

The Dramatic Implications of *Demir and Baykara*

By

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I INTRODUCTION

Mrs Vemal Demir was a member of an Istanbul – based trade union of civil servants called Tüm Bel Sen, of which Mr Vicdan Baykara was the president. Formed in 1990 to promote democratic trade unionism, the union negotiated a collective agreement with a local authority, the Gaziantep Municipal Council to cover all aspects of working conditions, such as salaries, allowances and welfare services, effective for two years from 1 January 1993. Within a few months of the agreement being concluded, however, the employer appears to have failed to comply with some of its terms, with the result that the president of the union successfully brought civil proceedings against the local authority in the Gaziantep District Court. An appeal by the employer to the Court of Cassation led to the District Court’s decision being quashed – holding that although civil servants had the right to join trade unions, their trade unions had no right to enter into a collective agreement or to take collective action. Thus, even though there was no legal bar preventing civil servants from forming a trade union, any union so formed had ‘no authority to enter into collective agreements as the law stood’,¹ The matter was re-heard by the Gaziantep District Court, which defiantly stuck to its original position, concluding that the lack of express statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements had to be filled by reference to international treaties such as the ILO conventions ratified by Turkey. Again the decision of the District Court was overturned on appeal, with the Court of Cassation this time concentrating its attention on questions about the legal status of trade unions in a way that managed conveniently to ignore the real issues of substance. To add to the union’s woes, a separate court (the Audit Court) found the negotiation of terms and conditions of employment of civil servants to be improper, and ordered union members to repay the benefits they had secured under the agreement, which was said to be ‘defunct’. The union members were pursued by the local authority accountants who themselves faced personal liability for having sanctioned the now unlawful collective agreements in the first place.

It was not until April 1996 that the domestic legal proceedings were finally concluded, with the Court of Cassation rejecting representations from the union for a rectification of the second decision. So in October 1996, more than three years after the agreement was concluded and almost two years after its expiry date, the union made an application to the European Court of Human Rights (ECtHR) claiming that its rights under Articles 11 (freedom of association) and 14 (protection against discrimination) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) had

¹ *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008, para 19.

been violated. The case was so old and had taken so long to be processed that it had been lodged with the European Commission on Human Rights, a body which no longer exists. However, following the procedural reforms in the Strasbourg court the complaint was referred to seven judges of the second section.² It held that ‘there had been a violation of Art 11 of the Convention in so far as the domestic courts had refused to recognise the legal personality of the trade union Tm Bel Sen and had considered null and void the collective agreement between that trade union and [the Council], and that there was no need for a separate examination of the complaints under Art 14 of the Convention’.³ Clearly alarmed by this decision eventually reached on 21 November 2006, the Turkish government asked that the matter be referred to the Grand Chamber, a request granted on 23 May 2007. Trade unionists throughout Europe have cause to thank the government of Turkey for what turned out to be, for it, a monumental misjudgement. The Grand Chamber of 17 judges unanimously held in its decision of 12 November 2008 that there had been a breach of Art 11 on two narrow grounds: ‘on account of the interference with the right of the applicants, as municipal civil servants, to form a trade union’; and ‘on account of the annulment *ex tunc* of the collective agreement entered into by the trade union Tm Bel Sen following collective bargaining with the employing authority’.⁴

These narrow findings conceal a rich seam of jurisprudence in which the court (i) repudiated its earlier decisions on the question of trade union rights, (ii) embraced collective bargaining as an essential right protected by Art 11, and in doing so (iii) introduced a body of reasoning that applies with equal force to other forms of trade union activity, notably the right to take collective action. In this article we consider this dramatic turn of events in the evolution of the Court’s case law and the equally dramatic decisions that have followed in its wake, with *Demir and Baykara* being the midwife of other major developments in which the Court now recognises the right to strike as the youngest offspring of the maturing ECHR, Art 11. Such is the speed of events that *Demir and Baykara* and their younger siblings have been considered now on two occasions by the English courts, where as might be predicted they have not been well received by institutions steeped in the common law, and where the English courts have revealed a much more conservative view of human rights than their Strasbourg counterparts, coming from jurisdictions unburdened by common law fetters. We also address this dynamic jurisprudence below, in the knowledge that eventually the English courts will be required at some stage to give effect to Convention obligations, however reluctantly, and however difficult that may be. Finally, we also consider some of the wider implications of this jurisprudence, not only for English law, but also for EU law in the wake of the *Viking* and *Laval* debacle. It appears that domestic law is some way off the pace so far as Art 11 is concerned, and the question now is how best and how quickly to get some of these matters before the Strasbourg Court for consideration. It is also clear that the ECtHR is pulling in different directions from its Luxembourg counterpart, with the mouth-watering possibility of a High Noon conflict between the two.

² Application No. 34503/97, 21 November 2006.

³ Grand Chamber, para 8.

⁴ *Ibid*, para 183.

II THE EVOLVING CASE LAW

In *Demir and Baykara*, the first problem for the applicants was that the European Court of Human Rights had addressed these matters in the past, in two famous cases from Sweden and Belgium decided in the 1970s.⁵ In these cases the Court expressed and repeated the mantra that Art 11 simply imposes a duty on member states of the Council of Europe to have in place mechanisms that enable trade unions to represent their members, but does not guarantee any particular means by which this is to be done:

The Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11(1) certainly leaves each State a free choice of the means to be used towards this end. Whilst the concluding of collective agreements is one of these means, there are others.⁶

Thus the failure of a State to provide a specific mechanism for unions to be heard in order to protect their members' interests would not breach Art11(1) if other means were permitted by which the union could be heard. Part of the justification for this was the existence of the European Social Charter of 1961 ('ESC'),⁷ in relation to which States are free to select which paragraphs of which Articles they are prepared to accept. Thus it is open to a State to refuse to accept (by way of example) the obligations relating to the right to organise, the right to bargain or the right to strike. According to the tortuous reasoning of the Court, if Art 11 of the Convention was to be read to include these rights, it would mean that in 1961 the Council of Europe would have taken a step backwards by creating a Charter in which such rights were optional.⁸

A Fresh Start for the Strasbourg Court

This old thinking was swept aside on 12 November 2008, though the Court expressly made clear that this was not a step that it took lightly:

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

⁵ *Swedish Engine Drivers Union v Sweden* (1976) 1EHRR 617; *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578. And see M Forde, 'The European Convention on Human Rights and Labor Law' (1983) 31 *American Journal of Comparative Law* 301.

⁶ *Swedish Engine Drivers*, above, para. 40; *Belgian Police*, above, para 38 (in relation to the 'right' to be consulted); *Schmidt v Dahlström*, above, para 36 (in relation to the right to strike).

⁷ The European Social Charter 1996 has not been ratified by the UK and is not referred to further in this paper.

⁸ See *Belgian Police*, at para 38; *Swedish Engine Drivers*, at para 39; and *Schmidt*, at para 34.

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.⁹

In so holding, the ECtHR adopted the ‘living document’ model of construction in preference to one based on the ‘original intention of the drafters’. But this still left the question for the Court of how to get from point A (the broad and formal Convention right to freedom of association, including the right to form and join trade unions for the protection of one’s interests) to point B (the specific right to engage in collective bargaining). Building on earlier path-breaking decisions against the UK (notably *Wilson v United Kingdom*,¹⁰ and *ASLEF v United Kingdom*),¹¹ this was done by reference to international labour standards, notably ILO Conventions 98 and 151; the Council of Europe’s Social Charter of 1961, art 6(4); the EU Charter of Fundamental Rights of 2000, art 28; and ‘the practice of European States’.¹² All this showed that:

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.¹³

Having thus decided that the right to freedom of association includes the right to bargain collectively, the next question for the Court concerned the substance and content of the right. Significantly, here the Court wisely held (as we have seen) that though States must remain free to develop their own systems, all such systems must be consistent with the requirements of ILO,¹⁴ and the ESC.¹⁵ Indeed, one of the most

⁹ *Demir and Baykara*, para 154.

¹⁰ [2002] IRLR 568; Application Nos 30668/96, 30671/96 and 30678/96 .

¹¹ [2007] IRLR 361; Application No 11002/05.

¹² *Demir and Baykara*, paras 98-101, 147151.

¹³ *Ibid*, para 154. Although the ECtHR in *Demir and Baykara* did not refer to it, the judgment is practically a mirror image of the decision of the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391, the Supreme Court likewise expressly rejected its earlier case-law in order to find that collective bargaining was thenceforth protected under Art 2(d) of the Canadian Charter of Rights, paras 23-31. The Court reviewed historical importance of collective bargaining in Canada (paras 43-67), recognised that collective bargaining reflected the values of human dignity, equality, respect for personal autonomy and enhancement of democracy (paras 80-86), and relied on the international treaty material (other than the ESC which had no application in Canada) (paras 70-79). See J Fudge, ‘The Supreme Court of Canada and the Right to Bargain Collectively’ (2008) 37 ILJ 25. The identical conclusions separately reached by these two eminent courts shows an international convergence in relation to the rights included in freedom of association to which parochial critics must now defer.

¹⁴ *Ibid*, para 147-8, and see paras 100-102.

notable aspects of the decision is thus the importance attached to both ILO and Council of Europe standards in determining the content of the right to trade union membership guaranteed by Art 11.¹⁶ The Court has done a complete u-turn – no longer is this material a barrier to reading up Art 11, it is now a reason for doing so. The ILO and ESC jurisprudence was also held to be relevant to another issue which arises in the context of Art 11 but which does not arise explicitly in the ILO Conventions on which Art 11(1) is now based.¹⁷ This is the scope for permitted restrictions on Convention rights where these can be seen to fall within the scope of Art 11(2). Here too the Court produced another rabbit from its brimming hat.¹⁸ True, it was easy for the Turkish government to say that the restriction on civil service unions were prescribed by law, indeed that it had a legitimate aim,¹⁹ but the Court refused to accept that the restrictions were necessary in a democratic society for any of the purposes permitted by Art 11(2).²⁰ The Court referred again to international labour standards, regional labour standards, and the practice of other countries to conclude that the restrictions were not proportionate.²¹ In other words, the same considerations which were used to determine the content of the right were also used to determine whether restrictions were necessary and permissible.

This is a remarkable delegation to external standards and their dynamic application, while at the same time effectively rendering Art 11(2) a duplicate line of fortification in this context.²² For in treating the ECHR as a living instrument, the Strasbourg Court is also acknowledging that these other treaties are living instruments as well, in the sense that in considering their scope and content it is necessary to have regard not only to the text of the treaties, but also to the jurisprudence of the supervisory

¹⁵ *Demir and Baykara*, at paras 149 and see paras 103-104.

¹⁶ The ECtHR also relied on Art 28 of the Charter of Fundamental Rights of the European Union adopted in Nice in 2000 and recognised by Art 6 of the Treaty on European Union (which subjected the provision to ‘explanations’). The part of the Charter in which that Article appears is now subject to the Lisbon Treaty in consequence of which Art 28 of the Charter, though a relevant statement of fundamental principle for most of the EU, has no impact in Poland or the UK since Protocol 6 to the Lisbon Treaty provides that neither the ECJ nor any domestic court may find that any existing law is inconsistent with Art 28 rights, and that Art 28 creates no justiciable rights beyond existing domestic law.

¹⁷ Though Art 31 of the ESC is equivalent in terms to Art 11(2) of the ECHR.

¹⁸ In *Wilson v United Kingdom* (above) Art 11(2) was simply brushed aside.

¹⁹ Paras 159-161.

²⁰ Paras 162-169.

²¹ Para 165.

²² *Demir and Baykara* highlights a very different approach to proportionality (and the use of these international standards in relation to proportionality) to that of the ECJ in *Viking* 12 months earlier when the right to strike in support of collective bargaining was disembowelled. In the latter case, ILO standards were relied on in part to justify the existence of a right to strike as part of the piped music of EC/EU law, but not to define the substance of the right, a task the ECJ arrogated to itself which in its own inimitable style succeeded in developing principles fully recognisable to 19th century English common lawyers.

bodies.²³ In the case of the ILO, this was not confined to observations of the Committee of Experts findings in relation to Turkey specifically, but also extended to its body of principles drawn from earlier decisions generally as set out in the Freedom of Association Committee's *Digest of Decisions* and the Committee of Experts' *General Survey*, texts which may now assume biblical status and with which labour lawyers should now become as familiar as with their own national statutes and law reports. By highlighting the importance of this jurisprudence, the Court by implication encourages trade unions to take the ILO seriously by responding comprehensively to the government reports to the Committee of Experts under Conventions 87, 98, 135 and 151, and by making effective use of complaints to the Freedom of Association Committee. The same is equally true of the ECtHR's reliance on the European Social Charter jurisprudence in decisions of the European Social Rights Committee,²⁴ and the Committee of Ministers of the Council of Europe.²⁵ Consequently labour lawyers will need to be familiar with that body of law too and European trade unions will consider using the mechanisms of the Charter to raise issues.²⁶

The ILO and ESC *fora* are thus now no longer processes for publicising grievances and causing some mild diplomatic embarrassment for national governments, but important steps in building up the scope of ILO and ESC rights generally (as well as in particular cases), with a view to bringing proceedings in the ECtHR in Strasbourg under Art 11. Even more importantly, however, these standards apply regardless of whether the Member State has ratified the relevant Convention or not. Although it was true that the that Turkey had ratified ILO Conventions 98 and 151, the construction of Art 11 which the ECtHR applied to Turkey was based on provisions of a treaty which Turkey had not accepted (the European Social Charter, Art 6(2)), and a treaty by which Turkey could not be bound (the EU Charter of Fundamental Rights), as well as the laws of other countries of the Council of Europe over which Turkey has no control. Needless to say, Turkey took exception to this. The Court responded that

... Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard...²⁷

The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources

²³ Reference to these instruments and their jurisprudence had been made in earlier cases and in particular *Sigurjonsson v Sweden* (1993) 16 EHRR 462 at para.35; *Wilson, Palmer* (above) paras 30, 35-36, 37; *ASLEF v UK* [2007] IRLR 361 at paras 22 and 25.

²⁴ Referred to in para 149. In *Wilson and Palmer* the references to the ESCR were yet more extensive, see paras 30-33 of that judgment.

