Neutral Citation Number: [2017] EWCA Civ 66

Case No: C1/2014/3342

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court, Queen's Bench Division
Administrative Court
Sir Brian Keith

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2017

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(Sir James Munby)
LORD JUSTICE UNDERHILL
and
LORD JUSTICE SALES

- -

Between:

THE PHARMACISTS' DEFENCE ASSOCIATION UNION	**Appellant**
- And -	
BOOTS MANAGEMENT SERVICES LTD	**First Respondent**
SECRETARY OF STATE FOR BUSINESS INNOVATION AND SKILLS	**Second Respondent**

- -
- -

Mr John Hendy QC and **Mr Simon Cheetham** (instructed by **The Pharmacists' Defence Association**) for the **Appellant**
Mr David Reade QC and **Mr Martin Palmer** (instructed by **Baker & McKenzie LLP**) for the **First Respondent**
Mr Daniel Stilitz QC and **Mr Joseph Barrett** (instructed by **The Government Legal Department**) for the **Second Respondent**

Hearing dates: 22 & 23 November 2016

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. The First Respondent, Boots Management Services Ltd, is the company within the Boots group which employs its staff: I will refer to it simply as "Boots". The Appellant, the Pharmacists' Defence Association Union ("the PDAU"), is an independent trade union representing pharmacists. It has a substantial membership among pharmacists employed by Boots. It has made a request to Boots to be recognised for collective bargaining purposes in accordance with the procedures under Part I of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992. Shortly before that request was made Boots entered into a recognition agreement, albeit with a very limited scope, with a non-independent trade union, the Boots Pharmacists Association ("the BPA"). It is (now) common ground that the effect of that recognition was to prevent the PDAU being able to take advantage of the statutory procedures to seek compulsory recognition. As the PDAU sees it, what has happened is that Boots has entered into a token recognition agreement with a tame in-house trade union in order to avoid having to deal with an independent union.

2. The PDAU contends that that state of affairs means that the statutory scheme of recognition fails to comply with the requirements of article 11 of the European Convention on Human Rights ("the Convention") and that it is entitled to a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998. By a somewhat complicated procedural route that claim came before Sir Brian Keith, sitting as a High Court Judge; and by a judgment dated 12 September 2014 he dismissed it. This is an appeal against that decision.

3. The PDAU has been represented before us by Mr John Hendy QC, leading Mr Simon Cheetham, and Boots by Mr David Reade QC, leading Mr Martin Palmer. The Secretary of State for Business, Innovation and Skills (now presumably the Secretary of State for Business, Energy and Industrial Strategy), who was an intervener in the High Court and is accordingly a Respondent before us, has been represented by Mr Daniel Stilitz QC, leading Mr Joseph Barrett.

THE RELEVANT LEGISLATIVE PROVISIONS

RECOGNITION

4. The provisions of Part I of Schedule A1, which contains the machinery for compulsory recognition, are detailed and complex, but for present purposes we are only concerned with a few aspects.

5. Paragraph 1 reads:

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

Although, as appears from that paragraph, a request may be made by a group of unions together, for convenience I will refer simply to a request by a single union.

6. Paragraph 3 identifies the scope of the matters in respect of which a union may seek recognition. It reads as follows:

> "(1) This paragraph applies for the purposes of this Part of this Schedule.
>
> (2) The meaning of collective bargaining given by section 178 (1) shall not apply.
>
> (3) References to collective bargaining are to negotiations relating to pay, hours and holidays; but this has effect subject to sub-paragraph (4).
>
> (4) If the parties agree matters as the subject of collective bargaining, references to collective bargaining are to negotiations relating to the agreed matters; and this is the case whether the agreement is made before or after the time when the CAC issues a declaration, or the parties agree, that the union is (or unions are) entitled to conduct collective bargaining on behalf of a bargaining unit.
>
> (5) Sub-paragraph (4) does not apply in construing paragraph 31 (3).
>
> (6) Sub-paragraphs (2) to (5) do not apply in construing paragraph 35 or 44."

7. It will be seen that sub-paragraph (2) excludes for the purpose of Part I the definition of "collective bargaining" in section 178 (1) of the main Act in favour of the definition in sub-paragraph (3). I need to set out the terms of section 178 (1), and also of sub-section (2), to which it refers, in full. They read:

> "(1) In this Act 'collective agreement' means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and 'collective bargaining' means negotiations relating to or connected with one or more of those matters.
>
> (2) The matters referred to above are –
>
> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
>
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
>
> (c) allocation of work or the duties of employment between workers or groups of workers;
>
> (d) matters of discipline;
>
> (e) a worker's membership or non-membership of a trade union;

> (f) facilities for officials of trade unions; and
>
> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."

As appears from sub-section (1), this is the definition which applies for the purpose of the Act generally – save as specifically provided otherwise. The range of matters which can be the subject of collective bargaining as so defined is very wide; and the definition is satisfied so long as the negotiations relate to any one of the specified matters. The effect of paragraph 3 (3) is to replace that definition with one which applies to a much more limited (albeit core) range of subject-matters – pay, hours and holidays; but it should be noted that the effect of sub-paragraph (6) is to restore the primary definition as regards (so far as relevant for our purposes) paragraph 35, to which I refer below.

8. Paragraph 4 provides that a request for recognition must be made in accordance with paragraphs 5-9. The only point that I need note is that paragraph 6 provides that a request will not be valid unless the union making it has a certificate of independence. Thus only independent trade unions – that is, trade unions accepted by the Certification Officer as not dominated or controlled, or liable to be unduly influenced, by an employer (see section 5 of the 1992 Act) – may take advantage of the statutory recognition procedure.

9. If the employer fails to respond to a valid request, or does not accept it, paragraph 11 provides that the union may apply to the Central Arbitration Committee ("the CAC") to decide whether the bargaining unit proposed in its request is appropriate and, crucially, whether it has the support of a majority of the workers constituting the appropriate unit. Paragraph 12 contains a similar provision which applies where the employer has initially indicated a willingness to negotiate about recognition but the negotiations have broken down. An application to the CAC under one or other of paragraphs 11 and 12 is the essential gateway to the remainder of the statutory procedure and thus to the possibility of the union achieving recognition compulsorily if the employer remains intransigent.

