to the present case

63. Mr Stilitz submits that the ECtHR has never held that the right of an independent trade union to conduct collective bargaining with a willing employer, which is what *Demir* clearly did establish, extends to a right to seek compulsory recognition – that is, the right to conduct collective bargaining with an (at least initially) unwilling employer. Although it is right to say that the ECtHR has never expressly held the opposite, I do not consider that there is anything in the Strasbourg case law to indicate that paragraph 35 of Schedule A1 to the 1992 Act should be classified as a restriction which strikes at the very core of trade union activity, on facts such as in the present case. It is therefore an area where any policy choice by the legislature should be given a wide margin of appreciation.

64. It is useful to test two hypothetical cases before coming to the one before us. Suppose one starts with a workplace where there is no trade union recognised at all, and the employer refuses to recognise for collective bargaining purposes an independent union with widespread support in the workforce. I consider that it would be a violation of the essential Article 11 rights of the workforce if no mechanism existed under which, once the wishes of the workforce had been ascertained, the employer could be compelled to recognise the union. Like Underhill LJ in *Boots* (at [53]), "I cannot understand how a trade union can be said to have the right to negotiate unless the employer has an obligation to negotiate with it". In such a case UK domestic law does provide a mechanism under which recognition can be achieved, namely Schedule A1 to the 1992 Act.

65. The same applies where, as in *Boots* itself, there is an incumbent union which is not independent of the employer, and an insurgent independent union seeks recognition. Again it would be a violation of the essential Article 11 rights of the workforce if no mechanism existed under which, once the wishes of the workforce had been ascertained, the employer could be compelled to recognise the independent union. The reason why this case is indistinguishable from the previous one is that, as I see it, a trade union which is not independent, operating under what is generally known as a "sweetheart agreement", is for Article 11 purposes not a trade union at all. Freedom to associate only in an organisation under the thumb of the employer is not freedom of association in any meaningful sense. I therefore also agree with Underhill LJ's *obiter* observation in *Boots* at [62] that, if derecognition of the non-independent union under Part VI of Schedule A1 had not been available, there would in that case have been a breach of Article 11.

66. The present appeal raises squarely a conflict between two viewpoints about collective bargaining. One is that independent trade unions such as the IWGB or UNISON should be free to compete with one another, not only to recruit members and to represent them as individuals (for example in disciplinary cases), but also to represent them in collective bargaining with employers; and that such competition will further the interests of the workforce by preventing incumbent unions from becoming complacent and taking their members for granted. The other is that stability and unity in collective bargaining are in the interests of the workforce, and that (provided that it is independent) a single trade union negotiating on their behalf is more likely to achieve positive results. There is no doubt much to be said for either of these viewpoints. Parliament has clearly opted for the latter by including in paragraph 19B(3)(c) of Schedule A1 the reference to "the desirability of avoiding small, fragmented bargaining

units within an undertaking". The road block placed in the IWGB's path by paragraph 35 of Schedule A1 reflects the same policy choice, combined with Parliament's wish to promote voluntary agreements between employers and independent trade unions.

67. This choice made by Parliament in 1999 is in my view clearly within the wide margin of appreciation indicated by the Strasbourg case law. Like the ban on secondary action considered in the *NURMTW* case, it represents a democratic consensus which has endured for 20 years despite changes of Government. The legislative provision under scrutiny in this case has never been the subject of political controversy in the way that the ban on secondary action once was, but that distinction is not a ground for saying that it is less the product of a democratic consensus: if anything it is an even greater indicator of a democratic consensus.

68. I do have concerns about Lord Hendy's hypothetical example of a workforce constituting a single bargaining unit where all the non-management staff are represented by one independent trade union, recognised voluntarily by the employer; but this incumbent union loses the support of the workforce, to the extent that a majority of them join an insurgent union which then seeks recognition; the employer refuses; and because of paragraph 35 of Schedule A1 the insurgent union has no remedy. I would wish to reserve for consideration in a future case whether on those facts there would be a breach of the Article 11 rights of the insurgent union and its members. The "desirability of avoiding small, fragmented bargaining units" would not be a relevant factor.