²⁵ Referred to in para 104.

²⁶ The ETUC have taken up this challenge and suggested that European unions should submit reports to the ILO and to the ESC machinery on *Viking* and *Laval*: circular to affiliates July 2009.

²⁷ *Ibid*, para 76.

of law according to whether or not they have been signed or ratified by the Respondent State.²⁸

The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.²⁹

The Court reiterated that ‘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’, and that 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 a majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies’.³⁰

Implications for other Trade Union Rights

The Court’s observations in *Demir and Baykara* that there was a ‘perceptible evolution’ in international law relation to such rights as that to collective bargaining,³¹ and ‘a

²⁸ *Ibid*, para 78. the argument that because States were not obliged to ratify every Article of the ESC it was voluntary and therefore no guide as to what was mandatory in the Convention was dismissed with contempt!

²⁹ *Ibid*, para 85.

³⁰ *Ibid*, para 86. The holding is plainly correct. The ILO has always considered that its fundamental Conventions apply to States irrespective of their ratification of them (e.g, to the Republic of South Africa in the apartheid era) and the very fact of membership of the ILO carries with it a constitutional obligation to respect the fundamental principles. Indeed, some authors regard the fundamental principles as having arguably become part of customary international law: C W Jenks, *The International Protection of Trade Union Freedom* (1957) at pp 561-2; P. O’Higgins, ‘International Standards and British Labour Law, in R Lewis (ed), *Labour Law in Britain* (1986), at p 577. The logic adopted by the ECtHR in resting on international law standards is consistent with the common law principle of legality explained by Lord Hoffman in *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115 at p 131; followed by Gleeson CJ in *Electrolux etc v Australian Workers Union* (2004) 221 CLR 309 at p 329.

³¹ *Ibid*, para153, and see para154. The only development of note would appear to be the adoption in 2000 of the EU Charter of Fundamental Rights which contains the familiar restatement of rights found in ILO Conventions and the European Social Charter. As the separate (concurring) opinion of Judge Zagrebelsky put it: ‘I have the feeling that the Court’s departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change, at European or domestic level, in the legislative framework’ (para 2).

‘continuous evolution in the norms and principles applied in international law’,³² set in train a course of reasoning that requires a re-examination of jurisprudence on trade union rights related to collective bargaining, specifically the right to strike. There have been several ECtHR cases on the right to strike, or collective action to use the new sanitised synonym. None of them have used the language of ‘essential right’. But they are worthy of consideration in this context. *Schmidt v Dahlström v Sweden* arose from a bitter three-month dispute involving lockouts and strikes by two of four relevant unions.³³ The dispute followed the expiry on 31 December 1970 of the previous collective agreement. Eventually in June 1971 a global collective agreement was reached which gave wage increases across the board. It contained, however, a clause which denied the benefit of those increases in respect of the period of the dispute (January to March) to members of the unions which had taken strike action, irrespective of whether the individual members of those two unions had struck or not. Such clauses were common in Sweden. Those two unions signed the agreement with a reservation and claimed that the clause in question amounted to a discouragement to future strike action and hence a breach of their Art 11 right to protect the occupational interests of their members. The ECtHR tersely held that ‘[e]xamination of the file in this case does not disclose that the applicants have been deprived of this capacity’.³⁴ In other words, the Court held that despite the sanction, the unions retained all the means to protect members’ interests which the State had made available to them: the right to collectively bargain and to enter collective agreements and, in particular, the right to strike. There was thus no breach of Art 11(1) and hence no need to consider justification under Art 11(2).

Schmidt also gave a very slightly different rendition of the mantra referred to earlier. Having reiterated that each State has a free choice of the means to be used to enable unions to protect the occupational interests of their members, the Court held that:

The grant of a right to strike represents without any doubt one of the most important of these means,³⁵ but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to ‘further restrictions’ compatible with its Article 31...³⁶

The importance of the right to strike was thus recognised with the implication that restriction of it should be governed by the conditions in Arts 6(4) and 31 of the ESC, the latter being in similar terms to Art 11(2) of the ECHR. Indeed all but one of the other pre-*Demir* cases on the right to strike found that restrictions on the ability to take strike action did amount to breach of Art 11(1), though all were justified on consideration of

³² *Ibid*, para 86

³³ (1976) 1 EHRR 632.

³⁴ *Schmidt and Dahlström*, above, para 36.

³⁵ Language which connotes an ‘upgrade’, according to the concurring opinion on the Grand Chamber in *Demir*, speaking of the right to collective bargaining prior to the Grand Chamber judgment, for example, in the second section judgment at para 40 and before that in *Swedish Transport Workers’ Union v Sweden*, Appn No 53507/99.

³⁶ *Schmidt and Dahlström*, above, para 34.

Art11(2). The exception is *NATFHE v UK*, a case which never reached the Court.³⁷ There the (now abolished) Commission refused admissibility to a union seeking to impugn an injunction imposed to prevent strike action by reason of the union's failure to meet the then requirement to disclose a list of its members' names in the pre-ballot (and pre-strike) notice. The Commission held that the obligation to disclose names imposed no interference with Art 11(1). In the light of the ECtHR jurisprudence of the last 12 months it must be doubted whether the same conclusion would be reached today. The Judge in the UK proceedings and the members of the Court of Appeal all expressed unease at the implications of the requirement and the British government subsequently amended the law to make clear that unions are not required to disclose names.³⁸ The case may properly be regarded as exceptional.

Of the other post *Schmidt* and pre *Demir* cases on the right to strike are concerned, there are three that stand out. In *Federation of Offshore Workers' Trade Unions ('OFS') v Norway*, the ECtHR held that the right to strike is a 'complement to collective bargaining'.³⁹ There a decree to prevent a strike in the offshore oil industry was held to infringe Art 11(1) but the Court accepted that the consequences to the nation, a strike in the offshore oil industry would be so disastrous that the restriction was justified under Art 11(2).

The second case is *UNISON v UK*,⁴⁰ where the ECtHR regarded an injunction to prevent a strike aimed at better protection for workers after transfer of the employing business as an infringement of Art 11(1):

The prohibition on the strike must be regarded as a restriction on the applicant's power to protect [the members'] interests and therefore discloses a restriction on the freedom of association guaranteed under the first paragraph [of Article 11].⁴¹

But the Court held that the restriction was justified by reference to Art 11(2) as necessary in a democratic society for the protection of the economic interests of the transferor, though the consequences, had the strike taken place, were not even suggested to be in the same league as in *OFS*.⁴² In a weak decision, the ECtHR in *UNISON* proffered no rationale in support of the thesis that it is necessary in a democratic society that industrial action must be confined to a dispute between existing workers and their existing employer (s 244).⁴³ In the light of subsequent decisions of the ILO and ESC Committees condemnatory of this UK restriction, and the ECtHR's recent jurisprudence, it seems unlikely that the ECtHR would reach the same conclusion on the same facts again. At its heart, the logic in *UNISON* would be capable of legitimating almost any restriction on strike action since a strike will invariably interfere with the

³⁷ (1998) 25 EHRR CD 122. The English proceedings (in the CA) were *NATFHE v Blackpool & Fylde College* [1994] IRLR 227.

³⁸ Now TULRCA 1992, ss 226A(2G) and 234A(3F).

³⁹ (2002) ECHR 2002-VI, 301, ECtHR, at p 320.

⁴⁰ [2002] IRLR 497.

⁴¹ Para 37.

⁴² Paras 42-43.

⁴³ Note that Art 1 of Protocol No 1 could not be prayed in aid: see the detailed rationale in *Gustafsson v Sweden* (1996) 22 EHRR 409 at paras 59-60 where it was held that industrial action blockading supplies delivered pursuant to private contract were outside its scope unless they were the 'product of governmental authority'.

economic interests of employers.⁴⁴ *UNISON* nevertheless supports the view that the right to strike is inherent in Art 11(1), the Court also pointing to the right of the union to take strike action at a later date against the transferee as one of the factors militating in favour of legitimacy of the restriction.⁴⁵

Finally in this context, *Wilson and Palmer* did not concern the right to strike. However, the ECtHR there recognised that freedom to strike is a necessary alternative to a right to compel an employer to bargain collectively. Thus the absence of such a right of compulsion did not give rise to breach of Art 11 in the UK *because* it had chosen to provide freedom to take strike action.⁴⁶ The Court also held that:

the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps **including, if necessary, organising industrial action**, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer **or to take action** in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory.⁴⁷ (Emphasis supplied).

Plainly, the Court was recognising both the right to strike and that it is an essential element in collective bargaining. That co-relationship was illustrated by the ECtHR in a case five months after *Demir and Baykara*. This link is obvious on examination of the realities of collective industrial relations. Without the right to strike, the right to collectively bargain is no more than a right to collective begging. The ability to take strike action is necessary to the process of bargaining if persuasion fails. Lord Wright used prescient words when he held in 1942 that the 'right of workmen to strike is **an essential element** in the principle of collective bargaining' (emphasis supplied).⁴⁸ As noted above, in the *OFS* case the ECtHR held that the right to strike is a 'complement to collective bargaining'.⁴⁹ In South Africa the Constitutional Court has held that: 'Once a right to collective bargaining is recognised implicit within it will be the right to exercise some economic power against partners in collective bargaining'.⁵⁰ In that case the economic power was that of lock out. The inter-relationship between collective bargaining and the right to strike is recognised in the jurisprudence of the ILO and ESC. Indeed, the right to strike in Art 6(4) of the ESC is expressly 'with a view to ensuring the effective exercise of the right to bargain collectively'.

⁴⁴ See B Simpson, 'Trade Disputes and Industrial Action Ballots in the Twenty-first Century' (2002) 31 ILJ 270.

⁴⁵ Para 41. At para 31 it had reiterated the familiar phrase that the ability to strike is one of the most important means of being heard but there are others.

⁴⁶ Paras 44-45.

⁴⁷ Para 46.

⁴⁸ *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 43 at p 463.

⁴⁹ (2002) ECHR 2002-VI, 301, at p 320.

⁵⁰ *In re Certification of the Constitution of South Africa* 1966 (4) SA 744, at p 795.

The Evolution of Trade Union Rights after *Demir and Baykara*

Perhaps unsurprisingly in light of the reasoning of the Court, it did not take very long for *Demir and Baykara* to be extended from collective bargaining to collective action. Indeed there is now a significant body of case law which examines the extent to which the right to strike is protected by arts 11 and 14, with major implications for workers, trade unions and governments. These cases also reveal the importance of ILO and ESC standards for the development of this jurisprudence, and the importance which they now have for national labour law systems. The starting point is *Enerji Yapi-Yol Sen v Turkey*,⁵¹ which was concerned with a circular from the Prime Minister's Public-Service Staff Directorate prohibiting public sector employees from taking part in a national one day strike organised by the Federation of Public Sector Trade Unions 'to secure the right to a collective bargaining agreement'. The first question was whether such conduct of the State violated the Convention rights of the union, the Court taking the view that:

The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests [reference made to *Schmidt and Dahlström*; *Belgian police*; *Swedish engine drivers*]. Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests (*Schmidt and Dahlström*, cited above, § 36). The Court also observed that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir et Baykara*, cited above). It recalled that the European Social Charter also recognised the right to strike as a means of ensuring the effective exercise of the right to collective bargaining. As such, the Court rejected the Government's preliminary objection [that the trade union was not a victim].⁵²

The reference to *Demir and Baykara* as support for reliance on the ILO and the European Social Charter to establish strike action as a corollary to the essential right to collective bargaining protected by Art 11, strongly suggests that the Court was accepting that the right to strike, insofar as it is exercised in furtherance of collective bargaining, is equally 'essential'.⁵³ True, the Court also said that strike action merely constitutes 'an important aspect in the protection of trade union members' interests'. But the passage cited above, as the last sentence makes clear, was directed to the Turkish government's primary assertion that the union's ability to be heard on behalf of its members (through means other than strike action) was untouched by the ban on strike action and hence there was no breach of Art 11.⁵⁴ The Court's iteration of the importance of strike action is merely descriptive of the fact that there is a range of

⁵¹ Application No 68959/01, Judgment dated 21 April 2009.

⁵² *Ibid*, para 24 (unofficial translation).

⁵³ Whether there is in Art 11 a right to strike for wider purposes (as the ILO holds to be the case under Convention 87) is not the issue here.

⁵⁴ See paras 18 and 20.

means by which unions can protect members' interests of which strike action is one of the most important. The paragraph is not asserting that Turkey was free to choose to abridge the right to strike and allow the union only other means to protect its members' interests; indeed the ECtHR held to the contrary, that by reliance on the ILO and ESC in accordance with the ratio in *Demir*, the ban interfered with the union's right to strike under Art11(1), and that this interference was a breach of Art11(1). It was not necessary therefore for the ECtHR to consider whether the other means by which the union might be heard on behalf of its members were sufficient: breach of the right to strike alone was a breach of Art11(1).

Thus it may be concluded that the ECtHR in *Enerji* did regard the right to strike as essential, as being an indissociable corollary of the right to collective bargaining. This was consistent with the Court's conclusion in *Wilson* and *Palmer* (cited above) that the freedom to strike is necessary to a voluntary system of collective bargaining. But this only takes us half the way home, for there is also the legal landmine in the form of Art 11(2), which sure enough the Turkish government relied on to justify the restrictions. However, although the Court accepted that the restriction was prescribed by law, it found it unnecessary to decide whether the restriction was for a legitimate end. The main focus of the Court's inquiry was the question whether the action by the government was necessary in a democratic society. It observed that the 'right to strike was not absolute and could be subject to certain conditions and made the object of certain restrictions', so that 'certain categories of civil servant could be prohibited from taking strike action' (citing *Pellegrin v France*),⁵⁵ for example 'civil servants exercising functions of authority on behalf of the State'. But the Turkish government had not identified such categories of civil servant but instead imposed a blanket ban without consideration of the imperatives enumerated in Art 11(2). Accordingly, it had 'not demonstrated the need in a democratic society for the impugned restriction'.⁵⁶ On this occasion, so clear was Turkey's failure that it was not even necessary to refer to the ILO or ESC material (which would have supported the proposition that such an indiscriminate ban was impermissible under their respective instruments).