10. Paragraphs 33-42 contain a series of provisions about the "admissibility" of applications to the CAC under paragraphs 11 or 12. The crucial provision for the purpose of the issue before us is paragraph 35, which reads (so far as material):

> "(1) An application under paragraph 11 or 12 is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit.
>
> (2) But sub-paragraph (1) does not apply to an application under paragraph 11 or 12 if—

(a) the union (or unions) recognised under the collective agreement and the union (or unions) making the application under paragraph 11 or 12 are the same, and

(b) the matters in respect of which the union is (or unions are) entitled to conduct collective bargaining do not include all of the following: pay, hours and holidays ("the core topics").

(3) …

(4) In applying sub-paragraph (1) an agreement for recognition (the agreement in question) must be ignored if —

(a) the union does not have (or none of the unions has) a certificate of independence.

(b) at some time there was an agreement (the old agreement) between the employer and the union under which the union (whether alone or with other unions) was recognised as entitled to conduct collective bargaining on behalf of a group of workers which was the same or substantially the same as the group covered by the agreement in question, and

(c) the old agreement ceased to have effect in the period of three years ending with the date of the agreement in question.

(5)-(6) …"

It will be recalled that for the purpose of this paragraph, unlike most of the rest of Part I, the definition of "collective bargaining" in section 178 (1) of the Act is preserved.

11. I need not summarise the details of the process following an admissible application. Very broadly, the union will be entitled to recognition either if the CAC is satisfied that the majority of employees in the bargaining unit are members of the union or if there has been a ballot in which a majority of those voting, comprising at least 40% of those in the bargaining unit, are in favour of recognition.

12. I should, because it is referred to elsewhere, also mention Part II of the Schedule. This is concerned with the case where following a request under Part I the employer agrees to recognise a trade union without the need for an application to the CAC.

DERECOGNITION

13. Parts IV-VII of Schedule A1 are concerned with the derecognition of trade unions previously recognised to conduct collective bargaining. They provide for a number of different procedures. Most are concerned with the derecognition of trade unions which have gained recognition under Part I or Part II and which will accordingly necessarily be independent (see para. 8 above). The procedures for derecognition in such cases may not be operated until at least three years after the initial recognition – although where a trade union loses its independence Part VII provides for automatic derecognition.

14. However Part VI, which is the most relevant for the purpose of the issues before us, is different in that it is concerned with the derecognition of non-independent trade unions, which will for that reason not have been recognised under the statutory procedures. Paragraph 134 (1), which forms part of the introductory section to Part VI, reads:

> "This Part of this Schedule applies if —
>
> (a) an employer and a union (or unions) have agreed that the union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of a group or groups of workers, and
>
> (b) the union does not have (or none of the unions has) a certificate of independence."

For reasons that will become apparent, it is important to note that paragraph 136, which forms part of the same group of provisions, reads:

> "The meaning of collective bargaining given by section 178 (1) shall not apply in relation to this Part of this Schedule."

However, oddly, unlike in the case of Part I (see para. 7 above) Part VI contains no alternative definition of "collective bargaining". I shall have to return to this conundrum in due course.

15. The provision of Part VI which confers the right to apply for derecognition is paragraph 137 (1), which reads:

> "A worker or workers falling within the bargaining unit may apply to the CAC to have the bargaining arrangements ended."

It will be noted that such an application has to be made by a worker: it cannot be made by a trade union. Unlike in the case of a trade union recognised under Parts I or II, the application can be made at any time: there is no three-year minimum period.

16. Paragraph 139 (1) sets out the threshold for an admissible application for derecognition under Part VI. It reads:

> "An application under paragraph 137 is not admissible unless the CAC decides that —
>
> (a) at least 10 per cent of the workers constituting the bargaining unit favour an end of the bargaining arrangements, and
>
> (b) a majority of the workers constituting the bargaining unit would be likely to favour an end of the bargaining arrangements."

17. I need not set out the full details of how the CAC resolves an admissible application for derecognition. In summary, in the absence of agreement (and unless the incumbent union obtains a certificate of independence in the meantime), it must conduct a ballot of the workers in respect of whom the union is recognised asking them whether the bargaining arrangements should be ended. If a majority of the

workers voting, and at least 40% of the workers constituting the bargaining unit, vote in favour of ending the bargaining arrangements the CAC must issue a declaration that those arrangements are to cease to have effect on a date specified – see paragraph 147, which incorporates (subject to various immaterial qualifications) the provisions of paragraphs 117-121, which form part of Part IV ("Derecognition: General").

ARTICLE 11

18. Article 11 of the Convention reads:

> "Freedom of assembly and association
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

THE FACTS AND THE PROCEDURAL HISTORY

19. Boots has not until the events giving rise to these proceedings recognised a trade union to conduct collective bargaining for pharmacists employed by it, but it has for many years had a consultative relationship with the BPA. The BPA was listed as a trade union in 1979, and according to its constitution, which was most recently revised in 2005, one of its objectives is "[t]o act as an officially recognised medium for representing to the management of Boots The Chemist all matters affecting the pharmacists of Boots The Chemist". Boots provided the BPA with some fairly limited support and facilities for that purpose (including check-off arrangements).

20. The PDAU was certified as an independent trade union in November 2010. In January 2012 it made a formal request to Boots to be recognised for collective bargaining purposes, claiming to have a very substantial membership among Boots pharmacists. That request was refused, and in February it made an application to the CAC under paragraph 11 of Schedule A1. Boots then indicated a willingness to talk, and the PDAU accordingly withdrew its application.

21. On 1 March 2012, i.e. almost immediately thereafter, Boots and the BPA entered into an agreement entitled "Boots and the BPA in Partnership". Most of its provisions were concerned with purely consultative arrangements, but it included the following statement:

> "Under this agreement the BPA is recognised as having collective bargaining rights for the purpose of negotiation relating to facilities for its officials and the machinery for consultation in respect of the

> matters upon which we will consult with the BPA (which are those set out in this agreement). This agreement does not provide for collective bargaining rights on any other matters."

The two matters there identified – facilities for officials and machinery for consultation – both fall within the list of matters in section 178 (2) of the 1992 Act (see heads (f) and (g) respectively).