69. The present case, however, is different. The IWGB has chosen a small subgroup of the existing bargaining unit and would wish (if paragraph 35 did not prevent it) to use that as the basis for an application to the CAC. They have, so to speak, drawn the boundaries of the constituency themselves. I appreciate that it would be for the CAC, not for the court, to decide whether the proposed bargaining unit was appropriate: as Lord Hendy put it, the Appellant is only seeking to enter the competition, not to win it outright. But the policy considerations referred to in the witness statement of Ms Waite, the 1999 White Paper and Schedule A1 itself remain highly relevant. The scheme of Schedule A1 (in particular paragraph 35) is certainly sub-optimal from the IWGB's viewpoint, but that does not put the UK in breach of its obligations under the Convention.

70. Lord Hendy places much emphasis on paragraph 64 of this court's judgment in *Vining*, in which it was said that "where a legislative scheme is in place it must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation". I do not consider that the scheme of Schedule A1 is properly described as one which restricts its availability to particular classes of workers. But, even if I am wrong about that, it was open to Parliament within the wide margin of appreciation given to it to decide that the scheme strikes a fair balance between the competing interests involved.

Conclusion

71. It follows that I agree with Supperstone J that the IWGB has not established any violation of the Article 11 rights of its members or of the union itself. I would therefore dismiss this appeal.

Lord Justice Phillips:

72. I agree.

Lord Justice Underhill:

73. I agree that this appeal should be dismissed, essentially for the reasons given by Bean LJ. Parliament has by the 1992 Act put in place a careful scheme for compulsory union recognition in the circumstances provided for in Schedule A1. The design of that scheme inevitably involved policy choices as to which unions should be entitled to compulsory recognition in what circumstances; and those choices mean that not every union that wishes to access the statutory mechanism in a particular situation will be able to do so. The Strasbourg jurisprudence rightly accords a very wide margin of appreciation to national legislatures in this area, and I do not believe that the features of the scheme which result in IWGB being unable to access it in the circumstances of the present case give rise to a breach of article 11. Those features are the result of the legitimate policy choices clearly identified by Bean LJ at para. 66 of his judgment, which may mean that a particular group of workers do not have the opportunity to be bargained for by the union of their choice but which nevertheless mean that they are entitled to be (and are) represented by an independent trade union. As he says, the position is very different from what it would have been in the *Boots* case if there been no opportunity under the scheme for the insurgent independent union to gain recognition because of the presence of an incumbent non-independent trade union (and, what is more, one recognised for an extremely limited range of purposes).

74. In para. 64 of his judgment Bean LJ contrasts the situation in the present case with one where a union with widespread support in the workplace was unable to achieve recognition because of the absence of any mechanism for compulsory union recognition, observing that in the latter case there would be a violation of the essential article 11 rights of the workforce. That may well be the logic of *Demir*, but the ECtHR has not yet had to confront such a case; and if one were to arise in that stark form it might raise quite difficult questions as to how to define the terms of the recognition that ought to have been made available. However, those issues are not likely to trouble a court in the UK, since we do have a scheme of compulsory union recognition, and any complaints about breaches of article 11 will relate to specific aspects of its provisions.

IN THE COURT OF APPEAL

Court of Appeal Refs: 2019/0889

Claim number in court below: CO/1604/2018

On appeal from:
The QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT,
Supperstone J

BEFORE UNDERHILL, BEAN AND PHILLIPS LJJ

BETWEEN:

THE QUEEN

on the application of the

INDEPENDENT WORKERS UNION OF GREAT BRITAIN ('IWGB')

Appellant

-and-

THE CENTRAL ARBITRATION COMMITTEE ('CAC')

Respondent

-and-

(1) CORDANT SECURITY LTD

(2) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Interested Parties

ORDER

UPON hearing Leading Counsel for the Appellant and for the Second Interested Party

IT IS ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant do pay the costs of the Second Interested Party summarily assessed at £8000.