As already pointed out, this linkage between collective bargaining and the right to strike has long been recognised, not only in international law but also by the common law, to say nothing of the law of other countries where the right to strike is often associated with the negotiation of collective agreements. The linkage is also reflected to some extent in British legislation insofar as the statutory immunity is confined to trade disputes, defined to mean disputes between workers and employers related to terms and conditions of employment and related matters. Whether the Strasbourg jurisprudence can be restrained in this way is, of course, another matter altogether, given that the ILO conception of the right to strike is not so constrained. Unlike the ESC conception of the right to strike which is rooted in collective bargaining (though in practice is read much more widely), the ILO conception is based on wider human rights considerations which would include but also extend beyond the right to strike in the context of collective bargaining, and – for example – encompasses the right to take part

⁵⁵ [GC] N° 28541/95, ss 64-67, CEDH 1999-VIII.

⁵⁶ *Enerji*, para 32. See also *Case No 32/2005, European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" (CL "Podkrepa") v Bulgaria*.

in some kinds of protest strikes directed against the government.⁵⁷ An early indication that the Strasbourg court may be moving in this wider direction to embrace a ‘human rights’ rather than an ‘industrial relations’ conception of the right to strike is suggested by the decisions in *Karacay and Kaya and Seyhan* (below), concerned with disciplinary action for taking part in protest strikes. Although concerned principally with the issue of the sanction, that could only be an issue if the strike itself was protected action under the Convention.

Collective Action and the Individual Worker

Enerji Yapi-Yol Sen v Turkey, *OFS* and *UNISON* were distinguished by the fact that the victims were trade unions. The other strike cases involve individual victims who claim to have been penalized in various ways because of their engagement in collective action. In July 2009, the judgment of the ECtHR in *Danilenkov v Russia* concerned 32 dockers,⁵⁸ members of a small union at Kaliningrad docks which had taken industrial action. Following the strike the employer discriminated against the members so that they were assigned less work, received reduced income, and were subject to discriminatory selection for redundancy. Domestic legal proceedings failed to compensate the losses suffered, so an application was made to Strasbourg, relying principally on Art 14 rather than Art 11 of the Convention.⁵⁹ Again the Court relied heavily on the ESC (including the jurisprudence of the Social Rights Committee) and ILO Conventions 87 and 98 (including the *Digest of Decisions of the ILO Freedom of Association Committee* and a decision involving the Dockers’ Union of Russia and the Russian Federation), in upholding the complaint. In doing so, the Court said that:

the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association capable to jeopardize the very existence of a trade union (see paragraph 107 above).⁶⁰

The Court found it:

crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief. Therefore, the States are required under Articles 11 and 14 of the Convention to set up a judicial system that

⁵⁷ See K D Ewing, ‘Laws against Strikes Revisited’, in C Barnard, S Deakin and G Morris (eds), *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC* (2004), ch 2 (on the implications of regarding the right to strike as a ‘human right’).

⁵⁸ Application No 67336/01, 30 July 2009.

⁵⁹ Art 14 provides that ‘The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

⁶⁰ *Danilenkov*, para 123.

would ensure real and effective protection against the anti-union discrimination'.⁶¹

In that case, although domestic law rendered discrimination against trade unionists unlawful, it did so only by way of criminal proceedings which brought the usual difficulties of surmounting the higher standard of proof, proving intention in relation to an artificial person, and removing control of the proceedings from the victims. In contrast 'civil proceedings would [have allowed fulfilment of] the far more delicate task of examining all elements of [the] relationship between the applicants and their employer, including [the] combined effect of various techniques used by the latter to induce dockers to relinquish DUR membership, and granting appropriate redress'.⁶² As a result, 'the Court considers that the State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership', so violating Art 14 taken together with Art 11.⁶³

The case demonstrates the requirement, under Art 11, to protect the right to strike, as does the subsequent decision in *Saime Özcan v Turkey*,⁶⁴ where a secondary school teacher in the public sector took part in a national strike day aimed at improving terms and conditions. She was prosecuted for having abandoned her place of work and sentenced to 3 months and 10 days imprisonment commuted to a substantial fine. The sentence was suspended though upheld in the appeal court where she was also barred from teaching for 3 years and 15 days. Those facts were the same as those applying to the applicant school teachers in the 2008 case of *Urcan v Turkey*.⁶⁵ The only difference was that in the case of *Saime Özcan*, some 5½ years after her conviction, on an application by the government, the original criminal court had set aside the prosecution on the basis that it had had no standing to find the applicant guilty of the charge. The fact that the applicants in *Urcan* had criminal convictions with a suspended sentence hanging over them of course made them victims. But in *Saime Özcan* the government relied on the setting aside of the adverse finding to assert that she was not a victim. The Court held that the fact that for 5½ years she had a criminal conviction and had been barred from exercising her profession made her a victim.⁶⁶ The ECtHR went on in these occasions to hold, unsurprisingly, that the imposition of the penalties was a breach of Art 11(1).

But what about lesser sanctions? This was the issue in *Schmidt and Dahlstrom* considered above, where the complainants were concerned about the imposition of pay penalties for having taken part in the industrial action. That too would no longer appear to be acceptable. In *Kaya and Seyhan v Turkey*,⁶⁷ two public servants participated in a strike day protesting about what appears to have been the organisation of the public service, the subject of parliamentary discussion. They were subjected to a disciplinary inquiry (a process governed, in the public service, by law) and subsequently

⁶¹ *Ibid*, para 124.

⁶² *Ibid*, para 134.

⁶³ *Ibid*, para 136.

⁶⁴ Appn. 22943/04, 15 September 2009, judgment in French only.

⁶⁵ Appn. 23018/04 etc, 17 July 2008, definitive judgment 17 October 2008, only in French.

⁶⁶ *Özcan*, para.17.

⁶⁷ Appn 30946/04, 15 September 2009.

disciplined for leaving their workplaces without authority. Each was given the written warning provided for in the disciplinary regime, that the public servant is warned ‘to be more attentive to the accomplishment of his/her functions and in his/her behaviour’.⁶⁸ The Court held that this constituted an attenuation of their right of freedom of association under Art 11(1),⁶⁹ emphasising once again that a restriction on the right to strike will infringe Art 11(1). This in itself is a remarkable conclusion with wide implications, given the subject matter of the strike, which does not appear to have been directly related to collective bargaining (with obvious implications for the UK in light of the narrow definition of a trade dispute in TULRCA 1992, s 244). So far as the Court was concerned, such a restriction could only be warranted by reference to Art 11(2). The Turkish government submitted that, for failing to do their jobs and absenting themselves from work without informing their employer and without justification a warning was necessary in response to a pressing social need and was proportionate.⁷⁰ The ECtHR rejected this, holding that

Or, la sanction incriminée, si minime qu'elle ait été, est de nature à dissuader les membres de syndicats de participer légitimement à des journées de grève ou à des actions pour défendre les intérêts de leurs affiliés.⁷¹

There was no pressing social need for a disciplinary sanction and thus the warning was not necessary in a democratic society.⁷²

Kaya and Seyhan adopted the 2007 judgment of the Court in *Karaçay v Turkey*.⁷³ In that case there was a public demonstration to defend the purchasing power of public servants. For his alleged participation in the action, the applicant electrician was subjected to the same disciplinary warning referred to in *Kaya and Seyhan*. He denied participation saying that he was helping colleagues deal with flooding in Istanbul that day. But the Court held that even if he had participated, the imposition of the warning was an interference with his right of freedom of association,⁷⁴ which could not be justified by reference to Art 11(2).⁷⁵ The Court rejected the argument that public servants were not exempt from disciplinary measures for participating in a strike day without permission and failing to carry out his work.⁷⁶ As in *Kaya and Seyhan*, though the impugned sanction was minimal, it was of a nature calculated to dissuade union members from participating lawfully in strike days or other actions to defend their interests.⁷⁷

⁶⁸ *Kaya and Seyhan*, para 12. It appears that subsequently an amnesty was granted in respect of certain disciplinary sanctions on public servants but not, it seems, in relation to warnings. The applicants were thus ‘victims’, para 22.

⁶⁹ *Ibid*, para 24.

⁷⁰ *Ibid*, para 27.

⁷¹ *Ibid*, para 30.

⁷² *Ibid*, para 31.

⁷³ Appn 6615/03 27 March 2007, definitive version of the judgment on 27 June 2007, only in French.

⁷⁴ *Karaçay*, para 28.

⁷⁵ *Ibid*, paras 33-39.

⁷⁶ *Ibid*, para 34.

⁷⁷ *Ibid*, para 37, citing *Ezelin v France*, 26 April 1991, Series A, No 202, § 53.

These cases plainly mark a clean break with the reasoning of the Court on Art 11(2) in the *UNISON* case, discussed above, and just as importantly with *Schmidt and Dahlstrom*, also considered above, revealing that any sanction designed to ‘attenuate’ the right to strike is not consistent with Convention rights. So far (as determined by the Court), this could take the form of criminal penalties at the hands of the State, or being assigned less work by the employer, having one’s income reduced, being selected for redundancy, or being subject to a disciplinary warning. This is not to suggest that all measures taken by an employer will amount to an infringement of Art 11, such as the non payment of wages for the days when on strike, or a refusal to accept part-performance where the industrial action involves the refusal to undertake certain duties. But in this fast moving area, it is possible to argue that the balance struck by UK law on the latter issue does not do justice to Convention requirements,⁷⁸ and to speculate what other employer sanctions would constitute a breach of Art 11 (1).

III DEMIR AND BAYKARA IN THE ENGLISH COURTS – THE COMMON LAW MEETS CONVENTION RIGHTS

It is impossible to exaggerate the importance of these developments, and implausible to argue that somehow these decisions are wrong or that they will soon be re-examined and reversed. It is equally impossible to exaggerate the scale of the challenge they present for the common law and for judges schooled in the common law tradition. We now appear to have a comprehensive right to bargain and to strike, based on ILO and ESC standards. By virtue of the Human Rights Act these standards ought now to be enforceable in the British courts, with a new statutorily based right to strike (based on ILO standards) consigning the common law to oblivion. As might be expected, however, that process will not emerge without a struggle, and it may well require another decision or decisions of the Strasbourg Court as a midwife to the birth of this new era in the field of labour law in the United Kingdom. The difficulty for trade unions is that before they get to Strasbourg they must overcome the practical, temporal and financial problems associated with ‘exhausting’ domestic legal proceedings. We consider below how these problems might be palliated, and the issues around which a challenge could arise. In the meantime, the English courts’ first brush with *Demir and Baykara* left little mark on domestic law, there having already been two cases where these matters were fully argued before the Court: *Metrobus Ltd v UNITE the Union*,⁷⁹ and now *EDF Energy Powerlink Ltd v RMT*.⁸⁰ In neither case did the Court rush to embrace the new jurisprudence. Indeed there are striking echoes of the Court of Appeal’s remarkable approach in the GCHQ case some 25 years ago.⁸¹

The *Metrobus* case

As Maurice Kay LJ put it:

⁷⁸ For a suggestion that the common law is not properly understood, see P Elias, ‘The Strike and Breach of Contract: A Reassessment’, in K D Ewing, C A Gearty and B A Hepple (eds), *Human Rights and Labour Law* (1994), ch 11.

⁷⁹ [2009] IRLR 851. See R Dukes (2009) COPY TO FOLLOW

⁸⁰ [2009] EWHC 2852 (QB).

⁸¹ There were echoes here of the remarkable performance of the Court of Appeal in the GCHQ case: see [1984] IRLR 353.

In this country, the right to strike has never been much more than a slogan or a legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from liability in tort. At times the immunities have been widened, at other times they have been narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union. Indeed, even now the conventional analysis at common law is that by going on strike employees commit repudiatory breaches of their contracts of employment... No statutory immunity attaches to such individual breaches, although those who induce them are protected and, since 1999, the dismissal of those taking part in official, but not unofficial, industrial action will in defined circumstances constitute unfair dismissal... It helps to keep this history and conceptual framework in mind when construing and applying the detailed provisions of the statute.⁸²

It is well known that British law imposes obligations on trade unions in relation to strike ballots and notices that are unprecedented in Europe. The law appears designed to frustrate trade unions on technical grounds from exercising the right to take collective action, rather than to provide a framework for assessing whether there is genuine worker support for the proposed action. Although the law has been changed on a number of occasions (notably in 1999 and 2004) with a view to simplifying the burdens on trade unions, each change has created fresh problems, and when combined with the problems presented to trade unions by English procedural law, this has proved to be a fertile ground for employers seeking to have industrial action banned. In some respects the law appears to impose obligations which appear impossible in practice for trade unions to comply with, giving rise now to questions of compatibility not only with ILO Convention 87 and the ESC, but also with ECHR, Art 11. In providing the first opportunity for that question to be ventilated, the *Metrobus* case (which was concerned ultimately with collective bargaining arrangements for London's de-centralised bus drivers) arose when strike action had been called in support of a demand for improved and London-wide terms and conditions for drivers. The relevant notices required by TULRCA 1992 had been duly given, and a ballot was held in which the drivers voted overwhelmingly in favour of action. A two day strike took place without challenge by the employer, but no agreement was reached and notice was given for a further two days of industrial action.

An injunction was granted in *Metrobus* on three grounds, and upheld by the Court of Appeal on two of these grounds. The first was that the union had failed to provide 'an explanation' of how it arrived at the figures it provided in relation to the numbers, categories and workplaces of the members which it set out in the pre-ballot and pre-strike notices. Two Lords Justices held that the relevant sections of TULRCA (ss 226A(2C) and 234A(2C)) required such an explanation to be given both where there were some check-off members and where there were none. The third held that the provisions did not require the explanation where there were some or all check-off members but did require it where there were none (not this case).⁸³ The Appeal Court

⁸² [2009] IRLR 851, at para 118.