22. On 23 March 2012 Boots wrote to the PDAU telling it that it had recognised the BPA for certain collective bargaining purposes. The PDAU regarded that – correctly – as meaning that Boots had no intention of recognising a different union, and on 5 October it submitted a fresh application to the CAC under paragraph 11 of Schedule A1. Boots objected that the application was inadmissible by reason of paragraph 35 (1) because it already recognised the BPA for the purpose of collective bargaining on behalf of workers within the relevant bargaining unit, it being irrelevant that the recognition was for extremely limited purposes.

23. The issue of the admissibility of the PDAU's application was considered by the CAC at a hearing on 11 December 2012. By a decision promulgated on 29 January 2013 it held it to be admissible. It acknowledged that on an ordinary construction paragraph 35 (1) had the meaning contended for by Boots[1]; but it held that such a construction would lead to a breach of the article 11 rights of the PDAU and of its members employed in Boots who wished to be represented by it, and it believed that it was possible to read down the statutory language, in accordance with its obligations under section 3 of the 1998 Act, so as to avoid that result. Specifically, it held that the sub-paragraph could be amended so as to read:

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

24. Boots applied for judicial review of that decision. By a judgment handed down on 22 January 2014 Keith J accepted that the inadmissibility of the PDAU's application gave rise to a breach of article 11, but he held that it was not possible, even construing paragraph 35 (1) in accordance with section 3 of the 1998 Act, to give it the meaning that the CAC had done. Accordingly he allowed Boots' claim and quashed the CAC's decision. There has been no appeal by the PDAU against that judgment. However he adjourned the proceedings to allow it to consider whether to apply for a declaration of incompatibility. It decided to do so, and the Secretary of State was accordingly joined as an intervener.

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[1] It appears to have been accepted by the parties and the CAC – and it was not disputed before us – that in respect of the limited matters covered by the Agreement Boots would be negotiating "on behalf of" workers in a bargaining unit comprising pharmacists, within the meaning of paragraph 35, notwithstanding that the subject-matter of the negotiations was purely collective in character.

25. The application for a declaration of incompatibility was heard before Sir Brian (following his retirement) in July 2014. As I have said, by a judgment handed down on 12 September 2014 he dismissed the PDAU's claim. In short, he held that there was no breach of article 11 because the obstacle posed to its recognition by paragraph 35 was not absolute but could be removed by the derecognition of the BPA under the provisions of Part VI of the Schedule.

THE ISSUES

26. The PDAU's case remains that if, as it now accepts, the effect of paragraph 35 (1) is that an otherwise valid application by an independent trade union to be recognised to negotiate about pay, hours and holidays can be stymied by the employer's recognition of a non-independent trade union in respect of other, entirely marginal, matters that gives rise to a breach of its article 11 rights.

27. Boots' response is twofold:

    (1) It contends that article 11 does not confer any right on a trade union to be recognised for collective bargaining against the wishes of the employer, so that even if the limited recognition of the BPA prevents the PDAU from achieving recognition that would give rise to no breach.

    (2) It contends that, even if the PDAU might in principle enjoy such a right, the Judge was right to find that it had not been breached in the present case because the obstacle presented by paragraph 35 (1) could be removed by an application for the derecognition of the BPA.

    The Secretary of State adopts the second contention but not the first.

28. I take those two issues in turn. As between the Respondents, the first was argued by Mr Reade and the second by Mr Stilitz.

(1) THE SCOPE OF ARTICLE 11

THE AUTHORITIES

The pre-*Demir* Strasbourg authorities

29. It was for many years accepted that the right under article 11.1 "to form and join trade unions" did not bring with it a right for trade unions to be recognised for the purpose of collective bargaining. That was first established by the decision of the European Court of Human Rights ("the ECtHR") in *Swedish Engine Drivers Union v Sweden* (1979-80) 1 EHRR 617. The Court's reasoning on this issue appears at paras. 38-41 of its judgment (pp. 627-9). The fundamental statement of principle is at para. 39, as follows:

> "[I]t has to be ascertained whether Article 11 para. 1 requires the 'State as employer' to enter into any given collective agreement with a trade union representing certain of its employees whenever the parties are in accord on the substantive issues negotiated upon. The Court notes in this connection that while Article 11 para. 1 presents trade union freedom as one form or a special aspect of freedom of

> association, the Article (art. 11) does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them."

(The reference to "the State" is because the union represented engine drivers employed in the Swedish state railways; but the Court's observations refer to its role as employer.) The Court continued, at para. 40:

> "The Court does not, however, accept the view expressed by the minority in the Commission who describe the phrase 'for the protection of his interests' as redundant. These words, clearly denoting purpose, show that 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 para. 1 certainly leaves each State a free choice of the means to be used towards this end. While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11 (art. 11), to strive for the protection of their members' interests (paragraph 39 of the above-cited judgment of 27 October 1975, Series A no. 19, p. 18)."

30. In *Wilson v United Kingdom* (2002) 35 EHRR 20 journalists employed on the Daily Mail complained of the derecognition of the National Union of Journalists, by which they had previously been represented: the claims pre-dated the coming into force of Schedule A1. The Court rejected their claim. Its reasoning can be summarised as follows.

31. The Court began the dispositive section of its judgment by observing that, although the essential object of article 11 is to protect the individual against arbitrary interference by public authorities with the rights conferred by it, it could also give rise to positive obligations on the state to secure the effective enjoyment of those rights: see para. 41 (p. 537). It went on, at para. 42 (p. 538), to recapitulate what is said at paras. 39 and 40 of its judgment in the *Swedish Engine Drivers* case. It then said, at para. 44 (p. 538):

> "… [T]the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say

> on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured (see *Swedish Engine Drivers' Union*, cited above, pp. 14-15, para. 39; *Gustafsson*, cited above, pp. 652-53, para. 45; and *Schettini and Others v. Italy* (dec.), no. 29529/95, 9 November 2000)."

Its conclusion, at para. 45 (p. 539) was that "the Court does not consider that the absence under United Kingdom law of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of Article 11".

32. On the basis of those authorities Buxton LJ said in *R (National Union of Journalists) v Central Arbitration Committee* [2005] EWCA Civ 1309, [2006] IRLR 53, at para. 32, that "the right to be recognised for the purposes of collective bargaining does not fall within the rights guaranteed by Article 11".

Demir v Turkey

33. In *Demir v Turkey* (2009) 48 EHRR 54 the Grand Chamber of the ECtHR avowedly modified the position stated in the earlier authorities, but the nature and extent of the modification is in issue before us. The applicants were a member and the president of a trade union representing public sector employees which had entered into a collective agreement on a voluntary basis with a municipal authority. The Turkish courts held that as a matter of domestic law any such agreement could only be valid if it were authorised by specific legislation; and since the agreement in question was not so authorised it was quashed.

34. The Court held that the quashing of the agreement gave rise to a breach of article 11. At paras. 140-143 of its judgment (p. 1307) it reviewed its previous case-law, including the *Swedish Engine Drivers* case and *Wilson*. At paras. 144-5 (pp. 1307-8) it said:

> "144. … [T]he evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.
>
> 145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to

> form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sorensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, para. 44)."

It went on at para. 146 (p. 1308) to say that the list of "essential elements" remained subject to evolution, and at paras. 147-150 (pp. 1308-9) it considered a range of international instruments, specifically ILO Convention nos. 98 and 151, the European Social Charter (article 6 (2)) and the EU Charter of Fundamental Rights (article 28). It also noted, at para. 151, that in most European states "the right of civil servants to bargain collectively with the authorities has been recognised". It continued, at paras. 153-4 (pp. 1309-10):

> "153. In the light of these developments, the Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, para. 39, and *Schmidt and Dahlström*, cited above, para. 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others*, cited above, para. 56).
>
> 154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any 'lawful restrictions' that may have to be imposed on 'members of the administration of the State' within the meaning of Article 11 para. 2 – a category to which the applicants in the present case do not, however, belong … ."

35. Applying those principles to the facts of the case it held, at para. 157 (pp. 1310-11):

> "Accordingly, the Court observes that the collective bargaining in the present case and the resulting collective agreement constituted, for the trade union concerned, an essential means to promote and secure the interests of its members. 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."

36. I should note that in the immediately following paragraph (para. 158) the Court referred to a complaint by the applicants that the relevant Turkish legislation "fails to impose on the authorities an obligation to enter into collective agreements with civil servants' trade unions" but observed that such a complaint was outside the scope of the application.

37. The issue in *Demir* was very different from that in the present case. The applicants' complaint was that the state had annulled a collective agreement which the parties themselves had freely made; whereas the PDAU's ultimate goal, which it is said that paragraph 35 inhibits, is to obtain recognition from Boots against its will. As I have noted, the Court explicitly recognised that the issue of whether the authority ought to be compelled to negotiate with the union was a separate question, which was not before it.

38. However, I do not think it would be right to treat the effect of the decision in *Demir* as being confined to cases where the state itself interferes with the freedom of a trade union to conduct collective bargaining already agreed. The reasoning goes wider than the facts of the particular case. The recognition of "the right to bargain collectively with the employer" as an "essential element" of the rights protected by article 11 means that it is a right of the same status as the more unspecific rights recognised in the earlier cases; and the Court evidently regarded this as a significant development. If the right in question is an essential element of the article 11 right the state may not simply be prohibited from itself interfering with it but may in principle have positive obligations to secure the effective enjoyment of those rights: that is the language of para. 41 of the judgment in *Wilson*, referred to at para. 31 above (which is clearer than, but to the same effect as, the phrase "both permit and make possible" which appears in the *Swedish Engine Drivers* decision – see para. 40). The extent of those positive obligations is another matter, which I consider further below.

Unite the Union v United Kingdom

39. The most recent consideration of this area by the ECtHR is in *Unite the Union v United Kingdom* (application 65397/13), decided on 3 May 2016, i.e. since the decision under appeal. It is of some importance because it is the first case since *Demir* to consider a submission that article 11 required the state to put, or at least maintain, in place a system of compulsory collective bargaining.

40. The case arose out of the abolition in 2013 of the Agricultural Wages Board ("the AWB"), which was a body comprising representatives of employers and agricultural workers which negotiated minimum terms and conditions in the agricultural sector. There is in practice no alternative mechanism for compulsory collective bargaining in this sector because Schedule A1 has no application in the case of an employer with twenty or fewer employees. Unite, which has a substantial membership among agricultural workers, claimed that the abolition of the AWB gave rise to a breach of

its rights under article 11. The Court declared the application inadmissible. Its reasoning can be summarised as follows.

41. After setting out the applicable principles, in terms to which I need not specifically refer, the Court at paras. 57-66 considered their application to the facts of the case. It started by seeking to characterise the nature of the complaint. It concluded, at the end of para. 58, that:

> "The applicant's complaint can therefore be treated as concerning the abolition of a statutory and mandatory mechanism of collective bargaining. Such a complaint may be said to fall within the scope of Article 11 of the Convention."

42. The Court then proceeded to consider, at para. 59, Unite's argument that "the abolition of the AWB amounted to an interference with its right to engage in collective bargaining, an essential element of the freedom of association accorded to trade unions" – the latter phrase being of course a reference to para. 154 of the judgment in *Demir*. It rejected that argument, pointing out that the removal of a particular forum for collective bargaining could not be equated with the kind of interference that occurred in *Demir*, where the agreement voluntarily entered into between the union and the employer was annulled.

43. However, the Court did not regard its decision that the case did not involve state interference of the kind that occurred in *Demir* as the end of the question. Consistently with my analysis at para. 38 above, it regarded itself as obliged to consider whether there was nevertheless a breach of the state's positive obligation to secure the effective enjoyment of the union's article 11 rights. As it put it, at para. 60, the question was whether the UK was under a positive obligation "to have in place a mandatory, statutory forum for collective bargaining in the agricultural sector in order to comply with its Article 11 obligations". It continued:

> "The applicant argued that the margin of appreciation was a limited one, relying on [*Demir*] § 119. However, as the Court explained in [*National Union of Rail, Maritime and Transport Workers v United Kingdom* 60 EHRR 10, [2014] IRLR 467] § 86, the Court in that case was examining a very far-reaching interference with freedom of association. In the present case, by contrast, the question concerns the extent of the State's positive obligation in the area of collective bargaining. As the Court has already noted …, the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys a wide margin of appreciation in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the AWB and the applicant's competing rights under Article 11 of the Convention."