⁸³ In fact the latter approach (Maurice Kay LJ) reflects the literal reading of the sections, the majority justifying their construction by way of an alleged need to avoid an

considered the value of any explanation the union should have provided, such as: ‘from our computerised membership records at Head Office cross checked by phone with branches’ or merely ‘from our records’. Lloyd LJ speculated that ‘it may be relevant for [the employer] to have some idea of how reliable the union’s records are, so that it can allow for contingencies and variables in its preparations’.⁸⁴ But an express assertion that the figures were drawn from the union’s computer records (which was implicit in any event) would convey no discernable indication of the reliability of those records or the extraction and manipulation of information from them. More importantly, nothing in the Act suggests that the underlying purpose of that provision was to indicate the reliability of the information provided.⁸⁵ Nor was insight into reliability of the figures from such a potential explanation asserted in evidence as something which Metrobus sought (or would have obtained) from such an explanation. There was no evidence that the explanation of how one of UNITE’s secretaries put together the figures (by phoning the relevant branches to check the Head Office computer print outs) would or could have assisted Metrobus in any way.⁸⁶

The second issue, on which the Appeal Court was unanimous, was that the union had failed to provide to the employer the ballot result ‘as soon as reasonably practicable’ after the close of the ballot as required by TULRCA, s 231. The ballot closed at noon on 1 September but the ERS (the scrutineers) failed to fax it to the union until 15:15 on 2 September whereupon it was transmitted to the General Secretary with a request for authority to call a strike, permission which was then emailed to the regional officer at about 17:00 but which he did not receive (having left work) until 09:30 on 3 September. With his secretary, the General Secretary prepared the notice of industrial action which was sent with the ballot result by email to the employer at 11:15 on 3 September. There was thus a delay of 15 hours before the union received the result and a delay of 20 hours from receipt by the union to receipt by the employer.⁸⁷ Had the statutory criterion been ‘within a reasonable time’, the union might have satisfied it because the notion of reasonableness gives ‘more elasticity’ and would have had to have been assessed ‘in the context of the employer’s need to know’. The reasonable practicability requirement, however, meant that the union should have conveyed the result by ‘the earliest time by which the communication of the information is reasonably

anomaly. The anomaly relied on was that such an explanation is plainly required by the words of the sections where there are no check-off members and there is no rational explanation as to why such an explanation would not be required if there was say, only one check-off member out of thousands. Be that as it may, the majority effectively added a gloss to the statute. This is impermissible except in circumstances which do not apply here. UNITE submitted that given that the literal reading was tenable, the provision should have been read restrictively, especially in the light of the Art 11 considerations (below).

⁸⁴ Para 93.

⁸⁵ The purposive phrase ‘to enable the employer to make plans’ was removed from the provisions by amendment in 2004.

⁸⁶ In any event, confidence as to the reliability of strike notice figures (which in fact were essentially accurate) would have hardly have been significant in the light of the inevitable uncertainty as to the extent that those identified in the ballot/strike notices might ultimately heed any strike call – the critical matter of interest to any employer.

⁸⁷ Para 65.

achievable'.⁸⁸ The Court of Appeal having dismissed the Art 11 argument (see below) considered that the provision had to be construed strictly. It therefore regarded as irrelevant (and gave no consideration to) the fact that Metrobus had no conceivable need to know the result before it received it, would have derived no benefit from earlier receipt, and alleged no prejudice by the delay.⁸⁹ The Court held that Art 11 made no difference. This conclusion appears flawed.

***Metrobus* and Convention Rights**

Despite the decision of the Court of Appeal, there are several compelling reasons why Art 11 ought to have been paid more deference (quite apart from the requirements of the HRA which impose a duty on the domestic courts to have regard to Strasbourg jurisprudence, presumably to avoid the need for Strasbourg applications). First, the Court rejected the proposition that the ECtHR had established that the right to strike was an 'essential element of Art 11, remarking that the 'contrast between the full and explicit judgment of the Grand Chamber in *Demir and Baykara* on the one hand, and the more summary discussion of the point in *Enerji Yapi-Yol Sen* on the other hand is quite noticeable'. It would therefore not be 'prudent to proceed on the basis that the less fully articulated judgment in the later case has developed the Court's case-law by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by Art 11'.⁹⁰ Yet the ECtHR strike cases considered above surely do imply (and by reference to *Demir and Baykara* in the later cases) that the right to strike is an essential element. Every strike case (with one or two possible exceptions) has treated the restriction (whatever its nature) on strike action as a breach of an Art 11 right only justifiable by reference to Art11(2).⁹¹

Secondly, even if that general proposition is not accepted a more restricted argument seems irrefutable: that if the right to collective bargaining is an essential element so must be any necessary element to its exercise. As cited above, Lord Wright held that, even in the eyes of the common law, the right to strike is an 'essential element' of collective bargaining. That was implicit in *Wilson and Palmer* and recognised in *Enerji* (in the passages cited above). The right to strike as the means to induce collective bargaining must be as essential as collective bargaining itself. This would mean that the ILO jurisprudence which holds that strikes should be possible for political and socio-economic objectives may go beyond Art 11, though there is no

⁸⁸ Maurice Kay LJ, at para 120.

⁸⁹ The Court also discounted: the fact that any delays in delivery were either not the union's fault or should have been disregarded (no duty to deal with non-urgent communication out of working hours) or were based on genuine misconceptions of the law; the delay was relatively trifling and immaterial to the interests of anyone; there was no dilatoriness on the part of the union, its officers and staff and no attempt to be other than co-operative (the obvious desire and intention of the union and its officers was to fulfil the legal requirements as they were understood). These points had no impact either on the exercise of the Court's discretion to grant an injunction.

⁹⁰ *Metrobus*, para 35, Lloyd LJ.

⁹¹ In *NATFHE* and *Schmidt*, the Court found that the facts disclosed no restriction.

indication of any such boundaries in *Demir and Baykara*, as we point out above, Convention rights may not be so constrained.⁹²

Thirdly, assume that the right to strike, even in support of collective bargaining is *not* an essential element in Art 11. The UK, however, exercised its choice within its margin of discretion and has provided a ‘right’ to strike as a means by which unions can be heard on behalf of their members (save for the military, police and prison officers).⁹³ This was explicitly recognised in *Wilson and Palmer* in the passage cited above. In *Metrobus* it was not held (nor argued) that the State through legislation or otherwise had provided to UNITE any *other* means by which the union could be heard. The facts were not in dispute: in the course of exercising the indisputably essential right to collectively bargain negotiations had broken down, the employer was intransigent, there was no collectively agreed or statutorily imposed provision for arbitration, the right to collectively bargain could no longer be exercised save to the extent that the union and its members could compel the employer by industrial action. Thus the union was seeking to exercise its UK ‘right’ to strike and so limitations on it could only be justified by reference to Art 11(2). Curiously, the Court of Appeal appeared to accept this proposition in general terms:

English law does of course recognise a right to strike, and exempts trade unions from the tortious liability that they would otherwise be under for calling a strike. The relevance of the jurisprudence of the ECHR, on Mr Hendy’s submissions, is that the restrictions on the ability of a trade union to call a strike must stand up to scrutiny under paragraph 2 of article 11. They are, of course, prescribed by law, but are they necessary in a democratic society in the interests mentioned in the paragraph? In other words, are they proportionate?⁹⁴

But fourthly, having posed this question, the Court unfortunately never applied the Art 11(2) tests to answer it. Instead of referring to Art 11(2), the Court of Appeal held that the legislation had been carefully adjusted over many years under both Conservative and Labour Governments to balance the interests of employers, unions, members and the public so that the requirements imposed by the relevant provisions fell within the margin of discretion (‘margin of appreciation’) left to governments by the European Convention. But this too appears not correct. The margin of discretion permitted to States is as to the choice of means to be provided to unions to be heard:⁹⁵ it is not as to the restrictions which may be imposed on the means selected. Restrictions on such means must be justified by reference to Art 11(2). With the exception of *NATFHE* before the Commission, that is the process that was applied in every strike

⁹² See ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, 2006, para.526; and *General Survey*, 1983, at paras 200, 203. Even the ECSR has a broader view of collective bargaining than UK law in s 178: see ECSR, *Conclusions, IV* at 50: ‘[Having given examples,] [a]ny bargaining... aimed at solving a problem of common interest, whatever its nature may be, should be regarded as ‘collective bargaining’ within the meaning of Article 6’; see also para 2 of the commentary to Art 6(4) in Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (2008).

⁹³ See Maurice Kay LJ in *Metrobus*, at para 118.

⁹⁴ Para 37.

⁹⁵ *Wilson*, para 44; *Gustaffson*, para.45.

case that has come before the ECtHR. So the Court of Appeal's holding that the restrictions in *Metrobus* were proportionate so that there was no breach of Art 11(1) necessitating a consideration of the tests in 11(2) is in direct contradiction of the ECtHR's jurisprudence (as, e.g., in *UNISON*). Had the restrictions been tested against Art 11(2) the answer must have been that the two specific legislative restrictions at issue in *Metrobus* were not necessary in a democratic society for the protection of the rights and interests of others. Indeed, one only has to restate the nature of the requirements and the absence of any prejudice consequent on their non-fulfilment to appreciate the absurdity of the proposition that they were necessary in a democratic society to protect the employer's (or public's) interests.

Fifthly, even on its narrow assessment of proportionality, the Court of Appeal seems to have weighed the wrong factors. It held that '[t]he question is whether [the statutory restrictions] go too far because of their complexity, detail and rigidity, so as to attenuate excessively the exercise of this aspect of the article 11 rights'.⁹⁶ On this basis, fulfilment of the two obligations which the union was held to have breached was held not to be unreasonable or unduly onerous,⁹⁷ and so it was proportionate to require a union to fulfil them 'before it can call lawful industrial action'.⁹⁸ The Court simply failed to consider whether the benefit of the restrictions if they were fulfilled or the detriment if they were not, were such as to make it proportionate to deny a union and its members the right to strike for any failure to comply with them.⁹⁹ The balance of proportionality is not confined, as the Court of Appeal held, to the ease of fulfilment of the restriction by the union on the one hand weighed against the consequences of a strike to the employer on the other. The correct factors to put into the balance must surely be, in the one scale, the nature and purpose of the condition imposed on the exercise of the right to strike (and the ease of its fulfilment by the union) and, in the other, the prejudice to the employer *of the union's failure to fulfil that condition*. Were it not so Art 11 would permit the imposition of a battery of obstructive conditions on unions, fulfilment of which conferred no conceivable benefit on the employer but, because each of which could be said to be relatively easy to fulfil, non-fulfilment of which would result in denial of the right to strike. To fulfil the requirement of proportionality a pre-strike condition must have some other justification than that non-fulfilment of it will preclude lawful strike action with resultant damage to the employer. A union must be entitled to argue that whilst a modest fine might be appropriate as an enforcement measure for a failure to deliver a ballot result for 20 hours (without detriment to the employer), complete loss of the right to strike and the loss (as here) of its bargaining position is wholly disproportionate. As was held by the ECtHR in *ASLEF*,¹⁰⁰ in relation to Art 11(2), that 'any restriction on a Convention right must be proportionate to the legitimate aim pursued'.

⁹⁶ Para 104.

⁹⁷ See paras 101- 113 which are littered with considerations of whether the statutory restrictions are reasonable (106, 108, 110, 112) and onerous (106, 109, 112).

⁹⁸ *Ibid*, para 106.

⁹⁹ In *Metrobus* the failures were only peripheral, the notice was in full compliance as to numbers, categories and workplaces, only the 'explanation' was lacking; the ballot result was delivered but it was a few hours later than the statute provided.

¹⁰⁰ Para 44.

The sixth concern is that the Court failed to consider that to be justifiable under Art 11(2) (or even, on the Court of Appeal's logic, under Art 11(1)), restrictions which must be compliant with the ILO and ESC jurisprudence on which the reasoning of the ECtHR was based in *Demir and Baykara*. This material was lightly brushed aside by the Court of Appeal. According to Lloyd LJ:

interesting as this material is, it does not, for the purposes of this appeal, affect the substance of the points arising under the ECHR itself. To the extent that material from these and similar sources informed the decision of the Court in *Demir and Baykara*, it provides part of the context for that decision. I do not regard it as relevant in any more direct way to the present appeal. The ILO general survey confirms what one might expect, namely that member States have a widely differing variety of legislative provision on these points. The binding effect of Article 11 of the ECHR does not restrict the scope for a wide variety of different legislative approaches, other than in a rather general way, at the extremes. Such variety is to be expected and is permitted by the margin of appreciation permitted to member States as regards conformity with the Convention (para [50]).¹⁰¹

(The error in regarding restrictions as justifiable by reference to the margin of appreciation rather than to Art 11(2) is again apparent.) It is strongly arguable that this reasoning greatly under-estimates the importance of ILO and Council of Europe material in the decision of the ECtHR in *Demir and Baykara*, where it was more than simply than 'part of the context' for the decision. As pointed out above, it was the material on which the Court rested its construction not only of Art 11(1), but also of Art 11(2). And although it is true that different countries have different legislative arrangements, that is not quite the point. After the decision in *Demir and Baykara* all of these different arrangements must now comply with minimum ILO and ESC standards.

The *EDF* Case, and Convention Rights

It is perhaps unfortunate that the union in *Metrobus* decided not to appeal further. However, the issues could have been ventilated again in *EDF Energy Powerlink Ltd v RMT* in October 2009,¹⁰² where the ECtHR cases made another appearance, albeit off-stage. The case concerned the breakdown in negotiations over an annual pay claim made by RMT which represented some 64 of 270 staff employed by EDF (which provides and maintains the electricity supply to the underground). The union, not being satisfied with the employer's offer resolved to hold a pre-strike ballot and served notice accordingly. EDF claimed that the notice was defective, and sought and was granted an injunction. The issue was whether the ballot notice complied with the statutory requirement that it must contain 'a list of the categories of employee to which the employees concerned belong' (TULRCA, s 226A(2A)(a)). The notice specified that RMT intended to ballot its 'engineer/technician' members employed by EDF, but Blake J held that that categorisation was too general to satisfy s 226A, though he did not specify what sub-categorisations would have been sufficient.¹⁰³

¹⁰¹ Para 50.

¹⁰² [2009] EWHC 2852 (QB), Judgment 23 October 2009.