It went on at paras. 61-63 to examine various international instruments – essentially the same ones as had been referred to in *Demir* (see para. 34 above) – pointing out that none of them insisted that signatories should provide for a system of mandatory collective bargaining. It concluded that they did not reduce the UK's margin of

appreciation in this field. At para. 64 it reviewed the work undertaken by the government prior to the abolition of the AWB, including its consideration of any human rights implications, noting that this was "relevant to the Court's assessment as to the fair balance to be struck between the competing interests".

44. The Court's dispositive reasoning appears in paras. 65-66 of its judgment, which read as follows:

> "65. It is significant that, as noted above (see paragraph 59), the applicant is not prevented from engaging in collective bargaining. The circumstances in which collective agreements are deemed to be legally enforceable in the United Kingdom are set out in section 179 of the 1992 Act (see paragraph 26 above). The conditions essentially require parties to confirm their intent to be bound by the collective agreement and stipulate that the agreement be reduced to writing. These conditions do not appear to be unreasonable or unduly restrictive. Furthermore, it is possible under English law for the terms of a collective agreement which is not, itself, legally enforceable to be incorporated into an individual employment contract and thus become indirectly enforceable (see paragraph 27 above). Moreover, there are circumstances, set out in the 1992 Act, whereby a union has the right to be entitled to conduct collective bargaining on behalf of a group of workers (see paragraph 28 above). While, as the applicant pointed out, the legislation is of limited assistance in the agricultural sector given the dispersal of workers among employers which renders the provision inapplicable in most cases (see paragraph 29 above), it nonetheless represents a measure intended to encourage and promote collective bargaining across industry in general. In the absence of any information in the case-file as to the reasons for the applicability restrictions in the 1992 Act, it cannot be assumed that they are unjustified or otherwise unsuitable. Finally, even accepting the applicant's submission that voluntary collective bargaining in the agricultural sector is virtually non-existent and impractical, this is not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation. The applicant remains free to take steps to protect the operational interests of its members by collective action, including collective bargaining, by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it has the right to be heard. As noted above (see paragraphs 61-63), the European and international instruments to which the applicant referred, as they currently stand, do not support its view that a State's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector.
>
> 66. Bearing in mind the wide margin of appreciation in this area, the Court is not satisfied that, in deciding to abolish the AWB, the respondent Government failed to observe the positive obligations incumbent on them under Article 11 of the Convention. It cannot be said that the United Kingdom Parliament lacked relevant and

> sufficient reasons for enacting the contested legislation or that the abolition of the AWB failed to strike a fair balance between the competing interests at stake. No violation of Article 11 is disclosed and the application must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention."

45. The structure of that reasoning is not entirely explicit, but it seems to break down into three elements (the second and third being introduced by the words "moreover" and "furthermore"), namely:

    (1) that the UK has an effective system for giving effect to the results of voluntary collective bargaining;

    (2) that the UK has a machinery under the 1992 Act for imposing compulsory collective bargaining, and that, although the minimum numbers threshold means that that machinery is not in practice available to agricultural workers, there was no reason to believe that that restriction was unjustifiable;

    (3) that the union retained the right to advance its members' interests because it had the "right to be heard" – this harks back to the language of the *Swedish Engine Drivers* and *Wilson* cases (though these are not explicitly cited) – and that the international instruments did not support the view that "a state's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector".

46. At first sight the third of those points reads like a re-affirmation of the position established by the pre-*Demir* authorities and would support a reading of *Demir* which limited its effect to cases of positive interference by the state with voluntary collective bargaining arrangements. I do not however think that that is correct. If that had been the Court's understanding, the multi-factorial approach taken in para. 65 would have been unnecessary: the third point would have been conclusive by itself. There would have been no need for a reference to the UK's margin of appreciation nor to the striking of a fair balance. Nor would there have been any need, in relation to the second factor, to raise the question whether the restrictions which prevented the union being able to access the statutory machinery in the agricultural sector were justifiable. Indeed arguably the conclusion at the end of para. 58 that the complaint "may be said to fall within the scope of article 11", which is the gateway to the remainder of the Court's reasoning, would be falsified. It is necessary to note the three final words of the conclusion in para. 66 – "for agricultural workers": given the broader context to which I have referred, I think they must be read as equivalent to "in the circumstances of the present case".

47. In my view, therefore, the reasoning in the *Unite* case acknowledges the possibility that the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of article 11. Such a reading is consistent with the logic of the reasoning in *Demir* itself, as discussed at para. 38 above. It is fair to say that various observations by the Court, and indeed the outcome of the case itself, tend to suggest that complaints based on the denial of a right to compel an employer to engage in collective bargaining may face an uphill struggle; but the point at this stage is simply that the attempt is not excluded *in limine*.

Other authority

48. Mr Hendy referred us to the recent decision of the Supreme Court of Canada in *Mounted Police Association of Ontario v Canada* 2015 SCC 1, but I am bound to say that I did not find it helpful. To the extent that the statements of principle there accord with those of the ECtHR they add nothing. To the extent that they differ, we must plainly take our lead from Strasbourg in interpreting the scope of article 11.

THE PARTIES' CASES

49. Mr Hendy's case at the first hearing before Keith J, as set out in his skeleton argument, can be summarised as follows. His starting-point was that the decision in *Demir* had established that the right to collective bargaining is an essential element of article 11. He accepted that although that formulation was in terms of the rights of the union (or its members) "the Hohfeldian correlative of [that] right" was that there might be an obligation on the employer to engage in collective bargaining with the union (though not, he emphasised to us, to reach agreement on the matters which were the subject of the negotiation). However, he submitted, that was not the issue in the instant case. All that the PDAU was seeking was entry into the Schedule A1 procedure, which was unjustifiably prevented by paragraph 35. As he put it, the issue was "whether the prohibition of entry to a procedure established by law (which may result in compulsion to recognise for voluntary collective bargaining) is justified in accordance with Article 11 where the ground for prohibition of entry is merely the employer's desire not to collectively bargain with any (and not just the applicant) union on behalf of his employees".