¹⁰³ By reason of that alleged failure by the union sufficiently to categorise its members in the ballot notice the Judge held that there was a serious issue to be tried which RMT had

At the time the Ballot Notice was served, and during the hearing, and even when judgment was given, the ballot result was not known; indeed, at the time of the judgment the ballot had not even closed. Strike action had neither been called, nor threatened. No notice of strike action pursuant to TULRCA, s 234A had been served. The relevant committee had not made any decision (final or even provisional) to call strike action. No consideration had been given as to which categories of worker at which workplaces might be called out on strike if a decision were to be made to call a strike. EDF claimed that, though the allegedly defective ballot notice neither caused nor threatened it any harm in itself, there was an imminent threat of harm posed by the possibility of strike action and, in that event, it did not sufficiently know which categories of its employees might be called on strike so that it could take steps to minimise the impact of such a strike. Blake J accepted this submission, and rejected a submission for the union that the s 226A Ballot Notice was *not* for the purpose of entitling an employer to know the categories so that it could take steps to minimise the impact of such a strike and that the s 234A pre-strike notice was for that purpose. Blake J also rejected the submission that the purpose of the s 226A notice was instead to inform the employer of which categories of its employees it was intended to invite to vote for strike action so that the employer could (lawfully) seek to persuade those employees to vote against strike action.¹⁰⁴ There was no suggestion that EDF was inhibited in this respect. The court held that it was practicable and reasonable for RMT to obtain from its unpaid shop stewards and then to specify in the notice the trades of the members it intended to ballot and, implicitly, that in those circumstances such sub-categorisation was necessary to fulfil the requirements of s 226A. He held that the fact that the union, its officers and employees did not know and had no record of the sub-categories of trade of their members was no defence.¹⁰⁵ Nor was the fact that RMT's computer records categorised the relevant members as 'engineers/technicians' (which it was not disputed was accurate), a categorisation of longstanding in the railway industry and utilised by the Institution of Railway Signalling Engineers and one which was entirely sufficient for the purposes of RMT.

Blake J rejected the submission that s 226A should be construed (in accordance with s 3 Human Rights Act 1998) so as to give effect to the right to strike protected by Art 11 of the ECHR and that such a construction would permit the descriptive and accurate categorisation used by RMT in its notice to satisfy s 226A. Blake J accepted that 'locating the interpretation of the legislation within the context of an important right could be a pointer to construction in a debateable case and could be a guide to avoid unreasonable

'poor' prospects of successfully resisting at trial so providing the basis for the grant of the injunction.

¹⁰⁴ A purpose recognised in *NATFHE v UK* (1998) 25 EHRR 122 which records at p 123 that in the UK proceedings at first instance Morrison J inferred that the purpose of s.226A 'was to enable employers to seek to persuade the employees who were entitled to vote to say no to the proposed action, and that a targeted approach would be more effective and less likely to provoke resentment than a lobbying of the whole work force'. The first instance judgment appears unreported, but the CA judgment is at [1994] IRLR 227 though it makes no mention of this point. The Judge in the instant case relied on *NURMT v London Underground Ltd* [2001] IRLR 228 CA and *Westminster City Council v UNISON* [2001] IRLR 524 CA (on different wording of the material provisions) which do not distinguish between the two types of notice.

¹⁰⁵ Despite TULRCA, ss.226(2D) and (2E).

requirements being imposed upon the union that might otherwise be said to interfere with the right'.¹⁰⁶ But he also held that the point needed no further exploration because of the Court of Appeal decision in *Metrobus*. Leaving aside whether there was a sufficiently choate cause of action here and the obvious criticism of the domestic statutory construction of the relevant section, it is evident that the Judge could have given a broader construction to the word 'category' which is not defined in the legislation and that such a broader construction would have precluded the injunction and hence supported the union's right to strike. Since Art 11 is now to be construed by reference to the provisions and jurisprudence of the relevant articles of the ESC, the Court should have had (but for *Metrobus*) had regard to the European Social Rights Committee conclusions,¹⁰⁷ that the very requirement on UK unions to give notice to an employer of the union's intention to hold a ballot is 'excessive' and not consistent with Art 6(4) of the ESC.¹⁰⁸ That finding was one of those adopted by the United Nations Committee on Economic, Social and Cultural Rights in their Report on the UK's Implementation of the International Covenant on Economic Social and Cultural Rights of 10 June 2008.¹⁰⁹ Permission to appeal the *EDF* case has been refused and the union intends to apply to the ECtHR.

IV THE IMPLICATIONS OF *DEMIR AND BAYKARA* FOR BRITISH AND EU LABOUR LAW

The reception of *Demir and Baykara* in the English courts raises questions about how British trade unions will be permitted to have access to their Convention rights. These are questions that will be complicated if the Conservatives win the forthcoming general election and carry out their promise to repeal the Human Rights Act. If it does not then cease to be possible to argue Convention rights in the domestic courts, it may nevertheless be more difficult to do so. Repeal of the Human Rights Act is not, however, fatal to any attempts to secure the protection of the enhanced Art 11 rights for British trade unions and their members, and indeed could paradoxically speed up the process. The lesson from the *Metrobus* case appears to be that whatever happens, it will be necessary to proceed to Strasbourg, either after exhausting domestically the remedies that the HRA currently provides, or proceeding perhaps more expeditiously in some cases to Strasbourg if these remedies are removed. Either way and regardless of which

¹⁰⁶ Para 4.

¹⁰⁷ Conclusions XVII, XVIII. See below, notes 127 and 129.

¹⁰⁸ And note Millett LJ in *London Underground Ltd v NURMT* [1995] IRLR 636 at para 27: 'Parliament's object in introducing the democratic requirement of a secret ballot is not to make life more difficult for trade unions by putting further obstacles in their way before they can call for industrial action with impunity, but to ensure that such action should have the genuine support of the members who are called upon to take part. The requirement has not been imposed for the protection of the employer or the public, but for the protection of the union's own members...'. And see para 32. The Court of Appeal in *Metrobus* were disparaging of this: paras 40 and 41.

¹⁰⁹ E/C 12/GBR/Q/5 at para 15. The earlier cyclical Reports on the UK had found the UK in breach of Art 8(1)(d) in respect of the failure to incorporate the right to strike and to protect strikers against dismissal: E/C 12/1/Add 19 (1997) and E/C 12/1/Add/79 (2002). By General Comment No 9 of 1998 the Committee on Economic, Social and Cultural Rights has determined that the provisions of the Covenant should be enforceable in the domestic legal system of ratifying States.

party ‘wins’ the general election, it seems likely that it will be necessary to seek relief before the ECtHR, and it may be necessary to do so on several occasions on several issues. In the pages that follow, we consider **some** of the **many** issues relating to collective bargaining and collective action which may be ripe for challenge. But it should not be assumed that these exhaust the potential scope for the application of Convention rights. Other matters not pursued here but worthy of further consideration include (i) the scandal of blacklisting construction workers which was exposed in the first half of 2009 and has met (at the time of writing) an inadequate response from government,¹¹⁰ as well as (ii) the restrictions on the ability of trade unions to control their rule books, and in particular the continued operation of ss 15, 65 and 66 of the 1992 Act.

The Right to Collective Bargaining and UK Labour Law

The Art 11 right to collective bargaining does not, of course, give the union a right to compel an employer to bargain with it.¹¹¹ Consequently the right recognised by the ECtHR is currently a negative right against the imposition of prohibitions on the freedom of the union side to engage in collective bargaining. *Demir and Baykara* was founded on the State’s annulment of a collective agreement, and the rationale applies equally to prohibitions on the right to bargain, whether generally or in relation to specific groups of workers. There is enough in the case, however, to conclude that the right applies also to restrictions which do not forbid collective bargaining but nevertheless make it difficult to secure. According to the Court in one important passage:

The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation judgment of 6 December 1995 based on that absence, with the resulting de facto annulment *ex tunc* of the collective agreement in question, constituted interference with the applicants’ trade-union freedom as protected by Article 11 of the Convention. (Emphasis added.)¹¹²

This is a passage that could cause serious problems for some States, where it could provide significant benefits for trade unions. In Ireland, for example, the Supreme Court is thought to be inching its way towards a position where the implied constitutionally protected right not to associate means not only that workers are entitled not to join a trade union, but that employers have a right not to recognise one. In a case involving everyone’s favourite airline, the Supreme Court expressly acknowledged that Irish industrial relations legislation ‘must be given a proportionate and constitutional interpretation so as not unreasonably to encroach on Ryanair’s right to operate a non-unionised company’.¹¹³ There is no such right in international law, and by tying the content of the right to bargain collectively to Convention 98, the ECtHR has avoided the

¹¹⁰ See P Chamberlain, ‘Boys from the Blacklist’, *The Guardian*, 21 November 2009.

¹¹¹ *Wilson and Palmer*, para 44.

¹¹² *Demir and Baykara*, para 157.

¹¹³ *Ryanair Ltd v Labour Court and IMPACT*, Appeal No 377/2005, at p 16 .

possibility that the right to bargain for the purposes of Art 11 of the ECHR could also be read as implying a right not to bargain.¹¹⁴

Quite apart from constitutional questions of this kind, the foregoing passage from *Demir and Baykara* suggests that there is an enforceable duty under the ECHR to have in place legislation that reflects the requirements of international labour standards on the question of collective bargaining. Far-reaching though this may be, the existence of such a duty is reinforced if - as *Demir and Baykara* makes crystal clear - ILO Convention 98 is to be the loadstar for the determination of the right to collective bargaining for the purposes of Art 11 of the ECHR. This is because Convention 98 imposes two duties, including that contained in Art 4 which provides that

[m]easures appropriate to national conditions **shall be taken**, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements' (emphasis added).

The existence of such a duty has huge implications for governments other than Ireland, for although it does not require conformity with any particular model of collective bargaining, it does mean that the State can be neither neutral nor restrictive. And although it is also true that the duty does not prescribe how the State should intervene, the *Danilenkov* and *Wilson and Palmer* decisions suggest that it may not be enough to resort to general statutory duties on public agencies to promote collective bargaining if there is no redress or remedy available to a trade union faced with employer intransigence.

Some work will be required to determine the extent to which *Demir and Baykara* will affect the collective bargaining law of different member states of the Council of Europe, though the task will begin with a fairly straightforward assessment of recent observations by the ILO supervisory bodies and recommendations of the Council of Europe's Social Rights Committee. But if it is the case that there is a Convention duty to give effect to international labour conventions in this regard, this means not only that there must be facilitative legislation in place, but that this legislation must also comply with those standards. So it seems that Art 11 now presents an opportunity for British trade unions to challenge in the ECtHR that which they have made the subject of complaints to the ILO Committee of Experts, namely that the British recognition procedure falls short of Convention 98 on four separate grounds:

- the exclusion of small businesses, in the sense that although collective bargaining by small businesses (fewer than 21 workers) is not prohibited, the use of the statutory procedure by trade unions to secure recognition in such cases is expressly forbidden;¹¹⁵

¹¹⁴ Compare on the right to membership of a trade union, M Forde. 'The Closed Shop Case' (1982) 11 ILJ 1, and V Mantouvalou, 'Is There a Right Not to be a Union Member? Labour Rights under the European Convention on Human Rights', in C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (2010), ch 16.

¹¹⁵ Sch A1, para 7.

- the privileges given to non-independent trade unions, in the sense that an employer may enter into a voluntary recognition agreement with an organisation of his creation and control, so as to prevent a real trade union using the statutory procedure;¹¹⁶
- the requirement that a trade union must have majority support in a bargaining unit determined by a statutory agency before it can secure recognition under the procedure, so denying trade union members any collective representation when they do not constitute a majority;¹¹⁷
- the limited scope of the protection from unfair labour practices by employers, with the current law being not only very narrowly construed by the relevant agency, applying only during the balloting period, and not earlier when the trade union organisation is much more fragile.¹¹⁸

The Committee of Experts has addressed these matters twice,¹¹⁹ and is now awaiting additional information from the British government. But on each issue, there is enough to suggest that negative conclusions are likely to be drawn with recommendations to the government to remove impediments and qualifications, as well as address shortcomings and gaps. On the question of small businesses, for example, in 2009 the Committee's report:

emphasizes that in accordance with the free and voluntary nature of collective bargaining, it should be possible for all workers and employers, with the possible exceptions contained in Article 6 of the Convention, to engage in collective bargaining.¹²⁰

Similarly in relation to the majority support threshold, the Committee:

once again recalls that problems of conformity with the principle of the promotion of collective bargaining, set out in the Convention, may arise when the law stipulates that a trade union must receive the support of the majority of the members of a bargaining unit to be recognized as a bargaining agent, since a

¹¹⁶ *Ibid*, para 35(4).

¹¹⁷ *Ibid*, paras 22 – 29. See *R(NUJ) v MGN Ltd* [2006] IRLR 53.

¹¹⁸ *Ibid*, paras 27A – 27F (as inserted by Employment Relations Act 2004, s 10). For an excellent account of the inadequacy of these provisions, see A Bogg, *The Democratic Aspects of Union Recognition* (2009).

¹¹⁹ See previously Report of the Committee of Experts on the Application of Conventions and Recommendations (2007):

<http://www.ilo.org/ilolex/english/newcountryframeE.htm> (CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98) United Kingdom (ratification: 1950) Published: 2007). See R Dukes. 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37 ILJ 236.

¹²⁰ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009): <http://www.ilo.org/ilolex/gbe/ceacr2009.htm> (CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98) United Kingdom (ratification: 1950) Published: 2009).

union which fails to secure this absolute majority is thus denied the possibility of bargaining.¹²¹

The question for British trade unions will be how far to pursue such matters, in the hope of finding a short cut to Strasbourg without the need pointlessly to exhaust domestic legal remedies in a legal system only partially responsive to human rights issues, and rarely where these human rights involve matters which run against the grain of the common law. But following the example in *ASLEF v United Kingdom*¹²² where a complaint went straight to Strasbourg from the employment tribunal (the lowest point in the food chain), thereby cutting out the time and expense of three other hearings (EAT, Court of Appeal and House of Lords), it would be possible for a trade union to make an application to the Central Arbitration Committee in a case involving a small business or a company which has recognised its alter ego, in the knowledge that the application was bound to fail. There would be no point in seeking judicial review, given that the legislation is clear that the CAC cannot award recognition in these cases; and no point in seeking a declaration that the legislation is incompatible with Convention rights, given the English courts' lack of experience in and discomfort with international labour conventions (with the notable exception of Cox J who sits on the ILO Committee of Experts).¹²³

The Right to Collective Action and UK Labour Law

Since *Enerji Yapi-Yol Sen* makes clear that the decision in *Demir and Baykara* has application to collective action as well as collective bargaining, this should also have important implications for domestic law.¹²⁴ It ought to require a judicial change in approach to questions of industrial action so that the right to collective action is the starting point from which any restrictions will have to be justified, in contrast to the common law assumption that the illegality of industrial action is the starting point from which any immunities are to be justified and narrowly confined. However, *Metrobus* and *EDF* show that notwithstanding the recent ECtHR jurisprudence, the courts in the UK are not yet prepared to treat the ILO and ESC standards as a yardstick for the legitimacy of collective action (whether or not they are so treated for collective bargaining – a proposition yet to be tested), so that UK restrictions on the right to strike can be held to be consistent with Art 11 whilst they are not consistent with ILO and ESC standards.¹²⁵ That approach appears unsustainable and it appears to be a matter of

¹²¹ *Ibid.*

¹²² [2007] IRLR 361.