50. Keith J adopted Mr Hendy's analysis. He said, at paras. 22-24 of his judgment:

> "22. Although the Court in *Demir* held that the trade union had the right to engage in collective bargaining with the council, the Court did not address whether the council had a corresponding duty to engage in collective bargaining with the trade union. The Court did not have to consider that in view of the council's willingness to do so. What the Court would have decided if it had had to address that question is a matter of speculation. Some people might think that the Hohfeldian view about rights giving rise to corresponding duties if such duties are necessary for the rights to be exercised in a meaningful way is engaged here. The same thing can be said about the point made by Mr David Reade QC for Boots that the Court did not say in so many words that it was departing from its previous decision in *Wilson*. The Court in *Demir* did not have to say whether it was departing from what it had said in *Wilson* about there being no obligation on an employer to engage in collective bargaining with a trade union. The issue whether an employer is obliged to engage in collective bargaining with a trade union was not before it.
>
> 23. Having said that, whatever the reach of Art. 11 may be, the fact is that our domestic law requires employers to recognise trade unions and to engage in collective bargaining with them in certain circumstances. That is what the Schedule provides for. The campaign by the trade union movement for compulsory recognition has been

> won. The current claim for judicial review is all about whether para. 35 of the Schedule – which is intended to prevent inter-union disputes about who should have collective bargaining rights for a particular group of workers, and which prevents the PDAU from invoking the procedure in the Schedule because of Boots' agreement with the BPA – should be read in such a way as to enable the PDAU to invoke it. That does not raise the issue whether Boots may be compelled to engage in collective bargaining with the PDAU. That issue only arises once the PDAU's application to the CAC has been held to be admissible. The issue which the present claim raises is whether the PDAU's inability to invoke the statutory procedure in the Schedule simply because Boots concluded an agreement with another trade union which permitted collective bargaining on some limited topics is compatible with such rights as Art. 11 gives.
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> 24. That issue does not turn on whether the rights which Art. 11 gives include the right to compel Boots to engage in collective bargaining with the PDAU. Rather, it turns on whether the PDAU's exclusion from invoking the statutory procedure in the Schedule simply because Boots has agreed to engage in collective bargaining with the BPA on topics which do not relate to the terms and conditions of employment of its pharmacists is compatible with the PDAU's undoubted right under Art. 11 to engage in collective bargaining with Boots over the terms and conditions of employment of Boots' pharmacists. That very much reflects Mr Hendy's formulation of the issue." [He goes on to set out the passage from Mr Hendy's skeleton argument which I have quoted above.]

As I have already said, he allowed Boots' challenge to the CAC decision not because he held that there was no breach of article 11 but because he did not accept that paragraph 35 could be read down so as to avoid such a breach.

51. Before us, Mr Hendy unsurprisingly contended that the Judge had been right to accept his submissions at the first hearing.

52. Mr Reade contended that the Judge's approach was wrong. The decision of the ECtHR in *Demir* did not go as far as Mr Hendy contended. All that it held was that where an employer had agreed to recognise a trade union for the purpose of collective bargaining it was a breach of article 11 for the state to prohibit them from giving effect to it. It did not qualify the clear position adopted in the earlier authorities that the rights protected by article 11 did not include a right for a trade union to require an employer to engage in collective bargaining with it; and despite Mr Hendy's protestation to the contrary, it was a necessary corollary of his case that Boots should be required to negotiate with the PDAU.

53. It is convenient to say at this stage that I agree with Mr Reade in rejecting Mr Hendy's submission, adopted by the Judge, that his case did not involve him taking a position on whether the union's right under article 11 to engage in collective bargaining involved a correlative duty on the employer. He says that all that the PDAU is doing is seeking entry into the Schedule A1 procedure, but that is a spurious

distinction. The PDAU's purpose in entering the procedure is to obtain the outcome for which it provides, namely a decision obliging Boots to negotiate with it. Article 11 cannot give it a right to enter the procedure unless it also confers a right (assuming the prescribed conditions are satisfied) to the outcome. So it is necessary to face up to the Hohfeldian question. As to that, I cannot understand in what sense the union could be said to have a right to negotiate with the employer unless the employer were under an obligation to negotiate with it; and that was indeed Mr Hendy's submission albeit that he said that the question does not arise. However, all this is a side-issue. The real question is whether article 11 does indeed impose such a right, and its correlative obligation, in the present case.

DISCUSSION AND CONCLUSION ON THE SCOPE OF ARTICLE 11

54. My conclusions on this issue are largely determined by what I have already said about the effect of the Strasbourg authorities. It follows from the recognition by the Court in *Demir* that "the right to bargain collectively with the employer" is an "essential element" of the rights protected by article 11 that a complaint that domestic law does not accord such a right in a particular case will fall within the scope of article 11. But, at the risk of spelling out the obvious, it does not follow from that that article 11 confers a universal right on any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the rules of any such scheme constrain access to collective bargaining for a particular union (or its members) the constraints will have to be justified by – to use the language of the *Unite* decision (see para. 66, quoted at para. 44 above) – "relevant and sufficient reasons" and should "strike a fair balance between the competing interests at stake". But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation.

55. Applying that conclusion to this case, if the PDAU can demonstrate that the inhibition which paragraph 35 imposes on what would otherwise be its right to seek compulsory collective bargaining under Schedule A1 is unjustifiable that would give rise to a breach of its article 11 rights. (I formulate it that way for convenience: no question about burden arose in this case.) In the paragraphs from his judgment which I quote at para. 50 above the Judge did not put it in quite the same way as I have, but I think that his approach was substantially the same. It is accordingly necessary to go on to consider the second issue.

(2) DERECOGNITION

BOOTS' CASE

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

57. I start by spelling out the steps in the Respondents' argument (the paragraphs of the Schedule referred to are set out or summarised at paras. 13-17above):

(1) The current state of affairs falls within the terms of Part VI of the Schedule because (a) Boots and the BPA have agreed that the BPA be "recognised to conduct collective bargaining" on behalf of pharmacists, within the meaning of paragraph 134 (1) (a); and (b) the BPA does not have a certificate of independence, so that paragraph 134 (1) (b) applies.

(2) Accordingly any pharmacist employed by Boots – being a "worker … falling within the bargaining unit" for which the BPA is recognised – may apply to the CAC under paragraph 137 "to have the bargaining arrangements ended". If that application is successful there will no longer be in force "a collective agreement under which [the BPA] is … recognised as entitled to conduct collective bargaining" for any pharmacists in Boots, with the result that paragraph 35 (1) will cease to bite.

(3) The criteria which the CAC will apply in considering the admissibility of the application and the provisions governing the outcome of any ballot – see paras. 16 and 17 above – will ensure that if a sufficient number of pharmacists wish to secure the derecognition of the BPA so as to open the door to the PDAU that will occur.

(4) The availability of those steps means that the constraint imposed on the PDAU by paragraph 35 (1) is not absolute and that it has a fair opportunity to secure recognition if a sufficient number of the pharmacists employed by Boots wish to be represented by it. That being so, there is no breach of article 11.

58. The PDAU advances two answers to that case. I take them in turn.

THE "COLLECTIVE BARGAINING" POINT

59. The PDAU contends that step (1) in the case summarised above is wrong. That step depends on the BPA being "recognised to conduct collective bargaining". As we have seen, for the purpose of paragraph 35 that is the case because the particular matters in respect of which it is explicitly recognised fall within two of the heads under section 178 (2) of the 1992 Act. But, as we have also seen, that definition is excluded for the purpose of Part VI. Mr Hendy submits that without reference to the artificially extensive definition in section 178 the fact that Boots had agreed to negotiate with the BPA about "facilities for its officials and the machinery for consultation arrangements" could not sensibly lead to the conclusion that it was "recognised as entitled to conduct collective bargaining on behalf of a group or groups of workers". Accordingly the derecognition machinery under Part VI is not available.

60. The CAC accepted that argument, though its reasoning is very short. Keith J also accepted it at the first hearing, holding (at para. 42 of his judgment) that it "must be given its ordinary and natural meaning" and that that meaning corresponded to the definition in paragraph 3 (3) – that is, negotiations over pay, hours and holidays. However at the second hearing he permitted the point to be re-argued, and he was

persuaded by Mr Stilitz to take a different view. At paras. 18-19 of his judgment he said:

> "18. … [T]here is a compelling argument in favour of the construction advanced on behalf of the Secretary of State. The inference to be drawn from the draftsman deciding not to limit the definition of the phrase 'collective bargaining' in Part VI to negotiations over any particular topics (whatever those topics may have been) is that the draftsman must have had it in mind that the negotiations could cover any topics over which the parties were prepared to negotiate. Moreover, it makes the topics on which an independent trade union can compel an employer to recognise it for the purpose of collective bargaining under Part I if those topics have been agreed the same topics as the employer has agreed to negotiate over with a non-independent trade union when an independent trade union seeks the de-recognition of the non-independent incumbent trade union under Part VI. I have not discerned any reason why the phrase 'collective bargaining' in Part VI should be given a definition which is narrower than the one in Part I.
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> 19. For these reasons, I have concluded, notwithstanding my previous judgment, that the phrase 'collective bargaining' in para. 134(1) of the Schedule should be interpreted as meaning negotiations over any matters which the parties have agreed should be the subject of collective bargaining. I have reached that conclusion, of course, by applying the ordinary principles of statutory interpretation, and without resort to the special interpretative duty imposed by section 3 (1) of the 1998 Act which arises only where the legislation, if read and given effect according to the ordinary principles of statutory interpretation, would result in a breach of any of the rights guaranteed by the Convention. No such breach arises since, on this interpretation of the phrase 'collective bargaining' in para. 134 (1), the bargaining arrangements between Boots and the BPA are terminable by the process in Part VI."

61. I agree with the Judge's conclusion. I think my reasoning is ultimately also the same as his but I would express it rather differently. In the absence of a statutory definition, the starting-point in principle must be the natural meaning of the phrase "recognised as entitled to conduct collective bargaining on behalf of a group or groups of workers". I see the force of the argument that, read in isolation, that phrase would not naturally include recognition in respect of the very limited matters covered by the agreement between Boots and the BPA. However, it is necessary to read it in context and having regard to the purpose of the provisions to which it relates, i.e. Part VI. Part VI contains a particular regime for the derecognition of non-independent trade unions, under which they can be derecognised more readily than an independent trade union (whose derecognition is the subject of Parts IV and V). That reflects the importance which the statute attaches to the independence of any trade union which enjoys recognition. The purpose of giving workers the right to secure the derecognition of a non-independent trade union must be to allow them to escape from the consequences of the recognition of a union by which they do not wish to be

represented. Where the recognition is for the purpose of negotiating (at least) pay, hours and holidays, the primary consequence from which they will wish to escape is no doubt that of having those core terms negotiated for them by such a union. But that is not the only consequence of the recognition of a non-independent trade union. Another, because of paragraph 35, is that an independent trade union is prevented from securing recognition even where it has majority support. It would in my view be plainly contrary to the policy of Schedule A1 in general, and the purpose of Part VI in particular, if workers were unable to escape from that situation. That means that the conditions for the operation of Part VI must, so far as the language allows, be construed so as to allow it to be operated in any situation where paragraph 35 is preventing an application for recognition by an independent trade union: in other words, whatever counts as recognition for the purpose of paragraph 35 must count as recognition for the purpose of Part VI. There is no difficulty in reading paragraph 134 (1) (a) in that way. It is frankly impossible to know why the draftsman thought it necessary to include paragraph 136, but it is unnecessary to answer that question: all that matters is that it was not his intention to prevent Part VI being operated in all cases where paragraph 35 applied.

62. Like Sir Brian Keith I would reach that conclusion on ordinary domestic principles of construction. But, also like him (see para. 21 of his judgment), if it were necessary I would invoke the special principles applicable under section 3 of the 1998 Act, since if derecognition under Part VI were not available there would in my view be a breach of article 11. Sir Brian in fact records at para. 21 of his judgment that before him Mr Hendy accepted that paragraph 134 could, with the assistance of section 3, be read so as to avoid the alleged incompatibility. That was not his position before us, where he argued that paragraph 136 represented an unequivocal expression of Parliament's intention which was incapable of being read down in the way proposed. For the reasons already given I do not accept that.