¹²³ See *R(NUJ) v MGN Ltd*, above, and Lloyd LJ in *Metrobus*, para 50.

¹²⁴ On the right to strike generally see: Lord Wedderburn, 'The Right to Strike: is there a European Standard?', in Lord Wedderburn, *Employment Rights in Britain and Europe, Selected Papers in Labour Law* (1991); K D Ewing, *The Right to Strike* (1991); T Novitz, *International and European Protection of the Right to Strike* (2003).

¹²⁵ The Conservative party's current proposals are also put into question: to restrict lawful industrial action in public services generally, and on the London Underground in particular, and to require that pre-strike ballots have a majority of the balloting constituency and not just of those voting. As to the first proposal, *Demir and Baykara* itself shows that a blanket denial of the right to strike for public employees (rather than agents of the State, see the discussion in *Urçan v Turkey*, Appn 23018/04 etc, 17

time before these issues come before the Strasbourg court. Both the Social Rights Committee of the Council of Europe (in its 18th and most recently completed cycle of supervision) and the ILO Committee of Experts (in its 2009 Observations) have restated again long-standing concerns about restrictions on the right to strike in the UK which British governments have not done enough to address and which also might provide fertile ground for applications to the ECtHR.¹²⁶

The first relates to the permitted scope of industrial action. The Social Rights Committee has again concluded that ‘the scope for workers to defend their interests through lawful collective action is excessively circumscribed’, having regard for example to restrictions that prevent ‘a union from taking action against the de facto employer if this was not the immediate employer’.¹²⁷ The ILO Committee of Experts returned specifically to secondary action, the Committee recalling yet again that ‘workers should be able to participate in sympathy strikes, provided the initial strike they are supporting is lawful, and to take industrial action in relation to social and economic matters which affect them, even though the direct employer may not be a party to the dispute’, and requesting the Government ‘to indicate in its next report any measures contemplated to amend [domestic law] in keeping with this principle’.¹²⁸ There will of course be no such report, for the government has no such plans. The Social Rights Committee have made the same criticism as the ILO of the UK’s ban on sympathetic industrial action.¹²⁹ No doubt British unions are considering cases where they and their members are blocked by the law from organising sympathetic industrial action in support of collective bargaining by those not sufficiently able to protect their

July 2008, definitive judgment 17 October 2008, para 22) is not compatible with Art 11. Still less would a ban on employees in privatised industries, like the London Underground, be compatible. The ILO and ESC permit only limitation of the right to strike in essential services (see Novitz, *International and European Protection of the Right to Strike*, above, at pp 310-313) - which does not include railways - and if strikes *are* banned in essential services cases there have to be ‘compensatory measures’ in the form of binding and independent arbitration: see e.g. the POA case (Case No 2383, 336th Report of the Committee on Freedom of Association, ILO (292nd session Governing Body, March 2005). As to the second proposal, both ILO and ESC jurisprudence has condemned State requirements of a majority of those eligible to vote (rather than of those who voted). The Conservative proposal to repeal the Human Rights Act may simply have the effect that Convention cases end up in the Strasbourg court more quickly.

¹²⁶ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009): <http://www.ilo.org/ilolex/gbe/ceacr2009.htm> (CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) United Kingdom (ratification: 1949) Published: 2009).

¹²⁷ See Council of Europe, European Committee of Social Rights, *Conclusions XVIII*, p 10.
www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/UKXVIII1_en.pdf.

¹²⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009, above).

¹²⁹ See Council of Europe, European Committee of Social Rights, *Conclusions XVII*, pp 130 - 132.
www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/UKXVII1_en.pdf.

own interests.¹³⁰ Such cases could proceed straight to Strasbourg from the High Court without need to exhaust domestic remedies since the UK law is absolutely and unambiguously clear.¹³¹ The ECtHR has itself given some indirect support for such an interpretation of Art 11.¹³²

A second issue addressed by both the Social Rights Committee (in the 18th and most recent cycle of supervision) and the ILO Committee of Experts (in 2009) related to the reinstatement of workers dismissed for taking part in a lawful strike. The Social Rights Committee concluded that ‘the protection of workers against dismissal when taking industrial action is insufficient [in British law]’,¹³³ the ILO Committee of Experts again concluding that ‘for the right to strike to be effectively guaranteed, the workers who stage a lawful strike should be able to return to their posts after the end of the industrial action’. Moreover, making the return to work ‘conditional on time limits and on the employer’s consent constitute, in the latter Committee’s view, obstacles to the effective exercise of this right, which constitutes an essential means for workers to promote and defend the interests of their members’. Again the Committee of Experts addressed the deaf by asking ‘the Government to indicate any measures taken or contemplated so as to amend [domestic law] with a view to strengthening the protection available to workers who stage official and lawfully organized industrial action’.¹³⁴ The absence of adequate protection of strikers in UK has attracted the attention also of United Nations Committee on Economic, Social and Cultural Rights which held in 1997 (reiterated in 2002) that the UK was not in compliance with Art 8(1)(d) of the International Covenant by reason of the failure to provide adequate protection against dismissal for strikers.¹³⁵ In the light of *Kaya and Sehan*¹³⁶ and *Karaçay v Turkey*¹³⁷ (both discussed above) where a mere disciplinary warning for having taken part in a strike was held to amount a breach of Art 11(1), it is to be questioned whether the UK can continue to dismissively wave aside the international jurisprudence. The logic of the recent decision of the EAT rejecting claims for unfair dismissal by several of the

¹³⁰ Past such cases would have been the dispute at Friction Dynamics (see J Hendy and K D Ewing, *IER Submission to the Joint Committee on Human Rights Inquiry into the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights* (at <http://www.ier.org.uk/system/files/strike.pdf>); or the Gate Gourmet dispute at London Heathrow Airport (see J Hendy and G Gall, ‘British Trade Union Rights Today and the Trade Union Freedom Bill’, in K D Ewing (ed) *The Right to Strike: from the Trade Disputes Act 1906 to the Trade Union Freedom Bill 2006* (IER, 2006).

¹³¹ TULRCA, s 224.

¹³² In seeming to regard secondary action as permissible in *Gustafsson v Sweden* (1996) 22 EHRR 409 at para 53.

¹³³ Conclusions XVIII, above, p 10

¹³⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009), above.

¹³⁵ See the cyclical reports on the UK: E/C12/1/Add 19 (4 December 1997), para.23, and E/C 12/1/Add 79 (5 June 2002), para.34.

¹³⁶ Appn 30946/04, 15 September 2009.

¹³⁷ Appn 6615/03, 27 March 2007, definitive version of the judgment on 27 June 2007.

workers sacked in the infamous Gate Gourmet dispute must now be in doubt.¹³⁸ In that case (*Sehmi v Gate Gourmet London Ltd*)¹³⁹ Underhill J, giving the judgment of the EAT held:

There is nothing in the legislative developments since 1976 which affects the basic proposition endorsed in *Simmons v Hoover Ltd*¹⁴⁰ that at common law an employer is entitled summarily to dismiss an employee who refuses to work. Nor does the case law of the ECtHR (or indeed the ECJ) support the proposition that the very qualified 'right to strike' which it may be said to recognise deprives employers of the right to dismiss employees participating in industrial action at least of the kind which took place in the present case.¹⁴¹

There must be a real possibility that a dismissed British striker denied an effective remedy for unfair dismissal (because the time limit has expired or because reinstatement could not be awarded) will, in due course, wend his or her way to Strasbourg. But there is also a third issue, namely the tight procedural requirements (such as those in *Metrobus* and *EDF*) which must be followed to secure protection for the organisation of collective action.¹⁴² Unlike the Social Rights Committee of the Council of Europe, however, the ILO Committee of Experts has yet to reach a conclusion on this. Nevertheless, the Social Rights Committee has considered various aspects of these restrictions to be in breach of Art 6(4) of the Social Charter, and in the most recent cycle of supervision (the 18th) referred to its previous conclusion (in the 17th cycle of supervision) in which it was found that 'the

¹³⁸ For a legal perspective on the Gate Gourmet dispute see G Gall and J Hendy above. The dispute also gave rise to an injunction against picketing in relation to which Art 11 was cited briefly: *Gate Gourmet London Ltd v TGWU* [2005] IRLR 881, hinting at the possibility of an argument for the future based on *Pepsi-Cola Canada Beverages (West) Ltd RWDSU, v Local 558* 2002 SCC 8, where the Canadian Supreme Court held that there was nothing illegal or unlawful about secondary picketing and to find otherwise would have been contrary to freedom of expression guaranteed by the Canadian Charter. There was no legal basis consistent with freedom of expression to distinguish primary and secondary picketing: both were exercises in freedom of expression and both lawful, unless accompanied by unlawful conduct.

¹³⁹ [2009] IRLR 807.

¹⁴⁰ [1976] IRLR 266.

¹⁴¹ Para 38. The circumstances referred to appear to be that the particular claimant did not attend for work because he supported the strike and was sacked when re-attending subsequently. Whether or not this amounted to gross misconduct so as to amount to a repudiation of the contract was not the issue (para 36), the question was whether the failure to attend work by participating in a strike justified dismissal (in accordance with s 98(4) Employment Rights Act 1996). From the IRLR report it does not seem that *Demir and Baykara*, the ILO, ESC or ICESCR material were cited to the EAT. The EAT hearing took place on 2-3 April and judgment was handed down on 17 July 2009. *Enerji Yapi-Yol* post-dated the argument and *Kaya and Sehan* post-dated the judgment.

¹⁴² The annual *Employment Tribunal and EAT Statistics 2008-2008* show that reinstatement or reengagement orders are made in 0.1% of unfair dismissal cases heard. The percentage in successful strikers' cases is unknown but is presumably as close to zero as makes no difference.

requirement to give notice to an employer of a ballot on industrial action is excessive, since in any case unions must issue a strike notice before taking action'.¹⁴³ On the occasion of the 18th cycle, the government sought to justify the position by claiming that the restrictions 'should remain since notices are useful in order to show to employers that the situation has moved closer to possible strike action and allows time for more efforts on both sides to try to resolve the dispute and avoid strike action'. To which the Committee replied, unimpressed, that it did not 'find the Government's reasoning sufficient to make it reconsider its position on this point',¹⁴⁴ having previously dismissed a similar argument that 'the requirement to give notice to an employer is necessary, since the balloting process has formal status in industrial action law. It is important for employers to be aware that the union is embarking on this course of action, the outcome of which often has an impact on negotiations'.¹⁴⁵

The Implications for EU Labour Law

Demir and Baykara is thus likely to have a significant effect on domestic law, more so in some countries than in others. A further issue, however, relates to the effect of the decision on EU law, and the impact of EU law on domestic law and practice. This follows the developing line of cases beginning with *Viking* and *Laval* on 11 and 18 December 2007,¹⁴⁶ cases which have already had an impact in the UK.¹⁴⁷ These decisions, including *Ruffert* and *Luxembourg*¹⁴⁸ are too well known to require further description,¹⁴⁹ but they are not too well known not to require review in the light of *Demir and Baykara* and its progeny. Briefly,

- *Viking* imposes restraints on the right to engage in collective action by imposing criteria on when such action may be lawful that goes beyond the requirements of many member states. Even though otherwise permitted under domestic law, collective action would be permitted under EU law only if it could be said reasonably to fall within the scope of a purpose permitted by the Court (such as

¹⁴³ *Conclusions XVII*, above.

¹⁴⁴ *Conclusions XVIII*, above.

¹⁴⁵ *Conclusions XVII*, above.

¹⁴⁶ See *Case C-438/05, FSU v Viking Line*, 11 December 2007, [2008] IRLR 143; and *Case C-341/05, Laval un Partneri v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, 18 December 2007, [2008] IRLR 160.

¹⁴⁷ See below, pp 37 - 40.

¹⁴⁸ *Case C-346-06, Ruffert*, [2008] IRLR 467; *Case-319/06, Commission v Luxembourg*, [2008] IRLR 388.

¹⁴⁹ See, for example, the late and sadly missed B Bercusson, 'Europe at the Crossroads', (2008) 8 (2) *Federation News* pp 25-27; R Eklund, 'The Laval Case' (2006) 35 ILJ 202; A C L Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 125; P Davies (2008) 37 ILJ 293; C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 ILJ 122; C Barnard, 'British Jobs for British Workers': The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38 ILJ 245. See also B Bercusson, *European Labour Law* (2nd ed, 2009), ch 21.

the protection of jobs or conditions of employment);¹⁵⁰ but then only if the action ‘is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective’;¹⁵¹ and then only if the union did not have other means available to resolve the dispute;¹⁵²

- *Laval* imposes different kinds of restraints and deals with the situation where workers are recruited by a company in one Member State to perform work under a contract in another Member State, where wages may be higher. Under the *Laval* judgment, a trade union in the host country may not take collective action to require the foreign based contractor to pay his or her workers in accordance with prevailing collective agreements in the host state unless these agreements fall within the definition of universally applicable collective agreements under the terms of the Posted Workers’ Directive of 1996,¹⁵³ a practice not universal throughout the Union.¹⁵⁴
- *Ruffert* and *Luxembourg* further undermine the application of collective agreements and the whole process of collective bargaining so central to so many European systems and reflected expressly in Art 6 of the ESC. The ECJ held that *Laval* (which discriminates between industrial relations systems and gives greatest protection to the most protective) applies so that governments cannot by contract and Parliaments cannot by legislation require foreign based contractors

¹⁵⁰ *Viking*, para 81.

¹⁵¹ *Ibid*, para 84.

¹⁵² *Ibid*, paras 86 – 87.

¹⁵³ Directive 96/71/EC. The definition of a universally applicable agreement is set out in Art 3(8) to mean ‘collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned’. It is further provided that ‘in the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on: - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or - collective agreements which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory, provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position’.

¹⁵⁴ Though it may be argued that in countries (such as the United Kingdom) where some collective agreements are ‘widely applicable’ in practice, there may now be a duty on Member States to make these agreements universally applicable within the meaning of art 3(8), in order to comply with their duty under ILO Convention 98, Art 4 to ‘encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements’. See K D Ewing and John Hendy (eds), *The New Spectre Haunting Europe*, (IER, 2009).

to observe the terms of collective agreements which are not universally applicable.

The cumulative effect has potentially devastating implications for labour standards in the host country, and will lead to a levelling down of standards to the condition of the worst, rather than a levelling up of standards to the condition of the best.¹⁵⁵ So far unresolved is the question whether *Viking* and *Laval* introduce the principle established in *Taff Vale* (and extinguished by the Trade Disputes Act 1906) to Europe,¹⁵⁶ by making trade unions liable in unlimited damages for any losses caused by collective action in breach of the Treaty.¹⁵⁷ The concerns about liquidation on the part of trade unions are very real, as corporate lawyers consider the judgments on behalf of their clients.¹⁵⁸

These ECJ cases were decided before *Demir and Baykara* and most of its associated ECtHR jurisprudence discussed above, in the light of which the ECJ cases may have to be reconsidered. The ECJ decisions cannot be reconciled with the ECtHR's requirement of a legal regime which (i) recognises the right to collective bargaining (and the duty to take steps to promote it), and (ii) respects the right to take collective action, while doing so (iii) in accordance with international labour conventions and regional labour standards. In particular, *Demir and Baykara* concerned precisely the annulment of a collective agreement by law, a situation apparently analogous to the denial of the application of the collective agreements in *Ruffert* and *Luxembourg*. It is hard to see why, if those ECJ decisions were before the ECtHR, the latter would not come to the same conclusion as in *Demir and Baykara* since the justification in the ECJ cases would not appear to be necessary in a democratic society, certainly not in Germany or Luxembourg! In *Viking* the ECJ purported to recognise the fundamental nature of the right to strike as a part of EU law and made reference to both the ILO and ESC. But the ECtHR has clarified that and has certainly not recognised any limitation on the right to strike which would reflect that imposed by the ECJ in *Viking* and *Laval*. But so far as making the ECJ accountable to this jurisprudence of a higher legal order is concerned, there is of course the problem that the EU is not yet (and perhaps may not be for some time) a party to the ECHR and therefore not answerable directly to the ECtHR. This means that it would yet not be possible to bring proceedings against the EU in the Strasbourg Court (despite Lisbon). But it does not mean that it would not be possible to do so indirectly or by collateral means, with a complaint by a trade union or trade unionist which or who is a victim of these decisions

¹⁵⁵ For a good treatment, see T Novitz and P Syrpis, 'Giving with One Hand and Taking with the Other: Protection of Workers' Human Rights in the European Union', in C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (2010), ch 17.

¹⁵⁶ *Taff Vale Railway Co Ltd v Amalgamated Society of Railway Servants* [1901] AC 426, holding trade unions liable at common law for losses caused by industrial action, for which relief was granted by way of statutory immunity in the Trade Disputes Act 1906. It has not proved to be possible to introduce an immunity in EC law. See Ewing and Hendy (eds), above.

¹⁵⁷ It is widely believed that '*Viking* and *Laval* do open up the potential for such claims' - K Apps, 'Damages Claims Against Trade Unions after *Viking* and *Laval*', (2009) 34 *European Law Review* 141, at p 142.

¹⁵⁸ D Ornstein, 'Laval, Viking and the limited right to strike', 15 ELA Briefing No 9, 145.

in subsequent litigation. Such a complaint could be made to the Strasbourg Court alleging that any future decision of a national court - under national law based on these ECJ decisions - is a breach of the Convention rights of the trade union or trade unionist concerned. The fact that the national court is bound to apply EU law – which has effect only as a result of an act of national law (the European Communities Act 1972 in the British context) - is hardly a convincing defence to a claim that national governments are bound to protect Convention rights from whatever source of restraint.

As a tactical matter it would appear to be highly desirable that much of the preparation for any such litigation in the future is undertaken in the trenches of the ILO supervisory bodies and the Social Rights Committee (including collective complaints from countries where this procedure is available).¹⁵⁹ As a starting point for any such challenge (from wherever it may come), it is thus important that the matter is ventilated now by national trade unions to establish that their governments are in breach of ILO Conventions 87 and 98 and the Social Charter because of the direct effect in the national law of the countries concerned of the *Viking* and *Laval* decisions.¹⁶⁰ It would be no excuse on ILO complaints (anymore than it would be under the ECHR) that the governments were bound by EU law, the governments in question having separate obligations under ILO Conventions (treaties in international law) to uphold their terms (and if necessary to protect them from violation in domestic law by instruments such as the EC Treaty and now the TFEU).¹⁶¹ So armed with determinations, conclusions and findings of the ILO supervisory bodies and the Social Rights Committee, a trade union or trade unionist which or who is subsequently a victim of one or other of these decisions will be in a stronger position in Strasbourg proceedings alleging a breach of Art 11. Although *realpolitik* suggests that both the ECtHR and the ECJ would attempt to avoid any expression of conflicting views, nevertheless if the ECtHR were to

¹⁵⁹ That is to say, countries that have either ratified the Collective Complaints Protocol or the Revised Social Charter. Such countries do not include the United Kingdom. For an important application of the procedure, see *Case No 32/2005, European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour “Podkrepa” (CL “Podkrepa”) v Bulgaria*. See now *Case No 59/2009 European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/ Confédération des Syndicats chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v Belgium*, lodged on 22 June 2009, alleging that the situation in Belgium is not in conformity with the rights laid down in Art 6(4) (right to strike) of the Revised Charter. They believe that judicial intervention in social conflicts in Belgium, in particular concerning restrictions imposed on the action of picket line, violate this provision. For a full list of cases, see

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.

¹⁶⁰ The matter could equally be raised by a national trade union confederation as part of its comment on its governments regular reporting under the ILO Constitution.

¹⁶¹ And it would be implausible to believe that the ILO supervisory bodies would accept that the right to bargain collectively and the right to take collective action may be subordinate to a higher freedom of business to set up establishments or to provide services in other States. If such subordination were permissible there would be no logical reason why those trade union rights should not be subordinated to the freedom of business to establish or provide services *within* a State.

conclude that the consequences of *Viking* and/or *Laval* were such as to give rise to a breach of Art 11, the ECJ would then have a problem, as would its political masters, for it would make explicit what is now implicit, namely that there is a conflict between the two courts at the apex of the European political systems. If the ECJ insisted on holding the line on *Viking* and *Laval*, it would be open to a trade union on the receiving end of any decision in domestic law arising as a result to make a complaint to the Strasbourg Court to recover damages for losses suffered (as in *Demir and Baykara*, and subsequent cases). It is difficult then to see how the ECtHR could avoid upholding Art 11 and the right to collective bargaining and to strike over the business freedoms contained in Arts 43 and 49 of the EU Treaty. And so issues would bat to and fro the two courts in a titanic battle of the juristocrats, each vying for supremacy in the European legal order, one determined to impale trade union rights on the long lance of economic freedom, and the other subordinating economic freedom to the modest demands of human rights and constitutionalism.

There would be only two ways out of any such hypothetical impasse, with the first being a political one in which the politicians decide how this dispute is to be resolved (and indeed it is arguable that they have done so unwittingly already with proposed EU accession to the ECHR),¹⁶² though the record of achievement to date is not encouraging, with some governments at least determined to cut against the grain of human rights standards. So at the very moment the Strasbourg court was finalising its decision in *Demir and Baykara*, the British government was securing parliamentary approval for its much vaunted ‘opt-out’ from the Lisbon treaty, with the European Union (Amendment) Act 2008 giving effect to the Protocol that ‘nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law’.¹⁶³ Title IV contains, amongst other things, Art 28: the right to collective bargaining and the right to strike. A more likely resolution of this conflict is thus by the courts themselves, and the question of who will blink first seems fairly easy to predict: on human rights issues at least, at the present time the Strasbourg Court has the ultimate say on the substance of the ECHR. It is also the case that, while the Strasbourg Court has never (so far as our researches reveal) said that it will be constrained by the jurisprudence of the ECJ in the construction of EC/EU Treaty obligations,¹⁶⁴ the Luxembourg Court in contrast has recognised:

the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the

¹⁶² TEU, Art 6.

¹⁶³ Protocol on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom. See footnote 16 above. On this so called ‘opt out’, see P Syrpis, ‘The Treaty of Lisbon: Much Ado . . . But About What?’ (2008) 37 ILJ 219. See also the discussion in House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment*, HL Paper 62-I (2007-08), paras 5.84-5.111.

¹⁶⁴ *Bosphorus Hava Yol lari Turizm v Ireland* (2006) 42 EHRR 1. See C Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 HRLR 87.

ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.¹⁶⁵

According to the Court ‘the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests’.¹⁶⁶ These circumstances have now changed since *Viking* and *Laval* were decided, and not only because the ECtHR has decided that freedom of association includes collective bargaining in accordance with ILO and Council of Europe standards. They will change further should the EU ever accede to the ECHR, formally emasculating the United Kingdom’s tawdry little ‘opt out’ from the Charter of Fundamental Rights in the process. This will not only reinforce the subordination of Luxembourg to Strasbourg,¹⁶⁷ but as one commentator quick off the mark has pointed out, ‘it will be possible for a decision of the Court of Justice to be contested by taking the case to the European Court of Human Rights in Strasbourg, claiming the European Court of Justice has failed to correctly apply (or failed to apply) a provision of the Convention’.¹⁶⁸ But we are not there yet, and it may well be a long time before we are.¹⁶⁹

The BALPA Case, the ECJ and the ECtHR¹⁷⁰

A perfect example of how these problems could arise in the future is provided by the BALPA case in the United Kingdom, which took place after *Viking* and *Laval*

¹⁶⁵ *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, 12 June 2003, para 77.

¹⁶⁶ *Ibid*, para 81.

¹⁶⁷ On which see Declaration 2 introduced by the Treaty of Lisbon, in which the Member States appear to have concern about the implications of the ECHR for the EU, it being agreed that EU accession to the ECHR ‘should be arranged in such a way as to preserve the specific features of Union law’, noting ‘the existence of a regular dialogue between the [ECJ] and the [ECtHR]’, and that ‘such dialogue could be reinforced when the Union accedes to that Convention’. Apart from the fact that this is a real dialogue rather than the mystical dialogue between judges and politicians now alluded to by some constitutional scholars, this reveals a certain nervousness on the part of the EU, as does Protocol 8, Art 2 (accession to the ECHR not to ‘affect the competences of the Union or the powers of its institutions’). (Emphasis added).

¹⁶⁸ J Fairhurst, *Law of the European Union* (7th ed, 2009), pp 69 – 70. The effect of all of these developments may be to shrink the ECJ’s room for manoeuvre to one in which it may ask in any case whether the collective action restricting an employer’s economic freedoms is consistent with ILO standards. Like the national courts in those countries where Convention rights have been fully incorporated (Ireland, Sweden and the United Kingdom), the role of the ECJ on human rights questions may be simply to act as a cipher for the standards established by the ECtHR, which in turn has allowed itself to be guided by the ILO.

¹⁶⁹ See TFEU, art 218: any decision concluding accession will first need the agreement of the Council (acting unanimously) as well as the consent of the Parliament, before being approved by all member states ‘in accordance with their respective constitutional requirements’.

¹⁷⁰ This section draws from K D Ewing and John Hendy (eds), *The New Spectre Haunting Europe* (IER, 2009), ch 6.

but before *Demir and Baykara*. The British Air Line Pilots Association (BALPA) had some 10,000 members, about 3,000 of whom were amongst the 3,237 flight deck employees of British Airways plc, the UK's principal and privately owned airline, with annual profits in 2007 of some £800 million. An industrial dispute arose out of BA's proposals to launch a wholly owned subsidiary airline operating from Paris to fly between various European airports and the USA under the Open Skies Treaty concluded between the EU and USA in 2007.¹⁷¹ BALPA members were concerned that the effect of the proposed arrangements for operating the subsidiary would provide leverage to restrain labour costs within 'Mainline' BA operations, though they were nonetheless keen that the subsidiary should flourish with the chance of more work and career development. The BALPA members accepted that the subsidiary, as a start-up company, would need to operate with lower labour costs than in BA Mainline. There was collective bargaining from summer 2007. BALPA sought various protective amendments to the long standing substantive collective agreement. Each stage of the disputes procedure (including ACAS intervention) was exhausted without agreement being reached. BALPA held a ballot which was overwhelmingly for strike action (the nature of the work made it difficult to take action short of a strike). BA threatened BALPA with an injunction if it called for any industrial action pursuant to the ballot. BA did not assert that BALPA had failed to comply with the complex statutory balloting and notice requirements. BA instead alleged that any strike action would be unlawful by virtue of *Viking* and *Laval*. Given that the test for the grant of an interim injunction is whether the claimant can demonstrate a serious issue to be tried and that the status quo should be maintained unless the balance of convenience disfavors it, it was plain that an interim injunction would be likely to be granted.¹⁷²

This was because *Viking* and *Laval* presented complex legal arguments unresolvable on an interim basis and because the court was almost bound to hold that the status quo and balance of convenience favoured preventing a costly and damaging strike.¹⁷³ Such considerations are likely to apply in most future strike injunction cases raising *Viking* and *Laval* issues. In order to protect BALPA's position and to ensure that industrial action was not taken which might later be found to be unlawful, BALPA applied to the court for a declaration to determine the issue which BA had raised. BALPA considered it had a good case. Even if *Viking* applied, it argued, BALPA's intended industrial action was a last resort and proportionate, there being no other way of protecting its members' interests. BA counterclaimed, seeking, amongst other things, unlimited damages, including damages in respect of damage alleged to have been sustained by it by the mere fact

¹⁷¹ Prior to the Open Skies Treaty there were significant regulatory obstacles to an airline based in one EU State flying passenger operations from another EU State to the US.