63. I cannot help observing that there is a real awkwardness about the PDAU's position on this aspect of the case. One might have expected that it was in its interest to argue for a construction of paragraph 134 (1) (a) that would enable it – provided only that it could find a worker to make the necessary application – to achieve the derecognition of the BPA and clear the way for its own application under Part I; and that it would be Mr Hendy who was advancing the arguments which we have heard from Mr Stilitz. But presumably the PDAU has made the assessment that if it achieves a finding that the statutory scheme is incompatible with the Convention it may achieve legislative changes which will suit it better.

THE NEED FOR AN APPLICATION BY A WORKER

64. I have already noted that under paragraph 137 an application for derecognition under Part VI can only be made by a worker. It cannot be made by a trade union. Mr Hendy argued before the Judge and before us that that meant that the escape-route from paragraph 35 relied on by Boots and the Secretary of State was not reliably available. It was true that if there were a substantial number of Boots employees who wanted to have the PDAU recognised, and thus to have the BPA derecognised as a necessary preliminary, one or more of them of them could be asked by it to make the necessary application; and the PDAU could stand behind and guide the application so far as necessary. But Mr Hendy argued that that was not the same as the union being able to make the application in its own right. It should be entitled to do so as a matter

of principle, but in any event there was a further problem that individual workers could not be counted on to go into battle on its behalf. He acknowledged that Part VIII of Schedule A1 enacted various protections for workers who were subjected to a detriment, including dismissal, for exercising their rights under the Schedule, but he submitted that in the real world employees might not have total confidence in that protection. The article 11 rights of the PDAU could only be protected by a mechanism that allowed it to apply in its own right for the derecognition of the BPA.

65. Sir Brian Keith rejected those submissions at paras. 12-13 of his judgment, as follows:

> "12. All in all, the PDAU's concern about the impact of these considerations is more theoretical than real. It is very unlikely that the PDAU will be unable to find a single pharmacist within Boots who wants the PDAU to be recognised for the purposes of collective bargaining in place of the BPA, and who is willing to put their head above the parapet. And if the PDAU is not able to find such a pharmacist, that is overwhelmingly likely to have been because there is insufficient support for the PDAU among Boots' pharmacists for any application for statutory recognition to be successful. That is because one of the conditions for the grant of statutory recognition to the PDAU under the Schedule is that it has to have the support of a majority of Boots' pharmacists.
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> 13. Ultimately, the question is whether the machinery in Part VI of the Schedule for securing the de-recognition of an incumbent non-independent trade union, coupled with the machinery in Part VIII of the Schedule for awarding compensation to workers who are subjected to detrimental treatment for seeking to secure that, enables the PDAU to avoid the consequences of para. 35 of the Schedule and to invoke the machinery in Part I of the Schedule for securing its own recognition. Subject, of course, to the issue over the proper construction of the phrase "collective bargaining" in para. 134(1) of the Schedule, I think it does. The mechanism may not be perfect, but the existence of the mechanism means that para. 35 does not render the right of the PDAU to engage in collective bargaining with Boots devoid of substance."

66. Mr Hendy's principal submission in answer to that reasoning was that it was wrong in principle that the PDAU should be dependent for the vindication of its article 11 rights on the action of a third party. I do not accept that. I am prepared to accept for present purposes, although Mr Stilitz did not, that a trade union as well as its members enjoys rights under article 11 in connection with recognition: the ECtHR appears to proceed on that basis in both *Demir* and *Unite*, though the issue did not arise for consideration. But it does not follow that a scheme for compulsory recognition should place all the levers in the hands of a union for which recognition is sought rather than in the hands of those who wish to be represented by it. It is, after all, ultimately for the benefit of the workers that recognition is sought. I appreciate that under Part I the process is initiated by a request, and if necessary an application, by the union rather than a worker or workers; but that does not mean that the same

approach needs to be followed in every element of the scheme. In my view the essential question is simply whether there is a reasonably practicable route whereby the recognition of the PDAU can be achieved if the majority of the pharmacists want it.

67. Mr Hendy's secondary submission was that even on that basis the Judge gravely under-estimated the disincentives to a pharmacist taking the necessary first step. He referred not only to the risk (perceived if not actual) that such action would prejudice their relationship with Boots but to other possible considerations, such as a disinclination to be (or appear) disloyal to the BPA or colleagues who were active in it. I do not accept that submission. Sir Brian Keith, who has great experience in this area, had to make a realistic assessment of whether the requirement to find a pharmacist who would make the application represented a substantial obstacle to achieving the derecognition of the BPA; and the assessment which he makes at para. 12 of his judgment is unimpeachable.

68. Looking at the point more generally, the observation at the end of para. 13 of Sir Brian Keith's judgment seems to me important. The devising of a statutory scheme of recognition inevitably requires a large number of detailed choices about both substantive and procedural matters, seeking, as Mr Stilitz put it, to "balance and calibrate the interests of multiple stake-holders (e.g. workers, employers and competing trade unions)". There will inevitably be some choices which not only could have been made differently but could have been made better. But I think it is clear from the case-law of the ECtHR referred to above that article 11 cannot be used as a tool to challenge this or that arguably sub-optimal element in a scheme provided that a fair balance has been struck. Both before and after *Demir* the Court has emphasised the wide margin of appreciation which must be accorded to member states in this area: see, purely by way of example, paras. 60 and 66 of its judgment in the *Unite* case (paras. 43-44 above). Mr Stilitz also referred us to similar passages in *Sindicatul "Pastoral Cel Bun" v Romania* (2014) 58 EHRR 10, a decision of the Grand Chamber, (see at para. 133) and in *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10 (see para. 86).

CONCLUSION

69. I would dismiss this appeal. As Sir Brian Keith observed, this may only be a short-term victory for Boots, since a route has been identified under which the PDAU can seek to take advantage of the statutory recognition procedure.

Lord Justice Sales:

70. I agree.

Sir James Munby:

71. I also agree.