¹⁷² On the injunction procedure in English law, see Lord Wedderburn, 'The Injunction and the Sovereignty of Parliament' (1989) 23 *Law Teacher* 4, also in Lord Wedderburn, *Employment Rights in Britain and Europe*, above.

¹⁷³ BA estimated the costs of a one day strike by BALPA pilots would cost it £100 million although BALPA disputed this – the real costs was never determined but was plainly very substantial.

that BALPA had served notice to ballot for strike action.¹⁷⁴ The hearing in the High Court commenced on 19 May 2008. On 22 May BALPA discontinued its legal claim on the basis that win or lose, the decision would be appealed to the Court of Appeal and (given the novelty of the primary point in issue) probably to the House of Lords. It was also likely that there would be a further reference to the ECJ with a resumed hearing back in the High Court thereafter. This process would be likely to last at least 18 months during which time BALPA could not risk taking strike action in case it was shown to be unlawful at the end of the litigation and result in an order for damages. By the end of the litigation too, the ballot would have become invalid to support industrial action,¹⁷⁵ BA's subsidiary would have been well established with a full staff of pilots, and BALPA's negotiating position would have been irretrievably lost. Though the outcome of BA's *Viking* and *Laval* argument was never determined, some frightening features of such litigation emerged.

Under the rules of the English court parties must disclose to each other all documents in their possession relevant to the issues in the case. The fact that a document was created in circumstances of confidentiality provides no ground for refusing disclosure.¹⁷⁶ The ECJ rationale in *Viking* made the union's reasons for the dispute and the proposed strike as well the reasonableness of its conduct of the negotiations central to the issues in the case. It followed that BALPA office holders were obliged to disclose *all* documents in their power, possession or control relating to such matters. The court made orders to that effect, for example, requiring BALPA to disclose documents which had passed between members of the NEC, its Company Council (the 'BACC', equivalent to a local union branch) and members of the union including:

All forms of communications evidencing the reasons for the dispute between BALPA and BA;
The reasons BALPA issued a strike ballot;
...
All documents relating to the conciliation process; and
All authorisations from the national executive council of BALPA to the BACC [to take any executive action].

Apart from the oppressive *volume* of material that this process generated (which extended to include hand-written confidential notes made in the course of negotiating meetings and private emails between BALPA officers reflecting on strategy and tactics), it will be seen at once that the *nature* of the material to be disclosed was directed to highly confidential internal union industrial strategy and tactics, and matters of policy. It was true that such disclosure, under the usual legal rule was not to be used other than for the litigation. It was also true that the

¹⁷⁴ *Financial Times*, 10 – 12 May 2008.

¹⁷⁵ A strike ballot (TULRCA 1992, s 234) has only four weeks of validity (save where extended by the court for up to a further eight weeks), hence the January ballot would have expired and a re-ballot would have been necessary if there was to be strike action.

¹⁷⁶ Unless the confidentiality arises from obtaining legal advice, State security or other specific exceptions.

material was ordered to be disclosed only to an identified core team of the employer's legal advisers but this included in-house lawyers who were employees of BA. Nevertheless, the degree of intrusion by such court orders into trade union autonomy is evident and trade unions will be discouraged by the extent of the disclosure obligations.

Perhaps even more alarming was BA's assertion that its losses, had there been a one day strike of pilots, would have been £100 million. Assuming that only 10% of this may have been provable, such a sum in damages would have been life threatening for any British union. On the face of it such a claim for damages would have been for the most part irrecoverable from a trade union by reason of TULRCA, s 22 which lays down a scale of maximum damages against trade unions for damages in tort. BA argued that a claim on *Viking* and *Laval* lines was not a claim in tort.¹⁷⁷ Alternatively, BA argued that the cap on damages was incompatible with the well established principle of EU law.¹⁷⁸ which requires that remedies for breaches of EU law should be effective and equivalent to parallel remedies in domestic law (just as the UK cap on compensation for sex discrimination had to be set aside). Since non-trade union bodies contravening Arts 43 or 49 of the EU Treaty would not have any limitation of damages for impeding freedom of establishment or provision of services, nor should trade unions, it would have been argued. The proceedings did not reach determination of this proposition,¹⁷⁹ though it is difficult to see how such a position could now be sustained in the light of the *Demir and Baykara* case and its progeny. Indeed it is a matter of great regret that *Demir and Baykara* had not been decided before rather than after the BALPA case, for it is strongly arguable even after *Metrobus* that any restraint on trade union action based on *Viking* (on the basis of EC law as a result of an Act of the British Parliament) would not have been consistent with Convention obligations as they now stand. Assuming that the BALPA action was consistent with ILO Convention 87 (and a complaint has been made to the ILO Freedom of Association Committee to establish just that point), it would be difficult to see how the restraint could also be consistent with Art 11, while separate questions arise under Art 11 about the extent to which the trade union was required to disclose internal documents for the purposes of litigation. These matters are in addition to any question of Art 11 being violated by the spectre of unlimited damages, which would not only undermine the right to strike but imperil the very existence of a trade union for taking what is no more than trade union action. Such a case would doubtless give rise to a reference for a preliminary ruling, inviting the ECJ to reconsider at least *Viking* in the light of the developing Convention jurisprudence.¹⁸⁰

¹⁷⁷ Though this was thought by BALPA to be a weak argument.

¹⁷⁸ *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989; *Unibet* [2007] ECR I-2271.

¹⁷⁹ In order to establish tort liability against a State in Community law, it would be necessary to so a 'sufficiently serious breach' under the principles summarised by Lord Clyde in *R (Secretary of State for Transport) ex p Factortame (No 5)* [2000] 1 AC 524, at pp 555-556.

¹⁸⁰ TFEU, Art 267 (ex EC Treaty, Art 234).

V CONCLUSION

From time to time, a decision is handed down by a court which for different reasons may be epoch making, usually because of the great political consequences which flow in its wake. *Demir and Baykara v Turkey* may be one such case: it is a decision of one of the most important courts in the world, a decision that in principle will have direct implications for the law in at least the 47 countries of the Council of Europe in which some 800 million people live. Perhaps even more importantly, it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process which is potentially nothing less than a socialisation of civil and political rights.¹⁸¹ And perhaps even more importantly still, it is a decision in which human rights have established their superiority over economic irrationalism and ‘competitiveness’ in the battle for the soul of labour law, and in which public law has triumphed over private law, and public lawyers over private lawyers.¹⁸²

All of this while at the same time transforming the nature of international labour standards, which although still burdened by the humiliating ‘soft law’ tag can now walk with a real swagger as soft law with a hard edge. That hard edge ought in time to address the neo-liberal legacy in countries such as the United Kingdom, and ought in time also to provide the best opportunity to clean up the mess left by the ECJ in the *Viking* and *Laval* cases. It certainly provides a nice opportunity for a measure of legal accountability of the Luxembourg court, of a kind with which it is wholly unfamiliar. Any suggestion that the ECtHR decision in *Demir and Baykara* is somehow a temporary aberration is of course demolished by the fact that this was the unanimous judgment of the 17 Judges of the Grand Chamber, following the unanimous judgment of the 7 Judges of the second section, and followed by the unanimous judgment of the 7 Judges in *Enerji Yapi-Yol Sen* (taking into account that two Judges sat on two of the benches, this is a total of 29 ECtHR Judges), and that it is precisely convergent with the landmark decision of the Supreme Court of Canada in the *Health and Support-Facilities Subsector Bargaining* case.¹⁸³ The plea of Lord Hoffman that the ECtHR should not bother itself with domestic implementation of the Convention is irrelevant to such monumental pronouncements of principle.¹⁸⁴ Nevertheless, there should be no illusion: these decisions are a symptom of trade union weakness rather than strength, and it remains to be seen how far in practice they penetrate beyond the boundaries of countries such as Russia, Turkey and the United Kingdom, distinguished by low levels of trade union protection, and how far they are implemented in practice in these countries.

¹⁸¹ V Leary, ‘The Paradox of Workers’ Rights as Human Rights’, in L Compa and S Diamond (eds), *Human Rights, Labor Rights and International Trade* (1996), p 22.

¹⁸² For an important analysis and collection of essays along these lines, see C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (2010).

¹⁸³ See footnote 13 above.

¹⁸⁴ Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009: ‘If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so’.

In suggesting opportunities for litigation as a way to restore trade union rights, the *Demir and Baykara* case and its family suggest to British eyes a curious reversal of roles in terms of the way in which litigation is used in relation to trade union rights. But not only that – the ECtHR in *Demir and Baykara* is saying to governments that they must have in place legislation that goes beyond what even labour-friendly governments (sustained by the financial support of affiliated trade unions) are willing to accept. This is partly because such rights run against the grain of current economic orthodoxy, and partly because governments are fearful of alienating corporate interests, including those with control over large sections of the media.¹⁸⁵ Yet the minimum international standards should be taken as a given, the political battleground being around the extras. Does the *Demir and Baykara* case (and its fast growing family) now invite a different kind of political action, which directs attention in the first instance at the courts rather than the legislature, and much more active use of procedures available in international law, now a process with a very different purpose? Although parliamentary representation may be necessary to ensure that judicial decisions are properly implemented (a problem which should not be under-estimated, whether in Russia, Turkey or the United Kingdom), could it be that traditional forms of political representation will assume less importance in relation to trade union rights when governments will in any event be subject to ongoing scrutiny in the courts?

But whilst trade unionists in some countries have the luxury to indulge such thoughts (and it would be remarkably short sighted to put all eggs in one basket), it may be some time before the impact of *Demir and Baykara* is fully felt in Turkey. Confirmation that the situation in Turkey remains grim is to be found in this year's report of the ILO Committee of Experts, in relation to both ILO Conventions 87 and 98.¹⁸⁶ So far as the former is concerned, the Committee received complaints about

the decision to prohibit workers from entering Taksim Square in Istanbul on May Day 2008, due to security reasons and to a violent repression of a peaceful demonstration by the TURK-IS affiliated Food, Beverage, Tobacco, Alcohol and Allied Workers' Union (TEKGIDA-IS) on 19 February 2008. The Committee also notes that KESK refers to disproportionate force used by police on May Day 2008 against the workers who had gathered in front of the DISK offices in order to take part in the abovementioned demonstration organized by the three major confederations, TURK-IS, DISK and KESK. The Committee notes moreover that the ITUC and KESK refer to several instances

¹⁸⁵ The difficult question for trade unions – which members may begin to ask with growing frequency – is why do they continue to support financially a process that so conspicuously delivers so little? In the case of the United Kingdom, British trade unions have contributed almost £80 million since 2001 (and more than £100 million since 1997, full details on the Electoral Commission's web site), for trade union laws that fall short of minimum international standards (though the altruistic will argue that trade union political action is not simply an instrumental transaction in which power is sought only for favourable laws on specific questions).

¹⁸⁶ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009): <http://www.ilo.org/ilolex/gbe/ceacr2009.htm> (CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Turkey (ratification: 1993) Published: 2009).

of restrictions of trade union activities, especially demonstrations and publications, including through prison sentences, judicial inquiries opened and proceedings instituted against trade union members and officials. With regard to the public sector in particular, the ITUC refers in its 2007 comments to interference in the activities of public sector trade unions by the Government as employer. In particular, according to the ITUC, in the course of 2006, 15 public employees were transferred, 402 were subjected to ‘disciplinary inquiries’, four were given prison sentences, 131 were prosecuted in court and nine were fined; in 14 different workplaces, the unions were prevented from using their offices, and in three other cases, union offices were emptied by force during legitimate trade union activities. ITUC adds that unions must obtain official permission to organize meetings or rallies and must allow the police to attend their events and record the proceedings.¹⁸⁷

It is true that some improvements in the legal position appeared to be underway following the visit by an ILO mission to Turkey in April 2008, these improvements addressing ‘severe restrictions of the right to strike’ (limitations on picketing; prohibitions and compulsory arbitration going beyond essential services in the strict sense of the term; excessively long waiting period before a strike can be called; heavy sanctions including imprisonment for participating in ‘unlawful strikes’ the definition of which ‘goes beyond what is acceptable under the Convention’), it remained the case that legislation ‘prohibiting strikes for political purposes, general strikes and sympathy strikes as well as the prohibition of occupation of work premises, go-slow strikes and other forms of obstruction provided for in article 54 of the Constitution - were not included for amendment in the [government’s reforms]’.¹⁸⁸ In its Convention 87 report for 2009, the ILO Committee of Experts also expressed concerns about restrictions on the right to organize by a large number of public servants, and the extent of State supervision of trade union statutes. There clearly remains a lot of work to be done here by the ILO in conjunction with the Council of Europe, with the report on Convention 98 also revealing serious violations of trade union freedom (with decision of the European Court of Human Rights in *Demir and Baykara* being cited by the Committee of Experts in a nice example of mutual reliance).¹⁸⁹ In the meantime, however, the first anniversary of the ground breaking decision of the ECtHR was celebrated in Turkey with a trial on 19 – 20 November 2009 of 22 officials of the public employee trade union federation KESK, the officials in question having been jailed pending their trial. The trial – attended by London - based NGO ICTUR and the Brussels-based ETUC as international observers - follows a police raid of the national headquarters of the federation and the

¹⁸⁷ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009): <http://www.ilo.org/ilolex/gbe/ceacr2009.htm> (CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) Turkey (ratification: 1993) Published: 2009).

¹⁸⁸ *Ibid.*

¹⁸⁹ Report of the Committee of Experts on the Application of Conventions and Recommendations (2009): <http://www.ilo.org/ilolex/gbe/ceacr2009.htm> (CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98) Turkey (ratification: 1952) Published: 2009).

arrest on buses and at airports of its leading officials.¹⁹⁰ Such events are timely reminders - if any were needed - of how great legal triumphs can produce such little social progress.

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¹⁹⁰ For an account of the trial, see D Blackburn, 'Teachers on trial', (2009) 16.5 *International Union Rights* 8.